

From: [Barbara Salzman](#)
To: [Fernandez, Xavier@Waterboards](mailto:Fernandez.Xavier@Waterboards); [Adam Wolff](#); sahrye.E.Cohen@usace.army.mil
Subject: Corte Madera Inn Pond On-site Analyses
Date: Thursday, January 12, 2017 3:23:22 PM
Attachments: [CM Inn Pond mmo WWR 2005-1114ct1.doc](#)
[CM Pond Alternatives Analysis comments.doc](#)
[CM Inn Alternativ, Arch Peter Harlock.pdf](#)
[CM Inn Alt Analys RWQCB.pdf](#)

Xavier,

The following documents are attached:

Marin Audubon's comment letter on the On-site alternatives Analyses

Memo Rpt. from WWR

1/16/15 Comment Letter to Corps on Off-Site Analysis

Alternative Design (without island in pond, of course)

Please let me know if you have any questions. Many thanks

Barbara Salzman



Memorandum

Corte Madera Inn Pond Comments

To: Barbara Salzman, Marin Audubon Society
From: Stuart Siegel and Christina Toms
Date: 14 November 2005

At the request of the Marin Audubon Society, Wetlands and Water Resources, Inc. (WWR) conducted brief site visits to the Corte Madera Inn Pond (“the Pond”) on September 12, 2005 and November 9, 2005. The purpose of these visits was threefold: (1) to determine if wetlands exist at the site that would meet federal, state, and local wetland definitions, (2) to evaluate the importance of the Pond and its associated habitats to wildlife, and (3) to examine whether other water quality improvement options may be feasible.

1 Do Wetlands Exist at the Corte Madera Inn Pond?

The members of the Town of Corte Madera Planning Commission explicitly stated at their September 13, 2005 meeting that they would rather not focus on the rather pedantic details of whether or not jurisdictional wetlands exist at the Pond. However, it is important to recognize that this apparent hair-splitting exists for a reason: 82% of the North Bay’s historic tidal wetlands have been lost to development and agriculture since the mid 1800s. As a result, wildlife species that depend on these systems to provide foraging and/or breeding habitat need every single piece of habitat they can find.

The Town’s Zoning Ordinance defines wetlands as follows: “[w]etland means an area inundated or saturated by surface or ground water at a frequency or duration sufficient to support hydrophytic vegetation” (Corte Madera Municipal Code Section 18.04.855). The General Plan defines wetlands as “... the environments of subtidal mudflats, mudflats, tidal salt marsh, periodically inundated or brackish marsh, diked marshland, associated upland, and freshwater marsh” (Corte Madera General Plan, page G-14). It is therefore critical to recognize the following facts about the Pond:

- Our site visits of September 12, 2005 and November 9, 2005 confirmed that two facultative wet (FACW) and one obligate (OBL) wetland plant species, as defined by the US Fish and Wildlife Service (Reed 1988) exist at the Pond:
 - Dispersed individuals of fat hen (*Atriplex subspicata*), a FACW species indicative of saline wetlands, grow as dispersed individuals around the Pond’s high water level perimeter,
 - A ring of salt grass (*Distichlis spicata*), a FACW species indicative of saline wetlands, surrounds most of the Pond along the high water level perimeter, and

- Two patches of alkali bulrush (*Schoenoplectus maritimus* [formerly *Scirpus maritimus*]), an OBL emergent aquatic plant, grow in the western lobe of the pond (Figure 1)

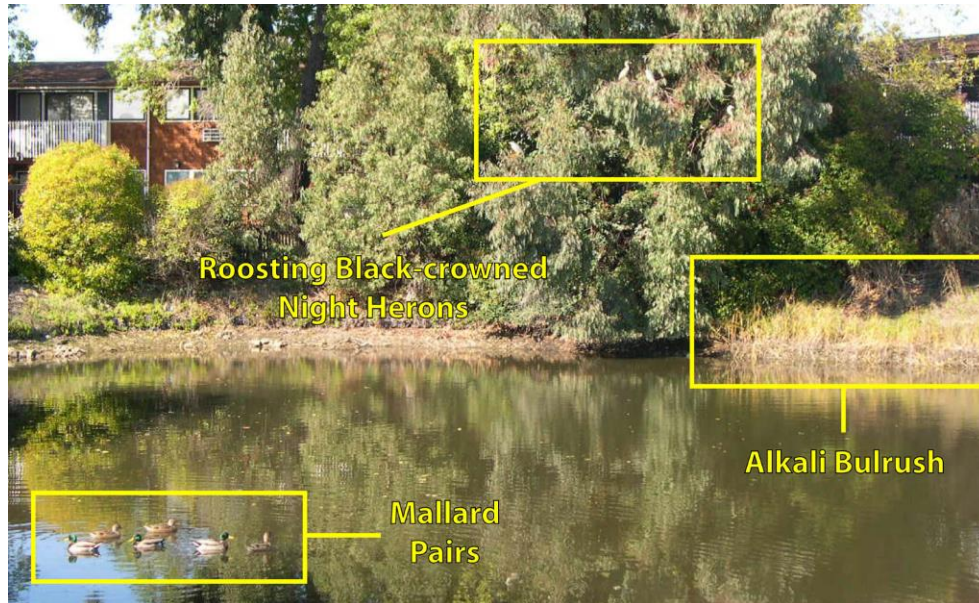


Figure 1. Wildlife and alkali bulrush in the Pond's western lobe, November 9, 2005. Photo by Christina Toms.

The existence of this vegetation, coupled with the Pond's hydrology and soils, qualifies the site as wetlands under the regulations of the Clean Water Act (US Army Corps of Engineers, 40 CFR §230.41), the US Fish and Wildlife Service (Cowardin 1979), the California Coastal Commission (14 CCR 13577), and, importantly, the Town of Corte Madera General Plan and Zoning Ordinance (Corte Madera Municipal Code Section 18.04.855). Though the October 25, 2001 USACE jurisdictional delineation failed to account for these existing resources (one species of which is shown on the 1989 WESCO map of the site but is not included in the delineation), these resources and conditions nonetheless exist. The Town's General Plan does not specify any source of its wetland definition, thus there is no basis to accept the outdated USACE jurisdictional delineation as a definitive determination on wetlands presence or absence.

- USEPA defines the special aquatic site category of vegetated shallows as, "...permanently inundated areas that under normal circumstances support communities of rooted aquatic vegetation" (40 CFR §230.43). Section 230.43 further defines possible loss of values by the discharge of fill materials into these special aquatic sites to include smothering vegetation and benthic organisms. Vegetated shallows would fall within the Town's General Plan wetland definition and therefore be subject to the same protection policies.

Our site visit of September 12, 2005 verified the presence of submerged aquatic vegetation (SAV) that are direct indicators of vegetated shallows. The species observed was likely pondweed (*Potamogeton* spp.); specimens were not collected for species identification. We further observed a very large number of small fish in the pond; again, specimens were not collected for identification but their presence demonstrates that conditions are suitable to

support aquatic life and thus the pond directly exhibits the functions and values that this type of special aquatic site provides.

These data collectively demonstrate 1) the presence of wetlands according to the Town's General Plan and Zoning Ordinances wetland definitions and 2) the presence of vegetated shallows per USEPA definition. Therefore, these data contradict the conclusions stated in the Revised Initial Study and Draft Mitigated Negative Declaration and the Town's Staff Report for the Corte Madera Inn Pond fill project regarding absence of wetlands and they support the application of the Town's General Plan wetland protection policies.

2 Importance of Existing Wetlands

While the Corte Madera Inn Pond is only 0.65 acres, with an average volume of approximately 2 acre-feet, it serves as foraging and possibly breeding habitat for a wide variety of wildlife species. The following list, provided by the Marin Audubon Society, contains 25 bird species that have been observed using the Pond and its associated habitats over the last 5 years:

- Pied billed Grebe (*Podilymbus podiceps*)
- Double-crested Cormorant (*Phalacrocorax auritus*)
- Black Crowned Night Heron (*Nycticorax nycticorax*)
- Green Heron (*Butorides virescens*)
- Snowy Egret (*Egretta thula*)
- Great Egret (*Ardea alba*)
- Great Blue Heron (*Ardea herodias*)
- Mallard (*Anas platyrhynchos*)
- Hooded Merganser (*Lophodytes cucullatus*)
- American Coot (*Fulica Americana*)
- Greater Yellowlegs (*Tringa melanoleuca*)
- Black-necked Stilt (*Himantopus mexicanus*)
- Killdeer (*Charadrius vociferous*)
- Ring-billed Gull (*Larus delawarensis*)
- Mourning Dove (*Zenaida macroura*)
- Scrub Jay (*Aphelocoma californica*)
- American Crow (*Corvus brachyrhynchos*)
- Yellow-rumped Warbler (*Dendroica coronata*)
- Wilson's Warbler (*Wilsonia pusilla*)
- California Towhee (*Pipilo crissalis*)
- Spotted Towhee (*Pipilo maculatus*)
- Golden-crowned Sparrow (*Zonotrichia atricapilla*)
- White-crowned Sparrow (*Zonotrichia leucophrys*)
- Red-winged Blackbird (*Agelaius phoeniceus*)
- Brewer's Blackbird (*Euphagus cyanocephalus*)

A November 9, 2005 site visit by WWR staff clearly demonstrated how, despite the Pond's small size, it is an important foraging and roosting habitat for large numbers of birds. On that day, at

least 20 adult and immature black-crowned night herons were witnessed both foraging and roosting at the site (Figures 1 and 2). Other birds seen foraging were one great egret and one snowy egret (Figure 2), and three male/female mallard pairs (Figure 1).

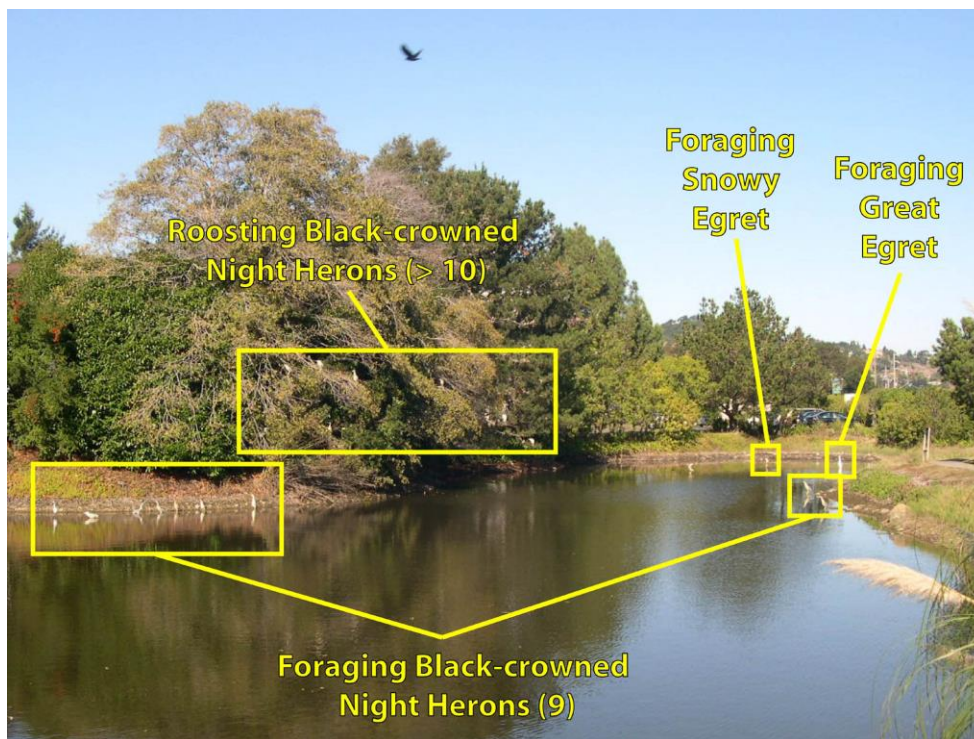


Figure 2. Foraging and roosting herons and egrets at the Pond, November 9, 2005. Photo by Christina Toms.

Except for the mallards, all of these birds prefer shallow wetland habitats. In wetland areas, great and snowy egrets primarily feed on aquatic invertebrates, fish, and amphibians, while mallards feed on aquatic invertebrates, insects, and aquatic vegetation. It is therefore reasonable to assume that conditions at the Corte Madera Inn Pond are favorable enough to allow these prey organisms to thrive, otherwise the birds would not expend their time foraging there.

3 Inadequacy of Existing Mitigation Plan

The February 7, 2003 Corte Madera Inn Mitigation Program Summary prepared by Zentner and Zentner states on page 1 that “[m]itigation credits of 0.65 have been purchased at the Burdell Ranch Wetland Conservation Bank to mitigate...” The Burdell Ranch Wetland Conservation Bank is approximately 14 miles to the north of the Pond. Though populations in the general vicinity of the Conservation Bank may benefit if the wetland mitigation bank is successful, the *local* populations that currently utilize the Pond would not receive those same benefits. Additionally, the Burdell Ranch Bank is a new project, and it is unlikely that it has developed habitat that will immediately offset habitat losses at the Pond. This would compound the spatial loss of habitat at the Pond by creating additional *temporal* losses.

Given the information above, has the Town received documentation from the applicant that (1) confirms such a mitigation credit purchase, (2) confirms that the mitigation habitat has been constructed and has met its ecological performance standards and therefore is able to offset both

spatial *and* temporal impacts, and (3) demonstrates to the Town that adverse impacts to the Pond will be mitigated effectively in terms of acreage *and* timing of replacement habitats?

4 “Fixing” the Corte Madera Inn Pond

Based on statements made at the September 13, 2005 Planning Commission meeting, there are a number of constituents throughout Corte Madera who believe that the Pond has water quality problems and thus is somehow *broken*, and that the most reasonable way to *fix it* is by paving it over and turning it into a parking lot. However, the Initial Study described the pond’s water quality problems primarily as “stagnation” and “noticeable odors”. No specific water quality parameters such as dissolved oxygen (DO), biological oxygen demand (BOD), turbidity, or the presence/absence of odorous algae-produced compounds such as geosmin and/or 2-methylisoborneol (MIB) are described. Aquatic systems like the Pond are filled with organic material, bacteria, algae, and other building blocks of the aquatic food web. It is the nature of these systems that, on a regular basis, they produce gases such as hydrogen sulfide (H₂S) that have odors offensive to humans. Paving over the Pond simply because it does not mesh with human aesthetics sets a dangerous and unfortunate precedent for Corte Madera and Marin County.

The Pond obviously has high enough dissolved oxygen (likely ≥ 5 mg/L, the RWQCB minimum) to support communities of aquatic vegetation, benthic invertebrates, and fish. However, the Pond’s DO may not be high enough to support the Pond’s BOD during periods of stratification and high primary production (summertime). This time period is when undesirable odors such as H₂S may be produced in the Pond and noticed by surrounding residents. Increasing summertime DO levels in the Pond, and reducing the occurrences of these odors, can be achieved at a relatively low cost through mechanical mixing.

Mechanical mixing is a process whereby oxygen is transferred from the air to the upper water to the sediments through propellers or baffles. These highly efficient systems can be completely submerged, and transfer oxygen from well-oxygenated surface water to less-oxygenated deeper water and sediments throughout the pond. They can also be partially submerged, increasing agitation at the air-water interface, increasing surface DO levels, and then transporting this high-DO water down to deeper water and sediments and throughout the pond (Horne and Goldman 1994). Corte Madera Inn Pond is an excellent candidate for mechanical mixing for a number of reasons:

1. The pond’s markedly small volume (2 acre-feet) means that relatively low levels of electricity would be needed to power any pumps or motors; this electricity could easily be provided through sustainable wind or solar power or through lines to adjacent properties.
2. The pond’s existing surroundings of Highway 101 and a busy hotel/restaurant complex and its continued use by wildlife means that wildlife are unlikely to be disturbed by the seasonal operation of mechanical mixing devices.
3. Mechanical mixing would only need to be employed during certain periods of time, primarily in the warm summer months. This time period would help keep operation and maintenance activities and their associated costs to a minimum.

With the Pond, the Town of Corte Madera has a unique opportunity to preserve and enhance valuable wildlife habitat in the most unlikely of locations. In doing so, it would set an excellent example for municipalities around the San Francisco Bay area, many of which are faced with similar questions about how to manage remnant tidal systems.

References

California Coastal Commission, Pub. Res. Code §30121.

Cowardin, L.M., V. Carter, F.C. Golet, and E.T. LaRoe. 1979. Classification of Wetlands and Deep Water Habitats of the United States. U.S. Department of the Interior, Fish and Wildlife Service, Office of Biological Services, Washington, D.C.

Horne, A.J., and Goldman, C.R. 1994. Limnology (2nd edition). McGraw-Hill, New York, New York.

Reed, Jr., P.B. 1988. National List of Plant Species That Occur in Wetlands: California (Region 0). US Fish and Wildlife Service, Washington, DC.

Town of Corte Madera General Plan, December 1989.

Town of Corte Madera Planning Commission Staff Report: Corte Madera Inn. September 8, 2005.

Town of Corte Madera Planning Commission Revised Initial Study and Draft Mitigated Negative Declaration: Corte Madera Inn. May 25, 2005.

Town of Corte Madera Planning Commission Initial Study: Corte Madera Inn. March 10, 2004.

Town of Corte Madera Zoning Ordinance.

US Army Corps of Engineers, 40 CFR §230.

Zentner and Zentner. 2000. Corte Madera Inn Pond Section 404 Jurisdictional Delineation. Prepared for Corte Madera Inn c/o Reneson Hotel Group. Oakland, CA. August 9.

February 16, 2015

Jane Hicks, Chief
Regulatory Division
Army Corps of Engineers
1455 Market Street
San Francisco, CA 94103

RE: Alternatives Analysis for Corte Madera Inn Pond Rebuild Project

Dear Ms.Hicks:

We are writing to clarify and correct sections of the Alternatives Analysis for the Corte Madera Inn Pond (undated) prepared by John Zentner and Associates and to provide our analysis of the alternatives. Filling of this pond is proposed as part of a plan to rebuild and expand the Corte Madera Inn that currently exists on the site. As described below, the Analysis has so many errors and inaccuracies that all of the information provided in the report should be questioned, and it certainly should not be considered adequate as an alternatives analysis.

First, we want to comment on the flood control benefits of the pond. The Corte Madera Inn property is built on former tidal marsh, in a floodplain and within the FEMA 100-year flood boundary. The Analysis states that the pond became “superfluous” for flood control purposes when the Town redesigned its flood system. Even if the pond is no longer an essential part of the Town’s flood control system, this does not mean that it is no longer useful as a ponding basin for flood waters. Further, it is likely that it will be more useful, and perhaps essential, in the future as sea level rises. We note that throughout the Ross Valley, there is considerable effort to find places to serve as basins to minimize or prevent flooding. To allow this basin to be filled is shortsighted at best.

Most of the alternative sites in the Analysis are evaluated as being unsuitable for similar reasons and many of these reasons are inaccurate. These reasons and the inaccuracies in the analyses are summarized below:

- 1) “Zoning is inconsistent.” A site should not be dismissed because it is not zoned for motel or hotel. Actually, the Town of Corte Madera has no such zoning category. The current zoning for the site is Mixed Use Commercial. A zoning change could be requested for any one of the Alternatives parcels just as it is required of and is being requested by the applicants for the proposed Corte Madera Inn rebuilding and expansion development.

2) “There is no evidence that (the parcel) is available at this time.” Just because a parcel is not on the market does not mean that the owner would not sell it. The project proponents should have contacted the owners of the alternative sites to determine their willingness to sell. In fact, most of the 10+ properties MAS has purchased in the last 20 years were not on the market.

3) “The slopes are greater than 20%” and therefore too steep for a hotel/motel. The presence of steep slopes should not exclude a site from consideration. Examples of hotel’s built on steep slopes exist in many locations in Sausalito and San Francisco.

Corrections to specific alternative sites are below

Alternative Site 1 – The discussions mix Site 1 and 2. Most of the text for Site 1 actually describes Site 2. According to figures 3 and 4, Site 1 is on the west side of Highway. The discussion for Site 1 describes it as being “near the Ring Mountain Preserve an area of serpentine soils that hoses numerous listed plant species.’

The Ring Mountain Preserve is actually east of Highway 101 and separated from Site 1 by it and various developments. This brings into question the validity of the presence of serpentine soils and listed species as claimed in the text. To our knowledge no listed species exist on Alternative Site 1, west of Highway 101. The listed plant species are on the Ring Mountain Preserve, east of Highway 101.

The third and fourth paragraphs of the Site 1 discussion are identical to the description of Site 2. This site is not zoned Open Space and Natural Habitat, as reported. According to the Corte Madera General Plan the site is zoned Hillside Residential

Alternative Site 2 – Site 2 is near the Ring Mountain Preserve. As noted above, the third and fourth paragraphs are identical to the third and fourth paragraphs for Site 1. The access road, Koch Road, is wide, flat and quite capable of supporting access to a motel/hotel.

It is unclear what is meant by the statement that the “water and sewer lines are similarly constrained”? There must be sewer and water lines in place to support the large residential development and commercial facilities along Koch Road.

It is unclear whether the site is actually adjacent to Ring Mountain. Even if it is, we don’t see why this would exclude it from consideration, because numerous developments have been built and exist adjacent to Ring Mountain. It appears to us that his would be a suitable site.

Alternative Site 3, as shown on figures 3 and 5, is actually the site described as Site 4. Site 4 on figure 5 is covered with gravel and is located between Shorebird Marsh to the north and the Villages Shopping Center to the south. Shorebird Marsh also functions as a flood basin. This gravel lot serves as an overflow parking lot for the shopping center. Seventy-two 72-acres owned by the Golden Gate Bridge Highway and Transportation District are directly east.

The flood basin, Shorebird Marsh, to the north could be described as being similar to the Corte Madera Inn Pond, in that it supports some areas of wetland but is largely waters of the US, except that it is larger. Marshes of the Corte Madera Ecological Reserve support endangered Ridgway's rails, but these are well to the east and not the adjacent to the gravel lot. The nearby habitats are diked and managed marsh to the north and seasonal wetland to the east, and are not suitable habitat for the endangered Ridgway's rail which requires tidal marsh.

The site is zoned Mixed Use, not Open Space. Access roads are large and infrastructure exists. .

Alternative Site 4, which is shown as Site 3 on figures 3 and 5, is near the western border of the Ecological Reserve between Shorebird Marsh to the south and west and the Corte Madera Ecological Reserve which is along the site's north, east, and southern boundary. The first paragraph on page 11 is garbled.

Site 3 as shown on figure 5, not Site 4, is near the western border of the Ecological Reserve. It is Site 3 not 4 that is accessible via Industrial Way and the small parking lot referred to is part of the Corte Madera Ecological Reserve. The Ecological Reserve surrounds the Site 3 shown on three sides, north, east and south. MAS is working on purchasing this site. There is a large population of Ridgway's rails in the Ecological Reserve tidal marshes adjacent to this site. Marin Audubon Society is in the process of purchasing the property. The site is zoned Professional and Administrative Offices. Because this site is surrounded on three sides by the Ecological Reserve, it is not suitable for hotel/motel development.

Alternative Site 5 - This site 11 acre property is large enough for a hotel. It is located adjacent to developed areas, north of Larkspur Landing. It appears that several access points exist, from Larkspur Landing and or from San Rafael from the north east. The site is rolling hills and it is likely that some areas with less than a 20% slope exist. It would appear to be suitable for a motel.

Alternative Site 6 – This site formerly supported an auto dealership, Bay Automotive properties. The site is zoned General Commercial and infrastructure exists. The depiction of the site on figure 5 Shows a site that appears to be larger than the claimed 3 acres and to be the same size as sites 3 and 4. The site is flat with good access and would seem to be suitable.

Alternative Site 7 is flat with good access. The claim that the local neighborhood would oppose development of a motel is an unsubstantiated assumption. There is a residential neighborhood near the current Corte Madera Inn site and residents of the local neighborhood near the current site are opposed to the expansion. Why would this be a deterrent? Roadways are suitable and infrastructure exists.

Alternative Site 8 This site is known as Cal Park. A stream with associated wetlands flows thorough the property. MAS owns a small parcel in the middle of the basin. Most of the site is owned by a real estate company. The site is zoned Residential Low Density, not Parks.

On-Site Design

The most suitable alternative site analysis for the Corte Madera Inn project would be one that redesigns the project to avoid the pond. The analysis does not “examine practicable alternatives

locations or on-site designs which could reduce or eliminate fill within special aquatic sites” as claimed at the bottom of page one. Avoiding the pond could be accomplished by relocating the limited number of units/facilities that would actually be directly over the existing pond, to other areas of the site. They could be relocated, for example, to the proposed lawn area which should not be acceptable with our drought- prone state, and/or the basket ball court area. The pond should then be enhanced as an amenity for the project.

Conclusion

In conclusion, this Alternatives Analysis should be found unacceptable. The analyses are flawed. Much of the information on which the analyses are based is inaccurate, garbled, and/or erroneous. This Analysis should not be approved as a justification to fill wetlands or waters of the U.S.

Thank you for considering our comments

Sincerely,

Barbara Salzman, Co-chair
Conservation Committee

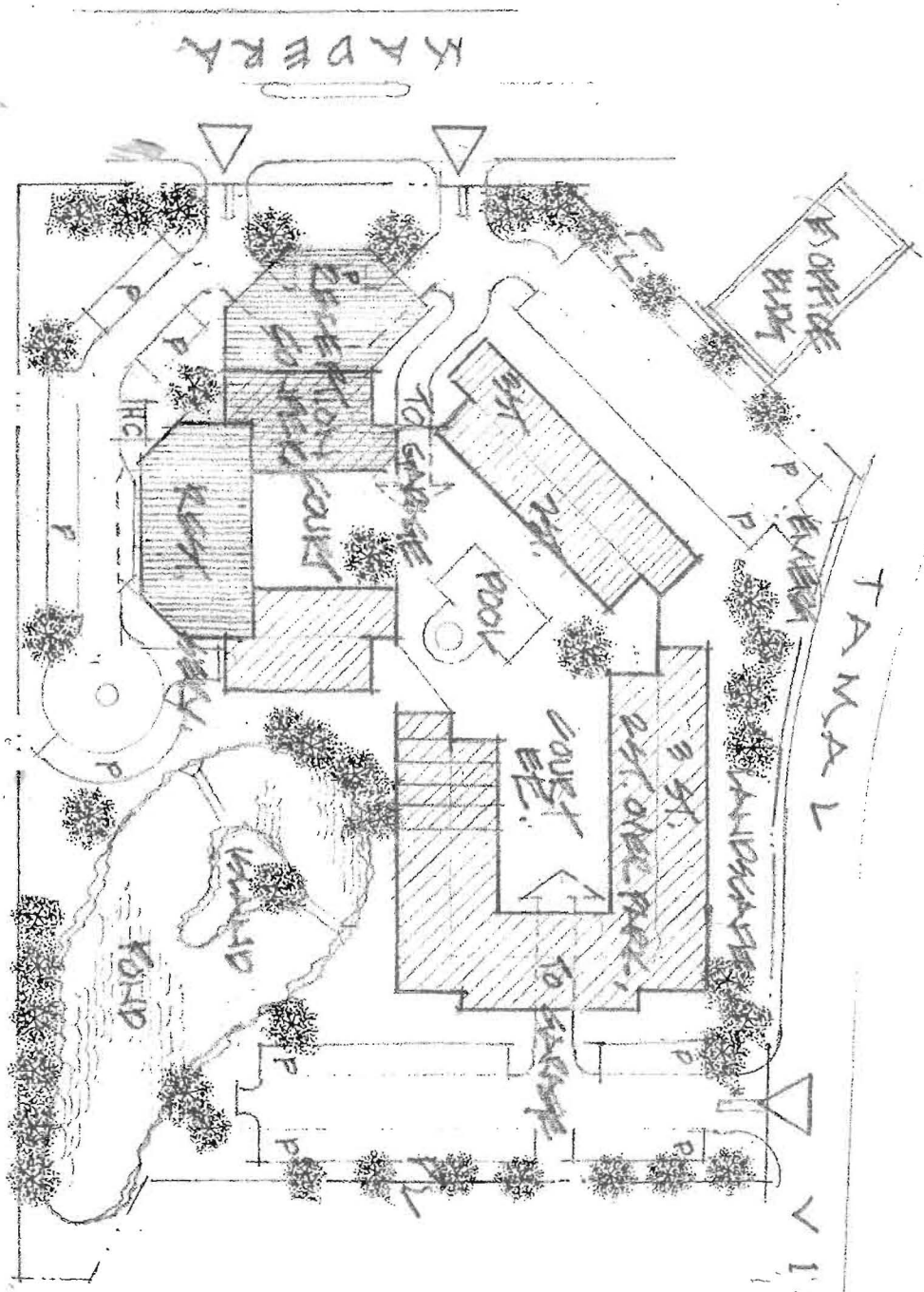
Phil Peterson, Co-chair
Conservation Committee

cc: RWQCB

± 900 ROOMS

KENILWORTH ALBERTS BLVD
MICHIGAN HARBOR AKA

1 3/16"



MADERA

OFFICE BLDG

KITCHEN

TO GARAGE

POOL

COURT ETC.

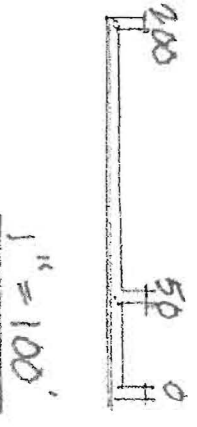
RESTAURANT

TO GARAGE

KOLIP

TANNA

VISTA



HTW, 101



Marin Audubon Society

P.O. Box 599 | MILL VALLEY, CA 94942-0599 | MARINAUDUBON.ORG

January 12, 2017

Xavier Fernandez
SF Bay Regional Water Quality Control Board
1515 Clay Street, 14th Floor
Oakland, CA 95612

RE: ALTERNATIVE ANALYSES FOR CORTE MADERA INN, MARIN COUNTY

Dear Mr. Fernandez:

Thank you for the opportunity to comment on the alternative analyses submitted by Zentner and Zentner, the applicant's consultant, for the Corte Madera Inn Rebuild project in Marin County. Zentner submitted three analyses: an Off-site, which is the same as the undated Alternatives Analysis submitted in 2014, and two On-site analyses, one from 2012 and the other from 2014, both of which are designed to convey that the on-site alternative is not feasible.

Off-site Alternatives Analysis:

We resubmit our comments about the many serious deficiencies and errors in the On-site Analysis originally submitted on February 16, 2015. These comments still apply. We do, however, have several updates. The site addressed as Site 3, surrounded by the Corte Madera Ecological Reserve and accessible via Industrial Way has been purchased by Marin Audubon Society and we are in the process of planning to restore the site to tidal marsh. Also, from our experience, the bird count data provided in Table 1 Bird Use is inaccurate. We did not comment on this last time, but the pond is surveyed annually on Marin Audubon's Christmas Counts and is observed by others during the year. The following were observed in 2014: 7 black crowned Night Herons; 2015: 25 Black Crowned Night Herons, 1 Greater Yellowlegs, 2 Mallard, 1 Gadwall, and on another occasion 7 BCNH and in 2016: 35 Black crowned Night herons, 4 Hooded Merganzers; 2 mallards. Seeing no wetland birds in the months of July and August is not surprising because they are not in the Bay Area during those months. The Bay is primarily an overwintering habitat. Although we do not have specific records on the pond in earlier years, it is rare we do not find water birds in the pond during the winter months. That Zentner observers did not see **ANY** waterfowl or shorebirds on any visits during November, December, January and February is hard to believe. A 2005 Memo Report from Wetlands and Water Resources (WWR) on the pond and its wildlife is also attached.

Also, comparing the Inn Pond with the Ecological Reserve is a fallacious argument. The Reserve is 300 plus acres of tidal marsh and intertidal habitats. To compare these two dissimilar habitats is only designed to mislead the reader who doesn't know much about habitats. The attached WWR Memo report on the pond identified the presence of wetlands in the pond in 2005 and also listed many species that have been observed in it.

On-Site Alternatives Analyses:

Concerning the On-site alternatives, the 2012 Alternatives Analysis is five years old and cannot be considered relevant nor acceptable. In addition to being outdated, it focuses primarily on the profit for the property owner, which is not germane. The 404 (b)(1) Guidelines do not identify profit for the

property owner as an aspect to be considered in alternative analyses.

The 2014 report is three years old and also outdated. It presents arguments that the 187 unit facility is needed and concludes that a 187 room facility is the "only financially viable option for the site." It, however, fails to recognize that the current proposal for the site is for a 174 room. As we understand, this new number reflects the fact that the Town changed the area zoning and a 187 unit complex is no longer consistent with the current zoning. If 187 is the "only financially viable option," how come the developer is now proceeding with a 174 room facility? Clearly he does not **need 187 rooms**, he simply wants 187 rooms to maximize his profit.

If a 174-room facility, 13 fewer than the "only viable option" is still proceeding, then it is feasible that deleting a few more rooms might also still be feasible and accomplished while retaining the pond. Furthermore, the 148-room scenario was produced by the EIR consultant. This may not be the only number of rooms that could be constructed while at the same time keeping the pond. There has simply not been a rigorous public exploration of alternatives that would allow the pond to be retained, probably because the developer simply does not want to keep it.


An on-site analysis should not focus on profits and not only on costs. This should be an opportunity to investigate other options that would allow the pond to remain. No arduous investigation into options was conducted at the Town public meetings, and it is time that other more environmentally sound designs be presented and evaluated. We understand that architects have submitted several alternative designs which could be considered. We attach one of these designs.


None of the analyses give a value to retaining the pond. Judging by the many comments from the community, the pond is recognized as an important habitat, and is appreciated and enjoyed by many people. None of the analyses recognize this and apparently the owner does not either. The pond should be assigned a positive value as a biological and community resource that is enjoyed by the community and probably visitors. It could be made an even more attractive amenity for the hotel with some relatively minor additions as described in the attached Memo from WWR.

In conclusion, none of the alternatives analyses should be acceptable to public agencies. Each reflect a bias in favor of the applicant's plan and have many other deficiencies. The information and analyses presented in them are inaccurate and/or insufficient to demonstrate that the pond and its associated wetlands and heron roost cannot be retained as biological resources important to the area wildlife and be designed as amenity for the community and hotel guests to enjoy.

Thank you for considering our comments.

Sincerely,


Barbara Salzman, Co-chair
Conservation Committee


Phil Peterson, Co-chair
Conservation Committee

Cc: Army Corps of Engineers
Town of Corte Madera

From: [Barbara Salzman](#)
To: [Fernandez, Xavier@Waterboards](mailto:Fernandez_Xavier@Waterboards); [Adam Wolff](#); sahrye.E.Cohen@usace.army.mil
Subject: Re: Corte Madera Inn Pond On-site Analyses
Date: Friday, January 13, 2017 2:19:10 PM
Attachments: [CM Inn Correction.pdf](#)

Xavier and Everyone,

Attached please find a letter correcting a mistake in our letter of January 12, 2017.
It has no bearing on the main points in our letter.

Sorry for the bother.
Barbara Salzman
Marin Audubon Society

On 1/12/2017 3:22 PM, Barbara Salzman wrote:

- > Xavier,
- >
- > The following documents are attached:
- >
- > Marin Audubon's comment letter on the On-site alternatives Analyses
- >
- > Memo Rpt. from WWR
- >
- > 1/16/15 Comment Letter to Corps on Off-Site Analysis
- >
- > Alternative Design (without island in pond, of course)
- >
- > Please let me know if you have any questions. Many thanks
- >
- > Barbara Salzman
- >
- >



Marin Audubon Society

P.O. Box 599 | MILL VALLEY, CA 94942-0599 | MARINAUDUBON.ORG

January 13, 2017

Xavier Fernandez
SF Bay Regional Water Quality Control Board
1515 Clay Street, 14th Floor
Oakland, CA 95612

RE: ALTERNATIVE ANALYSES FOR CORTE MADERA INN, MARIN COUNTY


Dear Mr. Fernandez:

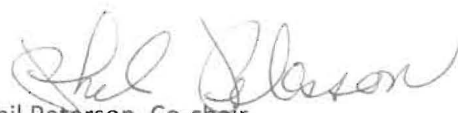
We are writing to correct a statement on page 2 of our January 12, 2017, letter regarding the reason for the reduction in the number of rooms in the Corte Madera Inn Rebuild Project. I just learned that the room reduction was due to action by the Corte Madera Planning Commission and not due to zoning changes.

This, however, does not change the validity of the point we made, which is that if the applicant can reduce the number of rooms from 187 to 174, then the number can very likely be reduced further, if need be, in order to retain the pond. Additional 174 and fewer-room alternatives that keep the pond should be developed and reviewed.

Sorry for the mistake.

Sincerely,


Barbara Salzman, Co-chair
Conservation Committee


Phil Peterson, Co-chair
Conservation Committee

Cc: Army Corps of Engineers
Town of Corte Madera

From: bsilvestri
To: [Fernandez, Xavier@Waterboards](mailto:Fernandez_Xavier@Waterboards)
Cc: [Michael Graf](mailto:Michael.Graf)
Subject: 1-Exhibits to Comment on the Corte Madera Inn Rebuild Project Alternatives Analysis
Date: Friday, January 13, 2017 3:40:30 PM
Attachments: [1-Exhibit I - E.Yates Comment Letter 01-20-2015.pdf](#)
[2-Exhibit II - E.Yates Comment Letter 08-19-2015.pdf](#)
[3-Exhibit III - E.Yates Comment Letter 12-19-2015.pdf](#)
[4-Exhibit IV - 2-9-16 ACR comment BCNH CorteMadera 20160209 \(2\).pdf](#)
[5-Exhibit V - Corte Madera Inn wetland & aquatic wildlife habitat Baye 021516.pdf](#)
[6-Exhibit VI - G.R. Kamman Hydrology comments 2-25-16.pdf](#)
[8-Exhibit VIII - Xavier Fernandez SF Bay Regional Water Quality Control Board Email.pdf](#)

Dear Mr. Fernandez:

Attached please find Exhibits 1 through 8 to our three comment letters on the off-site and on-site 404(b)(1) Alternatives Analysis for the Corte Madera Inn Rebuild Project (attached).

Best,

Bob Silvestri

President

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January 20, 2015

Adam Wolff, Planning and Building Director
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RE: Draft Environment Impact Report (DEIR) for the Corte Madera Inn

Dear Mr. Wolff;

INTRODUCTION

The following comments on compliance with planning and zoning law and CEQA for the Corte Madera Inn are submitted by me on behalf of Friends of Corte Madera. Friends of Corte Madera members use, frequent, and enjoy the Corte Madera Inn area and are adversely affected by the proposed project. I also submit these comments on behalf of individuals adversely affected by this project: Marla Orth, Peter Orth, Susan Kirsch, Joan Bennett, and Jennifer Larsen.

The deadline for comments on the Draft Environment Impact Report (DEIR) was January 19, which was a holiday. However, courts have held that comments must be accepted the next day in such a situation. *Rominger v. County of Colusa* C073815 (Cal. Ct. App. 2014)

Corte Madera Must Withdraw or Recirculate DEIR

Because Corte Madera's and California state planning and zoning law and CEQA requirements have been not been complied with and because the DEIR is so legally inadequate, the City should withdraw and start the entire process anew. The City should implement a more transparent planning approach that complies with both the Corte Madera General Plan and Zoning Ordinance and with CEQA. If the Town of Corte Madera will not withdraw the DEIR, then at a minimum, the DEIR must be re-circulated for public review and comment pursuant to CEQA Guidelines Section 15088.5 because the DEIR is so functionally and basically inadequate that it precludes meaningful public review.

MAIN POINTS REGARDING THE PROJECT'S LEGAL COMPLIANCE

- The Project's proposal to fill wetlands violates policies in and is inconsistent with Corte Madera's General Plan and Zoning Ordinance.
- The DEIR does not – as required by CEQA - identify these inconsistencies or mitigate the impacts. The DEIR remarkably, brushes off the lack of vertical consistency of wetlands zoning regulations and the General Plan with the Zoning ordinance overlay regarding identification and protection of wetlands.
- The DEIR's Impact Analysis is legally inadequate and does not provide substantial evidence for its conclusions and improperly:
 - Fails to include feasible measures to avoid impacts to wetlands and floodplains.
 - Defers almost all mitigation measures,
 - Fails to adequately address cumulative impacts to circulation and air quality given the recent traffic increases due to economic growth and future traffic growth due to cumulative projects such as WinCup.
 - Fails to adequately assess the impacts of additional impervious surfaces in a hazardous floodplain area; the project contributes to existing hazardous flood conditions and ignores sea level rise considerations.
- The DEIR proposes mitigation banking without assessing project impacts or considering avoidance or on site mitigation, thus not meeting either CEQA or the Clean Water Act's requirements to avoid and/or minimize impacts.
- The DEIR's Alternatives Analysis is inadequate due to narrow project objectives and the elimination of reasonable alternatives. The DEIR must consider more reasonable alternatives such as an L shape with slightly higher occupancy that avoids impacts to wetlands, floodplains and traffic.

COMMENTS ON GENERAL PLAN AND ZONING ORDINANCE CONSISTENCY AND DEIR ADEQUACY

- 1. The Proposed Project violates the General Plan by not restricting or modifying the project to avoid wetlands. The Zoning Ordinance of Corte Madera limits fill of wetlands in the overlay zone.**

General Plan (“GP”) Implementation Policies that must be adhered to for this project include the following:

GP Implementation Program RCS 8.1.b: Wetland Avoidance:

Restrict or modify proposed development in areas that contain wetlands as defined herein or waters of the United States, as necessary to ensure the continued health and survival of special status species and sensitive habitat areas.

GP Implementation Program RCS 8.1.b: Wetland Avoidance

Where complete avoidance of wetlands and waters of the United States due to filling is not feasible (as defined under State CEQA Guidelines Section 15364), require provision of replacement habitat on site through restoration and/or habitat creation at a minimum 2:1 ratio that would ensure no net loss of wetland acreage, function, water quality protection, and habitat values occurs. Allow restoration of wetlands off - site only when an applicant has demonstrated that no net loss of wetlands would occur and that on – Site.

GP Implementation Program RCS - 8.2.b: Wetlands Mitigation Standards.

No net losses shall occur in wetland acreage, functions, and values consistent with the mitigation standard set forth under Implementation Program RCS-8.2.a.

Mitigation sites shall be permanently protected and managed for open space and wildlife habitat purposes.

Restoration of wetlands is preferred to creation of new replacement wetlands, due to the greater likelihood of success.

Chapter 18.18.200 of the Municipal Code regulates development in the Baylands Risk Zone and Natural Habitat (BRZNH) Overlay District.

Approval of the project would violate the above sections because: 1) any fill of the wetlands cannot be allowed because the preferred alternative would not restrict or modify proposed development to protect species and habitat and 2) the applicant nor Corte Madera have provided any data or the required analysis demonstrating that avoidance is not feasible and that no net loss of wetlands would occur on-site; and 3) no showing has been made that wetlands cannot be restored. Thus, there is no support for either a finding that allows fill of the wetlands or approval of the preferred alternative. (DEIR, Section 4.3.)

The DEIR does not – as required in Section 18.20.220 - identify these inconsistencies or mitigate the impacts. The DEIR remarkably, brushes off the lack of vertical consistency of wetlands zoning regulations and the General Plan with the Zoning ordinance overlay regarding identification and protection of wetlands. The DEIR includes almost 20 pages on describing the regulatory background. But aside from a boilerplate compensation measure, the DEIR includes less than two pages describing project impacts and compliance and consistency with those wetlands requirements. (DEIR, p. 4.20-21.)

Corte Madera Zoning Ordinance Section 18.18.220 - Findings for approval of development states that:

Prior to approval of any development in the BRNH overlay district, the following findings shall be made:

- (1) The project protects and preserves saltwater and freshwater wetlands and related habitats, and protects and preserves the water quality of wetlands;
- (2) The project provides an acceptable level of risk related to possible damage to structures and improvements, including underground utilities, resulting from subsidence, differential settlement, seismic event or other failure and flood hazard.

These findings cannot be made because there is no evidence to support the conclusion that filling in of wetlands and 2:1 replacement protects wetlands or protects the surrounding area from flood hazard.

2. Consideration and Discussion of Environmental Impacts and Mitigation of Impacts to Wetlands and Aquatic Habitat is Inadequate

CEQA Guidelines Section 15126.4 under “Consideration and Discussion of Mitigation Measures Proposed to Minimize Significant Effects” states, “(1) An EIR shall describe feasible measures which could minimize significant adverse impacts, including where relevant, inefficient and unnecessary consumption of energy.” The CEQA Guidelines Section 15370 and the U.S. EPA, Corps of Engineers Regulations under Section 404(b) of the Clean Water Act set out the requirements for fill of wetlands (33 U.S.C. 1344(b)).

These regulations set out rules for considering permits to dredge and fill wetlands require that project applicants assess how to avoid or minimize impacts before considering less favorable methods of mitigation. Compensation – or off site replacement - is discouraged and only may be considered after a feasibility analysis has been prepared. (40 CFR 230.91 et seq.)

Regarding discussion and mitigation of impacts CEQA case law holds that specific project impacts must be assessed; simply proposing mitigation measures without impact assessment violates CEQA. *Citizens for Quality Growth v. City of Mt. Shasta*, 198 Cal. App. 3d 433 (1988); *San Joaquin Raptor/Wildlife Rescue Ctr. v. Cnty. of Stanislaus*, 27 Cal. App. 4th 713 (1994).

Specifically regarding wetlands, where a project filled wetlands adjacent to development, an agency must specifically measure and analyze impacts before simply proposing mitigation and declaring the impacts less than significant. *Mira Monte Homeowners Assn. v. County of Ventura*, 165 Cal. App. 3d 357 (1985).

Impact BIO – 2 (DEIR, p. 4.3-19-20) discusses impacts to special status species but includes no data or analysis regarding the potential impacts to these species due to the permanent loss of aquatic habitat.

Impact BIO – 3: Regulated Waters (DEIR, p. 4.3-20-23). The DEIR lists several authorities and concludes without any reasonable discussion that: “Proposed development would result in filling of the existing pond, eliminating an estimated 0.64 - acre of jurisdictional waters on the site. “

The DEIR makes a conclusion of no significant impacts to wetlands without first doing any in depth analysis of the hydrology or wetlands impacts as required under CEQA. (DEIR, p. 4.20.) The DEIR also makes this conclusion without any analysis, data, support or evidence for its conclusion that avoiding the pond or minimizing impacts to the pond is feasible. The DEIR essentially only cites the compensation, or replacement standard in the Zoning Ordinance, without the required attempts to analyze or avoid wetlands impacts as required by CEQA regulations and case law cited above.

The City’s reliance on later regulatory approval by the Corps of Engineers – without project specific analysis - has been held to violate CEQA. A determination that regulatory compliance will be sufficient to prevent significant adverse impacts must be based on a project specific analysis of potential impacts and effect of regulatory compliance. *Californians for Alternatives to Toxics v. Department of Food & Agriculture* 136 Cal.App.4th 1 (2005). Thus, simply presuming an impact would not occur if mitigation measure approved by agency is inadequate.

Storm water Impacts. The DEIR impermissibly relies completely on later compliance with environmental regulations to avoid any quantitative analysis of the storm water impacts. This area is in a flood hazard zone and the direct, indirect and cumulative impacts of the project’s new impervious surfaces runoff into Corte Madera Creek and its adjacent wetlands must be discussed in this EIR.

3. Consideration and Discussion of Environmental Impacts and Mitigation of Impacts Regarding Floodplains and Sea Level Rise is Inadequate

Corte Madera GP POLICY F – 2.1 is to “Require new development and redevelopment in areas subject to flooding to minimize or eliminate flooding hazards.

GP Implementation Program F – 2.1.b is the following:

Reduce Flood Hazards Individual development project mitigation shall demonstrate, through qualified engineering analyses, that no adverse flooding impacts are created by development on upstream and downstream properties in the project vicinity.

Section 16.10 of the Corte Madera Municipal Code sets out specific requirements for placing projects in floodplains including making certain findings and obtaining a Flood Plain Development Permit.

The DEIR lists the General Plan on-point policies but fails to provide any analysis regarding project compliance and consistency with these policies as required by CEQA. (See e.g. Section 4.8.) The DEIR also fails to address how development would minimize or eliminate flooding hazards or assess how the project will cause no adverse flooding impacts. Further, the DEIR does not discuss the application flood prevention aspects of Municipal Code Article 16.10 to this project.

The entire stretch of Corte Madera Creek, as well as many of its tributaries, have experienced extreme flooding due to impervious surfaces in the watershed, development in the floodplain, inappropriate infrastructure and inadequate stream maintenance. Damage to Ross Valley cities was enormous as recently as 2005 and 2006. Yet the DEIR contains almost no discussion of the flooding hazard issues or the actual impacts of the project on flooding. There is an enormous amount of documentation of Corte Madera's flooding problems. The Corte Madera General Plan EIR includes 41 pages of discussion, analysis and mitigation measures regarding flood hazards in the Corte Madera Creek yet this DEIR – while claiming to reference that EIR - does not cite or analyze that document regarding flood hazards. The project is located in a floodplain and thus subject to and affects flood hazards. (DEIR, p. 4.8-4.) The DEIR fails to adequately assess the impacts of additional impervious surfaces in a hazardous floodplain area; the project contributes to existing hazardous flood conditions and ignores sea level rise considerations.

The preferred project and the DEIR however, fail to consider the impact on flood hazards of filling the pond. The DEIR in Section 4.8 states that:

This would increase impervious surfaces at the site to slightly more than 176,700 square feet approximately 4.0 acres)(CSW/Stuber -Stroeh, 2013), an increase of approximately 30,500 square feet (0.64-acre) relative to existing conditions. A conceptual hydrologic analysis determined that by incorporating bioretention planters to treat runoff from building roofs and parking lots in accordance with MCSTOPP guidelines would reduce the overall volume and discharge rate of stormwater from the project site...."

The DEIR however, contains no analysis on either recent flooding or the cumulative incremental impacts of the project combined with other projects in the area, such as the SMART train station and construction of the WinCup project as required by CEQA. (CEQA Guidelines Sections 15130, 15355.) Also, FEMA published updated Flood Hazard Maps for the project area on

March 7, 2014. The DEIR should be revised to include these maps. These maps show the entire project area as subject to either the 100 or 500-year flood hazards, or both.

Given that the preferred alternative will contribute to the flood hazards in an already hazardous floodplain, the DEIR must include a detailed study of the floodplain and the flood patterns and analysis of the impacts of creating more impervious surfaces and development in the floodplain. The DEIR must include a discussion of the areas of the already hazardous floodplain that will be adversely affected by approval the project.

Sea Level Rise. The DEIR mentions climate change but contains no analysis on the subject. (DEIR, p. 4.8015.) The DEIR fails to consider putting new impervious fail to consider sea-level rise in locating project development, fails to cluster development outside of the likely flood areas, fails to develop engineering or design solutions to this major issue, fail to conduct a risk assessment before planning to locate new residents in a hazard area, fail to consider resiliency to sea level rise, and fail to include any real mitigation for sea level rise.

4. The DEIR improperly defers mitigation by claiming that a general mitigation bank contribution will apply to this project.

Under CEQA, mitigation may not be deferred. Mitigation measures for flood hazards, air quality and impacts to biological resources, including aquatic habitat and wetlands are deferred. As a matter of law, an agency cannot defer consideration or adoption of mitigation measures to a later date. (CEQA Guidelines §15126.4(a)(1)(B); *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296. Deferral may only be allowed where there is a reasonable expectation of effectiveness and compliance based on a requirement that the measure meet specific performance standards that are identified in the EIR. (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal. App.4th 777 [32 Cal. Rptr.3d 177.]

5. The EIR Improperly Contains a Narrow Range of Alternatives.

CEQA requires that an EIR contain a reasonable range of feasible alternatives that meet most or all project objectives while reducing or avoiding one or more significant effects of the project. (CEQA Guidelines Section 15126.6(f).) Where project applicants attempt to void or defeat CEQA's substantive alternatives analysis mandate by adopting an overly narrow project objective statement or contending that otherwise feasible alternatives are simply not appropriate, Courts have overturned the decisions. See, *Preservation Action Council v. City of San Jose* 141 Cal.App.4th 1336 (2006); *Uphold Our Heritage v. Town of Woodside* 147 Cal.App.4th 587 (2007).

The DEIR's Alternatives Analysis is inadequate due to narrow project objectives and elimination of reasonable alternatives. The DEIR must consider more reasonable alternatives that meet

most project objectives yet also follow Corte Madera, CEQA and the Clean Water Act requirements. Such a reasonable alternative could include an L shape with slightly higher occupancy that avoids impacts to wetlands, floodplains and traffic. (DEIR, pp. 5-1 to 5-4.)

CONCLUSION

The DEIR is so legally inadequate the City should withdraw and start the entire process anew with a more transparent planning approach that complies with both the Corte Madera General Plan, Zoning Ordinance and CEQA. If the Town of Corte Madera will not withdraw the DEIR, then at a minimum, the DEIR should be re-circulated for public review and comment.

In addition, the project fills .64 acres of wetlands and the Corps of Engineers must grant a permit to fill them. The Corps will require an analysis and then mitigation. Project opponents can use this process to further object to the project.

Sincerely,



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August 19, 2015

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RE: Recirculated Environmental Impact Report (REIR) for the Corte Madera Inn

Dear Mr. Wolff;

INTRODUCTION

The following comments regarding the approval process for the Corte Madera Inn development and CEQA compliance regarding are submitted on behalf of Community Ventures Partners, whose members use, frequent, and enjoy the Corte Madera Inn area and are adversely affected by Alternative 4. I also submit these comments on behalf of Jennifer Larson, Peter Hensel, and Andre Pessis, individuals and residents of Corte Madera adversely affected by the Development. I incorporate by reference my letter of January 20, 2015 regarding the DEIR.

The Recirculated Environmental Impact Report's (REIR) assessment of a new alternative appears to be either a quickly generated afterthought to the Town of Corte Madera's ("Town") approval process or a clumsy attempt to show the Developer's proposal in a better light. Alternative 4 wisely eliminates the fill of the pond, but curiously raises the height and mass of the proposed structure when such buildings have been broadly criticized by the community in the recent past.

Other factors bring up the question why Alternative 4 was added to the REIR. Alternative 4 does not have an application deemed complete by the Town and thus, cannot be built for some time because it would violate the Town building moratorium. Further, Alternative 4 serves no CEQA purpose because Alternative 4 *increases* many project impacts. Thus, the actual intended purpose of Alternative 4 is unclear except possibly to demonstrate to the public how much worse another proposal like Alternative 4 would be. As it is, Alternative 4 appears to act as a threat to coerce residents to accept the developer's original proposal.

Unfortunately, even if Alternative 4 is currently only a straw man, the public is forced to spend time and money addressing Alternative 4 now because the developer might later submit an application for Alternative 4 and claim that CEQA was already complied with by this current EIR. This way of conducting a public planning process was heavily criticized by the Marin

Grand Jury and mirrors the approach employed for WinCup and Larkspur Station Area Plan, of not disclosing that a current CEQA approval may cover a subsequent, controversial proposal.

Regarding Alternative 4 itself, the quick cure for the obvious design problems with Alternative 4 appears to be extensive amendments to the General Plan and Zoning Ordinance (“ZO”). The California Environmental Quality Act (“CEQA”), however, requires assessment of the impacts of these General Plan and ZO amendments.

Also, CEQA and good public policy require that the Town disclose why such a large structure with such enormous bulk and mass and aesthetic impacts would be approved based essentially on the developer’s stated desired economic return. In addition, the REIR does not remedy the DEIR’s failures to adequately assess impacts to wetlands, hydrology, floodplains, sea level, circulation, and alternatives.

These legal failings dictate that the Town should revise and recirculate the DEIR and REIR to comply with CEQA because the DEIR/REIR is so functionally and basically inadequate that it precludes meaningful public review.

MAIN POINTS REGARDING THE PROJECT’S LEGAL COMPLIANCE

- The DEIR has not addressed the comments in my previous letter and it remains legally inadequate.
- The REIR does not – as required by CEQA – assess the visual impacts of the increased bulk and mass of the building proposed in Alternative 4. Remarkably, the REIR brushes off Alternative 4’s visual impacts by claiming that traditional landscaping and General Plan and Zoning Ordinance (ZO) amendments will somehow drastically reduce visual impacts of this huge building.
- Alternative 4 exceeds Corte Madera’s FAR regulations and thus, is inconsistent with Corte Madera’s current General Plan and ZO. CEQA requires an assessment of any amendments to the General Plan and ZO to change the FAR and mitigate impacts.
- Alternative 4’s proposal to exceed Corte Madera’s height limitations is inconsistent with Corte Madera’s General Plan and its existing and proposed Zoning Ordinance and therefore, requires a variance.
- The DEIR and REIR Impact Analyses are legally inadequate because they continue to fail to adequately assess the following impacts: filling of a wetland, addition of impervious surfaces in a hazardous floodplain area; exacerbation of hazardous flood conditions; and sea level rise considerations.
- The REIR references a new traffic study and proposes mitigation measures for pedestrians and nearby traffic congestion, but the REIR does not analyze the cumulative

traffic impacts caused by the decrease in parking and the changed parking lot configuration as required by CEQA.

- The DEIR and REIR eliminate smaller alternatives from consideration, essentially because of the developer's desired financial return. CEQA finds such financial considerations insufficient to eliminate alternatives. Corte Madera should be transparent that its motive is to provide additional hotel tax revenue, if that is the case.

1. AESTHETICS ANALYSIS IS LEGALLY INADEQUATE

Alternative 4 will substantially increase aesthetic resources impacts from those identified in the DEIR and CEQA requires that an EIR be recirculated when the draft EIR is so fundamentally inadequate and conclusory that meaningful public review and comment are precluded. (CEQA Guidelines Section 15088.5). More specifically, CEQA requires that such increases in aesthetic resource impacts be examined in supplemental CEQA documents. *Ocean View Estates Homeowners Association, Inc. v. Montecito Water District* (2004) 116 Cal. App. 4th 396.

These new impacts of Alternative 4 are caused by the increased bulk in the hotel structure, but the *increase* in these new impacts is not analyzed in the REIR. The REIR does include some very general text with no support for these contentions. For instance, the REIR states that the existing vegetation near the adjacent pond will screen what will be a four story building. (Page 3.4- 3-5.) The REIR provides no support for this outlandish claim. For example, the REIR states that it "assumes" that new landscaping will mitigate Alternative 4's visual impacts, but provides absolutely no discussion of growth, screening coverage or data regarding such landscaping.

It should also be noted that the "landscaping to obscure mass and bulk" provision has been approved before by the Town of Corte Madera with wholly unsatisfactory results. Almost 2 years ago, The Village/Macerich submitted plans for expansion, including expansion of the parking lots. The Town approved the project based on a provision that landscaping would be included that would obscure the storefront signage and block the view of cars from 101. Nearly 2 years later, there has been *no* successful attempt by the Town to enforce installation of agreed landscaping by the developer.

Second, regarding the WinCup project, there has been *no* successful attempt by the Town to enforce the Public Improvements agreed on by the developer, including agreed aesthetic undergrounding of utilities.

Thus, the conclusions in the DEIR and REIR that "landscaping would lessen the impact of the project mass" have no successful historical precedent. In fact, this aesthetic 'solution' brings to mind still unmitigated issues with other projects and lack of oversight/accountability once developers received approvals.

The REIR also precludes meaningful review because it does not include any analysis or figures that are necessary for the decision makers and the public to either review Alternative 4's aesthetic impacts or to make any knowledgeable comments on design review. There are no

renderings or landscaping figures for Alternative 4, therefore, there is no context for commenting or for informed decision making. This lack of analysis and figures is especially striking given the recent approval and construction of a nearby building with similar bulk and mass – the Tamalpais Ridge/WinCup project.

The REIR should be revised to include both written analysis and figures so that decision makers and the public may make an informed review of Alternative 4. The EIR for this Alternative 4 must include figures, such as pre and post Alternative 4 renderings or simulations from vantage points such as Highway 101 or on the pedestrian trail on the east side of 101. Design review discussions without this analysis and figures will not be useful in determining the best design.

2. DEIR AND REIR FAILED TO ADDRESS LAND USE IMPACTS

A. Zoning Ordinance Permit Requirements.

The proposed project and Alternative 4 require a conditional use permit (CUP) and changes to and exemptions from existing and proposed height limits, yet there is no discussion of these impacts. Regarding a CUP, Corte Madera ZO Section 18.26.050(c)(3) requires that “[t]he proposed conditional use will comply with the general plan and with each of the applicable provisions of this title.” Currently, such a finding cannot be made. The EIR should describe the conflict and the mitigation or project measure intended to address this conflict. If it is to amend the General Plan and ZO, the REIR must evaluate the impacts of that amendment.

Regarding a variance, the REIR states: “It is assumed that the permissible height could be addressed at the time of the Precise Plan approval and would not require a variance.” (REIR, p. 4.9-9.) Upon discussion with Town staff, it appears that the Town intends to address any such issues in the project’s required preliminary and precise plans - as provided for in overlay districts, such as the Bay Overlay District the project is located in. This contention – that the Town has complete discretion about FAR and height - should be made clear in the EIR. In any case, the EIR must assess the impacts of the changes whether specifically allowed for in the zoning code or whether the Town has discretion to increase the height and FAR.

B. Height.

The Corte Madera Zoning Ordinance, Section 18.12.335, states, “No structure shall exceed 35 feet in height, as defined in Section 18.24.060.” The project will violate that standard by almost 30 percent, yet there is no discussion of the impacts of that violation.

The REIR states that the ZO will be amended to increase the height for Alternative 4. It is not clear if such a change in the ZO is a project measure or a mitigation measure, but in any case, there is no discussion of *the impacts* of this change in the zoning code as required by CEQA. CEQA does not allow an agency to simply propose a mitigation measure and call it a day; CEQA requires a discussion of the impacts of all project and mitigation measures. (See *Trisha Lee Lotus et al. v Department of Transportation et al.* (1st Dist., Div. 4, 1/30/14 A137315), which holds

that CEQA requires separate evaluation of mitigation measures and alternatives, even when mitigation measures are incorporated into project design.)

While the Town contends no variance is needed due to overlay zoning, the proposed project and Alternative 4's potential lack of consistency with the existing C-3 zoning should be discussed in the REIR.

C. FAR.

Currently, the Corte Madera General Plan provides for a .34 FAR for Mixed use commercial - .34. (GP, Page 2-21.) The DEIR stated, "The project would be inconsistent with the existing zoning that allows a FAR of 0.34. The project would require a General Plan amendment and a rezoning to allow the proposed FAR of 0.55." (Page 2-1.)

Now, the REIR states that "Alternative 4 would require a General Plan amendment and a rezoning to allow an increase in the allowable floor area ratio (FAR) for the site from 0.34 to 0.67." (REIR, p. 4.9-9.)

So it appears that as the developer changes his proposal, the Town of Corte Madera is simply increasing the FAR to accommodate the developer. There is no REIR analysis regarding the impacts of these changes and no analysis or context regarding why the FAR is increasing almost 45%. The only justification offered for such changes is the developer's desired economic return. (See Alternatives Section below.)

Similar to the height limitation change, the REIR proposes an amendment to the FAR limitation, but does not assess the impacts of this zoning change. Again, CEQA requires that the impacts of the zoning change, whether termed a project or mitigation measure, must be assessed.

3. HYDROLOGY CONCLUSIONS REMAIN UNSUPPORTED

The REIR does not address the hydrology issues raised in my comment letter on the Corte Madera Inn DEIR sent, January 20, 2015. (See "Consideration and Discussion of Environmental Impacts and Mitigation of Impacts Regarding Floodplains and Sea Level Rise is Inadequate.") Even though Alternative 4 will not include fill of the wetland pond area, it will have potentially significant impacts to the floodplain and sea level rise as explained in the January 20 letter; those impacts remain unanalyzed for Alternative 4 and mitigation measures have not been identified.

For instance, the DEIR or REIR still fail to include any detailed study of the floodplain and flood patterns or analysis of the impacts of creating more impervious surfaces in the floodplain and possible impacts related to sea level rise. Further, the DEIR and REIR contain no analysis of the cumulative, incremental floodplain impacts of Alternative 4 combined with other projects in the area, such as the SMART train station and construction of the WinCup project. CEQA Guidelines Sections 15130, 15355 require that such cumulative impacts be assessed.

4. CUMULATIVE TRANSPORTATION IMPACTS NOT ASSESSED

Despite the addition of mitigation measures in the REIR regarding pedestrian safety and nearby traffic congestion, the REIR does not analyze the cumulative traffic impacts due to the decrease in parking and the changed parking lot configuration. None of the previously examined alternatives include the lower number of parking spaces included in Alternative 4. This lower number of parking spaces will potentially have impacts on congestion due to cars circling in the area to park and due to wait times for cars entering the parking lot. These project factors must be identified and their cumulative impacts on circulation must be determined.

5. ALTERNATIVES IMPROPERLY CONSIDERED AND ELIMINATED

A. Alternative 4 Serves No Purpose but to Confuse the Public

The *REIR* has a purpose - presenting the new circulation analysis and mitigation measures. But the new Alternative 4 appears to be presented only to demonstrate to the public how much worse another hotel proposal would be. This is due to the fact that Alternative 4 serves no CEQA purpose of avoiding or reducing impacts because: a) there already is an alternative avoiding the pond (Alt 2) and b) Alternative 4 substantially increases other impacts. Therefore, inclusion of Alternative 4 is not required by CEQA (CEQA Guidelines Section 15126.6(a).) and the developer has no duty to pay for the additional CEQA analysis. But this is not made clear in the REIR and thus, the public is left with the impression that the developer is proposing a new alternative when instead the Town itself is presenting a different alternative that has substantially higher visual impacts. This should be clearly disclosed and justified.

Just as important, Alternative 4 cannot be built because the Town enacted an urgency extension moratorium on projects in the project area whose applications were not complete as of November 2014. (Town Ordinance 943, November 18, 2014). There is no complete application for Alternative 4. Thus, while a smaller version of the project contemplated in the developer's application could be built, a completely different project such as Alternative 4 would require new design and building plans to be submitted, reviewed and determined complete.

Presenting Alternative 4 as if it is a true alternative misleads the public and twists the purpose of CEQA, which is to present alternatives and mitigation measures to **reduce** impacts.

B. The Town Improperly Cedes its Responsibility to Determine Objectives to the Developer.

Page 3-1 of the DEIR list several project objectives after stating that: "The following objectives for the project have been identified by the applicant..." The Town, therefore, is acknowledging that it is limiting alternatives by simply following the financial and design objectives of the developer. But CEQA makes it clear that the "lead agency is responsible for selecting a range of alternatives..." ((CEQA Guidelines Section 15126.6(a).) The Town has improperly abdicated that responsibility and thus there is no substantial evidence for its elimination of alternatives.

C. Alternatives for a rebuild or more reasonable sized increases in size were improperly eliminated.

Both the DEIR and the REIR list various rationales for eliminating the alternative under the guise of being project objectives. Yet these objectives are the developer's objectives and thus, self-serving. Even the existing objectives (e.g. dual purpose, meeting rooms) can be met by most any alternative. Since pond consideration seems not to be an actual criteria for any alternative, the only remaining true rationale for eliminating smaller alternatives and for approving such large buildings – in both the proposed project and Alternative 4 - is that the developer contends that his financial return requires such a large building: “[m]oreover, they require sufficient scale for each brand to be competitive and efficient,” (DEIR p. 3-1); “...meeting the market demand and providing economic stability to the project;” (DEIR page p. 5-5); “the [density] restriction makes any development practically economically infeasible,” (Statement by developer, August 13, 2014 Planning Commission Minutes.)

CEQA finds such financial considerations insufficient on their own to eliminate alternatives. Thus, the Town needs to better explain why a large structure is actually the preferred alternative under CEQA. State and Federal planning and takings' law allow municipalities to approve a smaller reasonable sized project that does not meet the financial goals of a developer. If the Town wants additional development fees or hotel tax revenue, the Town and the EIR should disclose that factor and make it a project objective.

CONCLUSION

The DEIR and REIR are so legally inadequate that the Town should withdraw the DEIR/REIR and start the approval process anew with an approach that complies with both State planning law, the Corte Madera General Plan, and CEQA. At a minimum, the REIR should be re-circulated for public review and comment with the additional analysis required by CEQA.

Sincerely,

A handwritten signature in black ink, appearing to read 'E. Yates', with a long horizontal line extending to the right.

Edward Yates

Law Office of Edward E. Yates

1000 Fourth Street, Suite 800
San Rafael, CA 94901
415-526-6314
eyates@marinlandlaw.com

December 19, 2015

Adam Wolff, Planning and Building Director
Town of Corte Madera
300 Tamalpais Drive
Corte Madera, CA 94925-1418
Email to: AWolff@tcmmail.org

RE: Final Environmental Impact Report (FEIR) for the Corte Madera Inn

Dear Mr. Wolff;

The following comments regarding the FEIR Responses to Comments are submitted on behalf of Community Ventures Partners. I incorporate by reference my letters of January 20, 2015 and August 8, 2015.

After a review of the responses to comments in the FEIR, it is apparent that the Town of Corte Madera has not adequately responded to many of the comments made on the Draft and Recirculated Environmental Impact Reports, including those comments in my letters of January 20 and August 8.

CEQA Guidelines, Section 15088 requires that a lead agency make an evaluation of and response to environmental issues comments. Subsection C requires that:

The written response shall describe the disposition of significant environmental issues raised (e.g., revisions to the proposed project to mitigate anticipated impacts or objections). In particular, the major environmental issues raised when the Lead Agency's position is at variance with recommendations and objections raised in the comments must be addressed in detail giving reasons why specific comments and suggestions were not accepted.

In general, the FEIR responses simply repeat text from the EIR or state that the EIR is adequate. Neither type of response complies with Section 15088(c)'s requirements to give reasons and address in detail why specific comments and suggestions were not accepted. Examples of such inadequate responses include, but are not limited, to the following:

Response C1-2: Regarding the need to assess on site alternatives, the FEIR does not respond at all to the comment (including in Response C2-12 and C2-13.) The FEIR only states that CEQA does not require a similar alternatives analysis to the Clean Water Act. This statement is inaccurate and does not address why the Town did not consider on site wetlands impacts reductions or mitigation or include such an alternative.

Response C1-3: Regarding the EIR's lack of disclosure of the projects' potential flooding impacts, the FEIR is nonresponsive. The FEIR response does not in fact respond about impacts except to make an unsupported contention that there will be no impacts and mitigation will be sufficient. Regarding mitigation, the FEIR strangely contends that future required floor height elevations and a General Plan policy for coordinating with local regulatory agencies will mitigate the impacts. Neither addresses impacts and neither has any real world relation to the comment which requests assessment of and identification of substantive mitigation.

Response C1-4: The FEIR does not respond to the comment that the project's wetlands and floodplain impacts were inadequate except to essentially reject the comment and say the FEIR analysis is adequate. The FEIR response does not address the actual comment regarding loss of wetlands but instead references the BRA special status species text.

Response C1-5: The FEIR response to the request for quantification of site specific storm water runoff is not responsive as it does not address the loss of the pond but only assesses the new pervious surfaces design changes from existing conditions.

Response C1-6: This response does not relate to the comment regarding quantification of increased flooding but instead simply contends that floor elevation of future buildings will solve all potential project flooding problems.

Response C1-7: This response merely states that the EIR is adequate because it cites a general plan policy. However, it does not reference any EIR analysis that actually addresses floodplain impacts in a climate change scenario.

Response C1-8: Regarding CEQA's prohibition of deferred impacts, the response claims that performance standards may be used. However, neither the EIR, nor the response not identify any performance standards for biological resources, wetlands, or floodplains. General promises regarding acreage and general plan policy implementation are not performance standards.

Response C1-9: Regarding project objectives and alternatives, the FEIR (Response C1-2) does not respond at all to the comment regarding an impermissibly narrow set of objectives and the related lack of consideration of a reasonable range of alternatives.

Response RC23-6: This response essentially says "yes, we did do sufficient CEQA impacts analysis." But this response does not mention the actual subject matter of the comment and provides no required detail or a substantive response.

Response RC23-7: The comment requests parking impact information. The response says there are no impacts because the project meets Town requirements. Such an analysis does not comply with CEQA and thus the response is inadequate.

Response RC23-8: This response essentially says, "no we didn't depend solely on financial criteria" but the response provides no support for that conclusion nor does it include any substantive response to the actual comment. The response also includes information on the alternatives that is not relevant to the comment.

Response RC23-9: This response essentially says, “we don’t have to include quantified specifics or simulations” in an EIR regarding visual impacts. This response is not true and it does not respond to the comment regarding the feasibility of landscaping mitigation measures.

Response RC23-10: The comment requests a consistency analysis with the existing zoning. The response is that the zoning will be changed but that does not somehow wish the existing conditions – current zoning - away. Changing the zoning is a project measure or a mitigation measure – the EIR must examine the impacts of either.

The EIR continues to be so legally inadequate that the Town should withdraw the FEIR and start the approval process anew with an approach that complies with both State planning law, the Corte Madera General Plan, and CEQA. At a minimum, the EIR should be re-circulated for public review and comment with the additional analysis required by CEQA.

Sincerely,



Edward Yates



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February 9, 2016

Adam Wolff, Director of Planning
Town of Corte Madera Company
300 Tamalpais Drive
Corte Madera, CA 94925

RE: Proposal by Reneson Hotels, Inc., for reconstruction of the Best Western Corte Madera Inn

Dear Mr. Wolff,

ACR owns and manages a system of wildlife sanctuaries in Marin and Sonoma counties. Since the early 1970's, we have conducted scientific research, stewardship of natural areas, and education activities to help ensure the long-term protection of San Francisco Bay area wetlands. We have published numerous scientific articles on the ecology and conservation of herons and egrets (www.egret.org/scientific_contributions), including an annotated atlas of heron and egret nesting colonies in the San Francisco Bay area (Kelly et al. 2006; www.egret.org/atlas).

We are very concerned that the proposed filling and development of the wetland pond area behind the Best Western Corte Madera Inn would destroy a valuable wetland habitat area occupied by a roosting colony of Black-crowned Night-Herons. This species is one of the resident species of colonially nesting herons that depends on the protection of remnant wetlands surrounding the San Francisco Bay, such as the wetland area considered in this proposal. Annual results from the Southern Marin County Christmas Bird Count confirm that the roost site at the proposed development site is actively used by this species. Numerous scientific investigators have demonstrated that this species is an indicator of healthy wetlands (Hothem et al. 2010), and that protecting populations of such species aides effective management of these important habitats. In addition, please consider these concerns regarding the importance of protecting this wetland roosting site:

- Communal roosting sites provide important functions needed by herons, including enhanced foraging access and efficiency, thermoregulatory benefits, and reduction of predation risk (Beauchamp 1999).
- Wetland habitat in the San Francisco Bay Area is regionally and globally important for several species of wading birds—including Black-Crowned Night-Heron (Mikuska et al. 1998, Kelly et al. 2007).
- Although the loss of a single roost site is unlikely to have an acute negative impact on local or regional Black-Crowned Night-Heron abundances, the protection of individual sites such as this one contributes to a valuable variety of habitat alternatives needed to ensure the persistence of these

birds in the region. Together, the protection of individual roosting sites allows birds to adjust to varying levels of predation pressure and disturbance, unpredictable changes in weather, and increasing water levels associated local flooding and sea level rise. Therefore, the loss of any active Black-crowned Night-Heron roost represents the incremental loss of valuable habitat that may contribute to cumulative impacts over more extensive areas of the San Francisco Bay area.

- To our knowledge, the scientific literature on herons or egrets does not provide any evidence that can substantiate an effort to successfully translocate a roosting site or, similarly, that can justify appropriate mitigation for the loss of a roosting site.

We urge you require full protection of the valuable wetland habitat and pond area used by Black-crowned Night-Herons behind the Best Western Corte Madera Inn. Thank you for considering this comment.

Sincerely,



John P. Kelly, PhD
Director of Conservation Science



Scott Jennings
Avian Ecologist

References cited

- Beauchamp, G., 1999. The evolution of communal roosting in birds: origin and secondary losses. *Behavioral Ecology*, 10(6), pp.675-687.
- Hothem, R. L., B. E. Brussee, and W. E. Davis, Jr. 2010. Black-crowned Night-Heron (*Nycticorax nycticorax*), *The Birds of North America Online* (A. Poole, Ed.). Ithaca: Cornell Lab of Ornithology; Retrieved from the Birds of North America Online: <http://bna.birds.cornell.edu.bnaproxy.birds.cornell.edu/bna/species/074>
- Kelly, J.P., Etienne, Katie, Strong, Cheryl, McCaustland, Mark and Parkes, M.L., 2006. Annotated atlas and implications for the conservation of heron and egret nesting colonies in the San Francisco Bay area. Audubon Canyon Ranch, Stinson Beach, CA, 94940, p.236.
- Kelly, J. P., K. L. Etienne, C. Strong, M. McCaustland, and M. L. Parkes. 2007. Status, trends, and implications for the conservation of heron and egret nesting colonies in the San Francisco Bay area. *Waterbirds* 30: 455-478.
- Mikuska, T., Kushlan, J.A. and Hartley, S., 1998. Key areas for wintering North American herons. *Colonial Waterbirds*, pp.125-134.



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MEMORANDUM

To: Community Venture Partners (attn.: Bob Silvestri) 73 Surrey Avenue
Mill Valley, CA 94941 <http://www.communityventurepartners.org>

Date: February 15, 2016

SUBJECT: Review of Corte Madera Inn Final Environmental Impact Report: wetlands, wildlife, and aquatic habitat impacts

I reviewed Appendix H (biological data) and DEIR Section 4.3 (Biological Resources) regarding wetlands and aquatic habitats at the proposed project site. My findings regarding potential significant impacts and mitigation are summarized here, and discussed below.

Summary: The Corte Madera Inn “pond” habitat complex consists of three distinct elements that together support a persistent, important roost site of black-crowned night herons, contiguous with to foraging (feeding) habitat for black-crowned night herons and other wading birds. The Corte Madera Inn pond habitat complex comprises:

- (a) riparian upland non-native trees bordering the pond and fringing wetlands;
- (b) submerged perennial aquatic vegetation beds (SAV, or “vegetated shallows” – wigeongrass, *Ruppia maritima*) extending across the brackish pond bed, influenced by seasonably variable salinity (brackish to fresh-brackish salinity range);
- (c) perennial fringing brackish marsh composed of extensive to patchy saltgrass (*Distichlis spicata*) and alkali-bulrush (*Bolboschoenus maritimus*) wetland zones above the permanently submerged aquatic vegetation zone (*Ruppia maritima*).

Both the SAV beds and the fringing brackish marsh are jurisdictional waters of the United States and both qualify as jurisdictional “Special Aquatic Sites” subject to regulations of the Clean Water Act Section 404(b)(1): vegetated shallows (40 CFR §230.43), occupying most of the pond area, and wetlands (40 CFR §230.41). The types, status, and ecological functions of these jurisdictional waters are incorrectly and incompletely described in the DEIR., which erroneously identifies them as mere “other waters”. The DEIR omits analysis of potentially significant impacts to the important special aquatic site resources of SAV beds, which it incorrectly identifies as (nuisance) “algal blooms”.

The entire pond (SAV beds and lower marsh zones) provide *perennial* aquatic habitat for small fish that are the important aquatic prey base for wading birds (egrets and herons), which access fish at their shallow (wading depth) margins. The habitat structure and functions of adjacent perennial aquatic vegetated shallows and terrestrial/riparian roosting (tree) could not be mitigated by an off-site fresh-brackish *seasonal* non-tidal wetland mitigation bank, since (a) *seasonal* wetlands lack *perennial* shallow water fish habitat necessary for a rich prey base for egrets and herons, and (b) large tree or shrub roost habitat suitable for egrets or herons cannot practically be established in fresh-brackish seasonal wetland soils in diked baylands. Even if adequate off-site compensatory mitigation habitat

were successfully established in San Pablo Bay, it would not provide mitigation for loss of site-faithful heron roosts in the San Rafael Bay area wetlands. The loss of the Corte Madera Inn pond would be a potentially significant impact to an integrated aquatic, wetland, and riparian habitat complex, and wetland-dependent wildlife. This impact is not mitigated by a seasonal non-tidal wetland mitigation bank, regardless of the acreage ratio or credits transferred.

1. Wetlands and other special aquatic sites. The “biotic resources assessment” dated October 2013 claims that the pond at Corte Madera Inn is a “water of the United States but not a wetland”. This conclusion is inconsistent with previous evidence provided by Wetlands and Water Resources (2005) and previous biological assessments they cite, indicating that pond wetland-aquatic vegetation zonation includes two federal Clean Water Act jurisdictional habitats that qualify as “special aquatic sites”:

(a) A vegetated **wetland** zone (40 CFR § 230.41.) composed of discrete patches of alkali-bulrush fringing low brackish marsh (*Bolboschoenus maritimus* in current taxonomic treatments; synonymous with obsolete names *Scirpus maritimus*, *S. robustus* (misapplied), and *Schoenoplectus maritimus*) and more extensively distributed saltgrass high brackish marsh (*Distichlis spicata*). 40 CFR § 230.41.

(b) A **submerged aquatic vegetation bed** (vegetated shallows; 40 CFR §230.41). The aquatic vegetation was tentatively identified by WWR in 2005 as a linear-leaved pondweed species (*Potamogeton* sp.), but it is most likely salt-tolerant wigeongrass (*Ruppia maritima*), or possibly brackish-tolerant sago pondweed (*Stuckenia pectinata*) or variable mixtures of both that fluctuate with salinity. Page 7 of the DEIR shows a summer photograph of the pond described as “algae on the surface”. This algal mat pattern is typical of late summer growth of shallow-submersed leaves and stems of *Ruppia maritima* that support filamentous green algae in warm summer months. *Ruppia* holds the attached algal mat in place and restricts wind-stress current transport of free-floating algae. Otherwise, a free-floating algal mat would be transported by wind-stress currents to the shoreline. When *Ruppia* canopies die and degrade, floating algae tend to sink or beach along the shore. *Ruppia* colonies are frequently mistaken for “algae” by casual observers or inexperienced field biologists.

Both “wetlands” and “vegetated shallows” are Special Aquatic Sites, with equal special status under the Clean Water Act Section 404(b)(1) guidelines, and they are not generic “other waters” of the United States, which lack special regulatory policies for impact assessment, mitigation, and alternatives analysis. The DEIR and Biotic Assessment (appendix H) misidentify the pond as mere “other waters”. The Biotic Assessment fails to identify or assess impacts to these special aquatic sites regulated under Section 404 of the Clean Water Act. WWR (2005) concluded that the previous Section 404 delineation performed by Zentner and Zentner failed to mention the presence of saltgrass (a native wetland grass species indicator of saline wetlands), which has dominated much of the Pond’s lower banks since biological investigations at the site were initiated in the late 1980s. WWR stated that “Saltgrass is not mentioned in either the delineation’s text or data sheets, despite the fact that one of the delineation’s maps displays a thick, dashed line around the perimeter of the Pond labeled “SALTGRASS”. The map WWR cited was based almost entirely on a map produced by Western Ecological Services Company (WESCO) in 1989. WWR noted that WESCO stated in even back in 1989 that saltgrass “is able to dominate the lower banks of the pond”, a condition that persisted to 2005 despite omission by Zentner and Zentner. The DEIR (page 4.3-2) states that this fringe contains pickleweed, another salt marsh wetland indicator plant when it is dominant to co-

dominant along a pond edge. The current (2013) Zenter and Zentner wetland delineation cited in the Biotic Assessment (Appendix H, DEIR) on page 8 describes the presence of saltgrass growing along the water's edge. This fringe of wetland plants along the "water's edge" meets EPA/Corps criteria for wetlands. Indeed, Appendix H states explicitly that wetland vegetation occurs at the pond (page 9), as a "scattered fringe" or "thin fringe". This is also indicated on the wetland delineation figure, which does not account for the claimed lack of jurisdictional wetlands despite reference to map legend of "scattered wetland vegetation". There is no wetland regulatory exemption or definition for "scattered". Thinness or discontinuity of wetland do not eliminate either wetland status or jurisdictional status under current or all past Corps of Engineers/EPA wetland delineation criteria. No quantitative data on extent or distribution of this wetland vegetation is given by Appendix H. Appendix H also fails to discuss previous observations of saltgrass and alkali-bulrush marsh, and fails to discuss its present condition or why it would not be a "wetland", jurisdictional or otherwise.

The DEIR (p. 4.3-6) describes sensitive natural communities as "natural community types considered by the CDFW to have a high inventory priority because of their rarity and vulnerability to disturbance and loss." However, the DEIR goes on to state that "[n]o sensitive natural community types are present on the site. This is another example of the erroneous and misleading characterization of the sensitive, special-status (Special Aquatic Site) submerged aquatic vegetation/vegetated shallows and fringing wetlands of the pond habitat complex.

This inconsistent and incoherent information regarding wetlands habitat at the project site precludes the public from understanding the correct magnitude, context, type and intensity of impacts to aquatic, wetland, and riparian habitats. The failure to correctly identify the type of jurisdictional wetland and aquatic habitats, and their distinctive ecological functions, precludes meaningful public comments on the adequacy of compensatory mitigation in seasonal wetland mitigation banks (see 2, below).

The repeated omission of both saltgrass marsh and alkali-bulrush marsh from the 2013 wetland jurisdictional delineation and biotic assessment is not consistent with the evidence that stable, persistent, fringing brackish marsh exists at the project site. Fringing marshes may be temporarily unobservable during high water pond stands in winter when above-ground marsh vegetation is submerged or senesced or both. The EIR preparer and lead agency should verify the extent of submerged aquatic vegetation (vegetated shallows) when they may be observable from about April to August. Similarly the EIR preparer and lead agency should verify the extent of saltgrass and alkali-bulrush marsh (wetlands). Omission of these special aquatic sites would likely result in failure to assess potentially significant unmitigated impacts. DEIR lacks any analysis of the impacts of filling and destroying the pond's special aquatic sites (vegetated shallows and wetlands).

2. Wetland and vegetated shallows wildlife habitat mitigation. Compensatory mitigation of these aquatic and wetland habitats at remote mitigation banks would not compensate for setting-specific impacts to sensitive or special-status wildlife species. Submerged aquatic vegetation beds and wetlands provide important foraging habitat for locally roosting black-crowned night herons, as well as other wading birds that visit the pond to forage. As regional heron and egret experts John Kelly and Scott Jennings noted (2016), the energetic efficiency of foraging at a food-rich site, with thermal protection of a tree canopy roost adjacent to foraging habitat, is an important ecological

function for heron conservation. Black crowned night herons have recurrently roosted in the trees bordering the pond for over a decade. WWR observed 20 black-crowned night herons roosting or foraging at the pond in fall 2005, and this species is site-faithful (re-occupying preferred locations for roosts). . Roosting reportedly occurs in apparently non-native riparian vegetation (ornamental trees) along the pond edge (WWR 2005).

I agree with heron experts John Kelly and Scott Jennings of Audubon Canyon Ranch, who identify the important value of the wetlands/aquatic habitat at Corte Madera pond for the active roosting colony of Black-crowned night herons. The conservation significance of this individual colony, as they explained, inheres in its role as a component of a complex of roost sites that enables the larger population to respond to ecological variability in predation, food availability, or disturbances. I agree with their expert opinion that the destruction of this long-established roost site would constitute a significant long-term cumulative (incremental) impact to the regional population, even if the “acute” (direct, short-term) impact of its destruction was not detected. The distinction between short-term direct impacts versus long-term cumulative impacts is relevant here.

The Appendix H states only that black-crowned night herons do not nest at the site, but it fails to disclose that they roost and feed there, and have done so for over a decade. This is misleading, because the DEIR’s omission of ecologically important heron roosting, and its exclusive emphasis on lack of heron nesting suggests that there are no potential significant impacts to herons if there are no nests. This is not a reasonable or biologically justifiable threshold of significance in a CEQA context. The long-term presence of a heron roost next to a stable, productive perennial aquatic foraging habitat (pond SAV and wetland) is a biologically significant resource, and its destruction would be a threshold for significant impacts in eastern Marin County, where heron roost sites, and potentially suitable roost sites, are scarce. .

Appendix H fails to provide the DEIR with any basis for assessing potentially significant impacts to the pond foraging habitat (vegetated shallows and wetlands within wading depth of egrets). The regional distribution of black-crowned night heron roosting and foraging habitats, and the relative importance or size of the site’s roost (significance) is not assessed. The DEIR is completely deficient in assessment of impacts to black-crowned night herons and their habitat.

My understanding is that the project proposes to mitigate the loss of the pond and habitat through the purchase of credits at the Burdell Ranch Wetland Conservation Bank, an existing 82 acre wetland located 17 miles north of the project area. In my opinion, money towards restoration work at the Burdell Ranch wetland does not adequately compensate for the elimination of the wetlands at the project site. The Burdell Ranch mitigation bank is a non-tidal “freshwater” (in fact, predominantly fresh-brackish) *seasonal* wetland complex that necessarily lacks large trees or tall canopy shrubs suitable for heron roosts, because large trees and shrubs cannot grow in fresh-brackish (slightly saline) wetland soils of diked baylands. The Burdell Ranch wetlands are *seasonal* wetlands that necessarily lack perennial “vegetated shallows” (submerged aquatic vegetation) or other extensive, perennial shallow aquatic habitats providing year-round rich prey base for herons and egrets. The Burdell wetlands are “seasonal” wetlands because of habitat management objective requirements of the Burdell Mitigation Bank Memorandum of Agreement among state and federal resource agencies (MOA, p. 12). The description of the mitigation bank at its website (www.burdellranch.com) identifies its suitability for mitigation of wetlands, but *not* submerged aquatic vegetation/vegetated shallows.

The Burdell Ranch mitigation bank cannot provide either the type (vegetated shallows) or wildlife habitat functions (year-round adjacent heron roost habitat and foraging habitat) of the Corte Madera Inn pond. Moreover, it is located in San Pablo Bay, which implies a disadvantageous, long energetically costly flight distance between potential heron foraging and roost sites (Kelly *et al.* 2007), compared with the integrated habitats of the project site (Kelly and Jennings 2016). Finally, mitigating heron habitat or populations in San Pablo Bay would not offset the local decline in heron habitat in Corte Madera or San Rafael Bay vicinity wetlands.

Regarding the potential water quality of the pond, I agree with WWR's conclusion that conclusion that hypoxia and hydrogen sulfide emissions (likely to occur in summer stratified pond conditions with warm temperatures and brackish organic bottom sediments) would be highly feasible to correct with simple measures to enhance DO, such as very few bubblers that create weak vertical currents (mixing, overcoming stratification) and provide dissolved oxygen throughout the water column. This simple water quality enhancement potential should be considered in assessment of pond impacts and alternatives.

3. Conclusions. The DEIR findings regarding wetlands and wetland jurisdiction are based on conflicting, inconsistent evidence. The DEIR appears to omit all disclosure and impact analysis of perennial submerged aquatic habitat beds (vegetated shallows) The DEIR premise that no jurisdictional wetlands or other wetlands are present is not credible, since all information sources identify the presence of wetland vegetation in shallow aquatic habitat. Finally, the off-site compensatory mitigation approach for wetlands and aquatic habitats would likely result in unmitigated significant impacts due to the loss of the full integrated pond habitat complex supporting site-faithful foraging and roosting black-crowned night herons.

My conclusions are based on my professional experience as senior staff biologist at the U.S. Army Corps of Engineers (San Francisco District), and U.S. Fish and Wildlife Service, where I was responsible for wetland jurisdictional delineations and their review, wetland impact assessments, wetland restoration plans and mitigation plans, and joint NEPA/CEQA impact assessments, including EIR/EIS document management. I have over 36 years professional experience in management, restoration of coastal habitats, with specialization in wetlands and other shoreline habitats.

Literature Reviewed and Cited

City of Corte Madera. 2015. Corte Madera Inn Rebuild EIR. Section 4.3. Biological Resources.

Kelly, J.P. and S. Jennings. 2016. Letter to City of Corte Madera re: Proposal by Reneson Hotels, Inc., for reconstruction of the Best Western Corte Madera Inn. February 9, 2016. 2 pp.

Kelly, J.P., K. Etienne, C. Strong, M. McCaustland, M. Parkes. 2007 Status, trends, and implications for the conservation of heron and egret nesting colonies in the San Francisco Bay Area. *Waterbirds* 30:455-478.

Wetlands and Water Resources. 2005. Memorandum: Corte Madera Inn Pond, to: US Army Corps of Engineers, San Francisco District, Regulatory Branch (cc: Corte Madera Town Council) Prepared by Stuart Siegel and Christina Toms for Barbara Salzman, Marin Audubon Society. 11 January 2005.

Wetlands and Water Resources. 2005. Memorandum Corte Madera Inn Pond Comments. Prepared by Stuart Siegel and Christina Toms for Barbara Salzman, Marin Audubon Society. 14 November 2005

Zentner and Zentner. 2013. Corte Madera Inn Biotic Resources Assessment. Prepared for the Reneson Group. Appendix H in Corte Madera Inn DEIR.



January 25, 2016

Mr. Bob Silvestri, President
Community Venture Partners
73 Surrey Avenue
Mill Valley, CA 94941

Subject: DRAFT Review of Final, Recirculated and Draft Environmental Impact Reports
Corte Madera Inn Rebuild Project, Marin County, California

Dear Bob:

I am a hydrologist with over twenty five years of technical and consulting experience in the fields of geology, hydrology, and hydrogeology. I have been providing professional hydrology services in California since 1991 and routinely manage projects in the areas of surface- and groundwater hydrology, flood hazard assessment, water quality, water resources management, and geomorphology. Most of my work is located in the Coast Range watersheds of California, with emphasis on Marin County. My areas of expertise include: characterizing and modeling watershed-scale hydrologic and geomorphic processes; evaluating surface- and ground-water resources/quality and their interaction; assessing hydrologic, geomorphic, and water quality responses to land-use changes in watersheds and causes of stream channel instability; and designing and implementing field investigations characterizing surface and subsurface hydrologic and water quality conditions. I co-own and operate the hydrology and engineering consulting firm Kamman Hydrology & Engineering, Inc. in San Rafael, California (established in 1997). I earned a Master of Science in Geology, specializing in Sedimentology and Hydrogeology as well as an A.B. in Geology from Miami University, Oxford, Ohio. I am a Certified Hydrogeologist (CHg) and a registered Professional Geologist (PG).

I have reviewed the Final, Recirculated and Draft Environmental Impact Reports for the Corte Madera Inn Rebuild Project (State Clearinghouse No. 2014042069), prepared by Amy Skewes-Cox between November 2014 and November 2015. In addition to reviewing the DEIR, I have reviewed the following documents and rely on information contained in these documents to help formulate my opinions.

- Federal Emergency Management Agency (FERC), 2016, (Pending) Flood Insurance Study, Marin County, California and Incorporated Areas. Flood Insurance Study Number 06041CV001C, Volumes 3 of 3, Second Revision, March 16.
- Town of Corte Madera, 2009, General Plan for the Town of Corte Madera. Chapter 7.0 Flooding and Floodplain Management, April, 18p.
- Town of Corte Madera, 1999, Corte Madera, California – Code of Ordinance, Supplement 17, Title 16 – Protection of Flood Hazard Areas. Retrieved from https://www.municode.com/library/ca/corte_madera/codes/code_of_ordinances

Based on my review of these materials, it is my professional opinion that the EIR has failed to demonstrate that the project will have no potential adverse impact on local groundwater resources, flood hazards, and surface water quality. In addition, the EIR does not provide technical hydrologic analyses or project descriptions that comply with CEQA and City policies and ordinances associated with groundwater, flooding and flood hazard management. The rationale for these opinions is provided below.

1. Potential Impact on Groundwater Recharge: The EIR states that there are existing and potential beneficial uses for local groundwater resources. Page 4.8-1 of the DEIR states, “*Existing and potential beneficial uses of the Ross Valley Groundwater Basin include municipal and domestic water supply, industrial process water supply, industrial service water supply, and agricultural water supply.*” The EIR significance criteria state that interference with groundwater recharge is a significant effect on hydrology (pg. 4.8-10). Specifically, this criteria states, “*Substantially deplete groundwater supplies or interfere substantially with groundwater recharge such that there would be a net deficit in aquifer volume or a lowering of the local groundwater table level.*”

Groundwater recharge to the local project area aquifer comes from infiltration of rainwater through pervious soil as well as infiltration of water through local area canals, lagoons, drainage ditches and ponds. Currently, there is undoubtedly infiltration of water through the earthen base of the Inn Pond that recharges the local groundwater aquifer. Reduction of surface water infiltration reduces the available supply in the underlying aquifer and impacts the potential beneficial uses listed above.

The EIR claims that, “*The project would not substantially deplete groundwater resources or interfere with groundwater recharge. Changes in impervious surface as part of proposed project would be minor compared to the 24.7 square miles of the Ross Valley Watershed, and no significant changes in groundwater recharge would be expected as a result of development associated with the project.*” There are many independent and hydrologically disconnected groundwater basins/aquifers within the 24.7 square mile Ross Valley watershed. This variability is reflected in the different geologic rock types/deposits and physical environments in which they form throughout the watershed. As such, groundwater conditions (recharge, water level, storage volume, etc.) will behave different and independent between the different groundwater subbasins that underlie the Ross Valley watershed. Changes in groundwater recharge associated with the project has the potential to significantly affect LOCAL groundwater conditions. The EIR does not present any technical analyses on how the loss of groundwater recharge from the existing Inn Pond will affect the local water table or groundwater storage volume. Therefore, the effect of the project on local groundwater (i.e., reduced groundwater recharge) may be significant.

2. Potential Impact on Groundwater Quality: As stated above, beneficial uses of the Ross Valley Groundwater Basin include municipal, domestic, industrial and agricultural water supply. The degree of these activities within the area of project influence are not identified in the EIR. It's also important to note that, due to the close proximity to San Francisco Bay, groundwater pumping from wells in the vicinity of the project is subject to salt water intrusion from the Bay and its underlying saline aquifer. Scenarios that could lead to salt water intrusion include over-pumping or a changes in the inflow rate of freshwater that recharges the freshwater aquifer. Much of the water contained in the Inn Pond is likely fresh to brackish water and low in salinity. Therefore, the pond is likely a seasonal source of fresh groundwater recharge, which may help alleviate impacts of stated salt water intrusion. The EIR only evaluates the presence of wells on the project property and has not identified potential supply wells within the project vicinity that would be influenced by changes in pond recharge and potential enhanced salt water intrusion. Thus, the effect of the project on local groundwater quality and impacts to surrounding wells may be significant.
3. Loss of Flood Water Storage: The following section (pages 12-13) from the FEMA Flood Insurance Study (FIS) provides a good description about the causes for flooding in the project area.

All floods of any consequence in the Town of Corte Madera have occurred in the low areas that have been reclaimed from the bay's marsh and tidal lands. Generally speaking, these reclaimed areas encompass everything in and east of the Madera Gardens and the lands north of Paradise Drive. These areas constitute one-half of the present town area.

Flooding can result from either of two phenomena. The first is from storm runoff originating within the Town of Corte Madera and flooding low lands due to inadequate drainage channels and pipes necessary to transport this water into San Francisco Bay (sheet flooding). The second cause is from high water in the bay that in turn pushes salt water up into the stream channels and inundates all lands below the tide level that are not leveed. The elevation of the water surface in the bay is dependent upon the tide, local runoff, and wind and wave effects.

The extent of flooding has been further complicated by the fact that some of the originally reclaimed tidal lands were not filled high enough. The clay materials in the bay mud are so unstable that land subsidence takes place over periods of 30 years to 50 years. Thus, certain areas in the Town of Corte Madera have subsided to elevations that now cannot be drained with the existing storm drainage system.

Another flood complication is the gradual filling of the tidal lands that served originally as natural ponding areas. The storm waters that would have

drained to these areas must now proceed down the channels and into the bay, or to other low lands where ponding can occur.

A significant conclusion stated by FEMA FIS (page 44) is, “*The major flooding of the Town of Corte Madera considered is due to tidal flooding from San Francisco Bay.*” Model results from a hydraulic study completed by the U.S. Army Corps of Engineers (USACE) cited in the FIS, indicates that a flood having a 1-percent annual chance recurrence (100-year flood) interval in Corte Madera Creek will not create an inundation problem as severe as that created by the estimated 1-percent annual chance tide (100-year tide) in San Francisco Bay.

The FEMA FIS also provides a summary of the flood protection measures that have been developed for the project area. The following section comes from pages 22-23 of the FIS.

A Marin County ordinance controlling tidal areas states that the first floor of a structure must be at an elevation of at least 9.69 feet (assumed to be NAVD 88).

In order to control the substantial amount of storm water runoff from the steep slopes of Corte Madera Ridge and the impervious surfaces in the developed areas of town, and to prevent flooding of the lowlands, developers in the past found it necessary to build a system of lagoons and drainage canals. Most of the storm water runoff is discharged into Corte Madera Creek but San Clemente Creek, east of the Redwood Highway, drains a large portion of the eastern half of the town to San Francisco Bay.

Foreseeing the need for additional drainage works to facilitate new development, the town adopted a comprehensive drainage plan in April 1956. The plan designates certain areas for the “high level” fill method and other areas for the “low level” fill method. The developer has the choice of alternatives on certain other properties. The “high level” method involves filling low areas to elevations that are high enough to drain properly against the highest probable tides. The “low level” method involves protection of the area to be developed by use of levees, so that fills are placed at a much lower elevation than with the high level method. The low level method also calls for a holding pond or a lagoon so as to hold storm water during high tide periods until the water can be discharged into the bay through use of pumps or culverts equipped with tide gates.

A comprehensive drainage plan has been in effect in the Town of Corte Madera. The drainage problems have become much more severe, and areas built in conformance with the drainage plan recommendations have also experienced flood damage. The rapid increase in population and the accompanying development of housing facilities during this period have served to accentuate the damage problems.

All drainage ways and channels that carry runoff in the Town of Corte Madera have been partially or fully modified from their natural state. These modifications have been in the form of straightened channels or pipelines. Each channel originates at the ridge on the southern boundary of the Town of Corte Madera and traverses northerly so as to empty into Corte Madera Creek, San Clemente Creek, or San Francisco Bay.

The channels are dry in the summer, except for small quantities of irrigation return waters. When the winter rains begin, the channels again carry water during and after each storm. There are no stream gaging stations for the channels in the Town of Corte Madera.

There are two manmade lagoons in the Madera Gardens area, designated as Lagoon No. 1 and Lagoon No. 2. These lagoons were constructed as part of the Madera Gardens subdivision for the purpose of collecting and holding storm runoff during high tide periods and then discharging the collected water into Corte Madera Creek during periods of low tide.

The Inn Pond is part of City's floodwater storage as it is tied directly to Lagoon No. 1 in Watershed 1. The City lowers levels of Lagoon No. 1 and Inn Pond in winter to maximize floodwater storage capacity. As affirmed in the FEMA FIS, the loss of floodwater storage in a flood-prone area located within the 100-year flood zone (i.e., filling of Inn Pond) would increase the risk of flood hazards.

4. Increase in Stormwater Runoff: The EIR states less than significant impact associated with the loss of flood storage associated with the filling of the Inn Pond because there is no increase in peak stormwater discharge from the site. A decrease in discharge rate alleviates an increased risk of erosion potential. However, I assume that due to the increase in impervious surface area, there will be a net increase in the TOTAL volume of water running off the site during any given storm. The rate (discharge) at which it runs off won't be higher, but, the EIR does not quantify/present if there will be an INCREASE in the total volume of water that runs off the site during any given storm. This increase in runoff VOLUME would increase the flood potential in this low-lying area, because the water has nowhere to go except other surrounding low lands (due to high tides and existing propensity for flooding). The main point here is that the rate of runoff doesn't really matter – it is the net change in total storm runoff VOLUME that will lead to increased flooding potential. An increase in total runoff volume further compounds the risk of flooding when considered in tandem with the loss of flood storage from filling the Inn Pond. The EIR only evaluates the impact on flooding associated with loss/filling of Inn Pond; the EIR does not present an analysis of how the total volume of runoff from the project will change (likely increase) due to increased impervious surface area.

5. Lack of Project Drainage Plan: The EIR does not answer or address how drainage will be directed away from the site once the Inn Pond is filled. Without the storage associated with the Inn Pond, will runoff from the project be able to flow to Lagoon #1? Where project runoff be directed – west towards Lagoon #1 or east under Hwy 101? I would assume the pond provides some retention and storage such that it reduces the potential for flooding of Hwy 101 and surrounding properties. How will the project affect the flood hazard to Hwy 101 or other surrounding low-lying areas? The EIR does not provide an adequate project description (drainage plan) to evaluate these potential impacts to flooding.
6. Impacts of Sea Level Rise: The disparity between the severity of creek and tidal flooding in the project area will only increase with future sea-level rise (SLR). Rising sea level will translate to higher water levels in San Francisco Bay and increased flood hazard risk from tidal flooding. The EIR presents a reasonable description of estimated sea level rise rates and conclusion that additional measures may be required in the project vicinity to address increasing flooding hazards in the future.

However, the EIR does not include any studies that quantify potential flood conditions or descriptions of how the project will mitigate for: a) increased runoff volume, b) decreased on-site retention (filling of Inn Pond), and c) construction of storm drainage facilities that will reduce or alleviate flood hazard conditions, for either current or future SLR hydrologic conditions. Thus, the EIR has not complied with local City policies and ordinances (esp. City Policies F-2.1, F-2.2, F-3.2, and F-4.3) specific to conducting flood studies or project planning that demonstrate the project will not increase flood hazards on the site or within the vicinity surrounding the project site.

7. Potential Impact on Surface Water Quality: The Inn Pond likely provides the opportunity for settling of sediment from turbid flood waters. The EIR does not address or answer how the loss of this water quality benefit (by filling of the Inn Pond) could adversely impact adjacent water bodies, esp. SF Bay and Corte Madera Creek, by allowing higher concentrations of suspended sediment to remain in local waterways that discharge to SF Bay.
8. Inadequate Mitigation Measures: The stated mitigation measure HYDRO-2 proposes to mitigate flood hazard by submitting verification that the project design complies with Corte Madera Municipal Code Chapter 16.10 and ensuring that all finished floor grades are at least 1 foot above the 100-year Base Flood Elevation (BFE). As described above, the EIR does not present sufficient hydrologic study results or drainage plans that demonstrate that the project will not adversely impact flood hazards or mitigate for potential impacts. To state that the EIR will comply with these requirements in the future defers any potential mitigation that should be presented and evaluated in the EIR.

Without more detailed description of project fill and drainage plans, the more specific mitigation of raising finished floor elevations could logically generate a potential adverse impact in-itself. Presumably, by raising the elevation of existing and expanded inn facilities out of the BFE, these areas will need to be filled or constructed in a way that displaces existing floodwaters. These displaced flood waters need to go somewhere, and most likely will be displaced to adjacent low-lying areas, increasing the flood hazard in those areas. Thus, the EIR should be considered inadequate as it has not adequately characterized and quantified potential flood impacts, defers mitigation for these potential impacts, and proposes a mitigation measure that could exacerbate flooding in on-site and surrounding low-lying areas.

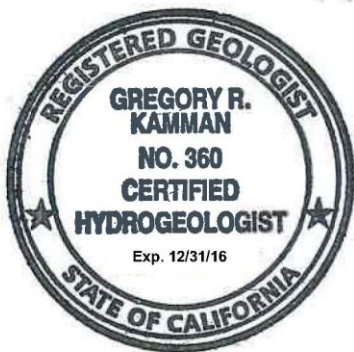
9. State Lands Commission Jurisdiction: The Inn Pond is historic Baylands and currently connected to tidal action from San Francisco Bay via Shorebird Marsh. Based on our experience in working on restoration and flood control projects around San Francisco Bay, I suspect that the project site falls under jurisdiction of the State Lands Commission. I did not see any mention of this in the “Regulatory Framework” section of the EIR.

Please feel free to contact me with any questions regarding the material and conclusions contained in this letter report.

Sincerely,



Greg Kamman, PG, CHG
Principal Hydrologist



From: Fernandez, Xavier@Waterboards
Sent: Thursday, April 28, 2016 9:14 AM
To: Adam Wolff
Cc: Sahrye Cohen (sahrye.e.cohen@usace.army.mil)
Subject: Corte Madera Inn - Submerged Aquatic Vegetation

Dear Mr. Wolff:

We were sent the following photographs of the pond at the Corte Madera Inn Rebuild Project Site. The photographs were taken on April 13 when the water in the pond had been drawn down. The photographs clearly show submerged aquatic vegetation growing within the pond at the Corte Madera Inn Site. Based on this, the pond is a special aquatic site that needs to be preserved to the maximum extent practicable. As such, we plan to attend the Town Council meeting to inform the Council that they may be approving a project that we will not be able to permit under our regulations.

Regards,

Xavier Fernandez

Environmental Scientist

SF Bay Regional Water Quality Control Board

510-622-5685

xavier.fernandez@waterboards.ca.gov

From: [bsilvestri](#)
To: [Fernandez, Xavier@Waterboards](mailto:Fernandez_Xavier@Waterboards)
Cc: [Michael Graf](#)
Subject: 2-Exhibits to Comment on the Corte Madera Inn Rebuild Project Alternatives Analysis
Date: Friday, January 13, 2017 3:42:33 PM
Attachments: [9-Exhibit IX - 061616 - CVP - Army Corps Public Notice 2000-255330N comment letter.pdf](#)

Dear Mr. Fernandez:

Attached please find Exhibits 9 to our three comment letters on the off-site and on-site 404(b) (1) Alternatives Analysis for the Corte Madera Inn Rebuild Project (attached).

Best,

Bob Silvestri

President

Community Venture Partners

A Catalyst for Sustainable Solutions

73 Surrey Avenue

Mill Valley, CA 94941

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Community Venture Partners, Inc.

A Catalyst for Sustainable Solutions

June 16, 2016

Sahrye Cohen
Permit Manager
US Army Corps of Engineers
San Francisco District
Regulatory Division
1455 Market Street, 16th Floor
San Francisco, CA 94103-1398

Re: Public Notice: Project: Corte Madera Rebuild
Public Notice Number: 2000-255330N

Dear Ms. Cohen:

Community Venture Partners, Inc. (“CVP”) is a 501(c)(3) nonprofit organization that facilitates and assists community based projects, programs and initiatives that demonstrate the highest principles of economic, social and environmental sustainability. We work to bring the community’s voice to local government decision-making in matters related to planning, development, social and environmental justice, and other matters of general public interest.

CVP has been involved in the public process and ongoing evaluation of the proposed Corte Madera Rebuild project for the past two years. We have submitted comments and retained experts in biology (Exhibit 6), wetlands, hydrology and real estate development (Exhibit 5), who have also submitted comments. Our legal counsel, Edward Yates has submitted comments related to CEQA, land use, zoning and planning (see Exhibits 1A, 1B and 1C).

In addition, as a resident of Marin, and as president of Community Venture Partners, Inc., I am an expert in real estate development and planning. I’ve been involved in local planning and development matters in Marin County for over 20 years, and submit my comments as a licensed architect and former real estate developer with significant expertise in the fields of architecture, planning, construction, and real estate finance. My professional CV is attached (Exhibit 2).

Comments on the Army Corps Public Notice:

1 - Discussion of Project Purpose: Having reviewed *Public Notice: Project: Corte Madera Rebuild; Public Notice Number: 2000-255330N* and other information provided, both the “Basic Project Purpose” and the “Overall Project Purpose” do not appear to be entirely accurate. The notice states that “The basic project purpose is to build additional commercial hotel rooms in southern Marin County, CA.” Similarly, it states that “The overall project purpose is to build additional commercial hotel rooms in southern Marin County, CA.”

In deliberating the requirements of Section 404(b)(1), we ask that the Corps please consider the recommendations of the Region IX offices of the EPA, as noted in *Wetlands Protection Through Impact Avoidance: A discussion of the 404(b)(1) Alternatives Analysis, Wetlands: Volume 9, No. 21 1989*, by Thomas G. Yocom, Robert A Leidy and Clyde A Morris. On page 290 of that publication, it states that

EPA Region IX consistently treats the basic project purpose as the generic function of the activity. From a regulatory perspective, for example, the basic purpose of a residential development is to house people or provide shelter.

And,

Similarly, the basic purpose of a restaurant is to feed people.

It goes on to explain that basic project purposes should be generic and not refer to the specific goals of the developer or the specific kind of housing or restaurant or hotel proposed. In light of this, to state that the purpose is to build “additional” commercial hotel rooms seems to be supported only by the applicant’s desires, since there is no evidence that adding rooms at this location is required, particularly when the consequence might be the loss of irreplaceable local wetlands. We therefore ask you to consider revising the project purpose to state it as being “to provide commercial hotel rooms in southern Marin County, CA.” This also aligns with the purposes of the project that have been used in the 2 year public EIR process in the Town of Corte Madera.

Comments on Project Alternatives

1 – Determining the LEDPA: We ask that the Corps carefully consider the least environmentally damaging practicable alternative (“LEDPA”) requirement in reviewing the application to fill the wetlands pond. It is our contention that the applicant’s preferred proposal is not the LEDPA.

As noted by John Schulz, *The Steepest Hurdle in Obtaining A Clean Water Act Section 404 Permit: Complying with EPA’s 404(b)(1) Guidelines’ Least Environmentally Damaging Practicable Alternative Requirement*,

An applicant for a 404 permit must demonstrate to the Corps that, among other things, the proposed project is the least environmentally damaging practicable alternative (“LEDPA”) to achieve the project’s purpose.¹

Further,

The 404(b)(1) Guidelines establish four prerequisites to approval, one of which, the basis for the LEDPA requirement, requires that there are no practicable alternatives to the proposed discharge that would have a less adverse effect on the aquatic environment.²

¹ *The Steepest Hurdle in Obtaining A Clean Water Act Section 404 Permit: Complying with EPA’s 404(b)(1) Guidelines’ Least Environmentally Damaging Practicable Alternative Requirement*, 2005, John Schulz, B.A. Brigham Young University; J.D. University of California, Davis.

² 40 C.F.R. § 230.10(a) (2005).

It is our understanding that under 40 C.F.R. Section 230.10(a), "if destruction of an area of water of the United States may be avoided, it should be avoided,"³ and that The Corps may only approve a project that is the LEDPA,⁴ and that the LEDPA must be both practicable and the least environmentally damaging. The LEDPA's purpose is "avoiding significant impacts to the aquatic resources and not necessarily providing either the optimal project location or the highest and best property use."⁵

Similarly, "Making money" or "increasing a tax base"... are further examples of inappropriate basic project purposes under the Guidelines.⁶ I only bring this to your attention because these have been the predominant arguments that the applicant has made to the Town of Corte Madera, to gain approval.

Finally, according to Yocom, et al,

*There are instances where a "no-project" or "no-action" alternative may be considered a practicable means of achieving the basic project purpose.*⁷

2 – On-Site Alternatives:

It has been brought to our attention that the applicant has not presented the Army Corps with any on-site alternatives that fulfill the basic project purpose and also preserve the pond. This comment is to notify the Army Corps that in addition to the proposal submitted by the applicant, two such on-site alternatives exist, known as "Alternative 2" in the project Draft EIR (Exhibit 3A), and "Alternative 4" in the project Revised EIR (Exhibit 3B).

In addition, we submit that Section 404(b)(1) guidelines suggest and that the scope of the alternatives presently being considered are too narrow. Similarly, the applicant's assertions that off-site mitigations are the only alternatives to be considered must be rejected. The Corps and EPA Region IX should not consider proposed mitigation for a project in determining the LEDPA.⁸ It is our understanding that the courts have upheld this EPA policy to conduct its alternatives analysis without considering mitigation measures.⁹

³ 45 Fed. Reg. 85336, 85340 (Dec. 24, 1980); *see also* 45 Fed. Reg. 85336, 85340 (Dec. 24, 1980); U.S. Army Corps of Engineers, *HQUSACE Review and Findings, Old Cutler Bay Permit 404(q) Elevation* (1990) 4 [hereinafter *Old Cutler*], at 5; U.S. Army Corps of Engineers, U.S. Army Corps of Engineers, *Plantation Landing Permit Elevation Decision* (1989) 2 [hereinafter *Plantation Landing*]; Yocom et al, *Protection Through Impact Avoidance: A discussion of the 404(b)(1) Alternatives Analysis, Wetlands: Volume 9, No. 21 1989*, by Thomas G. Yocom, Robert A Leidy and Clyde A Morris [hereinafter *Wetlands*].at 286.

⁴ U.S. EPA and U.S. Army Corps of Engineers, Memorandum to the Field, *Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements* (Aug. 23, 1993) 2, 3 [hereinafter *Appropriate Level of Analysis*], at 1; *see also* 40 C.F.R. §230.12(a)(3)(i) (2005).

⁵ Yocom et al., *supra* note 3, at 283,295, and *Appropriate Level of Analysis, supra* note 4. The Corps has stated that the LEDPA determination "clearly is intended to discourage unnecessary filling or degradation of wetlands..." *Plantation Landing supra* note 3, at 2.

⁶ *Wetlands, supra* note 3

⁷ *Wetlands, supra* note3

⁸ 33 U.S.C. § 1344(a). The goal of the Section 404 regulatory program is to contribute to the national goal of no net loss of wetlands. U.S. EPA and U.S. Army Corps of Engineers, *Memorandum of Agreement (MOA); Clean Water Act*

In this regard, please note that as stated in 40 CFR. § 230.10(a)(3),

*If the activity associated with a discharge is proposed for a “special aquatic site’ and 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.** (Emphasis added.)*

It is our understanding that the alternatives analysis must be fair, balanced, and objective, "and not used to provide a rationalization for the applicant's preferred result (i.e., that no practicable alternatives exist)."¹⁰ And, that “The applicant bears the burden of demonstrating to the Corps that no less environmentally damaging practicable alternative is available and that the project complies with the 404(b)(1) Guidelines.”¹¹

Region IX EPA guidance on the issue of project alternatives is extensive.¹² EPA guidance suggests that under the “practicability presumption,” the Corps will presume that practicable alternatives exist where the project is non-water dependent and will cause a discharge in a special aquatic site.”¹³ The presumption is intended to "increase the burden on an applicant for a non-water dependent activity to demonstrate that no practicable alternative exists to his proposed discharge in a [SAS]."¹⁴

Further, the Corps has stated that the

*Army Corps of Engineers is serious about protecting water of the United States, including wetlands, from unnecessary and avoidable loss... Further, the Corps should inform developers that special aquatic sites are not preferred sites for development and that non-water dependent activities will generally be discouraged in accordance with the Guidelines.*¹⁵

*To rebut this [practicability] presumption and obtain approval for the proposed alternative, the applicant must show by clear and convincing evidence that there are no practicable alternatives which will not cause a discharge into a SAS.*¹⁶

Section 404(b)(1) Guidelines; Correction (1990), 55 Fed. Reg. 9210, 9211 [hereinafter *EPA/ Corps MOA (1990)*]

⁹ *Alameda Water and Sanitation Dist.*, 930 F.Supp. at 492.

¹⁰ U.S. Army Corps of Engineers, *Permit Elevation, Hartz Mountain Development Corporation* (1989) 2 [hereinafter *Hartz Mountain*].

¹¹ *Old Cutler*, *supra* note 3, at 5; *Plantation Landing*, *supra* note 3, at 7; *Yocom*, *supra* note 4, at 283.

¹² *Wetlands*, *supra* note 3

¹³ 40 C.F.R. § 230.10(a)(3) (2005); 45 Fed. Reg. 85339. This presumption is intended to avoid impacts to the extent practicable. *EPA/Corps MOA (1990)*,

¹⁴ 40 C.F.R. § 230.1(d) (2005).

¹⁵ *Hartz Mountain*, *supra* note 8, at 11.

¹⁶ *Plantation Landing*, *supra* note 3, at 9, 12, 13-14; 45 Fed. Reg. 85336, 85339 (Dec. 24, 1980); see Department of the Army, South Pacific Division, Corps of Engineers *Review of Sundance Plaza Project Permit Denial* (Feb. 5, 2001), 1, 8.

Finally, it is our understanding that “any project that achieves the basic project purpose practicably should be considered.”¹⁷ Under this guidance, Alternative 2 and Alternative 4 must be considered as the LEDPA. And, where the project proposed by the applicant is not the LEDPA, “the availability of a LEDPA, where it is truly available, is an adequate basis for EPA’s determination that unacceptable adverse environmental effects will result.”¹⁸

3 – Discussion of Reasonable Alternatives: In light of the comments above, we would suggest that in addition to the applicant’s proposed redevelopment plans, a more appropriate range of alternatives would be as follows:

Alternative A: No Project: This is supported by the fact that the existing hotel is profitable and due to its extraordinary location and relative lack of competition, enjoys high occupancy and high room rental rates (Exhibit 5). This alternative preserves the pond and does not require any mitigation. There are no indications in the record that the existing hotel cannot continue to operate, making “no project” both a financially feasible and practicable alternative.

Alternative B: Renovate and update the existing 110 room hotel: In addition to being supported by the facts noted in “Alternative A,” above, it is reasonable to assume that an updating and modernizing of the present facilities, which would increase its desirability and room rental rates, must be considered as a financially feasible and practicable alternative. This alternative also preserves the pond and does not require any mitigation.

Alternative C (known as “Alternative 2” in the project Draft EIR, dated November 17, 2014): Rebuild the hotel and increase the number of rooms, without the loss of the pond. There is ample evidence that such an alternative would be financially feasible and highly profitable for the applicant to consider.¹⁹ This alternative, known as Alternative 2, in the project DEIR, which preserves the pond, is less impactful overall and also requires no mitigation. Note also that in the DEIR evaluation of this alternative (see Exhibit 3A), it states that the “Alternative with retention of the pond and FAR or .52 (147 room hotel) would be considered environmentally superior alternative,” and it lists avoidance of filling the pond, lessened impacts from tree removal, and a reduction in associated greenhouse gas emission, among the reasons.

Alternative D (known as “Alternative 4” in the project Revised EIR, dated July, 11, 2015): Rebuild the hotel and increase the number of rooms (187), without the loss of the pond - similar to Alternative C, but with an increased number of rooms and increase bulk, mass and height (See Exhibit 3B). Again, there ample evidence that such an alternative would be financially feasible and highly profitable for the applicant to consider.²⁰ This

¹⁷ *Wetlands, supra* note 3, at 294

¹⁸ See 56 Fed. Reg. 76-02 (Jan. 2, 1991) (stating that one of the reasons EPA denied the proposed Two Forks dam was because it would cause unacceptable loss and damage; the damage the dam would cause was unacceptable because the damage was avoidable. The damage was avoidable because the proposed project was not the LEDPA).

¹⁹ See attached; *The Corte Madera Inn Market Study & Financial Feasibility Evaluation*, prepared by Maurice H. Bennett, manager of RHSW, LLC.

²⁰ See attached; *The Corte Madera Inn Market Study & Financial Feasibility Evaluation*, prepared by Maurice H. Bennett, manager of RHSW, LLC.

alternative, known as Alternative 4, in the project REIR, which preserves the pond also requires no mitigation. However, in the REIR, Section 3.3 *Environmentally Superior Alternative* (Exhibit 3B), it identifies Alternative 2 as the “environmentally superior alternative” because its retention of the pond and FAR or .52 (147 room hotel), and lessened impacts from tree removal, and a reduction in associated greenhouse gas emission, among the reasons. That notwithstanding, for the purposes of the Corps’ decision regarding a permit to fill the pond, this alternative remains both feasible and practicable.

Alternative C (Alternative 2 in the project DEIR) and Alternative D (Alternative 4 in the project REIR), as well as other potential alternatives that preserve the wetlands pond (e.g., “no project” and “renovation of the existing hotel”), were presented in the original Draft EIR, dated November 17, 2014 and the Revised EIR, dated July 11, 2015, and incorporated into the Final EIR, dated November 23, 2015. However, since the inception of this project, the developer and the Town Planning Department have, without proper findings, dismissed these alternatives and abandoned any investigation into their feasibility. Thus, the destruction of the wetlands, which both the Town and the applicant have consistently misclassified as not being wetlands, became a goal of the project. All public objections to filling the pond were summarily ignored until conclusive evidence of the pond’s misclassification was presented in April of 2016, based on photographs taken at the site (Exhibit 4).

The applicant has also argued that one of the “project objectives” should include serving an under-served market segment described as a “limited service hotel design to target the mid to upper scale hotel market.” The applicant claims that the existing hotel is failing to serve this market because it is out dated. The applicant has also argued a Marriott Springhill Suites brand hotel serves this objective and therefore should be approved. However, none of this is part of the “basic project purpose” or the “overall project purpose,” and therefore should not be a consideration. In addition, as noted before, market demand is not an allowable criterion upon which the Corps should make its decision regarding a permit to fill wetlands. Finally, even if this were an allowable criterion, this particular market demand can be easily met by Alternative B, above; the renovation of the existing hotel, and there is no evidence found in the *Market Survey & Financial Feasibility Evaluation* (Exhibit 5), that would indicate that these types of accommodations could not be met by a new hotel or either 187 or 147 rooms, depending on their particular design. The peculiarities of Marriott’s corporate requirements are not relevant to the determination of what is financially feasible or practicable, or the LEDPA, because there are dozens of competing hotel types and brands that successfully address this market demand in many different ways, which could also retain the wetlands pond.

Financial Feasibility

It is our understanding that the applicant's financial wherewithal is not to be considered as a factor in determining whether an alternative is practicable, and that development costs will be examined from the perspective of what are reasonable costs for the proposed project, not whether the applicant can afford the cost of the alternative.²¹

²¹ *Wetlands*, supra note 6. 294-295, *Yocom*, supra note 4, at 5.

The attached *The Corte Madera Inn Redevelopment: Market Survey and Financial Feasibility Evaluation* (Exhibit 5) analyzes this issue in depth and concludes that a review of existing market conditions substantiates the practicability and financial feasibility of the development of on-site alternatives that also preserve the wetlands pond. This report concludes that Alternatives “B” and “C” and “D,” noted above are all practicable and financially feasible, and readily available to both the applicant and any objective third party developer.²²

It is important to note that

“The preamble to the Guidelines also states that “[i]f an alleged alternative is unreasonably expensive to the applicant, the alternative is not, ‘practicable.’” Guidelines Preamble, “Economic Factors”, 45 Federal Register 85343 (December 24, 1980). Therefore, to the extent that the individual homeowners and small businesses may typically be relevant consideration in determining what constitutes a practicable alternative. **It is important to emphasize, however, that it is not a particular applicant's financial standing that is the primary consideration for determining practicability, but rather characteristics of the project and what constitutes a reasonable expense for these projects that are most relevant to practicability determinations.**” (Emphasis added).

“**The burden of proof to demonstrate compliance with the Guidelines rests with the applicant; where insufficient information is provided to determine compliance, the Guidelines require that no permit be issued.**” 40 CFR 230.12(a)(3)(iv). (Emphasis added).²³

The Status of the Property

Please note that presently, the applicant does not have zoning rights to redevelop the hotel in a way that increases its size. The proposed project will require a rezoning of the parcel and a General Plan Amendment in order to proceed. Therefore, without local zoning changes, the only financially feasible and practicable options available to the applicant at this time are “No project” (Alternative A, above) or “Renovation of the existing 110 room hotel” (Alternative B, above).

Relevant Project History

1 – The misclassification of the wetlands pond: It should be noted that the applicant and the Town were notified of the existence of submerged aquatic vegetation and their misclassification of the pond, long before photographic evidence (Exhibit 4) was brought to their attention by Xavier Fernandez of the San Francisco Regional Water Quality Control Board, in his email to the Corte Madera Planning Director, in April of 2016 (Exhibit 14), in which he states:

²² See attached; *The Corte Madera Inn Market Study & Financial Feasibility Evaluation*, prepared by Maurice H. Bennett, manager of RHSV, LLC.

²³ Quote from *Memorandum to the Field: Guidance on Flexibility of the 404(b)(1) Guidelines and Mitigation Banking* (Aug. 23, 1993 – Dec. 31, 1998, Department of the Army and Environmental Protection Agency).

Dear Mr. Wolff:

We were sent the following photographs of the pond at the Corte Madera Inn Rebuild Project Site. The photographs were taken on April 13 when the water in the pond had been drawn down. The photographs clearly show submerged aquatic vegetation growing within the pond at the Corte Madera Inn Site. Based on this, the pond is a special aquatic site that needs to be preserved to the maximum extent practicable. As such, we plan to attend the Town Council meeting to inform the Council that they may be approving a project that we will not be able to permit under our regulations.

In his comment letter of February 15 2016 (Exhibit 6), biologist Peter Baye, Ph.D. provided a complete discussion and analysis of the proper classification of the pond, as a special aquatic site, based on evidence of the existence of submerged aquatic vegetation. In the face of this evidence, the Town's two biologists, both having been chosen and paid for by the applicant, launched a scathing rebuttal, denying the existence of SAV. The Town also chose to ignore the evidence and pushed through approval at the Planning Commission level.²⁴

However, at the March 22, 2016 Corte Madera Planning Commission hearing to approve the applicant's preferred alternative, Jim Martin, of Environmental Collaborative, one of the two biologists hired by the Town to evaluate the project, and the one who prepared the biological resource section of the EIR, commented on various issues regarding the pond, including the feasibility of an alternative that preserved and rejuvenated the pond, and ensured its viability.

At that hearing, under questioning, Mr. Martin admitted that he hadn't really "looked" at what it would take to save the pond because "doing so would require further detailed analysis, to look at water quality, hydrology and habitat enhancement to make sure that the problems ...of the pond [proper flushing] could be addressed." He freely admitted that "it is something that *is possible* [Emphasis his] within the parameters discussed in Alternative 2" (the Alternative that saves the pond).

However, he said that he wasn't asked to study how to do that, in spite of the fact that the EIR showed that both Alternative 2 and Alternative 4 met the project's basic purpose.

In response to further questioning by the Commission's chairman, Mr. Martin also offered, "I would agree this looks like this is a remnant of an historic slough that went through that area ...that now has been largely isolated." And that "The culvert that goes into the drainage ditch and then the boxed culvert, under the freeway, is no longer used by the city.... It's been closed off [by the Town and the developer]... so what's left is this largely silted 18 inch pipe that's not functioning and no longer provides the flushing that's needed there to maintain the water quality conditions."

What he described confirms exactly what project critics have been claiming: That the pond is not "artificial," and that the hotel owner and the Town have been consciously and purposefully

²⁴ For a complete recounting of the events surrounding the redevelopment of the Corte Madera Inn and the application for a permit from the Army Corps of Engineers, please see Exhibit 18.

neglecting the pond, and doing all they can to destroy its viability, so they could turn around and declare it a “cesspool” and a “smelly swamp” that is beyond redemption, in order to get rid of it.

Martin then advised the Commission that there are many other projects, some on larger scales, in the SF Bay Area, that have the same circulation problems, but that have been solved. He said, “It’s about improving circulation in that, you want to improve the water quality, you want to improve the ability to support emergent vegetation, and increase the habitat value.”²⁵

The Applicant Has Put the Property Up For Sale

The applicant has recently listed the subject property for sale with a local commercial real estate brokerage firm, Newmark, Cornish & Carey. They have not indicated an asking price. They describe the property as an “Extremely Rare Central Marin Redevelopment Opportunity” (sales brochure, attached as (Exhibit 7). A more complete evaluation of the value of the property and the financial feasibility of the project is found in *The Corte Madera Inn Redevelopment: Market Survey and Financial Feasibility Evaluation*, by RHSW, LLC (Exhibit 5).

Although it is not unusual for a land owner to list property for sale, just to find out what kind of offers might be submitted, it is certainly unusual for a land owner to intentionally discourage offers from the most likely buyers. CVP has recently learned that the applicant has instructed his brokers to not accept offers of any kind from hotel developers or hotel operators. In fact, such queries are not even acknowledged or sent information packages about the property.

Since the inception of this project, the applicant has taken an “all or nothing” approach to gain approvals from the Town of Corte Madera. Throughout that process the developer has stated that unless they receive approval for their preferred project (currently 174 rooms), they will not build anything at all and sell it to the highest bidder. They have threatened that this highest bidder will likely be a car dealership, retail stores, or an office complex. None of these uses are considered desirable by the Town. The town would prefer that a hotel remain the primary use of the site (see page 10 of this comment letter for more details).

It makes little sense then for the applicant to refuse offers from hotel operators and hotel developers, when those buyers would very likely be the most interested bidders, unless the applicant is trying to manufacture “evidence” to present to the Town and the Corps, to substantiate their claim that their own preferred project is the only alternative that is financially feasible in order to maintain a hotel use at that location. It is possible that they intend to use the claim that “no offers were received from other hotel operators or developers” as proof, to substantiate their desire to fill the pond.

Applicant’s Economic Feasibility Analysis

Starting on page 54 to page 57, of the applicant’s “Economic Feasibility,” in the January 8, 2016, Corte Madera Planning Department’s Staff Report to the Planning Commission (Exhibit 9), the applicant presents arguments for his proposal, which he justifies based on profitability, and on

²⁵ Audio recording of the March 22, 2016 Corte Madera Planning Commission hearing, which can be accessed on the Town’s web site at: <http://www.ci.corte-madera.ca.us/531/Corte-Madera-Inn-Rebuild-Project>

market demand for hotel rooms. However, these criteria (profits and market demands) are not relevant to the questions of financial feasibility or practicability.²⁶ As a part of this discussion, he presents an “Opinion of Value of the subject property, prepared by his broker Cornish & Carey Commercial. This “opinion” is purported to show the “highest and best use” of the property and translate that into a market value.

The figures shown are as follows:

Retail	\$26.5 million
Auto Dealership	\$12 million
Commercial Office	\$17.5 million
Housing	\$11.1 million
Hotel	\$9.7 million

In the applicant’s “Market Analysis - Exhibit A,” pages 67 to 82, of the January 8, 2016, Corte Madera Planning Department’s Staff Report to the Planning Commission (Exhibit 9), they provide a variety of scenarios for development that include retail, auto dealership, commercial office and housing. The applicant himself created the value for hotel use. It is assumed that the applicant submitted these documents to the Town of Corte Madera in an attempt to convince them that approving the project proposal that filled in the wetlands pond, was somehow in their best interests.

Disregarding for a moment that fact that none of this information has any direct bearing on the Corps’ determination of what is feasible or practicable,²⁷ the applicant’s evaluation fails to disclose pertinent facts and circumstances that make the valuations noted in the applicant’s “Economic Feasibility” and “Market Analysis” (Exhibits 8 and 9), questionable.

A more realistic evaluation of these possibilities would be more conservative on the high end and significantly more aggressive on the low end, for the following reasons.

- Development Moratorium in place: The applicant has failed to disclose to potential buyers that The Town of Corte Madera presently has a moratorium (which may be extended) on all development along Tamal Vista Boulevard, which is the property’s western boundary. If the applicant does not proceed with the project, and sells the property, that new owner will be subject to that moratorium and unable to apply for any type of development. It is highly unlikely then that any buyer would step forward and purchase this property until assurances of entitlements to redevelop it can be obtained. This has an immediate damper on any valuation estimate.
- Auto Dealership: The Town of Corte Madera has made it clear that they wish to have a hotel on the subject property, whether by the applicant or another hotel operator / developer. They have also been clear that an auto dealership will not be reviewed favorably. In addition, an auto dealership, which requires auto servicing on site (use and disposal of oil, grease, solvents, etc.), and which is typically located in the rear of the

²⁶ Yocom et al., *supra* note 3, at 283,295, and *Appropriate Level of Analysis*, *supra* note 4. *Wetlands*, *supra* note 3

²⁷ Yocom et al., *supra* note 3

dealership, will have a difficult challenge utilizing this site in such close proximity to the wetlands pond that is also located in the rear of the property. Therefore, the valuation prescribed to an auto dealership use appears spurious.

- Retail: The Town of Corte Madera has made it clear that they wish to have a hotel on the subject property, whether by the applicant or another hotel operator / developer. They have also been clear that retail will not be reviewed favorably because it would compete with their commitment to support the vitality of both the Town Center and Village malls. In addition, the applicant's valuation is based on the retail use being a "big box" retail operation. Approval of such a use is highly unlikely since it contradicts stated intentions and goals of the Corte Madera General Plan, regarding the town's character. This big box retail valuation appears to be included only to create a false "high end" range of value, perhaps in an attempt to further intimidate the Town into agreeing to approve a larger hotel that requires the filling of the wetlands pond. Therefore, the valuation prescribed to the retail use also appears to be spurious.
- Commercial Office: Commercial space has not been proposed or discussed as a use, though it remains a potential use of the property so long as the pond is preserved. However, considering that Marin currently has an oversupply of vacant commercial space, the valuation shown would seem too generous. Although it is true that newly developed commercial office space could offer large floor plates, which are not common in southern Marin, Census data indicates that larger employers have been leaving southern Marin, not relocating to southern Marin, due to the traffic congestion and extremely high housing costs. It remains unknowable whether a large commercial lessee in fact exists for such new space.
- Housing: The sole reason the Town instituted the development moratorium was to stop the future development of more housing along Tamal Vista Boulevard. Therefore, the property has no presumable value as a housing site.
- Valuation of the existing hotel / land: The valuation that the applicant has indicated for hotel use (\$9.7 million) makes little sense because it essentially values the existing buildings and amenities and the business itself at zero value. The applicant is essentially showing the value to be only the value of the land and its infrastructure (utilities, etc.). This is not realistic. As a comparative example, a one acre parcel on Miller Avenue, in Mill Valley, one mile from Highway 101, and one mile from its downtown shopping (a far inferior location), zoned for hotel use, today, would be valued at approximately \$2 million.²⁸ Considering that the applicant's property is 5.47 acres in size and located in arguably one of the best locations in all of southern Marin, it is unlikely that it would sell for less per acre than the Mill Valley property, even to a buyer who intended to tear down the existing hotel. This would indicate a potential value of the land alone at \$10.94 million. However, this figure is still less than the figure shown on the applicant's own "residual land value analysis," (Exhibit 5, page 3), which shows a land purchase price of \$16.87 million.

²⁸ Valuation estimate by House Properties, owner of the subject site at 505 Miller Avenue, Mill Valley, CA

In any event, and as clearly demonstrated in *The Corte Madera Inn Redevelopment: Market Survey and Financial Feasibility Evaluation* (Exhibit 5), the discussion of these “land valuation amounts” are irrelevant to a reasonable analysis of the financial feasibility or practicability of alternatives to the applicant’s preferred project, which can allow for redevelopment of the property as a new hotel and also preserves the Edgewater pond.

The applicant’s valuation also fails to consider a likely scenario in which a new owner purchases the existing hotel with the intention of renovating it and continuing to operate it. Therefore, what the applicant has failed to demonstrate is the value of the land plus the ongoing business opportunity. This is particularly interesting in light of the applicant’s refusal to entertain purchase offers from hotel developers and operators, as noted above.

The value of any property is only equal to what a purchaser is willing to pay. To assess the value of the existing Best Western Corte Madera Inn hotel on a comparative basis one has to look for comparable sales. The 100 room Mill Valley Holiday Inn Express sold for \$28 million in July of 2015. On that basis (price paid per door), the asking price / value of the existing Best Western Corte Madera Inn hotel, as is, would be approximately \$30 million.

Marriott Corporation’s Comment letter

The applicant has argued that constructing anything less than their preferred option (and filling in the pond), is not financially feasible. They cite a letter from Marriott Corporation as evidence of that (Exhibit 10). However, the letter from Marriott Corporation does not offer an opinion of financial feasibility. The letter from Marriott Corporation simply states that if the smaller hotel is built, it would probably be a Residence Inn, instead of a dual-branded hotel with a Marriott Springhill Suites. Furthermore, for the purposes of the Corps’ decision on the LEDPA and issuing a permit, please note that Alternative 4 in the REIR, would allow the development of a dual branded hotel project.

However, the *Marin Lodging Market Survey & Financial Feasibility Evaluation* (Exhibit 5) demonstrates that there is nothing that would lead one to conclude that a stand-alone Marriott Residence Inn hotel operation would not be feasible and highly profitable to operate at this location in southern Marin. In addition, the applicant has not presented any credible evidence otherwise, as is required.²⁹

Conclusion

Financially feasible and practicable alternatives exist, which provide for the redevelopment of the existing Best Western Corte Madera Inn hotel and the preservation of the Edgewater pond. Therefore, with all of the information presented in this comment considered, we respectfully request that the Army Corps deny the applicant a permit to fill in the special aquatic site, known as Edgewater Pond, located in Corte Madera, CA, because it is not the LEDPA and practicable alternatives exist that qualify as the LEDPA.

²⁹ 40 CFR 230.12(a)(3)(iv).

Thank you for the opportunity to submit our comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bob Silvestri', with a stylized flourish at the end.

Bob Silvestri
President

LIST OF EXHIBITS:

- 1A E.Yates Comment Letter 01-20-2015
- 1B E.Yates Comment Letter 08-19-2015
- 1C E.Yates Comment Letter 12-19-2015
- 2 – Robert Silvestri CV
- 3A - Corte Madera Inn Draft EIR Alternatives
- 3B - Corte Madera Inn REIR Alternative
- 4 - Photographs of submerged aquatic vegetation at Edgewater Pond – 041316
- 5 - Market Study & Financial Feasibility Evaluation by RHSW LLC
- 6 – 021516 - Corte Madera Inn wetland & aquatic wildlife habitat Peter Baye, Ph.D.
- 7 - 56-60 Madera Blvd Broker Brochure
- 8 - Applicant's Economic Feasibility
- 9 - Applicant's Market Analysis
- 10 - Marriott Corporation Letter
- 11 – Letters from Community Residents
- 12 - 012015 - SF Bay Regional Water Quality Control Board Letter
- 13 - 020916 - Audubon Canyon Ranch comment BCNH Corte Madera Inn Pond
- 14- 042816 - Xavier Fernandez SF Bay Regional Water Quality Control Board Email
- 15 - 01112005 - WWR1090_CorteMaderaInnPondmemotoUSACE
- 16 - 04122004 - WWR1090_CorteMaderaInnPondFillAnalysis
- 17 - 11152005 - WWR1090_CorteMaderaInnPondmemo_v2
- 18 - Marin Post - Investigative piece on the Edgewater Pond at the Corte Madera Inn

Interactive Links to articles:

<https://marinpost.org/blog/2016/5/26/rook-vs-knight-endgame-the-corte-madera-inn-developer-puts-property-up-for-sale-part-i>

<https://marinpost.org/blog/2016/5/26/rook-vs-knight-endgame-the-corte-madera-inn-developer-puts-property-up-for-sale-part-ii>

<https://marinpost.org/blog/2016/5/26/rook-vs-knight-endgame-the-corte-madera-inn-developer-puts-property-up-for-sale-part-iii>

<https://marinpost.org/blog/2016/5/26/rook-vs-knight-endgame-the-corte-madera-inn-developer-puts-property-up-for-sale-part-iv>

From: [bsilvestri](#)
To: [Fernandez, Xavier@Waterboards](mailto:Fernandez.Xavier@Waterboards)
Cc: [Michael Graf](#)
Subject: 6-Exhibits to Comment on the Corte Madera Inn Rebuild Project Alternatives Analysis
Date: Friday, January 13, 2017 3:50:56 PM
Attachments: [X-061616 - M. Graf 404 Comment Letter.pdf](#)

Dear Mr. Fernandez:

Attached please find Exhibits 11 to our three comment letters on the off-site and on-site 404(b)(1) Alternatives Analysis for the Corte Madera Inn Rebuild Project (attached).

Best,

Bob Silvestri

President

Community Venture Partners

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June 16, 2016

Sahrye Cohen
Permit Manager
US Army Corps of Engineers
San Francisco District, Regulatory Division
1455 Market Street, 16th Floor
San Francisco, CA 94103-1398

Re: Public Notice: Project: Corte Madera Rebuild, Public Notice Number: 2000-255330N

Dear Ms. Cohen:

I am writing on behalf of Community Venture Partners, Inc. ("CVP") regarding the application to the Army Corps of Engineers ("Corps") filed by Reneson Hotels, Inc. ("Developer") through its agent, John Zentner, for a Section 404 permit to fill a 0.64 acre pond and wetland habitat on the 5.47-acre Best Western Corte Madera Inn site at 56 Madera Boulevard in Corte Madera, California. The Developer's proposal to fill the pond is part of a proposed demolition of an existing 110 room hotel and restaurant and the construction of a new luxury 174-room hotel ("Project").

The record demonstrates that the pond is a special aquatic site with submerged aquatic vegetation, frequent wildlife use and adjacent habitat for sensitive bird species such as black crowned night herons that use the area for regular roosting and foraging.

The Project proposes to fill this habitat based on the design of its preferred alternative for a 174 room luxury hotel, which the Developer claims renders preserving the pond an infeasible option. However, this assertion is contradicted by the record as well as independent analyses conducted by CVP, and experts who have examined the facts of this proposal. *See* Comments of Community Venture Partners, Corte Madera Project Rebuild, dated June 16, 2016 ("CVP Comments"); CVP Comments, Exhibit 5, Corte Madera Inn Redevelopment: Market Study & Financial Feasibility Evaluation ("Feasibility Evaluation").

As a result, the Corps cannot make the findings that the Project is the least damaging practical alternative, as required by the Section 404 regulations. *See* 40 C.F.R. § 230.10(a). This is particularly true given that in this case the Developer has been less than forthcoming with Corps' officials about the alternative *onsite* Project designs that would preserve the Pond while also

achieving the Developer's project purposes.

A. Background on Project

1. The Pond is a Special Aquatic Site.

The Corps' Notice for the Project describes the pond as follows:

The project site also has a 0.64 acre brackish pond that is jurisdictional waters of the U.S. This pond consists of open water with algae and submerged aquatic vegetation (widgeon grass -*Ruppia maritime*) and a fringe wetland of saltgrass (*Distichlis spicata*) and alkali-bulrush (*Bolboschoenus maritimus*). The waters have a constricted connection to San Pablo Bay and the site was historically tidal baylands.

The Corps' description of the pond and its surrounding wetland area is incomplete. As noted by Peter Baye, a local ecologist with longtime expertise in wetland identification and delineation, the Wetlands and Water Resources (2005) and previous biological assessments (*See CVP Comments, Exhibits 15-17*) identified the "pond wetland-aquatic vegetation zonation" as including two federal Clean Water Act jurisdictional habitats that qualify as "special aquatic sites:"

(a) a vegetated wetland zone composed of discrete patches of alkali-bulrush fringing low brackish marsh.... and more extensively distributed saltgrass high brackish marsh...

(b) a submerged aquatic vegetation bed (vegetated shallows) tentatively identified by WWR as a linear-leaved pondweed species (*Potamogeton* sp.), but most likely salt-tolerant widgeongrass (*Ruppia maritima*), or possibly brackish-tolerant sago pondweed (*Stuckenia pectinata*) or mixtures. *Ruppia* colonies are frequently mistaken for "algae" by casual observers or inexperienced field biologists.

See CVP comments, Exhibit 6, p. 1. Baye further identifies the significant impacts of filling the pond on rare black-crowned night herons that forage and roost there:

Submerged aquatic vegetation beds and wetlands provide foraging habitat for black-crowned night herons which have recurrently roosted in the trees bordering the pond for over a decade. WWR observed 20 black-crowned night herons roosting or foraging at the pond in fall 2005, and this species is site-faithful (re-occupying preferred locations for roosts). [The DEIR] *fails to disclose* that they roost and feed there, and have done so for over a decade. Roosting reportedly occurs in apparently non-native riparian vegetation (ornamental trees) along the pond edge (WWR 2005).

Significant impacts may occur to essential foraging and roosting habitat of site-faithful black crowned night herons; significant impacts are not limited to nesting sites. [The DEIR] fails to provide the DEIR with any basis for assessing potentially significant impacts to the pond foraging habitat (vegetated shallows and wetlands within wading depth of egrets). The regional distribution of black-crowned night heron roosting and foraging habitats, and the relative importance or size of the site's roost (significance) is not

assessed. The DEIR is completely deficient in assessment of impacts to black-crowned night herons and their habitat.

Id., pp. 2-3. This view is corroborated by Audubon Canyon Ranch researchers, who found that the loss of the wetland area could have significant impacts on the local night heron population:

We are very concerned that the proposed filling and development of the wetland pond area behind the Best Western Corte Madera Inn would destroy a valuable wetland habitat area occupied by a roosting colony of Black-crowned Night-Herons. *This species is one of the resident species of colonially nesting herons that depends on the protection of remnant wetlands surrounding the San Francisco Bay, such as the wetland area considered in this proposal.* Annual results from the Southern Marin County Christmas Bird Count confirm that the roost site at the proposed development site is actively used by this species. Numerous scientific investigators have demonstrated that this species is an indicator of healthy wetlands (Hothem et al. 2010), and that protecting populations of such species aides effective management of these important habitats.

See CVP Comments, Exhibit 13. (emphasis added.) The ARC researchers also found that “[c]ommunal roosting sites provide important functions needed by herons, including enhanced foraging access and efficiency, thermoregulatory benefits, and reduction of predation risk,” and that [w]etland habitat in the San Francisco Bay Area is regionally and globally important for several species of wading birds, including Black-Crowned Night-Heron.” Most critically, the ARC researchers noted that:

[T]he protection of individual sites such as this one contributes to a valuable variety of habitat alternatives needed to ensure the persistence of these birds in the region. Together, the protection of individual roosting sites allows birds to adjust to varying levels of predation pressure and disturbance, unpredictable changes in weather, and increasing water levels associated local flooding and sea level rise. *Therefore, the loss of any active Black-crowned Night-Heron roost represents the incremental loss of valuable habitat that may contribute to cumulative impacts over more extensive areas of the San Francisco Bay area.*

See CVP Comments, Exhibit 13 (emphasis added.)

Finally, the important habitat status of the pond was confirmed by the San Francisco Regional Water Quality Control Board, which reviewed photos of the site showing demonstrating submerged aquatic vegetation and concluded that “the pond is a special aquatic site that needs to be preserved to the maximum extent practicable.” See CVP Comments, Exhibit 14 (emphasis added.)

In sum, the Corps’ notice does not provide adequate information regarding the regulatory status or ecological value of the pond proposed to be filled by the Developer for a luxury hotel.

2. CEQA Review of Project to Date Including Consideration of Onsite Alternatives.

The Corps' notice does not disclose the substantial review process of the Project undergone under the California Environmental Quality Act ("CEQA"), Pub. Res. Code §§ 21000 *et seq.*,

As part of CEQA review process, the Developer has prepared two environmental impact reports, none of which have disclosed that the pond constitutes a special aquatic site due to its submerged aquatic vegetation and transitional wetland habitat valuable for wildlife.

Further, the CEQA review process for the Project in fact identified *two onsite project alternatives* that would increase the number of hotel rooms on the site while still preserving the pond. These include Alternative 2: - 147-Room Hotel; Alternative 3: and Alternative 4 - 187-room hotel (130,326 square feet of gross floor area) and retention of the on-site pond. *See* CVP Comments, Exhibits 3A-B.

For Alternative 2, the draft Environmental Impact Report ("DEIR") states:

Alternative 2 would leave the pond in its current location. A new hotel would be built on the remaining site area (see Figure 5-1) with an FAR of 0.52.....The hotel would include 147 rooms in a three-story building as shown in Figure 5-1.The aesthetic condition and habitat values of the existing pond could be improved to reduce odor and safety concerns. Further detailed study would be conducted to determine options for improving conditions associated with the pond, but would most likely involve improved water circulation and aeration during the spring, summer, and fall months. This could possibly be achieved through increased hydrologic connection with the existing culvert and slide gate that connects to the tidally influenced drainage ditch along the west side of U.S. Highway 101, use of permanent spray fountains, and seasonal circulation with Lagoon No. 1. Reconfiguring the banks of the existing pond to create shallow terraces around the entire perimeter would allow for establishment of native marsh vegetation for natural filtration functions and could reduce the hazard posed by the existing steeply sided banks. *This alternative would meet most of the basic project objectives as related to minimizing visual intrusion, serving as a community gathering place during times of emergency, providing a convenient hotel lobby entrance, and providing recreational facilities.* (emphasis added)

See CVP Comments, Exhibits 3A (DEIR p. 5-2) (emphasis added.) Despite the apparent feasibility of the 147 room Alternative 2, the DEIR goes on to state that this alternative "would not meet objectives related to the *number of hotel rooms* for both short-term and long-term accommodations, limiting the mass and height of the building on Tamal Vista Boulevard near existing residences, and *eliminating the pond.*" *Id.* (emphasis added.)

For the 187 room Alternative 4, the Recirculated DEIR ("RDEIR") states:

Retaining the existing pond and establishing a minimum 20-foot-wide buffer around this feature would avoid the significant impacts associated with filling of the 0.64-acre of

jurisdictional waters and would allow for substantial improvement to its current condition to address odor, aesthetic, and safety concerns and improve existing wildlife habitat values as well....Alternative 4 would require further detailed study but could include a number of modifications to the existing bank configuration and improved management of water levels and circulation. In addition, the buffer zone created under this alternative would allow for additional native enhancement plantings around this feature not available under the No Project Alternative. Increasing water circulation and aeration during the warmer months when anaerobic conditions develop as a result of poor water quality and higher water temperatures could help address the concerns about odor and aesthetic problems. With proper management and controls, options to be explored to improve water quality and circulation include using the existing culvert with slide gate to the tidally influenced ditch along the west side of Highway 101 and the culvert to Lagoon No. 1 for improved water circulation, and using spray fountains in the pond to improve aeration....To further improve the existing limited habitat values, the perimeter of the pond could be revegetated with native marsh riparian and upland plant species including substantial plantings in the upland 20-foot buffer and adjacent areas along the cross-site roadway in this alternative.

Any modifications to jurisdictional waters would require appropriate authorizations from regulatory agencies, including the U.S. Army Corps of Engineers, Regional Water Quality Control Board (RWQCB), and possibly California Department of Fish and Wildlife (CDFW). *This would be a relatively simple process in comparison to the proposed project, however, given that the improvements would greatly improve existing habitat functions and values and could be designed as a habitat improvement and restoration program.*

See CVP Comments, Exhibit 3B (RDEIR, pp. 3-7-3.8) (emphases added.)

3. CEQA Process Halted Due to Regulatory Consensus that Wetland/Pond Area is a Special Aquatic Site despite Developer's Attempt to Conceal This Fact.

During the CEQA process on the Project, citizens and community groups strongly objected to the Developer's characterization of the Pond they wished to fill for their luxury hotel as a 'cesspool' and visually intrusive. Finally, in response to Peter Baye's identification of the pond as in fact a sensitive habitat and special aquatic site due in part to the existence of submerged aquatic vegetation, *see* CVP comments, Exhibit 6, p. 1, the Developer funded its consultants to provide a response on March 11, 2016, which stated:

Mr. Baye is incorrect in his claims that the pond bottom supports a submerged perennial aquatic vegetation bed (SAV) and therefore qualifies as a Special Aquatic Site....The claims by Mr. Baye that the Draft EIR "...omits analysis of potentially significant impacts to the important special aquatic site resources of SAV beds... "is erroneous because the site does not contain SAV beds. Algal blooms are a seasonal problem with the pond and an indication of poor circulation, and they create anaerobic conditions as they decompose that limit available oxygen in the water and reduce the suitability of the pond to support aquatic life.

The Developer's consultant's conclusion was based on a site visit on February 22, 2016, a time

period in the winter well before submerged aquatic vegetation would have a chance to grow and be visible to a casual observer. Nevertheless, relying on its consultant's conclusions, the Developer subsequently published an article in the local Marin Independent Journal, which asserted:

“The independent biologist concluded that the pond is not a wetland or nesting habitat for birds. Specifically, the environmental report noted, ‘The lack of protective emergent vegetation, poor water quality, and relatively small size of the pond collectively limit the habitat value of this feature on the site.’”

See <http://www.marinij.com/opinion/20160415/marin-voice-rebuilding-the-inn-with-an-environmentally-friendly-focus>.

In response to this continued misrepresentation by the Developer and its consultants, concerned citizens sent photos of the submerged aquatic vegetation now visible in the pond to the Regional Board, which led to the Board to notify the Town of Corte Madera that the Developer's characterization was in error:

We were sent the following photographs of the pond at the Corte Madera Inn Rebuild Project Site. The photographs were taken on April 13 when the water in the pond had been drawn down. The photographs clearly show submerged aquatic vegetation growing within the pond at the Corte Madera Inn Site. Based on this, the pond is a special aquatic site that needs to be preserved to the maximum extent practicable. As such, we plan to attend the Town Council meeting to inform the Council that they may be approving *a project that we will not be able to permit under our regulations*.

See CVP Comments, Exhibit 14 (emphasis added.)¹

In response, on May 3, 2016, the Planning Director Adam Wolff notified the Town Council that based on the letter they had received from the Regional Board; the Town would be putting off scheduling a future hearing for the Project to an indefinite time in the future.

Less than two weeks later, on May 16, 2016, the Corps issued its Notice of the Developer's application for a 404 permit to fill the pond and its surrounding wetlands habitat.

B. 404 Regulations and Related Requirements for Evaluating Practical Alternatives to Filling Wetlands.

Under the Section 404 Regulations, the Corps may not permit the filling of a pond “if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem.” 40 C.F.R. § 230.10(a).

"An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." *Id.*§

¹ See also CVP Comments pp. 7-9 for further discussion of the Developer's mischaracterization of the pond and its special aquatic site status.

230.10(a)(2). (emphasis added.)

Further, if the activity associated with a discharge is proposed for a “special aquatic site” and 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.” *Id.* § 230.10(a)(3) (emphasis added).

The 1990 Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency entitled “The Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines” further states:

Section 230.10(a) requires that *no discharge shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact to the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.Compensatory mitigation may not be used as a method to reduce environmental impacts* in the evaluation of the least environmentally damaging practicable alternatives for the purposes of requirements under Section 230.10(a). (emphases added.)

Other regulatory guidance on the issue of how the Corps must consider whether there are practical alternatives to filling a wetland comes in several forms. For example, the Preamble to the Section 404 Regulations states the following:

[O]ur revised “water dependency” provision creates a presumption that there are practicable alternatives to “non-water dependent” discharges proposed for special aquatic sites. ...The mere fact that an alternative may cost somewhat more does not necessarily mean it is not practicable (see § 230.10(a)(2) and discussion below). Because the applicant may rebut the presumption through a clear showing in a given case, no unreasonable hardship should be worked. At the same time, *this presumption should have the effect of forcing a hard look at the feasibility of using environmentally preferable sites....*

What is practicable depends on cost, technical, and logistic factors. We have changed the word “economic” to “cost”. Our intent is to consider those alternatives which are reasonable in terms of the overall scope/cost of the proposed project. *The term economic might be construed to include consideration of the applicant's financial standing, or investment, or market share, a cumbersome inquiry which is not necessarily material to the objectives of the Guidelines. We consider it implicit that, to be practicable, an alternative must be capable of achieving the basic purpose of the proposed activity.* Nonetheless, we have made this explicit to allay widespread concern. Both “internal” and “external” alternatives, as described in the September 18, 1979 Preamble, must satisfy the practicable test. In order for an “external” alternative to be practicable, it must be reasonably available or obtainable. However, the mere fact of ownership or lack thereof, does not necessarily determine reasonable availability...These waters form a priceless mosaic. Thus, if destruction of an area of waters of the United States may reasonably be avoided, it should be avoided..... If an alleged alternative is unreasonably expensive to the applicant, the alternative is not “practicable.” (emphasis added)

See 45 Fed. Reg. 85336 (emphases added.)

Further, the Memorandum to the Field: Guidance on Flexibility of the 404(b)(1) Guidelines and Mitigation Banking (Aug. 23, 1993 – Dec. 31, 1998, Department of the Army and Environmental Protection Agency) (“Guidance on Flexibility”) document states:

The preamble to the Guidelines also states that “[i]f an alleged alternative is unreasonably expensive to the applicant, the alternative is not, 'practicable.'" Guidelines Preamble, "Economic Factors", 45 Federal Register 85343 (December 24, 1980)... *It is important to emphasize, however, that it is not a particular applicant's financial standing that is the primary consideration for determining practicability, but rather characteristics of the project and what constitutes a reasonable expense for these projects that are most relevant to practicability determinations. The burden of proof to demonstrate compliance with the Guidelines rests with the applicant; where insufficient information is provided to determine compliance, the Guidelines require that no permit be issued.* 40 CFR 230.12(a)(3)(iv). (emphasis added)

C. Application of Section 404 Regulations to the Proposed Project.

Under the 404 Regulations, an alternative is “practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” 40 C.F.R. § 230.10(a)(2). As noted by a leading publication on the Regulations:

The determination of what constitutes an unreasonable expense should generally consider *whether the projected cost is substantially greater than the costs normally associated with the particular type of project, not the financial circumstances of the applicant.* Debates over the issue of cost often revolve around specific issues of capital costs, operating costs, and funds committed to the project before the permit was issued. As described above, applicants may not limit the scope of the alternatives analysis by spending money on their proposed site and then asserting that alternatives are not feasible. Increases in costs do not necessarily render an alternative infeasible. An alternative that increases costs so as to preclude construction of a project (e.g., would render the project uneconomical) would not normally be feasible.

See Environmental Law Institute, “The Federal Wetland Permitting Program: Avoidance and Minimization Requirements,” March 2008, p. 10 ((emphasis added.) See also Guidance on Flexibility, p. 6 (“It is important to emphasize, however, that it is *not a particular applicant's financial standing that is the primary consideration for determining practicability*, but rather characteristics of the project and what constitutes a reasonable expense for these projects that are most relevant to practicability determinations.”)

Here, the CVP Comments and accompanying Feasibility Evaluation clearly demonstrate the practical feasibility of maintaining a profitable hotel on the Project site, whether as a hotel with the same number of or moderate increase in room number. Indeed, the Feasibility Evaluation notes:

[T]he best comparable and direct competition on all metrics, for a new hotel, is probably the Marriott Courtyards Inn at Larkspur Landing, which is only 1.7 miles north on Highway 101. The Hotel Acqua, located at Highway 101, in Mill Valley, would also remain a competitor mostly due to its unique waterfront location, and its highway visibility and access. Our telephone interview with management of both the Marriott Courtyards at Larkspur Landing and the Hotel Acqua

indicated that they currently enjoy high demand and a high occupancy rate, year round (greater than 80% occupancy).

See Feasibility Evaluation, p. 4. The Hotel Acqua has 48 rooms. The Marriott Courtyards Inn at Larkspur Landing has 147 rooms, precisely the *same number of rooms* evaluated as an alternative (Alternative 2) in the DEIR that would preserve the pond on the Project site.

As demonstrated in the EIR's Alternatives' analyses for the Project, there are at least two alternatives that would meet the overall project purpose as defined by the Corps constructing a new hotel on the site with a greater number of rooms. See Corps' Notice, p. 1 (project purpose identified as "to build additional commercial hotel rooms in the southern area of Marin County.")²

Here, the EIR's prepared in the CEQA process emphasize that both the 147 room and 187 room onsite hotel options that would retain the pond are feasible. See CVP Comments, Exhibits 3A B. Moreover, the EIRs go out of their way to clarify that the ecological, aesthetic and even market values (as an attraction for hotel visitors) of the pond could be *greatly improved* with feasible and proven restoration measures that have been effective in other similar jurisdictions:

It should be noted that there may be ways to improve the overall water quality and habitat value of the pond *through better water circulation, native revegetation, and re-landscaping around the entire feature that could be incorporated into this alternative*. Creating a shelf or terrace around most of the existing pond by importing fills and regrading the perimeter to support wetland vegetation (like the small area of native vegetation at the northern end of the existing pond) would *greatly improve habitat values and aesthetics and would probably reduce odor problems*. One or two fountains could be added to improve aeration, which would improve the odor problems as well. *Such systems have been created in Foster City and Aquatic Park in Berkeley*, which all point to improved water circulation to improve pond health and aesthetics.

DEIR, p. 5-1, fn. 1.

The 404 Regulations and accompanying regulatory interpretative guidelines emphasize that the appropriate barometer for financial feasibility and practicality must be based on what is feasible within the *industry*, not simply what may be desired by a particular developer of a project. Here, the Feasibility Evaluation demonstrates that *any hotel* on the Project site will be feasible and profitable, including both of the alternatives considered in the Town's CEQA process that preserves the pond onsite as a natural environmental amenity for guests and local citizens.

The 404 Regulations also state that if the activity associated with a discharge is proposed for a "special aquatic site" and is not "water dependent," "practicable alternatives that do not involve special aquatic sites are *presumed to be available, unless clearly demonstrated otherwise*." 40 C.F.R. § 230.10(a)(3) (emphasis added.)

In this case the Developer has *completely failed* to meet its burden that there is no practical

² As noted in the CVP Comments, this project purpose statement is itself problematic. Here, there has been no finding or determination that a hotel of the same size and with the *same number of rooms* would not be a practicable and feasible alternative given that the existing hotel has been running successfully for decades, on the site.

alternative to filling the pond. Indeed, according to the Project Notice (p. 2), the Developer has submitted a review of off-site alternatives but no *on-site alternatives or accompanying analysis* as of the date of the Notice:

The off-site alternatives consist of 8 sites in Marin County with similar settings to the proposed project site. These were analyzed for environmental constraints, physical conditions and size, infrastructure requirements, consistent land use and availability/land costs. Four sites were identified in Corte Madera, three in San Rafael, and one in Larkspur.

The Developer's failure to meet its burden here is particularly noteworthy given that the need to examine the feasibility of *onsite* alternatives was raised over a year ago in the Regional Board's earlier comment letter from January 2015:

Because the EIR only evaluates one alternative that avoids filling the pond and does not indicate that it will be implemented moving forward, the only permitable alternative (i.e., the LEDPA) may not have been included in the EIR. To rectify this situation, we recommend evaluating additional alternatives that avoid filling the pond, including, but not limited to: (1) renovating the existing hotel; (2) using a multi-story garage and shifting the position of the hotel to avoid the pond; (3) reducing the number of units to reduce the footprint of the hotel thereby avoiding the pond; (4) altering the types of rooms offered by the hotel to reduce the footprint thereby avoiding the pond; and (5) eliminating or reducing the size of some of the amenities offered by the hotel.

The Developer's subsequent consideration of additional onsite alternatives (Alternatives 2 & 4) in the CEQA process raises the further question of why the Developer's *subsequent* application for a 404 permit is limited to only offsite alternatives, particularly given the clear priority and importance given to this issue in the regulations, as discussed above. *See* 40 C.F.R. § 230.10(a).

D. Procedural Issues for Public Review.

The Corps' Notice and public review in this case raises two concerns that do not appear to be addressed in the Notice.

First, as discussed, the main issue for the Corps' decision on the 404 permit issuance is whether there is a practical onsite alternative for operating a hotel while also preserving the pond as an environmental and local amenity on the site. However, here the public is being asked to review this proposal without information about why the Developer believes there is no practical alternative. Instead as discussed above, the Corps' Notice dated April 16, 2016 refers only to the Developer's submission of an offsite alternatives analysis dating back to 2014. The Notice goes on to state:

An evaluation pursuant to the Guidelines indicates the project is not dependent on location in or proximity to waters of the United States to achieve the basic project purpose. This conclusion raises the (rebuttable) presumption of the availability of a less environmentally damaging practicable alternative to the project that does not require the discharge of dredged or fill material into special aquatic sites. *The applicant has been informed to submit an analysis of project alternatives to be reviewed for compliance with the Guidelines.* (emphasis added.)

This approach by the Corps undermines the entire function of public review in that the public is being

asked to provide commentary on the feasibility of onsite options for the future hotel, without being provided any *analysis of project alternatives* that the Developer will presumably submit once the public comment period is closed.

Second, a related problem arises with respect to the Corps' legal obligation to review the potential impacts of issuing a 404 permit to fill the pond in compliance with the National Environmental Policy Act ("NEPA"). As the Corps is aware, NEPA review requires the agency to include a careful consideration of project alternatives that can meet the project purpose as part of its evaluation. *See* 42 U.S.C. §§ 4332(C) & (E); 40 C.F.R. 1508.9(b.); *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 895-896 (9th Cir. 2002.) *Muckleshoot Indian Tribe v. United States Forest Serv.*, 177 F.3d 800, 810 (9th Cir. 1999).

Here, the Corp's Notice simply states:

USACE has made a preliminary determination that the project neither qualifies for a Categorical Exclusion nor requires the preparation of an Environmental Impact Statement for the purposes of NEPA. The final NEPA analysis will normally address the direct, indirect, and cumulative impacts that result from regulated activities within the jurisdiction of USACE and other non-regulated activities USACE determines to be within its purview of Federal control and responsibility to justify an expanded scope of analysis for NEPA purposes. The final NEPA analysis will be incorporated in the decision documentation that provides the rationale for issuing or denying a Department of the Army Permit for the project.

We do not agree that this Project to fill in one of the last remnant ponds in the Corte Madera area does not require the preparation of an EIS, or that no public review of the Corps' proposed NEPA analysis – including its examination of alternatives – is warranted. Instead, if the Corps proposes to issue a 404 permit for this Project, it must circulate a draft environmental review document under NEPA and consider public comments on cumulative impacts and alternatives prior to making any final decision.

Very truly yours,


Michael W. Graf

From: [bsilvestri](#)
To: [Fernandez, Xavier@Waterboards](mailto:Fernandez_Xavier@Waterboards)
Cc: [Michael Graf](#)
Subject: 3-Exhibits to Comment on the Corte Madera Inn Rebuild Project Alternatives Analysis
Date: Friday, January 13, 2017 3:45:57 PM
Attachments: [12-Exhibit XII-Corte Madera Inn Recirc EIR memo wigeongrass SAV & wetlands Baye 123116.pdf](#)
[13-Exhibit XIII - 7.16 Audubon Canyon Ranch comment BCNH CorteMadera RDEIR 20161209.pdf](#)

Dear Mr. Fernandez:

Attached please find Exhibits 12 through 13 to our three comment letters on the off-site and on-site 404(b)(1) Alternatives Analysis for the Corte Madera Inn Rebuild Project (attached).

Best,

Bob Silvestri

President

Community Venture Partners

A Catalyst for Sustainable Solutions

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M E M O R A N D U M

To: Community Venture Partners (attn.: Bob Silvestri) 73 Surrey Avenue
Mill Valley, CA 94941 <http://www.communityventurepartners.org>

Cc: Michael Graf

Date: December 31, 2016

SUBJECT: Review of Corte Madera Inn Recirculated Environmental Impact Report:
wetlands and aquatic habitat impacts

I have reviewed the Corte Madera Inn Rebuild Project Draft Recirculated Environmental Impact Report No. 2, SCH 2014042069, prepared for Town of Corte Madera November 2016 by Amy Skewes-Cox, AICP, dated November 2016.

The scope of the REIR No. 2 “addresses new information and new analyses related to conditions at the on-site pond, specifically related to the presence of submerged aquatic vegetation dominated by widgeongrass (*Ruppia maritime*) [sic]” [REIR p. 1-2] and “has been prepared to show changes to the Biological Resources section of the DEIR (Section 4.3) that are necessary to reflect new information that became available after circulation of the DEIR and first REIR”. The new information resulted in identification of a new environmental impact related to sensitive natural communities. (REIR p. 1-1). I originally identified this neglected aquatic resource, submerged aquatic widgeongrass (*Ruppia maritime*) vegetation beds, and impacts to this special aquatic site, in my memorandum of February 15, 2016.

My qualifications to comment are summarized in Attachment A. I qualify as an expert specifically on the ecology Bay Area submerged aquatic vegetation species, particularly linear-leaved pondweeds and widgeongrass. I provide taxonomic and other field investigation consultant technical support for estuary-wide surveys of submerged aquatic vegetation (including widgeongrass) for the Boyer lab at the Romberg Tiburon Center, San Francisco State University. http://online.sfsu.edu/katboyer/Boyer_Lab/Home.html. I have served as thesis advisor on two (2016) San Francisco State University Master’s thesis investigations of estuarine linear-leaved pondweeds that are ecologically associated with widgeongrass.

1. Jurisdictional versus regulatory policy issues regarding aquatic impacts and mitigation.

As a preliminary and general point of clarification, it is important to understand that determination and boundaries of Clean Water Act Section 404 jurisdiction for waters of the United States is an independent, fundamental and separate regulatory status, and is not the same as the “special aquatic site” designation that applies to specific aquatic habitat categories including “wetlands (40 CFR §230.41)”, “vegetated shallows” (40 CFR §230.43; aquatic vegetation beds). The special aquatic site status of “wetlands” and “vegetated shallows” does not

affect jurisdiction, but does affect regulatory policies and review of alternatives, compared with undistinguished “other waters” status of jurisdictional waters of the United States. The LSA memorandum in Attachment A is incorrect in describing these categories as different types “components” of jurisdiction”. There is only one type of Clean Water Act jurisdiction, but many categories of special aquatic sites with special regulatory procedures for evaluation.

The REIR continues to provide a misleading and incomplete statement of biological impacts in Impact BIO-3: “Regulated Waters. Proposed development would result in filling of the existing pond, eliminating an estimated 0.64-acre of jurisdictional waters on the site.”. The term “jurisdictional” does not denote biological status; it denotes legal status (jurisdiction), which is relevant primarily to Land Use Policy, and does not substantively describe biological resources. The special aquatic status of the waters on site are “vegetated shallows” or “submerged aquatic vegetation bed” and “wetland”, each with a distinct and unique quantifiable loss of area.

Both “wetlands” and “vegetated shallows” special aquatic site classifications trigger a more stringent review of alternatives in U.S. Army Corps of Engineers and Environmental Protection Agency regulations for fill permits in 404 jurisdiction. Note that “vegetated shallows” and “wetlands” are categorically distinct aquatic habitats, not equivalents or sub-types of one another. Wetlands are vegetated with emergent wetland plants, and are identifiable by explicit indicators and criteria in the Corps’ wetland delineation manual. Vegetated shallows support only submerged aquatic (not “wetland”) plants, and have no manual for delineation. Both are jurisdictional, but they differ in habitat type, function, and structure. For mitigation policies regarding compensation for unavoidable losses of aquatic resources, wetlands and vegetated shallows (submerged aquatic vegetation beds; SAV beds) are “out of kind”, not in-kind. Compensation of SAV resource loss by wetlands, without supporting analysis of evidence-based ecological functions, does not satisfy compensatory aquatic habitat mitigation policies requiring or prioritizing “in-kind” mitigation.

This is an important point for CEQA assessment of **Land Use Policies**. The REIR identified this regulatory status correctly on page 4.3-13 of the Biological Resources chapter (and in the September 2016 LSA memo), but this is in fact a Land Use policy issue and not a biological characteristic. The REIR failed to analyze this as a land use policy impact for Corps/EPA regulations, or for corresponding General Plan policies including:

- Implementation Program RCS-6.2a: Resource Protection
Protect sensitive biological resources, including wetlands and other waters of the United States and other wetland habitat areas...
- Implementation Program RCS-8.2.a: Wetland Mitigation

Where complete avoidance of wetlands and waters of the United States due to filling is not feasible (as defined under State CEQA Guidelines Section 15364), require provision of replacement habitat on-site through restoration and/or habitat creation at a minimum 2:1 ratio that would ensure no net loss of wetland acreage, function, water quality protection, and habitat values occurs. Allow restoration of wetlands off-site only when an applicant has demonstrated that no net loss of wetlands would occur and that on-site restoration is not feasible. Off-site wetland mitigation preferably will consist of the same habitat type as the wetland area that would be lost.

- Implementation Program RCS-8.2.b: Wetlands Mitigation Standards
Amend the zoning ordinance to implement the following mitigation standards for jurisdictional wetlands and waters of the United States:
 - No net losses shall occur in wetland acreage, functions, and values consistent with the mitigation standard set forth under Implementation Program RCS-8.2.a. (emphasis added)

The REIR must carry over new analysis of biological impacts into corresponding full and complete analysis of Land Use policy impacts regarding County and City General Plan policies regarding wetlands and other aquatic habitats, noting the SAV beds, though jurisdictional, are categorically and functionally not “wetlands”.

2. Compensatory mitigation for vegetated shallows (special aquatic site)

The REIR must provide an objective, evidence-based account of the functional ecological equivalence justifying compensatory mitigation of Burdell Ranch ditch habitats of wigeo grass for the pond at Corte Madera Inn. It has not done so. Since the REIR continues to propose **compensatory mitigation of seasonal wetlands** (dry or lacking surface water in summer-fall dry season) as substitutes for **perennial (submerged all year) SAV beds**, without distinguishing “wetlands” from the distinct “special aquatic site” category of SAV beds, the omission of Land Use policy impact analysis relating specific, distinct jurisdictional aquatic habitat types, and mitigation policies, may result in significant impacts caused by out-of-kind wetland and aquatic habitat “swaps”. The REIR has provided **no substantive evidence or analysis to support the proposed out-of-kind compensatory mitigation in mitigation measure BIO-3**, which substitutes generic seasonal wetlands at Burdell Ranch mitigation bank for SAV perennial pond habitat losses by substituting would reduce impacts to less-than-significant levels:

Mitigation Measure BIO-3a: If avoidance of jurisdictional wetlands and waters of the US due to filling is not feasible, a **Wetland** Protection and Replacement Program (WPRP) shall be prepared by a qualified **wetland** specialist and implemented to provide compensatory mitigation for the proposed fill of 0.64 acre of **jurisdictional** waters on the site, and any other areas of **jurisdictional** waters affected by the project, and to ensure compliance with Town policies related to wetland protection and mitigation. The WPRP shall contain the following components: If on-site avoidance of jurisdictional waters is not feasible, the WPRP shall provide **compensatory mitigation at a minimum 2:1 ratio** (ratio of mitigation acreage or credits to affected jurisdictional waters), subject to the review and approval by the Town and regulatory agencies. In 2002, the applicant purchased 1.20 acres of wetlands credits from the Burdell Ranch Wetlands Conservation Bank. An additional 1/10th of an acre mitigation credit is needed to achieve the full 2:1 ratio under the Wetlands Protection and Replacement Program. An alternative on-site or off-site method to achieving the full 2:1 ratio may be necessary as part of the WPRP if additional wetland credits are no longer available from Burdell Ranch Wetlands Conservation Bank. (emphasis added)

First, there is no reliable quantitative estimate of wigeo grass extent at the Inn pond to provide a basis for the mitigation debt of project impacts. The REIR presents two conflicting estimates of

SAV habitat extent, differing significantly (about an order of magnitude): an incredibly low estimate by Zentner & Zentner (0.16 acres) and a higher credible estimate by LSA (0.42 acres or approximately 75 percent of the pond.) The REIR, however, does not explain or reconcile these significantly conflicting estimates. LSA's longer-term review of aerial imagery of the pond resulted only in an ambiguous conclusion that "the coverage of widgeon-grass in the pond varies by season and from year to year...", (LSA 2016, p. 3) noting it was absent some years (despite abundance in other years).

The SAV habitat (*Ruppia maritima* beds) at Burdell Ranch mitigation bank identified in the Zentner and Zentner memo of June 30, 2016, p. 6) includes only marginal, seasonal ditch and relict channel colonies of *Ruppia maritima* of unknown unquantified extent and variability. Unlike the perennial wigeongrass pond at the Inn, Burdell ditches and relict channels supporting wigeongrass are subject to seasonal drying and desiccation in summer and fall in non-tidal conditions, and have no supporting evidence of fish or invertebrate prey for wading birds available all year. The REIR fails to account for the ecological non-equivalence of these two hydrologically distinct and geographically remote wigeongrass habitats in the Bay Area, in the context of compensatory mitigation. Based on the distinct hydrology and setting, the two are not equivalent.

The abundance and variability of wigeongrass at Burdell mitigation bank is unquantified and speculative. The Zentner and Zentner account of wigeongrass at Burdell provides a map of speculative "presumed" rather than "observed" or quantified wigeongrass (Figure 3, June 30 2016 memo in Attachment A of REIR), and unquantified presence/absence "contains wigeongrass" boundaries. The Zentner and Zentner memorandum provided no evidence about the quality, quantity, or stability of wigeongrass habitat at Burdell Ranch in the long term and no information about the methods or data collected from the "survey" Zentner and Zentner staff claim to have conducted supporting the Figure 3 map of wigeongrass at Burdell Ranch. The lack of documentation for this mitigation site wigeongrass "survey", and presentation of a map (Figure 3) that represents "presumed" wigeongrass distribution, is unsound evidence to support any conclusions about mitigation adequacy for impacts to wigeongrass habitat.

The unreliability of the Zentner and Zentner estimate of "presumed" and observed (present/absent; no quantification) Burdell Ranch wigeongrass is not corrected or supplemented by the LSA memo, which provided no information on the extent or seasonal to annual variability of wigeongrass at Burdell Ranch mitigation bank. The LSA memo of September 19 2016 notes that "This lack of a confirmed quantification of [SAV and wetland areas at the Inn] creates a technical ambiguity...", and this ambiguity is even greater for the Burdell mitigation site.

There Zentner and Zentner memorandum contained no meaningful or objective basis for assessing the ecological equivalence or stability of the wigeongrass habitat at Burdell Ranch as a substitute for the equivalent area at Corte Madera Inn. The water depth and permanence of SAV habitat at Corte Madera Inn pond with an edge of tree canopy is not comparable to a seasonally dry ditch or relict channel with unknown duration or quantities of wigeongrass or associated invertebrate or fish communities providing significant prey base for wading birds. The Zentner and Zentner memorandum provides no evidence or analysis of the ecological functions, composition, seasonal productivity, or status of the Burdell wigeongrass beds. It provided utterly

irrelevant accounts of wigeongrass from the choked tidal basin of Lake Merritt in Oakland, but no relevant information about the actual ecology of wigeongrass beds at the proposed mitigation site.

The most significant omission of ecological data relevant to compensatory mitigation from Burdell Ranch ditch habitats was about the wading bird foraging habitat productivity. The importance of wigeongrass at Corte Madera Inn is that it was associated with a black-crowned night heron colony, for which it provided potential significant foraging habitat year-round. Do Burdell Ranch ditches provide comparable or equivalent habitat and ecological value? Both the Zentner and Zentner memo and the LSA memo, on which the REIR relies for its conclusions about compensatory mitigation, provide no evidence or analysis. There is no actual ecological evidence (including quantitative data on wigeongrass abundance) from Burdell Ranch, presented in the REIR to justify the conclusion of Zentner and Zentner (June 30 2016 memo, p. 6) of “sufficient wigeongrass mitigation...for loss of the Inn pond” provided by Burdell Ranch mitigation bank credits.

The LSA memo of September 19, 2016 provides unsound ecological assessment of the black crowned night heron habitat mitigation debt incurred by impacts of destroying a colony roost site adjacent to a perennial SAV pond, which can provide efficient proximate foraging habitat with little or no flight distance. Flight distance from the roost to foraging sites influences the energetics of foraging: the farther the foraging sites, the greater the net energetic cost of foraging. Neither the LSA memo, the Zentner memo, nor the REIR provide any consideration of the significance of night heron roost location and adjacency of the SAV pond, in assessing the adequacy of the Burdell Ranch mitigation site. The nearest location of suitable egret or heron roost tree habitat to the Burdell Ranch was not assessed. The flight distance or energetic costs (and potential significant loss of energetic efficiency) of roost relocation were not assessed. In addition, the REIR provides no analysis of the seasonal availability of SAV habitat (foraging) resources for herons or egrets at Burdell Ranch, which draws down and dries seasonally, compared with the Inn pond, which is flooded year-round. This appears to be due to a lack of hydrological data demonstrating the depth and duration of flooding in ditches and relict channels at Burdell, and the seasonal duration of wigeongrass, over a multi-year sampling period. Again, the LSA memo, like the Zentner memo, provides the REIR overall with no objective evidence or analysis supporting any conclusions about the ecological equivalence or adequacy of mitigation at Burdell Ranch for wigeongrass habitats.

The REIR provides no rational basis for the conclusion (proposed by generalist wildlife biologist staff at LSA as a “belief”) that the black crowned night heron colony at the Inn is not a sensitive resource. The only statement LSA made about the relationship between black-crowned night herons and Burdell Ranch wetlands is “Observations at BRWCB included black-crowned night heron”, citing unspecified data or sampling dates from Zentner and Zentner. Stating that “observations include” a species – mere presence/absence data - is not a reasonable argument supporting adequacy of mitigation for a species at a mitigation site. No evidence or arguments in the LSA report or Zentner and Zentner memo rebut the expert conclusion of Dr. John Kelley and Scott Jennings of Audubon Canyon Ranch (regional experts on heron and egret ecology) that “Elimination of the roost site and pond would impose cumulative impacts on night-herons in the surrounding region by contributing to the incremental loss of habitat and reducing the

availability of suitable roost sites.” Kelley and Jennings comments to the Town of Corte Madera dated December 7, 2016).

Finally, it is significant that the REIR has not only provided inadequate compensatory mitigation for aquatic habitats and inadequate evidence supporting it, but it did so without first rigorously analyzing avoidance of impacts. Compensatory mitigation for wetlands or other special aquatic sites is a “last resort”, after exhausting mitigation by avoidance and minimization. The REIR inverts the standard policy of mitigation sequencing with compensatory mitigation as a last resort. This is a requirement of both the Regional Water Quality Control Board (Basin Plan policy regarding the presumption of less environmentally damaging alternatives for non-water-dependent projects sited in jurisdictional special aquatic sites, including wetlands), the EPA, and U.S. Army Corps of Engineers wetland regulations. The Inn pond supports two special aquatic sites, wetlands and vegetated shallows. Accordingly, there should be no analysis of compensatory mitigation until a rigorous analysis of alternatives demonstrates that there are no less environmentally damaging practicable alternatives to filling the Inn pond, based on EPA/Corps criteria for “practicability”. This was not analyzed as a Land Use Policy impact or a biological resources impact in the REIR.

In conclusion, the REIR remains inadequate as a CEQA document because:

- (a) it provides inadequate, inconsistent or incomplete evidence about the extent of wigeongrass habitat at the Inn pond;
- (b) grossly inadequate evidence and analysis of compensatory mitigation at the Burdell Ranch mitigation site; and
- (c) flawed assessment of significant impacts (and mitigation debt) of destroying the Inn pond’s black-crowned night heron colony roost site.

My conclusions are based on my professional experience as senior staff biologist at the U.S. Army Corps of Engineers (San Francisco District), and U.S. Fish and Wildlife Service, where I was responsible for wetland jurisdictional delineations and their review, wetland impact assessments, wetland restoration plans and mitigation plans, and joint NEPA/CEQA impact assessments, including EIR/EIS document management. I have over 36 years professional experience in management, restoration of coastal habitats, with specialization in wetlands and other shoreline habitats.



Peter R. Baye, Ph.D.

ATTACHMENT A

General Statement of Qualifications – Coastal Ecology

Peter Baye is a coastal ecologist and botanist specializing in conservation management of coastal vegetation. He began applied studies of dunes and barrier beaches as an undergraduate at Colby College in Maine in the late 1970s, and expanded to tidal marshes and lagoons in Cape Cod, Canadian Maritime Provinces, Great Britain, and California. He received his Ph.D. from the University of Western Ontario, Department of Plant Sciences, Canada, in 1990. In California, he worked for the U.S. Army Corps of Engineers, San Francisco District, as a senior ecologist specializing in wetlands regulatory projects, from 1991-1997. He prepared endangered species recovery plans for coastal species and ecosystems, including the first draft of the tidal marsh recovery plan covering the San Francisco Estuary, while he worked for the U.S. Fish and Wildlife Service, Sacramento, from 1997-2002. After leaving the Fish and Wildlife Service, Peter continued his diverse wetlands and endangered species conservation work in the Bay Area and Central California as an independent ecological consultant. Adaptation of coastal ecosystems management to accelerated sea level rise and shoreline retreat has been a major focus of his independent consulting work in the Bay and outer coast. His projects include original designs for mixed gravel-sand estuarine beaches as “soft” shoreline and marsh-edge erosion control (alternative to rock armoring), terrestrial transition zones of tidal marshes (including slope wetland “horizontal levees”), high tidal marsh mounds, submerged aquatic vegetation beds, and specialized habitats for endangered plant and wildlife species.



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December 7, 2016

Adam Wolff, Director of Planning
Town of Corte Madera Company
300 Tamalpais Drive
Corte Madera, CA 94925

RE: Recirculated Draft EIR for the Corte Madera Inn Rebuild Project

Dear Mr. Wolff,

ACR owns and manages a system of wildlife sanctuaries in Marin and Sonoma counties. Since the early 1970's, we have conducted scientific research to help ensure the long-term protection of San Francisco Bay area wetlands. We have published numerous scientific articles on the ecology and conservation of herons and egrets (www.egret.org/scientific_contributions), including an annotated atlas of heron and egret nesting colonies in the San Francisco Bay area (Kelly et al. 2006; www.egret.org/atlas).

As noted in the RDEIR, the proposed development of the Best Western Corte Madera Inn would eliminate the Black-crowned Night-Heron roost site and the associated pond habitat. ACR is concerned that the proposed development would reduce the regional availability of suitable habitat needed to sustain the number of Black-crowned Night-Herons that occupy central San Francisco Bay. The night-herons are a resident, colonially nesting species that depends on the protection of remnant wetlands and roost sites near the Bay shoreline such as the area considered in this proposal. We offer the following responses to the RDEIR.

- Wetland habitat in the San Francisco Bay Area is regionally and globally important for several species of wading birds, including Black-crowned Night-Herons (Mikuska et al. 1998, Kelly et al. 2007).
- Ensuring the presence of top wetland predators such as Black-crowned Night-Herons is likely to be important in sustaining healthy wetlands (Vander Zanden et al. 2006), and numerous scientific investigators have demonstrated that Black-crowned Night-Herons qualify as indicators of healthy wetlands (e.g., Hothem et al. 2010).
- The number of Black-crowned Night-Herons in the central and northern San Francisco Bay area has been in a significant long-term decline since 2001 (Kelly and Robinson-Nilson 2011, Condeso 2013; ACR, unpublished data).
- Communal roost sites such as the night-heron roost in the proposed development site provide important functional benefits related to vital rates of adult and juvenile annual survival. These benefits, which include energetically efficient access to nearby feeding areas, enhanced foraging

efficiency, thermoregulatory benefits, and reduction of predation risk can be critical in sustaining regional populations (Beauchamp 1999).

- The statement in the RDEIR (Impact BIO-4 on page 4.3-29) that elimination of the roost site “would not contribute to a significant cumulative impact on the black-crowned night heron populations,” is made without scientific justification. Similarly, the implication that ornamental landscape trees in the area—even if not near ponds or estuaries—would provide viable alternative sites for roosting is made without supporting evidence. In contrast, heron specialists Kushlan and Hancock (2005) have indicated that roost sites are particularly important habitat features for night-herons, and they have further specified that, although roosts are often established in human environments, essential habitat conditions for roost sites include adequately dense roosting cover near fresh, brackish or saltwater feeding areas. Therefore, the conclusion that removing the night-heron roost would have no impact on the number of night herons in the area is unsubstantiated.
- Elimination of the roost site and pond would impose cumulative impacts on night-herons in the surrounding region by contributing to the incremental loss of habitat and reducing the availability of suitable roost sites. The assertion in the RDEIR (Impact BIO-4 on page 4.3-29) that, if the roost site is destroyed, the birds would simply “disperse to other locations during construction and, when the trees are removed, would roost in alternative locations” is highly speculative and fails to consider impacts of incremental habitat loss and the importance of roost site quality and location. Scientific work on Black-crowned Night-Herons provides evidence that they depend on finding particular roost-site conditions among multiple alternatives within their foraging range to facilitate annual and intraseasonal adjustments in roosting behavior (Perlmutter 1992). Such conditions include changes temperature, wind, predation risk, disturbance, and increasing water levels associated local flooding and sea level rise. In addition, considerable scientific evidence suggests that roost sites near important feeding areas provides herons with important energy benefits (Beauchamp 1999).

We urge you require full protection of the valuable wetland habitat and pond area used by Black-crowned Night-Herons behind the Corte Madera Inn. Thank you for considering this comment.

Sincerely,



John P. Kelly, PhD
Director of Conservation Science



Scott Jennings
Avian Ecologist

References cited

Beauchamp, G., 1999. The evolution of communal roosting in birds: origin and secondary losses. *Behavioral Ecology* 10:675-687.

Condeso, E. 2013. Life on the edge: The status of Black-crowned Night-Herons in the northern San Francisco Bay area. Audubon Canyon Ranch. *The Ardeid* 2013:4-5. [<http://www.egret.org/ardeid>]

- Hothem, R. L., B. E. Brussee, and W. E. Davis, Jr. 2010. Black-crowned Night-Heron (*Nycticorax nycticorax*), The Birds of North America Online (A. Poole, Ed.). Ithaca: Cornell Lab of Ornithology. [<http://bna.birds.cornell.edu.bnaproxy.birds.cornell.edu/bna/species/074>]
- Kelly, J.P., Etienne, Katie, Strong, Cheryl, McCaustland, Mark and Parkes, M.L., 2006. Annotated atlas and implications for the conservation of heron and egret nesting colonies in the San Francisco Bay area. Audubon Canyon Ranch, Stinson Beach, CA, 94940.
- Kelly, J. P., K. L. Etienne, C. Strong, M. McCaustland, and M. L. Parkes. 2007. Status, trends, and implications for the conservation of heron and egret nesting colonies in the San Francisco Bay area. *Waterbirds* 30: 455-478.
- Kelly, J. P., and C. Robinson-Nilson. 2011. Tidal marsh herons and egrets. Pages 14-15 *in* M. Pitkin and J. Wood (eds.), *The State of the Birds, San Francisco Bay*. PRBO Conservation Science and the San Francisco Bay Joint Venture.
- Kushlan, J. A., and J. A. Hancock. 2005. *The Herons*. Oxford University Press, New York.
- Mikuska, T., Kushlan, J.A. and Hartley, S., 1998. Key areas for wintering North American herons. *Colonial Waterbirds*, pp.125-134.
- Perlmutter, G. B. 1992. Environmental factors influencing roost arrival of Black-crowned Night-Herons *J. Field Ornithology* 63:462-465.
- Vander Zanden, M. J., J.D. Olden, and C. Gratton. 2006. Food-web approaches in restoration ecology. Pp. 165-189, *in* D.A. Falk, M.A. Palmer, and J.B. Zedler (eds.) *Foundations of Restoration Ecology*. Island Press, Washington, D.C.

From: [bsilvestri](#)
To: [Fernandez, Xavier@Waterboards](mailto:Fernandez_Xavier@Waterboards)
Cc: [Michael Graf](#)
Subject: 7-Exhibits to Comment on the Corte Madera Inn Rebuild Project Alternatives Analysis
Date: Friday, January 13, 2017 4:32:49 PM
Attachments: [12-Exhibit XII-Corte Madera Inn Recirc EIR memo wigeongrass SAV & wetlands Baye 123116.pdf](#)
[13-Exhibit XIII - 7.16 Audubon Canyon Ranch comment BCNH CorteMadera RDEIR 20161209.pdf](#)
[Marin Hotels 7-1-16 Letter re CM Inn.pdf](#)

Dear Mr. Fernandez:

Attached please find Exhibits 12 and 13, which we add to those already sent today, and an unnumbered exhibit referenced in our comment letters from Marin Hotels indicating their interest in purchasing the property and developing a project that fits Alternative 2, re: our three comment letters on the off-site and on-site 404(b)(1) Alternatives Analysis for the Corte Madera Inn Rebuild Project (attached).

Best,

Bob Silvestri

President

Community Venture Partners

A Catalyst for Sustainable Solutions

73 Surrey Avenue

Mill Valley, CA 94941

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Peter R. Baye, Ph.D.
Coastal Ecologist, Botanist
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Annapolis, California 95412



baye@earthlink.net

M E M O R A N D U M

To: Community Venture Partners (attn.: Bob Silvestri) 73 Surrey Avenue
Mill Valley, CA 94941 <http://www.communityventurepartners.org>

Cc: Michael Graf

Date: December 31, 2016

SUBJECT: Review of Corte Madera Inn Recirculated Environmental Impact Report:
wetlands and aquatic habitat impacts

I have reviewed the Corte Madera Inn Rebuild Project Draft Recirculated Environmental Impact Report No. 2, SCH 2014042069, prepared for Town of Corte Madera November 2016 by Amy Skewes-Cox, AICP, dated November 2016.

The scope of the REIR No. 2 “addresses new information and new analyses related to conditions at the on-site pond, specifically related to the presence of submerged aquatic vegetation dominated by widgeongrass (*Ruppia maritime*) [sic]” [REIR p. 1-2] and “has been prepared to show changes to the Biological Resources section of the DEIR (Section 4.3) that are necessary to reflect new information that became available after circulation of the DEIR and first REIR”. The new information resulted in identification of a new environmental impact related to sensitive natural communities. (REIR p. 1-1). I originally identified this neglected aquatic resource, submerged aquatic widgeongrass (*Ruppia maritime*) vegetation beds, and impacts to this special aquatic site, in my memorandum of February 15, 2016.

My qualifications to comment are summarized in Attachment A. I qualify as an expert specifically on the ecology Bay Area submerged aquatic vegetation species, particularly linear-leaved pondweeds and widgeongrass. I provide taxonomic and other field investigation consultant technical support for estuary-wide surveys of submerged aquatic vegetation (including widgeongrass) for the Boyer lab at the Romberg Tiburon Center, San Francisco State University. http://online.sfsu.edu/katboyer/Boyer_Lab/Home.html. I have served as thesis advisor on two (2016) San Francisco State University Master’s thesis investigations of estuarine linear-leaved pondweeds that are ecologically associated with widgeongrass.

1. Jurisdictional versus regulatory policy issues regarding aquatic impacts and mitigation.

As a preliminary and general point of clarification, it is important to understand that determination and boundaries of Clean Water Act Section 404 jurisdiction for waters of the United States is an independent, fundamental and separate regulatory status, and is not the same as the “special aquatic site” designation that applies to specific aquatic habitat categories including “wetlands (40 CFR §230.41)”, “vegetated shallows” (40 CFR §230.43; aquatic vegetation beds). The special aquatic site status of “wetlands” and “vegetated shallows” does not

affect jurisdiction, but does affect regulatory policies and review of alternatives, compared with undistinguished “other waters” status of jurisdictional waters of the United States. The LSA memorandum in Attachment A is incorrect in describing these categories as different types “components” of jurisdiction”. There is only one type of Clean Water Act jurisdiction, but many categories of special aquatic sites with special regulatory procedures for evaluation.

The REIR continues to provide a misleading and incomplete statement of biological impacts in Impact BIO-3: “Regulated Waters. Proposed development would result in filling of the existing pond, eliminating an estimated 0.64-acre of jurisdictional waters on the site.”. The term “jurisdictional” does not denote biological status; it denotes legal status (jurisdiction), which is relevant primarily to Land Use Policy, and does not substantively describe biological resources. The special aquatic status of the waters on site are “vegetated shallows” or “submerged aquatic vegetation bed” and “wetland”, each with a distinct and unique quantifiable loss of area.

Both “wetlands” and “vegetated shallows” special aquatic site classifications trigger a more stringent review of alternatives in U.S. Army Corps of Engineers and Environmental Protection Agency regulations for fill permits in 404 jurisdiction. Note that “vegetated shallows” and “wetlands” are categorically distinct aquatic habitats, not equivalents or sub-types of one another. Wetlands are vegetated with emergent wetland plants, and are identifiable by explicit indicators and criteria in the Corps’ wetland delineation manual. Vegetated shallows support only submerged aquatic (not “wetland”) plants, and have no manual for delineation. Both are jurisdictional, but they differ in habitat type, function, and structure. For mitigation policies regarding compensation for unavoidable losses of aquatic resources, wetlands and vegetated shallows (submerged aquatic vegetation beds; SAV beds) are “out of kind”, not in-kind. Compensation of SAV resource loss by wetlands, without supporting analysis of evidence-based ecological functions, does not satisfy compensatory aquatic habitat mitigation policies requiring or prioritizing “in-kind” mitigation.

This is an important point for CEQA assessment of **Land Use Policies**. The REIR identified this regulatory status correctly on page 4.3-13 of the Biological Resources chapter (and in the September 2016 LSA memo), but this is in fact a Land Use policy issue and not a biological characteristic. The REIR failed to analyze this as a land use policy impact for Corps/EPA regulations, or for corresponding General Plan policies including:

- Implementation Program RCS-6.2a: Resource Protection
Protect sensitive biological resources, including wetlands and other waters of the United States and other wetland habitat areas...
- Implementation Program RCS-8.2.a: Wetland Mitigation

Where complete avoidance of wetlands and waters of the United States due to filling is not feasible (as defined under State CEQA Guidelines Section 15364), require provision of replacement habitat on-site through restoration and/or habitat creation at a minimum 2:1 ratio that would ensure no net loss of wetland acreage, function, water quality protection, and habitat values occurs. Allow restoration of wetlands off-site only when an applicant has demonstrated that no net loss of wetlands would occur and that on-site restoration is not feasible. Off-site wetland mitigation preferably will consist of the same habitat type as the wetland area that would be lost.

- Implementation Program RCS-8.2.b: Wetlands Mitigation Standards
Amend the zoning ordinance to implement the following mitigation standards for jurisdictional wetlands and waters of the United States:
 - No net losses shall occur in wetland acreage, functions, and values consistent with the mitigation standard set forth under Implementation Program RCS-8.2.a. (emphasis added)

The REIR must carry over new analysis of biological impacts into corresponding full and complete analysis of Land Use policy impacts regarding County and City General Plan policies regarding wetlands and other aquatic habitats, noting the SAV beds, though jurisdictional, are categorically and functionally not “wetlands”.

2. Compensatory mitigation for vegetated shallows (special aquatic site)

The REIR must provide an objective, evidence-based account of the functional ecological equivalence justifying compensatory mitigation of Burdell Ranch ditch habitats of wigeo grass for the pond at Corte Madera Inn. It has not done so. Since the REIR continues to propose **compensatory mitigation of seasonal wetlands** (dry or lacking surface water in summer-fall dry season) as substitutes for **perennial (submerged all year) SAV beds**, without distinguishing “wetlands” from the distinct “special aquatic site” category of SAV beds, the omission of Land Use policy impact analysis relating specific, distinct jurisdictional aquatic habitat types, and mitigation policies, may result in significant impacts caused by out-of-kind wetland and aquatic habitat “swaps”. The REIR has provided **no substantive evidence or analysis to support the proposed out-of-kind compensatory mitigation in mitigation measure BIO-3**, which substitutes generic seasonal wetlands at Burdell Ranch mitigation bank for SAV perennial pond habitat losses by substituting would reduce impacts to less-than-significant levels:

Mitigation Measure BIO-3a: If avoidance of jurisdictional wetlands and waters of the US due to filling is not feasible, a **Wetland** Protection and Replacement Program (WPRP) shall be prepared by a qualified **wetland** specialist and implemented to provide compensatory mitigation for the proposed fill of 0.64 acre of **jurisdictional** waters on the site, and any other areas of **jurisdictional** waters affected by the project, and to ensure compliance with Town policies related to wetland protection and mitigation. The WPRP shall contain the following components: If on-site avoidance of jurisdictional waters is not feasible, the WPRP shall provide **compensatory mitigation at a minimum 2:1 ratio** (ratio of mitigation acreage or credits to affected jurisdictional waters), subject to the review and approval by the Town and regulatory agencies. In 2002, the applicant purchased 1.20 acres of wetlands credits from the Burdell Ranch Wetlands Conservation Bank. An additional 1/10th of an acre mitigation credit is needed to achieve the full 2:1 ratio under the Wetlands Protection and Replacement Program. An alternative on-site or off-site method to achieving the full 2:1 ratio may be necessary as part of the WPRP if additional wetland credits are no longer available from Burdell Ranch Wetlands Conservation Bank. (emphasis added)

First, there is no reliable quantitative estimate of wigeo grass extent at the Inn pond to provide a basis for the mitigation debt of project impacts. The REIR presents two conflicting estimates of

SAV habitat extent, differing significantly (about an order of magnitude): an incredibly low estimate by Zentner & Zentner (0.16 acres) and a higher credible estimate by LSA (0.42 acres or approximately 75 percent of the pond.) The REIR, however, does not explain or reconcile these significantly conflicting estimates. LSA's longer-term review of aerial imagery of the pond resulted only in an ambiguous conclusion that "the coverage of widgeon-grass in the pond varies by season and from year to year...", (LSA 2016, p. 3) noting it was absent some years (despite abundance in other years).

The SAV habitat (*Ruppia maritima* beds) at Burdell Ranch mitigation bank identified in the Zentner and Zentner memo of June 30, 2016, p. 6) includes only marginal, seasonal ditch and relict channel colonies of *Ruppia maritima* of unknown unquantified extent and variability. Unlike the perennial wigeongrass pond at the Inn, Burdell ditches and relict channels supporting wigeongrass are subject to seasonal drying and desiccation in summer and fall in non-tidal conditions, and have no supporting evidence of fish or invertebrate prey for wading birds available all year. The REIR fails to account for the ecological non-equivalence of these two hydrologically distinct and geographically remote wigeongrass habitats in the Bay Area, in the context of compensatory mitigation. Based on the distinct hydrology and setting, the two are not equivalent.

The abundance and variability of wigeongrass at Burdell mitigation bank is unquantified and speculative. The Zentner and Zentner account of wigeongrass at Burdell provides a map of speculative "presumed" rather than "observed" or quantified wigeongrass (Figure 3, June 30 2016 memo in Attachment A of REIR), and unquantified presence/absence "contains wigeongrass" boundaries. The Zentner and Zentner memorandum provided no evidence about the quality, quantity, or stability of wigeongrass habitat at Burdell Ranch in the long term and no information about the methods or data collected from the "survey" Zentner and Zentner staff claim to have conducted supporting the Figure 3 map of wigeongrass at Burdell Ranch. The lack of documentation for this mitigation site wigeongrass "survey", and presentation of a map (Figure 3) that represents "presumed" wigeongrass distribution, is unsound evidence to support any conclusions about mitigation adequacy for impacts to wigeongrass habitat.

The unreliability of the Zentner and Zentner estimate of "presumed" and observed (present/absent; no quantification) Burdell Ranch wigeongrass is not corrected or supplemented by the LSA memo, which provided no information on the extent or seasonal to annual variability of wigeongrass at Burdell Ranch mitigation bank. The LSA memo of September 19 2016 notes that "This lack of a confirmed quantification of [SAV and wetland areas at the Inn] creates a technical ambiguity...", and this ambiguity is even greater for the Burdell mitigation site.

There Zentner and Zentner memorandum contained no meaningful or objective basis for assessing the ecological equivalence or stability of the wigeongrass habitat at Burdell Ranch as a substitute for the equivalent area at Corte Madera Inn. The water depth and permanence of SAV habitat at Corte Madera Inn pond with an edge of tree canopy is not comparable to a seasonally dry ditch or relict channel with unknown duration or quantities of wigeongrass or associated invertebrate or fish communities providing significant prey base for wading birds. The Zentner and Zentner memorandum provides no evidence or analysis of the ecological functions, composition, seasonal productivity, or status of the Burdell wigeongrass beds. It provided utterly

irrelevant accounts of wigeongrass from the choked tidal basin of Lake Merritt in Oakland, but no relevant information about the actual ecology of wigeongrass beds at the proposed mitigation site.

The most significant omission of ecological data relevant to compensatory mitigation from Burdell Ranch ditch habitats was about the wading bird foraging habitat productivity. The importance of wigeongrass at Corte Madera Inn is that it was associated with a black-crowned night heron colony, for which it provided potential significant foraging habitat year-round. Do Burdell Ranch ditches provide comparable or equivalent habitat and ecological value? Both the Zentner and Zentner memo and the LSA memo, on which the REIR relies for its conclusions about compensatory mitigation, provide no evidence or analysis. There is no actual ecological evidence (including quantitative data on wigeongrass abundance) from Burdell Ranch, presented in the REIR to justify the conclusion of Zentner and Zentner (June 30 2016 memo, p. 6) of “sufficient wigeongrass mitigation...for loss of the Inn pond” provided by Burdell Ranch mitigation bank credits.

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availability of suitable roost sites.” Kelley and Jennings comments to the Town of Corte Madera dated December 7, 2016).

Finally, it is significant that the REIR has not only provided inadequate compensatory mitigation for aquatic habitats and inadequate evidence supporting it, but it did so without first rigorously analyzing avoidance of impacts. Compensatory mitigation for wetlands or other special aquatic sites is a “last resort”, after exhausting mitigation by avoidance and minimization. The REIR inverts the standard policy of mitigation sequencing with compensatory mitigation as a last resort. This is a requirement of both the Regional Water Quality Control Board (Basin Plan policy regarding the presumption of less environmentally damaging alternatives for non-water-dependent projects sited in jurisdictional special aquatic sites, including wetlands), the EPA, and U.S. Army Corps of Engineers wetland regulations. The Inn pond supports two special aquatic sites, wetlands and vegetated shallows. Accordingly, there should be no analysis of compensatory mitigation until a rigorous analysis of alternatives demonstrates that there are no less environmentally damaging practicable alternatives to filling the Inn pond, based on EPA/Corps criteria for “practicability”. This was not analyzed as a Land Use Policy impact or a biological resources impact in the REIR.

In conclusion, the REIR remains inadequate as a CEQA document because:

- (a) it provides inadequate, inconsistent or incomplete evidence about the extent of wigeongrass habitat at the Inn pond;
- (b) grossly inadequate evidence and analysis of compensatory mitigation at the Burdell Ranch mitigation site; and
- (c) flawed assessment of significant impacts (and mitigation debt) of destroying the Inn pond’s black-crowned night heron colony roost site.

My conclusions are based on my professional experience as senior staff biologist at the U.S. Army Corps of Engineers (San Francisco District), and U.S. Fish and Wildlife Service, where I was responsible for wetland jurisdictional delineations and their review, wetland impact assessments, wetland restoration plans and mitigation plans, and joint NEPA/CEQA impact assessments, including EIR/EIS document management. I have over 36 years professional experience in management, restoration of coastal habitats, with specialization in wetlands and other shoreline habitats.



Peter R. Baye, Ph.D.

ATTACHMENT A

General Statement of Qualifications – Coastal Ecology

Peter Baye is a coastal ecologist and botanist specializing in conservation management of coastal vegetation. He began applied studies of dunes and barrier beaches as an undergraduate at Colby College in Maine in the late 1970s, and expanded to tidal marshes and lagoons in Cape Cod, Canadian Maritime Provinces, Great Britain, and California. He received his Ph.D. from the University of Western Ontario, Department of Plant Sciences, Canada, in 1990. In California, he worked for the U.S. Army Corps of Engineers, San Francisco District, as a senior ecologist specializing in wetlands regulatory projects, from 1991-1997. He prepared endangered species recovery plans for coastal species and ecosystems, including the first draft of the tidal marsh recovery plan covering the San Francisco Estuary, while he worked for the U.S. Fish and Wildlife Service, Sacramento, from 1997-2002. After leaving the Fish and Wildlife Service, Peter continued his diverse wetlands and endangered species conservation work in the Bay Area and Central California as an independent ecological consultant. Adaptation of coastal ecosystems management to accelerated sea level rise and shoreline retreat has been a major focus of his independent consulting work in the Bay and outer coast. His projects include original designs for mixed gravel-sand estuarine beaches as “soft” shoreline and marsh-edge erosion control (alternative to rock armoring), terrestrial transition zones of tidal marshes (including slope wetland “horizontal levees”), high tidal marsh mounds, submerged aquatic vegetation beds, and specialized habitats for endangered plant and wildlife species.



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December 7, 2016

Adam Wolff, Director of Planning
Town of Corte Madera Company
300 Tamalpais Drive
Corte Madera, CA 94925

RE: Recirculated Draft EIR for the Corte Madera Inn Rebuild Project

Dear Mr. Wolff,

ACR owns and manages a system of wildlife sanctuaries in Marin and Sonoma counties. Since the early 1970's, we have conducted scientific research to help ensure the long-term protection of San Francisco Bay area wetlands. We have published numerous scientific articles on the ecology and conservation of herons and egrets (www.egret.org/scientific_contributions), including an annotated atlas of heron and egret nesting colonies in the San Francisco Bay area (Kelly et al. 2006; www.egret.org/atlas).

As noted in the RDEIR, the proposed development of the Best Western Corte Madera Inn would eliminate the Black-crowned Night-Heron roost site and the associated pond habitat. ACR is concerned that the proposed development would reduce the regional availability of suitable habitat needed to sustain the number of Black-crowned Night-Herons that occupy central San Francisco Bay. The night-herons are a resident, colonially nesting species that depends on the protection of remnant wetlands and roost sites near the Bay shoreline such as the area considered in this proposal. We offer the following responses to the RDEIR.

- Wetland habitat in the San Francisco Bay Area is regionally and globally important for several species of wading birds, including Black-crowned Night-Herons (Mikuska et al. 1998, Kelly et al. 2007).
- Ensuring the presence of top wetland predators such as Black-crowned Night-Herons is likely to be important in sustaining healthy wetlands (Vander Zanden et al. 2006), and numerous scientific investigators have demonstrated that Black-crowned Night-Herons qualify as indicators of healthy wetlands (e.g., Hothem et al. 2010).
- The number of Black-crowned Night-Herons in the central and northern San Francisco Bay area has been in a significant long-term decline since 2001 (Kelly and Robinson-Nilson 2011, Condeso 2013; ACR, unpublished data).
- Communal roost sites such as the night-heron roost in the proposed development site provide important functional benefits related to vital rates of adult and juvenile annual survival. These benefits, which include energetically efficient access to nearby feeding areas, enhanced foraging

efficiency, thermoregulatory benefits, and reduction of predation risk can be critical in sustaining regional populations (Beauchamp 1999).

- The statement in the RDEIR (Impact BIO-4 on page 4.3-29) that elimination of the roost site “would not contribute to a significant cumulative impact on the black-crowned night heron populations,” is made without scientific justification. Similarly, the implication that ornamental landscape trees in the area—even if not near ponds or estuaries—would provide viable alternative sites for roosting is made without supporting evidence. In contrast, heron specialists Kushlan and Hancock (2005) have indicated that roost sites are particularly important habitat features for night-herons, and they have further specified that, although roosts are often established in human environments, essential habitat conditions for roost sites include adequately dense roosting cover near fresh, brackish or saltwater feeding areas. Therefore, the conclusion that removing the night-heron roost would have no impact on the number of night herons in the area is unsubstantiated.
- Elimination of the roost site and pond would impose cumulative impacts on night-herons in the surrounding region by contributing to the incremental loss of habitat and reducing the availability of suitable roost sites. The assertion in the RDEIR (Impact BIO-4 on page 4.3-29) that, if the roost site is destroyed, the birds would simply “disperse to other locations during construction and, when the trees are removed, would roost in alternative locations” is highly speculative and fails to consider impacts of incremental habitat loss and the importance of roost site quality and location. Scientific work on Black-crowned Night-Herons provides evidence that they depend on finding particular roost-site conditions among multiple alternatives within their foraging range to facilitate annual and intraseasonal adjustments in roosting behavior (Perlmutter 1992). Such conditions include changes temperature, wind, predation risk, disturbance, and increasing water levels associated local flooding and sea level rise. In addition, considerable scientific evidence suggests that roost sites near important feeding areas provides herons with important energy benefits (Beauchamp 1999).

We urge you require full protection of the valuable wetland habitat and pond area used by Black-crowned Night-Herons behind the Corte Madera Inn. Thank you for considering this comment.

Sincerely,



John P. Kelly, PhD
Director of Conservation Science



Scott Jennings
Avian Ecologist

References cited

Beauchamp, G., 1999. The evolution of communal roosting in birds: origin and secondary losses. *Behavioral Ecology* 10:675-687.

Condeso, E. 2013. Life on the edge: The status of Black-crowned Night-Herons in the northern San Francisco Bay area. Audubon Canyon Ranch. *The Ardeid* 2013:4-5. [<http://www.egret.org/ardeid>]

- Hothem, R. L., B. E. Brussee, and W. E. Davis, Jr. 2010. Black-crowned Night-Heron (*Nycticorax nycticorax*), The Birds of North America Online (A. Poole, Ed.). Ithaca: Cornell Lab of Ornithology. [<http://bna.birds.cornell.edu.bnaproxy.birds.cornell.edu/bna/species/074>]
- Kelly, J.P., Etienne, Katie, Strong, Cheryl, McCaustland, Mark and Parkes, M.L., 2006. Annotated atlas and implications for the conservation of heron and egret nesting colonies in the San Francisco Bay area. Audubon Canyon Ranch, Stinson Beach, CA, 94940.
- Kelly, J. P., K. L. Etienne, C. Strong, M. McCaustland, and M. L. Parkes. 2007. Status, trends, and implications for the conservation of heron and egret nesting colonies in the San Francisco Bay area. *Waterbirds* 30: 455-478.
- Kelly, J. P., and C. Robinson-Nilson. 2011. Tidal marsh herons and egrets. Pages 14-15 *in* M. Pitkin and J. Wood (eds.), *The State of the Birds, San Francisco Bay*. PRBO Conservation Science and the San Francisco Bay Joint Venture.
- Kushlan, J. A., and J. A. Hancock. 2005. *The Herons*. Oxford University Press, New York.
- Mikuska, T., Kushlan, J.A. and Hartley, S., 1998. Key areas for wintering North American herons. *Colonial Waterbirds*, pp.125-134.
- Perlmutter, G. B. 1992. Environmental factors influencing roost arrival of Black-crowned Night-Herons *J. Field Ornithology* 63:462-465.
- Vander Zanden, M. J., J.D. Olden, and C. Gratton. 2006. Food-web approaches in restoration ecology. Pp. 165-189, *in* D.A. Falk, M.A. Palmer, and J.B. Zedler (eds.) *Foundations of Restoration Ecology*. Island Press, Washington, D.C.

ACQUA HOTEL

M I L L V A L L E Y

7/1/2016

Bob Silvestri
Community Venture Partners, Inc.
73 Surrey Avenue
Mill Valley, CA 94941

Re: The redevelopment of the Corte Madera Inn

Dear Bob:

As you know, Marin Hotels has been developing and operating hotels in Marin County and Northern California for the past 25 years, and currently own and operate Hotel Acqua, The Mill Valley Inn, and the Waters Edge Hotel in Tiburon.

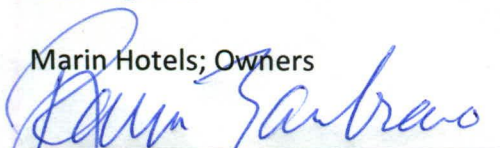
You had asked us for an opinion, regarding the feasibility of redeveloping the existing Corte Madera Inn in Corte Madera, either by renovating and adding on to the existing hotel, or by rebuilding a new hotel on the property, but in either case doing so in a way that preserves the existing .64 acre wetlands pond, located in the north east corner of the property.

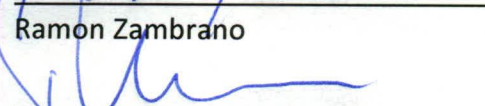
There are, of course, many factors one must consider when making an investment; including land costs, building costs, available financing, and terms of a sale, among others. However, given Marin's strong market environment, and assuming that the owner's cost basis in the property is reasonable (there is not excessive debt) and/or the purchase price to a third party hotel developer / operator would accurately reflect the property's current market value, it would be reasonable to say that either of the two scenarios mentioned, above, would be financially feasible. Preserving the wetlands pond is not a major impediment to redevelopment, due to its small size and back corner location.


We would, therefore, fully support an owner's right to renovate, update, and improve his property in order to maximize his investment returns, including having the ability to add an additional 30 to 40 rooms to the existing 110 room hotel.

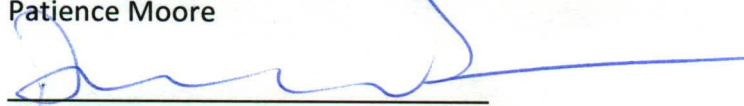
Best regards,

Marin Hotels; Owners


Ramon Zambrano


Paolo Petrone


Patience Moore


Domenico Petrone

From: bsilvestri
To: [Fernandez, Xavier@Waterboards](mailto:Fernandez_Xavier@Waterboards)
Cc: [Michael Graf](mailto:Michael.Graf)
Subject: 4-Exhibits to Comment on the Corte Madera Inn Rebuild Project Alternatives Analysis
Date: Friday, January 13, 2017 3:47:13 PM
Attachments: [14-Exhibit XIV- Market Study & Financial Feasibility Evaluation by RHSW LLC.pdf](#)
[15-Exhibit XV - SF Bay Regional Water Quality Control Board Letter.pdf](#)
[16-Exhibit XVI - Robert Silvestri CV.pdf](#)
[17-Exhibit XVII - 56-60MaderaBlvd Broker Brochure.pdf](#)
[18-Exhibit XVIII -TheRail_May2016_Web.pdf](#)
[19-Exhibit XIX - Marriott Corporation Letter.pdf](#)

Dear Mr. Fernandez:

Attached please find Exhibits 14 through 19 to our three comment letters on the off-site and on-site 404(b)(1) Alternatives Analysis for the Corte Madera Inn Rebuild Project (attached).

Best,

Bob Silvestri

President

Community Venture Partners

A Catalyst for Sustainable Solutions

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Best Western Corte Madera Inn Redevelopment: Market Study & Financial Feasibility Evaluation

Exhibit 5 - 061616 - CVP - Army Corps Public Notice 2000-255330N Comment Letter

Prepared for: Community Venture Partners, Inc.

By: Maurice H. Bennett, RHSW, LLC.

Subject Property: 50 – 64 Madera Boulevard, Corte Madera, CA 94925

Subject Property Proposed Use: Hospitality / Hotel

Re: Project: Corte Madera Rebuild; Public Notice Number: 2000-255330N

Purpose: To evaluate financial feasibility and practicability of developing and operating a hotel at the subject location along Highway 101 in the Town of Corte Madera, Marin County.

Subject Property Description: The subject property is 5.47 acres (238,273 square feet) in size and currently contains a 110 room Best Western Inn and a freestanding retail / restaurant building, together totally approximately 82,000 square feet of development. The property is currently zoned C-3 Highway Commercial with an allowable floor area ratio ("FAR") of .34 (81,012 square feet of building allowable to a height of 35 feet). Per the March 22, 2016 Staff Report, the applicant is currently applying to the Town for an FAR of .533 for an allowable 127,036 square feet of developed space.

Introduction and Property Location Evaluation

Marin and the San Francisco Bay Area are currently among the hottest real estate markets in the country. The subject property itself would be classified as an A+ location, meaning it is arguably one of the best possible locations for a hotel or other commercial uses in southern Marin County. The property enjoys maximum highway exposure on Highway 101, the main thoroughfare through Marin County, making it easily visible to anyone travelling either north to Sonoma County or south to San Francisco. In addition, it is located at the foot of a highway on-ramp / off-ramp.

The subject property is approximately 11 miles from the Golden Gate Bridge to San Francisco, 1.7 miles from the Larkspur Ferry Terminal and the future SMART commuter train station, and 2.5 miles from the Richmond San Rafael Bridge to the East Bay. It is in immediate proximity to all conceivable services and amenities, including but not limited to restaurants, gas stations, banking, professional services, athletic clubs, health care facilities, office complexes, public parks and dedicated open space, waterfront recreation, government offices, cinemas, and two regional-sized retail malls anchored by major national tenants (e.g., Safeway, Rite-Aid, Barnes & Noble, Crate & Barrel, Nordstrom, REI, the Container Store, Macy's, Tesla, Banana Republic, Apple, Microsoft, Williams Sonoma, Ann Taylor, Gap, J. Crew, Pottery Barn, Restoration Hardware, Cheesecake Factory, Talbots, Starbucks, North Face, Tommy Bahama, Verizon, P.F. Chang, JP Morgan Chase, Charles Schwab, and Urban Outfitters).

Perhaps the best evidence of the high value of this location is the "For Sale" brochure currently being circulated by the applicant, which calls this property an "Extremely Rare Central Marin

Redevelopment Opportunity” (Exhibit 7 to the 061516 - CVP - Army Corps Public Notice 2000-255330N comment letter). This parcel’s inherent value, based on its prime location, suggests that it can support above normal development investment.

Marin Lodging Market Survey

The subject property is arguably one of the best locations for a hotel in southern Marin County. The property enjoys maximum highway exposure on Highway 101, the main thoroughfare through Marin County, and is located at the foot of a highway on-ramp / off-ramp. There are superior locations for boutique, luxury, waterfront hotels in Sausalito. However, those hotels do not serve the same clientele that the subject project is intended to serve.

The Survey Methodology:

This Survey was conducted in order to establish comparative data, with which to test the assumptions of the applicant, regarding valuation, occupancy, practicability, and financial feasibility. The data presented was compiled via direct telephone interviews of management at the properties listed, and/or by using the most conservative available published data on average annual room rental rates,¹ and was then significantly discounted to allow for online sales promotions.

Properties were then evaluated, ranked, and compared to the “Subject Property,” based on a combination of factors such as location, building type, age, price point, quality, services, and amenities offered (swimming pool, tennis court, workout room, concierge, food service, outdoor recreational spaces, etc.). Each was then categorized as either comparable to the existing subject property (Noted as “1” - shown in yellow highlighting), or a comparable to the newly redeveloped subject property (Noted as “2” - shown in blue highlighting), or as a property that is not comparable to either (Noted as “N”), due to the same criteria or because it serves a different market segment that is either higher end or lower end.

Survey:

Marin Lodging Market Survey				
Name	City	Rooms	Average Rate	Notes
<u>SUBJECT PROPERTY:</u>				
Best Western Corte Madera Inn	Corte Madera	110	\$209	
Dual-Branded Marriotts - Proposed		174	\$239	
Marriott Residence Inn - Alternative 2 (with pond)		147	\$249	
Cavallo Point Lodge	Sausalito	142	\$492	N
Casa Madrona Hotel	Sausalito	11	\$279	N
The Gables Inn	Sausalito	15	\$259	N

¹ Website data for each hotel, and TripAdvisor, Google

Hotel Sausalito	Sausalito	16	\$245	N
Inn Above The Tides	Sausalito	31	\$500	N
Acqua Hotel	Mill Valley	48	\$219	2
Holiday Inn Express	Mill Valley	100	\$198	1
Mill Valley Inn	Mill Valley	25	\$269	N
America's Best Value Inn Motel	Mill Valley	35	\$107	N
Mill Valley Travel Lodge Motel	Mill Valley	34	\$102	N
Tamalpais Motel	Mill Valley	15	\$109	N
The Lodge at Tiburon	Tiburon	103	\$269	N
Waters Edge	Tiburon	23	\$299	N
Marin Suites Hotel	Corte Madera	100	\$140	1
LOCATION OF SUBJECT PROPERTY				
America's Best Value Motel	Corte Madera	18	\$99	N
Marriott Courtyards San Francisco	Larkspur Landing	147	\$249	2
Extended Stay America	San Rafael	112	\$161	1
North Bay Inn Motel	San Rafael	21	\$130	N
Hilton Embassy Suites Hotel	San Rafael	235	\$209	1
Four Points Sheraton	San Rafael	235	\$169	1
Marin Lodge Motel	San Rafael	20	\$119	N
Marriott Courtyard Inn Novato	Novato	136	\$179	1
Best Western Plus Novato Oaks	Novato	108	\$169	1
NOTES:				
1 - Current Comparables: based on location, building type, age, quality, and amenities				
2 - Post Renovation Comparables: based on location, building type, quality, and amenities				
N - Not comparable (+ or -) due to price, age, location, building type, quality, and amenities				

Survey Results:

Fourteen of the lodgings included in the survey were determined to not be comparable because they are either significantly inferior by all measures and aim to serve the “overnight” motel market, or they serve higher end guests and are located in more scenic destination locations such as Tiburon, the Sausalito waterfront, or downtown Mill Valley.

Of the remaining properties, the survey shows that the existing Corte Madera Inn presently has eight direct competitors for market share in southern Marin County. These are the Hotel Acqua, Holiday Inn Express, Marin Suites Hotel, Extended Stay America, Hilton Embassy Suites, Four Points Sheraton, Marriott Courtyard Novato, and the Best Western Plus Novato Oaks Hotel. Their designation as competitors is primarily based on a blend of characteristics. Some are somewhat higher quality but they target the same market price point (Hilton Embassy Suites, Four Points Sheraton). Some are not as well located but are somewhat newer and offer more amenities (Marriott Courtyard Inn Novato), or somewhat fewer amenities (Hotel Acqua,

Extended Stay America). Some are similarly located (the Marin Suites Hotel) but are inferior or dated in character and construction style.

The most significant result of the survey is the finding that once the subject property is redeveloped, either as a new, high quality, dual-branded Marriott Springhill Suites and Marriott Residence Inn (174 rooms), or as a Marriott Residence Inn (147 rooms), its *direct competition is likely to significantly decrease*, giving it a dominant position and market share in southern Marin.

Ironically, the best comparable and direct competition on all metrics, for a new hotel, is probably the Marriott Courtyards Inn at Larkspur Landing, which is only 1.7 miles north on Highway 101. The Hotel Acqua, located at Highway 101, in Mill Valley, would also remain a competitor mostly due to its unique waterfront location, and its highway visibility and access.

Our telephone interview with management of both the Marriott Courtyards at Larkspur Landing and the Hotel Acqua indicated that they currently enjoy high demand and a high occupancy rate, year round (greater than 80% occupancy).

A number of other former comparables, even those offering similar services and amenities, lose their competitive edge because they are either much older or they lack the location advantage of the newly redeveloped hotel of the subject property. In addition, the interest in purchasing the subject property, by hotel developers / operators appears to be extremely high. Every hotel developer / operator we interviewed indicated that they had already gotten in contact with the applicant's broker in order to discuss making a purchase offer.

Hotel Occupancy Rates in Marin County

The assumed hotel occupancy rate is important because it impacts operating revenues and how profitable the project will be (the number of rooms for rent multiplied by average room rental rate multiplied by number of nights per year of occupancy equals gross revenues²).

In their "Residual Value Analysis", the applicant cites PKF Hospitality Research as their data source for occupancy estimates of 75% occupancy. PKF is a highly respected firm for such data. But PKF's most recent reports and forecasts do not support the applicant's occupancy assumptions.

The assumed 75% occupancy might be a reasonable *average* room occupancy rate for Marin County. However, it has less bearing on this particular project in this particular location, because that average includes a very wide range of types of hotel and motel rooms (from the four star Hilton Embassy Suites in San Rafael to small, dated motels, the majority of which are significantly older and inferior to what is being proposed at the Marriott Corte Madera Inn). The newly developed Marriott Corte Madera Inn will arguably be one of the best located, highest quality hotels in Marin County (excluding the boutique, luxury, waterfront hotels noted above). It is very likely that its occupancy rate will be higher than the Marin average.

² There are other ancillary revenues associated with hotel operations such as concessions, mini bars, and vending machines, etc., which have been ignored for the sake of simplicity.

In their December 2015 “Hotel Horizon” hotel occupancy forecast, PKF states that in hot West Coast markets such as Marin and the SF Bay Area

the growth in demand for lodging accommodations will exceed the change in supply during each of the next two years.

For 2016, PKF-HR is projecting

room rates to increase by 5.5 percent, followed by an even greater 5.8 percent rise in 2017.

And that

At this point in the cycle, the top tier cities are approaching all-time highs, limiting the potential for continued occupancy gains, (and in) the San Francisco market... occupancy level achieved was 90.3 percent (in 2015).

The 80% to 90% occupancy rate for qualify hotels in Marin was corroborated when we conducted the *Marin Lodging Market Survey*, included in this report. This considered, if the assumed occupancy rate were increased by only +5%, to 80% occupancy (vs. 75%), we’d get an increase in annual gross revenue of almost \$600,000.³

Average Room Rates

The applicant has shown a projected annual, average room rate of \$175 per night for a newly developed hotel on the property. This figure is grossly inadequate. The existing Best Western Corte Madera Inn presently has an average, published (per its website), annual, average room rate of \$239 per night. This rate is “as is” before any improvements. Even considering that online discount bookings are now reducing the published nightly rates at most hotels, the \$175 per night for a newly developed hotel, in this prime location, is unsupportable. For comparative purposes we have used an average room rate of \$209 per night for the existing Corte Madera Inn.

It is conservative to estimate that the average room rental rates of a new hotel would at least match the rates of the published room rates of the existing hotel. This would result in an estimated average room rate of \$239 per night for the dual branded Marriott Residence Inn / Springhill Suites redevelopment, and \$249 per night for the Marriott Residence Inn redevelopment. This difference is significant because of its impact on total revenues, project valuation and overall profitability / financial feasibility.

Cap rate and valuation of a new hotel

The applicant’s data assumes a “cap rate” of 6% to estimate project value. A cap rate, or “capitalization rate,” is the ratio of the net operating income (“NOI”) to the property’s value. It tells an investor what kind of “yield” the property will provide (the percentage of return on investment based on the project’s value) so it can be compared to other investments.

³ \$175 per night multiplied by 185 rooms multiplied by 292 days (80% of 365 days a year) of rental equals \$9,453,500 vs. \$8,862,656, a differential of +\$590,844.

To get the cap rate, you divide the net operating income by the project value and you get a percentage. So, for example, if a property was listed for \$1,000,000 and generated a net operating income of \$100,000, the cap rate would be \$100,000/\$1,000,000, or 10%. Conversely, if you know the NOI and have a rate that you think investors are looking for (the 6% suggested by the applicant, for example), you can divide the income by that rate and get a projected value or selling price.

The lower the cap rate, the higher the value of the hotel. And that value, just like in your house, is basically *profit to the developer / owner*.

A 6% cap rate is a reasonable number for a developer to submit to a lender when they're trying to obtain financing. However, again, this is only an average valuation metric for hospitality properties in Marin. In the southern Marin market, in this location, however, it's likely that the actual value of a new, premium hotel could be higher and therefore, the cap rate could be lower (perhaps 5.75%), and therefore, the resultant profits could be significantly greater.

If, for example, we use a slightly more aggressive 5.75% cap rate, it results in approximately \$4,500,000 more in property value, and more than \$100,000 in additional cash flow profit per year.

Marriott Corporation's Comment letter

The applicant has argued that constructing anything less than their preferred option (and filling in the pond), is not financially feasible, and they cite a letter from Marriott Corporation as evidence of that. However, the letter from Marriott Corporation that has been cited does not offer an opinion of financial feasibility. The letter from Marriott Corporation (see 061516 – CVP Army Corps Public Notice 2000-255330-N comment letter – Exhibit 10) simply states that if the smaller hotel is built, it would probably be a Residence Inn, instead of a dual-branded hotel with a Marriott Springhill Suites. As this *Marin Lodging Market Survey & Financial Feasibility Evaluation* demonstrates, there is nothing that would lead one to conclude that a stand-alone Marriott Residence Inn hotel operation would not be feasible and highly profitable to operate in southern Marin.

Financial Feasibility Analysis

We have been asked to evaluate the subject property to determine if new development, redevelopment, or renovation of the existing hotel is “capable of being done” not just by the applicant but by any developer. In addition, we have been asked to evaluate if there are other “practicable” on-site alternatives that could achieve the project's basic purpose, which is to provide hotel lodging on the subject property, but without the loss of the wetlands pond.

To the best of our knowledge, the applicant has not provided or analyzed any alternative proposals. However, such alternatives do exist (Alternative 2, which proposes the development of a 147 room hotel and the preservation of the wetlands pond, noted in the Corte Madera Inn Redevelopment Project Draft EIR, dated November 17, 2014, [Section 5. Alternatives](#) (also as *Exhibit 3A* to the 061516 - CVP - Army Corps Public Notice 2000-255330N comment letter). Therefore, in order to evaluate the feasibility of developing the project or alternative projects, or

the “practicability” of such projects we must use methods and data that align with accepted industry standards.

Data and Assumptions

To address the questions of “capable of being done” and “practicable,” one needs as much location specific information as possible. However, the information provided by the applicant is generally insufficient and/or inaccurate. Therefore, in order to make this determination, we have done market research to arrive at realistic income and expense figures.

The income and expense data used in any project feasibility analysis must reflect the unique characteristics of the subject property, rather than rely on national statistics or even statewide statistics. In addition to determining an appropriate land valuation, estimating development investment feasibility would also include construction costs, operating expenses, occupancy rates and market capitalization rates (“Cap Rates”) for the given market area.

Financial feasibility is also highly dependent on the specific financial circumstances of the developer entity. For example, the developer’s ability to raise capital, obtain financing, and secure favorable lending rates are all considerations. Also, the term of loans, the amount of equity to be invested vs. the amount of debt available (loan to value constraints), the terms of the property’s purchase agreement, and so forth must also be determined. In addition, each investor group / developer may have different requirements or thresholds for return on investment (“cash on cash RIO”), or internal rate of return (“IRR”⁴), in order to determine if a purchase, redevelopment or new development is “feasible.”

As one can imagine, metrics also vary considerably from one developer to the next. Among real estate development professionals, “feasibility” and “profit” are variable terms. There are also considerable variables with regard to the quality of any redevelopment proposal, its architecture, amenities choices of materials and fixtures, etc. Therefore, in order to evaluate financial feasibility, we need to consider both quantitative (room counts) and qualitative (construction type) variables.

The applicant has failed to address all of these issues except for providing figures for construction costs, operating expenses, occupancy rates and market capitalization rates.

Applicant’s “Financial Analysis”

In “Attachment 3” to [the January 8th Corte Madera Planning Staff Report](#), the applicant included a financial analysis, which is titled a *Hotel Development Residual Value Analysis - “Exhibit C”*. It purports to demonstrate why the applicant should be granted increased zoning rights (FAR) in order to construct the maximum size hotel. In addition, the applicant only provided one financial scenario; the one they want to build.

The applicant’s analysis is as follows:

⁴ Internal rate of return (IRR) is the interest rate at which the net present value of all the cash flows (both positive and negative) from a project or investment equal zero. Internal rate of return is used to evaluate the attractiveness of a project or investment.

Applicant's Hotel Development Residual Value Analysis - 185 rooms			
Item	Amount	/SF	Notes
Net building area	131,180		
Rooms	185		*
Projected occupancy	75%		
Average room rate	\$175		
Annual room revenue	\$8,862,656		
Operating and fixed costs	(\$5,574,611)		1
Net operating income	\$3,288,045		
Cap rate	6%		
Potential Project Value	\$54,800,758		2
Building and improvements	\$29,515,500	\$225	
FF&E (finishes, fixtures and)	\$3,935,400	\$30	
Offsite mitigation measures	\$950,000	\$7	
Soft costs	\$2,361,240	\$18	
Construction period property taxes	\$250,000	\$2	
Construction period interest	\$918,260	\$7	
Total Development Costs	\$37,930,400	\$289	
Developer Fee			
Residual Land Purchase Price	\$16,870,358		
Total Project Development Cost	\$54,800,758		
* Maximum number at .55 FAR			
1 - 62.9% per PKF Hospitality			
2 - Corrected: this item was mislabeled by the applicant as "potential income"			

The applicant's analysis employs a method that determines what it calls "residual value" and "residual land purchase price." However, this methodology and terminology does not conform to industry standards, with regard to demonstrating financial feasibility. It also cannot be correlated with the applicant's own broker's opinion of value, which is "Attachment A" to that January 8, 2016 Staff Report, which shows a purchase price for the hotel and land of \$9.7 million.

A principal at Skyline Properties, LLC, a veteran commercial real estate and hotel investor / developer, in Mill Valley, California, euphemistically referred to "residual land value" as "an interesting concept." Put simply, the "residual land value" calculation is not a method of analysis used by real estate professionals to determine if an investment should be made. It doesn't tell us whether or not the investment is actually profitable or if the project is financial feasible because it lacks most of the information described in the section above, *Data and Assumptions*.

In short, the applicant's analysis makes no sense. In reality, no developer would actually make a determination to purchase or redevelop a property based on this methodology. In addition, the estimates used for occupancy and average room rate, and even cap rate, are all questionable.

However, even if we employ the applicant's methodology, using the same income per room and cost assumptions, proportionately, and apply it to Alternative 2 (147 rooms and the preservation of the wetlands pond), we do not find any results that would suggest this Alternative is not feasible, profitable, or practicable.

Hotel Development Residual Value Analysis - 147 rooms			
Item	Amount	/SF	Notes
Net building area	104,235		
Rooms	147		*
Projected occupancy	75%		
Average room rate	\$175		
Annual room revenue	\$7,042,219		
Operating and fixed costs	(\$4,429,556)		1
Net operating income	\$2,612,663		
Cap rate	6%		
Potential Project Value	\$43,544,386		2
Building and improvements	\$23,464,823	\$225	
FF&E (furniture, fixtures & equipment)	\$3,128,643	\$30	
Offsite mitigation measures	\$0	\$0	
Soft costs	\$1,877,186	\$18	
Construction period property taxes	\$250,000	\$2	
Construction period interest	\$730,017	\$7	
Total Development Costs	\$29,450,668	\$283	
Developer Fee			
Residual Land Purchase Price	\$14,093,718		
Total Project Development Cost	\$43,544,386		
* Maximum number at .55 FAR			
1 - 62.9% per PKF Hospitality			
2 - Corrected: this item was mislabeled by the applicant as "potential income"			

The resultant difference in the "Residual Land Purchase Price" remains strongly positive. Therefore, even using the applicant's own irrelevant methodology, there is no reason to conclude that Alternative 2, which preserves the wetlands pond, is any less feasible or practicable than the larger hotel plan, which requires the filling of the wetlands pond.

However, again, **this methodology does not conform to industry standards and does not in any way determine financial feasibility.**

Comparative Sales Valuation Method

Comparative sales and valuation data is also very difficult to obtain in southern Marin because so few properties are developed or sold. However, there is one recent sale of a property that is somewhat comparable to the existing Corte Madera Inn: The Mill Valley Holiday Inn Express sold for \$28 million in July of 2015.

Therefore, on a comparative value basis, the existing Best Western Corte Madera Inn would be valued at \$30.8 million. A new 147 room Marriott Residence Inn hotel would be valued at \$41.2 million, and in both cases, *before* accounting for the fact that it is better located, new, and with superior amenities.

Hotel Purchase / Redevelopment Analysis

The best way to evaluate the financial feasibility of redeveloping the existing Best Western Corte Madera Inn is to analyze the project from the perspective of how a potential third party purchaser / developer would evaluate the investment opportunity. This would include basing assumptions about financing (loan interest rate, loan term, loan to value) based on market conditions present.

Using more realistic data and assumptions (occupancy rate, average room rate, and cap rate) to assess financial feasibility of Alternative 2, would result in the following:

Actual Hotel Development Analysis - Alternative 2 - 147 rooms			
Item	Amount	/SF	Notes
Net building area	104,235		
Rooms	147		*
Projected occupancy	80%		1,4
Average room rate	\$249		2,4
INCOME			
Annual room revenue	\$10,688,076		
Operating and fixed costs	(\$6,722,800)		3
Net operating income	\$3,965,276		
Cap rate	6%		4
Potential Project Value	\$66,087,937		
Debt Service	\$3,014,035		6
Net Cash After Debt Service	\$951,241		**
REDEVELOPMENT EXPENSE			
Building and improvements	\$23,464,823	\$225	
FF&E (finishes, fixtures and)	\$3,128,643	\$30	
Offsite mitigation measures	\$0	\$0	

Soft costs	\$1,877,186	\$18	
Construction period property taxes	\$250,000	\$2	
Construction period interest	\$730,017	\$7	
Total Development Costs	\$29,450,668	\$283	
Property Value / Purchase Price	\$30,800,000		5
Total Project Costs	\$60,250,668		
Developer Gain / ROI	\$5,837,269	38.75%	7
* Maximum number at .44 FAR			
1 - Projected occupancy based on market data and location			
2 - Projected average room rate for new hotel based on market survey			
3 - 62.9% per PKF Hospitality			
4 - See discussion below			
5 - Sale Price based on "per door" comparable sale of Holiday Inn Express: 2015			
6 - Assumes 75% loan to value financing @ 4.5% for 25 years			
7- Assumes 25% equity investment			
** New IRS rulings on depreciation enhance post redevelopment tax returns.			

The Financial Feasibility and Practicability of Alternative 4

The 061616 - CVP - Army Corps Public Notice 2000-255330N comment letter identifies another new hotel alternative, which allows the development of a new 187 room hotel that also preserves the wetlands pond (Alternative D, known as Alternative 4 in the project Revised EIR, dated July 11, 2015). Since this evaluation shows that Alternative 2 (147 rooms) is both financially feasible and practicable, it is axiomatic that Alternative 4 is also financially feasible and practicable, and in fact even more so. The difference between a financial analysis of Alternative 2 and Alternative 4 is that in both cases the cost of the land is fixed at \$30,800,000. Therefore, in Alternative 4, the cost of land decreases in relation to all other expenses (e.g., building and improvements, FF&E, soft costs, etc., which are reduced proportionately to the overall size). This fixed cost of land results in an increase in profitability / overall developer gain and ROI).

Owner's Redevelopment Options

In order to fairly assess financial feasibility and practicability of redeveloping the property as either a 147 room or a 187 room new hotel, this Market Study & Financial Feasibility Evaluation has been done from the perspective of an arm's length third party developer, and in doing so, has shown that alternatives exist that fit those criteria. However, redevelopment by the applicant is likely to have additional benefits to the applicant that might not be enjoyed by other developers.

The applicant's position in the property is vastly superior to that of a new third party developer because of his historic ownership and his equity basis in the property. Therefore, the applicant's individual returns are likely to greatly exceed those of other third party developers in any alternative development scenario.

We would also suggest that significant benefits to ownership can be achieved by gifting the wetlands pond acreage to the Town of Corte Madera, in order to ensure its preservation, to lower

expenses and increase returns, and take advantage of the tax benefits and reduced property taxes resulting from such a gift. Given that the returns on investment are clearly attractive for doing so, it is in our opinion, difficult for the applicant to argue that any such redevelopment is not both feasible and practicable.

Conclusions on Financial Feasibility and Practicability

The results of this *Market Study & Financial Feasibility Evaluation* provide credible evidence to suggest that the redevelopment of the hotel and preservation of the wetlands pond is both practicable and financially feasible and that viable alternatives exist to accomplish this. This *Market Study & Financial Feasibility Evaluation* indicates that when this project is completed, there will be very little that is comparable in southern Marin. It is reasonable then to assume that a newly redeveloped hotel in this location will command a significant valuation premium. Further,

It is our opinion then that the results of this *Market Study & Financial Feasibility Evaluation*, indicate that Alternative 2 for the redevelopment of the hotel as a new 147 room hotel, and Alternative 4 for the redevelopment of a hotel as a new 187 room hotel, both of which preserve the pond, are both a financially feasible and practicable on-site alternatives that produces fewer environmental impacts.

Prepared by Maurice H. Bennett III



Manager, RHSW, LLC

Maurice Bennett has been active in real estate finance, investment, and development for over 25 years, with a portfolio of projects and properties located in Denver, Colorado and San Francisco. His projects include Section 8 affordable housing, market rate rental housing, for sale condominium / urban loft development, neighborhood retail and shopping centers, and historic office/residential renovation. In conjunction with his investment and development career, Mr. Bennett worked as a manager at Household Finance (1988-91) and a licensed mortgage broker in California (1991-2000). He holds a Bachelors of Economics from Colorado State University and an MBA from San Francisco State University. He has taught Macroeconomics at Community College of Denver since 2000, and it currently a Board Member of Community Venture Partners, Inc., and the Denver Colfax-Mayfair Business Improvement District.

San Francisco Bay Regional Water Quality Control Board

January 20, 2015
CIWQS Reg. Meas. 396251
CIWQS Place ID 754206

Sent via electronic mail: No hard copy to follow

Town of Corte Madera
Planning Department
300 Tamalpais Drive
Corte Madera, CA 94925-1418
Attn.: Mr. Adam Wolff
Email: AWolff@tcmmail.org

Subject: Comments on the Draft Environmental Impact Report for the Corte Madera Inn Rebuild Project, SCH No. 2014042069

Dear Mr. Wolff:

We have reviewed the Draft Environmental Impact Report for the Corte Madera Inn Rebuild Project (Project). The Project would involve demolishing an existing 110-room hotel and restaurant, and constructing a new 187-room hotel. Based on the information provided in the EIR, we offer the following comments. These comments are to advise the Town of Corte Madera (Town) and Reneson Hotels, Inc. (Project Applicant) of our concerns, so they may be incorporated into the planning and design process.

Comments on Impacts to Aquatic Resources

The EIR indicates that the Project will fill a pond that has been part of the Corte Madera storm water management system but was determined by the Town's Flood Control Board to be no longer needed. Please note that the pond is a water of the State.

The Water Board adopted U.S. Environmental Protection Agency's Section 404(b)(1), "Guidelines for Specification of Disposal Sites for Dredge or Fill Material," dated December 24, 1980, in its Basin Plan for determining the circumstance under which filling of waters of the State may be permitted. Section 404(b)(1) Guidelines prohibit all discharges of fill material into regulated waters of the United States, unless a discharge, as proposed, constitutes the least environmentally damaging practicable alternative (LEDPA) that will achieve the basic project purpose. To accomplish this, the Guidelines sequence the order in which proposals should be approached: 1) Avoid - avoid impacts to waters; 2) Minimize – once impacts have been avoided to the maximum extent practicable, modify the project to minimize impacts to waters; and, 3) Mitigate – once impacts have been fully minimized, compensate for unavoidable impacts to waters.

We appreciate inclusion of an alternative in the EIR that would avoid filling the pond (Alternative 2) and appears to meet the basic purpose of the Project, which is to establish a hotel in south Marin. However, there is no indication that Alternative 2 will be selected as the preferred alternative for the Project. If Alternative 2 is not selected as the preferred alternative, then additional alternatives that avoid filling the pond will need to be evaluated because the Section 404(b)(1) Guidelines will require evaluation of the practicability of all alternatives that avoid filling the pond and only the LEDPA will be permitted by the Water Board. Because the EIR only evaluates one alternative that avoids filling the pond and does not indicate that it will be implemented moving forward, the only permissible alternative (i.e., the LEDPA) may not have been included in the EIR. To rectify this situation, we recommend evaluating additional alternatives that avoid filling the pond, including, but not limited to: (1) renovating the existing hotel; (2) using a multi-story garage and shifting the position of the hotel to avoid the pond; (3) reducing the number of units to reduce the footprint of the hotel thereby avoiding the pond; (4) altering the types of rooms offered by the hotel to reduce the footprint thereby avoiding the pond; and (5) eliminating or reducing the size of some of the amenities offered by the hotel.

If you have any questions, please contact me by e-mail at xafernandez@waterboards.ca.gov or via phone at (510) 622-5685.

Sincerely,

Xavier Fernandez
Environmental Scientist

Cc: State Clearinghouse, state.clearinghouse@opr.ca.gov
USACE, Sahrye Cohen, sahrye.e.cohen@usace.army.mil
USACE, Holly Costa, holly.n.costa@usace.army.mil

EXHIBIT 2

CV Robert Silvestri

Mr. Silvestri the founder of Community Venture Partners, Inc. and the creator of the [Marin Post](#). He is a licensed architect (CO 1986-Present), is NCARB certified and holds a Bachelors of Architecture with honors from the Cooper Union School of Architecture in New York City. In his career, he has been a member of the American Institute of Architects and National Association of Realtors, and a number of national environmental organizations.

In his career, Bob has been extensively involved in the design, planning and real estate development. In 1980 he founded Tiburon Group (1980 through 2003) which offered architecture, planning and affordable housing development services, financial underwriting and real estate brokerage services and participated in a variety of real estate partnerships and investments. Tiburon Group helped develop approximately 2,000 units of Section 8 affordable housing using low income housing tax credit financing. Mr. Silvestri acted as managing partner for a variety of major real estate investment and development ventures. Tiburon Group has also acted as a real estate investment advisor to private, corporate and institutional clients.

In particular, as the founder of Tiburon Group, Inc., and a licensed real estate broker for 18 years, my company specialized in property and land acquisitions and acted as managing partners for a variety in investment partnerships. Clients that Tiburon Group advised included Prudential Insurance, Los Angeles, GE Capital, New York, Property Company of America, Tulsa, Gold Crown Management Corporation, Denver, The Leinbach Company, Oklahoma, Pacific Union Ventures, San Francisco, La Salle Partners, Chicago, Tomlin Properties, Dallas, Gold Crown Management Denver, and Westland Properties, Denver.

Bob has dedicated the past 2 decades to community service and charitable and philanthropic work in Marin County, California, where he resides. Bob has published Op-Ed pieces and commentary in local newspapers and online journals about sustainable local planning and affordable housing solutions. His writings include the recently published book, "[The Best Laid Plans: Our Planning and Affordable Housing Challenges in Marin](#)." Bob has served on planning advisory committees and been active in local community affairs in Mill Valley since 1993. In 2007, he published "The Miller Avenue Alternative Analysis," a comprehensive land use study to help the City identify affordable housing and commercial development opportunities using an innovative market responsive approach.

REAL ESTATE DEVELOPMENT / ARCHITECTURE CV

TIBURON GROUP, INC. – PRESIDENT / CEO: REAL ESTATE DEVELOPMENT: (1980–2003).

Managing partner of LLC affiliates: Land development, multifamily residential development, and single family land development.

- Property selection and evaluation, site inspection, financial proforma and financial feasibility analysis.

- Coordination, preparation and review of legal, survey issues, title and partnership agreements, purchase, acquisition, contract negotiation and closing.
- Partnership / LLC representation with local, state and federal government agencies.
- Coordination of short term and long term financing, including bond sales, bridge financing and permanent funding commitments.
- Hiring, coordination and management of engineers, soils and environmental studies, architects, surveyors and general contractors, property managers and other service providers (title companies, attorneys, etc.).
- Bidding, bid coordination and contract coordination.
- Construction management and oversight, cost accounting oversight, payments approvals, change orders, inspection walk-throughs, substantial completion and certificate of occupancy reviews.
- Coordination with local building agencies, zoning and planning departments, and HUD field officers and housing agencies.
- Monitoring of bonding, insurance, warranties, final cost certification and related items.
- Construction monitoring, Clerk of the Works duties and reporting.
- Coordination with property management entities and sales/marketing staff.
- Marketing planning and implementation.

CLIENT LIST:

- ARAPAHOE, LTD. - Real estate development, Baltimore, MD
- BENTON MORTGAGE COMPANY – Multifamily Coinsurer / mortgage, Knoxville, TN
- BOSTON FINANCIAL GROUP - Tax Credit Syndication, Boston, MA
- CITY OF VICTORIA, TEXAS - Affordable Housing Analysis
- COLUMBIA SAVINGS - Savings and Loan, Denver, CO
- CONAM - Property management, Las Vegas, NV
- COVIA CORPORATION / UA Airlines - Computer distributor, Denver, CO
- GOLD CROWN MANAGEMENT CO. - Property management, Denver, CO
- GRAISTONE REALTY ADVISORS –RTC asset managers, Ft. Lauderdale, FL
- LA SALLE PARTNERS – Real estate asset management, Chicago, IL
- LEINBACH COMPANY - Real estate development, Tulsa, OK
- MASHBURN ENTERPRISES – Real estate development, Oklahoma City, OK
- MILLER & SCHROEDER FINANCIAL – Muni bond underwriters, Minneapolis, MN
- PACIFIC UNION VENTURES - Real estate development, San Francisco, CA
- PCA/ALLIANCE - Property Company of America and General Capital Corporation, Tulsa, OK
- PHILIPS DEVELOPMENT CORP. - Real estate development, Denver, CO
- RSF VENTURES, LLC - Real Estate Development, Denver, CO
- STRIKER PETROLEUM CORP. – Land subdivision sales, Denver, CO
- THE BROE COMPANIES - Property management, San Diego, CA
- THE ROSS GROUP - Property management, Denver, CO
- TIMBERLAND INVESTMENT CO. - Real estate development, Evergreen, CO
- WEINSTOCK BELL - Real estate development, Los Angeles, CA
- WESTCLIFF SEVEN, LTD. - Land Development, Denver, CO
- WESTLAND PROPERTIES - Real estate development, Denver, CO

DEVELOPMENT RELATED SERVICES (1986 – 2002)

DEVELOPMENT & DESIGN REVIEW (1986-1992): Chairman of the Castle Pines Development Company Homeowner's Association Design Review Board. Chairman of the Regulations Subcommittee: revision of the Development Guide, Homeowner's Association Development Handbook and regulations. Castle Pines Village is a 1500 luxury home development with 2 PGA Championship Golf Courses, located 30 minutes southeast of Denver.

REHAB SYSTEMS, INC. (1988–1991): Rehab Systems, Inc., a subsidiary of Tiburon Group, Inc., provided technical assistance in multifamily renovation to private developers and Public Housing Agencies. The company's proprietary computer database and analysis software tools allowed users to better control the costs and the progress of complex substantial rehabilitation projects. Successfully implemented the renovation of approximately 1,500 multifamily housing units, under various HUD and FHA financing programs. The software programs were specially written to interface and correlate HUD/FHA cost formats with AIA MasterSpec formats for the purposes of cost estimating. Services included scope of work analysis, construction cost estimating and preparation of construction documentation for bidding.

PEAK FINANCIAL SERVICES (1988-1989): Peak Financial, a subsidiary of Tiburon Group, Inc., provided mortgage consulting, financial underwriting and correspondence services on approximately \$25,000,000 in FHA coinsured multifamily loans (221d4 and 223f). Services consisted of underwriting proforma and feasibility, applications, structuring of loan fees and cash requirements, partnership coordination of the sale of GNMA bonds, lender communications, owner's representative in application for Low Income Housing Tax Credits, and tax credit syndication sales with Boston Financial and Paine Webber Financial.

LICENSED REAL ESTATE BROKERAGE, SALES & MARKETING (1984-2002): Residential single family home sales as listing brokers and buyer's brokers, multifamily property acquisitions, land sales, subdivision sales and marketing.

CONSTRUCTION MANAGEMENT SERVICES: Project workout and construction management services:

- ELMWOOD/DEL MAR APARTMENTS (1989) - 96 Unit substantial rehabilitation, Aurora, CO
- FOX RUN APARTMENTS (1988) - 150 Unit substantial rehabilitation, Victoria, TX
- SPRING HILL APARTMENTS (1988) - 127 Unit substantial rehabilitation, Casper, WY
- SIERRA POINTE APARTMENTS (1987) - 160 Unit substantial rehabilitation, Las Vegas, NV

RESIDENTIAL DESIGN / BUILD SERVICES:

- JANOV RESIDENCE (1976) - 1,500 SF addition, Beverly Hills, CA
- ELKIND RESIDENCE (1982) - 10,000 SF custom residence, Cherry Hills Village, CO
- NICHOLSON RESIDENCE (1976) – Renovation, Beverly Hills, CA
- BLACK RESIDENCE (1975) - 7,000 SF historic renovation, Hancock Park, CA
- BRANDO RESIDENCE (1976) – Interior and property renovation, Beverly Hills, CA
- MARTIN RESIDENCE (1981) - 2,000 SF addition, Evergreen, C
- PHILLIPART RESIDENCE (1979) - 1,500 SF addition Evergreen, CO
- ROBINSON RESIDENCE (1979) - 3,500 SF custom residence, Evergreen, CO
- WEBSTER RESIDENCE (1980) - 4,500 SF custom residence, Evergreen, CO

ARCHITECTURE & DESIGN SERVICES: (1977-1994): Residential and commercial design, planning and development related services: public agency presentation, code and zoning analysis, land planning, site planning, construction cost analysis, architecture and interior design, bid coordination, contract negotiations and construction supervision.

ARCHITECTURE - SINGLE-FAMILY: (1975–1992): Architect of record / construction management; custom residences and renovations.

- BENNETT RESIDENCE (1980) - 6,000 SF custom residence, Evergreen, CO
- BLINDER RESIDENCE (1986-87) - 12,000 SF custom residence, Cherry Hills, CO
- EVERGREEN MEADOWS HOUSES (1978) - (2) 1,500 SF spec. residences, Evergreen, CO
- SHWAYDER RESIDENCE (1988-89) - 11,000 SF custom residence, Lakewood, CO
- GUN CLUB HOUSES (1980) - (2) 3,500 SF spec. residences, Aurora, CO
- HAWKINS RESIDENCE (1979) - 5,200 SF custom residence, Evergreen, CO
- TOWNE RESIDENCE (1977) 3,500 SF historic Rindge house renovation, Malibu, CA
- KNOEBEL RESIDENCE (1986) - 5,500 SF addition, Cherry Hills Village, CO
- LANIER RESIDENCE (1990-92) - 10,000 SF new construction, Denver, CO
- LAURITA RESIDENCE (1991-92) - 4,000 SF new construction, Evergreen, C
- PFISTER RESIDENCE (1986) - 5,000 SF custom residence, Larkspur, CO
- SCOTT RESIDENCE (1978) - 4,200 SF custom residence, Evergreen, CO
- WAHRMAN RESIDENCE (1989) - 1,800 SF addition, Los Angeles, CA
- BEATTY RESIDENCE (1975-77) - 11,000 SF custom residence Beverly Hills, CA, Project Architect / Construction manager under Tim Vreeland FAIA.
- WELLS RESIDENCE (1983) - 5,500 SF custom residence, Cherry Hills Village, CO
- WINN RESIDENCE (1987) - 3,500 SF renovation. Red Mountain, Aspen, CO

ARCHITECTURAL SERVICES - RESIDENTIAL: (1980-1993) Architecture, design and development consulting services to contractors and developers of single family and multifamily development.

- CARINTHIA, R.D. – Custom homebuilder, Denver, CO
- FIDELITY CASTLE PINES - Land developer, Denver, CO
- HALLMARK HOMES – Custom homebuilder, Denver, CO
- KUROWSKI DEVELOPMENT – Custom homebuilder, Denver, CO
- LEXUS HOMES – Custom homebuilder, Denver, CO
- NELSON – Private residence, Tulsa, OK
- NEWCASTLE CONSTRUCTION CO. – Custom homebuilder, Denver, CO

ARCHITECTURE - MULTI-FAMILY:

- AURORA EAST APARTMENTS (1987) - FHA Inspecting Architect / Clerk of the Works, 125 Unit rehab, Aurora, CO
- CITRUS VILLAS APARTMENTS (1988) - Consulting Architect, 35 Unit rehab, San Diego, CA
- ELMWOOD/DEL MAR APTS (1989-92) - Architect /Partner, 96 Unit rehab, Aurora, CO.
- FOX RUN APARTMENTS (1988-92) - Architect /Partner, 150 Unit rehab, Victoria, TX
- INDIAN SPRINGS APARTMENTS (1986) – Constr. Supervision, 400 Unit rehab, Tulsa, OK
- LAFAYETTE ST. CONDOMINIUMS (1986) – Architect, 32 luxury condo units, Denver, CO
- MANOR HOUSE/NORTH TRACE (1988) - Architect /Partner, 158 Unit rehab, Richland, WA

- PEACH EMERALD MANOR APTS (1988) - Consulting Architects, 40 Unit rehab, San Diego, CA
- RENAISSANCE APARTMENTS (1989-92) - Architect, 100 Unit renovation, Austin, TX
- SIERRA POINTE APARTMENTS (1987-89) – Constr. Mgmt., 160 Unit rehab, Las Vegas, NV
- SIERRA VISTA APARTMENTS (1986-87) - Architect, 209 Unit rehab, Denver, CO
- SPRING HILL APARTMENTS (1988-92) - Architect/Partner, 127 Unit rehab, Casper, WY
- WINDSOR COURT APARTMENTS (1987-88) – Architect, 144 Unit rehab, Aurora, CO

ARCHITECTURE – COMMERCIAL:

- BROADWAY WATER WORKS (1987) - Architect, Full service car wash, Denver, CO
- MARINA POINTE (1986) - Architect 25,000 SF office building - Littleton, CO
- THE PRIMAL INSTITUTE (1977) - Design/Build, Commercial renovation, Los Angeles, CA

ADDITIONAL DESIGN / DEVELOPMENT EXPERIENCE: Architectural design / project management:

- DAY CARE CENTERS (1971) - (2) 5,000 SF Community Center Day Care Centers, New York, N.Y., Developed for the New York Department of Social Services, Project designer for Frank Williams and Associates, Architects, FAIA.
- FORT GREEN PARK PLAYGROUND (1972) - Playground design for NYC Department of Parks & Recreation; Brooklyn, NY.
- PLANTATION GREEN CONDOMINIUMS (1973) - 475 Unit condominium, new construction, Plantation, FL, Architectural Associate/Project Manager for Frank Williams & Associates, Architects, FAIA.
- SUNRISE APARTMENTS (1974-75) - 375 Unit apartment - new construction, Sunrise, FL, Project Manager for Frank Williams & Associates, Architects, FAIA.
- THE BEVERLY APARTMENTS (1979) - 40 Unit apartment renovation, Beverly Hills, CA, Project Manager for Tim Vreeland FAIA at Kamnitzer Marks Lappin & Vreeland, Architects.
- ENVIRONMENTAL TASK FORCE & DOCUMENTARY WORKSHOP (1972) - City Planning Study for the City of Lockport, New York, in association with Lawrence Halprin & Associates and Hardy Holzman & Pfeifer Architects, New York City, NY.

EDUCATION

- Bachelor of Architecture (1971) - The Cooper Union School of Architecture, New York, N.Y.

FELLOWSHIPS & AWARDS

- Arthur Wolf Design Excellence Award (1969, 1971)
- Graham Foundation of Chicago: Fellowship in Urban Studies (1972)
- National Council on the Arts: Travelling Fellowship (1970)

ASSOCIATIONS

- AIA Committee on Education - Member (1970-1972)
- American Institute of Architects - Member (1986-1992)
- Environmental Defense Fund (1968-1988); Benefactor (1989 -1992)
- National Association of Industrial and Office Parks - Member (1989-1992)
- National Association of Realtors - Member (1985-1992)

LICENSES & CERTIFICATIONS

- Licensed Real Estate Broker (1998-2003); Colorado #24907
- Licensed Real Estate Sale; California (1993-2001)
- NCARB Certified; (current) Certificate No. 34,887
- Registered Architect; (current) Colorado #B2277

56-60
**MADERA
BOULEVARD**

CORTE MADERA
CALIFORNIA



Extremely Rare Central Marin
Redevelopment Opportunity

±238,273 square feet - Approximately 80,000 SF buildable



**Newmark
Cornish & Carey**

Haden Ongaro // 415.526.7649 // hongaro@newmarkccarey.com
Mark Carrington // 415.526.7650 // mcarrington@newmarkccarey.com

“ *Newmark Cornish & Carey, exclusive listing agent, is pleased to present the opportunity to purchase the fee simple interest in the property located at 56 – 60 Madera Blvd in Corte Madera, California.*

Located in scenic Marin County, the offering provides a unique opportunity to redevelop a major infill property located in the commercial heart of the Central Marin submarket.

”

property **highlights**

In its current state, the 5.47 acre (238,273 square-foot) property contains the Best Western Corte Madera Inn and an adjacent freestanding retail building, totaling approximately 82,000 square feet. The property is zoned C-3 Highway Commercial, which has a floor-area-ratio of 0.34. This allows 81,012 square feet to be built on the site, with a height limit of 35 feet.

The subject site faces Highway 101 and is located adjacent to the Corte Madera Town Center, a 370,151 square-foot regional mall anchored by Safeway, Rite-Aid, as well as featuring Barnes & Noble, Crate & Barrel & REI. The site is also across Highway 101 from The Village at Corte Madera, a 437,950 square-foot lifestyle center anchored by Nordstrom, Macy's as well as featuring The North Face, Banana Republic, Apple, Microsoft & Tesla.





56-60
MADERA
BOULEVARD
CORTE MADERA
CALIFORNIA

Central Marin is currently experiencing an extremely tight office market with strong demand for medical office space. The Central Marin overall office availability rate has dropped 1.28% from 1Q15 to 1Q16, from 9.55% to 8.27%. Over the same period of time, Class A direct full service asking rates in the submarket rose 16.57% from \$3.96/SF to \$4.62/SF. Currently, there are only five available offices spaces for lease in the Central Marin submarket which are larger than 5,000 square feet, none of which are larger than 9,000 SF.

200 Tamal Vista Blvd:
7,505 SF (three spaces contiguous)

2200 Larkspur Landing Circle:
5,147 SF (sublease)

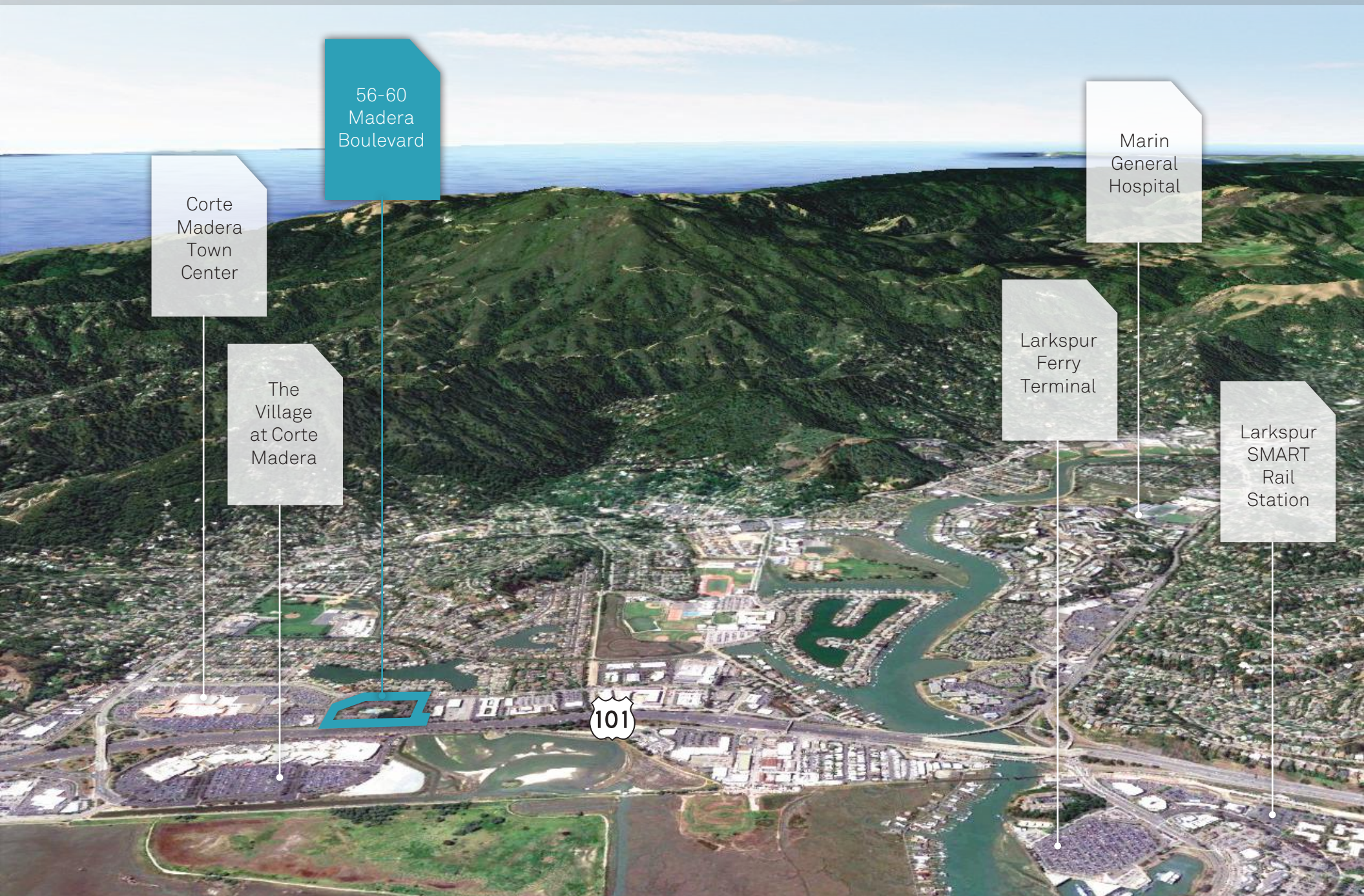
101 Larkspur Landing Circle:
6,211 SF (single space)

700 Larkspur Landing Circle:
6,526 SF (two spaces contiguous)

900 Larkspur Landing Circle:
8,869 SF (single space)

C-3 Highway Commercial zoning includes a wide variety of permitted uses. Office uses include medical offices, dental offices, medical laboratories, medical clinics, optometric shops, as well as general office use. Retail uses include schools, general retail, service retail, auto service, auto sales, bakeries, delis, restaurants, grocery stores, athletic clubs, nurseries and electronics repair, among others. Further uses are allowed with a conditional use permit.

The property enjoys immediate southbound access off of Highway 101, and is approximately 1.7 miles from the Larkspur Ferry Terminal, 2.5 miles from the Richmond-San Rafael Bridge, and 11.4 miles from the Golden Gate Bridge.



56-60
Madera
Boulevard

Corte
Madera
Town
Center

The
Village
at Corte
Madera

Marin
General
Hospital

Larkspur
Ferry
Terminal

Larkspur
SMART
Rail
Station



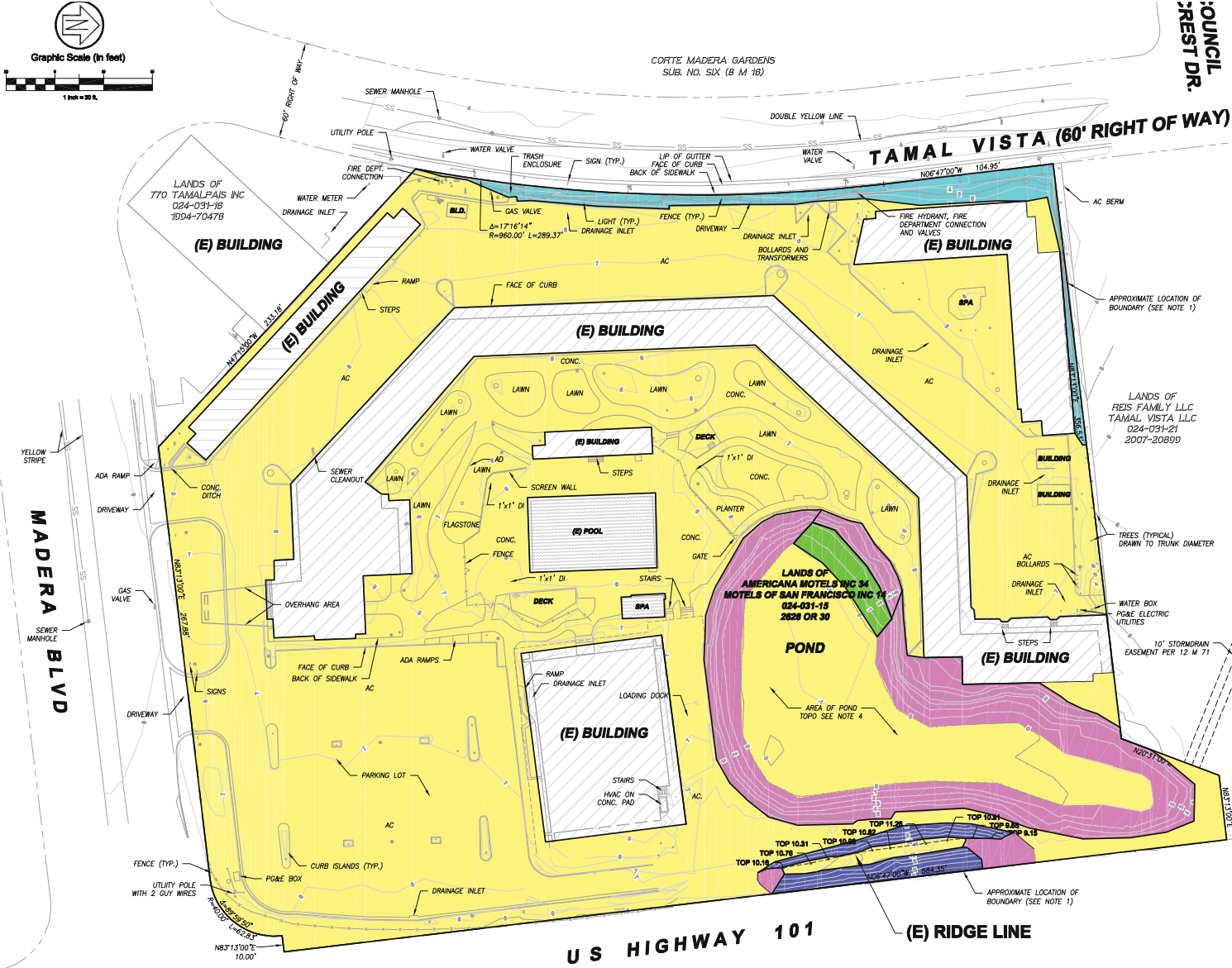
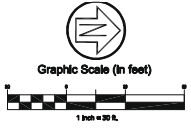
±238,273 square feet // Approximately 80,000 SF buildable

adjacent **property**



right **across the freeway**





SLOPE ANALYSIS

SLOPE	AREA (SF)
0%-9.9%	145,750± SF
10%-14.9%	1,407± SF
15%-19.9%	4,433± SF
20%-39.9%	16,787± SF
40%+	2,577± SF

LEGEND

---	APPROXIMATE BOUNDARY (SEE NOTE 1)
---	APPROXIMATE BOUNDARY ADJUNCTIONS
---	BUILDING
---	EDGE OF PAVEMENT/CONCRETE
---	FACE OF CURB
---	FENCE
---	CONTOUR MAJOR (5')
---	CONTOUR MINOR (1')
---	WALL AS NOTED

- SURVEY NOTES**
- BOUNDARY LINES SHOWN ARE FOR VISUAL PURPOSES ONLY BASED ON RETRACEMENTS OF RECORD MAPS RECOVERED FROM THE COUNTY OF MARIAN AND ARE SHOWN IN THEIR APPROXIMATE LOCATIONS RELATIVE TO EXISTING MONUMENTATION FOUND IN THE FIELD. SAID LINES ARE NOT THE RESULT OF A BOUNDARY SURVEY BY CSMWSTZ.
 - VERTICAL DATUM FOR THIS PROJECT IS BASED ON USGS 8-36, 1930. TAKEN AS ELEV. 8.483 NAVD 1929 (12.16 NAVD 1983). THE SURVEY HAS BEEN ADJUSTED TO NAVD 1988 DATUM BY CONVERTING THE NAVD 1929 DATUM USED PREVIOUSLY. THE CONVERSION/ADJUSTMENT USED WAS 2.667 FT.
 - THE BASIS OF BEARINGS FOR THIS PROJECT IS N03°15' E ALONG THE MONUMENT LINE OF CHOCASAW COURT AS SHOWN ON THE MAP OF MADERA GARDENS SUBDIVISION NO. SIX (8 M 16), MARIAN COUNTY RECORDS.
 - PORTIONS OF TOPO IN THE POND AREA IS BASED ON EXISTING CONDITIONS SURVEY BY CSMWSTZ DATED 12/22/03

ABBREVIATIONS

AC	ASPHALT CONCRETE	FL	FLOW LINE
AD	AREA DRAIN	GB	GRADEBREAK LINE
BLD	BUILDING	M	MAP
BLC	BUILDING	NAV	NORTH AMERICAN VERTICAL DATUM
CONC	CONCRETE	NOVD	NATIONAL GEODETIC VERTICAL DATUM
CP	CONTROL POINT	SD	STORM DRAIN
DEP	DEPRESSION	SSCO	SANITARY SEWER CLEANOUT
DI	DRAINAGE INLET	ST	STREET
DR	DRIVE	TBW	TOP BACK OF WALL
DWY	DRIVEWAY	TC	TOP OF CURB
EP	EDGE OF PAVEMENT	TYP	TYPICAL
FF	FINISH FLOOR	USA	UNDERGROUND SERVICE ALERT
		UTIL	UTILITY
		WV	WATER VALVE

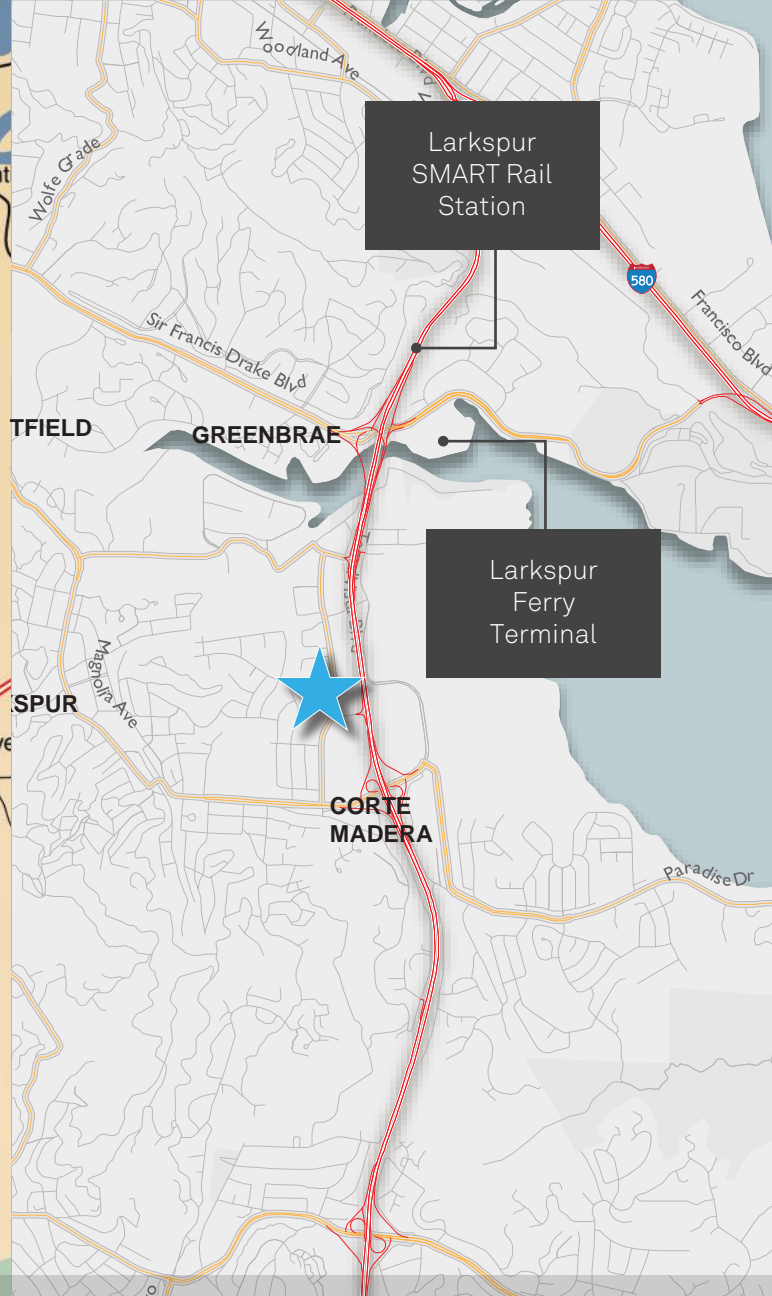
PRELIMINARY



±238,273 square feet // Approximately 80,000 SF buildable



Population	1 Mile	3 Miles	5 Miles
Estimated Population (2015)	8,934	85,353	143,050
Projected Population (2020)	9,451	90,313	151,671
Projected Annual Growth (2015-2020)	516	4,959	8,620
Historical Annual Growth (2010-2015)	500	3,454	6,273
Trade Area Size	3.1 sq mi	28.3 sq mi	78.5 sq mi
Households			
Estimated Households (2015)	3,811	32,372	56,886
Projected Households (2020)	3,922	33,471	58,849
Average Household Income			
Estimated Average Household Income (2015)	\$166,038	\$155,566	\$154,066
Projected Average Household Income (2020)	\$175,578	\$164,652	\$163,078
Median Household Income			
Estimated Median Household Income (2015)	\$109,345	\$102,522	\$104,252
Projected Median Household Income (2020)	\$112,453	\$103,807	\$105,768
Per Capita Income			
Estimated Per Capita Income (2015)	\$70,827	\$59,115	\$61,402
Projected Per Capita Income (2020)	\$72,874	\$61,131	\$63,403
Estimated Average Household Net Worth (2015)	\$1,438,534	\$1,372,459	\$1,411,821



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Cornish & Carey**

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Listing
Agents

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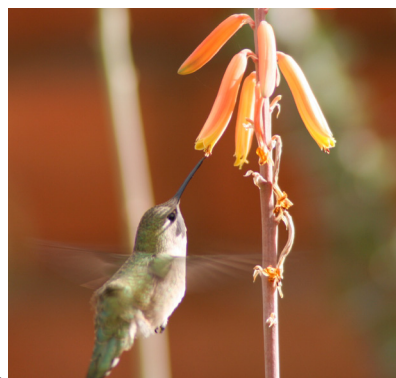
The information contained herein has been obtained from sources deemed reliable but has not been verified and no guarantee, warranty or representation, either express or implied, is made with respect to such information. Terms of sale or lease and availability are subject to change or withdrawal without notice.

Our June Speaker Series will be on the **FIRST THURSDAY**. Turn to page 2 for more information.

THURSDAY, MAY 14 7:30 PM

Mutualism: A Lesson In Perspective

With Joe Mueller



Joe Mueller

Anna's Hummingbird

Our world, in every aspect, is interconnected. Mutualism is everywhere—from the foundation of coral reefs to the very cells that compose us—but few would know it. Even biologists rarely discuss the underlying significance of this type of symbiosis. Join us for an intriguing discussion on evidence for why mutualism is so foundational for ecological systems, how it can be applied to human systems, and why following this type of natural philosophy would solve the human predicament.

Joe Mueller has been teaching biology at the College of Marin for 25 years. Of the 15 different courses he has taught, subjects of particular interest include ecology, marine biology, ornithology and environmental science. Taking a holistic approach to science, Joe emphasizes the interconnective approach to understanding biology. Always fun and light-hearted you're sure to enjoy your time while learning. Joe is the recipient of the 2008 Terwilliger Environmental Award.

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The Rail

MARIN AUDUBON SOCIETY

MAS Annual Meeting, May 12

You are invited to join us for Marin Audubon Society's Annual Meeting at which Board members will be elected. This year our Annual Meeting is on Thursday, May 12. The election will take place just before our Speaker Series program (see adjacent column for details on our Speaker program for that date).

As a non-profit membership 501(c)(3) organization, members of Marin Audubon Board of Directors are elected by our members. At the meeting we will also have a brief overview of the past year's activities. MAS's fiscal year is July 1 through June 30.

This year our Nominating Committee presents the following nominees who will be new to our Board: **Matthew Perry, William**

Legge, and Everett Clark. Brief bio's for William, Everett and Matthew were presented in the April issue of *The Rail*. **Martha Jarocki** is also up for reelection. As a current member of our Board, Martha is already a familiar face and has been serving us well as Publicity Chair and Chair of our Mother's Day Picnic at Audubon Canyon Ranch.

Thank you to our 2016 Nominating Committee for their diligence and success: Chair **Jane Medley, Ed Nute and Phil Peterson.**

We hope you will exercise your right as a Marin Audubon member and join us to elect Board members for the coming year, and to see what we are sure will be a spectacular program by College of Marin ornithology Professor **Joe Mueller.**

SF Bay Habitat Restoration Measure AA

Measure AA on the June 2016 ballot will impose a \$12 parcel tax on properties in the nine Bay Area counties for the next 20 years to restore wetlands. The ballot language describes the purpose of the tax as "to protect and restore San Francisco Bay to benefit future generations by reducing trash and harmful toxins, improving water quality, restoring habitat for fish, birds and wildlife, protecting communities from flooding, and increasing shoreline public access and recreation areas."

A two-thirds majority of all voters in the Bay Area is needed for Measure AA to pass. It is expected to generate \$500 million. The tax "... may fund projects along the Bay shorelines within the Counties of Alameda, Contra Costa, Marin, Napa, Santa Clara, San Mateo, Solano, Sonoma and San Francisco ..." to benefit water quality, habitat, flood control and recreation.

According to the Measure, 50% of the total new revenue will be allocated to the four Bay Area regions, the North Bay, which includes Marin, the East Bay, West Bay and South Bay, in proportion to population, and that no more than 5% may be used for administrative

costs. The North Bay's share would be 9% and Marin's would likely be 2-3%. The Measure provides that the remaining 45% "shall be allocated consistent with provisions of this Measure."

Measure AA includes criteria that will guide decisions on approving projects. The #1 priority for evaluating projects is having the "greatest positive benefit to the Bay as a whole," and priority #2 is that a project will have the greatest long-term impact. Additional criteria include: benefit to future generations and economically disadvantaged communities; geographic distribution, i.e., ensure projects in each of the nine counties; engage youth; prevent pollution; provide clean water, vital fish and wildlife habitat and shoreline public access; provide flood protection including addressing climate change; and is consistent with the Bay Conservation and Development's Coastal Zone Management Program and San Francisco Bay Joint Venture Implementation Strategy.

The Restoration Authority, which has already been established and consists of a governing

continued on page 4

BOARD OF DIRECTORS

All phone numbers are in the 415 area code unless otherwise noted. Questions? Please contact the appropriate Board member.

President	Barbara Salzman 924-6057
Vice President	Lowell Sykes 388-2821
Secretary	Mariah Baird 456-3355
Treasurer	Josephine Kreider 707/230-3553
Finance Chair	Greg Block 479-8254
Conservation	Phil Peterson 828-4780 Barbara Salzman 924-6057
Field Trips	Vicky Van Meter 299-2514
Fundraising	Flinn Moore Rauck 892-7554
Speaker Series/Programs	Board Members
Special Projects	Jude Stalker 668-1242
Nominating	Phil Peterson 828-4780
Editor, <i>The Rail</i>	Bob Hinz, 383-8688
Volunteer Coordinator	Katy Zaremba, 847-9933
Property Management	Ed Nute 669-7710
Publicity	Martha Jarocki 461-3592
At Large Board Member	Jane Medley 559/760-1551
BAAC Reps	Lowell Sykes 388-2821 Barbara Salzman 924-6057

DIRECTORS MEETINGS

Meetings open to members. If you wish to attend please call 924-6057.

6:30 PM, First Tuesday of the month
Richardson Bay Audubon Center
376 Greenwood Beach Road
Tiburon, California 94920

MAS telephone: 721-4271 (for messages only)

Marin Audubon Society is a nonprofit 501(c)(3) organization. All memberships and contributions are tax-deductible to the extent allowed by law.

The Rail is published ten times a year by the Marin Audubon Society on 100% recycled paper; edited by Bob Hinz rbrthnz@comcast.net, 383-8688; assisted by other members of MAS; and designed by Studio NaCl (www.studio-nacl.com). Deadline is the first of each month.

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Website: www.marinaudubon.org
Northern Calif. Bird Box: 681-7422
(Provided by Golden Gate AS)

Members can receive *The Rail* electronically instead of a hard copy by emailing joandbijou@sbcglobal.net

DONATIONS APPRECIATED!

Marin Audubon Society welcomes gifts of funds, stock, or property, and bequests in general, or in honor or memory of someone. Gifts may be directed to any MAS project. Unspecified gifts of more than \$100 will be placed in the Endowment Fund for conservation, the protection of wildlife species and the preservation and enhancement of wildlife habitats. Since MAS is an all-volunteer organization, 100% of your donation goes to its projects. All gifts are tax-deductible and will be acknowledged in *The Rail*, as well as personally on behalf of the Society. Checks should be made out and mailed to: Marin Audubon Society, P.O. Box 599, Mill Valley, CA 94942.

MISSION STATEMENT

To conserve and restore natural ecosystems, focusing on birds and other wildlife and their habitats, for the benefit of humanity and the earth's biological diversity.

PRESIDENT'S MESSAGE

By Barbara Salzman

At its April meeting, the Marin Audubon Board voted to endorse Measure AA (see article on page 1) which will be on the June ballot. We urge a "yes" vote to continue the much-needed restoration work of Bay wetlands and endorsed a resolution, with a few modifications, suggested by Audubon California. We also voted to contribute \$500 to support the measure and to co-sponsor a campaign event at Larkspur Landing.

We apologize for not getting our April issue of *The Rail* out to you more promptly. Unfortunately it did not reach members until well after the last hearing on GGNRA's dog management plan. We hope you had a chance to comment online or via US mail. You still can comment to local legislators (see page 5).

We have several important events coming up. Our Annual Meeting is on May 12 at which you will vote for directors for the coming year and hear a great program by College of Marin's Professor Joe Mueller. Our Mother's Day Picnic is also coming up on, of course, Mother's Day May 8. This is always a fun event in a special place, Volunteer Canyon, and we hope you will join us. Griffin Canyon will be open again for you to visit, although the herons have not

returned to nest.

Marin Audubon has registered for Amazon-Smile, which is an easy way to donate to Marin Audubon every time you shop at Amazon. If you identify Marin Audubon Society as your selected charity, 0.5% of your purchase price will be donated to MAS. The cost of the items is the same and thousands of products are eligible. Visit <https://smile.amazon.com/ch/94-6076664> for more information.

We've begun to plan for an event to celebrate Marin Audubon's 60th Birthday—it is tentatively scheduled for a weekend in mid-October. Save the dates.

Thanks to volunteers who signed up for the Brown Pelican survey and especially to William Legge who reached out to the volunteers. We are pleased to be able to participate in this important study that aims to find out why the Brown Pelican population is declining.

And finally, don't miss the last of our migratory shorebirds and waterfowl as most head north to breed, and do get out and enjoy the landbirds that are breeding here. Don't forget that there may be small birds nesting in your plants. Do your tree cutting and brush trimming after nesting season wherever possible.

SPEAKER SERIES: THURSDAY, JUNE 2

7:30 PM

FIRST THURSDAY!

Herons and Egrets – Ecology and Regional Status and Trends

With John Kelly



Len Blomin

Great Egret

There are no better iconic symbols of Audubon than the majestic herons and egrets that are so commonly seen feeding in the tidal marshes of the San Francisco Bay. The successful campaign to save these beautiful birds from extinction in the early 1900s led to the foundation of the National Audubon Society. The movement to save one of the largest nesting colonies in coastal California from development was launched in the 1960s by the Marin Audubon Society (supported by the Madrone, Sequoia and Golden Gate Audubon Societies) and resulted in the founding of

Audubon Canyon Ranch.

As the Director of Conservation Science at Audubon Canyon Ranch (ACR), John Kelly has been monitoring, researching and reporting on the herons and egrets found throughout the North Bay region for 27 years.

In his presentation, John will provide a solid look at heron and egret ecology and conservation, with anecdotes and natural history, report on regional status and trends, describe disturbance patterns, climate effects, wetland values and more.

At ACR John develops and oversees programs in conservation research, ecological restoration and natural resources management on ACR lands and associated systems, such as Tomales Bay. Before coming to ACR in 1988, John worked as a biologist and educator for several public and private organizations. He holds a doctorate in ecology from the University of California, Davis, and a master's degree in wildlife from Humboldt State University.

MAS FIELD TRIPS

Open to the public

No need to sign up for one-day trips, just join us. Bring lunch, snacks, water, field guide, and binoculars. For information, accessibility and weather check: Vicky Van Meter, 415/299-2514, vicky.vanmeter@gmail.com or co-host, Jane Medley, 559/760-1551, janermedley@gmail.com.

CHECK OUR WEBSITE FOR THE MOST RECENT UPDATES.

LAS GALLINAS STORAGE PONDS

San Rafael

Thursday, May 5, 2016, 9 AM to Noon
With Susan Kelly, Len Blumin and friends

Join Susan and Len for a walk around the Las Gallinas Storage Ponds. Birders of all levels are welcome. Spring is a busy time at the ponds with opportunities to view a variety of nesting birds including Marsh Wrens, Common Gallinules, several colorful duck species, as well as the non-native Mute Swans, which successfully fledged nine cygnets in 2015. Dress for all weather and bring water. We'll be walking about 2 miles on the flat levees that surround the ponds. Heavy rain cancels.

DIRECTIONS: From Hwy 101 take the Smith Ranch Road exit, then go east on Smith Ranch Road toward the McInnis Park entrance. Turn left immediately after crossing the railroad tracks, stay on Smith Ranch Road, and go about 0.5 miles to the end of the road at the Las Gallinas Ponds parking lot. Meet the group by the bridge just past the parking lot. Late arrivals should easily be able to find the group. There are rest room facilities only at the parking area.

BIG ROCK TRAILHEAD TO LOMA ALTA TRAIL

Thursday Morning Bird Songs

Thursday, May 12, 2016, 7:30 AM to Noon
With Lisa Hug and Susan Kelly

Spring is the best time of year to hear and learn bird songs. Males are full of hormones and bursting with song. Many neo-tropical migrants are returning and vying for mates and territories. It is a very exciting time of year. This walk will require participants to stay quiet to enable us to listen to the myriad of bird sounds. Bring comfortable walking shoes, layered clothing, water, binoculars, field guides and snacks.

This trip is limited to 15 participants. To sign up, email Jane Medley at janermedley@gmail.com. Please include your phone number. Participants will be contacted prior to the trip to confirm registration. A wait list will be created if registration exceeds available spaces.

DIRECTIONS: From Hwy 101 in San Rafael, take the exit for Lucas Valley Road west approximately 5.5 miles (look for the big rock). The trailhead is on the north side of Lucas Valley Road.

MUIR WOODS, REDWOOD CREEK AND MUIR BEACH

No. 5, Birding in Marin (BIM) Series

Saturday, May 21, 2016

8:30 AM to mid-afternoon

With Jim White and Bob Battagin

May is the height of the breeding season in Marin. Join Jim and Bob as we visit Muir Woods, Redwood Creek and Muir Beach. We will start the morning in Muir Woods where we will bird along Redwood Creek and hear the beautiful songs of Swainson's Thrushes, Black-headed Grosbeaks and Pacific Wrens, along with Warbling Vireos, Wilson's and Orange-crowned (perhaps MacGillivray's) Warblers. We may or may not go into the Park but bring your Senior Pass if you have one. Entrance fee is \$10/adult. We will then

check out the restored riparian area at Muir Beach and picnic there. Scanning the ocean, we usually find Pigeon Guillemots, Common Murres, Pelagic and Brandt's Cormorants, grebes, loons and Black Oystercatchers. We plan to walk several miles. Bring bins, scopes and lunch; dress in layers. Carpool if possible.

DIRECTIONS: Meet in the lower parking lot (sign says "Additional Parking") at Muir Woods. From Hwy 101 take the Mill Valley/Hwy 1/Stinson Beach Exit. Follow the signs to Hwy 1 and then to Muir Woods. The address is 1 Muir Woods Road, Mill Valley.

HAMILTON WETLANDS FOR YOUNG BIRDERS, Novato

Saturday, May 28, 2016, 8:30 to 10 AM

With Mark Forney

Do you know a child who might enjoy learning about birds and the natural world in the company of other children? Help Marin Audubon build a young generation of bird lovers and nature stewards by sharing the joys of birding with a young person (15 and under invited). Parents, grandparents, and friends are invited to accompany the special children in their lives for a morning of bird watching with Mark. We hope this field trip becomes an important monthly offering and request your help in recruiting participants and getting this program established. Bring binoculars if you have them.

DIRECTIONS: We will meet at South Hamilton Park playground at Hamilton Field. From the south on Hwy 101 take the Nave Drive/Hamilton exit, and from the north use the Ignacio Blvd. exit. Follow Main Gate Road, go right on South Palm, and then turn right on Hangar Avenue. The South Hamilton Park parking lot is at the intersection of Hangar Avenue and Maybeck Street. From the parking lot, walk along Hangar Avenue south to its end, and you will see the playground ahead on the right.

BIRDING FOR BEGINNERS

OLOMPALI STATE PARK, Novato

Sunday, May 29, 2016, 9 to 11:30 AM

With Rich Cimino and Janet Bodle

Are you curious about our local birds and want to learn more about them but need some guidance to deepen your appreciation? This second in a series of field trips for beginners will help you become more confident and skilled in bird identification with the use of binoculars, scopes and field guides. Participants will learn how to identify local resident birds of Eastern Marin County with this trip focusing on species found in the oak woodland/oak savannah habitats at Olompali. Resident species as well as recently arrived spring migrants will be busy singing and nesting, so there should be a variety of birds to hear and see.

DIRECTIONS: Take Hwy 101 to the Atherton Avenue/San Marin Drive Exit in Novato. Head west, crossing over Hwy 101, then turn north onto Redwood Boulevard to the park entrance on the west side of the highway. We will meet in the large parking lot. There is an \$8 registration fee paid through self-registration. There is a portable toilet in the parking lot.

FORT MASON AND CRISSY FIELD

San Francisco

Tuesday, May 31, 2016, 8 AM to Noon

With David Assmann

Bird two of San Francisco's hotspots with David. Fort Mason has a variety of habitats in a very compact area at the northeast corner of San Francisco and has an eBird list of 97 species for May. We'll look for late migrants, including flycatchers and warblers, and scan Aquatic Park for water birds. We'll also look for nesting birds such as Downy Woodpeckers, Hooded Orioles, and Pygmy Nuthatches. Then we'll travel to Crissy Field, our second hotspot on the northern shore of San Francisco, where we'll look for loons, terns, ducks, and shorebirds.

DIRECTIONS: Enter Fort Mason at Bay and Franklin (It's at the very end of Franklin Street). There should be ample free parking. Make sure you do not park in reserved spots. We will meet at the gate on the east side of the Community Garden at 8 AM.

ALCATRAZ ISLAND

History and Birding on "The Rock"

Tuesday, June 21, 2016

Boat leaves at 8:45 AM, Trip ends early PM

With Ranger John Cantwell and

Karen Vandergrift

This special trip to Alcatraz is designed for people who are interested in both the human and natural history of the island and varies from our usual trips focusing more exclusively on birds.

We will begin our morning with a special tour of the island led by Ranger John Cantwell who has worked on Alcatraz for 25 years and currently supervises all National Park Service operations there. Our walking tour will highlight the island's layers of history including the Civil War, Army, Federal Prison, Indian Occupation, and National Park Service eras. Our special behind-the-scenes tour may include visits to the Officer's Gun Gallery, the Dungeon, and an extremely rare opportunity to climb to the top of the Lighthouse!

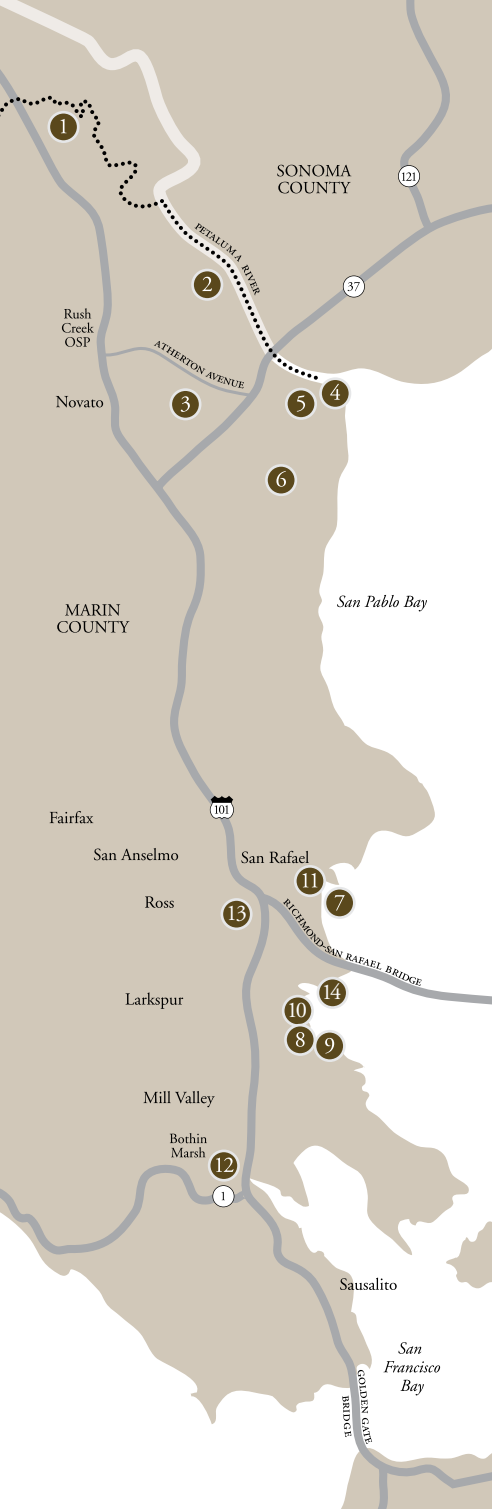
The second half of the tour will focus on the island's natural history and bird life with opportunities to view breeding colonies of Western Gulls, Brandt's Cormorants, Pigeon Guillemots, Black-crowned Night-Herons, and Snowy Egrets. Our guide, Karen Vandergrift, leads tours as a Waterbird Docent and has adopted Alcatraz as her "patch" in conjunction with training as a Master Birder. She will share her observations of the natural history and bird life of the island as we tour several active nesting sites.

Be sure to wear comfortable shoes, as we will be covering 2 miles, sometimes on steep and uneven paths. Bring water, a lunch, layered clothing, and binoculars.

The trip is limited to 25 participants with a cost of \$21 each for the round-trip boat ride. We will depart from Pier 33 on the 8:45 AM boat. The tour will end in the early afternoon. However, after the tour, participants may stay on the island and return on any boat they wish. To sign up, register online at www.marinaudubon.org. Additional information will be sent before the trip to confirm your reservation. For further information, contact Jane Medley at janermedley@gmail.com or 559/760-1551.

CONSERVATION

Marin Audubon Conservation Committee reviews critical issues related to wildlife habitats and comments to cities, agencies, and other jurisdictions. To attend, phone Barbara Salzman at 415/924-6057.



Measure AA

continued from page 1

body of elected officials from around the Bay, would manage the tax revenue and approve projects to be funded. This governing body can amend Measure AA by a majority vote of its members to further purposes of the Measure. An Advisory Committee will advise the Authority about implementation and will make recommendations about expenditure priorities. An independent Citizen's Oversight Committee, consisting of six members appointed by the Authority, will review conformance with the Measure and advise the Governing Body on the allocation of funds.

Benefits for the Bay and Wildlife

The funds generated by Measure AA would unquestionably benefit San Francisco Bay and the resident and migratory wildlife that overwinter, move through or reside here permanently. Most of the waterfowl and shorebirds of the Pacific Flyway depend on this estuary for some part of their life cycle.

Measure AA will enable the significant restorations that have taken place around the Bay to continue, primarily by restoring significant properties that have already been acquired. The priority criteria list and explanations make it clear that Measure AA is focused on restoring large properties that are already in protective ownership. These are primarily owned by government agencies. The largest example is the South Bay Salt Ponds which were acquired from Cargill about 10 years ago. While a thousand acres of the South Bay Salt Ponds have been restored, there are still about 15,000 acres that need restoring. One large site in Marin that would be a likely priority is the 1,600-acre Bel Marin Keys property that is owned by the Coastal Conservancy and is awaiting restoration.

Bay wildlife would also benefit from projects that provide flood protection, particularly if natural systems such as marshes are used, and through projects that prevent pollution and reduce toxins.

Benefits for Marin County Baylands

Marin Audubon will certainly apply for Measure AA funds for acquisition, restoration and monitoring. We would be eligible for grants, but how we would fare in evaluations with larger properties that would likely be viewed as having a greater benefit is uncertain.

Supporters of the measure compiled a list of Examples of Projects Anticipated to be Eligible

for Grants from Measure AA funds. Marin County has fifteen parcels on the list and of these six are Marin Audubon projects. Several years ago, we were asked to provide our project funding needs for inclusion on the list. Among the MAS projects are monitoring of restoration projects we have already implemented. The full list includes 55 projects that are from all of the Bay Area counties as well as Bay Area-wide projects, such as the Invasive Spartina Project.

Although spending Measure AA funds for acquisitions is not explicitly prohibited, it is clearly not a priority. According to the publicity "acquisition simply won't be a priority because there is plenty of work to do on land already acquired." As long-time MAS members know, our approach is different. We want to acquire properties so they are in protective ownership. Habitat restoration can follow later. In our view, if properties are not acquired when the opportunity arises, they may be developed and lost forever.

Because this is a parcel tax, the question has been raised whether MAS would have to pay it. As mentioned above, the measure specifically provides that "Properties that are exempt from paying ad valorem property taxes in any given year would also be exempt from this parcel tax in that year." This would exempt Marin Audubon from paying this parcel tax on the 30 parcels we own, because as a 501(c)(3) organization, we are exempt from property taxes.

The tax will undoubtedly have overall benefits for the Bay and our wildlife, even if we are unable to get grants for smaller Marin County properties that may be available for purchase.

WHAT YOU CAN DO:

Much is yet to be done to restore baylands and protect the Bay wildlife and habitats. VOTE FOR MEASURE AA on the June ballot.

UPDATES

GGNRA Dog Management Plan Progress

GGNRA staff has held two meetings in Marin County on the subject of the Dog Management Plan. Both were heavily attended by folks who wanted more places to walk their dogs off-leash. The speakers seemed to be largely from the Oakwood Valley/Sausalito area who are angry about losing the ability to walk off-leash dogs on neighboring GGNRA lands.

Acting on the direction of a now defunct Citizen's Advisory Committee, GGNRA unfortunately allowed off-leash dog walking for

MARIN AUDUBON PROPERTIES

1. Petaluma Marsh	180 acres
2. Bahia	60 acres
3. Simmons Slough	144 acres
4. Norton Avenue Pond	4 parcels
5. Black Point Parcels	2 parcels
6. Arroyo San Jose	2 parcels
7. Tidelands at Murphy's Rock	34 acres
8. Corte Madera Marsh	1.8 acres
9. Triangle Marsh	31 acres
10. San Clemente Creek	4.34 acres
11. Tiscornia Marsh	20 acres
12. Arroyo Corte Madera del Presidio	2 acres
13. Cal Park	<1 acre
14. Corte Madera Ecological Reserve Expansion Site	5.2 acres

many years. As a result, some nearby residents came to consider GGNRA lands as their backyard with the right to walk their dogs off-leash there.

Two speakers spoke in support of the Plan at the first hearing and six at the second. One was a father who spoke of his son having been bitten by an off-leash dog. Superintendent Lehnert and other staff conducted an informative presentation about the National Park Service's responsibility to protect natural resources and responded to questions. Opponents of the Plan were clearly not interested in the responses.

Of course, GGNRA lands belong to all of us and the Park Service's primary responsibility is to ensure protection of its resources, both natural and cultural. Dogs, particularly off-leash, threaten resources in many ways. Dogs trample vegetation, spook and run after wildlife, and are unnatural predators in the GGNRA habitats. Who hasn't seen dogs on beaches running after birds, dispersing flocks of shorebirds. Dog droppings (sometimes wrapped in plastic bags which only make it worse) and urine leave foreign odors and further disrupt the natural habitats. Although perhaps unusual, dogs do sometimes catch wildlife—just last week we had a report of an off-leash dog that caught and killed a duck on Corte Madera Creek. Studies have shown that wildlife use near trails frequented by dogs is less than away from trails. Wildlife have even less habitat available to them when they need to avoid areas with dogs running loose. And, of course, off-leash dogs disturb human visitors. Some people are afraid of dogs, don't like dogs or just want to enjoy the natural habitats without dogs.

Thank you to all who wrote GGNRA in support of species and habitat protection. It will undoubtedly be too late to write by the time this newsletter is published, but it will not be too late to contact legislators (see below).

A law suit by a dog advocacy group seeking to obtain GGNRA records on dog incidents has just been announced. Apparently they don't believe that many people have complained.

WHAT YOU CAN DO:

There is still time to follow up on the information from Golden Gate Audubon Society that a campaign is underway to influence federal elected officials to pressure the Park Service to weaken the Management Plan. The congressional representatives need to hear from supporters. Send your email in support of the GGNRA Management Plan to:

Congressman Jared Huffman (huffman.house.gov/contact/email-me);

Congresswoman Nancy Pelosi (pelosi.house.gov/contact-me/email-me) and

U.S. Senator Dianne Feinstein (www.feinstein.senate.gov/public/index.cfm/e-mail-me).

Saga of the Corte Madera Inn

At its March meeting, the Corte Madera Planning Commission voted to support the applicant's project which is slightly reduced from 187 to 174 rooms/suites and includes destroying the pond. Most of the speakers' comments included support for keeping the pond. Those in support of the project felt the Town needed more motel space and that the owner is a nice person, a good citizen – as if a person's personality should have anything to do with approving a development project.

Several prominent residents specifically advocated to destroy the pond. One stated that the pond could be filled because Corte Madera has already saved enough wetlands. Several others wanted the pond gone because they think it smells and is ugly. I felt like I was in another place and time 100 years ago when we lost 90% of our wetlands because people didn't know their value and wanted to fill them for financial gain. Having some wetlands left does not justify filling any of those remaining, it means we should hold on to what we have.

All natural habitats have odors. Some smell like roses, some smell like soil, others have less pleasant odors. Natural systems and processes smell as organic matter decomposes. Some systems smell because they are poorly managed. One of the speakers raved about Corte Madera's lagoon #1. She did not seem to realize that it, too, is a completely managed system, carved out of tidal marsh just as is the Corte Madera Inn Pond. It differs in that it is larger, deeper and apparently more responsibly managed by the Town.

The Commissioners did not seem to care about or question the biological consultant's evasions, conflicting, incomplete and inadequate reports and biases. It didn't matter that they claim to have surveyed the pond in one report for two years and in another for four years, but they never reported seeing the Black-crowned Night-Heron roosting colony, until we and a few other members of the public did, nor that they mention seeing any waterfowl, shorebirds or other water birds, which we see regularly during our winter visits. Nor did the Commission notice or care that the project did not comply with several of the natural resource protection policies and programs of the General Plan.

It was surprising to me to see the city manager, who has not appeared at other hearings, present and respond to what appeared to be a set up question by the Commission Chair about the value of the pond for flood control. He repeated his view that the pond has no value for flood control and that it is difficult to manage for the Town employees. Developments should benefit communities, and this can happen in

many ways but it doesn't usually cover making employee work easier. I don't think I can recall any time when a prominent staff person spoke at a hearing sending the clear message, although he did not say it directly, that they should vote for destroying a natural resource because it would make work easier for employees.

Let's hope the Council can see the broader picture.

WHAT YOU CAN DO:

The Planning Commission is expected to take a final vote on the project in mid-May and then it will go to the Town Council. Email or write your comments to the Commission and Town Council: 400 Tamalpais Drive, Corte Madera, CA 94925.

WELCOME NEW MEMBERS

Elizabeth Arnold, Tom Bates, G. Belsky, Mary Berger, Anne Bernhard, Jeffrey Anderson & Bonnie Bompert, Stephen M Braitman, Michael Brown, Jacklyn J Cato, Dr. Ronald Cavanagh, Leah D Chelemedos, Sheila Codoner, Jon Cosner, John Dahl, Michele Dillard, Pamela T Dixon, Jennifer Dorsey Browne, Daniel Dunn, Bonnie Edwards, Hans J Fallant, Janelle Fazackerley, Rachel Fierberg, Cecil Finch, Dechen Fitzhugh, Joan Franc, Millie Froeb, Rachel Ginis, Stephen Hahn, Lisa Hauck-Loy, Micheal Ina, Kitty Jacobson, Jim Kaneko, Oleksandr Kovalchuk, Linda Krause, Sali Kriegstein, David E Kurland, Karen Lavsa, Donald Leonard, Jane Lesh, Austin Lowery, Thomas W Lundy, Tom Maloney, Eliezer T Margolis, Bob & Karen Martin, Alice C Martin, George Mc Neil, Joan Mickle, Jennifer L Miller, Norman Miller, Jerry Miller, Gayle & George Mills, Ted Murray, Sarah Nolen, Alexander J Piccinini, Susan Plotnick, Melissa Polick, S R Politzer, Bernice Rehnen, Sophia Reinders, Marjorie Reynolds, Linda Roberts, J M Rosales, Delrae Roth, Thelma Rubin, Joan W Sadler, Mary L Sammis, Kerilyn Sappington, Morri Schiesel-Manning, Nan Schow, Sharon Sherrard, Joanne Sidwell, Jay Smalridge, Margaret Thayer, Sarah Tiederman, James G Tipton, Anita Torres, Gary Von Wittenmeier, Steve Voss, Miranda Wagner, Williamson Travel LLC, David Wimpfheimer, Vennie Yancy, Eric Yunker, David Zoellner, Joey Zwillinger

HABITAT STEWARDSHIP PROGRAM

The seed season is well underway. Radish, Italian thistle, various nonnative annual grasses and purple needlegrass, a native grass, are blooming and forming seeds. Harding grass will be producing seed heads soon. May will be the last chance to stop radish and Italian thistle before their seeds mature. Harding grass, a perennial, can always be dug out of the ground but, because there is too much to remove it all in one (or several) seasons, we will be cutting it back to stop seed production.

Act locally and join us on a workday. You would make a difference.

We have the tools, gloves and snacks. We generally work until about 1 PM, but even an hour is valuable help. Everyone is welcome.

VOLUNTEER WORK DAYS

Triangle Marsh, Corte Madera:

First Saturdays: May 7, June 4

Meet at 10 AM on Paradise Drive directly across from the main Ring Mountain trailhead.

Bahia, Novato:

Second Saturdays: May 14, June 11

Meet at 10 AM at the end of Topaz Dr. near Bolero Ct. and the tennis courts.

If you would like to help, contact Katy Zaremba at 415/847-9933 or volunteercoordinator@marinaudubon.org for more information.

THANK YOU TO OUR STEWARDSHIP VOLUNTEERS

Debbie Ablin, Bob Bundy, Johnnie Chamberlin, Dave Chenoweth, Andrew Fisher, Fred Goff, Bob Hinz, Theo Lesser, Will Metz, Flinn and Demetrius Rauck, Alec Sievers, Jude Stalker, Lowell Sykes, Timothée Walters

Presentation by State Water Board Member

Join us at the Larkspur-Corte Madera Police Department on Thursday, May 25 to hear Marin's own member of the State Water Resources Control Board, Steve Moore, talk about:

- What the State Water Board does
- The state of California's water
- Will the Bay get more water

This presentation is co-sponsored by MAS and the Marin Conservation League Water Committee.

HABITAT STEWARDSHIP



Another clump of Harding grass is uprooted along the Eastern Peninsula at Bahia.

BAHIA

Despite or perhaps because of the rain, we had a delightful day at Bahia this month. Seven volunteers removed many big Harding grass clumps along the Eastern Peninsula before they had time to send up their seed heads and spread.

Harding grass is a tall very invasive perennial bunch grass that can spread quickly by seed and threaten the native plants established there. The work done on Saturday was a huge help to the native plantings and very much appreciated.

Thanks to the students from the Branson School and San Marin High School as well as our MAS members. Also, thank you to the Center for Volunteer and Nonprofit Leadership for their part in recruiting some of the volunteers.

The fence to protect the Eastern Peninsula for wildlife was installed on April 14-15.

CORTE MADERA

Planning for restoration projects is always a long and tedious task that extends usually for years—considerably longer than the actual construction work. For our newest property, we've begun working on the applications for Army Corps of Engineers, Regional Water Quality Control Board and Bay Conservation and Development Commission permits, finalizing our Initial Study in compliance with the California Environmental Quality Act (CEQA) and developing engineering plans for the project design. Also we have ordered signs to alert people that our restoration will change the property and their ability to use it, as well as to inform them that the property is for wildlife and urge them to keep their dogs on-leash and pick up after them.

It's looking more and more like we may not be able to construct the restoration project

until fall of 2017 instead of 2016 primarily because of requirements of the federal grant. We have to have an updated appraisal prepared, and go to the California Coastal Conservancy's Board twice for release of the grant funds. You may recall that the grant was awarded to the Conservancy to be passed on to us.

TRIANGLE MARSH

On the regular first Saturday volunteer work day a good group of volunteers spent most of the day pulling and digging Italian thistles with the aim of getting every last one in the area we were able to cover. Because it is an annual, there will be no more thistles in that area next spring except from a few seeds that come in on the wind. That strategy has already worked with radish, which is also an annual. The Corte Madera Boy Scout troop has been rescheduled for a day of sheet mulching in late April. That work will eliminate non-natives of all kinds in preparation for planting in a subsequent rainy season.

Thank you to the Corte Madera Public Works Department for the pickup and proper disposal of a television that apparently floated into Triangle Marsh on a high tide.



BROWN PELICAN SURVEY NEEDS YOU

Audubon is organizing a Citizen Science Survey in an effort to find out why the Brown Pelican productivity has been declining across its range in recent years. One known problem is the collapse of the key foraging species anchovy and sardine. The surveys will help define the distribution and abundance in the non-breeding season and track shifts in population.

The survey will take place on May 7 from 5 to 7 PM. Protocol for entering data will be provided, and you will be asked to take a few photos. Several observers would be helpful. The roost locations are Bird Rock at Point Bonita, near Rodeo Beach; two in West Marin off of MM10 on Hwy 1; and one on Tomales Bay.

USE YOUR BIRDING SKILLS TO BENEFIT THE BIRDS, VOLUNTEER NOW!

Contact Ariana Rickard, arickard@audubon.org. For more information visit ca.audubon.org/news/audubon-network-helping-pacific-brown-pelicans.

MARIN BIRDLOG: MARCH – APRIL 2016

By Josiah Clark

March rains have yielded April flowers, and as luck would have it the continuing rains are making for a prolonged spring. The hills are still green, oaks are putting out lots of new growth, and resident birds are in peak breeding mode with some birds already raising a second clutch of young. Insects and larvae are reaching their peak abundance for the year, and incoming migrant birds make haste to set up nesting. The whole journey of songbird migration is timed to correspond to the foods needed to raise songbird young.



Kevin Cole

Bullock's Oriole

On March 25 the first returning **Bullock's Oriole** for the county was reported from a usual "FOS" location, Stafford Lake (TP). The **Tufted Duck** was still there, reported last on 3/31 (RO). One has to wonder, does it go back to Asia to breed?

Also, over in the east side of the county, **Cliff Swallows** were back building nests at Las Gallinas on 3/31 (DE). The recent population explosion of non-native **Mute Swans** in the North Bay continues to move south, with birds now also nesting at Las Gallinas.

Surely among the 'rarest birds' in the county this period were species observed in the Marin Headlands. Incidentally both of these species are from areas far to the south, and just a year or so ago would have been huge news in the county. These species have now been seen by hundreds of birders in the county and are likely a sign of trends to come.

One of several continuing **Brown Boobies** was showing well for the patch birders off of Rodeo Beach on 4/5 (WL), where it sometimes roosts on offshore rocks. "The" **Black Vulture** that has been in the area for a couple years now drifted into the view of hawk watchers on two separate occasions, adding a new a raptor species to the hawk watch list (GGRO).

Observers and Acronyms **GGRO**: Golden Gate Raptor Observatory, **RO**: Rob O'Donnell, **TP**: Todd Plummer, **DE**: Daniel Edelstein, **WL**: William Legge

APRIL 19 FIELD TRIP

Pinnacles Trip No Disappointment

By Jane Medley



John Dahl

California Condors

Despite predicted heavy rainstorms, seven participants traveled to Pinnacles National Park for our April 9 field trip. Upon arrival at the Pinnacles Visitor Center, Leader Rusty Scalf immediately focused his scope on four condors roosting on the distant ridgeline. While waiting for more optimum flying conditions to develop for these giant scavengers, our group walked through the Park's newly acquired Bacon Ranch, with chaparral and other habitats, then

went on to check out a riparian habitat adjacent to the campground.

On the nearby slopes what were assumed at first glance to be four roosting Turkey Vultures were soon re-identified as **California Condors!** We watched them resting, preening, and flying for a long period of time and were grateful for this opportunity to see these spectacular, rare birds at such incredibly close range. After that success, we could have just packed up and gone home, but this was no lazy group! We took the steep hike up Condor Gulch where we lunched in a favorable viewing area but saw no additional condors. However, we all enjoyed the hike with chaparral birds heard more than seen including a singing **Canyon Wren** and abundant wildflowers.

Special thanks to Rusty who shared many details about condor biology, the decline of the species, and recent conservation efforts at Pinnacles National Park. Also, thanks to John Dahl and Bob Flynn for sharing many fine photos from the trip.

THANK YOU \$1000+ DONORS FOR THE CORTE MADERA PROPERTY ACQUISITION

The list below includes donors to both MAS and Marin Baylands Advocates.

Anonymous, Barbara Benson, Richard Bergmann & Denise Filakosky, Susan & Howard Blair, Linda Brune, Michael & Priscilla Bull, California Alpine Club Foundation, California Coastal Conservancy, Corte Madera Beautification Committee, Corte Madera Community Foundation, John Crawford, Jim & Drusie Davis, David Eiseman, Michelle & Robert Friend Foundation, Barbara Ford, Anki & Larry Gelb, Greenbrae Improvement Club Inc., Sallie Griffith, Maureen Groper, Estate of Ken Howard, Joan & Eugene Jacks, Gardner Kent & Sarahy Williamson, Nancy Kittle, KLS Fund, Harriet Lapin, LEF Foundation, Lincoln Financial Foundation Inc., Love Family Trust, Kathy Lowrey, Diane & Leslie Lynch, Maria Mangold, Marin Conservation League and its members, Marin County Fish & Wildlife Commission, Marin County Board of Supervisors/Open Space District, Marin Open Space Trust, Robert & Sandra Mauceli, Michelle & Robert Friend Foundation, National Fish and Wildlife Foundation, Russel Nelson, Warren & Marcia Nute, Pasadena Community Foundation, Thomas Peacock, Richard Plant, Joanne K. Powell, RHE Charitable Foundation, Harry Richards, Pamela Rickert & Brian Hertz, Lori H. Runnfeldt, Barbara & Jay Salzman, Mary Kent Schardt, E. C. & Shari Shute Jr., Dr. Jill Sideman, Springcreek Foundation/Glenda & Henry Corning, Charles & Jean Stewart, Town of Corte Madera, Rosemary Wakeham, Jay J. & Sigrid E. Wimberly Foundation through Audubon California

THANK YOU FOR YOUR DONATIONS

Ablin Family Fund, Anonymous, Earth Share of California, Jurgen Huck, Richard Jennings, Bill & Kay Jones, Daphne Markham, Michelle & Robert Friend Foundation, PG&E Corporation Foundation (donor match), Richard & Anne Ruben, Dave Wimpfheimer

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- June 4 **Stewardship Day:** Triangle Marsh
- June 11 **Stewardship Day:** Bahia
- June 11 **Lake Tahoe Bird Festival**
www.tinsweb.org/lake-tahoe-bird-festival
- June 17-19 **Mono Basin Bird Chautauqua**
Lee Vining
www.birdchautauqua.org
- June 18 **Field Trip:** Five Brooks
and Bear Valley
With Jim White & Bob Battagin
- June 21 **Field Trip:** Alcatraz
With Ranger John Cantwell and
Karen Vandergrift

Check website for updates and details

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SUPPORT MARIN AUDUBON SOCIETY — BECOME A CHAPTER-SUPPORTING MEMBER

The success of Marin Audubon Society's (MAS) work depends greatly on its chapter-supporting members. We work collaboratively with the National Audubon Society (NAS) on issues of mutual concern, but very little of our funding comes from NAS. MAS relies on local support for our habitat protection efforts, conservation advocacy, birding field trips, educational speakers series, and publication of *The Rail*. To better ensure we can continue our programs on the local level, MAS offers a separate chapter membership. Your membership in MAS will help us protect local habitats, resident and migratory birds and provide you with educational and enjoyable programs because all of your chapter-supporting dues stay with MAS.

If you are not already a chapter-supporting member, we urge you to join MAS and urge your friends, neighbors, relatives to join us, too.

You can also join or make a donation on our website using your credit card or PayPal. Please go to www.marinaudubon.org.

JOINT NAS-MAS MEMBERSHIP

A National Audubon Society Membership is a joint membership with National and chapters. With this joint membership, you receive our newsletter and other chapter benefits. However, MAS receives no portion of your National Audubon Membership dues. We receive a fixed amount based on our 2001 membership. We will receive, however, a portion of any new memberships that are generated by MAS, the local chapter. **So we request that you send all checks for new National memberships to: MAS, P.O. Box 599, Mill Valley, CA 94942.**

For NAS membership renewals, send your check directly to NAS.

Join or Donate to the Marin Audubon Society

Please fill in this form and mail to the address below. If you are paying by check, please make it payable to **Marin Audubon Society**.

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SIGNATURE _____

Exhibit D



Marriott International, Inc.
Lodging Development

915 Highland Pointe Drive
Suite 250
Roseville, CA 95678

Robert A. Sanger
Area Vice President
916-724-5234
714-464-5498 Fax

July 30, 2014

Garrett Grialou
Reneson Hotels, Inc.
215 Alameda del Prado
Novato, CA 94949

Dear Garrett:

Thank you for providing me with an update on your approved Residence Inn/SpringHill Suites project. I certainly understand the challenges of developing in Marin County.

My design team and I have reviewed the revised site plan for a proposed 147-room Residence Inn for the existing Best Western hotel site in Corte Madera, which assumes that the existing pond onsite is retained. Given the local municipality's height restriction, setback requirements, and other mandatory building standards, we think that your new site plan is not of sufficient size to accommodate two brands. Marriott, therefore, would not approve the site for a dual-branded hotel project if the pond is retained. However, we think that the development of a standalone 147-room Residence Inn is appropriate assuming that it is financially feasible.

Please let me know if I can be of further assistance.

Sincerely,

A handwritten signature in black ink that reads "Robert A. Sanger". The signature is written in a cursive, flowing style.

Robert A. Sanger
Area Vice President Lodging Development

From: [bsilvestri](#)
To: [Fernandez, Xavier@Waterboards](mailto:Fernandez_Xavier@Waterboards)
Cc: [Michael Graf](#)
Subject: 5-Exhibits to Comment on the Corte Madera Inn Rebuild Project Alternatives Analysis
Date: Friday, January 13, 2017 3:47:09 PM
Attachments: [20-Exhibit XX-Journal of Environmental Law and Policy - Jon Schutz.pdf](#)
[21-Exhibit XXI -Yocum - Wetlands protection through impact avoidance.pdf](#)
[22-Exhibit XXIII -Evironmental Law Institute 2008.pdf](#)

Dear Mr. Fernandez:

Attached please find Exhibits 20 through 22 to our three comment letters on the off-site and on-site 404(b)(1) Alternatives Analysis for the Corte Madera Inn Rebuild Project (attached).

Best,

Bob Silvestri

President

Community Venture Partners

A Catalyst for Sustainable Solutions

73 Surrey Avenue

Mill Valley, CA 94941

415.381.3887 Office

415.342.7877 Cell

<http://www.communityventurepartners.org>

<https://marinpost.org>



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Title:

The Steepest Hurdle in Obtaining a Clean Water Act Section 404 Permit: Complying with EPA's 404 (b)(1) Guidelines' Least Environmentally Damaging Practicable Alternative Requirement

Journal Issue:

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The Steepest Hurdle in Obtaining A Clean Water Act Section 404 Permit: Complying with EPA's 404(b)(1) Guidelines' Least Environmentally Damaging Practicable Alternative Requirement*

Jon Schutz*

I.

INTRODUCTION

To construct any project involving the discharge of dredged or fill material into U.S. waters, one must obtain a 404 permit from the United States Army Corps of Engineers (Corps). An applicant for a 404 permit must demonstrate to the Corps that, among other things, the proposed project is the least environmentally damaging practicable alternative (LEDPA) to achieve the project's purpose. To determine the LEDPA, an applicant conducts a 404(b)(1) Alternatives Analysis. Though the LEDPA determination is only one of many determinations the Corps will make for a project and that the applicant must pass, the LEDPA determination is often the "steepest hurdle" in obtaining a 404 permit.¹ Practitioners should be aware that where a proposed

* A shorter version of this article was published in the California Real Property Journal, published by the State Bar of California Real Property Law Section.

* Jon Schutz (B.A. Brigham Young University; J.D. University of California, Davis) is an attorney at Somach, Simmons & Dunn in Sacramento and can be reached at jon.schutz@gmail.com.

1. Robert Uram, *The Evolution of the Practicable Alternatives Test*, 7 NAT. RESOURCES & ENV'T (Summer 1992); see also Gregory J. Hobbs, Jr. and Bennett W. Raley, *Water Rights Protection in Water Quality Law*, 60 U. COLO. L. REV. 841, 865 (1989) (stating that "taken by themselves, the 404(b)(1) guidelines appear to spell doom for many water projects, particularly in light of the alternative analysis and the antidegradation provision of the guidelines") and James E. Broadway, Note, *Practicable Alternatives Under Section 404 of the Federal Clean Water Act after Bersani v. Robichaud*, 41 SYRACUSE L. REV. 813, 813 (1990) (stating that of the 404(b)(1)

project is not the LEDPA, the Corps may not approve the project or grant the applicant a 404 permit. In other words, the LEDPA determination can be fatal to the project.

This article explains how the Corps determines whether an applicant's project is the LEDPA. Because the LEDPA is one determination among many that the Corps will make in deciding whether a project is in the public interest and complies with the 404(b)(1) Guidelines, this article also explains the context in which the LEDPA review is undertaken. A flow chart of the LEDPA determination process is included as Appendix 1.

II.

404 (B)(1) GUIDELINES COMPLIANCE

Section 404 of the Clean Water Act (CWA) requires a permit for the discharge of "dredged or fill materials" into "waters of the United States."² Therefore, a permit to discharge dredged or fill materials into waters of the U.S. is referred to as a 404 permit.³ To issue a 404 permit, the Corps must ensure, among other things, that the activity complies with the U.S. Environmental Protection Agency's (EPA) 404(b)(1) Guidelines, set out in 40 C.F.R. section 230.⁴ The purpose of the Guidelines is "to restore

guidelines' requirements, "perhaps none is more strict than the practicable alternatives analysis").

2. 33 U.S.C. § 1344(a). The goal of the Section 404 regulatory program is to contribute to the national goal of no net loss of wetlands. U.S. EPA and U.S. Army Corps of Engineers, *Memorandum of Agreement (MOA); Clean Water Act Section 404(b)(1) Guidelines; Correction* (1990), 55 Fed. Reg. 9210, 9211 [hereinafter *EPA/Corps MOA (1990)*]. Wetlands are defined by three parameters: vegetation, soils, and hydrology. PAUL D. CYLINDER, ET AL., *LAW OF WETLANDS REGULATION* 22 (1995).

3. 33 C.F.R. § 325.1(c) (2005). Ideally, an applicant would submit an application to the Corps with a completed 404(b)(1) alternatives analysis. Interview with Ken Bogdan, Attorney, Jones and Stokes, in Sacramento, Cal. (July 15, 2004). However, applicants typically submit the application and then prepare the alternatives analysis. *Id.* A 404(b)(1) alternatives analysis is not required for a complete application, though it is recommended that the analysis be done early in the review process. Yocom et al., *Wetlands Protection Through Impact Avoidance: A Discussion of the 404(b)(1) Alternatives Analysis*, 9 *WETLANDS* 283, 295 (1989); Uram, *supra* note 1, at 59. The Yocom et al. article was written by three EPA employees, discussing their interpretation of the 404(b)(1) Guidelines.

4. Heidi Wendel, Comment, *Bersani v. EPA Toward a Plausible Interpretation of the 404(b)(1) Guidelines for Evaluating Permit Applications for Wetland Development*, 15 *COLUM. J. ENVTL. L.* 99, 102 (1990) (hereafter *Wendel*); *Broadway*, *supra* note 1, at 813. The 404(b)(1) compliance process is not a rigid process; the process is very fact specific and very dependent upon the particular circumstances of the particular case. Interview with Lisa Clay, Corps Counsel, U.S. Army Corps of Engineers, in Sacramento, Cal. (June 30, 2004) (all comments of Ms. Clay reflect her

and maintain the chemical, physical, and biological integrity of waters of the United States through the control of discharges of dredged or fill material.”⁵ The project applicant is required to prepare a 404(b)(1) analysis to provide the Corps with the necessary information to determine whether the Guidelines have been followed.⁶ Such an analysis is required for water and non-water-dependent projects, but certain presumptions will apply to non-water-dependent projects, discussed below.⁷ The amount of information necessary to make this determination is commensurate with the level of the project’s impacts—more information is required for large and complex projects.⁸

The 404(b)(1) Guidelines are the substantive criteria the Corps will use in determining a project’s environmental impacts on aquatic resources from discharges of dredged or fill material.⁹ The Guidelines are binding regulations, meaning a project that does not comply with these guidelines will be denied a 404 permit.¹⁰ If the project does comply with the Guidelines, a permit will be granted “unless issuance would be contrary to the public interest.”¹¹ While the Guidelines are binding, they are also inherently flexible, leaving room for judgment in determining compliance on a case-by-case basis.¹²

personal views and are not necessarily the official position of the Corps). Compliance with the 404(b)(1) Guidelines, and specifically the LEDPA determination, may be the “steepest hurdle” in obtaining a 404 permit. Uram, *supra* note 1, at 15.

5. 40 C.F.R. § 230.1(a) (2005).

6. See Regulatory Guidance Letter 88-5 (1988). This Regulatory Guidance Letter expired December 31, 1990, but is instructive as to the Corps’ expectations. Guidance provided in regulatory guidance letters “generally remains valid after the expiration date.” 61 Fed. Reg. 30990 (June 18, 1996).

7. Uram, *supra* note 1, at 15.

8. U.S. EPA and U.S. Army Corps of Engineers, Memorandum to the Field, *Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements* (Aug. 23, 1993) 2, 3 [hereinafter *Appropriate Level of Analysis*].

9. 45 Fed. Reg. 85336, 85340 (Dec. 24, 1980); U.S. Army Corps of Engineers, *HQUSACE Review and Findings, Old Cutler Bay Permit 404(q) Elevation* (1990) 4 [hereinafter *Old Cutler*]; U.S. Army Corps of Engineers, *Permit Elevation, Hartz Mountain Development Corporation* (1989) 2 [hereinafter *Hartz Mountain*]; Yocom, *supra* note 3, at 284; U.S. Army Corps of Engineers, *Permit Elevation, Twisted Oaks Joint Venture* (1991) 4 [hereinafter *Twisted Oaks*]; 49 Fed. Reg. 39478, 39479 (Oct. 5, 1984); 33 C.F.R. §§ 320.4(a)(1), 323.6(a) (2005); Broadway, *supra* note 1, at 815.

10. 33 C.F.R. § 320.4(a)(1) (2005); *Old Cutler*, *supra* note 9, at 4; *Hartz Mountain*, *supra* note 9, at 2; *Appropriate Level of Analysis*, *supra* note 8, at 1; *Twisted Oaks*, *supra* note 9, at 4; *Broadway*, *supra* note 1, at 817.

11. 33 C.F.R. § 323.6(a) (2005).

12. 45 Fed. Reg. 85336 (Dec. 24, 1980); *Appropriate Level of Analysis*, *supra* note 8, at 1-2; Uram, *supra* note 1, at 15; Interview with Lisa Clay, *supra* note 4; EPA/

The 404(b)(1) Guidelines establish four prerequisites to approval, one of which, the basis for the LEDPA requirement, requires that there are no practicable alternatives to the proposed discharge that would have a less adverse effect on the aquatic environment.¹³ Noncompliance with this requirement is a sufficient basis for the Corps to deny the project permit.¹⁴ The LEDPA determination is thus most important of the four prerequisites for determining compliance with the Guidelines.¹⁵

The 404(b)(1) Guidelines compliance process will be managed by the Corps and the Corps will make all final permit decisions including whether the Guidelines have been satisfied; EPA and other resources agencies usually comment on the Corps' public notice.¹⁶ However, EPA, the Department of the Interior (Interior), and other resource agencies may become very involved in the 404(b)(1) compliance process pursuant to memoranda of agreement between the Corps and EPA and the Corps and Interior.¹⁷ For example, EPA and Interior are encouraged to participate in preapplication meetings with the applicant,¹⁸ EPA or Interior may elevate a Corps decision,¹⁹ and the Corps must fully

Corps MOA (1990), *supra* note 3, at 9210-9211 (recognizing that no net loss of wetlands may not be possible in every situation).

13. 40 C.F.R. § 230.10(a) (2005).

14. WILLIAM WANT, LAW OF WETLANDS REGULATION (6-24 (1989) 6-24. See Yocom, *supra* note 3, at 284; Broadway, *supra* note 1, at 817.

15. Broadway, *supra* note 1, at 815.

16. U.S. EPA and U.S. Army Corps of Engineers, *Clean Water Act Section 404(q) Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army* (1992) pt. I [hereinafter *EPA/Corps 404(q) MOA (1992)*]; Department of the Army and Department of the Interior, *Clean Water Act Section 404(q) Memorandum of Agreement Between Department of the Interior and the Department of the Army* (1992) 1 [hereinafter *Corps/Interior MOA (1992)*]; U.S. Army Corps of Engineers, U.S. Department of Commerce, *Memorandum of Agreement Between the Department of Commerce and the Department of the Army* (1992) 1, 3 [hereinafter *Corps/Commerce MOA (1992)*]; *Regulatory Guidance Letter 92-1*, 61 Fed. Reg. 30990-30992 (June 18, 1996) [hereinafter *Regulatory Guidance Letter 92-1*]; *Twisted Oaks*, *supra* note 9, at 5. A failure to comment is presumed to mean the agency has no objection. WANT, *supra* note 14, at 6-8.

17. Interview with Lisa Clay, *supra* note 4; *EPA/Corps 404(q) MOA (1992)*, *supra* note 16, at pt I; *Corps/Interior MOA (1992)*, *supra* note 16, at 2-5; *Regulatory Guidance Letter 92-1*, *supra* note 16, at 30991; *Corps/Commerce MOA (1992)*, *supra* note 17, at 2; 33 C.F.R. § 320.4(c) (2005); William McGreevey, Note, *A Public Availability Approach to Section 404(B)(1) Alternatives Analysis: A Practical Definition for Practicable Alternatives*, 59 GEORGE WASHINGTON LAW REVIEW. WASH. L. REV. 379, 383 (1991).

18. *Regulatory Guidance Letter 92-01*, *supra* note 16, at 30991 (encouraging resources agencies to participate "to the maximum extent possible in the pre-application consultation.").

19. *EPA/Corps 404(q) MOA (1992)*, *supra* note 16, at pt. I, sec. 3.

consider EPA's and Interior's comments when determining whether the applicant has complied with the 404(b)(1) Guidelines, whether to issue a permit, and what conditions should be placed on the permit.²⁰ EPA involvement early in the 404(b)(1) Guidelines compliance process may be advantageous for a project applicant because the applicant can address EPA's concerns early in the review process.²¹

III.

LEDPA DETERMINATION

40 C.F.R. section 230.10(a), the basis for the LEDPA determination, states that, except as provided in CWA section 404(b)(2),²² a permit will not be issued "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences."²³ The LEDPA requirement is an attempt to avoid environmental impacts instead of mitigating them; "if destruction of an area of water of the United States may be avoided, it should be avoided."²⁴ The Corps may only approve a project that is the LEDPA.²⁵ The LEDPA involves two separate determinations; it must be both practicable and the least environmentally damaging. The LEDPA requirement's purpose is "avoiding significant impacts to the aquatic resources and not necessarily providing

20. *EPA/Corps MOA (1990)*, *supra* note 2, at 9212; *EPA/Corps 404(q) MOA (1992)*, *supra* note 16, at pt. I; Department of Defense, Army Corps of Engineers, *Regulatory Guidance Letter 92-1*, *supra* note 16, at 30991.

21. Interview with Lisa Clay, *supra* note 4; *EPA/Corps MOA (1990)*, *supra* note 2, at 9212; *Regulatory Guidance Letter 92-1*, *supra* note 16, at 30991.

22. Section 404(b)(2) allows the Corps to issue a discharge permit otherwise prohibited under the 404(b)(1) Guidelines after considering the economic impact a discharge will have on navigation and anchorage. 33 U.S.C. § 1344(b); 45 Fed. Reg. 85336, 85336, 85337 (Dec. 24, 1980).

23. This requires the permit applicant to evaluate project alternatives that will result in less adverse impacts to the aquatic environment thereby providing the Corps with the information necessary to determine whether the proposed project is the LEDPA. 40 C.F.R. § 230.12(a)(3)(iv) (2005). Where an alternative does not have a "significant or easily identifiable difference in impact, the alternative need not be considered to have a 'less adverse' impact." 45 Fed. Reg. 85336, 85339-85340 (Dec. 24, 1980).

24. 45 Fed. Reg. 85336, 85340 (Dec. 24, 1980); *see also Old Cutler*, *supra* note 9, at 5; U.S. Army Corps of Engineers, U.S. Army Corps of Engineers, *Plantation Landing Permit Elevation Decision* (1989) 2 [hereinafter *Plantation Landing*]; *Yocom*, *supra* note 3, at 286; *EPA/Corps MOA (1990)*, *supra* note 2, at 9211.

25. *Appropriate Level of Analysis*, *supra* note 8, at 1; *see also* 40 C.F.R. § 230.12(a)(3)(i) (2005).

either the optimal project location or the highest and best property use."²⁶ EPA Region IX feels that the LEDPA analysis functions most effectively when it is applied by the project applicant to the project early in the permitting process.²⁷ EPA believes that the LEDPA requirement compels a project applicant to evaluate non-aquatic sites or less environmentally damaging aquatic site alternatives regardless of whether a project is water dependent or proposed for a special aquatic site.²⁸ The LEDPA determination functions to identify and rank project alternatives; the LEDPA requirement "prohibits discharges if avoidance is practicable and sets the order of development between competing sites."²⁹

To determine the LEDPA, the project applicant is required to generate a list of alternatives, including the proposed project, from which the LEDPA will be determined.³⁰ This process of identifying alternatives and determining the LEDPA is commonly called the "404(b)(1) Alternatives Analysis."³¹ The list of alternatives from which the LEDPA is selected is created after the basic purpose of the project is identified because only alternatives that meet the project's basic purpose need be consid-

26. *Appropriate Level of Analysis*, *supra* note 8, at 9. The Corps has stated that the LEDPA determination "clearly is intended to discourage unnecessary filling or degradation of wetlands . . ." *Plantation Landing*, *supra* note 24, at 2. EPA Region IX has stated that the LEDPA determination "should ensure that most projects are sited out of the nation's water and that only projects that are absolutely necessary and environmentally acceptable receive permits." *Yocom*, *supra* note 3, at 296.

27. *Yocom*, *supra* note 3, at 296; *Uram*, *supra* note 1, at 59; *Regulatory Guidance Letter 92-1*, *supra* note 16, at 30991.

28. *Appropriate Level of Analysis*, *supra* note 8, at 1.

29. *Uram*, *supra* note 1, at 15.

30. Where a proposed project is subject to NEPA and the Corps is the permitting agency, the environmental documentation prepared to satisfy NEPA's requirements for an alternatives analysis will generally provide the information necessary for evaluating alternatives under the CWA guidelines. 40 C.F.R. § 230.10(a)(4), (5) (2005); 45 Fed. Reg. 85336, 85340 (Dec. 24, 1980). However, even though the NEPA documentation may provide sufficient information for the LEDPA analysis and determination, a separate LEDPA analysis must be performed. The Corps' Sacramento District Regulatory Program indicated that the LEDPA determination is more stringent than the NEPA alternatives analysis. Telephone Interview with Michael Jewell, Regulatory Program Representative, U.S. Army Corps of Engineers (June 22, 2004) (all comments of Mr. Jewell reflect his personal views and are not necessarily the official position of the Corps). . The analysis may be a separate document submitted to the Corps or may be included as an appendix in other environmental documentation submitted to the Corps.

31. *Uram*, *supra* note 1, at 15.

ered.³² All alternatives that achieve “the basic project purpose practicably should be considered.”³³ The geographic scope of the alternatives considered will in most cases be determined by the basic purpose of the project and will include areas typically considered in the particular industry.³⁴ If the list of alternatives is inadequate the Corps may require the applicant to expand its analysis.³⁵

The applicant will also establish specific criteria to use in determining the practicability of the alternatives and eliminating the non-practicable alternatives—those that do not meet the screening criteria.³⁶ The Corps will review the applicant’s screening criteria and document how the criteria were developed and utilized.³⁷ The criteria allow the Corps to justify why some alternatives are practicable and others are not. The alternatives analysis must be fair, balanced, and objective, “and not used to provide a rationalization for the applicant’s preferred result (i.e., that no practicable alternatives exist).”³⁸

The project applicant must provide sufficient evidence to the Corps demonstrating that the proposed project is the LEDPA and that all impacts to the selected site have been avoided to the extent practicable.³⁹ The applicant bears the burden of demonstrating to the Corps that no less environmentally damaging practicable alternative is available and that the project complies with

32. *Old Cutler*, *supra* note 9, at 6. It is recommended that an applicant approach the Corps with a project idea and a justified need for the project and that the applicant and the Corps determine the project’s purpose before the applicant proceeds any further with the alternatives analysis. Interview with Ken Bogdan, *supra* note 3. Ideally, the Corps would sign off on the basic project purpose, thereby focusing the alternatives analysis. CCWD followed this method for Los Vaqueros. *Id.* The Corps signed off on the project’s basic purpose before anything else was done. *Id.* The basic project purpose was then used to guide the alternatives analysis.

33. *Yocom*, *supra* note 3, at 294.

34. *Yocom*, *supra* note 3, at 293.

35. The Corps will usually require the applicant to look at both onsite and offsite alternatives as well as different combinations/configurations of the each. Interview with Lisa Clay, *supra* note 4; *see also EPA/Corps MOA (1990)*, *supra* note 2, at 9212; 40 C.F.R. §§ 230.10(a)1(i) and (ii), 230.5(c) (2005).

36. *Hartz Mountain*, *supra* note 9, at 4.

37. *Old Cutler*, *supra* note 9, at 9.

38. *Hartz Mountain*, *supra* note 9, at 6.

39. *Yocom*, *supra* note 3, at 283; *Old Cutler*, *supra* note 9, at 5. Where the project applicant does not provide the Corps with sufficient information to make a reasonable judgment as to whether the project complies with the 404(b)(1) guidelines, the Corps will reject the project. 40 C.F.R. § 230.12(a)(3)(iv) (2005); *see also Yocom*, *supra* note 3, at 296 and *Wendel*, *supra* note 4, at 107.

the 404(b)(1) Guidelines.⁴⁰ The Corps will determine whether the LEDPA has been selected.⁴¹

A. *Practicability Determination and Presumption*

Only practicable alternatives to the proposed project need be considered in determining the LEDPA.⁴² An alternative is practicable where “it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.”⁴³ The Corps will determine whether practicable alternatives are available.⁴⁴

1. “Overall Project Purpose” and “Basic Project Purpose”

An alternative is only practicable if it capable of being done taking into consideration the overall project purpose. Region IX opines that “overall project purpose” means the “basic project purpose plus consideration of costs and technical and logistical feasibility.”⁴⁵ Overall project purpose does not include secon-

40. *Old Cutler*, *supra* note 9, at 5; *Plantation Landing*, *supra* note 24, at 7; *Yocom*, *supra* note 3, at 283.

41. *Old Cutler*, *supra* note 9, at 5; *EPA/Corps 404(q) MOA (1992)*, *supra* note 17, pt. I; *Corps/Interior MOA (1992)*, *supra* note 16, at 1; Regulatory Guidance Letter 92-1, *supra* note 16, at 30991.

42. 45 Fed. Reg. 85336, 85339 (Dec. 24, 1980).

43. 40 C.F.R. § 230.10(a)(2) (2005); *see also* 40 C.F.R. § 230.3(q) (2005). The project’s purpose will be determined before alternatives which achieve the project’s purpose are developed. Once the project purpose is determined, alternatives will be developed, and then the LEDPA analysis will be applied to the alternatives to determine which of the alternatives is the LEDPA. Some have argued that this definition is too broad and that it “gives no indication of how the crucial factors of cost and project purposes should be taken into account in reach a decision on the availability.” *Wendel*, *supra* note 4, at 103.

44. *Plantation Landing*, *supra* note 24, at 8.

45. *Id.* at 289. There is some uncertainty whether the Corps distinguishes between “overall project purpose” and “basic project purpose” and, if it did, whether it would make any practical difference. Corps counsel in Sacramento indicated that the Corps does not distinguish between the two phrases. Interview with Lisa Clay, *supra* note 4. Some practitioners feel there is no a difference between the two phrases, but that there is enough ambiguity between the two that the Corps could distinguish, albeit with little practical effect, between the two if they wished. Interview with Ken Bogdan, *supra* note 3. One Corps representative indicated that the overall project purpose drives the alternatives analysis, while the basic project purpose drives the water dependency determination. Telephone Interview with Michael Jewell, *supra* note 30. The Corps’ elevated decision, *Twisted Oaks*, follows Jewell’s view. *Twisted Oaks*, *supra* note 9, at 6. However, 40 C.F.R. § 230.10(a)(2) (2005) refers to both “overall project purpose” and “basic purpose” in the same section, which tends to indicate that the two phrases are interchangeable. *See Plantation Landing*, *supra* note 24, at 9. Furthermore, EPA has stated that the two phrases are used interchangeably. *Final Determination of the U.S. Environmental Protection*

dary project purposes, site-specific secondary requirements, project amenities, desired size requirements, or desired return on an investment.⁴⁶ For example, EPA disallowed a proposed dam's proposed project purpose which included flow releases for the enhancement of downstream fish habitat.⁴⁷ EPA also disallowed a proposed dam's proposed overall project purpose to capture run-off in the specific stream where the dam was to be constructed.⁴⁸ EPA disallowed each project's stated overall project purpose because to accept them would preclude an analysis of otherwise legitimate options.⁴⁹

A project's "basic purpose" is its generic purpose or function.⁵⁰ The Corps will define the basic purpose, not the project applicant,⁵¹ but the Corps may discuss with the applicant what the basic project purpose should be. The Corps will typically view the project's purpose from the applicant's perspective rather than the public's perspective, though arguably the Corps is not required to do so and may use the public perspective.⁵² In defining the project's basic purpose the Corps is not required by the Guidelines to define the project's purpose "in the manner most

Agency's Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Two Forks Water Supply Impoundments (Nov. 23 1990), 2, 2 n.2 [hereinafter *Two Forks Final Determination*]; Uram, *supra* note 1, at 18, 59. The Andalex Resources elevation decision did not distinguish the two, and stated that EPA and the Corps should provide clarification on the issue, and that an elevation decision was not the proper forum to decide whether there is a distinction. Department of the Army, U.S. Army Corps of Engineers, *Request for Permit Elevation, Andalex Resources, Inc.* (1991) 3-4, 8.

46. *Yocom, supra* note 3, at 289.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Yocom, supra* note 3, at 290. Determining the project's basic purpose is significant in determining whether an alternative is practicable. It is also significant later in the process in determining whether a project is water dependent.

51. *Plantation Landing, supra* note 24, at 6, 8; *Hartz Mountain, supra* note 9, at 3; *Twisted Oaks, supra* note 9, at 5; *McGreevey, supra* note 17, at 400. The determination in *Plantation Landing* that the Corps and not the applicant defines the project purpose was significant because the Corps policy had formerly been to defer to the applicant's stated purpose in determining the project's basic purpose. Uram, *supra* note 1, at 16-17.

52. *Plantation Landing, supra* note 24, at 7. In *Plantation Landing*, viewing the project purpose from the applicant's perspective meant that the applicants' land clearing project was defined as being "to increase soybean production or to increase net returns on assets owned by the company" as opposed to "providing the U.S. public a sufficient supply of soybeans, consistent with protection of wetlands." *Plantation Landing, supra* note 24, at 7-8; see also *McGreevey, supra* note 17, at 403, 405 (stating that "defining project purpose from the public perspective is both permissible and appropriate by all accounts").

favorable to 'environmental maintenance'"⁵³ The Corps "has a duty to take into account the objectives of the applicant's project" in analyzing project alternatives.⁵⁴ Furthermore, the Corps has "some discretion" in defining the project's basic purpose "in a manner which seems reasonable and equitable for that particular case."⁵⁵ However, while the Corps will consider the applicant's stated purpose, the Corps will determine the project's purpose and will not be limited by or required to give undue deference to the proponent's stated purpose.⁵⁶ The Corp will not be a project opponent or advocate, but will provide an objective evaluation.⁵⁷

The Corps' *Old Cutler* decision stated that the Corps may not so narrowly define the project's basic purpose "so as to unduly restrict a reasonable search for potential practicable alternatives."⁵⁸ *Old Cutler* also stated that the project purpose must be defined so that the "applicant is not in the position to direct, or attempt to direct, or appear to direct the outcome of the Corps

53. *Plantation Landing*, *supra* note 24, at 8.

54. *Louisiana Wildlife Fed'n v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985); *see also Plantation Landing*, *supra* note 24, at 4 (stating that the Corps should "consider" the applicant's views).

55. *Hartz Mountain*, *supra* note 9, at 4.

56. *Plantation Landing*, *supra* note 24, at 4, 7, 8; *Old Cutler*, *supra* note 9, at 6; *Hartz Mountain*, *supra* note 9, at 3; *supra* note 10, at 5; *Alameda Water and Sanitation Dist. v. Reilly*, 930 F.Supp. 486, 492 (D. Co. 1996); *McGreevey*, *supra* note 17, at 400. The applicant bears the burden of proving that an alternative does not achieve the applicant's purpose. *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1270 (10th Cir. 2004). Because a project is only practicable to the extent it achieves the project's basic purpose, and the Corps will consider the applicant's purpose, how an applicant defines their project's purpose is critical. EPA Region IX believes that there are no basic project purposes that are invalid under the 404(b)(1) Guidelines, but that there are unacceptable ways of defining the basic project purpose. *Yocom*, *supra* note 3, at 291. Examples of unacceptable basic project purposes are "water-front housing," "development," "redevelopment," "making money," "increasing a tax base," or "generating revenues for redevelopment." *Yocom*, *supra* note 3, at 291-92; *see also Plantation Landing*, *supra* note 24, at 9-10.

57. *Corps/Interior MOA (1992)*, *supra* note 16, at 2; *Regulatory Guidance Letter 92-1*, *supra* note 16, at 30991.

58. *Old Cutler*, *supra* note 9, at 13-14, 6; *see also Hartz Mountain*, *supra* note 9, at 4 and *Sylvester v. U.S. Army Corps of Engineers*, 882 F.2d 407, 409 (9th Cir. 1986) (stating that an applicant cannot define their project so as to preclude the possibility of alternative sites, making impossible what is practicable).

evaluation” under 404(b)(1).⁵⁹ A project purpose should be concisely stated in one or two sentences.⁶⁰

(a) *Examples of Basic Project Purposes*

The basic project purpose of the Contra Costa Water District’s (CCWD) Los Vaqueros reservoir project was “to improve the quality of potable water delivered to the service area of CCWD and to improve the reliability of water supply by providing for increased emergency storage.”⁶¹ This project purpose is more narrow than “water storage” or “increasing potable water supply.” This indicates that the Corps may allow an applicant to tailor the proposed project’s basic purpose.

In the Corps’ *Twisted Oaks* decision, Corps headquarters disallowed the Corps District’s basic purpose definition for a residential subdivision project with a proposed lake that was “to provide an upscale, water oriented, residential development having related recreational amenities to allow the applicant to realize a profit on its investment.”⁶² Corps Headquarters stated that because the project included two elements, a recreational lake and a residential development, that “a definition of project purpose excluding either one would not be sufficient.”⁶³ Corps Headquarters defined the basic purpose as “to provide a *viable*, upscale, water oriented, residential development having water related recreational amenities.”⁶⁴ Corps Headquarters, however, determined that the District’s description was appropriate as the project’s overall project purpose.⁶⁵

EPA defined the basic purpose of the proposed Two Forks Dam in Colorado to be “the provision of dependable, long-term

59. *Old Cutler*, *supra* note 9, at 7; *Twisted Oaks supra*, note 9, at 6. In *Twisted Oaks*, the Corps disallowed a basic project purpose that included to “allow the applicant to realize a profit on its investment” because this purpose would inappropriately require profitability to be a component of the Corps’ practicability analysis of alternatives. *Twisted Oaks*, *supra* note 9, at 6, 8.

60. *Old Cutler*, *supra* note 9, at 6.

61. U.S. Army Corps of Engineers, Department of the Army Permit Evaluation and Decision Document (1994) 1; *see also* Contra Costa Water District (1992), *Contra Costa Water District’s Section 404(b)(1) Alternatives Analysis for Meeting Water Quality and Reliability Objectives*, 2-5.

62. *Twisted Oaks*, *supra* note 9, at 5-6.

63. *Id.* at 6.

64. *Ibid.* (emphasis in original).

65. *Ibid.*

water supply to the Denver metropolitan area."⁶⁶ EPA did not allow the Two Fork Dam proponents to include as part of the basic purpose a provision for water at the least cost.⁶⁷

The Corps defined a proposed golf course/residential community development's basic purpose as "to construct a viable upscale residential community with an associated regulation golf course in the South Dade County area."⁶⁸ This determination is significant because it defines a residential proposed housing development's basic purpose to be more than "housing" or "shelter" by allowing its basic purpose to be "upscale housing" with a "regulation golf course."⁶⁹ The Corps disallowed a version of the project's basic purpose that included a minimum number of houses and specified a Jack Nicklaus designed golf course because such a purpose was too narrow.⁷⁰

The Corps' *Hartz Mountain* decision defined the basic project purpose of a residential housing development as "construction of a large scale, high density housing project in the Region 1 area."⁷¹

2. "Capable of being done"

An alternative is only practicable if it is capable of being done. An alternative is capable of being done where it will accomplish the project's basic purpose taking into account cost, existing technology, and logistics.⁷² For example, the construction of a dam in an area that is seismically unsound is not capable of being done, even though it may be physically possible to construct the dam in that location.⁷³

3. "Cost"

The applicant must develop criteria to evaluate and eliminate alternatives based on cost. Where an alternative is "unreasona-

66. *Final Determination of the U.S. Environmental Protection Agency's Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Two Forks Water Supply Impoundments* (Nov. 23 1990), 2-3.

67. *Id.*, at 22; see also *Uram*, *supra* note 1, at 59.

68. *Old Cutler*, *supra* note 9, at 7, 12.

69. *Uram*, *supra* note 1, at 18.

70. *Id.*

71. *Hartz Mountain*, *supra* note 9, at 6. Other examples of basic project purposes for condominium housing is "housing/shelter" and for a restaurant, to feed people. *Plantation Landing*, *supra* note 24, at 12.

72. *Yocom*, *supra* note 3, at 288.

73. *Id.*

bly expensive to the applicant” the alternative is not practicable.⁷⁴ The applicant’s financial standing is not a factor in determining whether an alternative is practicable; costs will usually be examined from the perspective of what are reasonable costs for the proposed project (i.e., what the reasonable cost of a dam is), not whether the applicant can afford the cost of the alternative.⁷⁵ For example, a developer with insufficient funds to purchase other available land, where the project could profitably be constructed, may be unable to obtain a discharge permit for the developer’s proposed site.⁷⁶ That the applicant’s financial standing is not to be considered is evidenced by the Guidelines reference to “cost” instead of “economic” concerns.⁷⁷ “Economic” was not used because it suggests a “consideration of the applicant’s financial standing, or investment, or market share, a cumbersome inquiry which is not necessarily material to the objective of the guidelines.”⁷⁸

4. “Available”

An alternative is only practicable if it is “available” to the project applicant.⁷⁹ An alternative is available to a project applicant where the property is obtainable for meeting the project’s purpose.⁸⁰ The looseness of this definition has caused conflict over the availability of potential alternatives.⁸¹ Some guidance is available on the issue. Sites owned by the applicant, sites that can be obtained by the applicant, and even sites that were available to the applicant when they started project planning (not when they applied for a permit) are considered available.⁸² “If it is

74. 45 Fed. Reg. 85336, 85343 (Dec. 24, 1980); *Plantation Landing*, *supra* note 24, at 9; *Wendel*, *supra* note 4, at note 24.

75. *Yocom*, *supra* note 3, at 294-295; *Appropriate Level of Analysis*, *supra* note 8, at 5; *WANT*, *supra* note 14, at 6-14.

76. *Yocom*, *supra* note 3, at 295.

77. *McGreevey*, *supra* note 17, at 402.

78. *McGreevey*, *supra* note 17, at 402 *citing* 45 Fed. Reg. 85336, 85339.

79. 40 C.F.R. § 230.10(a)(2) (2005); *Plantation Landing*, *supra* note 24, at 7.

80. *Yocom*, *supra* note 3, at 287; 45 Fed. Reg. 85336, 85339 (Dec. 24, 1980).

81. *Wendel*, *supra* note 4, at 102; *McGreevey*, *supra* note 17, at 386.

82. 40 C.F.R. § 233.10(a)(2) (2005). 40 C.F.R. section 230.10(a)(2) (2005) states that “if it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed activity may be considered.” Land that was available to the project proponent at the time of “market entry” that is not available when the proponent applies for a permit, may still be considered available as an alternative. *Bersani v. U.S. EPA* (2nd Cir. 1988) 850 F.2d 36, 38 (2d. Cir. 1988) (upholding EPA’s veto of a project because an alternative site was available to plain-

otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed activity may be considered.”⁸³ A site that can be expanded, converted, modified, or renovated to meet the project’s basic purpose may also be considered available.⁸⁴ Laws that prohibit site development may also be a factor in determining whether an alternative is available.⁸⁵

Technically, under the “market entry” theory, land that was available to the project proponent at the time of “market entry” that is not available when the proponent applies for a permit, may still be considered available as an alternative.⁸⁶ However, the Corps may not follow this rule very rigidly; a good faith effort to look at alternatives is usually sufficient.⁸⁷ A potential inequity of the “market entry” test is that it does not clearly define what constitutes “entry.”⁸⁸ The test is also potentially inequitable in that it disfavors parties who have owned property for a long period of time who may not have evidence to rebut applicable presumptions and because the party possibly entered the market at a time when an area was not extensively developed and many alternatives were available.⁸⁹ Furthermore, though a potential site may not be available to a current applicant because it had alternatives at the time of market entry, the test does not preclude the site from being available for another subsequent applicant if this later applicant did not have other alternatives available to it at the time it entered the market.⁹⁰ Generally, EPA Region IX will not look back to sites that were available to the applicant prior to 1980 when the 404(b)(1) Guidelines were promulgated.⁹¹ Lastly, the “market entry” test also potentially

tiff when he entered the market to search for a mall site, even though the site was later purchased by another developer). The Corps may not follow this rule very rigidly; a good faith effort to look at alternatives is usually sufficient. Interview with Ken Bogdan, *supra* note 3.

83. 40 C.F.R. § 230.10(a)(2) (2005).

84. 40 C.F.R. § 230.10(a)(2) (2005); *Yocum*, *supra* note 3, at 288. Existing sites may be the LEDPA because they will usually be less environmentally damaging than constructing the project on a new site and may be less costly to develop (making them practicable). *Yocum*, *supra* note 4, at 288.

85. *Uram*, *supra* note 1, at 59.

86. *Bersani* 850 F.2d at 36.

87. Interview with Ken Bogdan, *supra* note 3.

88. *Broadway*, *supra* note 1, at 826.

89. *Broadway*, *supra* note 1, at 825; *McGreevey*, *supra* note 17, at 397.

90. *McGreevey*, *supra* note 17, at 392.

91. *Yocom*, *supra* note 3, at 287.

allows a party to circumvent the rule through the use of an investor that “enters” the market before the future applicant and purchases sites making them unavailable to the future applicant at the time it enters the market.⁹² The market entry test may be inappropriate because it looks at the status of the applicant, not at the larger issue of whether the site should be developed.⁹³

5. Practicability Presumption⁹⁴

The “practicability presumption” introduces the concepts of a “special aquatic site” (SAS) and “water dependency” to the 404(b)(1) analysis. These are related concepts: a project is water dependent where it requires access or proximity to or siting within a SAS to fulfill its basic purpose. Under the practicability presumption, the Corps will presume that practicable alternatives exist where the project is non-water dependent and will cause a discharge in a special aquatic site.⁹⁵ Conversely, where a project is water dependent, there is no presumption that practicable alternatives are available which do not involve a SAS.⁹⁶ Even if a project is water dependent, where it is proposed for a SAS, it must still be the LEDPA to be approved.⁹⁷

This presumption is intended to implement the Corps’ policy that “from a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered” by the Guidelines.⁹⁸ The presumption is intended to “increase the burden on an applicant for a non-water dependent activity to demonstrate that no practicable alternative exists to his proposed discharge in a [SAS].”⁹⁹ The presumption forces

92. *McGreevey*, *supra* note 17, at 398.

93. *McGreevey*, *supra* note 17, at 393.

94. This is the first presumption in the LEDPA analysis.

95. 40 C.F.R. § 230.10(a)(3) (2005); 45 Fed. Reg. 85339. This presumption is intended to avoid impacts to the extent practicable. *EPA/Corps MOA (1990)*, *supra* note 2, at 9212. SASs include wetlands, mudflats, coral reefs, riffle-and-pool complexes, vegetated shallows, and sanctuaries and refuges. 40 C.F.R. §§ 230.40-230.45 (2005).

96. *James City County, VA v. U.S. EPA*, 758 F.Supp. 348, 352 (E.D.Va. 1990), *rev’d*, 12 F. 3d 1330 (4th Cir. 1993) (“James II”), *cert. denied*, 513 U.S. 823 (1994).

97. *Yocom*, *supra* note 3, at 285.

98. 40 C.F.R. § 230.1(d) (2005); *see also Wendel*, *supra* note 4, at 111 (stating that “the presumption is intended to provide the developer with an incentive to search for alternatives”).

99. *Plantation Landing*, *supra* note 24, at 3. This increased burden is added to the Guidelines’ general presumption against discharges into an aquatic ecosystem found at 40 C.F.R. section 230.1(c). *Plantation Landing*, *supra* note 24, at 3. Section

the Corps to take a "hard look" at the possibility of using environmentally preferable sites and to discourage discharges into a SAS.¹⁰⁰ Lastly, the presumption provides an incentive to avoid constructing in wetlands.¹⁰¹ The Corps has stated that the

Army Corps of Engineers is serious about protecting water of the United States, including wetlands, from unnecessary and avoidable loss Further, the Corps should inform developers that special aquatic sites are not preferred sites for development and that nonwater dependent activities will generally be discouraged in accordance with the Guidelines.¹⁰²

The 404(b)(1) Guidelines have been written to "provide an added degree of discouragement for non-water dependent activities proposed for SAS."¹⁰³

The presumption is very strong, but it may be rebutted and a permit may be granted for a project in a SAS that is not water dependent.¹⁰⁴ However, if the presumption is not rebutted, a permit may not be issued for the proposed project.¹⁰⁵ To rebut this presumption and obtain approval for the proposed alternative, the applicant must show by clear and convincing evidence that there are no practicable alternatives which will not cause a discharge into a SAS.¹⁰⁶ The Corps will make the water dependency determination.

(a) SAS

The first step in applying this presumption that practicable alternatives exist is to determine whether the proposed project will

230.1(c) states that "Fundamental to the Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern."

100. *Old Cutler*, *supra* note 9, at 5.

101. *Wendel*, *supra* note 4, at 111-112 (stating that such an incentive is necessary because "in general the permit applicant has no market-derived incentive to analyze upland sites as alternatives").

102. *Hartz Mountain*, *supra* note 9, at 11. The *Plantation Landing* elevation decision contains similar language. *Plantation Landing*, *supra* note 24, at 14.

103. *Plantation Landing*, *supra* note 24, at 2.

104. *Plantation Landing*, *supra* note 24, at 13; *Buttrely v. U.S.* (1982) 690 F.2d 1170, 1180.

105. *Yocom*, *supra* note 3, at 284. For example, Los Vaqueros Reservoir was not determined to be water dependent, but was still the LEDPA and eventually constructed. Interview with Ken Bogdan, *supra* note 3.

106. *Plantation Landing*, *supra* note 24, at 9, 12, 13-14; 45 Fed. Reg. 85336, 85339 (Dec. 24, 1980); see Department of the Army, South Pacific Division, Corps of Engineers *Review of Sundance Plaza Project Permit Denial* (Feb. 5, 2001), 1, 8.

result in a discharge in a SAS.¹⁰⁷ SASs are defined by two separate EPA regulations: 40 C.F.R. section 230.3(q-1) and Subpart E (40 C.F.R. §§ 230.40-.45).¹⁰⁸ EPA Region IX and the Corps use Subpart E to identify SASs.¹⁰⁹ Subpart E states that “the definition of [SAS] is found in § 230.03(q-1)” but specifically lists the following as SASs: sanctuaries and refuges, wetlands, mudflats, vegetated shallows, coral reefs, and riffle and pool complexes.¹¹⁰

(b) *Water Dependency Determination*

The next step in determining whether the presumption applies is to determine whether the proposed project is water dependent. If the project is water dependent, even where the project affects a SAS, the Corps will not presume that alternatives not involving a SAS are available.¹¹¹ A project is water dependent if it requires access or proximity to or siting within a SAS to fulfill its basic purpose.¹¹²

107. The water dependency determination is important because EPA and the Corps scrutinize non-water dependent projects more thoroughly than water-dependent projects. The Corps has stated that housing, restaurants, cafes, bars, retail facilities, or convenience stores will not be considered water dependent. *Plantation Landing*, *supra* note 24, at 12. Neither will these projects be considered water dependent where the applicant proposes to integrate them with a marina or seeks to build them as waterfront projects. *Id.* If a project is proposed for a SAS, a second presumption, discussed in section b below, that discharges into SASs are more environmentally damaging than discharges that are not into SASs, will apply. If a project is proposed for a SAS, the applicant will be required to rebut both of these presumptions. 45 Fed. Reg. 85336, 85339 (Dec. 24, 1980); *Plantation Landing*, *supra* note 24, at 12.

108. Section (q-1) states that “[SAS] means those sites identified in subpart E” and are “geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values.” Wetlands are especially protected by regulations. 33 C.F.R. section 320.4(b)(1) (2005) states that “most wetlands constitute a productive and valuable public resources, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest.” *See also* 33 C.F.R. § 320.4(b)(4) (2005), *WANT*, *supra* note 14, at 6-29.

109. *EPA/Corps MOA (1990)*, *supra* note 2, at 9212; *Yocom*, *supra* note 3, at 284; Telephone Interview with Hugh Barroll, Counsel, U.S. Environmental Protection Agency Region IX (April 17, 2006); Telephone Interview with Calvin Fong, Regulatory Branch Chief San Francisco District, U.S. Army Corps of Engineers (June 8, 2004).

110. 40 C.F.R. §§ 230.40-230.45.

111. Demand for the project is irrelevant to whether the proposed project is water dependent. *Plantation Landing*, *supra* note 24, at 10; *Hartz Mountain*, *supra* note 9, at 6. *See also Twisted Oaks*, *supra* note 9, at 13.

112. 40 C.F.R. § 230.10(a)(3). Where a project with multiple components is proposed, the water dependency determination will be applied to each separate component and each component’s basic purpose will be used in the determination. *Plantation Landing*, *supra* note 24, at 12; *Yocom*, *supra* note 3, at 283, 290-91.

James City County stated that a reservoir was water dependent because its basic purpose was to impound a stream.¹¹³ In *Twisted Oaks*, the Corps determined that an earthen dam associated with a residential development was water dependent because it required siting in Rice Creek.¹¹⁴ EPA does not automatically consider, for example, a dam, a reservoir, or even a pier, to be water dependent, because while they may require access to water, they do not necessarily need to be sited in a SAS.¹¹⁵ Under this rationale, an offstream reservoir will not be considered water dependent, and an onstream reservoir may, but will not automatically, be considered water dependent.

In *Twisted Oaks*, the Corps determined that the overall project purpose of a residential development with a water related amenity (a small lake) was not water dependent, even though the project contained a water dependent element (a small dam).¹¹⁶ Therefore, if any part of the project is not water dependent, the project as a whole will not be considered water dependent. In *Plantation Landing*, the Corps determined that housing, restaurants, cafes, bars, retail facilities, and convenience stores were not water dependent, even where they were part of a waterfront development.¹¹⁷ Each part of the project was analyzed in terms of its non-water dependent function; adding "water front" to a development will not automatically make a project water-dependent.¹¹⁸ In *Hartz Mountain*, the Corps determined that a 3,301 unit residential housing development proposed to be constructed in wetlands was "clearly not a water dependent activity."¹¹⁹

Where a part of a multi-part project is water dependent and other parts are not, the overall project purpose is not water dependent. *Twisted Oaks*, *supra* note 9, at 6, 8.

113. *James City County*, *supra* note 96, at 351-52.

114. *Twisted Oaks*, *supra* note 9, at 6, 8. Even though the earth dam was water dependent, the overall project was not water dependent because the residential aspect of the development was not water-dependent. *Twisted Oaks*, *supra* note 9, at 6; *Two Forks Final Determination*, *supra* note 45, at Appendix p. 11 (vetoing the Two Forks Dam, EPA stated that the dam's purpose was to provide a dependable water supply and that reservoirs are not inherently water dependent because, while a reservoir may ordinarily require a connection to some water, the water need not be a SAS).

115. Telephone Interview with Hugh Barroll, *supra* note 110.

116. *Twisted Oaks*, *supra* note 9, at 6, 8.

117. *Plantation Landing*, *supra* note 24, at 12.

118. *Id.* at 11-12; see also *Twisted Oaks*, *supra* note 9, at 6.

119. *Hartz Mountain*, *supra* note 9, at 3.

B. *Least Environmentally Damaging Determination and Presumption*¹²⁰

In order to be approved as the LEDPA, in addition to being practicable, the proposed project alternative must be the least environmentally damaging of the practicable alternatives. It should be noted, that if an alternative is as environmentally damaging and not *less* environmentally damaging to the aquatic ecosystem than the proposed project or if a practicable alternative has significant environmental impacts of its own, the alternative will not be the least environmentally damaging.¹²¹ EPA Region IX generally considers the alternatives involving the least amount of filled waters and those that avoid ecologically-significant areas to be the least damaging.¹²² In determining which alternative is the least environmentally damaging, the Corps will presume that practicable alternatives not including a discharge into a SAS will have a less adverse impact and, therefore, be environmentally preferable unless the applicant demonstrates otherwise.¹²³ This presumption is rebuttable, but it is rarely overcome.¹²⁴

This presumption applies where the project proposes a discharge into a SAS, regardless of whether the project is water dependent or proposed for a SAS; the presumption focuses on the location of the discharge, not water-dependency.¹²⁵ This presumption is a tool for ranking practicable alternatives according to their environmental impacts.

IV.

MITIGATION IN DETERMINING THE LEDPA

In addition to the LEDPA determination, the Guidelines require that the applicant have taken all appropriate and practica-

120. This is referred to as Presumption #2 in the flow chart at Appendix 1.

121. 40 C.F.R. § 230.10(a) (2005); *see also* Department of the Army, U.S. Army Engineer District, Sacramento, *Record of Decision Delta Wetlands Properties Application No. 190109804* (July 15, 2002), 2.

122. *Yocom, supra* note 3, at 283, 285. The project affecting the least amount of wetlands is typically considered the least environmentally damaging. Interview with Ken Bogdan, *supra* note 3.

123. There is no case law interpreting this presumption.

124. *Yocom, supra* note 3, at 285; 40 C.F.R. § 230.10(a)(3) (2005); 45 Fed. Reg. 85336, 85339 (Dec. 24, 1980) (stating that in 1975 the presumption was irrebuttable, but was changed to recognize that discharges to wetlands are not always the most environmentally damaging alternative).

125. 45 Fed. Reg. 85336, 85339 (Dec. 24, 1980).

ble steps to minimize potential adverse impacts of the discharge on the aquatic environment.¹²⁶ Therefore, because mitigation will be required for any potential adverse impacts on the aquatic environment even where the LEDPA is selected, this section describes how this mitigation requirement relates to the LEDPA determination. The LEDPA will be determined first and then appropriate and practicable steps must be taken to mitigate any impacts the LEDPA may cause.¹²⁷ The Corps and EPA Region IX will not consider proposed mitigation for a project in determining the LEDPA.¹²⁸ Courts have upheld EPA's policy to conduct its alternatives analysis without considering mitigation measures.¹²⁹ This sequence of determining the LEDPA prior to mitigation is to implement Corps' and EPA's agreed upon sequence for mitigating impacts to aquatic sites. The sequence is that first, the applicant must seek to avoid the impacts, then minimize the project's impacts, then the applicant must provide compensatory mitigation for any aquatic sites that are destroyed.¹³⁰

Mitigation that is not practicable or will result in only inconsequential environmental benefits will not be required.¹³¹ The determination of what level of mitigation is appropriate will depend on the value and functions of the impacted aquatic resource and should be practicable and appropriate to the scope and degree of the impacts.¹³² The required mitigation will become a permit condition.¹³³

V.

EPA VETO AUTHORITY

While the Corps administers the LEDPA determination, the EPA exercises an oversight role through its ability to veto a

126. 40 C.F.R. § 230.10(d) (2005).

127. *EPA/Corps MOA (1990)*, *supra* note 2, at 9211-9212.

128. *EPA/Corps MOA (1990)*, *supra* note 2, at 9212; *Hartz Mountain*, *supra* note 9, at 7; *Yocom*, *supra* note 3, at 3-4; *Twisted Oaks*, *supra* note 9, at 5 and 5 n.2; *Uram*, *supra* note 1, at 17, 60.

129. *Alameda Water and Sanitation Dist.*, 930 F.Supp. at 492.

130. *EPA Corps MOA (1990)*, *supra* note 2, at 9212; *Twisted Oaks*, *supra* note 9, at 9; . See also *Uram*, *supra* note 1, at 17; Department of the Army, South Pacific Division, Corps of Engineers *Review of Sundance Plaza Project Permit Denial* (Feb. 5, 2001), 2.

131. *EPA/Corps MOA (1990)*, *supra* note 2, at 9211; *Old Cutler*, *supra* note 9, at 10.

132. *EPA/Corps MOA (1990)*, *supra* note 2, at 9211, 9212.

133. *EPA/Corps MOA (1990)*, *supra* note 2, at 9213

Corps LEDPA determination.¹³⁴ Though rare, EPA may veto a Corps-approved project where EPA determines that the project would have an “unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas.”¹³⁵ An “unacceptable adverse effect” results from an “impact on an aquatic or wetland ecosystem which is likely to result in significant degradation” of the resources listed in section 1344(c).¹³⁶ Before deciding to veto a project, the EPA must consult with the Secretary of the Army and publish notice of its proposed determination.¹³⁷ If EPA has notified the Corps that it is considering exercising its veto authority, the Corps may not issue a permit until final action is taken by the EPA.¹³⁸ EPA must put in writing its findings and reasons supporting its determination that unacceptable adverse effects will occur which justify a veto of the project.¹³⁹

Where the proposed project is not the LEDPA, the availability of a LEDPA, where it is truly available, is an adequate basis for EPA’s determination that unacceptable adverse environmental effects will result.¹⁴⁰ However, under *James II*, even where there is no less environmentally damaging alternative to the proposed project, EPA may still veto the project based solely on a determination that the environmental effects of the project are too great.¹⁴¹ This means that even if the project has been determined by the Corps to be the LEDPA and is approved by the Corps, EPA may still scrutinize and potentially veto a project approved by the Corps as the LEDPA.

134. McGreevey, *supra* note 17, at 383; 33 U.S.C. § 1344(c); 40 C.F.R. § 231.1 (2005). The veto process is outlined in 33 U.S.C. § 1344(c) and 40 C.F.R. Part 231 (2005).

135. 33 U.S.C. § 1344(c); 40 C.F.R. § 231.1 (2005); *James City County*, 758 F.Supp. at 348; *James II*, 12 F.3d at 1330; *Alameda Water and Sanitation Dist.*, 930 F.Supp. at 486. EPA vetoes are rare probably out of deference to the Corps’ central role in administering the Guidelines. *Wendel*, *supra* note 4, at 1113-1114.

136. 40 C.F.R. § 231.2(e) (2005).

137. 33 U.S.C. § 1344(c); 40 C.F.R. § 231.1 (2005).

138. 40 C.F.R. §§ 231.3(a)(2)-(a)(1) (2005).

139. 33 U.S.C. § 1344(c); 40 C.F.R. § 231.6 (2005).

140. *See* 56 Fed. Reg. 76-02 (Jan. 2, 1991) (stating that one of the reasons EPA denied the proposed Two Forks dam was because it would cause unacceptable loss and damage; the damage the dam would cause was unacceptable because the damage was avoidable. The damage was avoidable because the proposed project was not the LEDPA).

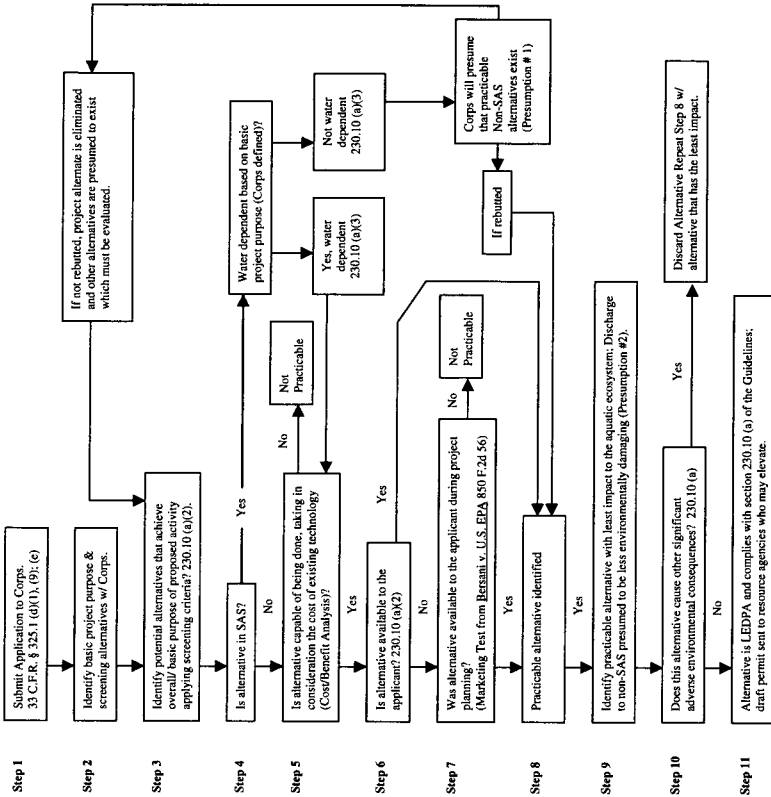
141. *James II*, 12 F.3d at 1335-36. *See also* *EPA/Corps MOA (1990)*, *supra* note 2, at 9212 n.5.

VI.

CONCLUSION

In order to obtain a 404 permit, the applicant must demonstrate that the proposed project is the LEDPA. The LEDPA determination is a critical element of complying with the EPA's 404(b)(1) Guidelines. The LEDPA determination is one determination in a much larger process. Because the LEDPA is one of many determinations, an applicant may underestimate its importance. However, overlooking the LEDPA could be a fatal mistake.

APPENDIX 1



PHASE I:
IDENTIFY ALTERNATIVES

PHASE II:
PRACTICABILITY ANALYSIS

PHASE III:
ENVIRONMENTAL ANALYSIS

*This chart is partially based on a chart found in State Water Resources Control Board, Division of Water Quality, Water Quality Certification Program publication entitled CWA Section 401, Policy & Regulatory References.

WETLANDS PROTECTION
THROUGH IMPACT AVOIDANCE:
A DISCUSSION OF THE
404(b)(1) ALTERNATIVES ANALYSIS

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Abstract: In order to receive a Department of Army permit to discharge dredged or fill material into "waters of the United States," including wetlands, a permit applicant may have to clearly demonstrate that the proposed discharge is unavoidable and the least environmentally-damaging practicable alternative. Failure to do so as required under EPA's 404(b)(1) Guidelines (40 CFR 230) may result in permit denial. Generally, the practicable alternative that involves the least amount of filled "waters" will be considered the least damaging; practicable alternatives that avoid "special aquatic sites" such as wetlands are always presumed to be less damaging environmentally than those that do not. "Practicable" alternatives are not unreasonably costly, but may produce less return on investment than is desired by the permit applicant. Such alternatives are considered available if they are owned by the applicant or if they can be obtained, utilized, expanded, or managed during the planning and permitting phases of the proposed project. In order for the analysis of alternatives to be useful to the permitting process, the project purpose must be defined generically, and separate analyses may be required for each component of a multiple-purpose project. The geographic scope of analysis must remain broad enough to reasonably consider all environmentally-preferable sites where the basic project purpose could be achieved. We conclude that an alternative analysis, performed properly and early in the project formulation stage can reduce project costs, increase certainty, and most importantly, result in avoidance and protection of valuable wetland resources.

Key Words: Clean Water Act, 404(b)(1) Guidelines, practicable alternatives, basic project purpose, avoidance, wetlands.

* Views represented in this paper are those of the authors and do not necessarily represent those of the Environmental Protection Agency.

INTRODUCTION

The objective of the Clean Water Act (CWA) is to restore and maintain the physical, chemical, and biological integrity of the nation's waters through the elimination of discharges of pollutants (33 U.S.C. 466 et seq.); among areas defined as waters of the United States are wetlands [40 CFR 230.3(s) (7)], and pollutants include dredged and fill materials [40 CFR 230.3(o)]. Inasmuch as the CWA identifies the goal of eliminating all discharges of pollutants after 1985 [Section 101(a) (1) of the CWA], there is little question that Congress intends the federal government to strongly discourage all discharges into the nation's waters, including wetlands.

The Environmental Protection Agency's (EPA) 404(b)(1) Guidelines (40 CFR 230) are the substantive environmental criteria used in evaluating permit applications to the U.S. Army Corps of Engineers (Corps), to discharge dredged or fill material into "waters of the United States," including wetlands [definitions at 40 CFR 230.3(s) and (t)]. Under the Guidelines, a primary screening mechanism to determine the necessity of permitting a discharge of dredged or fill material is the analysis of practicable alternatives [see 40 CFR 230.10(a)]. The Guidelines prohibit all discharges of dredged or fill material into regulated "waters," including wetlands, unless a discharge, as proposed, constitutes the least environmentally-damaging practicable alternative that will achieve the basic project purpose. However, even if a proposed discharge constitutes the least environmentally-damaging practicable alternative, it may be prohibited by other portions of the Guidelines and Corps' regulations.

The Guidelines recognize that certain areas regulated by the CWA ("special aquatic sites") are deserving of special protection because of their ecological significance and positive contributions to the overall health or vitality of an ecosystem of a region [40 CFR 230.3(q-1)]. "Special aquatic sites" include wetlands, mudflats, coral reefs, riffle-and-pool complexes, vegetated shallows, and sanctuaries and refuges (40 CFR 230.40-230.45). In addition, the Guidelines recognize that water-dependent projects (i.e., projects such as certain port or marina facilities that require access or proximity to, or siting within, "special aquatic sites" to fulfill their basic purpose), by their very nature are more likely to actually require discharges of dredged and fill material than are non-water-dependent projects.

Thus, if a project is 1) not water-dependent *and* 2) the project proposes to discharge dredged or fill material into a "special aquatic site," the Guidelines establish a regulatory presumption that a less environmentally-damaging practicable alternative exists, unless the permit applicant can clearly demonstrate otherwise [see 40 CFR 230.10(a)(3)]. If this presumption is not clearly rebutted, no permit may be issued for the proposed project.

It is this clear demonstration by the permit applicant that has been a significant source of frustration to applicants and regulators alike. Despite the

strong reliance of EPA and the Corps upon alternatives analysis in screening the permissibility of proposed discharges, very little formal agency guidance has been provided until very recently (Department of Army 1989) on how to properly conduct such an analysis. In this paper, we summarize the specific guidance that EPA Region IX has provided to applicants regarding alternatives analysis, and we discuss the most common areas of misunderstanding between federal regulators and the regulated public, using examples from selected projects within Region IX (California, Nevada, Arizona, Hawaii, and the Pacific Islands).

EPA'S 404(b)(1) GUIDELINES

Determination of the Least Environmentally-damaging Alternative

Projects that avoid discharges of dredged or fill material into "waters of the United States," including wetlands, are assumed generally to have less adverse impact to the aquatic environment than projects that require fill in such "waters." Similarly, projects that propose to minimize fill and/or that avoid ecologically-significant areas are assumed generally to be less harmful to the aquatic environment than those projects or project alternatives that do not.

Projects that do not propose discharges into "special aquatic sites" are always presumed to have less adverse impact on the aquatic ecosystem than projects that do [40 CFR 230.10(a)(3)]. These assumptions may be rebuttable in individual cases, but our experience indicates that these situations are rare.

Whether or not the activity associated with the discharge is water-dependent or proposes discharges of dredged or fill material into a "special aquatic site," it must constitute the least environmentally-damaging practicable alternative to be considered for permitting under the regulations. Applicants should realize that the "water-dependency" determination has more to do with the burden of proof than it does with any inherent permissibility of water-dependent versus non-water-dependent projects. The applicant proposing a non-water-dependent project in a wetland, for example, will have the burden of demonstrating clearly that there are no less damaging practicable alternatives.

Mitigation and the Determination of Practicable Alternatives

Applicants often contend that their project, with proposed mitigation measures included, has no net adverse impacts and that, therefore, there are no less environmentally-damaging alternatives. These applicants argue that on-site or off-site alternatives that might reduce or avoid discharges of dredged or fill material will not have less impact than their proposal (with mitigation included) that has none. EPA Region IX disagrees with this argument and has rejected alternatives analyses that are based on these assumptions for the following reasons.

We believe that EPA's 404(b)(1) Guidelines are written hierarchically to ensure that maximum efforts are made to achieve the objective of the CWA to eliminate all discharges of pollutants into the nation's waters. Discharges of pollutants that can be avoided reasonably should be avoided [see preamble to EPA's 404(b)(1) Guidelines--Alternatives--40 CFR 230]. The basic premise is that compensatory mitigation should not be used to offset avoidable impacts. To allow such mitigation proposals to determine the acceptability of a proposed discharge thwarts the objectives of the CWA. Accordingly, EPA generally will not judge the appropriateness of compensatory mitigation measures until the least environmentally-damaging practicable alternative has been identified.

Another important reason that EPA rejects the concept that compensatory mitigation take precedence over avoidance is that certain types of wetland mitigation proposals commonly fail to offset the impacts they are designed to mitigate (Baker 1984, Race 1985, Kusler and Kentula, in press). It has been our experience regionally and nationally that compensatory mitigation to replace lost functional values through habitat creation, restoration, or enhancement is only partially successful for many aquatic and wetland habitats (Kusler and Kentula, in press).

As a result of the uncertain success rate of many past mitigation proposals, mitigation measures now required in Department of Army permits have become much more complex and expensive. Often an applicant may not only have to buy mitigation property and deed it to a third party, but may have to fund extensive planning, grading, planting, and hydrologic modifications, as well as monitoring studies, to ensure that specified performance standards are met. In addition, the applicant may have to post performance bonds to provide for remedial actions if the mitigation proposal is not successful and to pay for long-term operation and maintenance costs of the mitigation in perpetuity or over the life of the project.

Increasingly, Department of Army permits require that mitigation be implemented and proven successful in meeting stated mitigation goals before project construction proceeds. Thus, projects that require extensive and complex mitigation measures may prove very expensive in terms of investments of initial capital costs and subsequent time delays. Clearly, a proposal that avoids or minimizes discharges of dredged or fill material into "waters" also avoids or reduces costs and delays associated with the 404 permitting process.

We believe that the financial costs and regulatory requirements associated with the 404 permitting process are creating an economic incentive for potential permit applicants to relocate proposed projects out of "waters of the United States." In fact, some developers have found that incorporation of natural water features into their site plans has real market value in its own right (i.e., avoidance can increase profitability). In one case in San Mateo County, California, a housing developer spent approximately \$200,000 in preliminary site analysis and design in order to avoid impacts to aquatic resources on the site. Not only did this planning and design effort result in avoidance of the federal 404 permitting process, including documen-

tation under the National Environmental Policy Act, but the developer estimates that the value of the development exceeds \$120 million (Del Davis, Ailanto Properties, Oakland, CA, personal communication, May 20, 1989).

Determination of Practicability

The Guidelines define "practicable" as available and capable of being done, taking into account cost, existing technology, and logistics, in light of overall project purposes [40 CFR 230.10(a)(2)]. For example, an alternative for a commercial project that is so unreasonably costly as to be unprofitable would not be practicable under the Guidelines. Similarly, an alternative site that is seismically unsound may, technically or logistically, not be a practicable alternative, even though the site could be obtained reasonably. However, a project alternative that achieves a smaller return on investment than the applicant's preferred alternative may be considered practicable for the purposes of 404 permitting, even though that alternative may not be financially acceptable to a particular applicant.

Availability

"Available" means obtainable for meeting the project purpose. Available sites may include property already owned by a permit applicant, as well as properties that could be obtained, utilized, expanded, or managed. In evaluating the availability of alternatives, a "look back in time" may be considered appropriate, particularly when a project has a long planning history. In certain cases, it may be determined that an alternative that was available in the planning phases of a project, but that is no longer available at the time of permit application, may be, nonetheless, practicable. In general, EPA Region IX has limited this "look back in time" to no earlier than the period during which the analysis of practicable alternatives has been a regulatory requirement (EPA's 404(b)(1) Guidelines were promulgated on December 24, 1980).

The most well-known example of EPA's requiring such a retroactive analysis of alternatives involved a proposed shopping mall in North Attleboro, Massachusetts. In that case, EPA determined that a previously available site was a less environmentally-damaging practicable alternative, even though the site was allegedly no longer available to the applicant at the time that a permit application was submitted to the Corps. In litigation at the U.S. District Court and on appeal to the U.S. Circuit Court of Appeals, EPA was upheld in its decision (*Bersani v. U.S. Environmental Protection Agency*, 694 F. Supp. 405 [N.D.N.Y. 1987]; *Bersani v. Robichaud*, 850 F. 2d 3b [2nd Cir. 1988]).

In evaluating the availability of off-site alternatives, it may be appropriate to review city and county records to determine whether upland sites upon which the proposed project purpose could be achieved have been bought, sold, optioned, or

leased within the planning period of the proposed project. In many cases, applicants cite zoning restrictions as rationales for eliminating alternative sites as impracticable. In certain cases, zoning may, in fact, be a legitimate measure of practicability. However, in areas where zoning variances or zoning changes are common, the zoned status of a parcel may be given little weight in determining the practicability of using that site under the Guidelines.

For example, several county general or specific plans in California have zoned wetlands for housing developments and related facilities, while restricting such development on certain upland locations (e.g., ridge tops zoned for open space). In this situation, EPA Region IX may determine that upland sites are available for housing regardless of local zoning restrictions. In one case in Los Angeles County, a parcel containing wetlands and zoned as a "mountain preserve" was purchased by an applicant, after which the property received a variance and was re-zoned residential. EPA did not consider this new zoning status as eliminating the need for the applicant to consider other sites for the proposed housing development.

In addition to considering undeveloped properties, sites with existing development could be considered practicable alternatives if the existing development could be converted (or removed) to accommodate the basic project purpose profitably. When considering the costs of 1) filling a regulated site, 2) developing the site, and 3) mitigating unavoidable impacts, use of a previously developed site may be less environmentally damaging, less costly to develop, and therefore, practicable.

Although it may appear that the Guidelines are land-use regulations, EPA does not, in fact, regulate local growth. EPA regulatory actions are not intended to affect growth management or control. However, it may be that an unintended but unavoidable result of a particular action is to regulate growth to some extent, where that growth requires the discharge of dredged or fill material into regulated "waters," including wetlands.

Capable of Being Done

"Capable of being done" means that it is possible to achieve the basic project purpose on a given site, after considering cost, existing technology, and logistics. Construction of a dam in a site that is seismically unsound would not be considered "capable of being done," for example, even though it may physically possible to construct a dam on that site in a cost-effective manner. Similarly, an applicant may be incapable of constructing a nuclear power plant on a site that is too near to a human population center, even though the costs and technical considerations would not preclude its construction.

Overall Project Purpose

It is the legal opinion of EPA Region IX that the term "overall project purposes" means the basic project purpose plus consideration of costs and technical and logistical feasibility. The term "overall project purposes" does not include 1) project amenities, 2) a particular return on investment (unless a certain minimum return can be shown to render a project impracticable--i.e., a negative benefit/cost ratio), 3) "highest and best use of land", or 4) certain desired size requirements. "Overall project purposes" also may not include a market-area that is so narrow as to only include an applicant's specific desires, such as "upscale" or "water-oriented" housing.

For example, a permit applicant in Alameda County, California, proposed a "rail-served" warehouse development and only considered alternative development parcels in a narrow geographic area that could accommodate a rail spur. EPA did not question the advantages of a "rail-served" amenity but did, however, reject the alternative analysis because it artificially narrowed the basic project purpose of warehousing. An analysis of the market supported EPA's rejection of the rail-served amenity because "non-rail-served" warehousing had been successfully developed recently within the area.

EPA Region IX also reviewed and rejected analyses for two reservoir projects in which the permit applicants stated that their overall project purposes included site-specific secondary requirements. In one instance, an agency proposing a dam and reservoir project in San Diego County, California, argued that the "overall project purposes" included capturing unregulated run-off in the very stream where the proposed dam was to be constructed. The obvious consequence of EPA's accepting such an argument would have been to automatically reject all otherwise legitimate reservoir alternatives in other watersheds, even if they could practicably supply equivalent water to proposed service areas in environmentally-preferable ways.

In a similar instance, EPA Region IX rejected an argument that the basic or overall project purposes of a proposed dam and reservoir in Monterey County, California included flow releases at the dam site for enhancement of downstream fish habitat. Region IX accepted that such enhancement is a desirable aspect or secondary benefit of the applicant's preferred alternative. However, EPA rejected the premise that other viable alternatives to supply water to the people of Monterey County should be rejected, simply because those alternatives might not be capable of the site-specific secondary operations (i.e., flow releases for fisheries) of the applicants preferred alternative.

It is noteworthy that in each of these two reservoir cases, less environmentally-damaging practicable alternatives were identified ultimately that would supply equivalent or greater quantities of water with similar or reduced costs. Such results should be the rule, rather than the exception, if the alternatives test is applied

properly. Thus in simple terms, the least environmentally-damaging practicable alternative is that project proposal whose discharge of dredged or fill material into "waters of the United States" a) has the minimal adverse environmental impact, b) achieves the basic project purpose, and (for profit-making ventures) c) is profitable.

Determination of the Basic Project Purpose

Although defining the basic project purpose would seem obvious, this determination has been among the most controversial aspects of the analysis of alternatives. EPA Region IX consistently treats the basic project purpose as the generic function of the activity. From a regulatory perspective, for example, the basic purpose of a residential development is to house people or provide shelter, whether an applicant has proposed "water-oriented housing" with finger piers, upscale, single-family housing, or resort housing with a golf course. Similarly, the basic purpose of a restaurant is to feed people, even though the applicant may be proposing a waterfront restaurant [See preamble to EPA's 404(b)(1) Guidelines--Water Dependency--40 CFR 230].

In adopting a generic viewpoint, Region IX is not questioning the validity of an applicant's business decision, nor suggesting that an applicant adopt a different basic project purpose. Rather, EPA is seeking to evaluate whether or not an activity has available options in order to comply with the CWA goal of eliminating all discharges into "waters of the United States."

EPA, therefore, would not question whether a waterfront restaurant, for example, would be a better business opportunity than the same restaurant on a site not on or near the water. Instead, EPA must provide a means to screen projects to ensure that only projects that absolutely need to be sited in "waters" and/or "special aquatic sites" receive what amounts to a "waiver" from the objective of the CWA to eliminate all discharges after 1985.

Analysis of Multipurpose Projects

Multiple-purpose projects are considerably more complicated. In some cases, the basic project purpose is the activity that is driving the project financially. Under the regulations, a planned community development, for example, may be viewed essentially as housing, even though it seeks to include recreational and commercial facilities. Similarly, a "world-class destination resort" may, for regulatory purposes, be viewed as a hotel. Again, EPA is not suggesting that a destination resort or planned community are not valid purposes from the applicant's perspective, or that they are not sound business proposals. EPA's regulatory role is rather to evaluate whether discharges of pollutants into the nation's waters should be permitted, particularly if the activities can be practicably relocated into uplands.

Certain multiple-purpose projects really are multiple projects. For example, an applicant in Alameda County, California, proposed a "world-class"

horse-racing facility in association with an office park, hotel, commercial development, recreational vehicle parking area, and family amusement park. The permit applicant stated that the racetrack by itself would not be feasible financially, and that the other project components had to be built to financially support the race track. In this case, EPA and the Corps required that the alternatives analysis be structured to evaluate options that included placing the various components in separate locations. As a general rule, separate project components that are not linked functionally will be considered separate projects for the purpose of the 404(b)(1) alternatives analysis. The rationale is that if some of the project purposes can be built practicably in uplands, they should be (see preamble to EPA's 404(b)(1) Guidelines--Alternatives--40 CFR 230).

Even if an applicant can demonstrate that certain elements of a multiple-purpose project are necessary to financially support other elements, as the applicant contended in the Alameda County case, the alternatives analysis process will assume that this financial support can be provided, even if certain project elements are built on upland sites. In other words, financial linkage does not constitute the functional linkage justifying permitting of the entire project in a "water of the United States." Unless there is a compelling functional reason that the projects be on the same site, the analysis of alternatives will consider other sites that could accommodate the entire multiple-purpose project and/or smaller, individual project purpose elements.

Obviously, project proponents ultimately design their projects to utilize particular parcels of land. If that parcel happens to be on or in the water, it may be wise from a developer's perspective to incorporate water-oriented facilities and/or amenities to maximize the use and potential profits from that parcel. For example, an applicant in Contra Costa County, California, proposed an "historic entertainment park" in a tidal wetland. A "Chinese fishing village," complete with fishing boats, was added to the proposal to take advantage of the waterfront location. In order to comply with EPA's regulations, the applicant was asked to consider the practicability of alternatives that avoided "waters," such as an entertainment park without a fishing village or with a substitute "dry-based" fishing village.

To have considered these site-specific facilities and amenities as the basic purpose of the project for regulatory purposes would have eliminated consideration of any alternative sites or configurations that were not in or near the water. The result would have been to reduce the scope of alternatives to "waters of the United States," the very areas that the CWA seeks to avoid as discharge sites.

Unacceptable Project Purposes

There are no basic project purposes that are invalid under the 404(b)(1) Guidelines but many unacceptable ways of defining them. As stated earlier, EPA and the Corps do not, for example, consider "waterfront housing" to be an accept-

able basic or overall project purpose under the Guidelines. Similarly, "development" or "redevelopment" is not a valid basic or overall project purpose for regulatory purposes, being too general to allow an applicant to conduct a meaningful search for alternative sites or configurations.

"Making money" or "increasing a tax base" or "generating revenues for redevelopment" are further examples of inappropriate basic project purposes under the Guidelines. Given that there are an infinite number of ways to "make money," an applicant proposing an undefined project to achieve this basic project purpose would theoretically have to consider all alternative ways to achieve this purpose and all available sites where money could be made. Such an analysis would be impossible, and the applicant would be unable to rebut the presumption that less environmentally-damaging practicable alternatives are available.

An example of another difficult purpose to evaluate is flood control. In general, we consider flood control to be a valid project purpose where the proposed activity is designed to protect existing upland development, recognizing that in many instances EPA Region IX believes that flood control can be built outside of "waters of the United States" (set-back levees, for example). However, if the project is being built in order to enable development in a floodplain or wetland, we consider the project purpose to be the basic purpose of the enabled development, rather than flood control.

For example, EPA Region IX reviewed a proposed "flood control" project in Sacramento County, California, where the stream course was known to flood, but where there was no existing development in need of immediate protection. The project included plans to channelize and levee the stream, and to construct housing behind the levees. The permit applicant argued that the housing was necessary in order to provide funding for the flood control project through property assessments. EPA rejected that the project purpose was flood control and asked that the applicant evaluate alternatives available to achieve the basic project purpose of housing.

For EPA to have done otherwise would have led to an unworkable situation, since virtually any project that requires fill in "waters of the United States" is placing that fill for the main purpose of raising the base of the project so that the project does not flood. Taken to the extreme, one could argue that all fill projects are flood control projects.

Finally, there are instances where the "no-project" or "no-action" alternative may be considered a practicable means of achieving the basic project purpose. This situation may arise in cases where the basic project purpose is defined by the applicant as expansion of an existing, profitable operation. From a regulatory perspective, it may be considered practicable to achieve the regulatory basic project purpose without the expansion.

For example, a ski resort at Lake Tahoe, California, proposed construction of a reservoir in a sub-alpine wetland to increase water storage for snow-making. This project would allow the resort to extend the ski season and increase revenues.

However, because the resort already had snow-making capability in certain areas and was operating profitably, EPA considered the "no-project" alternative as a less-damaging practicable alternative to achieve the basic purpose of skiing.

Geographic Scope of the Alternatives Analysis

The geographic scope of analysis will, to some extent, be determined on a case-by-case basis and may vary, depending on a number of factors. For example, the basic purpose of a project will in many cases serve to set the reasonable scope. Constraints that are inherent to siting a nuclear power plant are obviously different from those governing the siting of housing or restaurants. In general, the scope will include all areas that would be reasonable to consider in the particular industry.

A developer seeking to build housing within a certain community may be forced under 404 regulations to consider sites somewhat removed from that community should the developer propose a project in a regulated wetland site. Clearly, there are no 404 regulatory concerns if the developer selects a site within the desired community that has no regulated "waters of the United States" that would be filled. If, however, a regulated wetland site is proposed, the developer may be required to consider other nearby communities within which housing could be built practicably without filling wetlands or other "waters of the United States," or where such filling would have less adverse environmental impacts. This requirement may lead to conflicts between 404 regulations and local zoning ordinances.

Certain projects may entail very large geographical scopes if the project purpose is one that could be built practicably almost anywhere and/or that cannot be tied reasonably to any particular market. For example, a "destination" resort proposed on a scale to attract clients from great distances could, by its very nature, achieve its basic purpose on sites in a large geographic area. In such cases, a proposed "destination" resort should consider a multi-state geographic area.

In cases where a local or county government seeks to sponsor a project, the basic project purpose generally will determine the appropriate geographic scope. Thus, if a city is seeking a permit for housing as part of a redevelopment plan, the scope of alternatives will be similar to that which would be required of a private housing developer and generally should include sites outside of the city boundaries.

EPA addressed this problem in two cases involving housing developments. In one case, a city in Solano County, California, sought a permit to fill a regulated wetland as part of its redevelopment plan. The city argued that its proposal to build housing on the site was necessary to generate sufficient revenues to support nearby commercial aspects of the redevelopment plan. EPA Region IX rejected "redevelopment" as a legitimate basic project purpose under the regulatory framework of the 404(b)(1) Guidelines. Rather, EPA considered the basic project purpose to be housing. Similarly, EPA rejected the notion that filling wetlands could be justified by the need for revenues to support other projects on other sites.

In another case, an applicant in Los Angeles County, California, sought to limit the geographic scope of analysis by stating that the basic project purpose included providing tax revenues to the city within which the housing project had received local approvals. The applicant did not consider any alternative sites outside of the limits of that city. EPA rejected this analysis and recommended that the Corps direct the applicant to consider other sites within the Los Angeles Basin.

Assessment of Project Scale and Configuration

In determining which alternative constitutes the least environmentally-damaging practicable alternative for 404 permitting, any project that achieves the basic project purpose practicably should be considered. Thus, a housing project that can avoid or reduce impacts by alteration of its configuration ("footprint"), reduction of units, and/or relocation to an alternate site or sites and remain practicable will not be permissible as originally configured by the applicant. By regulation, only the least-damaging practicable alternative can be permitted.

For example, an applicant in Alameda County, California proposed a project that, among other features, required "upscale, single family houses" on a parcel that contained both wetlands and uplands. While EPA recognized that the applicant could receive a higher return on his investment by building single family units, the basic project purpose of housing could be fulfilled by building higher density, multi-family units on uplands and avoid wetlands.

Assignment of Project Costs Under the Alternatives Analysis

In general, the "sunk costs" associated with one site cannot be assigned to alternatives. For example, consider a developer who has invested in site-specific architectural designs or has installed infrastructure on a regulated site. In evaluating alternatives under the Guidelines, these "sunk costs" cannot be added to the costs of developing a less-damaging design or site. The project proponent assumes a certain risk in moving forward financially for a project that requires, but has not received, 404 authorization. This risk cannot be transferred to the costs of another site, nor can these "sunk costs" be used to justify a finding that another site is not practicable on the basis of costs.

For example, an applicant in Santa Clara County, California had already completed considerable work on development, design, and mitigation plans on a research and development facility proposed in a regulated wetland. In the alternatives analysis, several alternative upland sites were eliminated as too costly after the "sunk costs" associated with developing the wetland parcel were added to the costs of utilizing each upland parcel. EPA did not consider these "sunk costs" to be a valid justification for eliminating otherwise practicable alternatives, and recommended that these costs be removed from the economic evaluations.

Financial Standing of the Applicant Under the Alternatives Analysis

In general, the financial standing of an applicant is not considered applicable in determining whether or not the basic project purpose can be achieved practicably. The Guidelines state specifically that the term "cost" was used in defining "practicable" so as to avoid construing the term to "... include consideration of the applicant's financial standing, or investment, or market share, a cumbersome inquiry which is not necessarily material to the objectives of the Guidelines" (Preamble to EPA's 404(b)(1) Guidelines--Alternatives--40 CFR 230).

Accordingly, a developer with insufficient resources to acquire an available upland site where the project could be built profitably will be unable to obtain a permit for the project on a wetland site. Similarly, a large, multinational development corporation generally will be asked to consider the same market area and constraints as a local developer seeking to build for the same basic project purpose.

The Relationship Between the 404(b)(1) Alternatives Analysis and the Corps' Public Interest Determination

Before granting a permit pursuant to Section 404 of the Clean Water Act, the Corps must determine that the project complies fully with EPA's 404(b) (1) Guidelines and that the project is not contrary to the public interest (33 CFR 323.6). Therefore, a project that the Corps finds to be not contrary to the public interest will not qualify for a permit if it fails to comply with the Guidelines. Similarly, although a project might comply with the Guidelines, it will not receive a permit if the Corps determines that issuance of the permit would be contrary to the public interest.

For example, the Corps requested that an applicant proposing a research and development park in wetlands in Santa Clara County, California, supply information on the vacancy rate of similar existing facilities within the project area. The Corps was questioning whether, under its regulations, it would be contrary to the public interest to discharge fill material into a "water of the United States," if there was evidence of little public need for this type of development. In this case, the reported 90 percent vacancy rate for research and development parks was leading the Corps toward permit denial when the applicant withdrew the application.

CONCLUSIONS

In order for the analysis of practicable alternatives to serve its intended purpose as a planning and screening tool, the analysis must be applied by potential permit applicants as early in the planning phases of their projects as possible. This analysis process should streamline the permitting process rather than hinder and

... delay it, but the degree to which this streamlining is successful will largely depend upon the applicant. Obviously, if the analysis has identified practicable alternatives that avoid discharges of dredged or fill material into "waters of the United States", the delays and uncertainty associated with Section 404 permit processing can be avoided altogether.

On the other hand, if the analysis is improperly designed to simply justify an applicant's preconceived proposal and does not seriously consider alternative sites and configurations, delays and uncertainties are likely to be magnified, as will be the possibility of permit denial. In this latter regard, the federal government has an important role in providing strong incentive to prospective permit applicants to thoroughly analyze practicable alternatives early in their planning processes. This incentive should come not only from the denial of permit applications that have not clearly demonstrated that the proposed discharge of dredged or fill material is unavoidable, but from improved regulatory guidance to the regulated public and to regulators that establishes criteria on how to conduct and how to evaluate a proper analysis of alternatives.

We believe that alternatives analysis potentially is the best and most useful means to achieving the goals and intent of the CWA in a reasonable manner. The analysis, if performed 1) early in the project planning stages and 2) in good faith by regulators and permit applicants, should ensure that most projects are sited out of the nation's waters, and that only projects that are absolutely necessary and environmentally acceptable receive permits. The analysis should be a process that helps planners and developers rather than hindering them.

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LITERATURE CITED

- Baker, G. F. 1984. An analysis of wetland losses and compensation under the Clean Water Act Section 404 program: managing natural resources through mitigation. MS Thesis, University of San Francisco, San Francisco, CA, USA.
- Department of Army. 1989. Memorandum from General Patrick J. Kelly to the Commander, U.S. Army Engineer District, New Orleans, LA, regarding permit elevation, Plantation Landing Resort, Inc., April 21, 1989.
- Kusler, J.A. and M.E. Kentula. In press. Executive Summary. *In* J.A. Kusler and M.E. Kentula (eds.) Wetland creation and restoration: the status of the science. Vol 1. Regional reviews. EPA/600/3-89/38a. Environmental Research Laboratory, Corvallis, OR, USA.
- Race, M. S. 1985. Critique of present wetlands mitigation policies in the United States based on an analysis of past restoration projects in San Francisco Bay. *Environmental Management* 9: 71-82.

The Federal Wetland Permitting Program: Avoidance and Minimization Requirements



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I. Introduction

The Clean Water Act (CWA) prohibits the discharge of any dredged or fill material in “waters of the United States,”¹ including wetlands, without a permit. Wetlands are regulated under CWA § 404 which is administered by the U.S. Army Corps of Engineers (the Corps) with oversight by the U.S. Environmental Protection Agency (EPA).² The basic premise of the § 404 permitting program is that no discharge shall be permitted if (1) a practicable alternative exists that is less damaging to the aquatic environment, or (2) the discharge would cause the nation’s waters to be significantly degraded. In order for a project to be permitted, it must be demonstrated that, to the extent practicable: steps have been taken to avoid impacts to wetlands and other aquatic resources, potential impacts have been minimized, and compensation will be provided for any remaining unavoidable impacts. This process is commonly referred to as the mitigation sequencing requirement of the Clean Water Act § 404 regulatory program.

Significant attention has been paid over the past 20 years to improving the third step in the process—compensatory mitigation—to ensure that the compensation being provided is ecologically effective, self-sustaining, protected in perpetuity, has “assurances of long-term sustainability and stewardship,”³ and ultimately meets the program’s goal of no net loss (discussed further below). This report focuses on the first two steps in the sequencing process which, to date, have received far less attention: avoidance and minimization.

While the sequencing requirement in the § 404 program comes from EPA’s permitting regulations, the Corps also has regulations that control this permitting process and the process has been the subject of administrative and legal decisions and policy changes. The current state of avoidance and minimization requirements is a result of all of these authorities. Before describing the substantive requirements of avoidance and minimization policy, this paper will describe the setting for the requirements, which includes the regulatory context and the permitting procedures.

Agency Roles and Responsibilities

Congress created the § 404 program in 1972 with authority divided between the Corps and EPA.

1. Corps Roles and Responsibilities

The Corps plays the lead role in the § 404 program through its authority to require and issue permits for the discharge of dredged or fill material in “waters of the United States.” In addition to administering the program on a day-to-day basis, the Corps also conducts or verifies jurisdictional determinations and shares enforcement responsibilities with EPA.⁴

2. EPA Roles and Responsibilities

EPA is responsible for developing and interpreting the substantive environmental criteria used by the Corps to evaluate permit applications—the § 404(b)(1) Guidelines⁵ (Guidelines)—and maintains a review and comment role in the issuance of § 404 permits. EPA is also responsible for determining the geographic scope of jurisdiction and the applicability of exemptions, approving and overseeing state and tribal assumption of the permitting program, and shares enforcement responsibilities with the Corps.⁶ Finally, EPA has two additional powers that have, over the years, helped to shape avoidance and minimization policy: § 404(c) veto authority and § 404(q) elevation authority.⁷

3. EPA’s Elevation and Veto Authorities

Section 404(c) of the Clean Water Act gives EPA the authority to prohibit, deny, or restrict the use of any defined area as a disposal site for dredged or fill material if the discharge will have unacceptable adverse effects on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas.⁸ Under § 404(c), EPA may “veto” the Corps’ permit decisions. EPA has exercised its veto power very rarely, reporting that it has completed only 11 veto actions out of an estimated 1,640,000 permit applications received between October 1979, when the § 404(c) regulations went into effect, and December 2005.⁹ EPA can exercise its § 404(c) authority over specific sites without a related § 404 permitting action, but the agency has not “pre-designated” any § 404(c) sites since the program’s inception.¹⁰

Section 404(q) of the Act established a requirement that the Secretary of the Army enter into an agreement with EPA and other appropriate federal agencies to ensure that delays in the issuance of permits under § 404 are minimized to the maximum extent practicable.¹¹ Under these agreements, EPA, the U.S. Fish and Wildlife Service (FWS), and the National Oceanic and Atmospheric Administration (NOAA) may request “elevation” of specific permit decisions or policy concerns for higher-level review within the Department of the Army.¹² EPA reports that it has requested elevation of review on 20 permit cases out of an estimated 1,580,000 applications received between 1982 and December 2005.¹³ In the same time period, eight permit cases were elevated to EPA Headquarters by EPA regional offices, but these cases were resolved before a final elevation request was transmitted.¹⁴ Between 1992, when the current § 404(q) Memorandum of Agreement (MOA) between EPA and the Department of the Army was signed, and 2006, EPA made ten requests for elevation. Of these 10 requests, 4 were denied, 3 were accepted, 2 were withdrawn (EPA withdrew elevation on one and the applicant withdrew the permit on the other). In one of these cases, EPA’s elevation request was denied, but FWS’s elevation request based on similar concerns was ultimately accepted.¹⁵

CWA § 404 Permitting Process

The Corps has the authority to issue both individual and general permits. General permits authorize certain activities that the Corps determines are similar in nature and will “cause only minimal adverse environmental effects both individually and cumulatively.”¹⁶ General permits are meant to expedite the permitting process by allowing certain activities to be evaluated categorically, rather than on a case-by-case basis. The general permit procedure allows the Corps to apply the § 404(b)(1) Guidelines to an entire class of activities on a national, regional, or statewide basis.¹⁷ The vast majority of the Corps’ permitting actions involve general permits. For example, in Fiscal Year 2003, the Corps made approximately 85,000 permit decisions. Of these, nearly 79,000—over 91 percent of the permit decisions in that year—involved general permits.¹⁸

Proposed activities that are not covered under a general permit must be evaluated under the individual permit review process.¹⁹ The Corps relies on three sets of regulations to make its individual permit decisions. These include: 1) the Corps regulations guiding permit processing procedures, issued in 1986;²⁰ 2) the Corps “public interest review” policy, first issued in 1968 as part of the general policies for evaluating permit procedures;²¹ and; 3) the § 404(b)(1) Guidelines, issued by EPA in 1980.²²

1. Corps Procedures for Processing Individual Permits

The Corps’ individual permits process begins with the submission of an application. Applicants are encouraged, however, to consult with the Corps (and other resource agencies) prior to submitting an application in order to identify avoidance and minimization opportunities before the official permit evaluation process starts. As a result, before submitting a full, formal permit application, applicants for larger projects often request a pre-application meeting with the Corps.²³ Between the time a permittee has a pre-application meeting with the regulatory agencies and when a full application is submitted, permittees may significantly alter their proposed activities based on the agencies’ feedback.²⁴ These revisions may include efforts to avoid or minimize impacts, even before the formal sequencing steps, discussed further below, are applied.²⁵

Clean Water Act § 404(b)(1) Guidelines

The Federal Water Pollution Control Amendments of 1972 (the Clean Water Act) authorized the U.S. Army Corps of Engineers to issue permits for the discharge of dredged or fill material into waters of the United States, including wetlands.^a Section 404 (b)(1) of the Act directed the U.S. Environmental Protection Agency to develop substantive criteria to be used when evaluating discharges under § 404.^b

Interim Guidelines were issued by the U.S. Environmental Protection Agency in 1975, and the current Guidelines were finalized in 1980. In the intervening years, EPA and the Corps have issued a variety of guidance on how to carry out the Guidelines.

a. 33 U.S.C. § 1344; CWA § 404.

b. 33 U.S.C. § 1344 (b)(1); CWA § 404 (b)(1).

Once the Corps receives a complete application, it is posted in post offices or other appropriate public places and distributed to all interested parties who requested copies of public notices and to other parties listed in the regulations.²⁶ This begins the public interest review phase—generally a 15-30 day period—during which the Corps solicits feedback from the public on how the proposed project will impact the public interest.²⁷ Section 404 also requires the Corps to consult with its sister natural resource agencies, including EPA, FWS, and NMFS.²⁸

2. EPA's Guidelines for Permit Applications

On December 24, 1980, EPA issued the § 404(b)(1) Guidelines, the regulations that established the environmental criteria by which the Corps evaluates dredge and fill permit applications.²⁹ Central to the Guidelines is the fundamental requirement for an alternatives analysis. “. . .[N]o discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the environment, so long as the alternative does not have other significant adverse environmental consequences.”³⁰ “[T]he application is required in every case (irrespective of whether the discharge site is a special aquatic site or whether the activity associated with the discharge is water dependent) to evaluate opportunities for the use of non-aquatic areas and other aquatic sites that would result in less adverse impact on the aquatic ecosystem.”³¹ Thus, applicants must demonstrate that for any discharge or fill activity there is no practicable alternative site for the proposed activity that will have less adverse environmental impacts.

For special aquatic sites such as wetlands, however, the Guidelines propose a more difficult test for avoidance with two presumptions. For proposed discharges to special aquatic sites there is a presumption that an alternative site that is not a special aquatic site exists and a presumption that such a site will result in less adverse environmental impacts on the aquatic ecosystem.³²

These rebuttable presumptions clarify how to determine if discharges proposed for special aquatic sites meet the requirement that the practicable alternatives have less significant adverse impact on the environment and do not have other significant environmental impacts. If the applicant can rebut either of

these presumptions, the project has been shown not to have a practicable alternative that is less environmentally damaging, and thus is no longer subject to denial for that reason. The Guidelines also require that “appropriate and practicable steps” are taken to minimize potential adverse impacts to the aquatic ecosystem before a discharge can be permitted.³³ The Guidelines further describe habitat “development and restoration” as an appropriate method for compensating for permitted impacts that destroy habitat.³⁴

3. Corps Public Interest Review for Permit Applications

In addition to satisfying the § 404(b)(1) Guidelines, the Corps bases its permitting decision on a public interest review that balances foreseeable benefits and detriments.³⁵ Under this review, the Corps’ public interest review provision states, “a permit will be granted unless the district engineer determines that it would be contrary to the public interest.”³⁶ The evaluation of every application must include a consideration of “[t]he relative extent of the public and private need for the proposed [project].”³⁷ The Corps determines how much weight to give each factor by its relevance to the specific proposal.³⁸

4. Relationship Between the Two Sets of Permit Regulations

The Corps’ public interest review and EPA’s § 404(b)(1) Guidelines have a complex relationship. Furthermore, the agencies have differed on how to apply the EPA’s environmental standards. After the Guidelines were finalized in 1980, the Corps often treated them as a lesser weighted component of the public interest determination, while the EPA maintained they were for the threshold determination.³⁹

In October 1984, the Corps agreed to abide by EPA’s § 404(b)(1) Guidelines, pursuant to a settlement agreement in *National Wildlife Federation v. Marsh*.⁴⁰ The Corps amended its regulations to include the statement that a permit would be denied if it “would not comply with the Environmental Protection Agency’s 404(b)(1) guidelines.”⁴¹ In 1989, the Corps issued two decisions—in the *Plantation Landing* guidance and the *Hartz Mountain* elevation findings—reasserting that the § 404(b)(1) Guidelines are binding on the Corps and emphasizing the importance of the alterna-

tives test.⁴² This point was clarified and reestablished in the 1990 Mitigation MOA between the Corps and EPA.⁴³ In 1992, EPA and the Corps issued another MOA clarifying their roles, including the procedures for requesting elevation of permit decisions.⁴⁴ As the areas of agreement shifted over the years, EPA relied upon the threat of its veto and elevation powers to press for more rigorous application of the Guidelines.

Notes

1. 33 U.S.C. § 1311; CWA § 301. Waters of the United States means “(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (2) All interstate waters including interstate wetlands; (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) Which are used or could be used for industrial purpose by industries in interstate commerce; (4) All impoundments of waters otherwise defined as waters of the United States under the definition; (5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section; (6) The territorial seas; (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section. (8) Waters of the United States do not include prior converted cropland.

Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.” 33 C.F.R. § 328.3.

2. 33 U.S.C. § 1344; CWA § 404.

3. National Research Council, *Compensating for Wetland Losses Under the Clean Water Act*, National Academy of Sciences, at 9 (2001).

4. 33 C.F.R. § 325.9.

5. 40 C.F.R. § 230 et. seq.
6. 33 U.S.C. § 1344; CWA § 404.
7. 33 U.S.C. §§ 1344 (c), 1344(q); CWA §§ 404(c), (q).
8. 33 U.S.C. § 1344(c); CWA § 404(c); U.S. Environmental Protection Agency, *Clean Water Act 404(c) "Veto Authority,"* at <http://www.epa.gov/owow/wetlands/pdf/404c.pdf> (last visited Apr. 16, 2007).
9. *Id.*
10. *Id.*
11. 33 U.S.C. § 1344(q); CWA § 404(q); Environmental Protection Agency, *Clean Water Act 404(q) Dispute Resolution Process,* at <http://www.epa.gov/owow/wetlands/pdf/404q.pdf> (last visited Apr. 16, 2007).
12. 33 U.S.C. 1344(q); CWA § 404(q); Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning Section 404(q) of the Clean Water Act (Aug. 11, 1992).
13. Dispute Resolution Process, *supra* note 11.
14. *Id.*
15. U.S. Environmental Protection Agency. "404(q) Permit Cases Elevated to EPA HQ – August 2006."
16. 33 U.S.C. § 1344 (e)(1); CWA § 404(e)(1).
17. *Id.*
18. U.S. Army Corps of Engineers Regulatory Program, *All Permit Decisions FY 2003*, available at <http://www.usace.army.mil/cw/cecwo/reg/2003webcharts.pdf> (last visited May 15, 2007).
19. 33 U.S.C. § 1344; CWA § 404.
20. 33 C.F.R. § 325.
21. *Id.* § 320.4(a).
22. 40 C.F.R. § 230 et. seq.
23. 33 C.F.R. § 325.1(b).
24. *Id.*
25. Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, § III.A (Feb. 6, 1990).
26. 33 U.S.C § 1344(o); CWA § 404(o); 33 C.F.R. § 325.3.
27. 33 C.F.R. § 325.2.
28. 33 U.S.C §§ 1344, (c), 1344(m), 1344(q); CWA §§ 404(c), 404(m), 404(q).
29. 40 C.F.R. § 230 et. seq.
30. 40 C.F.R. § 230.10(a).
31. RGL 93-02, Memorandum to the Field: Guidance on Flexibility of the 404(b)(1) Guidelines and Mitigation Banking (Aug. 23, 1993 - Dec. 31, 1998, Department of the Army and Environmental Protection Agency).
32. 40 C.F.R. § 230.10(a)(3).
33. *Id.* § 230.10(d).
34. *Id.* § 230.75(d).
35. Department of the Army, *Army Corps of Engineers Standard Operating Procedures for the Regulatory Program*, 13 (Oct. 15, 1999).
36. 33 C.F.R. § 320.4(a)(1).
37. *Id.*
38. Department of the Army, *SOP, supra* note 35.
39. Government Accounting Office, RCED-88-110, *Wetlands: Corps of Engineers Administration of Section 404 Permit Program*, 26 (July, 1988).
40. 721 F.2d 767, 782 (11th Cir. 1983).
41. 33 C.F.R. § 320.4(a)(1).
42. Plantation Landing Guidance, Brigadier General Patrick J. Kelly, Director of Civil Works, Department of the Army (Apr. 21, 1989); Hartz Mountain HQUSACE Findings (July 25, 1989).
43. 1990 Mitigation MOA, *supra* note 25.
44. 1992 §404(q) MOA, *supra* note 12.

II. Sequencing

Federal standards on mitigation were first described in the NEPA regulations issued by the Council on Environmental Quality in 1978. The CEQ defined mitigation as avoiding, minimizing, rectifying, reducing or eliminating, and compensating for impacts.¹ Avoidance and minimization were further described as “[a]voiding the impact altogether by not taking a certain action or parts of an action...”² and “[m]inimizing impacts by limiting the degree or magnitude of the action and its implementation.”³ The CEQ presented compensation as a separate, independent procedural element.⁴ The Clean Water Act and EPA’s Guidelines make mitigation a requirement of the § 404 program, through the standards set at 40 CFR §§ 230.10(a)-(d).⁵

The four standards are: (a) the prohibition against discharging dredged or fill material without a permit, if there is a practicable alternative; (b) the prohibition against discharging dredged or fill material if it will violate state water quality standards, toxic effluent standards, or jeopardize a species listed under the Endangered Species Act; (c) the antidegradation rule; and (d) the requirement to minimize impacts.

These standards were clarified in the 1990 Mitigation MOA that articulates EPA and the Corps’ mitigation procedures.⁶ The MOA establishes the process by which the Corps seeks to meet the § 404 program’s guiding goals: 1) the 1972 Clean Water Act’s purpose, “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,”⁷ “including wetlands”;⁸ and, 2) the national goal, established by President Bush in 1989, of achieving a “no overall net loss” of wetland acres and functions.⁹ The 1990 MOA was developed by EPA and the Corps to elaborate on the mitigation sequence of the alternatives analysis and the rebuttable presumptions from the Guidelines.

The Mitigation MOA defines mitigation as a three-part sequence: avoidance, minimization, and compensation:¹⁰

The Corps...first makes a determination that potential impacts have been avoided to the maximum extent practicable; remaining unavoidable impacts will then be mitigated to the extent appropriate and practicable by requiring steps to minimize impacts and, finally, compensate for aquatic resource values.¹¹

The sequencing provisions are further described in the Mitigation MOA as follows:

1. **Avoidance:** The avoidance provisions are satisfied through the alternatives test spelled out in the § 404(b)(1) Guidelines (specifically, 40 C.F.R. § 230.10(a)(1)(i)). By approving permits only for the “least environmentally damaging alternatives,” the Corps seeks to avoid impacts.
2. **Minimization:** The minimization provisions are satisfied through the minimization procedures described in the § 404(b)(1) Guidelines (specifically 40 C.F.R. § 230.10(d)). Subpart H of the Guidelines further provides a broad array of possible methods for minimizing the impacts of a proposed activity.
3. **Compensation:** All remaining unavoidable adverse impacts must be addressed through “[a]ppropriate and practicable compensatory mitigation.” Compensation activities are specified in Subpart H of the Guidelines (specifically, 40 § C.F.R. 230.75).¹²

There are two overarching themes that affect how this sequencing analysis is conducted. One is that although the burden of proof for satisfying these steps rests with the permit applicant,¹³ the Corps must rely upon its own analysis in making a finding of compliance or non-compliance with the Guidelines.¹⁴ Where the applicant provides information that is insufficient to determine compliance, the Guidelines require that the Corps deny the permit.¹⁵ This issue has arisen in several policy elevations relating to who has the responsibility of determining the project purpose, described below. The second overarching theme is that in evaluating projects, the stringency of the review may be modified based on the “significance and complexity of the discharge activity.”¹⁶ The Corps issued guidance in 1993 providing districts with additional information on how to determine the appropriate level of analysis for evaluating compliance with the alternatives analysis.¹⁷

A. Avoidance: The Alternatives Analysis

Avoidance is the first step in the sequencing process by which the Corps determines whether or not the proposed project is the least environmentally damaging practicable alternative (LEDPA).¹⁸ The LEDPA is identified by an evaluation of the direct, secondary, and cumulative impacts on the aquatic ecosystem¹⁹ and “other ecosystems”²⁰ of each alternative under consideration.

The Guidelines state:

...no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem so long as the alternative does not have other significant adverse environmental consequences.²¹

The universality of the requirement to evaluate opportunities for use of non-aquatic areas and other aquatic sites that would result in less adverse impact on the aquatic ecosystem was reiterated in a EPA and Army guidance memo in 1993.²²

The regulations further establish two analytical presumptions that increase the burden on an applicant for a non-water dependent activity to demonstrate that no practicable alternative exists.²³

The first presumption is that if the basic purpose of a project is not water dependent, “practicable alternatives that do not involve special aquatic sites are presumed to be available.”²⁴ The second presumption is, “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.”²⁵ The two presumptions hold unless the applicant proves otherwise.²⁶ The standards for overcoming these presumptions and the other components of the alternatives analysis have been clarified by numerous administrative and legal decisions.

1. Project Purpose

The first step in completing an alternatives analysis is defining the project purpose. Defining project purpose is critical, as it has a profound effect on the set of alter-

natives to the permit applicant’s proposed site which must be considered. Certain aspects of this determination have been controversial, including who is ultimately responsible for making the required findings, whether there are two severable components to project purpose, and how the water dependency test relates to project purpose. These perspectives are described below.

Several administrative decisions in the early 1990s established that the project purpose must be defined broadly enough that more than only the proposed project will meet it.²⁷ The EPA requested elevation of the *Plantation Landing* application in 1989 in part due to concern about project purpose.²⁸ In this case, the Department of the Army affirmed that the Corps must conduct an independent analysis of project purpose to ensure that the purpose is not defined too narrowly.²⁹ This was similarly affirmed in the *North Fork of the Hughes River, Petro Star, and Old Cutler Bay Associates* elevations.³⁰ Nonetheless, the Corps must take the applicant’s purpose into account when conducting the alternatives analysis.³¹

a. Burden of Proof

Although the Clean Water Act does not specify who has the responsibility to meet the requirements of the Guidelines, over 20 years of agency policy-making and judicial decisions have clarified that the responsibility lies with the Corps. The permit applicant must demonstrate compliance with the Guidelines³² in order to obtain the permit, though the Corps may supplement the analysis with its own information. The Guidance states that ultimately the Corps must make an independent finding that the proposed activity complies with the applicable standards and may deny a permit if the information supplied by the applicant is insufficient.³³

In a 1988 report on the § 404 program, the Government Accounting Office explained the concern that the Corps Districts were simply accepting project purposes asserted by applicants without making the required independent finding.³⁴ In an effort to establish clarity, EPA requested elevation of several applications, calling the problem of the Corps’ failure to independently verify the information and analysis presented by § 404 permit applicants one of national concern. “We are concerned by matters of interpretation of the Guidelines... and the potential for site specific and cumulative envi-

ronmental impacts as well as impacts on the integrity of the Section 404 program,” EPA stated in the *Old Cutler Bay* elevation request.³⁵ This concern was similarly expressed in the *North Fork of the Hughes River* elevation request.³⁶ The EPA asserted that by relying on the applicant’s alternatives analysis, the Corps had unnecessarily limited the scope of practicable alternatives that could meet the project purpose.³⁷

Through acceptance of EPA elevation requests and resulting guidance, the Department of the Army has affirmed the requirement that the districts make independent verifications of the findings.³⁸ This position was further affirmed by a federal appellate court in 2002 in *Utahns for a Better Environment v. USDOT*.³⁹ The decision established that the applicant bears the burden of proving that there is no practicable alternative but the Corps must independently verify the finding.⁴⁰ The demonstration must “provide detailed, clear and convincing information *proving* impracticability.”⁴¹ Further, both the applicant and the Corps “are obligated to determine the feasibility of the least environmentally damaging alternatives that serve the basic project purpose. If such an alternative exists... then the CWA compels that the alternative be considered and selected unless proven impracticable.”⁴²

b. Basic Versus Overall Project Purpose

The Corps separates the Guidelines’ concept of project purpose into two analytical elements, distinguishing between the “basic purpose” (a regulatory term from EPA’s § 404 Guidelines) of the project and the “overall purpose” (a guidance term from HQUSACE’s guidance resulting from the Twisted Oaks Venture and Old Cutler Bay Elevation Requests) of the project.⁴³ The Corps Standard Operating Procedures state that the overall project purpose is more specific to the applicant’s project than the basic purpose.⁴⁴ EPA’s final interpretation of the Guidelines’ use of the terms “basic purpose” and “overall project purposes” came in 1990 in the veto of the *Two Forks* application.⁴⁵ EPA clarified that these terms were intended to be used interchangeably. This analytical distinction is entangled with the determination of water dependency, as described below.

c. Water Dependency

Once the project purpose is established, the next step is to determine whether the project is water dependent—whether it “requires access or proximity to or siting within [a wetland] to fulfill its basic purpose.”⁴⁶ This distinction is crucial because of the presumption in the Guidelines that non-water-dependent projects have “practicable alternatives that do not involve [wetlands].”⁴⁷ If a project is not water dependent, then a practicable alternative must be chosen. In 1986, EPA vetoed the application to build the *Attleboro Mall* in Sweedens Swamp because the project was not water dependent and there was a practicable alternative to the proposed site.⁴⁸ This view was affirmed through litigation.⁴⁹

The Corps’ subsequent interpretation of this rule has resulted in confusion. In the late 1980s, the Corps asserted that if a project has two components, one of which is water dependent, then the overall project purpose is water dependent.⁵⁰ The 1989 *Plantation Landing* decision highlighted this issue. In this case, one concern was that the District had found the project to be water dependent because one element was water-related, though the overall purpose of the project was not.⁵¹ The Army accepted EPA’s assertion that the basic purpose of each component of a project must be considered in terms of its actual, non-water-dependent function, and the project components cannot be made water dependent simply by planning them to be adjacent to another component that *is* water dependent.⁵² That same year, the EPA requested elevation of the *Hartz Mountain* application for similar reasons. The Department of the Army confirmed that the water-dependence analysis must be conducted for the individual components of the project, one component does not confer water dependence on the whole project, and non-water-dependent projects may not be permitted.⁵³

The *Old Cutler Bay Associates* elevation request in June of 1990 was also based on a concern that the project was not in fact water dependent, though the Corps was processing the application.⁵⁴ EPA was concerned that the applicant had failed to rebut the presumption that there was a less damaging alternative for the non-water-dependent golf course.⁵⁵ The Army accepted the request and directed the District to apply the policy of

Plantation Landing and *Hartz Mountain*, requiring the Corps to conduct an independent determination of project purpose, water dependence, and finding of whether the presumption that there is an alternative had been rebutted.⁵⁶

The issue of project purpose and water dependency was revisited in 1991 by the Department of the Army in the *Twisted Oak Joint Venture* elevation, initially requested by the EPA and subsequently requested by the FWS.⁵⁷ Although the Army affirmed the District's determination that one element of the project was water dependent, and agreed generally with the project purpose as the District defined it, the Army also found that an alternatives analysis was necessary.⁵⁸ Overruling the District, the Army found that one water-dependent element did not make the whole project water dependent.⁵⁹ Thus, the applicant did not overcome the regulatory presumption that alternatives are available for non-water-dependent projects.

As discussed earlier, the Corps must assume that non-water-dependent projects have practicable alternatives. Court decisions, elevation proceedings, and veto decisions in the late 1980s and early 1990s have established that if the Corps does not find that the permit applicant has shown that there is no practicable non-wetland site that fits the overall or basic project purpose, the permit must be denied.⁶⁰ In order to conduct a thorough alternatives analysis, the Corps therefore must correctly analyze the project purpose and its water dependency.

2. Practicability

Once the Corps determines whether there are non-water-dependent alternatives, the agency makes a finding of whether there is a less environmentally damaging project alternative⁶¹ to the applicant's proposed site that is practicable.⁶² This is where the second analytical presumption comes into play: "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."⁶³

All practicable alternatives must be considered.⁶⁴ An alternative is considered to be practicable if it is "available and capable of being done after taking into

consideration cost, existing technology, and logistics in light of the overall project purposes."⁶⁵ Because the definition of practicability contains the overall project purpose, the analysis of project purpose is bound to the practicability determination.

As described above, practicable alternatives are presumed to exist.⁶⁶ From the late 1980s into the 1990s, EPA requested elevation of several permit decisions based on its finding that the Corps had failed to consider practicable alternatives.⁶⁷ The existence of these practicable alternatives, EPA argued, provided the Corps with sufficient cause to reject the permit applications. In the *Petro Star* elevation request, EPA was concerned that a practicable alternative had been neglected.⁶⁸ The Army affirmed that the Corps was required to consider all practicable alternatives and not limit its analysis based on the applicant's assertion that the proposed project was more attractive.⁶⁹

In some cases, the Army has disagreed with EPA about the availability and practicability of alternatives, and has issued permits despite EPA's requests for elevation. In the *Churchill Downs* case, it took a second request by another agency, the FWS, before the Army accepted the elevation.⁷⁰ The Army's ultimate acceptance of the FWS's elevation request reestablished that alternatives must be rigorously analyzed and that the presence of a practicable alternative results in the rejection of the permit application.⁷¹ In the *Sears Island* case, the Army concluded that the alternative proposed by the EPA was not in fact practicable, and denied its elevation request.⁷²

a. Availability

The first element in the definition of practicability is the concept of availability—an alternative is practicable if it is available and capable of being done.⁷³ Availability was clarified in the late 1980s in one of the rare applications that EPA vetoed.⁷⁴ In the *Attleboro Mall* case, discussed above, the applicant claimed that the alternative property was no longer available because it had been subsequently purchased.⁷⁵ The Army rejected EPA's "market entry theory:" that availability is to be judged at the time when the developer is selecting the property on which to site the proposed activity, rather than at a later stage in the development process.⁷⁶ The Army sided with the permit applicant, arguing that the "sold" site was not practicable because it was no longer available at the time the per-

mit application was filed. EPA disagreed asserting that availability decisions under the Guidelines are made at the time the permit applicant selects the project site. Since that now sold site was available at when the applicant was choosing the site and would have had less impact on the aquatic environment, the proposed site at Sweeden's Swamp was not the LEDPA and the permit had to be denied. After subsequent appeals, EPA's market entry theory was ultimately affirmed by the Second Circuit Court of Appeals.⁷⁷ In other words, an alternative is considered practicable if it was available at the time when the applicant was considering project locations, even if the alternative later becomes unavailable. The *Attleboro Mall* case established that the existence of available alternatives must be considered from the perspective of meeting the basic project purpose, not the perspective of the applicant, or of profitability.⁷⁸

The Guidelines themselves establish that to be available, alternative sites need not be under the ownership of the applicant. The sites must merely be *reasonably* available for purchase, use, or management.⁷⁹ The 1992 *Churchill Downs* elevation proceeding established that the need for rezoning does not make an alternative impracticable.⁸⁰ In this case, EPA requested elevation because there were practicable alternatives that had not been considered. The applicant argued that in light of funds already committed to the project and because the alternative would require rezoning, it was not available. After the FWS echoed EPA's concerns, the Department of the Army directed the Corps to reevaluate the application in light of the potential for rezoning.⁸¹ In the *Tennessee DOT* elevation, the agencies also agreed that the applicant's previous expenditures—in this case the amount of money the applicant spent on a project before a § 404 permit was issued—may not be a factor in determining the practicability of an alternative.⁸² The Department of the Army directed the Corps not to limit its consideration of practicable alternatives in light of the resources the DOT had committed in preparing the project proposal, because DOT should have consulted with the Corps earlier in the process.⁸³

b. Feasibility

Another key phrase in the definition of practicability ("available and capable of being done after taking into

consideration cost, existing technology, and logistics in light of the overall project purposes"⁸⁴) is "capable of being done," which the EPA refers to as "feasibility." Federal policy has established that an applicant's unwillingness—or in some cases inability—to pursue an alternative does not render it infeasible. The Guidelines require the evaluation of feasibility "in light of overall project purposes."⁸⁵ Alternatives that do not satisfy the project purpose are not feasible. As in the analysis of availability, in the analysis of feasibility, issues of costs, existing technologies, and logistics must be considered.

c. Cost

The cost aspect of the practicability finding has been established as a legitimate but difficult consideration that generally requires a case-by-case evaluation. The preamble to the Guidelines state, "The mere fact that an alternative may cost more does not necessarily mean it is not practicable."⁸⁶ The preamble further states, "Our intent is to consider those alternatives which are reasonable in terms of the overall scope/cost of the proposed project. The term economic [for which the term "cost" was substituted in the final rule] might be construed to include consideration of the applicant's financial standing, or investment, or market share, a cumbersome inquiry which is not necessarily material to the objectives of the Guidelines."⁸⁷ The distinction between cost and economics and how discretion is to be applied concerning costs is further described in a joint Regulatory Guidance Letter issued by EPA and the Department of the Army.⁸⁸ The determination of what constitutes an unreasonable expense should generally consider whether the projected cost is substantially greater than the costs normally associated with the particular type of project, not the financial circumstances of the applicant.⁸⁹

Debates over the issue of cost often revolve around specific issues of capital costs, operating costs, and funds committed to the project before the permit was issued. As described above, applicants may not limit the scope of the alternatives analysis by spending money on their proposed site and then asserting that alternatives are not feasible. Increases in costs do not necessarily render an alternative infeasible. An alternative that increases costs so as to preclude construction of a project (*e.g.*, would render the project uneconomical) would not normally be feasible.

d. Existing Technology

The Guidelines elaborate on the technology requirement in the definition of practicability.⁹⁰ The policy states that discharge technology should be adapted to the needs of each site, and the applicant should consider:

- Using appropriate equipment or machinery, including protective devices, and the use of such equipment or machinery in activities related to the discharge of dredged or fill material;
- Employing appropriate maintenance and operation on equipment or machinery, including adequate training, staffing, and working procedures;
- Using machinery and techniques that are especially designed to reduce damage to wetlands. This may include machines equipped with devices that scatter rather than mound excavated materials, machines with specially designed wheels or tracks, and the use of mats under heavy machines to reduce wetland surface compaction and rutting;
- Designing access roads and channel spanning structures using culverts, open channels, and diversions that will pass both low and high water flows, accommodate fluctuating water levels, and maintain circulation and faunal movement;
- Employing appropriate machinery and methods of transport of the material for discharge.⁹¹

e. Logistics

The final factor element that must be considered in determining practicable alternatives is logistics.⁹² Logistics include considerations such as geography of the site, the proximity of the location of the fill material to the proposed site, or other issues related to the specifics of the proposed location. This factor in the practicability determination for the alternatives analysis has not been controversial and thus has not been elaborated in any regulatory guidance or other publications.

3. Making the LEDPA Determination

Once the practicable alternatives are identified, based on the factors and standards described above, the Corps may only issue a permit for the proposed activity if it is the alternative that which would cause the least damage to the aquatic environment—the LEDPA.⁹³

There are occasions, however, when the Corps may find that the LEDPA will still cause too much harm to special aquatic resources to be allowed.⁹⁴ The 1990 Mitigation MOA states: “It is important to recognize that there are circumstances where the impacts of the project are so significant that even if alternatives are not available, the discharge may not be permitted regardless of the compensatory mitigation proposed.”⁹⁵ In other words, the Corps may deny a permit if it finds that the proposed project is the least damaging alternative but that the damage would still be too significant, even after all practicable avoidance and minimization.

Finally, the availability of compensation opportunities may *not* be taken into account during the alternatives analysis and identification of the LEDPA. Guidance issued in 1990 states that “[c]ompensatory mitigation may not be used as a method to reduce environmental impacts in the evaluation of the least environmentally damaging practicable alternatives for the purposes of requirements under Section 230.10(a).”⁹⁶ Guidance issued by the Corps in 1993 further reinforced this position: “It is not appropriate to consider compensatory mitigation in determining whether a proposed discharge will cause only minor impacts for purposes of the alternatives analysis required by Section 230.10(a).”⁹⁷

The Alternatives Test

- When the Corps receives an application for a project that will impact a wetland it must determine if there are alternatives that are less environmentally damaging to the aquatic environment and other ecosystems.
- The Corps presumes that there are non-wetland alternative sites on which to locate non-water-dependent projects.
- The Corps presumes that alternatives that do not impact wetlands are less damaging to the aquatic ecosystem and are environmentally preferable.
 - Are the alternatives practicable?
 - Are the alternatives reasonable in terms of overall scope, cost, existing technology, and logistics?
 - Do the alternatives allow the project to meet the applicant’s basic purpose?
- In order to grant the permit, the Corps must make a finding that the proposed project is the Least Environmentally Damaging Practicable Alternative (LEDPA).

b. *Minimization*

After applying the avoidance requirement outlined in the § 404(b)(1) Guidelines, the agencies must minimize impacts to aquatic resources.

...no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.⁹⁸

As a part of the permitting requirements, some minimization efforts can play a role in finding the LEDPA. On the other hand, it is also clear that minimization-type activities can also be used to reduce remaining significant impacts. In this way, minimization has a dual identity, existing pre- and post-LEDPA. For example, some minimization measures such as utilizing alternative project designs and construction methods can be used to attain compliance with Section 230.10(a)-(c).

Subpart H of the Guidelines lists examples of how unavoidable impacts may be minimized.⁹⁹ Actions to minimize the impacts of discharges include: changing the location of the discharge, changing the material to be discharged, controlling the material after discharge, changing the method of dispersion, changing the technology used, changing the affects on plants, animals, and human uses.¹⁰⁰

The actions described in Subpart H largely relate to § 404 permits for the narrow purpose of the disposal of dredge spoil in the context of the dredging of harbors and river channels. In the intervening years since the law was written, the § 404(b)(1) Guidelines have been used to prescribe mitigation for a wider variety of wetland fill projects than the agencies had originally anticipated. As such, the program would benefit greatly from additional guidance on how to evaluate minimization procedures for activities more commonly encountered, such as wetland and stream fill projects.

Notes

1. 40 C.F.R. § 1508.20.
2. *Id.* § 1508.19(a).
3. *Id.* § 1508.19(b).
4. *Id.* § 1508.18(e).
5. 33 U.S.C. § 1344; CWA § 404; 40 C.F.R. § 230.
6. Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines (Feb. 6, 1990).
7. 33 U.S.C. § 1251(a); CWA § 101(a).
8. 1990 Mitigation MOA, *supra* note 6.
9. The national goal of achieving no net loss of wetland acres and functions was first articulated by the National Wetlands Policy Forum, a group of governors, business, environmental groups, state officials and federal agencies, convened by the Conservation Foundation at the request of the EPA in 1987. Thomas H. Kean, Carroll Campbell, Booth Gardner, and William K. Reilly, *Protecting America's wetlands: an action agenda, Final Report of the National Wetlands Policy Forum* (The Conservation Foundation 1988). The report recommended that "the nation establish a national wetlands protection policy to achieve no overall net loss of the nation's remaining wetlands base, as defined by acreage and function, and to restore and create wetlands, where feasible, to increase the quality and quantity of the nation's wetlands resource base." *Id.* President George H.W. Bush echoed the recommendation with a campaign commitment in 1988. U.S. Environmental Protection Agency, *Oral History Interview: William K. Reilly* (Sept., 1995) available at www.epa.gov/history/publications/reilly/08.htm. On June 8, 1989, President H.W. Bush officially articulated no net loss as a national policy goal in a speech to Ducks Unlimited. The American Presidency Project, *George Bush: Address to Ducks Unlimited*, available at www.presidency.ucsb.edu/ws/index.php?pid=17125. In 1990, joint guidance issued by the Corps and EPA stated the national goal of achieving "no overall net loss of values and functions." 1990 Mitigation MOA, *supra* note 8 at § IIB. The Guidance acknowledges the difficulty inherent in measuring and therefore replacing functions and values and states that "a minimum of 1 to 1 acreage replacement may be used as a reasonable surrogate for no net loss of functions and values." *Id.* at § IIIB. The no net loss goal is, therefore, often referred to in terms of acres and functions, rather than values and functions, despite the fact that existing federal guidance encourages reliance on functional assessment methods in determining impacts and required mitigation for aquatic resources. See Jon A. Kusler, Association of State Wetlands Managers, *Common Questions: Definitions of the Terms Wetland Function and Value*, at http://www.aswm.org/propub/16_functions_6_26_06.pdf (last visited May 14, 2007).
10. 1990 Mitigation MOA, *supra* note 6 at § IIA.
11. *Id.* § II.C.
12. *Id.* § II.C. 3.
13. Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 45 Fed. Reg. 85336, 85339 (Dec. 24, 1980) ("Consistent with the burden of proof under these Guidelines, where an applicant proposes to discharge in a special aquatic site it is his responsibility to persuade the permitting authority that both of these presumptions have clearly been rebutted in order to pass the alternatives portion of these Guidelines."); RGL 93-02,

- Memorandum to the Field: Guidance on Flexibility of the 404(b)(1) Guidelines and Mitigation Banking (Aug. 23, 1993 – Dec. 31, 1998, Department of the Army and Environmental Protection Agency).
14. 40 C.F.R. § 230.12(a)(3)(iv); RGL 93-02, Guidance on Flexibility, *supra* note 13 at 4.
15. 40 C.F.R. § 230.12(a)(3)(iv).
16. 40 C.F.R. § 230.6(b).
17. RGL 93-02, Guidance on Flexibility, *supra* note 13.
18. Certain minimization measures such as utilizing alternative project designs and construction methods can also be used to help identify the LEDPA.
19. 40 C.F.R. § 230.10(a).
20. Fed. Reg., *supra*, note 13 at 85339.
21. 40 C.F.R. § 230.10(a).
22. Guidance on Flexibility, *supra* note 13.
23. Plantation Landing Guidance, U.S. Army Corps Brigadier General Patrick Kelly (April 21, 1989).
24. 40 C.F.R. § 230.10(a)(3).
25. *Id.*
26. RGL 93-02, Guidance on Flexibility, *supra* note 13; 40 C.F.R. § 230.10(a)(3).
27. North Fork of Hughes River Army Response, Acting Assistant Secretary of the Army John Zirschky, (Dec. 22, 1994); Old Cutler Bay Associates Elevation Request, EPA Assistant Administrator LaJuana Wilcher, (June 4, 1990).
28. Old Cutler Bay Elevation Request, *supra* note 27.
29. Old Cutler Bay Associates Guidance, Director of Civil Works Major General Patrick Kelly (September 13, 1990).
30. North Fork of Hughes River Army Response, *supra* note 27; Petro Star/Port Valdez Elevation, Acting Assistant Secretary of the Army Edward Dickey (July 14, 1993); Petro Star/Port Valdez Guidance, Director of Civil Works Major General Stanley Genega (Sept. 28, 1993); Old Cutler Bay Associates Guidance, *supra* note 29.
31. *Louisiana Wildlife Federation v. York*, 761 F.2d 1044 (5th Cir. 1985).
32. RGL 93-02, Guidance on Flexibility, *supra* note 13 at (b)(4).
33. 40 C.F.R. § 230.12(a)(3)(iv); RGL 93-02, Guidance on Flexibility, *supra* note 13 at 4.
34. Government Accounting Office, RCED-88-10, *Wetlands: Corps of Engineers Administration of Section 404 Permit Program*, 26 (July, 1988).
35. Old Cutler Bay Elevation Request, *supra* note 27.
36. North Fork of Hughes River Elevation Request, U.S. Environmental Protection Agency Assistant Administrator Robert Perciasepe (November 22, 1994).
37. *Id.*
38. North Fork of Hughes River Army Response, *supra* note 25; Petro Star/Port Valdez Guidance, *supra* note 28; Petro Star/Port Valdez Elevation, *supra* note 28; Old Cutler Bay Associates Guidance, *supra* note 27; Hartz Mountain HQUSACE Findings (July 25, 1989).
39. *Utahns for a Better Environment v. USDOT*, 305 F.3d 1152 (10th Cir. 2002).
40. *Id.*
41. *Id.* at 1186.
42. *Id.*
43. Department of the Army, *Army Corps of Engineers Standard Operating Procedures for the Regulatory Program*, 13 (Oct. 15, 1999). See 33 U.S.C. § 1344(q); CWA § 404(q); Old Cutler Bay Associates Guidance, *supra* note 29.
44. *Id.* at 7.
45. Two Forks Final Determination, (Nov. 23, 1990).
46. 40 C.F.R. § 230.10(a)(3).
47. *Id.*
48. Final Determination of the Assistant Administrator for External Affairs Concerning the Sweedens Swamp Site, 51 Fed. Reg. p. 22977 (June 24, 1986).
49. *Bersani v. USEPA*, 674 F. Supp 405 (N.D.N.Y. 1987); *Bersani v. Robichaud*, 850 F.2d 36, 44 (2d. Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989), (affirmed EPA's reliance on the Section 404(b)(1) Guidelines to arrive at the veto decision, supporting the agency's assertion that a determination that the losses were avoidable under the Guidelines necessarily gives EPA the authority to veto a decision under Section 404(c)).
50. Corps SOP *supra* note 43 at 6.
51. Plantation Landing Elevation Request, EPA Acting Assistant Administrator Rebecca Hanmer (Jan. 13, 1989).
52. Plantation Landing Guidance, *supra* note 23.
53. Hartz Mountain HQUSACE Findings, *supra* note 38.
54. Old Cutler Bay Associates Elevation Request, *supra* note 27.
55. *Id.*
56. Old Cutler Bay Associates Guidance, *supra* note 29.
57. Twisted Oaks Joint Venture Elevation, Director of Civil Works Patrick J. Kelly (Mar. 15, 1991).
58. *Id.*
59. *Id.*
60. 40 C.F.R. § 230.10 (a)(2); Attleboro Mall Final Determination, Department of the Army Assistant Administrator for External Affairs Jennifer Joy Wilson, (May 13, 1986); *Bersani v. Robichaud*, 850 F.2d 36, *supra* note 49 at 44; Two Forks Final Determination, *supra* note 45.
61. RGL 93-02, Guidance on Flexibility, *supra* note 13.
62. 40 C.F.R. § 230.10(a).
63. *Id.* § 230.10(a)(3).
64. *Id.* § 230.10(a).
65. *Id.* § 230.10(a)(2).
66. *Id.* § 230.10(a)(3); see Tennessee DOT Guidance, Director of Civil Works Major General Arthur Williams (July 16, 1992).
67. Hartz Mountain Elevation Request, EPA Acting Administrator for Water Rebecca Hanmer (Apr. 25, 1989), Sears Island Elevation Request, EPA Acting Assistant Administrator for Water Rebecca Hanmer (Apr. 8, 1988).
68. Petro Star/Port Valdez Elevation, *supra* note 30.
69. Petro Star/Port Valdez Guidance, *supra* note 30.
70. Churchill Downs Army Response to U.S. FWS, Acting Assistant Secretary of the Army Edward Dickey (Apr. 14, 1993).
71. *Id.*

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72. Sears Island Army Response, Assistant Secretary of the Army Robert Page (Apr. 27, 1988).
73. 40 C.F.R. § 230.10(a)(2).
74. *Bersani v. USEPA*, 674 F. Supp 405, *supra* note 49 (The court affirmed EPA's reliance on the Section 404(b)(1) Guidelines to arrive at the veto decision, supporting the agency's assertion that a determination that the losses were avoidable under the Guidelines necessarily gives EPA the authority to veto a decision under Section 404(c)); Final Determination Concerning the Sweedens Swamp Site, *supra* note 48.
75. Attleboro Mall Final Determination, *supra* note 60.
76. *Bersani v. USEPA*, 674 F. Supp 405, *supra* note 49; Final Determination Concerning the Sweedens Swamp, *supra* note 48.
77. *Bersani v. EPA*, 850 F.2d 36, *supra* note 49.
78. *Bersani v. EPA*, 850 F.2d 36, *supra* note 49; *Bersani v. USEPA*, 674 F. Supp 405, *supra* note 46; Final Determination Concerning the Sweedens Swamp Site, *supra* note 48.
79. 40 C.F.R. § 230.10(a)(2).
80. Churchill Downs Elevation Request, Acting Assistant Secretary for Fish and Wildlife Joseph E. Doddridge (Mar. 15, 1993).
81. Churchill Downs Response to the FWS, *supra* note 70.
82. Tennessee DOT Army Response, Assistant Secretary of the Army Nancy P. Dorn (Dec. 19, 1991); *see also* Churchill Downs Response, *supra* note 70.
83. Tennessee DOT Army Response, *supra* note 82.
84. 40 C.F.R. § 230.10(a)(2).
85. *Id.*
86. Fed. Reg. 85339, *supra* note 13 at Preamble.
87. *Id.*
88. RGL 93-02 Guidance on Flexibility, *supra* note 13.
89. RGL 93-02 Guidance on Flexibility, *supra* note 13 at 3(b).
90. 40 C.F.R. § 320.74.
91. *Id.*
92. *Id.* § 230.10(a)(2).
93. RGL 93-02 Guidance on Flexibility, *supra* note 13 at 3(a)(iii – v); *Bersani*, *supra* note 49.
94. 40 C.F.R. §§ 230.10(c), 230.12(a)(ii).
95. 1990 Mitigation MOA, *supra* note 6 at footnote 6.
96. *Id.* at II. C. 2.
97. RGL 93-02 Guidance on Flexibility, *supra* note 13 at 3.
98. 40 C.F.R. § 230.10(d).
99. *Id.* § 230.70-77.
100. *Id.*

III. Comprehensive Planning Process

Comprehensive planning efforts can be effective mechanisms to achieve aquatic resource mitigation on a programmatic basis. As noted in the 1990 MOA between the Department of the Army and the EPA:

“This [mitigation] sequence is considered satisfied where the proposed mitigation is in accordance with specific provisions of a Corps and EPA approved comprehensive plan that ensures compliance with the compensation requirements of the Section 404(b)(1) Guidelines (examples of such comprehensive plans may include Special Area Management Plans, Advanced Identification areas (Section 230.80) and State Coastal Zone Management Plans).”¹

Thus, the MOA allows that with appropriate compensatory mitigation, “comprehensive plans” such as Advanced Identification of Disposal Areas (ADIDs), Coastal Zone Management Plans, and special area management plans (SAMPs) may obviate the requirement for sequencing, provided that they are approved by the Corps and EPA.² While the opportunity to forgo sequencing may appeal to developers, and may make sense ecologically where the plan is truly “comprehensive,” this raises the stakes over the consideration and adoption of SAMPs and similar plans.³

1. Advanced Identification of Disposal Areas

Advance identification of disposal areas is a planning process used to identify wetlands and other waters that are generally suitable or unsuitable for the discharge of dredged and fill material. The ADID process was established by the § 404(b)(1) Guidelines.⁴ The process may be initiated by EPA, another regulatory authority, or at the request of another party, in consultation with the state.⁵

The ADID process involves collecting information on the values and functions of wetlands in a specific, pre-defined area. EPA conducts the process in consultation with States or Tribes. Although an ADID study generally classifies wetland areas as suitable or unsuitable for the discharge of dredged or fill material, the classification does not constitute either a permit approval or denial. ADIDs may, however, be used as a guide by community planners, landowners, and project proponents in planning future activities. They may also provide possible permittees with a preliminary indication of

the factors likely to be considered during review of future § 404 permit applications.

Because the ADID process brings to light the specific functions and values of an area’s aquatic resources, it may yield valuable information to permittees and regulatory agencies that can be put to use in the sequencing steps. The ADID process is intended to add predictability to wetlands permitting as well as to better account for the impacts of losses from multiple projects within a geographic area.

In the early to mid-1990s, ADIDs were a popular means for gathering information on the location and functions of areas in specific geographic regions. In February 1993, 38 ADID projects had been completed and 33 were ongoing. The projects ranged in size from less than 100 acres to more than 4,000 square miles and were located across the country.⁶

ADID projects have often been initiated by local entities to facilitate planning efforts. One of the best known examples of ADID and its ability to build local support for wetland protection is the plan that emerged from a process in West Eugene, Oregon. In West Eugene, local entities embarked on an ADID process, which led to the adoption of a § 404 general permit. The ADID was subsequently incorporated into the City of Eugene’s general comprehensive plan, and as a result, has had a significant effect on local land-use planning.

Because of their resource-intensive nature, however, few ADIDs have been initiated since the mid-1990s.

2. State Coastal Zone Management Plans

The development of SAMPs under the Coastal Zone Management Act (CZMA)⁷ is another means of identifying areas as suitable or unsuitable for issuance of a discharge permit before a permit application is filed. The CZMA, enacted in 1972 to protect the United State’s coastal zone, gives coastal states authority to develop programs regarding activities in the coastal zone. It requires federal actions, including the issuance of permits under § 404 of the Clean Water Act, to be consistent with the states’ programs. Applicants for federal permits to conduct development activities in the coastal zone must furnish a certification that the proposed development activity is consis-

tent with that state's coastal zone management program.⁸ The program is administered through the Office of Coastal Resource Management in the National Oceanic and Atmospheric Administration's National Ocean Service.

Under the CZMA, the "coastal zone" is defined as the "coastal waters and the adjacent shorelands," including wetlands areas.⁹ This zone extends seaward to the outer limit of the United States territorial sea and inland from the shorelines "only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters."¹⁰

In 1980, the CZMA was amended to provide an express procedure for developing special area management plans. A SAMP is:

A comprehensive plan providing for natural resource protection and reasonable coastal-dependent economic growth containing a detailed and comprehensive statement of policies; standards and criteria to guide public and private uses of lands and waters; and mechanisms for timely implementation in specific geographic areas with the coastal zone.¹¹

The purpose of a SAMP is to protect the coastal environment while still allowing for economic uses.¹² To date, a number of SAMPs have been developed in coastal states with the involvement of federal, state, and local governments and the public. Unlike ADIDs or other nonbinding reconnaissance efforts, SAMPs have formal legal status and can serve as the basis for state coastal wetland permit decisions. Since they are part of a state's coastal zone management program, SAMPs also provide states with a mechanism for reviewing the issuance of § 404 permits through the consistency review process under § 307 of the CZMA.¹³

The Corps has been involved with SAMPs through its participation in the CZMA planning process. In addition, the Corps also has adopted the SAMP procedure for areas which extend beyond the coastal zones.¹⁴ The Corps applies four criteria before participating in a SAMP. First, the area in question must be environmentally sensitive and under strong development pressure. Second, the public must be involved in the process. Third, a sponsoring local agency must participate to ensure that local concerns are addressed. Fourth, all

parties must agree to an end result which includes definitive regulatory guidance documents.

Generally, SAMPs cover relatively small geographic areas, and often are developed in conjunction with an ADID or a Section 404 general permit. EPA and the Corps have agreed, in Section IIC of their MOA, that sequencing does not apply to wetland development activities where an EPA and Corps approved SAMP fully considers and plans for wetland conservation. The SAMP is regarded as a functional equivalent or substitute for sequencing.¹⁵

Notes

1. Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines (Feb. 6, 1990).

2. Environmental Law Institute, *Wetland Mitigation Banking*, 129, (Environmental Law Institute, 1993).

3. *Id.*

4. 40 C.F.R. § 230.80.

5. *Id.* § 230.80(a).

6. U.S. EPA, Wetlands, "Advanced Identification (ADIDs)," at <http://www.epa.gov/owow/wetlands/facts/fact28.html> (last visited September 25, 2007).

7. 16 U.S.C. §§ 1451-1464.

8. *Id.*

9. *Id.* § 1453(1).

10. *Id.*

11. *Id.* § 1453(17).

12. *Id.*

13. Environmental Law Institute, *supra*, note 2.

14. RGL 86-10, Special Area Management Plans (Oct. 2, 1986 – Dec. 31, 1998, Department of the Army and Environmental Protection Agency).

15. 1990 Mitigation MOA, *supra* note 1.

IV. Summary of Federal Avoidance and Minimization Policy

Three aspects of the avoidance and minimization provisions have been particularly controversial: (1) the requirement to reject a permit if there is a less-damaging practicable alternative; (2) the requirement that the purpose of the project be appropriately defined to allow for an appropriate analysis; and (3) the responsibility of the Corps to ensure that these analyses are done thoroughly and in good faith.

Federal regulations, guidance, and administrative and judicial precedent all combine to establish the current state of federal policy on avoidance and minimization procedures under § 404. The Department of the Army,

EPA, and the courts have consistently interpreted the regulations to require the use of sequencing in determining mitigation for dredge and fill permit applications that may impact wetlands and other aquatic resources. Adherence to the Guidelines requires that: (1) the project purpose be defined by the basic function of the proposal; (2) alternative sites be analyzed; (3) the presence of a less environmentally damaging practicable alternative results in the denial of the permit; (4) impacts from the least damaging practicable alternative must be minimized; and (5) the Corps is required to ensure the analysis is conducted thoroughly.

V. U.S. Army Corps of Engineers District Avoidance, Minimization, and Alternatives Analysis Guidance

The U.S. Army Corps of Engineers' 38 district offices play the lead role in issuing permits for the discharge of dredged or fill material into waters of the U.S. under § 404 of the Clean Water Act. The Corps Districts are responsible for ensuring that proposed projects represent the least environmentally damaging practicable alternative. Although federal law, regulations, and guidance—detailed in previous sections of this report—provide the Districts with direction on how to ensure that avoidance and minimization requirements are met, nearly all of the Districts provide additional resources, guidelines, and information online to help permit applicants understand and comply with the § 404(b)(1) Guidelines and the sequencing provisions of the 1990 Mitigation MOA.¹ District public information materials are summarized in Appendix A. The avoidance and minimization guidance the Districts provide to the public can be divided into three categories: general resources related to the permitting process, avoidance and minimization guidance within general mitigation guidelines, and resources specifically addressing alternatives analysis and mitigation sequencing.

A. Permitting Process Information

Applicants can use many different tools to learn about the permitting process and avoidance and minimization requirements. One source of information is Corps Districts websites, where many post information including permitting overviews, checklists, answers to frequently asked questions, or other online resources to help prospective applicants understand the permitting process. In these documents, 17 Districts provide some statement or explanation of the need to assess project alternatives during the permit review process.² Eleven of these seventeen Districts include standard language stating that “where unresolved conflicts of resource use exist, the practicability of using reasonable alternative locations and methods to accomplish project purposes” is one of the factors that will be assessed during the permit application review.³ The remaining six Districts express the same concept in their own words.⁴ Going beyond vague descriptions of the alternatives analysis and the avoidance and minimization requirements, six Districts require permit

applicants to provide specific information about their alternatives analysis through prompts in their permit applications, or by requiring applicants to submit supplemental application materials or fill out application checklists. The District instructions for inclusion of information related to avoidance and minimization during the permit application process are detailed in Appendix B.⁵

The Norfolk District is unique in providing a fact sheet about General Permits that states which agency (state or federal) will review avoidance, minimization, and compensatory mitigation for each category of General Permit. The fact sheet does not provide any additional information about the criteria used in this review.

B. Avoidance & Minimization in General Mitigation Guidance

Twenty-four Districts provide information about alternatives analysis and/or avoidance and minimization in general mitigation guidelines, guidance, or standard operating procedures. Of these 24 Districts, 11 state that the permit applicant has the responsibility for conducting the alternatives analysis or for describing avoidance and minimization measures.⁶ These Districts generally direct prospective permittees to describe their alternatives analysis and/or their avoidance and minimization efforts in their permit application or in their preliminary mitigation plan. The discussion of mitigation sequencing in these Districts' guidelines varies from just a few lines⁷ to a lengthy discussion of the § 404(b)(1) guidelines and their implications.⁸ For example, joint guidance issued by the San Francisco and Sacramento Districts merely states, “After the applicant has demonstrated maximum avoidance and minimization of project impacts to waters of the U.S., Corps Districts will likely require compensatory mitigation for the remaining unavoidable impacts.”⁹ At the other end of the spectrum, the Los Angeles District's final mitigation guidelines and monitoring requirements contain several lengthy references to alternatives analysis, avoidance and minimization. Specifically, the policy sections of the document's introduction contain relatively detailed explanations of § 404(b)(1) requirements:

Corps District Avoidance and Minimization Resources

Districts	Avoid & min info	Avoid & min in permit process info	Require specific alternatives submission	Avoid & min in mitigation info	Detailed avoid & min info
Alaska	✓	✓	—	—	—
Albuquerque	✓	✓	✓	✓	✓
Baltimore	✓	—	—	✓	✓
Buffalo	✓	✓	—	—	—
Charleston	✓	—	—	✓	—
Chicago	✓	✓	✓	—	—
Detroit	✓	—	—	✓	—
Fort Worth	✓	—	—	✓	—
Galveston	✓	—	—	—	—
Honolulu	✓	✓	—	✓	—
Huntington	✓	—	—	—	✓
Jacksonville	✓	✓	—	—	—
Kansas City	✓	✓	—	—	—
Little Rock	✓	—	—	✓	—
Los Angeles	✓	—	—	✓	—
Louisville	✓	✓	—	—	—
Memphis	✓	—	—	✓	—
Mobile	✓	—	—	✓	—
Nashville	✓	—	—	✓	—
New England	✓	—	—	✓	—
New Orleans	✓	✓	✓	✓	—
New York	✓	—	✓	—	—
Norfolk	✓	—	✓	—	✓
Omaha	✓	—	—	✓	—
Philadelphia	✓	—	—	✓	—
Pittsburgh	—	—	—	—	—
Portland	✓	—	—	✓	—
Rock Island	✓	—	—	✓	—
Sacramento	✓	✓	—	✓	✓
San Francisco	✓	—	—	✓	✓
Savannah	✓	—	—	✓	—
Seattle	✓	✓	—	—	✓
St. Louis	✓	✓	—	✓	—
St. Paul	✓	✓	✓	—	—
Tulsa	✓	✓	—	✓	✓
Vicksburg	✓	✓	—	✓	—
Walla Walla	✓	✓	—	✓	—
Wilmington	✓	✓	—	—	—

MITIGATION POLICY

The Corps and the EPA formulated policy and procedures to be used in determining the mitigation necessary to demonstrate compliance with the Clean Water Act Section 404(b)(1) Guidelines (40 CFR 230) (the Section 404(b)(1) Guidelines). This information is set forth in the “Memorandum of Agreement (MOA) Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines,” dated February 7, 1990 (the Mitigation MOA).

The Section 404(b)(1) Guidelines limit the issuance of a permit to the activity or project design representing the least environmentally damaging practicable alternative (LEDPA) that is not contrary to the public interest. More specifically, the Section 404(b)(1) Guidelines state that no discharge of dredged or fill material shall be permitted if there is a practicable alternative available to the proposed discharge that would have less adverse impact on the aquatic ecosystem, if the alternative does not have other significant adverse environmental consequences. Practicability is defined in terms of cost, logistics, and existing technology in light of the overall project purpose. The burden to demonstrate compliance with the Section 404(b)(1) Guidelines rests with the permit applicant. For non-water dependent discharges into special aquatic sites, there is a presumption that less environmentally damaging practicable alternatives are available. If the applicant has complied with the Guidelines by first evaluating alternatives that would avoid impacts, and then taken appropriate and practicable steps to minimize adverse impacts to the maximum extent practicable, then compensatory mitigation is required for the unavoidable impacts.

Even in cases where a Corps-notifying General Permit (Nationwide Permit or Regional General Permit pursuant to 33 CFR 330) applies, the applicant will have to demonstrate avoidance and minimization of aquatic resource impacts. Granted, the demonstration required is typically less rigorous than for a Standard Permit. Nevertheless, if

an applicant is required to notify the Corps regarding authorization under an existing General Permit, it is likely that the Corps Los Angeles District’s verification letter/notice to proceed will require compensatory mitigation. Clearly, the sequence of avoidance, minimization, and compensatory mitigation specified by the Section 404(b)(1) Guidelines and the Mitigation MOA is fundamental to the administration of the Corps’ regulatory program.

CORPS POLICY

As stated in the Mitigation MOA, the goal of the Clean Water Act and the Section 404(b)(1) Guidelines is to maintain and to restore the physical, chemical, and biological integrity of the Nation’s waters. The Corps strives to avoid or minimize adverse impacts to waters of the U.S., and to achieve a goal of no net loss of wetland functions and values.¹⁰

The Los Angeles District also makes special mention of alternatives analysis and avoidance in its discussion of projects occurring around lakes, ponds and vernal pools:

Because wetlands are common along lakes and ponds, many proposed impacts to lake/pond habitat will be evaluated under the Corps’ Standard Permit procedures, which will involve an analysis of alternatives pursuant to the 404(b)(1) Guidelines. In those cases where wetland habitat would be impacted by a non-water dependent activity (e.g., housing), the applicant is required to rebut the presumption that there is a less damaging, practicable alternative that does not impact wetlands or other special aquatic sites.¹¹

Proposed impacts to natural, seasonal ponds and lakes within the Los Angeles District is discouraged because there are so few remaining. As an example, within Orange County, there may be only three natural lakes remaining within the entire county. Preservation of these few remaining systems is a priority of the District, and proposed impacts to them would likely require Standard Permit review. The requirements to rebut the presumption that there is a less damaging practicable alternative will likely be more

stringent in the case of proposed impacts to natural ponds and lakes.¹²

The Los Angeles District of the Corps has proposed a regional condition that would require an applicant to obtain a Standard Permit for any impact to a jurisdictional vernal pool. Because jurisdictional vernal pools are considered wetlands, the Standard Permit requirement would require an applicant proposing an activity that is not water-dependent (e.g., housing) to rebut the presumption that a less environmentally damaging, practicable alternative is available to the proposed project. The increased sensitivity of vernal pools will make this requirement more difficult to satisfy in the near future. As a result, the Los Angeles District of the Corps is stressing total avoidance in order to protect the remaining jurisdictional vernal pools.¹³

Fourteen Districts do not provide information about avoidance and minimization or alternatives analysis in mitigation guidelines or checklists online. Two of these Districts have mitigation guidelines and/or checklists that do not mention alternatives analysis or avoidance and minimization available on their web sites.¹⁴ The other 12 Districts do not have mitigation guidelines or similar documents available on their web sites at all, in any form.¹⁵

Three Districts discuss avoidance and minimization requirements in their guidelines for mitigation banking, either to establish that permit applicants must demonstrate compliance with the mitigation sequencing process before using a mitigation bank¹⁶ or as part of a larger discussion of mitigation policy.¹⁷ Similarly, the New Orleans District provides a brief description of mitigation sequencing and the § 404(b)(1) guidelines on its compensatory mitigation web page and the Fort Worth District describes the mitigation sequence from the 1990 Mitigation MOA on its mitigation web page.

C. Information Specific to Alternatives Analysis or Mitigation Sequencing

Eight Districts provide specific information or guidance related to alternatives analysis or avoidance and minimization. The Baltimore and Sacramento Districts each offer flowcharts of the permitting process that help permit applicants understand how alternatives analysis

and avoidance and minimization fit into the overall permitting process.¹⁸ Going into greater detail, the San Francisco District is the only District that has a web page dedicated to explaining mitigation sequencing in more depth.¹⁹ In addition, the Tulsa District includes a lengthy description of mitigation sequencing on its general mitigation web page.²⁰ Each of these web pages is based on the § 404(b)(1) Guidelines, with the San Francisco page quoting relevant sections of the guidelines and the Tulsa page referencing the guidelines more generally. The Tulsa page also gives some examples of avoidance and minimization:

Avoidance Mitigation

Avoidance mitigation best occurs in the planning and design stages of a project by configuring the site layout to avoid impacting an aquatic area or areas or by not implementing certain parts of an action. Project proponents should configure the proposed development or facility around natural flood plains and aquatic resources by incorporating open space, green space, natural areas, and buffers into the site plan. For linear projects such as utility lines and transportation facilities, alternative alignments should be vigorously investigated to eliminate wetland and other aquatic resource impacts.

The Section 404(b)(1) Guidelines are the substantive criteria used in evaluating proposed construction requiring a Clean Water Act Section 404 permit. These Guidelines support the selection of the least environmentally damaging practicable alternative in all cases. Where an action is proposed in a Special Aquatic Site (wetland, stream riffle and pool complex, mudflat, vegetated shallows, coral reefs, and sanctuaries and refuges) the Guidelines establish a rebuttable presumption that alternatives to construction in Special Aquatic Sites are less damaging to the aquatic environment and are environmentally preferable. In addition, where the proposed action is non-water dependent, practicable alternatives that do not involve Special Aquatic Sites are presumed to be available unless demonstrated otherwise. A non-water dependent activity does not require access or proximity to, or positioning within an aquatic area to fulfill its basic purpose (e.g. a

marina is water dependent; a restaurant is non-water dependent).

Minimization Mitigation

Minimization mitigation should occur during the planning and design stages as well as during construction or implementation stages of a project. Project proponents should consider ways in which minimization of aquatic resource impacts could occur through limiting the degree or magnitude of the action and its implementation, and by effectively rectifying temporary impacts by repairing, rehabilitating, or restoring the affected environment to pre-construction or pre-disturbance conditions. Minimization of impacts could also occur through the designing or programming of operation or maintenance activities to eliminate or reduce impacts over the life of the project or operation. For linear projects such as utility lines and transportation facilities, alternative alignments should be vigorously investigated to reduce the number and length of wetland, stream, and river crossings, with particular sensitivity to multiple crossings of the same stream or wetland. Proper consideration of avoidance and minimization should result in the selection of the least environmentally damaging practicable alternative as required by the Section 404(b)(1) Guidelines.²¹

Two Districts, Albuquerque and Seattle, have published stand-alone documents that describe in detail how applicants should undertake alternatives analysis and the specific factors that must be provided to the Corps. The Albuquerque District's standards for submittal of a § 404(b)(1) alternatives analysis specify five general categories of information that must be considered: project purpose and need, project alternatives, practicability of alternatives, environmental impact of alternatives, and mitigation required for remaining adverse impacts. More specifically, the District directs that assessment of project alternatives should consider those with "smaller and larger areal coverage," those "sited in different locations," and those that "would have alternative phase-in times for different features of a project." Practicability is assessed based on costs, existing technology, and logistics, "in light of overall purpose." Assessment criteria

are not specified for the other three categories of information.²²

The Seattle District's Alternative Analysis Guidance contains similar provisions to the Albuquerque District's guidance. The Seattle District emphasizes the need to clearly identify the project's purpose in order to be able to evaluate potential alternatives. Alternatives "should include both offsite and onsite alternatives which are available and capable of meeting the project purpose." Offsite alternatives must be evaluated in light of the geographic scope of the project's market analysis. To obtain permit approval, the Seattle District recommends that both onsite and offsite alternatives be assessed based on cost, logistics, existing technology, and impacts, in order to demonstrate that the preferred alternative is the least environmentally damaging practicable alternative.²³

Two Districts have created more unique resources related to alternatives analysis. The Huntington District provides slides from a PowerPoint presentation about alternatives analysis.²⁴ The presentation appears to be intended to help the regulated community understand the requirements of the § 404(b)(1) Guidelines and to provide detailed instructions on how to comply with the guidelines. The presentation lists a wide range of factors that must be considered during the alternative analysis. First, permittees are directed to include detailed factual determinations regarding the aquatic system that the proposed project would impact.²⁵ Project proponents must then clearly define the project's purposes (basic purpose and overall purpose),²⁶ and consider a range of alternatives at a level of detail "commensurate with the level of impacts associated with the proposal."²⁷ The alternatives should include those with different aerial and surface area coverages and those in different locations. Each alternative should also "indicate how impacts to aquatic resources have been avoided or minimized to the maximum extent practicable."²⁸ The practicability of alternatives is assessed with regard to technical and logistical factors (i.e. access, transportation needs, utilities and infrastructure constraints, topography, and available construction techniques), and considers the level of impact both to the aquatic ecosystem and to the overall environment.²⁹ The final assessment should also include a rationale for why the proposal is the least environmentally damaging alternative and a

consideration of the effects of the project not being undertaken (a no action alternative).

The Norfolk District has developed a set of spreadsheets that guide permit applicants through a detailed economic analysis of project alternatives. The spreadsheets are designed to facilitate the careful consideration of cost, logistics, and existing technology for possible project alternatives on “those occasions when [the Norfolk District regulatory staff] believe there are practicable alternatives to avoid and minimize impacts to waters and wetlands and an applicant voices concern over the effects of those changes on the economic viability of their project.”³⁰ The District reports that these spreadsheets are used only on a case-by-case basis.³¹

It is important to note that in all of these documents, the Corps Districts are providing additional explanations and information about requirements under existing national-level regulations and guidance, rather than providing new regulations. Much of the information provided by the Corps Districts uses consistent, standard language to describe permittees’ obligations under the federal § 404(b)(1) Guidelines and the 1990 Mitigation MOA, and only a few Districts have gone beyond these policies to offer additional information that is specific to the District. For example, the Los Angeles District uses standard language to describe the existing Corps policies, but also informs permit applicants that the District takes a special interest in preserving rare aquatic resources, such as vernal pools and seasonal lakes or ponds. As a result, the Los Angeles District makes clear to prospective permittees that application of the alternatives analysis is more stringent for proposed activities that would impact these resources.

D. Potential Model Documents

In the context of assessing how the Corps Districts describe their approach to alternatives analysis and mitigation sequencing, the most useful documents are the guidance documents prepared by the Albuquerque, Huntington, and Seattle Districts to help applicants complete their alternatives analysis, and the instructions for permittees provided by the Albuquerque, Chicago, New Orleans, New York, Norfolk, and St. Paul Districts that direct permit applicants to describe their

alternatives analysis and how impacts have been avoided and minimized. These nine documents provide the most thorough explanation of the types of information that the Corps Districts are using to assess projects under the § 404(b)(1) Guidelines, and would be a logical starting point for any effort to standardize the methods used by various Districts to comply with the § 404(b)(1) Guidelines. In addition, the spreadsheets created by the Norfolk District could provide a useful starting point for standardizing the determination of practicability based on an economic analysis of project costs, logistics, and feasibility using existing technology.

Notes

1. Only one district, Pittsburgh, does not appear to provide any information online about alternatives analysis or mitigation sequencing.
2. The 17 districts that describe or reference alternatives analysis or avoidance and minimization include: Alaska, Albuquerque, Buffalo, Chicago, Honolulu, Jacksonville, Kansas City, Louisville, New Orleans, Sacramento, Seattle, St. Louis, St. Paul, Tulsa, Vicksburg, Walla Walla, and Wilmington.
3. The 11 districts that use standard language to describe the alternatives analysis requirement include: Alaska, Albuquerque, Honolulu, Jacksonville, Kansas City, Louisville, New Orleans, Sacramento, Seattle, St. Louis, and Vicksburg; *see, e.g.* the Alaska District.
4. The six districts that describe alternatives analysis or avoidance and minimization requirements in their own terms include: Buffalo, Chicago, St. Paul, Tulsa, Walla Walla, and Wilmington.
5. The six districts that require specific alternatives analysis information in the permit application forms or supplemental materials include: Albuquerque, Chicago, New Orleans, New York, Norfolk, and St. Paul.
6. Albuquerque, Baltimore, Fort Worth, Los Angeles, Memphis, Portland, Sacramento, San Francisco, Savannah, St. Louis, and Walla Walla.
7. *See, e.g.*, San Francisco and Sacramento Districts.
8. *See, e.g.*, the Los Angeles District.
9. Sacramento and San Francisco Districts, U.S. Army Corps of Engineers. “Mitigation and Monitoring Proposal Guidelines.” December 30, 2004. http://www.spk.usace.army.mil/organizations/cespk-co/regulatory/pdf/Mitigation_Monitoring_Guidelines.pdf, § Overview.
10. Los Angeles District, U.S. Army Corps of Engineers. “Final Mitigation Guidelines and Monitoring Requirements.” April 29, 2004. http://www.spl.usace.army.mil/regulatory/mmg_2004.pdf, §§ I.B, C.
11. *Id.* at Appendix A, § A.2.
12. *Id.*
13. *Id.* at Appendix A, § A.3.
14. Norfolk and Wilmington Districts.

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15. Districts that do not provide mitigation guidelines or similar documents on their web sites include: Alaska, Buffalo, Chicago, Galveston, Huntington, Jacksonville, Kansas City, Louisville, New York, Pittsburgh, Seattle, and St. Paul.
16. Galveston and Savannah Districts.
17. Portland District.
18. Interagency Mitigation Task Force. "Maryland Compensatory Mitigation Guidelines." August 1994.
<http://www.nab.usace.army.mil/Regulatory/Mitigation/MDCompensatoryMitigationGuidance.pdf>, Ch.1, § 3; Ch. 2, § 3; *and* Sacramento District, U.S. Army Corps of Engineers. "Permit Review Process."
http://www.spk.usace.army.mil/organizations/cespk-co/regulatory/pdf/Permit_Review_Process.pdf.
19. <http://www.spn.usace.army.mil/regulatory/amc.htm>.
20. <http://www.swt.usace.army.mil/permits/Mitigation.cfm>.
21. <http://www.swt.usace.army.mil/permits/Mitigation.cfm>.
22. Albuquerque District, U.S. Army Corps of Engineers. "Expedited Standard Individual Permit Processing Pilot Program."
<http://www.spa.usace.army.mil/reg/Special%20Public%20Notice/XIP.doc>, Attachment 1: Standards for Submittal of a Section 404(b)(1) Alternatives Analysis.
23. Seattle District, U.S. Army Corps of Engineers. "Alternative Analysis Guidance." October 23, 2003.
<http://www.nws.usace.army.mil/publicmenu/DOCUMENTS/REG/AltGuidance.pdf>.
24. Hatten, Mike. Huntington District, U.S. Army Corps of Engineers. "Section 404 of the Clean Water Act Alternative Analysis."
http://www.lrh.usace.army.mil/_kd/go.cfm?destination=ShowItem&Item_ID=9855.
25. *Id.* slide 14.
26. *Id.* slides 17-19.
27. *Id.* slide 20.
28. *Id.*
29. *Id.* slide 21.
30. Norfolk District, U.S. Army Corps of Engineers. "Public Notice: Financial Analysis." June 21, 2006. This public notice and the associated spreadsheets are no longer available online but are on file with the authors.
31. Steve Martin, Norfolk District U.S. Army Corps of Engineers. Personal Communication. 15 February 2007.

VI. Conclusion

Avoidance and minimization are critical requirements of the CWA § 404 permitting process. The application of the underlying presumptions and standards results in permitting decisions that support national wetland protection goals.

Appendix A

Corps Districts' Online Public Information

Summary of documents available online from each Corps District that are related to alternatives analysis and/or mitigation sequencing

Alaska

In the Alaska District's Regulatory Program Overview,¹ the District describes the pre-application consultation as, in part, a forum to discuss "the viability of some of the more obvious alternatives available to accomplish the project purpose, [and] to discuss measures for reducing the impacts of the project...." The web page also states that "the practicability of using reasonable alternative locations and methods to accomplish project purposes" is one of the general criteria used in evaluating projects.

Albuquerque

The Albuquerque District provides an application information brochure includes standard language about using the pre-application consultation to discuss alternatives and about using the practicability of alternatives as a general evaluation criteria, according to the § 404(b)(1) Guidelines.² The District's permit application checklist includes the following items related to alternatives analysis:

- Alternatives Analysis for the proposed project design and location
 - Describe and discuss other alternatives considered that would avoid and minimize impacts, and satisfy the project purpose and need.
 - Discuss why those alternatives were rejected.
 - Discuss why the chosen plan is the least damaging alternative to the environment.³

According to the Albuquerque District's website, the District tested an expedited, standard individual permitting process from September 30, 2005 to September 30, 2006. The guidance for submitting permit applications under the expedited process includes an attachment with a detailed description of the components that should be present in the applicant's alternatives analysis.⁴ The guidance includes detailed explanations of the need for an alternatives analysis, the types of alternatives that must be considered, and the factors that are considered in assessing practicability of the alternatives. This is one of the most detailed descriptions of alternatives analysis that has been prepared by a district.

The Albuquerque District's Mitigation and Monitoring Guidelines also discuss alternatives analysis, avoidance and minimization. The guidelines state:

The Section 404(b)(1) Guidelines limit the issuance of a permit to the least environmentally damaging, practicable alternative that is not contrary to the public interest. In other words, no discharge of fill material will be permitted if there is a practicable alternative that would have less adverse impact on the aquatic ecosystem, if the alternative does not have other significant adverse environmental consequences, and is practicable in light of cost, logistics, and existing technology. For individual permit applications, the applicant should include an alternatives analysis with the permit application that clearly documents compliance with the Guidelines, i.e., first evaluating alternatives that avoid impacts; then taking appropriate and practicable steps to minimize adverse impacts to the maximum extent practicable; and, finally, proposing compensatory mitigation for unavoidable impacts.⁵

In addition, avoidance and minimization are mentioned throughout the guidelines, especially in the preamble and purpose sections that give background information about the 404 permitting program and Corps policy.⁶

Baltimore

The Baltimore District's Final Mitigation and Monitoring Guidelines from November 2004 are primarily directed at compensatory mitigation, but include a few references to avoidance and minimization. In explaining the purpose of the guidelines, the District states "[i]t is important to note that the first element of mitigation is avoidance and minimization of impacts, and all mitigation proposals are evaluated on a case-by-case basis during review of permit applications in accordance with all relevant laws, regulations, and guidance."⁷ Later, in its discussion of preliminary mitigation plans, the District states that "[a] preliminary mitigation plan should generally include a discussion of how on-site impacts to aquatic resources were avoided and minimized and how the proposed compensatory mitigation will appropriately compensate for the remaining unavoidable impacts."⁸

The District's website also has Maryland Compensatory Mitigation Guidance from 1994. This guidance is principally directed at compensatory mitigation, but it does include a flowchart of the mitigation process that lists avoidance and minimization as steps in considering both project site location alternatives and project design alternatives.⁹

Buffalo

The Buffalo District has an online brochure titled "Understanding the U.S. Army Corps of Engineers Regulatory Program." The brochure states that to expedite the permit process, the applicant may request a pre-application meeting with a Corps project manager who "will listen to your ideas and discuss alternatives which may be incorporated into your permit application."¹⁰ The brochure also discusses the idea of an alternatives analysis saying:

An alternative analysis involves considering other practicable ways to do the project which will reduce environmental impacts. Examples of alternatives may include using a different location, different alignment of structures, and/or the use of different construction techniques. Under the USEPA 404(b)(1) Guidelines (40 CFR 230), the water dependent nature of the proposed project is an important factor. If the proposed project is not a marina or another type of project which needs to be located in the waterway or wetland to fulfill its primary purpose, alternatives are presumed to exist. For example, parking lots, houses and shopping centers do not need to be located in waters or wetlands to fulfill their primary purpose. Therefore, if you are proposing a new project, you need to consider the water-dependent nature of the proposal.¹¹

Charleston

The Charleston District has published Standard Operating Procedures for Compensatory Mitigation, which state that:

Types of mitigation other than compensation (e.g., avoidance, minimization, reduction) are not addressed by this SOP. This SOP does not obviate or modify any requirements given in the 404(b)(1) Guidelines or other applicable documents regarding avoidance, sequencing, minimization, etc. Such requirements shall be evaluated during consideration of permit applications.¹²

Chicago

The Chicago District has an online Regulatory Program Overview that outlines the permitting and mitigation processes. The District writes that:

The pre-application process is designed to provide the applicant with the Chicago District's assessment of potential alternatives available to accomplish the project purpose, to discuss measures for reducing the adverse impacts of the project, and to advise him of the factors the Corps must consider in its decision making process.¹³

The overview goes on to say that:

In order to receive a permit from the Corps to discharge dredged or fill material into wetlands, applicants must demonstrate that they have avoided wetlands to the extent practicable, and have minimized the adverse effects of the project to the extent practicable. These conditions, known as the Section 404(b)(1) Guidelines, are central to the Corps decision making process. Compensation is generally required for most impacts which are not avoided or minimized.¹⁴

Finally, in describing compensatory mitigation, the District states that:

Wetland mitigation is only considered as an option after the Corps has determined that the applicant has avoided impacts to jurisdictional areas to the extent practicable, and has minimized unavoidable impacts to such areas.¹⁵

The District also has a permit application checklist that provides a description of what applicants should include in their alternatives analysis:

Alternatives analysis

Avoidance and minimization of impacts must be accomplished before considering compensatory mitigation for wetlands or other waters of the United States.

- **Individual permit authorizations under Section 404 of the Clean Water Act require evaluation of an alternatives analysis.** See page 3 for other application requirements for individual permit processing.
- This material is not required for the issuance of a Public Notice but is required to fully assess the project for compliance under the Section 404(b)(1) Guidelines (40 CFR Part 230). It would be advantageous to submit this information with the permit application to facilitate accurate description of your project in the public notice.
- Provide selection criteria used in determining the feasibility of the chosen project site.
- Provide a list of alternatives rejected and reasons including application of criteria to the proposed site.
- Provide sufficient information (i.e. location map, site descriptions) for comparison of selected site with other apparent alternative sites.
- Statement of reason that impact has been minimized to the smallest impact possible, and other designs considered.
- Statement of why avoidance is not possible.
- Alternative analyses are not required for projects that meet the RPP or existing nationwide permit conditions with minimal adverse environmental impacts.¹⁶

Detroit

In November 2006, the Detroit District released Mitigation Guidelines and Requirements. Although these guidelines focus on compensatory mitigation, the introduction mentions that they are intended “for permit applicants and others in meeting the requirements of Section 404(b)(1) Guidelines of the Clean Water Act. Compensatory mitigation is required to offset impacts that cannot be avoided and minimized to the extent practicable.”¹⁷

Fort Worth

The Fort Worth District describes the mitigation sequence, including avoidance and minimization, at the beginning of its web page on mitigation. This page includes the definitions of avoidance and minimization from the 1990 Mitigation MOA between EPA and the Corps.¹⁸

The District also includes these definitions from the 1990 Mitigation MOA in the Introduction to its Draft Mitigation Guidelines.¹⁹ The guidelines go on to specify that permit applications should include, as part of the baseline information about the proposed project:

a complete description of the measures the applicant proposes to avoid and minimize the adverse impact of the project on the aquatic environment, both on-site and off-site. Include a discussion of the measures proposed to avoid adverse impacts of the preferred alternative on the aquatic environment.²⁰

Galveston

The Galveston District has a web page containing Draft Mitigation Guidelines and Procedures for the Development and Use of Mitigation Banks. This page mentions that

The MBRT continues to maintain its policy that an applicant will only be allowed to use a mitigation bank after the mitigation sequencing process has been followed. In other words, an applicant must first demonstrate that impacts to wetlands and other aquatic resources have been avoided and minimized to the maximum extent practicable.²¹

Honolulu

On its regulatory web page, the Honolulu District describes the pre-application process in the same terms as the Alaska District, writing that the process:

is designed to provide the applicant with an assessment of the viability of some of the more obvious alternatives available to accomplish the project purpose, to discuss measures for reducing the impacts of the project, and to inform him of the factors the Corps must consider in its decision making process.²²

The District also specifies that one of the general criteria used in the public interest review process is “[w]here unresolved conflicts of resource use exist, the practicability of using reasonable alternative locations and methods to accomplish project purposes...”²³

In its description of mitigation on its regulatory program homepage, the Honolulu District references the 1990 Mitigation MOA, writing:

The Mitigation MOA states that compensatory mitigation may not be used as a method to reduce environmental impacts in the evaluation of the least environmentally damaging practicable alternatives for the purposes of requirements under Section 230.10(a).

The following sequence is used in evaluating proposed projects:

- determination that potential impacts have been avoided to the maximum extent practicable;
- remaining unavoidable impacts will then be mitigated
- to the extent appropriate and practicable by requiring steps to minimize
- impacts and, finally, compensate for aquatic resource values.
- Section 230.10(d) of the Guidelines states that appropriate and practicable steps to minimize the adverse impacts will be required through project modifications and permit conditions.

Appropriate and practicable compensatory mitigation is required for unavoidable adverse impacts which remain after all appropriate and practicable minimization has been required.²⁴

The Honolulu District also briefly discusses avoidance and minimization in its Compensatory Mitigation and Monitoring Guidelines. The Guidelines state that:

The National Environmental Policy Act (40 CFR 1502-1508) requires the consideration of mitigation for adverse environmental impacts, and requires that permit decisions reflect all practicable means to avoid and minimize environmental harm from a Federal action, to include monitoring for compliance and subsequent enforcement for non-compliance with any mitigation requirement. Mitigation includes avoiding impacts to a resource, minimizing the impacts, and compensating for “unavoidable” impacts. The mitigation sequence of avoidance, minimization, and compensation forms the basis for permit application evaluation by the Corps, and should be considered by the regulated public in project planning and development. Permit applicants will develop their project plans following a process of identifying resources and taking actions, including considering practicable project alternatives, to avoid and minimize project impacts *before* considering compensatory mitigation. Compensatory mitigation cannot be used to satisfy, or otherwise pre-empt, the requirements for avoidance and minimization.²⁵

Huntington

The Huntington District’s regulatory page includes a link to a 34-slide PowerPoint presentation about alternatives analysis.²⁶ The PowerPoint presentation appears to be intended to help the regulated community understand the alternatives analysis process. The slideshow explains the requirements under the various subparts of the § 404(b)(1) Guidelines and emphasizes that it is the applicant’s responsibility to provide the Corps with sufficient analysis of project alternatives to allow the Corps to determine whether the project may be permitted under the §404(b)(1) Guidelines. The end of the slideshow also discusses compensatory mitigation, including under this heading the entire mitigation sequence of avoidance, minimization and compensation. Overall, this slideshow is an explanation of the general, headquarters-level guidance regarding alternatives analysis and mitigation sequencing and does not seem to represent separate district-level guidance. It is, however, a useful explanation of the alternatives analysis process and the factors considered therein.

Jacksonville

The Jacksonville District's website on permitting includes standard Corps language regarding permit evaluation factors that include "where unresolved conflicts of resource use exist, the practicability of using reasonable alternative locations and methods to accomplish project purposes shall be considered."²⁷

Kansas City

The Kansas City District has a web page of information for permit applicants. In the section on evaluation factors, the District states that one of the general factors that will be considered is "the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed activity."²⁸ In the same section, the District notes that:

If your project involves the discharge of dredged or fill material, it will be necessary for the Corps to evaluate your proposed activity under the Section 404(b)(1) guidelines prepared by the Environmental Protection Agency. The guidelines restrict discharges into aquatic areas where less environmentally damaging, practicable alternatives exist.²⁹

Little Rock

The Little Rock District does not have specific policies on its website related to avoidance and minimization or alternatives analysis. Mitigation sequencing is, however, mentioned in the District's Compensatory Mitigation Standard Operating Procedure (SOP). The introduction to the SOP states that:

This guidance is intended to fully support the national policy for "no overall net loss" of wetlands and other waters of the United States, consistent with the Section 404 (b)(1) Guidelines. The Section 404 (b) (1) Guidelines require compensatory mitigation to offset aquatic resource losses after all appropriate and practicable steps have been taken to first avoid and then minimize aquatic resource impacts.³⁰

Los Angeles

In April 2004, the Los Angeles District issued a public notice detailing its final mitigation guidelines and monitoring requirements. These guidelines contain several references to alternatives analysis, avoidance and minimization. Specifically, the policy sections of the document's introduction contain relatively detailed explanations of § 404(b)(1) requirements:

B. MITIGATION POLICY

The Corps and the EPA formulated policy and procedures to be used in determining the mitigation necessary to demonstrate compliance with the Clean Water Act Section 404(b)(1) Guidelines (40 CFR 230) (the Section 404(b)(1) Guidelines). This information is set forth in the "Memorandum of Agreement (MOA) Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines," dated February 7, 1990 (the Mitigation MOA).

The Section 404(b)(1) Guidelines limit the issuance of a permit to the activity or project design representing the least environmentally damaging practicable alternative (LEDPA) that is not contrary to the public interest. More specifically, the Section 404(b)(1) Guidelines state that no discharge of dredged or fill material shall be permitted if there is a practicable alternative available to the proposed discharge that would have less adverse impact on the aquatic ecosystem, if the alternative does not have other significant adverse environmental consequences. Practicability is defined in terms of cost, logistics, and existing technology in light of the overall project purpose. The burden to demonstrate compliance with the Section 404(b)(1) Guidelines rests with the permit applicant. For non-water dependent discharges into special aquatic sites, there is a presumption that less environmentally damaging practicable alternatives are available. If the applicant has complied with the Guidelines by first evaluating alternatives that would avoid impacts, and then taken appropriate and practicable steps to minimize adverse impacts to the maximum extent practicable, then compensatory mitigation is required for the unavoidable impacts.

Even in cases where a Corps-notifying General Permit (Nationwide Permit or Regional General Permit pursuant to 33 CFR 330) applies, the applicant will have to demonstrate avoidance and minimization of aquatic resource impacts. Granted, the demonstration required is typically less rigorous than for a Standard Permit. Nevertheless, if an applicant is required to notify the Corps regarding authorization under an existing General Permit, it is likely that the Corps Los Angeles District's verification letter/notice to proceed will require compensatory mitigation. Clearly, the sequence of avoidance, minimization, and compensatory mitigation specified by the Section 404(b)(1) Guidelines and the Mitigation MOA is fundamental to the administration of the Corps' regulatory program.

C. CORPS POLICY

As stated in the Mitigation MOA, the goal of the Clean Water Act and the Section 404(b)(1) Guidelines is to maintain and to restore the physical, chemical, and biological integrity of the Nation's waters. The Corps strives to avoid or minimize adverse impacts to waters of the U.S., and to achieve a goal of no net loss of wetland functions and values. To achieve these goals, compensatory mitigation is generally required at a minimum 1:1 replacement ratio.³¹

The Los Angeles District also makes special mention of alternatives analysis and avoidance in its discussion of projects occurring around lakes, ponds and vernal pools:

Because wetlands are common along lakes and ponds, many proposed impacts to lake/pond habitat will be evaluated under the Corps' Standard Permit procedures, which will involve an analysis of alternatives pursuant to the 404(b)(1) Guidelines. In those cases where wetland habitat would be impacted by a non-water dependent activity (e.g., housing), the applicant is required to rebut the presumption that there is a less damaging, practicable alternative that does not impact wetlands or other special aquatic sites.³²

Proposed impacts to natural, seasonal ponds and lakes within the Los Angeles District is discouraged because there are so few remaining. As an

example, within Orange County, there may be only three natural lakes remaining within the entire county. Preservation of these few remaining systems is a priority of the District, and proposed impacts to them would likely require Standard Permit review. The requirements to rebut the presumption that there is a less damaging practicable alternative will likely be more stringent in the case of proposed impacts to natural ponds and lakes.³³

The Los Angeles District of the Corps has proposed a regional condition that would require an applicant to obtain a Standard Permit for any impact to a jurisdictional vernal pool. Because jurisdictional vernal pools are considered wetlands, the Standard Permit requirement would require an applicant proposing an activity that is not water-dependent (e.g., housing) to rebut the presumption that a less environmentally damaging, practicable alternative is available to the proposed project. The increased sensitivity of vernal pools will make this requirement more difficult to satisfy in the near future. As a result, the Los Angeles District of the Corps is stressing total avoidance in order to protect the remaining jurisdictional vernal pools.³⁴

Louisville

The Louisville District has a PDF document of information for permit applicants that includes brief references to alternatives analysis and mitigation sequencing. The document explains that a pre-application consultation "may involve discussion of alternatives."³⁵ It also provides the standard Corps language regarding permit evaluation factors, noting that one of the general criteria for permit evaluation is "the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed activity"³⁶ and describing the requirement to evaluate projects under the § 404(b)(1) Guidelines:

If your project involves the discharge of dredged or fill material, it will be necessary for the Corps to evaluate your proposed activity under the Section 404(b)(1) guidelines prepared by the Environmental Protection Agency. The guidelines restrict discharges into aquatic areas where less environmentally damaging, practicable alternatives exist.³⁷

Memphis

The Memphis District has released mitigation guidelines that include a mitigation checklist. The checklist states that mitigation plans should include a “[d]escription of avoidance and minimization of impacts.”³⁸ The special public notice accompanying the District mitigation guidelines also includes the following description of § 404(b)(1) requirements:

The Corps and the EPA formulated policy and procedures to be used in determining the mitigation necessary to demonstrate compliance with the Clean Water Act Section 404(b)(1) Guidelines (40 CFR 230) (the Section 404(b)(1) Guidelines). This information is set forth in the “Memorandum of Agreement (MOA) Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines,” dated February 7, 1990 (the Mitigation MOA). The Section 404(b)(1) Guidelines limit the issuance of a permit to the activity or project design representing the least environmentally damaging practicable alternative (LEDPA) that is not contrary to the public interest. More specifically, the Section 404(b)(1) Guidelines state that no discharge of dredged or fill material shall be permitted if there is a practicable alternative available to the proposed discharge that would have less adverse impact on the aquatic ecosystem, if the alternative does not have other significant adverse environmental consequences. Practicability is defined in terms of cost, logistics, and existing technology in light of the overall project purpose. The burden to demonstrate compliance with the Section 404(b)(1) Guidelines rests with the permit applicant. For non-water dependent discharges into special aquatic sites, there is a presumption that less environmentally damaging practicable alternatives are available. If the applicant has complied with the Guidelines by first evaluating alternatives that would avoid impacts, and then taken appropriate and practicable steps to minimize adverse impacts to the maximum extent practicable, then compensatory mitigation is required for the unavoidable impacts. Even in cases where a

Corps-notifying General Permit (Nationwide Permit or Regional General Permit pursuant to 33 CFR 330) applies; the applicant will have to demonstrate avoidance and minimization of aquatic resource impacts. Granted, the demonstration required is typically less rigorous than for a Standard Permit. Nevertheless, if an applicant is required to notify the Corps regarding authorization under an existing General Permit, it is likely that the Corps verification letter/notice to proceed will require compensatory mitigation. Clearly, the sequence of avoidance, minimization, and compensatory mitigation specified by the Section 404(b)(1) Guidelines and the Mitigation MOA is fundamental to the administration of the Corps’ regulatory program.³⁹

Mobile

The Mobile District has released a mitigation checklist in accordance with Corps HQ policy inspired by the Mitigation Action Plan. The checklist and associated guidance do not include any requirements for information about avoidance and minimization.⁴⁰ The only mention of sequencing is in the supplementary guidance which states that “[c]ompensatory mitigation is required to offset impacts that cannot be avoided and minimized to the extent practicable.”⁴¹ This is not actually an accurate statement of Corps and EPA policy. According to the 404(b)(1) guidelines and the 1990 Mitigation MOA, the District should say that compensation is required to offset unavoidable impacts after those impacts have been avoided and minimized to the maximum extent practicable.

Nashville

The Nashville District has released compensatory mitigation guidelines that reference avoidance and minimization requirements. Specifically, the guidelines state that:

Before compensatory mitigation is considered, appropriate and practicable measures to avoid and minimize those adverse impacts to the aquatic ecosystem that are not necessary or cannot reasonably be avoided must be taken.

Once avoidance and minimization have been considered, applicants must implement appropriate

and practicable measures to compensate for adverse project impacts to the aquatic ecosystem.

While this sequential process (avoid, minimize, compensate) is normally applied only during the individual permit process, most nationwide and regional general permits require that discharges of dredged or fill material into waters of the US be avoided and minimized to the maximum extent practicable, unless the District Engineer approves a compensatory mitigation plan that is more beneficial to the environment than minimization or avoidance measures that could be undertaken at the project site.⁴²

New England

The New England District has published a mitigation plan checklist and mitigation plan checklist guidance, neither of which directly address avoidance and minimization.⁴³ The guidance does reference avoidance and minimization in excluding those forms of mitigation from the definition used throughout the guidance: “While mitigation includes sequencing from avoidance to minimization to, finally, compensation, it is frequently used instead of “compensation,” including in this document.”⁴⁴ In addition, in reference to compensatory mitigation through preservation, the guidance states that:

“[w]etlands within subdivisions, golf courses, etc. should generally be protected along with appropriate buffers. This is part of the avoidance and minimization steps of mitigation. . . . Preservation should be part of every mitigation package as preservation of a creation, restoration, or enhancement area, and buffer; the remaining unimpacted wetlands on-site as part of avoidance and minimization; as a stand-alone form of mitigation; or as any combination of these.”⁴⁵

New Orleans

The New Orleans District’s permitting overview includes standard Corps language regarding evaluation factors (see Kansas City District summary for language).⁴⁶ The District’s regulatory program overview page includes standard language about using the pre-application meeting to assess “the viability of some of the more obvious alternatives available to accomplish the project purpose, [and] to discuss measures for reducing the impacts of the project. . . .”⁴⁷ It also repeats the standard language about alternatives being one of the general evaluation criteria for permits.⁴⁸

The District’s Joint Permit Application for projects in the Louisiana Coastal Zone requires applicants to describe:

- a. What alternative locations, methods and access routes were considered to avoid impact to wetlands and/or waterbottoms?
- b. What efforts were made to minimize impact to wetlands and/or waterbottoms?⁴⁹

The District’s standard permit application for projects outside the Louisiana Coastal Zone does not include any language related to mitigation sequencing or alternatives analysis.⁵⁰

The District’s webpage on compensatory mitigation includes an explanation of mitigation sequencing:

...special conditions may be added to permits in order to satisfy public interest concerns and/or legal requirements, such as compliance with the Clean Water Act 404(b)(1) Guidelines. If a proposed permit action would result in impacts to wetlands, these special conditions often include provisions requiring the permittee to compensate for the expected impact. This compensation is commonly referred to as compensatory mitigation. It may also be referred to simply as mitigation, although strictly speaking, it is only one of three forms of mitigation. The first two forms, avoidance and minimization are typically addressed through alternative siting and/or modifications to the project design. For most standard permits (i.e., those that require issuance of a public notice), and in particular those subject to regulation under the Clean Water Act, avoidance and

minimization of impacts to aquatic resources, including wetlands, must be addressed prior to considering compensatory mitigation. Compensatory mitigation, therefore, is only utilized to offset impacts which are otherwise unavoidable. The process of incorporating all appropriate and practicable measures to avoid, minimize and, finally, compensate for impacts to aquatic resources caused by permit actions is referred to as sequencing.⁵¹

The compensatory mitigation page also quotes the sentence from 1990 Mitigation MOA establishing a policy of striving to avoid adverse impacts and offset unavoidable impacts to aquatic resources.⁵²

The New Orleans District has published Mitigation Guidelines, of which avoidance and minimization is the first step: “Impacts to aquatic resources shall be avoided and/ or minimized to the maximum extent practicable.”⁵³ The District has also published Compensatory Mitigation Standard Operating Procedures, which reference avoidance and minimization and the definition of mitigation from the 1990 Mitigation MOA to establish that the SOP deals only with compensatory mitigation.⁵⁴ The SOP also references mitigation sequencing in its discussion of when applicants should develop and formalize a compensatory mitigation plan for their proposed project.⁵⁵

New York

The New York District directs permit applicants to include an environmental questionnaire with their permit application. The questionnaire includes a prompt requiring applicants to discuss their alternatives analysis:

Provide a thorough discussion of alternatives to your proposal. This discussion should include, but not necessarily be limited to, the “no action” alternative and alternative(s) resulting in less disturbance to waters of the United States. For filling projects in waters of the United States, including wetlands, your alternatives discussion should demonstrate that there are no practicable alternatives to your proposed filling and that your project meets with current mitigation policy (i.e. avoidance, minimization and compensation).⁵⁶

Norfolk

The Norfolk District has a General Permit Summary Sheet that summarizes the process for general permit applications. The summary sheet notes whether the Virginia DEQ or the Corps will conduct avoidance, minimization and mitigation reviews for each category of General Permit.⁵⁷ The District’s annotated Mitigation Recommendations are focused on compensatory mitigation and do not mention avoidance, minimization, alternatives analysis, or the § 404(b)(1) Guidelines.⁵⁸ Likewise, the District’s mitigation checklist calls for “Site selection considerations” but does not mention avoidance, minimization, alternatives analysis or the § 404(b)(1) Guidelines.⁵⁹

The District’s joint permit application for tidal waters and/or wetlands includes a prompt for permit applicants to describe avoidance and minimization measures:

10. Describe the measures that will be taken to avoid and minimize impacts, to the maximum extent practicable, to wetlands, surface waters, submerged lands, and buffer areas associated with any disturbance (clearing, grading, excavating) during and after project construction. Please be advised that unavoidable losses of tidal wetlands and/or aquatic resources may require compensatory mitigation.⁶⁰

Similarly, the District’s full-length joint permit application directs permit applicants to:

- Include a description of alternatives considered to avoid or minimize impacts to surface waters, including wetlands, to the maximum extent possible. Include factors such as, but not limited to, alternative construction technologies, alternative project layout and design, alternative locations, local land use regulations, and existing infrastructure
- For utility crossings, include both alternative routes and alternative construction methodologies considered (p. 8)⁶¹

In June 2006, the Norfolk District issued a public notice regarding two spreadsheets that the District developed to help assess the economics of project alternatives. In the public notice, the District wrote,

“Our intent is to request this information only on those occasions when we believe there are practicable alternatives to avoid and minimize impacts to waters and wetlands and an applicant voices concern over the effects of those changes on the economic viability of their project.”⁶² Although these documents are not available online, as of February 2007, regulatory staff at the District indicated that the spreadsheets are used on a case-by-case basis as needed.⁶³

Omaha

The Omaha District released “Guidance for Compensatory Mitigation and Mitigation Banking in the Omaha District” in August 2005. The Guidance is directed almost exclusively at compensatory mitigation, and mentions avoidance and minimization only briefly: “Compensatory mitigation will be considered after all appropriate and practicable avoidance and minimization has been achieved.”⁶⁴ The Guidance also asserts that the District’s guidance is intended to clarify policies under existing guidance including the 1990 Mitigation MOA and the § 404(b)(1) Guidelines.⁶⁵

Philadelphia

The Philadelphia District released draft compensatory mitigation guidelines in December 2003. The draft guidelines are directed primarily at compensatory mitigation, and mention avoidance and minimization only briefly: “The policies and guidance that have been developed and implemented in the Corps’ Regulatory program have emphasized that compensation for aquatic resources should only be considered after the applicant has adequately addressed the issues of avoidance and minimization.”⁶⁶ In the Public Notice that accompanied the draft guidelines, the District also stated:

It should be noted that these compensatory mitigation guidelines are being developed as a technical guide, and are not intended to modify or alter the Corps’ responsibilities to comply with the Section 404(b)(1) Guidelines, the Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning Mitigation, and Regulatory Guidance Letter 02-2.⁶⁷

Pittsburgh

The Pittsburgh District does not appear to have any documents online that relate to alternatives analysis or mitigation sequencing.⁶⁸

Portland

The Portland District has two guidance documents that discuss avoidance and minimization. The District’s Wetland Mitigation Banking Guidebook for Oregon includes the following passages:

The Section 404(b)(1) guidelines, developed by the U.S. Environmental Protection Agency (USEPA), are the substantive criteria that the Corps uses to evaluate the effects of proposed discharges. The guidelines require that practicable alternatives to the proposed action be considered before a Corps permit is issued. The guidelines also require that if there is no practicable alternative available, the permit applicant will minimize any potential harm to the aquatic ecosystem. The Corps evaluates permit applications to ensure that impacts are avoided where practicable through the evaluation of alternative sites so that impacts are minimized, and that unavoidable impacts are mitigated through appropriate and practicable compensation, called compensatory wetland mitigation.

Mitigation policy was further clarified in a MOA between the Corps and the USEPA in 1990. The sequencing requirement articulated in the MOA provides that permit applicants must demonstrate that they have made every reasonable effort to avoid and minimize wetland losses through careful location and design before compensatory mitigation techniques such as wetland restoration, creation or enhancement can even be considered.⁶⁹

The processing and evaluation of permit applications by DSL follows a process similar to the Corps process and applies standards for evaluation similar to those of the Corps, including the requirements for an alternatives analysis, minimization of impacts, and compensation for unavoidable impacts.⁷⁰

Oregon and the Federal Government define mitigation as the reduction of adverse effects of a proposed project by considering, in the following order:

- a. Avoiding the impact altogether by not taking a certain action or parts of an action.
- b. Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- c. Rectifying the impact by repairing, rehabilitating or restoring the affected environment.
- d. Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action by monitoring and taking appropriate corrective measures.
- e. Compensating for the impact by replacing or providing comparable substitute wetland or water resources.⁷¹

Mitigation means sequentially avoiding impacts, minimizing impacts, and compensating for remaining unavoidable impacts.⁷²

The District's Mitigation Guidelines and Monitoring Requirements include the following language that is identical to the language in guidance from the Los Angeles District:

B. MITIGATION POLICY

The Corps and the EPA formulated policy and procedures to be used in determining the mitigation necessary to demonstrate compliance with the Clean Water Act Section 404(b)(1) Guidelines (40 CFR 230) (the Section 404(b)(1) Guidelines). This information is set forth in the "Memorandum of Agreement (MOA) Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines," dated February 7, 1990 (the Mitigation MOA).

The Section 404(b)(1) Guidelines limit the issuance of a permit to the activity or project design representing the least environmentally damaging practicable alternative (LEDPA) that is not contrary to the public interest. More specifi-

cally, the Section 404(b)(1) Guidelines state that no discharge of dredged or fill material shall be permitted if there is a practicable alternative available to the proposed discharge with less adverse impact on the aquatic ecosystem, if the alternative does not have other significant adverse environmental consequences. Practicability is defined in terms of cost, logistics, and existing technology in light of the overall project purpose. The burden to demonstrate compliance with the Section 404(b)(1) Guidelines rests with the permit applicant. For non-water dependent discharges into special aquatic sites, there is a presumption that less environmentally damaging practicable alternatives are available. If the applicant has complied with the Guidelines by first evaluating alternatives that would avoid impacts, and then taken appropriate and practicable steps to minimize adverse impacts to the maximum extent practicable, then compensatory mitigation is required for the unavoidable impacts.

Even in cases where a Corps-notifying General Permit (Nationwide Permit or Regional General Permit pursuant to 33 CFR 330) applies, the applicant will have to demonstrate avoidance and minimization of aquatic resource impacts. Granted, the demonstration required is typically less rigorous than for a Standard Permit. Nevertheless, if an applicant is required to notify the Corps regarding authorization under an existing General Permit, it is likely the Corps's verification letter/notice to proceed will require compensatory mitigation. Clearly, the sequence of avoidance, minimization, and compensatory mitigation specified by the Section 404(b)(1) Guidelines and the Mitigation MOA is fundamental to the administration of the Corps' regulatory program.

C. CORPS POLICY

As stated in the Mitigation MOA, the goal of the Clean Water Act and the Section 404(b)(1) Guidelines is to maintain and to restore the physical, chemical, and biological integrity of the Nation's waters. The Corps strives to avoid or minimize adverse impacts to waters of the U.S., and to achieve a goal of no net loss of wetland functions and values.⁷³

In addition, the Portland District guidelines also include the following additional passages:

For Standard Permit applications, the applicant can submit a conceptual mitigation plan along with the formal application materials. This plan should focus on discussing the mitigation concept(s); not providing a fully developed mitigation and monitoring plan with implementation, maintenance, and monitoring protocols. It should include a summary of how on-site impacts would be avoided and minimized, and why the applicant believes the remaining, proposed impacts would be adequately compensated.⁷⁴

After the applicant has demonstrated maximum practicable avoidance and minimization of project impacts to waters of the U.S., the Corps will determine whether compensatory mitigation for the unavoidable impacts is required.⁷⁵

Assessment results can provide a basis for modifying pre-construction plans to avoid and/or minimize impacts to these resources.⁷⁶

Applicants should carefully consider expanding efforts to avoid and minimize on-site impacts and to attempt to submit plans for self-sustaining compensatory mitigation sites along natural water features, such as stream channels.⁷⁷

Preservation is essentially avoidance, which is required under the Mitigation MOA and the Section 404(b)(1) Guidelines.⁷⁸

Monitor the construction activities to ensure habitat outside of the planned compensatory mitigation site is not impacted. The use of heavy equipment may be needed to construct the site, and care must be taken to ensure equipment operators do not stray outside of the project boundaries. Brief the operators of heavy equipment on the location of sensitive habitat areas and the importance of avoidance.⁷⁹

Rock Island

The Rock Island District has published Mitigation and Monitoring Guidelines that explicitly “are intended to summarize major points regarding the compensatory mitigation that may be required in a Department of the Army (DA) permit after all practicable steps have been taken to avoid and minimize impacts to aquatic sites.”⁸⁰ The District’s website does not have any guidance that deals specifically with avoidance and minimization.

Sacramento

The Sacramento District has a Permitting Overview web page that includes the standard Corps language stating that one of the general evaluation criteria for permits is “the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed activity.”⁸¹ The District has also posted a graphical permitting process flow chart that illustrates the steps in a permit review including avoidance, minimization and alternatives analysis using the § 404(b)(1) Guidelines.⁸²

In December 2004, the San Francisco and Sacramento Districts released joint Mitigation and Monitoring Proposal Guidelines. These guidelines are primarily designed to address compensatory mitigation practices, but the document does reference avoidance and minimization in relation to compensatory mitigation: “After the applicant has demonstrated maximum avoidance and minimization of project impacts to waters of the U.S., Corps Districts will likely require compensatory mitigation for the remaining unavoidable impacts.”⁸³ The guidelines also state that as part of mitigation planning, the project site impact assessment “can provide a basis for modifying pre-construction plans to avoid and/or minimize impacts to these resources.”⁸⁴ Finally, the Districts’ guidelines state that compensatory mitigation implementation plans should “[d]escribe any measures used to avoid sensitive areas outside of the grading plan.”⁸⁵

San Francisco

The San Francisco District is the only district that has a web page specifically to explain mitigation sequencing. The definitions and explanations on this webpage are either quoted from or paraphrased from national guidance, it does not represent unique district-level guidance.⁸⁶

In December 2004, the San Francisco and Sacramento Districts released joint Mitigation and Monitoring Proposal Guidelines. These guidelines are primarily designed to address compensatory mitigation practices, but the document does reference avoidance and minimization in relation to compensatory mitigation: “After the applicant has demonstrated maximum avoidance and minimization of project impacts to waters of the U.S., Corps Districts will likely require compensatory mitigation for the remaining unavoidable impacts.”⁸⁷ (p. 1 Overview) The guidelines also state that as part of mitigation planning, the project site impact assessment “can provide a basis for modifying pre-construction plans to avoid and/or minimize impacts to these resources.”⁸⁸ Finally, the Districts’ guidelines state that compensatory mitigation implementation plans should “[d]escribe any measures used to avoid sensitive areas outside of the grading plan.”⁸⁹

Savannah

The Savannah District released Standard Operating Procedures for compensatory mitigation in March 2004. The SOP stipulates that “[t]ypes of mitigation other than compensation (e.g., avoidance, minimization, reduction) are not addressed by this SOP.”⁹⁰ However, the SOP also explicitly states that “[t]his SOP does not obviate or modify any requirements given in the 404(b)(1) Guidelines or other applicable documents regarding avoidance, sequencing, minimization, etc. Such requirements shall be evaluated during consideration of permit applications.”⁹¹ Finally, in the section on mitigation plan drawings, the SOP states, “All aquatic areas within the project boundaries (avoided, impacted, or mitigated) must be shown.”⁹²

The Savannah District has also released a working draft of guidelines on the establishment, operation, and use of mitigation banks. Again, these draft guidelines do not directly concern avoidance and minimization, but they do state that:

...prior to use of credits from a commercial mitigation bank, it is the permit applicant’s responsibility to demonstrate that the proposed discharge would comply with the mitigation sequencing requirements of the Section 404(b)(1) Guidelines of the CWA, as follows:

- A. Avoid wetland, stream and open water impacts through practicable upland alternatives;
- B. Minimize wetland, stream and open water impacts using all reasonable actions; and
- C. Mitigate for unavoidable direct and indirect wetland, stream and open water impacts that result in a loss of aquatic function(s).⁹³

The banking guidelines also include definitions of compensatory mitigation and mitigation that refer to avoidance and minimization:

Compensatory mitigation: For purposes of Section 10/404, the restoration, enhancement, or in exceptional circumstances, preservation or creation of wetlands, streams, and/or aquatic resources expressly for the purpose of compensating for adverse impacts that remain after all appropriate and practicable avoidance and minimization have been achieved.

Mitigation: The three step process outlined in the 404(b)(1) Guidelines: first, avoid adverse impacts associated with a proposed project through selection of less damaging practicable on-site or off-site alternatives; then minimize the impact of the selected alternative to the extent appropriate and practicable; and finally, compensate for remaining unavoidable impacts to the extent appropriate and practicable.⁹⁴

Seattle

The Seattle District released guidance in October 2003 on alternatives analysis. The District guidance emphasizes that it is the permit applicant’s responsibility to prepare the alternatives analysis, and provides a detailed explanation of the factors that must be included in this analysis and how the Corps weighs these factors. The District guidance does not change or add to the national-level § 404(b)(1) Guidelines, but it does provide a detailed and user-friendly explanation of the factors that permit applicants must address in

the alternatives analysis process. This is by far the most thorough district-level guidance related to alternatives analysis, avoidance, and minimization.⁹⁵

The Seattle District has a web page titled “Helpful Hints for the Permit Process” that includes the suggestion:

Minimize the impact on the aquatic environment. Document your efforts in the process. For example, do you really need to develop 5 acres of wetlands? Instead, is it feasible to develop 1 to 2 acres of wetlands and 3 to 4 acres of uplands? Do you have to develop wetlands, would your project succeed if you developed 5 acres of uplands? Does your boat ramp have to be 50 feet wide? Can you use other materials besides pouring concrete onto the beach (possibly destroying fish habitat)? We will ask these types of questions in order to determine if the proposed project has the least possible impact on the aquatic environment.⁹⁶

The District also has a webpage listing the standard set of evaluation factors for permits, including standard Corps language regarding alternatives (see e.g. Kansas City District).⁹⁷

St. Louis

The St. Louis District released its most recent Mitigation and Monitoring Guidelines in June 2004. The guidelines are primarily directed at compensatory mitigation, however, they do include a description of mitigation sequencing:

When reviewing a proposed project for DA authorization the Corps of Engineers applies a sequential three-step evaluation of the need for mitigation in order to maximize protection of the aquatic resource. The sequence is as follows:

Avoidance: The Corps requires the applicant to employ all practicable measures in order to avoid adverse impacts to the aquatic ecosystem that are not absolutely necessary.

Minimization: The Corps requires the applicant to employ all practicable measures in order to minimize adverse impacts to the aquatic ecosystem that cannot be reasonably avoided.

Compensation: Implement appropriate and practicable measures to compensate for all adverse impacts to the aquatic ecosystem that cannot be avoided or minimized. This is commonly referred to as compensatory mitigation.⁹⁸

In addition, the District’s guidelines stipulate that compensatory mitigation plans must include “[a] complete description of the alternatives investigated and the efforts made to avoid and to minimize adverse impacts of the project on the aquatic ecosystem.”⁹⁹

The District also has a website with information for permit applicants that includes the standard Corps language regarding the use of the pre-application consultation for identifying project alternatives. The website also explains that the practicability of project alternatives is one of the general evaluation factors used in assessing permits in accordance with the 404(b)(1) guidelines (see e.g. Kansas City District, Seattle District, etc.).¹⁰⁰

St. Paul

The St. Paul District has a Frequently Asked Questions webpage that mentions alternatives analysis, avoidance, and minimization in several places:

The general rule is that for an activity to receive a 404 permit it must comply with the EPA’s Section 404(b)(1) guidelines. In general, the guidelines require that the activity be the least environmentally damaging alternative that is feasible, and that adverse impacts are avoided, then minimized, and then compensated for (such as creating or restoring wetlands to replace those that would be filled). Activities also must not be contrary to the public interest, as determined by the Corps....

Select a project site or design that can support the project purpose without the need to alter wetland or water areas. If that is not practical, then you should enhance your chances of receiving a favorable interagency review and a permit by designing the project so that water and wetland impacts are avoided, minimized, and then compensated for, in that order and to the maximum extent practical. Completely avoiding water and wetland areas will eliminate the need for a 404 permit. Minimizing

wetland impacts will reduce the amount of wetlands that may need to be created or restored in order to satisfy compensatory mitigation requirements of state or Corps' permits.¹⁰¹

The general joint permit application (Corps and Minnesota Department of Natural Resources) for Minnesota directs applicants to include a section on project alternatives:

PROJECT ALTERNATIVES: What alternatives to this proposed project have you considered that would avoid or minimize impacts to wetlands or waters? List at least **TWO** additional alternatives to your project in Section 5 that avoid wetlands (one of which may be “no build” or “do nothing”), and explain why you chose to pursue the option described in this application over these alternatives. Attach *PROJECT ALTERNATIVES* sheet if needed.¹⁰²

The joint permit application for Public Transportation and Linear Utility Projects in Minnesota directs applicants to include:

SEQUENCING CONSIDERATIONS: What alternatives to this proposed project have you considered that could have avoided or minimized impacts to wetlands or water? **For new construction only - list at least two alternatives** (one of which may be “no build” or “do nothing”), and explain why you chose to pursue the option described in this application over these alternatives. (If space below is not adequate, attach separate sheet labeled *SEQUENCING CONSIDERATIONS*.)¹⁰³

The District's joint permit application for Wisconsin also requires alternatives analysis. The permit application includes a two page questionnaire of information related to alternatives analysis, which includes the following requirements:

- I. Background/Description of Project
 - A. Describe the purpose and need for the project.
 - B. Is your project an expansion of existing work or is it new construction? Explain.
 - C. When did you start to develop a plan for your project?

- D. Explain why the project must be located in or adjacent to wetlands.
- II. Alternatives (your analysis should address the following questions).
 - A. How could you redesign or reduce your project to avoid the wetland, and still meet your basic project purpose?
 - B. Other sites
 1. What geographical area(s) was searched for alternative sites?
 2. Were other sites considered?
 3. Have you sold any lands in recent years that are located within the vicinity of the project? If so, why were they unsuitable for the project?
 - C. For each of the alternatives you identified, explain why you eliminated the alternative from consideration (include cost comparisons, logistical, technological, and any other reasons).
 - D. What are the consequences of not building the project? (include social and economic consequences):

If you have chosen an alternative that would result in wetland impacts:
 - E. Summarize why your alternative was selected.
 - F. Explain what you plan to do to minimize adverse effects on the wetlands during your project (e.g. erosion control, best management practices, setbacks, etc.).¹⁰⁴

Tulsa

The Tulsa District has a mitigation web page that includes a relatively detailed explanation of mitigation sequencing, avoidance, and minimization. The webpage includes the definition of mitigation from the NEPA regulations (40 CFR 1508.20) and describes avoidance and minimization with reference to the § 404(b)(1) Guidelines.¹⁰⁵ This is one of the more detailed explanations of avoidance and minimization on any of the Corps District websites, though like other districts the Tulsa District is not creating new guidance but rather explaining the existing national-level guidance.

The Tulsa District's web page on the Individual Permit Review Process also mentions alternatives analysis,

avoidance, and minimization briefly in a paragraph about alternatives and impact mitigation:

The Individual Permit review process will sometimes reveal an alternative project design that creates less impact to the aquatic environment. This determination may require a change to the projects design, scope, or construction method. However, if the original request is determined to be the least environmentally damaging practicable alternative, any impacts to the aquatic environment, which cannot be avoided or minimized, will require compensatory mitigation.¹⁰⁶

The District's aquatic resource mitigation and monitoring guidelines from October 2004 also discuss alternatives analysis, avoidance, and minimization briefly. The introduction states that:

Mitigation of project impacts to aquatic resources requires the development and consideration of project alternatives. These alternatives must employ three mitigation steps that are to be considered in a sequential manner. First, project impacts must be *avoided* to the extent practicable. Second, unavoidable impacts should be *minimized*. Third, remaining unavoidable impacts should be mitigated through *compensatory actions*. This mitigation policy is more explicitly described in the Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines.¹⁰⁷

The guidelines also repeat the definition of mitigation from the NEPA regulations (40 CFR 1508.20) and state that “[w]here avoidance and minimization of project impacts have been maximized to the extent practicable and unavoidable impacts remain, project proponents should consider compensatory actions to counter the aquatic ecosystem losses of the proposed project.”¹⁰⁸

Vicksburg

The Vicksburg District provides a document on Detailed Application Information for permit applicants. This document defines mitigation to include avoidance and minimization and contains the standard Corps language regarding assessment of practicable alternatives under the § 404(b)(1) Guidelines as one of the general criteria for permit evaluations.¹⁰⁹ The document also contains a section on mitigation requirements that states:

The first step in the process is to determine if the wetlands can be avoided. The second step is to minimize adverse impacts to those wetland areas that cannot be avoided. If the Corps determines that the proposed site is the only available practicable alternative, then any remaining adverse impacts to the wetland functions and values must be mitigated to the extent appropriate and practicable in terms of cost, existing technology and logistics in light of the overall project purposes.¹¹⁰

In August 2004, the District also released a Compensatory Mitigation Standard Operating Procedure. This SOP is intended to address compensatory mitigation, not avoidance and minimization, but does reference avoidance and minimization stating:

This guidance is intended to fully support the national policy for “no overall net loss” of wetlands and other waters of the United States, consistent with the Section 404(b)(1) Guidelines. The Section 404(b)(1) guidelines require compensatory mitigation to offset aquatic resource losses after all appropriate and practicable steps have been taken to first avoid and then minimize aquatic resource impacts.¹¹¹ (§ I)

Walla Walla

The Walla Walla District has created a pamphlet containing permitting information, which includes a section on permit evaluation factors. This pamphlet does not use the standard Corps language regarding alternatives, stating instead:

If an activity is proposed in valuable wetlands, the Corps will evaluate it to determine whether it is a necessary alteration. The unnecessary alteration or destruction of these wetlands will be considered

contrary to the public interest and must be avoided. In determining whether the alteration is necessary, the Corps will primarily consider whether the proposed activity is dependent on the wetland resource and whether alternatives are practical.¹¹²

In December 2003, the District issued Proposed Mitigation and Monitoring Guidelines. In the public notice accompanying the proposed guidelines the District stated that “[a]pplicants who apply for a permit to fill wetlands or waterways are required to avoid and minimize impacts as much as possible.”¹¹³ The Proposed Mitigation and Monitoring Guidelines include a lengthy description of the § 404(b)(1) Guidelines and their requirements in the Corps Policy section:

The 404(b)(1) Guidelines allow permit issuance for only the least environmentally damaging practicable alternative in light of the overall project purposes. The 404(b)(1) Guidelines state that no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem so long as the alternative does not have other significant adverse environmental consequences. An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics. The burden to demonstrate compliance with the 404(b)(1) Guidelines rests with the permit applicant. For non-water dependent discharges into special aquatic sites (e.g. wetlands), there is a presumption that less environmentally damaging practicable alternatives exist. If the applicant has complied with the 404(b)(1) Guidelines through first evaluating alternatives to avoid impacts, and then taken appropriate and practicable steps to minimize adverse impacts to the maximum extent practicable, then reasonable and practicable compensatory mitigation is required for the unavoidable impacts that remain.

The goal of the Clean Water Act and the 404(b)(1) Guidelines is to maintain, restore, and enhance the physical, chemical, and biological integrity of the Nation’s waters. The Corps strives to avoid adverse impacts to waters of the United States, and to achieve a goal of no net loss of wetland functions.¹¹⁴

The guidelines also specify that compensatory mitigation plans should “describe how the project has been modified to minimize and avoid impacts to the aquatic environment.”¹¹⁵

Wilmington

The Wilmington District has a website dedicated to mitigation, but it includes relatively little about avoidance and minimization.¹¹⁶ On the Permitting and Compensatory Mitigation page, the District cites the Corps’ regulations and includes avoidance and minimization in its description of the role of mitigation in the permitting process: “Mitigation is considered throughout the permit application review process and includes avoiding, minimizing, rectifying, reducing, or compensating for resource losses [33 CFR 320.4(r)(2)].”¹¹⁷ The District briefly discusses avoidance and minimization on its Frequently Asked Questions page, in response to a question of how much wetland or stream area can be impacted, writing:

The best practice is to avoid all impacts to streams and wetlands. When this is unavoidable, contact your Corps office to determine how to minimize the area impacted and whether a permit is needed. Stringent limits are placed on activities that may cause anything other than minimal impacts to the waterbody or aquatic environment. There are additional prohibitions and limitations on special aquatic resources. The national policy regarding wetlands is to prevent any further net loss. To meet this goal, if your activity is permitted, you may be required to compensate for the loss through mitigation as a condition for proceeding with the planned activity.¹¹⁸

The District also mentions avoidance and minimization on its page of mitigation-related definitions. The District defines avoidance as “[n]ot discharging into the waters of the United States or discharging into an alternative aquatic site with potentially less damaging consequences.” Avoidance and minimization are also mentioned in the definitions of ‘mitigation’ and ‘compensatory mitigation.’¹¹⁹ The Wilmington District’s Wetland Compensatory Mitigation Checklist does not mention avoidance and minimization, and includes no requirement to describe avoidance and minimization efforts in the mitigation plan proposal.¹²⁰

Notes

1. Available at: <http://www.poa.usace.army.mil/reg/regover.htm>.
2. U.S. Army Corps of Engineers. "Regulatory Program Applicant Information." May 1985. <http://www.spa.usace.army.mil/reg/application%20process/appinfo.pdf>, p. 8.
3. Albuquerque District Regulatory Branch, U.S. Army Corps of Engineers. "Checklist of Information Required for Complete Application." <http://www.spa.usace.army.mil/reg/application%20process/applcklst.pdf>, p. 3.
4. Albuquerque District, U.S. Army Corps of Engineers. "Expedited Standard Individual Permit Processing Pilot Program." <http://www.spa.usace.army.mil/reg/Special%20Public%20Notice/XIP.doc>, Attachment 1: Standards for Submittal of a Section 404(b)(1) Alternatives Analysis.
5. Albuquerque District, U.S. Army Corps of Engineers. "Albuquerque District Mitigation and Monitoring Guidelines." June 28, 2004. <http://www.spa.usace.army.mil/reg/200300788-1/Final%20Guidelines%20combined.pdf>, § I.C.2.
6. *Id.* §§ Preamble; I.B
7. Baltimore District, U.S. Army Corps of Engineers. "Mitigation and Monitoring Guidelines." November 2004. <http://www.nab.usace.army.mil/Regulatory/Mitigation/FinalMitigationGuidelinesNov04.pdf>, § II.
8. *Id.* § IV.
9. Interagency Mitigation Task Force. "Maryland Compensatory Mitigation Guidelines." August 1994. <http://www.nab.usace.army.mil/Regulatory/Mitigation/MDCompensatoryMitigationGuidance.pdf>, Ch.1, § 3; Ch. 2, § 3.
10. Buffalo District, U.S. Army Corps of Engineers. "Understanding the U.S. Army Corps of Engineers Regulatory Program." <http://www.lrb.usace.army.mil/regulatory/reg-bro.htm#11>.
11. *Id.*
12. Charleston District, U.S. Army Corps of Engineers. "Compensatory Mitigation Standard Operating Procedure." September 19, 2002. <http://www.sac.usace.army.mil/assets/pdf/regulatory/sop02-01.pdf>, p. 2.
13. Chicago District, U.S. Army Corps of Engineers. "Regulatory Program Overview." November 2002. <http://www.lrc.usace.army.mil/co-r/overview.htm>: Steps in the Permit Process.
14. *Id.* at the Corps and Wetlands.
15. *Id.* at Mitigation.
16. Chicago District, U.S. Army Corps of Engineers. "Application Checklist." September 2005. <http://www.lrc.usace.army.mil/co-r/checklis.htm>.
17. Detroit District, U.S. Army Corps of Engineers. "Mitigation Guidelines and Requirements." November 2006. http://www.lre.usace.army.mil/functions/rf/html/Mitguidefinal_1106.pdf, § I.
18. Fort Worth District, U.S. Army Corps of Engineers. "Mitigation." <http://www.swf.usace.army.mil/pubdata/envirom/regulatory/permitting/mitigation.asp>.
19. Fort Worth District, U.S. Army Corps of Engineers. "Draft Mitigation Guidelines." December 24, 2003. <http://www.swf.usace.army.mil/pubdata/envirom/regulatory/permitting/mitigation/fwmitguid.pdf>, § 1.
20. *Id.* § 3.b.1.
21. Galveston District, U.S. Army Corps of Engineers. "Draft Guidelines and Procedures for the Development and Use of Mitigation Banks." <http://www.swg.usace.army.mil/reg/mitigation/bank/draft%20guidelines%20document%20and%20links/d%20mit.htm>, Introduction.
22. Honolulu District, U.S. Army Corps of Engineers. "Regulatory Branch." January 4, 2007. <http://www.poh.usace.army.mil/EC-R/EC-R.htm>, § Pre-Application Consultation.
23. *Id.* at Public Interest Review.
24. *Id.* at Mitigation.
25. Honolulu District, U.S. Army Corps of Engineers. "Honolulu District Compensatory Mitigation and Monitoring Guidelines." February 14, 2005. <http://www.poh.usace.army.mil/pa/publicNotices/SPN20050214%204-448.pdf>, p. 2.
26. Hatten, Mike. Huntington District, U.S. Army Corps of Engineers. "Section 404 of the Clean Water Act Alternative Analysis." http://www.lrh.usace.army.mil/_kd/go.cfm?destination=ShowItem&Item_ID=9855.
27. Jacksonville District, U.S. Army Corps of Engineers. "Permitting and Appeals." February 7, 2006. <http://www.saj.usace.army.mil/regulatory/permitting/permitting.htm>.
28. Kansas City District, U.S. Army Corps of Engineers. "Regulatory Program Applicant Information." <http://www.nwk.usace.army.mil/regulatory/permitap.htm#evaluation>, § Evaluation Factors.
29. *Id.*
30. Little Rock District, U.S. Army Corps of Engineers. "Compensatory Mitigation Standard Operating Procedures." <http://www.swl.usace.army.mil/regulatory/pdf/compensatorymitigationguidelines.pdf>, § 1.0.
31. Los Angeles District, U.S. Army Corps of Engineers. "Final Mitigation Guidelines and Monitoring Requirements." April 29, 2004. http://www.spl.usace.army.mil/regulatory/mmg_2004.pdf, §§ I.B, C.
32. *Id.* at Appendix A, § A.2.
33. *Id.*
34. *Id.* at Appendix A, § A.3.
35. Louisville District, U.S. Army Corps of Engineers. "Applicant Information." <http://www.lrl.usace.army.mil/orf/article.asp?id=151>, § Explanation of Some Commonly Used Terms.
36. *Id.* at Evaluation Factors.

37. *Id.*
38. Memphis District, U.S. Army Corps of Engineers. "Mitigation Guidance and Monitoring Guidelines." September 24, 2004. <http://www.mvm.usace.army.mil/regulatory/guidelines/Mitigation.Guidelines.pdf>, p. 4.
39. *Id.* at p. 2.
40. Mobile District, U.S. Army Corps of Engineers. "Compensatory Mitigation Guidelines." September 22, 2006. <http://www.sam.usace.army.mil/RD/reg/SAM-2006-2008-MBM.pdf>.
41. *Id.* at p. 6.
42. Nashville District, U.S. Army Corps of Engineers. "Mitigation Guidelines for the Nashville District Regulatory Program." August 2004. <http://www.lrn.usace.army.mil/cof/pdf/finalmitigationaug.pdf>, §§ Preface, I.
43. New England District, U.S. Army Corps of Engineers. "Mitigation Plan Checklist." January 12, 2007. [http://www.nae.usace.army.mil/reg/Mitigation Plan Checklist.pdf](http://www.nae.usace.army.mil/reg/Mitigation%20Plan%20Checklist.pdf); New England District, U.S. Army Corps of Engineers. "New England District Mitigation Guidance." January 12, 2007. <http://www.nae.usace.army.mil/reg/Mitigation%20Plan%20Checklist%20Guidance.pdf>.
44. New England District. "Mitigation Plan Checklist Guidance." p. 3.
45. *Id.* at p. 18.
46. New Orleans District, U.S. Army Corps of Engineers. "Permitting Overview." <http://www.mvn.usace.army.mil/ops/regulatory/permover.htm>.
47. New Orleans District, U.S. Army Corps of Engineers. "Regulatory Program Overview." <http://www.mvn.usace.army.mil/ops/regulatory/oceover.htm>, § Processing Steps.
48. *Id.* at § Permit Decision.
49. New Orleans District, U.S. Army Corps of Engineers and Louisiana Department of Natural Resources Coastal Management Division. "Joint Permit Application for Work Within the Louisiana Coastal Zone." May 21, 2004. <http://www.mvn.usace.army.mil/ops/regulatory/CMD-JPA.pdf>, p. 6.
50. New Orleans District, U.S. Army Corps of Engineers. "Application for Department of the Army Permit." <http://www.mvn.usace.army.mil/ops/regulatory/ENG4345.htm>.
51. New Orleans District, U.S. Army Corps of Engineers. "Compensatory Mitigation." <http://www.mvn.usace.army.mil/ops/regulatory/comp.htm>, § I.
52. *Id.* at § II.
53. New Orleans District, U.S. Army Corps of Engineers. "Mitigation Guidelines." <http://www.mvn.usace.army.mil/ops/regulatory/guide.htm>, § 1.
54. New Orleans District, U.S. Army Corps of Engineers. "Compensatory Mitigation Standard Operating Procedures." June 29, 2004. <http://www.mvn.usace.army.mil/ops/regulatory/mitigateSOP.pdf>, § I.
55. *Id.* at § II.B.
56. New York District, U.S. Army Corps of Engineers. "Environmental Questionnaire." <http://www.nan.usace.army.mil/business/buslinks/regulat/form-docs/new-201r.pdf>, p. 2.
57. Norfolk District, U.S. Army Corps of Engineers. "Fact Sheet on Norfolk District's State Program General Permit." http://www.nao.usace.army.mil/technical%20services/Regulatory%20branch/Guidance/SPGP_summary_sheet.pdf.
58. Norfolk District, U.S. Army Corps of Engineers and Virginia Department of Environmental Quality. "Recommendations for Wetland Compensatory Mitigation." July 12, 2004. http://www.nao.usace.army.mil/technical%20services/Regulatory%20branch/Guidance/Annotated_Corps-DEQ_Mit_7-04.pdf.
59. Norfolk District, U.S. Army Corps of Engineers and Virginia Department of Environmental Quality. "Wetland Mitigation Checklist." http://www.nao.usace.army.mil/technical%20services/Regulatory%20branch/Guidance/Corps-DEQ_Mit_Checklist_7-04.pdf, § 1.
60. Norfolk District, U.S. Army Corps of Engineers, Virginia Department of Environmental Quality and Virginia Marine Resources Commission. "Joint Permit Application for Projects Involving Tidal Waters and/or Tidal Wetlands in Virginia." <http://www.nao.usace.army.mil/technical%20services/Regulatory%20branch/webTidewater/JPA2004.pdf>, Part 1.10.
61. Norfolk District, U.S. Army Corps of Engineers, Virginia Department of Environmental Quality and Virginia Marine Resources Commission. "Joint Permit Application." <http://www.nao.usace.army.mil/technical%20services/Regulatory%20branch/webJPA2004.pdf>, § 3.
62. Norfolk District, U.S. Army Corps of Engineers. "Financial Analysis." June 21, 2006. Public notice and associated spreadsheets are on file with the authors.
63. Martin, Steve. Norfolk District, U.S. Army Corps of Engineers. Personal Communication. February 15, 2007.
64. Omaha District, U.S. Army Corps of Engineers. "Guidance for Compensatory Mitigation and Mitigation Banking in the Omaha District." August 2005. <https://www.nwo.usace.army.mil/html/odr/mitbnk.htm>, § B.I.
65. *Id.* at § A.II, III.
66. Philadelphia District, U.S. Army Corps of Engineers. "Draft Compensatory Mitigation Guidelines." December 2003. http://www.nap.usace.army.mil/cenap-op/regulatory/draft_mit_guidelines.pdf, § IV.
67. Philadelphia District, U.S. Army Corps of Engineers. "Public Notice: Compensatory Mitigation Guidelines." December 19, 2003. http://www.nap.usace.army.mil/cenap-op/regulatory/mit_guide_pn.pdf, p. 1.
68. The Pittsburgh district's regulatory division homepage can be accessed at <http://www.lrp.usace.army.mil/or/or-f/permits.htm>.
69. Portland District, U.S. Army Corps of Engineers. "Wetland Mitigation Banking Guidebook for Oregon." October 2000. <http://www.nwp.usace.army.mil/op/g/docs/documents/Mitigation%20Banking%20Guidebook.pdf>, § 1.4.1.

70. *Id.* at § 1.4.2.
71. *Id.* at § 2.2.
72. *Id.* at § 8, “Mitigation.”
73. Portland District, U.S. Army Corps of Engineers. “Mitigation Guidelines and Monitoring Requirements.” <http://www.nwp.usace.army.mil/op/g/docs/documents/Mitigation%20Guidelines%20and%20Monitoring%20Requirements.pdf>, § 1.B, C.
74. *Id.* at § I.C.
75. *Id.* at § II.
76. *Id.* at § II.A.
77. *Id.* at § II.B.1.a.
78. *Id.* at § II.B.3.
79. *Id.* at § II.D.1.c.
80. Rock Island District, U.S. Army Corps of Engineers. “Rock Island District Mitigation and Monitoring Guidelines.” June 29, 2004. http://www2.mvr.usace.army.mil/Regulatory/Documents/mitigation_guidance6-29-04.pdf, p. 1.
81. Sacramento District, U.S. Army Corps of Engineers. “Permitting Overview.” <http://www.spk.usace.army.mil/organizations/cespk-co/regulatory/permitting.html>.
82. Sacramento District, U.S. Army Corps of Engineers. “Permit Review Process.” http://www.spk.usace.army.mil/organizations/cespk-co/regulatory/pdf/Permit_Review_Process.pdf.
83. Sacramento and San Francisco Districts, U.S. Army Corps of Engineers. “Mitigation and Monitoring Proposal Guidelines.” December 30, 2004. http://www.spk.usace.army.mil/organizations/cespk-co/regulatory/pdf/Mitigation_Monitoring_Guidelines.pdf, § Overview.
84. *Id.* at § I.A.
85. *Id.* at § II.F.1.b.
86. San Francisco District, U.S. Army Corps of Engineers. “Mitigation Sequence: Avoidance, Minimization, then Compensation.” July 28, 2006. <http://www.spn.usace.army.mil/regulatory/amc.htm>.
87. Sacramento and San Francisco Districts, U.S. Army Corps of Engineers. “Mitigation and Monitoring Proposal Guidelines.” December 30, 2004. http://www.spk.usace.army.mil/organizations/cespk-co/regulatory/pdf/Mitigation_Monitoring_Guidelines.pdf, § Overview.
88. *Id.* at § I.A.
89. *Id.* at § II.F.1.b.
90. Savannah District, U.S. Army Corps of Engineers. “Standard Operating Procedure: Compensatory Mitigation.” March 2004. <http://www.sas.usace.army.mil/SOP.04.doc>, § 1.
91. *Id.* at § 2.
92. *Id.* at § 8.e (emphasis original).
93. Savannah District, U.S. Army Corps of Engineers. “Guidelines on the Establishment, Operation and Use of Wetland and Stream Mitigation Banks in Georgia (Working Draft).” March 2006. <http://www.sas.usace.army.mil/bankguid2.htm>, § I.
94. *Id.* at § VIII.
95. Seattle District, U.S. Army Corps of Engineers. “Alternative Analysis Guidance.” October 23, 2003. http://www.nws.usace.army.mil/publicmenu/DOCUMENTS/REG/Alt_Guidance.pdf.
96. Seattle District, U.S. Army Corps of Engineers. “Helpful Hints for the Permit Process.” http://www.nws.usace.army.mil/PublicMenu/Menu.cfm?sitename=REG&pagename=Helpful_Hints_for_Permits.
97. Seattle District, U.S. Army Corps of Engineers. “Evaluation Factors.” http://www.nws.usace.army.mil/PublicMenu/Menu.cfm?sitename=REG&pagename=Evaluation_Factors.
98. St. Louis District, U.S. Army Corps of Engineers. “St. Louis District Mitigation and Monitoring Guidelines.” June 30, 2004. <http://www.mvs.usace.army.mil/permits/Guidelines.pdf>, § 1.
99. *Id.* at § II.A.1.
100. St. Louis District, U.S. Army Corps of Engineers. “Regulatory Program Applicant Information.” May 25, 2005. <http://www.mvs.usace.army.mil/permits/permitap.htm>.
101. St. Paul District, U.S. Army Corps of Engineers. “Corps Permit FAQ – St. Paul District.” <http://www.mvp.usace.army.mil/regulatory/default.asp?pageid=740>.
102. St. Paul District, U.S. Army Corps of Engineers. “Minnesota Local/State/Federal Application Forms for Water/Wetland Projects.” October 29, 2004. http://www.bwsr.state.mn.us/wetlands/wcmanual/form03_B.pdf, § I.6.
103. St. Paul District, U.S. Army Corps of Engineers. “Minnesota Local/State/Federal Application Forms for Water/Wetland Projects: Public Transportation and Linear Utility Projects.” September 1, 2004. http://www.bwsr.state.mn.us/wetlands/wcmanual/form03_C.pdf, § I.8.
104. State of Wisconsin Department of Natural Resources. “Application for Wetland Water Quality Certification.” January 2002. <http://www.dnr.state.wi.us/org/water/fhp/waterway/permits/pack20a.pdf>, pp. 3-4.
105. Tulsa District, U.S. Army Corps of Engineers. “Mitigation of Aquatic Resource Impacts.” <http://www.swt.usace.army.mil/permits/Mitigation.cfm>.
106. Tulsa District, U.S. Army Corps of Engineers. “Individual Permit Review Process.” <http://www.swt.usace.army.mil/permits/IPRP.cfm>.
107. Tulsa District, U.S. Army Corps of Engineers. “Mitigation and Monitoring Guidelines.” October 12, 2004. <http://www.swt.usace.army.mil/permits/Documents%20-%20Mitigation/M&MG.pdf>, § I.
108. *Id.* at § II.

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109. Vicksburg District, U.S. Army Corps of Engineers. "Regulatory Program Applicant Information."
<http://www.mvk.usace.army.mil/offices/od/odf/Application%20Information.pdf>, pp. 3, 7.
110. *Id.* at p. 11.
111. Vicksburg District, U.S. Army Corps of Engineers. "Standard Operating Procedures for the States of Mississippi, Arkansas, and Louisiana." August 30, 2004.
<http://www.mvk.usace.army.mil/offices/od/odf/PubNotice/JCB-200400320%20Special%20Public%20Notice.pdf>, § I.
112. Walla Walla District, U.S. Army Corps of Engineers. "Applicant Information Web Pamphlet."
<http://www.nww.usace.army.mil/html/offices/op/rf/Pamphlet/web-pamphlet.pdf>, p. 20.
113. Walla Walla District, U.S. Army Corps of Engineers. "Public Notice: Proposed Mitigation and Monitoring Guidelines." December 16, 2003.
<http://www.nww.usace.army.mil/html/offices/op/rf/guidelin.pdf>, p. 1.
114. Walla Walla District, U.S. Army Corps of Engineers. "Mitigation and Monitoring Guidelines." December 15, 2003.
<http://www.nww.usace.army.mil/html/offices/op/rf/mitguide.pdf>, pp. 1-2.
115. *Id.* at p. 5.
116. Wilmington District, U.S. Army Corps of Engineers. "Mitigation."
<http://www.saw.usace.army.mil/wetlands/Mitigation/index.html>.
117. Wilmington District, U.S. Army Corps of Engineers. "Permitting and Compensatory Mitigation."
<http://www.saw.usace.army.mil/wetlands/Mitigation/permitting.htm>.
118. Wilmington District, U.S. Army Corps of Engineers. "Frequently Asked Questions." <http://www.saw.usace.army.mil/wetlands/faq.html>.
119. Wilmington District, U.S. Army Corps of Engineers. "Definitions."
<http://www.saw.usace.army.mil/wetlands/Mitigation/definitions.html>.
120. Wilmington District, U.S. Army Corps of Engineers. "Wetland Compensatory Mitigation Considerations." October 2002.
<http://www.saw.usace.army.mil/wetlands/Mitigation/Documents/Wetlands/Wetland%20Checklist.pdf>.

Appendix B

Corps Districts' Instructions for Specific Avoidance and Minimization Submissions

DISTRICT	ALTERNATIVES ANALYSIS/AVOIDANCE AND MINIMIZATION IN THE PERMITTING PROCESS
Albuquerque	<p><i>District's permit application checklist includes:</i></p> <ul style="list-style-type: none"> • Alternatives Analysis for the proposed project design and location <ul style="list-style-type: none"> – Describe and discuss other alternatives considered that would avoid and minimize impacts, and satisfy the project purpose and need. – Discuss why those alternatives were rejected. – Discuss why the chosen plan is the least damaging alternative to the environment.¹
Chicago	<p><i>District's permit application checklist includes:</i></p> <p><u>Alternatives analysis</u></p> <p>Avoidance and minimization of impacts must be accomplished before considering compensatory mitigation for wetlands or other waters of the United States.</p> <ul style="list-style-type: none"> • Individual permit authorizations under Section 404 of the Clean Water Act require evaluation of an alternatives analysis. See page 3 for other application requirements for individual permit processing. • This material is not required for the issuance of a Public Notice but is required to fully assess the project for compliance under the Section 404(b)(1) Guidelines (40 CFR Part 230). It would be advantageous to submit this information with the permit application to facilitate accurate description of your project in the public notice. • Provide <u>selection criteria</u> used in determining the feasibility of the chosen project site. • Provide a <u>list of alternatives</u> rejected and reasons including application of criteria to the proposed site. • Provide <u>sufficient information</u> (i.e. location map, site descriptions) <u>for comparison</u> of selected site with other apparent alternative sites. • <u>Statement of reason that impact has been minimized</u> to the smallest impact possible, and other designs considered. • <u>Statement of why avoidance is not possible</u>. • Alternatives analyses are <u>not required</u> for projects that meet the RPP or existing nationwide permit conditions with minimal adverse environmental impacts.²
New Orleans	<p><i>The District's Joint Permit Application for projects in the Louisiana Coastal Zone requires applicants to describe:</i></p> <ol style="list-style-type: none"> a. What alternative locations, methods and access routes were considered to avoid impact to wetlands and/or waterbottoms? b. What efforts were made to minimize impact to wetlands and/or waterbottoms?³
New York	<p><i>District directs permit applicants to provide with their permit application responses to an environmental questionnaire that includes:</i></p> <p>Provide a thorough discussion of alternatives to your proposal. This discussion should include, but not necessarily be limited to, the “no action” alternative and alternative(s) resulting in less disturbance to waters of the United States. For filling projects in waters of the United States, including wetlands, your alternatives discussion should demonstrate that there are no practicable alternatives to your proposed filling and that your project meets with current mitigation policy (i.e. avoidance, minimization and compensation).⁴</p>

DISTRICT ALTERNATIVES ANALYSIS/AVOIDANCE AND MINIMIZATION IN THE PERMITTING PROCESS

Norfolk *The District's joint permit application for tidal waters and/or wetlands includes a prompt for permit applicants to describe avoidance and minimization measures:*

10. Describe the measures that will be taken to avoid and minimize impacts, to the maximum extent practicable, to wetlands, surface waters, submerged lands, and buffer areas associated with any disturbance (clearing, grading, excavating) during and after project construction. **Please be advised that unavoidable losses of tidal wetlands and/or aquatic resources may require compensatory mitigation.**⁵

The District's full-length joint permit application directs permit applicants to:

- Include a description of alternatives considered to avoid or minimize impacts to surface waters, including wetlands, to the maximum extent possible. Include factors such as, but not limited to, alternative construction technologies, alternative project layout and design, alternative locations, local land use regulations, and existing infrastructure
- For utility crossings, include both alternative routes and alternative construction methodologies considered (p. 8)⁶

St. Paul *The general joint permit application (Corps and Minnesota Department of Natural Resources) for Minnesota directs applicants to include a section on project alternatives:*

PROJECT ALTERNATIVES: What alternatives to this proposed project have you considered that would avoid or minimize impacts to wetlands or waters? List at least **TWO** additional alternatives to your project in Section 5 that avoid wetlands (one of which may be “no build” or “do nothing”), and explain why you chose to pursue the option described in this application over these alternatives. Attach *PROJECT ALTERNATIVES* sheet if needed.⁷

The joint permit application for Public Transportation and Linear Utility Projects in Minnesota directs applicants to include:

SEQUENCING CONSIDERATIONS: What alternatives to this proposed project have you considered that could have avoided or minimized impacts to wetlands or water? For new construction only - list at least two alternatives (one of which may be “no build” or “do nothing”), and explain why you chose to pursue the option described in this application over these alternatives. (If space below is not adequate, attach separate sheet labeled *SEQUENCING CONSIDERATIONS*.)⁸

The District's joint permit application for Wisconsin also requires alternatives analysis. The permit application includes a two page questionnaire of information related to alternatives analysis, which includes the following questions:

I. Background/Description of Project

- A. Describe the purpose and need for the project.
- B. Is your project an expansion of existing work or is it new construction? Explain.
- C. When did you start to develop a plan for your project?
- D. Explain why the project must be located in or adjacent to wetlands.

II. Alternatives (your analysis should address the following questions).

- A. How could you redesign or reduce your project to avoid the wetland, and still meet your basic project purpose?
- B. Other sites
 1. What geographical area(s) was searched for alternative sites?
 2. Were other sites considered?

DISTRICT ALTERNATIVES ANALYSIS/AVOIDANCE AND MINIMIZATION IN THE PERMITTING PROCESS

St. Paul, cont.

3. Have you sold any lands in recent years that are located within the vicinity of the project? If so, why were they unsuitable for the project?
- C. For each of the alternatives you identified, explain why you eliminated the alternative from consideration (include cost comparisons, logistical, technological, and any other reasons).
- D. What are the consequences of not building the project? (include social and economic consequences):
If you have chosen an alternative that would result in wetland impacts:
- E. Summarize why your alternative was selected.
- F. Explain what you plan to do to minimize adverse effects on the wetlands during your project (e.g. erosion control, best management practices, setbacks, etc.).⁹

Notes

1. Albuquerque District Regulatory Branch, U.S. Army Corps of Engineers. "Checklist of Information Required for Complete Application." <http://www.spa.usace.army.mil/reg/application%20process/appl-cklst.pdf>, p. 3.

2. Chicago District, U.S. Army Corps of Engineers. "Application Checklist." September 2005. <http://www.lrc.usace.army.mil/cor/checklis.htm>.

3. New Orleans District, U.S. Army Corps of Engineers and Louisiana Department of Natural Resources Coastal Management Division. "Joint Permit Application for Work Within the Louisiana Coastal Zone." May 21, 2004. <http://www.mvn.usace.army.mil/ops/regulatory/CMD-JPA.pdf>, p. 6.

4. New York District, U.S. Army Corps of Engineers. "Environmental Questionnaire." <http://www.nan.usace.army.mil/business/buslinks/regulat/formdocs/new-201r.pdf>, p. 2.

5. Norfolk District, U.S. Army Corps of Engineers, Virginia Department of Environmental Quality and Virginia Marine Resources Commission. "Joint Permit Application for Projects Involving Tidal Waters and/or Tidal Wetlands in Virginia." <http://www.nao.usace.army.mil/technical%20services/Regulatory%20branch/webTidewaterJPA2004.pdf>, Part 1.10.

6. Norfolk District, U.S. Army Corps of Engineers, Virginia Department of Environmental Quality and Virginia Marine Resources Commission. "Joint Permit Application." <http://www.nao.usace.army.mil/technical%20services/Regulatory%20branch/webJPA2004.pdf>, § 3.

7. St. Paul District, U.S. Army Corps of Engineers. "Minnesota Local/State/Federal Application Forms for Water/Wetland Projects." October 29, 2004. http://www.bwsr.state.mn.us/wetlands/wcamanual/form03_B.pdf, § 1.6.

8. St. Paul District, U.S. Army Corps of Engineers. "Minnesota Local/State/Federal Application Forms for Water/Wetland Projects: Public Transportation and Linear Utility Projects." September 1, 2004. http://www.bwsr.state.mn.us/wetlands/wcamanual/form03_C.pdf, § 1.8.

9. State of Wisconsin Department of Natural Resources. "Application for Wetland Water Quality Certification." January 2002. <http://www.dnr.state.wi.us/org/water/fhp/waterway/permits/pack20a.pdf>, pp. 3-4.

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From: [bsilvestri](#)
To: [Fernandez, Xavier@Waterboards](mailto:Fernandez.Xavier@Waterboards)
Subject: Re: Public Notice of Corte Madera Inn Rebuild Project Alternatives Analysis
Date: Thursday, December 8, 2016 3:35:21 PM
Attachments: [Exhibit 5 - Market Study & Financial Feasibility Evaluation by RHSW LLC.pdf](#)

On 12/8/2016 2:00 PM, Fernandez, Xavier@Waterboards wrote:

Dear Interested Parties:

The San Francisco Bay Regional Water Quality Control Board (Water Board) received an off-site and on-site 404(b)(1) Alternatives Analysis (Alternatives Analysis) for the Corte Madera Inn Rebuild Project (Project). The Project is being proposed by Reneson Hotels. As proposed, the Project would demolish an existing 110-room hotel and construct a new 174-room hotel in the Town of Corte Madera, Marin County. The new hotel would include 235 parking spaces and would be a dual-branded hotel with both extended-stay and limited-service rooms. The Project would result in the fill a 0.64 acre pond with shallow aquatic vegetation and fringing wetland vegetation.

The Alternatives Analysis for the Project is available for public review at:

http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/CorteMadera.shtml.

Comments on the Alternatives Analysis will be accepted by the Water Board until **January 6, 2017**, and may be submitted via email to:

Xavier.Fernandez@waterboards.ca.gov, or by sending hardcopies to: 1515 Clay St., Oakland, CA, Suite 1400, to the attention of Xavier Fernandez.

If you have any questions or concerns, please contact Xavier Fernandez via phone at 510-622-5685 or email at Xavier.Fernandez@waterboards.ca.gov.

Regards,

Xavier Fernandez
Senior Environmental Scientist
SF Bay Regional Water Quality Control Board
510-622-5685
xavier.fernandez@waterboards.ca.gov

Best Western Corte Madera Inn Redevelopment: Market Study & Financial Feasibility Evaluation

Exhibit 5 - 061616 - CVP - Army Corps Public Notice 2000-255330N Comment Letter

Prepared for: Community Venture Partners, Inc.

By: Maurice H. Bennett, RHSW, LLC.

Subject Property: 50 – 64 Madera Boulevard, Corte Madera, CA 94925

Subject Property Proposed Use: Hospitality / Hotel

Re: Project: Corte Madera Rebuild; Public Notice Number: 2000-255330N

Purpose: To evaluate financial feasibility and practicability of developing and operating a hotel at the subject location along Highway 101 in the Town of Corte Madera, Marin County.

Subject Property Description: The subject property is 5.47 acres (238,273 square feet) in size and currently contains a 110 room Best Western Inn and a freestanding retail / restaurant building, together totally approximately 82,000 square feet of development. The property is currently zoned C-3 Highway Commercial with an allowable floor area ratio ("FAR") of .34 (81,012 square feet of building allowable to a height of 35 feet). Per the March 22, 2016 Staff Report, the applicant is currently applying to the Town for an FAR of .533 for an allowable 127,036 square feet of developed space.

Introduction and Property Location Evaluation

Marin and the San Francisco Bay Area are currently among the hottest real estate markets in the country. The subject property itself would be classified as an A+ location, meaning it is arguably one of the best possible locations for a hotel or other commercial uses in southern Marin County. The property enjoys maximum highway exposure on Highway 101, the main thoroughfare through Marin County, making it easily visible to anyone travelling either north to Sonoma County or south to San Francisco. In addition, it is located at the foot of a highway on-ramp / off-ramp.

The subject property is approximately 11 miles from the Golden Gate Bridge to San Francisco, 1.7 miles from the Larkspur Ferry Terminal and the future SMART commuter train station, and 2.5 miles from the Richmond San Rafael Bridge to the East Bay. It is in immediate proximity to all conceivable services and amenities, including but not limited to restaurants, gas stations, banking, professional services, athletic clubs, health care facilities, office complexes, public parks and dedicated open space, waterfront recreation, government offices, cinemas, and two regional-sized retail malls anchored by major national tenants (e.g., Safeway, Rite-Aid, Barnes & Noble, Crate & Barrel, Nordstrom, REI, the Container Store, Macy's, Tesla, Banana Republic, Apple, Microsoft, Williams Sonoma, Ann Taylor, Gap, J. Crew, Pottery Barn, Restoration Hardware, Cheesecake Factory, Talbots, Starbucks, North Face, Tommy Bahama, Verizon, P.F. Chang, JP Morgan Chase, Charles Schwab, and Urban Outfitters).

Perhaps the best evidence of the high value of this location is the "For Sale" brochure currently being circulated by the applicant, which calls this property an "Extremely Rare Central Marin

Redevelopment Opportunity” (Exhibit 7 to the 061516 - CVP - Army Corps Public Notice 2000-255330N comment letter). This parcel’s inherent value, based on its prime location, suggests that it can support above normal development investment.

Marin Lodging Market Survey

The subject property is arguably one of the best locations for a hotel in southern Marin County. The property enjoys maximum highway exposure on Highway 101, the main thoroughfare through Marin County, and is located at the foot of a highway on-ramp / off-ramp. There are superior locations for boutique, luxury, waterfront hotels in Sausalito. However, those hotels do not serve the same clientele that the subject project is intended to serve.

The Survey Methodology:

This Survey was conducted in order to establish comparative data, with which to test the assumptions of the applicant, regarding valuation, occupancy, practicability, and financial feasibility. The data presented was compiled via direct telephone interviews of management at the properties listed, and/or by using the most conservative available published data on average annual room rental rates,¹ and was then significantly discounted to allow for online sales promotions.

Properties were then evaluated, ranked, and compared to the “Subject Property,” based on a combination of factors such as location, building type, age, price point, quality, services, and amenities offered (swimming pool, tennis court, workout room, concierge, food service, outdoor recreational spaces, etc.). Each was then categorized as either comparable to the existing subject property (Noted as “1” - shown in yellow highlighting), or a comparable to the newly redeveloped subject property (Noted as “2” - shown in blue highlighting), or as a property that is not comparable to either (Noted as “N”), due to the same criteria or because it serves a different market segment that is either higher end or lower end.

Survey:

Marin Lodging Market Survey				
Name	City	Rooms	Average Rate	Notes
<u>SUBJECT PROPERTY:</u>				
Best Western Corte Madera Inn	Corte Madera	110	\$209	
Dual-Branded Marriotts - Proposed		174	\$239	
Marriott Residence Inn - Alternative 2 (with pond)		147	\$249	
Cavallo Point Lodge	Sausalito	142	\$492	N
Casa Madrona Hotel	Sausalito	11	\$279	N
The Gables Inn	Sausalito	15	\$259	N

¹ Website data for each hotel, and TripAdvisor, Google

Hotel Sausalito	Sausalito	16	\$245	N
Inn Above The Tides	Sausalito	31	\$500	N
Acqua Hotel	Mill Valley	48	\$219	2
Holiday Inn Express	Mill Valley	100	\$198	1
Mill Valley Inn	Mill Valley	25	\$269	N
America's Best Value Inn Motel	Mill Valley	35	\$107	N
Mill Valley Travel Lodge Motel	Mill Valley	34	\$102	N
Tamalpais Motel	Mill Valley	15	\$109	N
The Lodge at Tiburon	Tiburon	103	\$269	N
Waters Edge	Tiburon	23	\$299	N
Marin Suites Hotel	Corte Madera	100	\$140	1
LOCATION OF SUBJECT PROPERTY				
America's Best Value Motel	Corte Madera	18	\$99	N
Marriott Courtyards San Francisco	Larkspur Landing	147	\$249	2
Extended Stay America	San Rafael	112	\$161	1
North Bay Inn Motel	San Rafael	21	\$130	N
Hilton Embassy Suites Hotel	San Rafael	235	\$209	1
Four Points Sheraton	San Rafael	235	\$169	1
Marin Lodge Motel	San Rafael	20	\$119	N
Marriott Courtyard Inn Novato	Novato	136	\$179	1
Best Western Plus Novato Oaks	Novato	108	\$169	1
NOTES:				
1 - Current Comparables: based on location, building type, age, quality, and amenities				
2 - Post Renovation Comparables: based on location, building type, quality, and amenities				
N - Not comparable (+ or -) due to price, age, location, building type, quality, and amenities				

Survey Results:

Fourteen of the lodgings included in the survey were determined to not be comparable because they are either significantly inferior by all measures and aim to serve the “overnight” motel market, or they serve higher end guests and are located in more scenic destination locations such as Tiburon, the Sausalito waterfront, or downtown Mill Valley.

Of the remaining properties, the survey shows that the existing Corte Madera Inn presently has eight direct competitors for market share in southern Marin County. These are the Hotel Acqua, Holiday Inn Express, Marin Suites Hotel, Extended Stay America, Hilton Embassy Suites, Four Points Sheraton, Marriott Courtyard Novato, and the Best Western Plus Novato Oaks Hotel. Their designation as competitors is primarily based on a blend of characteristics. Some are somewhat higher quality but they target the same market price point (Hilton Embassy Suites, Four Points Sheraton). Some are not as well located but are somewhat newer and offer more amenities (Marriott Courtyard Inn Novato), or somewhat fewer amenities (Hotel Acqua,

Extended Stay America). Some are similarly located (the Marin Suites Hotel) but are inferior or dated in character and construction style.

The most significant result of the survey is the finding that once the subject property is redeveloped, either as a new, high quality, dual-branded Marriott Springhill Suites and Marriott Residence Inn (174 rooms), or as a Marriott Residence Inn (147 rooms), its *direct competition is likely to significantly decrease*, giving it a dominant position and market share in southern Marin.

Ironically, the best comparable and direct competition on all metrics, for a new hotel, is probably the Marriott Courtyards Inn at Larkspur Landing, which is only 1.7 miles north on Highway 101. The Hotel Acqua, located at Highway 101, in Mill Valley, would also remain a competitor mostly due to its unique waterfront location, and its highway visibility and access.

Our telephone interview with management of both the Marriott Courtyards at Larkspur Landing and the Hotel Acqua indicated that they currently enjoy high demand and a high occupancy rate, year round (greater than 80% occupancy).

A number of other former comparables, even those offering similar services and amenities, lose their competitive edge because they are either much older or they lack the location advantage of the newly redeveloped hotel of the subject property. In addition, the interest in purchasing the subject property, by hotel developers / operators appears to be extremely high. Every hotel developer / operator we interviewed indicated that they had already gotten in contact with the applicant's broker in order to discuss making a purchase offer.

Hotel Occupancy Rates in Marin County

The assumed hotel occupancy rate is important because it impacts operating revenues and how profitable the project will be (the number of rooms for rent multiplied by average room rental rate multiplied by number of nights per year of occupancy equals gross revenues²).

In their "Residual Value Analysis", the applicant cites PKF Hospitality Research as their data source for occupancy estimates of 75% occupancy. PKF is a highly respected firm for such data. But PKF's most recent reports and forecasts do not support the applicant's occupancy assumptions.

The assumed 75% occupancy might be a reasonable *average* room occupancy rate for Marin County. However, it has less bearing on this particular project in this particular location, because that average includes a very wide range of types of hotel and motel rooms (from the four star Hilton Embassy Suites in San Rafael to small, dated motels, the majority of which are significantly older and inferior to what is being proposed at the Marriott Corte Madera Inn). The newly developed Marriott Corte Madera Inn will arguably be one of the best located, highest quality hotels in Marin County (excluding the boutique, luxury, waterfront hotels noted above). It is very likely that its occupancy rate will be higher than the Marin average.

² There are other ancillary revenues associated with hotel operations such as concessions, mini bars, and vending machines, etc., which have been ignored for the sake of simplicity.

In their December 2015 “Hotel Horizon” hotel occupancy forecast, PKF states that in hot West Coast markets such as Marin and the SF Bay Area

the growth in demand for lodging accommodations will exceed the change in supply during each of the next two years.

For 2016, PKF-HR is projecting

room rates to increase by 5.5 percent, followed by an even greater 5.8 percent rise in 2017.

And that

At this point in the cycle, the top tier cities are approaching all-time highs, limiting the potential for continued occupancy gains, (and in) the San Francisco market... occupancy level achieved was 90.3 percent (in 2015).

The 80% to 90% occupancy rate for qualify hotels in Marin was corroborated when we conducted the *Marin Lodging Market Survey*, included in this report. This considered, if the assumed occupancy rate were increased by only +5%, to 80% occupancy (vs. 75%), we’d get an increase in annual gross revenue of almost \$600,000.³

Average Room Rates

The applicant has shown a projected annual, average room rate of \$175 per night for a newly developed hotel on the property. This figure is grossly inadequate. The existing Best Western Corte Madera Inn presently has an average, published (per its website), annual, average room rate of \$239 per night. This rate is “as is” before any improvements. Even considering that online discount bookings are now reducing the published nightly rates at most hotels, the \$175 per night for a newly developed hotel, in this prime location, is unsupportable. For comparative purposes we have used an average room rate of \$209 per night for the existing Corte Madera Inn.

It is conservative to estimate that the average room rental rates of a new hotel would at least match the rates of the published room rates of the existing hotel. This would result in an estimated average room rate of \$239 per night for the dual branded Marriott Residence Inn / Springhill Suites redevelopment, and \$249 per night for the Marriott Residence Inn redevelopment. This difference is significant because of its impact on total revenues, project valuation and overall profitability / financial feasibility.

Cap rate and valuation of a new hotel

The applicant’s data assumes a “cap rate” of 6% to estimate project value. A cap rate, or “capitalization rate,” is the ratio of the net operating income (“NOI”) to the property’s value. It tells an investor what kind of “yield” the property will provide (the percentage of return on investment based on the project’s value) so it can be compared to other investments.

³ \$175 per night multiplied by 185 rooms multiplied by 292 days (80% of 365 days a year) of rental equals \$9,453,500 vs. \$8,862,656, a differential of +\$590,844.

To get the cap rate, you divide the net operating income by the project value and you get a percentage. So, for example, if a property was listed for \$1,000,000 and generated a net operating income of \$100,000, the cap rate would be $\$100,000/\$1,000,000$, or 10%. Conversely, if you know the NOI and have a rate that you think investors are looking for (the 6% suggested by the applicant, for example), you can divide the income by that rate and get a projected value or selling price.

The lower the cap rate, the higher the value of the hotel. And that value, just like in your house, is basically *profit to the developer / owner*.

A 6% cap rate is a reasonable number for a developer to submit to a lender when they're trying to obtain financing. However, again, this is only an average valuation metric for hospitality properties in Marin. In the southern Marin market, in this location, however, it's likely that the actual value of a new, premium hotel could be higher and therefore, the cap rate could be lower (perhaps 5.75%), and therefore, the resultant profits could be significantly greater.

If, for example, we use a slightly more aggressive 5.75% cap rate, it results in approximately *\$4,500,000 more* in property value, and more than \$100,000 in additional cash flow profit per year.

Marriott Corporation's Comment letter

The applicant has argued that constructing anything less than their preferred option (and filling in the pond), is not financially feasible, and they cite a letter from Marriott Corporation as evidence of that. However, the letter from Marriott Corporation that has been cited does not offer an opinion of financial feasibility. The letter from Marriott Corporation (see *061516 – CVP Army Corps Public Notice 2000-255330-N comment letter – Exhibit 10*) simply states that if the smaller hotel is built, it would probably be a Residence Inn, instead of a dual-branded hotel with a Marriott Springhill Suites. As this *Marin Lodging Market Survey & Financial Feasibility Evaluation* demonstrates, there is nothing that would lead one to conclude that a stand-alone Marriott Residence Inn hotel operation would not be feasible and highly profitable to operate in southern Marin.

Financial Feasibility Analysis

We have been asked to evaluate the subject property to determine if new development, redevelopment, or renovation of the existing hotel is “capable of being done” not just by the applicant but by any developer. In addition, we have been asked to evaluate if there are other “practicable” on-site alternatives that could achieve the project's basic purpose, which is to provide hotel lodging on the subject property, but without the loss of the wetlands pond.

To the best of our knowledge, the applicant has not provided or analyzed any alternative proposals. However, such alternatives do exist (Alternative 2, which proposes the development of a 147 room hotel and the preservation of the wetlands pond, noted in the Corte Madera Inn Redevelopment Project Draft EIR, dated November 17, 2014, [Section 5. Alternatives](#) (also as *Exhibit 3A* to the *061516 - CVP - Army Corps Public Notice 2000-255330N comment letter*). Therefore, in order to evaluate the feasibility of developing the project or alternative projects, or

the “practicability” of such projects we must use methods and data that align with accepted industry standards.

Data and Assumptions

To address the questions of “capable of being done” and “practicable,” one needs as much location specific information as possible. However, the information provided by the applicant is generally insufficient and/or inaccurate. Therefore, in order to make this determination, we have done market research to arrive at realistic income and expense figures.

The income and expense data used in any project feasibility analysis must reflect the unique characteristics of the subject property, rather than rely on national statistics or even statewide statistics. In addition to determining an appropriate land valuation, estimating development investment feasibility would also include construction costs, operating expenses, occupancy rates and market capitalization rates (“Cap Rates”) for the given market area.

Financial feasibility is also highly dependent on the specific financial circumstances of the developer entity. For example, the developer’s ability to raise capital, obtain financing, and secure favorable lending rates are all considerations. Also, the term of loans, the amount of equity to be invested vs. the amount of debt available (loan to value constraints), the terms of the property’s purchase agreement, and so forth must also be determined. In addition, each investor group / developer may have different requirements or thresholds for return on investment (“cash on cash RIO”), or internal rate of return (“IRR”⁴), in order to determine if a purchase, redevelopment or new development is “feasible.”

As one can imagine, metrics also vary considerably from one developer to the next. Among real estate development professionals, “feasibility” and “profit” are variable terms. There are also considerable variables with regard to the quality of any redevelopment proposal, its architecture, amenities choices of materials and fixtures, etc. Therefore, in order to evaluate financial feasibility, we need to consider both quantitative (room counts) and qualitative (construction type) variables.

The applicant has failed to address all of these issues except for providing figures for construction costs, operating expenses, occupancy rates and market capitalization rates.

Applicant’s “Financial Analysis”

In “Attachment 3” to [the January 8th Corte Madera Planning Staff Report](#), the applicant included a financial analysis, which is titled a *Hotel Development Residual Value Analysis - “Exhibit C”*. It purports to demonstrate why the applicant should be granted increased zoning rights (FAR) in order to construct the maximum size hotel. In addition, the applicant only provided one financial scenario; the one they want to build.

The applicant’s analysis is as follows:

⁴ Internal rate of return (IRR) is the interest rate at which the net present value of all the cash flows (both positive and negative) from a project or investment equal zero. Internal rate of return is used to evaluate the attractiveness of a project or investment.

Applicant's Hotel Development Residual Value Analysis - 185 rooms			
Item	Amount	/SF	Notes
Net building area	131,180		
Rooms	185		*
Projected occupancy	75%		
Average room rate	\$175		
Annual room revenue	\$8,862,656		
Operating and fixed costs	(\$5,574,611)		1
Net operating income	\$3,288,045		
Cap rate	6%		
Potential Project Value	\$54,800,758		2
Building and improvements	\$29,515,500	\$225	
FF&E (finishes, fixtures and)	\$3,935,400	\$30	
Offsite mitigation measures	\$950,000	\$7	
Soft costs	\$2,361,240	\$18	
Construction period property taxes	\$250,000	\$2	
Construction period interest	\$918,260	\$7	
Total Development Costs	\$37,930,400	\$289	
Developer Fee			
Residual Land Purchase Price	\$16,870,358		
Total Project Development Cost	\$54,800,758		
* Maximum number at .55 FAR			
1 - 62.9% per PKF Hospitality			
2 - Corrected: this item was mislabeled by the applicant as "potential income"			

The applicant's analysis employs a method that determines what it calls "residual value" and "residual land purchase price." However, this methodology and terminology does not conform to industry standards, with regard to demonstrating financial feasibility. It also cannot be correlated with the applicant's own broker's opinion of value, which is "Attachment A" to that January 8, 2016 Staff Report, which shows a purchase price for the hotel and land of \$9.7 million.

A principal at Skyline Properties, LLC, a veteran commercial real estate and hotel investor / developer, in Mill Valley, California, euphemistically referred to "residual land value" as "an interesting concept." Put simply, the "residual land value" calculation is not a method of analysis used by real estate professionals to determine if an investment should be made. It doesn't tell us whether or not the investment is actually profitable or if the project is financial feasible because it lacks most of the information described in the section above, *Data and Assumptions*.

In short, the applicant's analysis makes no sense. In reality, no developer would actually make a determination to purchase or redevelop a property based on this methodology. In addition, the estimates used for occupancy and average room rate, and even cap rate, are all questionable.

However, even if we employ the applicant's methodology, using the same income per room and cost assumptions, proportionately, and apply it to Alternative 2 (147 rooms and the preservation of the wetlands pond), we do not find any results that would suggest this Alternative is not feasible, profitable, or practicable.

Hotel Development Residual Value Analysis - 147 rooms			
Item	Amount	/SF	Notes
Net building area	104,235		
Rooms	147		*
Projected occupancy	75%		
Average room rate	\$175		
Annual room revenue	\$7,042,219		
Operating and fixed costs	(\$4,429,556)		1
Net operating income	\$2,612,663		
Cap rate	6%		
Potential Project Value	\$43,544,386		2
Building and improvements	\$23,464,823	\$225	
FF&E (furniture, fixtures & equipment)	\$3,128,643	\$30	
Offsite mitigation measures	\$0	\$0	
Soft costs	\$1,877,186	\$18	
Construction period property taxes	\$250,000	\$2	
Construction period interest	\$730,017	\$7	
Total Development Costs	\$29,450,668	\$283	
Developer Fee			
Residual Land Purchase Price	\$14,093,718		
Total Project Development Cost	\$43,544,386		
* Maximum number at .55 FAR			
1 - 62.9% per PKF Hospitality			
2 - Corrected: this item was mislabeled by the applicant as "potential income"			

The resultant difference in the "Residual Land Purchase Price" remains strongly positive. Therefore, even using the applicant's own irrelevant methodology, there is no reason to conclude that Alternative 2, which preserves the wetlands pond, is any less feasible or practicable than the larger hotel plan, which requires the filling of the wetlands pond.

However, again, **this methodology does not conform to industry standards and does not in any way determine financial feasibility.**

Comparative Sales Valuation Method

Comparative sales and valuation data is also very difficult to obtain in southern Marin because so few properties are developed or sold. However, there is one recent sale of a property that is somewhat comparable to the existing Corte Madera Inn: The Mill Valley Holiday Inn Express sold for \$28 million in July of 2015.

Therefore, on a comparative value basis, the existing Best Western Corte Madera Inn would be valued at \$30.8 million. A new 147 room Marriott Residence Inn hotel would be valued at \$41.2 million, and in both cases, *before* accounting for the fact that it is better located, new, and with superior amenities.

Hotel Purchase / Redevelopment Analysis

The best way to evaluate the financial feasibility of redeveloping the existing Best Western Corte Madera Inn is to analyze the project from the perspective of how a potential third party purchaser / developer would evaluate the investment opportunity. This would include basing assumptions about financing (loan interest rate, loan term, loan to value) based on market conditions present.

Using more realistic data and assumptions (occupancy rate, average room rate, and cape rate) to assess financial feasibility of Alternative 2, would result in the following:

Actual Hotel Development Analysis - Alternative 2 - 147 rooms			
Item	Amount	/SF	Notes
Net building area	104,235		
Rooms	147		*
Projected occupancy	80%		1,4
Average room rate	\$249		2,4
INCOME			
Annual room revenue	\$10,688,076		
Operating and fixed costs	(\$6,722,800)		3
Net operating income	\$3,965,276		
Cap rate	6%		4
Potential Project Value	\$66,087,937		
Debt Service	\$3,014,035		6
Net Cash After Debt Service	\$951,241		**
REDEVELOPMENT EXPENSE			
Building and improvements	\$23,464,823	\$225	
FF&E (finishes, fixtures and)	\$3,128,643	\$30	
Offsite mitigation measures	\$0	\$0	

Soft costs	\$1,877,186	\$18	
Construction period property taxes	\$250,000	\$2	
Construction period interest	\$730,017	\$7	
Total Development Costs	\$29,450,668	\$283	
Property Value / Purchase Price	\$30,800,000		5
Total Project Costs	\$60,250,668		
Developer Gain / ROI	\$5,837,269	38.75%	7
* Maximum number at .44 FAR			
1 - Projected occupancy based on market data and location			
2 - Projected average room rate for new hotel based on market survey			
3 - 62.9% per PKF Hospitality			
4 - See discussion below			
5 - Sale Price based on "per door" comparable sale of Holiday Inn Express: 2015			
6 - Assumes 75% loan to value financing @ 4.5% for 25 years			
7- Assumes 25% equity investment			
** New IRS rulings on depreciation enhance post redevelopment tax returns.			

The Financial Feasibility and Practicability of Alternative 4

The 061616 - CVP - Army Corps Public Notice 2000-255330N comment letter identifies another new hotel alternative, which allows the development of a new 187 room hotel that also preserves the wetlands pond (Alternative D, known as Alternative 4 in the project Revised EIR, dated July 11, 2015). Since this evaluation shows that Alternative 2 (147 rooms) is both financially feasible and practicable, it is axiomatic that Alternative 4 is also financially feasible and practicable, and in fact even more so. The difference between a financial analysis of Alternative 2 and Alternative 4 is that in both cases the cost of the land is fixed at \$30,800,000. Therefore, in Alternative 4, the cost of land decreases in relation to all other expenses (e.g., building and improvements, FF&E, soft costs, etc., which are reduced proportionately to the overall size). This fixed cost of land results in an increase in profitability / overall developer gain and ROI).

Owner's Redevelopment Options

In order to fairly assess financial feasibility and practicability of redeveloping the property as either a 147 room or a 187 room new hotel, this Market Study & Financial Feasibility Evaluation has been done from the perspective of an arm's length third party developer, and in doing so, has shown that alternatives exist that fit those criteria. However, redevelopment by the applicant is likely to have additional benefits to the applicant that might not be enjoyed by other developers.

The applicant's position in the property is vastly superior to that of a new third party developer because of his historic ownership and his equity basis in the property. Therefore, the applicant's individual returns are likely to greatly exceed those of other third party developers in any alternative development scenario.

We would also suggest that significant benefits to ownership can be achieved by gifting the wetlands pond acreage to the Town of Corte Madera, in order to ensure its preservation, to lower

expenses and increase returns, and take advantage of the tax benefits and reduced property taxes resulting from such a gift. Given that the returns on investment are clearly attractive for doing so, it is in our opinion, difficult for the applicant to argue that any such redevelopment is not both feasible and practicable.

Conclusions on Financial Feasibility and Practicability

The results of this *Market Study & Financial Feasibility Evaluation* provide credible evidence to suggest that the redevelopment of the hotel and preservation of the wetlands pond is both practicable and financially feasible and that viable alternatives exist to accomplish this. This *Market Study & Financial Feasibility Evaluation* indicates that when this project is completed, there will be very little that is comparable in southern Marin. It is reasonable then to assume that a newly redeveloped hotel in this location will command a significant valuation premium. Further,

It is our opinion then that the results of this *Market Study & Financial Feasibility Evaluation*, indicate that Alternative 2 for the redevelopment of the hotel as a new 147 room hotel, and Alternative 4 for the redevelopment of a hotel as a new 187 room hotel, both of which preserve the pond, are both a financially feasible and practicable on-site alternatives that produces fewer environmental impacts.

Prepared by Maurice H. Bennett III



Manager, RHSW, LLC

Maurice Bennett has been active in real estate finance, investment, and development for over 25 years, with a portfolio of projects and properties located in Denver, Colorado and San Francisco. His projects include Section 8 affordable housing, market rate rental housing, for sale condominium / urban loft development, neighborhood retail and shopping centers, and historic office/residential renovation. In conjunction with his investment and development career, Mr. Bennett worked as a manager at Household Finance (1988-91) and a licensed mortgage broker in California (1991-2000). He holds a Bachelors of Economics from Colorado State University and an MBA from San Francisco State University. He has taught Macroeconomics at Community College of Denver since 2000, and it currently a Board Member of Community Venture Partners, Inc., and the Denver Colfax-Mayfair Business Improvement District.

From: bsilvestri
To: [Fernandez, Xavier@Waterboards](mailto:Fernandez,Xavier@Waterboards)
Cc: [Michael Graf](mailto:Michael.Graf)
Subject: Comment on the Corte Madera Inn Rebuild Project Alternatives Analysis
Date: Friday, January 13, 2017 3:39:13 PM
Attachments: [011316 CVP Comment to RWQCB on Corte Madera Inn Rebuild - General Comment Letter 1.pdf](#)
[011316 CVP Comment to RWQCB on Corte Madera Inn Rebuild - Off Site Alternatives Analysis Letter 2.pdf](#)
[011316 CVP Comment to RWQCB on Corte Madera Inn Rebuild - Off Site Alternatives Analysis Letter 3.pdf](#)

Dear Mr. Fernandez:

We are herewith submitting three comment letters on the off-site and on-site 404(b)(1) Alternatives Analysis for the Corte Madera Inn Rebuild Project (attached).

Our comments are organized as follows:

LETTER 1: General comments, which will provide essential background information, data, reports, comments and expert opinions that provide RWQCB with a complete picture of the applicant's proposal and form the basis for our request to reject the application without comment.

LETTER 2: Comments on the "Alternatives Analysis Final with Figures" as posted on your web site at:

[http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/CorteMadera/404\(b\)\(1\)%20Alternatives%20Analysis/1000_Alt_Analysis_final%2012.01.14_w_figures.pdf](http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/CorteMadera/404(b)(1)%20Alternatives%20Analysis/1000_Alt_Analysis_final%2012.01.14_w_figures.pdf)

LETTER 3: Comments on the "On-Site Alternatives Analysis Final with Figures and Attachments" as posted on your web site at:

[http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/CorteMadera/404\(b\)\(1\)%20Alternatives%20Analysis/On_site_AA_11%2030%201_%20final_w_figs_and_atts.pdf](http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/CorteMadera/404(b)(1)%20Alternatives%20Analysis/On_site_AA_11%2030%201_%20final_w_figs_and_atts.pdf)

All attachments of Exhibits will be sent via US MAIL, today due to their size. We will attempt to send as many as we can via emails that follow this one.

Community Venture Partners, Inc. has been following the permit process of this project since its inception. As a locally based, community serving nonprofit organization, we have been working for over two years with a great many of Corte Madera residents, regarding this project, and have done our best to help their voices be heard.

Best,
Bob Silvestri
President

Community Venture Partners

A Catalyst for Sustainable Solutions

73 Surrey Avenue
Mill Valley, CA 94941
415.381.3887 Office
415.342.7877 Cell

<http://www.communityventurepartners.org>

<https://marinpost.org>

Remember: The [Amazon Foundation](#) will donate 1/2% of the total value of your purchases to Community Venture Partners, *every time you buy something on their site--* at no additional cost to you!

Just go to <http://smile.amazon.com>

Select Community Venture Partners as your designated charity...then shop the same way you normally would. **It's easy and free!**

Community Venture Partners, Inc.

A Catalyst for Sustainable Solutions

January 13, 2017

Xavier Fernandez
SF Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA, 94612

Re: General Comment Letter on The San Francisco Bay Regional Water Quality Control Board (404(b)(1) Alternatives Analysis review for the Corte Madera Inn Rebuild Project; in response to the *Alternatives Analysis for the Project*, available for public review at: http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/CorteMadera.shtml

Dear Mr. Fernandez:

Community Venture Partners, Inc. (“CVP”) is a 501(c)(3) nonprofit organization that facilitates and assists community based projects, programs and initiatives that demonstrate the highest principles of economic, social and environmental sustainability. We work to bring the community’s voice to local government decision-making in matters related to planning, development, social and environmental justice, and other matters of general public interest.

We are submitting our comments on behalf of Peter Hensel, Marla Orth, Peter Orth, and other residents of the Town of Corte Madera. I have been an active participant in local planning and development matters in Marin County for over 20 years, As a resident of Marin, and as president of Community Venture Partners, Inc., and based on my professional experience and CV (see “Exhibit 16” attached), I am an acknowledged expert in planning, land use, architecture, real estate finance and development and sales, and submit my comments as a licensed architect and former real estate developer and broker.

CVP has been involved in the public process and the ongoing evaluation of the proposed Corte Madera Inn Rebuild project, for the past three years. We have submitted numerous comments and retained a experts in biology, wetlands, hydrology, and wildlife, who have also submitted comments (See Exhibits 4, 5, 6, 12 and 13, attached). Our legal counsels, Edward Yates and Michael Graf, both acknowledged experts in land use law, CEQA, NEPA, and other areas germane to your decision-making process, have submitted timely extensive commentary over the past three years of public review. (See Exhibits 1, 2, 3, and 11).

There are a number of inter-related issues that weigh on a careful and fair evaluation of the applicant’s proposal, which need to be considered. It is with that in mind that we respectfully submit our comments.

OVERRIDING CONSIDERATIONS

The Applicant's Proposal is fundamentally flawed in a number of important ways, which precludes it being accepted for consideration by your agency at this time. For the reasons noted herein, we ask that the entire application review be denied.

1. The Applicant's analysis and conclusions are based on shifting, erroneous and self-serving definitions of the project's basic and overall purpose.
2. The Applicant's analysis and conclusions are based upon erroneous and self-serving definitions of what is "practicable" within the 404(b)(1) Guidelines, and supported only by the opinions of paid consultants, not evidence.
3. The federal Guidelines are clear that "The burden to demonstrate compliance with the Section 404(b)(1) Guidelines rests with the permit applicant."¹ By submitting limited project information to your agency and requesting "feedback," without actually filing a proper application, the Applicant is seeking to avoid careful examination of all the criteria your agency needs to evaluate and respond properly. The information provided by the applicant is insufficient to merit any type of response from RWQCB.
4. The documents submitted by the Applicant are replete with inaccuracies, partial facts, outdated data and outright falsehoods that the record shows were known to the applicant to be false at the time of making this application), and which are used to support its pre-determined conclusions. For example, both *Alternatives Analysis* documents by Zentner and Zentner, repeatedly state that the Corte Madera Inn pond "is not a wetland." Yet, numerous studies and documents in the record clearly establish that it is both a wetlands and a special aquatic site (see Exhibits 5, 8, 12, and 15).
5. The Applicants submitted their proposal to the Army Corps of Engineers in the spring of 2016. That application has been put on "inactive" status since November of 2016. Per Roberta Morganstern, Permit Manager at the Army Corps of Engineers, in her email to CVP, on

Monday November 7, 2016 I notified the applicant and Town that I had withdrawn the project from "active" status. The applicant had not requested an extension and the application is not complete because the alternatives analysis, National Marine Fisheries Service (NOAA) consultation response², public comments responses and sacred lands research have not been satisfied.

We question the legitimacy of the Applicant now bringing an Alternative's Analysis before RWQCB, while failing to submit that same analysis to the Army Corps, as they have requested. It appears as if the applicant is hoping that because RWQCB does not have the full file of information that the Army Corps, the Town and the general public

¹ *The Federal Wetland Permitting Program: Avoidance and Minimization Requirements*, the Environmental Law Institute, March 2008.

² Note that the NMFS review is critical because the Corte Madera Inn wetlands is defined by law as a vital habitat for spawning of Pacific salmon, which is a keystone species recognized to be experiencing significant decline.

possess, it may obtain a favorable opinion from RWQCB, which the Applicant can then use as leverage to persuade the Corps and the Town to relax enforcement of the 404(b)(1) Guidelines requirements.

6. The application information RWQCB received is grossly incomplete and lacking the requisite analysis, documentation, data, context or history, to allow RWQCB to undertake a fair or reasonable evaluation of its merits or to use as the basis for a response. On this basis alone, the application is insufficient to merit any type of response from RWQCB.
7. The Town of Corte Madera, working in concert with the applicant, recently noticed a new Recirculated Draft Environmental Impact Report (“RDEIR”), which was circulated for a public comment period ending January 3, 2017. This is the fourth EIR that has been circulated for this project (DEIR, January 2015, REIR, August 2015, FEIR, December 2015). The information included in those documents and the comments received from experts and the general public has significant bearing on any decisions or determinations that RWQCB might make in this matter. Without the benefit of this critical information in our opinion, it would be improper for RWQCB to accept or process or otherwise comment on the applicant’s proposal. However, in the public’s interest and to ensure that RWQCB has adequate information to undertake its deliberations, we are attaching that relevant documentation and historical record herewith (see all attached Exhibits).
8. The Regional Water Quality Control Board's review of this project is not exempt from the requirement of the California Environmental Quality Act (CEQA). The Applicant's Proposal is a “project” under CEQA, Pub. Res. Code § 21065, and thus requires full CEQA review. The Regional Board's 401 Certification review does not appear to fall within the certified regulatory program for the Regional Board's Water Quality Control (Basin)/208 Planning Program, as set forth at 14 Cal. Code Regs. § 15251(g). Even if the Board's 401 Certification Program were considered a part of the agency's certified program, the Board's CEQA review would still be required to comply with CEQA policies. Pub. Res. Code § 21080.5(d). At this juncture, however, we have not seen any attempt by the RWQCB to comply with CEQA's requirements as set forth in the Public Resources Code, including but not limited to a thorough evaluation of project impacts and avoidance of significant impacts based on feasible mitigation or project alternatives and responses to public comments. In addition please also note that the various Exhibits attached with this comment (EIRs, studies and independent analysis, expert opinions, legal comment letters, public comments, etc.) contain numerous citations, descriptions and references to unmitigated significant impacts and requirements under CEQA, all of which are hereby made a part of this comment letter and incorporated herein by reference.

FORMAT OF OUR COMMENTS

Due to the extensiveness of the issues noted above and the voluminous nature of the evidence that exists to support our comments, we are submitting our comments in the format of three separate comment letters, as follows:

- A. **This general comment letter**, which will provide essential background information, data, reports, comments and expert opinions that provide RWQCB with a complete picture of the applicant's proposal and form the basis for our request to reject the application without comment.
- B. **A comment letter on the "Alternatives Analysis Final with Figures"** as posted on your web site at:

[http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/CorteMadera/404\(b\)\(1\)%20Alternatives%20Analysis/1000_Alt_Analysis_final%2012.01.14_w_figures.pdf](http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/CorteMadera/404(b)(1)%20Alternatives%20Analysis/1000_Alt_Analysis_final%2012.01.14_w_figures.pdf)

- C. **A comment letter on the "On-Site Alternatives Analysis Final with Figures and Attachments"** as posted on your web site at:

[http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/CorteMadera/404\(b\)\(1\)%20Alternatives%20Analysis/On_site_AA_11%2030%201_%20final_w_figs_and_atts.pdf](http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/CorteMadera/404(b)(1)%20Alternatives%20Analysis/On_site_AA_11%2030%201_%20final_w_figs_and_atts.pdf)

GENERAL COMMENTS

Discussion of Project Purpose

The application's analysis and conclusions are entirely based on a shifting, erroneous and self-serving definition of the project's basic and overall purpose. In considering our comments above on the ambiguity and incorrectness of the applicant's project purpose, please note the following:

1. On page 3-18 of the Draft EIR it states

The following objective has been stated by the applicant. Eliminate the pond for aesthetic, odor and safety reasons.

2. In its "Alternatives Analysis," by Zentner and Zentner, as submitted, under section C. *Basic Purpose*, page 6, the Applicant states that

The Basic Purpose of this project is to develop a viable hotel complex capable of meeting the demand for central Marin hotel space.

3. In its "Corte Madera Inn On-Site Alternatives Analysis," by Zentner and Zentner, under section B. *Basic Purpose* the Applicant states that

*The Basic Purpose of this project is to develop a viable hotel facility capable of **capitalizing on the demand** for central Marin hotel space. Based on market studies of the local area, "building a viable hotel facility" means developing a hotel project that can: (1) provide both short-term and extended-stay hotel accommodations (that is, is "dual-branded") **to capitalize on market demand**,*

*and (2) is affiliated with a top-tier hotel brand (e.g. Marriott, Hilton), **which can provide the requisite returns and economic stability.*** [Emphasis added]

4. In other documents to other agencies and the Town of Corte Madera, the Applicant has submitted different purposes, stating that.

The basic project purpose is to build additional commercial hotel rooms in southern Marin County, CA.

5. In the letter prepared by Environmental Planner, Amy Skewes-Cox AICP, and included in the Corte Madera Staff Report for the March 22, 2016 hearing, on page 11, Skewes-Cox explains that Alternative 2 is rejected because it “would not meet many of the project objectives”.. the third of which she lists as “eliminating the pond.”

Throughout several years of this project’s evaluation and review, the Applicant has repeatedly attempted to incorrectly define the basic and overall project purposes to their own advantage. We find this to be the case again in the current application to the RWQCB.

Having an accurate and correct project purpose definition, from which all other decisions and determinations must logically flow, is a fundamental requirement under the 404(b)(1) Guidelines. Guidance from the EPA and Army Corps has also emphasized this requirement, which is why it is listed as the first requirement under “Sequencing” statutes.

The Applicant’s various definitions of project purpose not only fail to conform to the requirements of the 404(b)(1) Guidelines, but for various reasons are expressly prohibited under those Guidelines. In the documents submitted to the Town of Corte Madera, the Army Corps, and now the RWQCB, the “Basic Project Purpose” and the “Overall Project Purpose” definitions invoked by the Applicant are improper and contrary to what is acceptable under the 404(b)(1) Guidelines and agency guidance, which has been upheld by court rulings.

For example and as will be more fully explained in our comment letters on the *Alternatives Analysis Final with Figures* and the *On-Site Alternatives Analysis Final with Figures*, based on these erroneous definitions of project purpose, the Applicant attempts to make its case for “capitalizing on demand” to substantiate why a permit should be granted to fill the wetlands. However, as we will show, “capitalizing on demand,” or maximizing returns or meeting “requisite returns” are not considerations under the 404(b)(1) Guidelines. In point of fact, they are expressly prohibited from being considered in defining a project’s purpose and for permit approval.

Comment:

As noted in *The Federal Wetland Permitting Program: Avoidance and Minimization Requirements*, by the Environmental Law Institute March 2008, authored by Sandra S. Nichols, Jared Thompson, and Jessica Wilkinson, with valuable guidance and review by Annie Brock, James McElfish, and Bruce Myers;

1. Project Purpose: The first step in completing an alternatives analysis is defining the

*project purpose. Defining project purpose is critical, as it has a profound effect on the set of alternatives to the permit applicant's proposed site which must be considered. In the case of Plantation Landing application in 1989 ... the Department of the Army affirmed that the Corps must conduct **an independent analysis of project purpose to ensure that the purpose is not defined too narrowly.***³ [Emphasis added]

Similarly, in *The Steepest Hurdle in Obtaining A Clean Water Act Section 404 Permit: Complying with. EPA's 404(b)(1) Guidelines' Least Environmentally Damaging Practicable Alternative Requirement*, by Jon Schutz, notes

*1. "Overall Project Purpose" and "Basic Project Purpose" - Region IX opines that "overall project purpose" means the "basic project purpose plus consideration of costs and technical and logistical feasibility."⁴ **Overall project purpose does not include secondary project purposes, site-specific secondary requirements, project amenities, desired size requirements, or desired return on an investment.***⁵ [Emphasis added]

And that

*A project's "basic purpose" is its generic purpose or function.*⁶

And under IV. Summary of Federal Avoidance and Minimization Policy, Schutz notes that

*The Department of the Army, EPA, and the courts have consistently interpreted the regulations to require the use of sequencing in determining mitigation for dredge and fill permit applications that may impact wetlands and other aquatic resources. Adherence to the Guidelines requires that: **(1) the project purpose be defined by the basic function of the proposal;*** [Emphasis that this requirement is number one, added]

Per the requirements of Section 404(b)(1), we ask that RWQCB consider the recommendations of the Region IX offices of the EPA, as noted in *Wetlands Protection Through Impact Avoidance: A discussion of the 404(b)(1) Alternatives Analysis, Wetlands: Volume 9, No. 21 1989*, by Thomas G. Yocom, Robert A Leidy and Clyde A Morris. On page 290 of that publication, it states that

*EPA Region IX consistently treats the basic project purpose as the generic function of the activity. From a regulatory perspective, **for example, the basic purpose of a residential development is to house people or provide shelter....Similarly, the basic purpose of a restaurant is to feed people.*** [Emphasis added]

This analysis goes on to explain that **basic project purposes should be generic and not refer to the specific goals of the developer** or the specific kind of housing or restaurant or hotel proposed.

³ Old Cutler Bay Associates Guidance, Director of Civil Works Major General Patrick Kelly (Sept. 1990).

⁴ Fed. Reg. 85336, 85339 (Dec. 24, 1980)

⁵ Yocom, supra note 3, at 289

⁶ Corps SOP supra note 43 at 6

For example, to state that the purpose is to build “additional” commercial hotel rooms (as stated in the Applicant’s submittal to the Town) is supported only by the applicant’s desires, since there is no evidence whatsoever that adding rooms at this location is required (e.g., the existing hotel itself, without any rebuild, is presently financially viable and therefore practicable).

One has to question why the project purpose is being changed with each submission to different agencies for different aspects of approval. Furthermore, the Applicant’s actions do not appear to be by accident. The record suggests that these discrepancies in defining project purpose could benefit the applicant by misdirecting the focus of each agency review. In our opinion, the Applicant is flouting the 404(b)(1) Guidelines and the authority of state and federal agencies in order to direct the course of the permit approval project to its own financial benefit.

We respectfully request that RWQCB revise the project purpose to state

“The basic purpose of the project is to provide commercial hotel rooms in southern Marin County, CA.”

Defining “Practicable”

We will discuss this definition and how it relates to the proposed project in greater depth in our second and third comment letters, regarding alternatives, however, we would like to make the general comment that as noted in *40 CFR Chapter I (7-1-10 Edition), § 230.1 Purpose and Policy. 1(c)*,

Fundamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.

As we will show in our comment letters and Exhibits, the proposed project fails to meet this most fundamental test for environmental impacts because the applicant has not provided sufficient evidence to support their claims or conclusions, and has failed to consider the cumulative impacts of the proposal.

Further, as noted in *40 CFR 230.3 (q); Part 230—Section 404(b)(1) Guidelines; Subpart A; General*: the term “practicable” means

...available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

Though this is acknowledged in theory by the applicant, the Applicant’s conclusions are not evidenced-based, but rather derived from self-serving opinion and conjecture, all of which was provided from consultants paid for those opinions by the Applicant. In addition, to date, the applicant has submitted architectural plans that are narrowly and specifically designed only to meet the specifications, layout, and size of one corporate partner, The Marriott Corporation.

As we will show in our comment letters on *On-Site Alternatives Analysis Final with Figures and Attachments*, the Applicant has not in good faith tried to develop alternatives, which would save the pond. In fact, his architects seem to have gone out of their way to only produce “alternatives” floor plans, layouts, site plans and designs that meet with the approval of the Marriott Corporation, the eventual end user of the new hotel. They have disregarded any and all public comment to the contrary since they began this project.

Factual determination requirements

Under § 230.11 Factual determinations it states that the determinations of effects of each proposed discharge shall include the following:

*2(e) Aquatic ecosystem and organism determinations. Determine the nature and degree of effect that the proposed discharge will have, both individually **and cumulatively**, on the structure and function of the aquatic ecosystem and organisms. [Emphasis added]*

The Applicant has failed to submit any data, analysis or other information to address this fundamental requirement regarding cumulative impacts.

Additionally, under § 230.11 Factual determinations it states that the determinations of effects of each proposed discharge shall include the following:

*The permitting authority shall **collect information and solicit information from other sources about the cumulative impacts on the aquatic ecosystem**. This information shall be documented and considered during the decision-making process concerning the evaluation of individual permit applications. [Emphasis added]*

As we will show, this requirement to collect and consider information from “other sources,” such as the comments, expert opinions and analysis that CVP is submitting takes on added significance in light of the inadequacies of the erroneous information provided by the Applicant.

It is our opinion that the Applicant has failed to adequately address these requirements. Therefore, the application is sufficiently incomplete to be denied by RWQCB, without comment.

Critical habitat determinations and need for additional information

Under 40 CFR, Subpart B - Compliance with the Guidelines § 230.10 Restrictions on discharge; it states that “additional information” is required if a project potentially

6(4) Violates any requirement imposed by the Secretary of Commerce to protect any marine sanctuary designated under title III of the Marine Protection, Research, and Sanctuaries Act of 1972. (c) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States.

Findings of significant degradation related to the proposed discharge shall be based upon 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 outlined in those subparts. Under these Guidelines, effects contributing to significant degradation considered individually or collectively, include: [Emphasis added]

It is our opinion that the Applicant has failed to adequately address these requirements. Therefore, the application is sufficiently incomplete to be denied by RWQCB, without comment.

Under § 230.31 Fish, crustaceans, mollusks, and other aquatic organisms in the food web, and under § 230.32 Other wildlife it states

Wildlife associated with aquatic ecosystems are resident and transient mammals, birds, reptiles, and amphibians. [Emphasis added]

Possible loss of values: The discharge of dredged or fill material can result in the loss or change of breeding and nesting areas, escape cover, travel corridors, and preferred food sources for resident and transient wildlife species associated with the aquatic ecosystem. [Emphasis added]

It is our opinion that the Applicant has failed to adequately address these requirements. Therefore, the application is sufficiently incomplete to be denied by RWQCB, without comment. As noted above, the Army Corps has required a determination by the National Marine Fisheries Service (NOAA), regarding the impacts of filling the wetlands at the Corte Madera Inn. This is in part, due to the fact that the wetlands are identified under federal law to be essential habitat for the Pacific salmon, a species in serious decline. Due to this and under the guidance noted above, RWQCB is required to withhold any comment or evaluation of the materials submitted by the Applicant unless or until the Applicant has submitted a full and complete application along with all the analysis and documentation required under the 404(b)(1) Guidelines.

Finally, the Applicant's proposal rests on the quality of the various DEIRs, REIRs and FEIRs developed for the project. However, those documents continue to fail to adequately assess the cumulative impacts of filling of a wetland, loss of the wildlife habitat, the addition of impervious surfaces in a hazardous floodplain area, which will exacerbate hazardous flood conditions, particularly in light of sea level rise considerations, and the many other environmental considerations noted throughout these comment letters.

Respectfully submitted,



Bob Silvestri
President
Community Venture Partners, Inc.

RWQCB Project Evaluation

As noted above, in order to ensure that RWQCB has the benefit of all the data, documents, comments and other information required under the 404(b)(1) Guidelines to evaluate and comment on the Corte Madera Inn Rebuild Alternatives Analysis that is before you, we are attaching the following Exhibits, which provide more complete background information, to this comment letter.

LIST OF ATTACHED EXHIBITS

- 1-Exhibit I - E.Yates Comment Letter 01-20-2015
- 2-Exhibit II - E.Yates Comment Letter 08-19-2015
- 3-Exhibit III - E.Yates Comment Letter 12-19-2015
- 4-Exhibit IV - 2-9-16 ACR_comment_BCNH_CorteMadera_20160209 (2)
- 5-Exhibit V - Corte Madera Inn wetland & aquatic wildlife habitat Baye 021516
- 6-Exhibit VI - G.R. Kamman Hydrology comments_2-25-16
- 8-Exhibit VIII - Xavier Fernandez SF Bay Regional Water Quality Control Board Email
- 9-Exhibit IX - 061616 - CVP - Army Corps Public Notice 2000-255330N comment letter
- 10-Exhibit X - 061616 - CVP - Army Corps Comment Exhibits
- 11-Exhibit XI - 061616 M. Graf Comment Letter and Exhibits to CVP Letter
- 12-Exhibit XII-Corte Madera Inn Recirc EIR memo wigeongrass SAV & wetlands Baye 123116
- 13-Exhibit XIII - 7.16 Audubon Canyon
Ranch_comment_BCNH_CorteMadera_RDEIR_20161209
- 14-Exhibit XIV- Market Study & Financial Feasibility Evaluation by RHSW LLC
- 15-Exhibit XV - SF Bay Regional Water Quality Control Board Letter
- 16-Exhibit XVI - Robert Silvestri CV
- 16a-Exhibit XVII – Marin Hotel Group Letter
- 17-Exhibit XVII - 56-60MaderaBlvd Broker Brochure
- 18-Exhibit XVIII -TheRail_May2016_Web
- 19-Exhibit XIX - Marriott Corporation Letter
- 20-Exhibit XX-Journal of Environmental Law and Policy - Jon Schutz
- 21-Exhibit XXI -Yocum - Wetlands protection through impact avoidance
- 22-Exhibit XXIII -Evironmental Law Institute 2008
- 24-Exhibit 24a CorteMaderaInn_DEIRandAPPENDICES
- 24-Exhibit 24b Corte Madera Inn Draft EIR Alternatives
- 24-Exhibit 24c Corte Madera Inn REIR Alternative
- 24-Exhibit 24d November 2014 DEIR Corte Madera Inn EIR and
APPENDICES_201411221423255752
- 24-Exhibit 24e November 2015 FINAL CorteMaderaInn_FEIR
- 24-Exhibit 24f November 2016 Corte Madera Inn RDEIR2_WITH Appendices_FINAL
- 24-Exhibit 24g CorteMadera Inn Rebuild_RDEIR

USB DRIVE of all Exhibits is sent and attached via US Mail.

LIST OF ATTACHED ARTICLES

We ask that RWQCB carefully consider the information contained in the following published articles, regarding the Corte Madera Inn Rebuild Proposal (linked by the title).

- [Community Venture Partners submits comments on the Corte Madera Inn Recirculated DEIR](#)
- [Biologist Peter Baye, PhD, comments on the Corte Madera Inn Rebuild DEIR](#)
- [Wildlife experts argue against the plan to destroy the Corte Madera Inn pond habitat](#)
- [CVP comments to the Army Corps regarding recent statements about the Corte Madera Inn Rebuild](#)
- [Marin 2016 - Part IV: Dispatches from the front – Corte Madera](#)
- [Region IX of the EPA comments on the application to fill in Edgewater pond at Corte Madera Inn](#)
- [Community Venture Partners comments on Reneson's request to fill Edgewater Pond](#)
- [Rook vs Knight Endgame? The Corte Madera Inn developer puts property up for sale - Part I](#)
- [Rook vs Knight Endgame? The Corte Madera Inn developer puts property up for sale - Part II](#)
- [Rook vs Knight Endgame? The Corte Madera Inn developer puts property up for sale - Part III](#)
- [Rook vs Knight Endgame? The Corte Madera Inn developer puts property up for sale - Part IV](#)
- [A Cesspool in Corte Madera?](#)
- [Marin Audubon President, Barbara Saltzman, comments on the Corte Madera Inn Pond Habitat Value](#)
- [Comments to the Corte Madera Planning Commission on the Redevelopment of the Corte Madera Inn](#)
- [CVP submits critical comments on the proposed expansion of the Corte Madera Inn](#)
- [Friends of Corte Madera File Legal Comment on Madera Inn Draft EIR](#)

Community Venture Partners, Inc.

A Catalyst for Sustainable Solutions

January 13, 2017

Xavier Fernandez
SF Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA, 94612

Re: Comment Letter on the Corte Madera Inn *Alternatives Analysis Final with Figures* by Zentner and Zentner, as submitted The San Francisco Bay Regional Water Quality Control Board (404(b)(1) Alternatives Analysis for the Corte Madera Inn Rebuild Project; in response to the documents posted on the RWQCB web site under *Alternatives Analysis for the Project*, which are available for public review at:
http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/CorteMadera.shtml

Dear Mr. Fernandez:

Community Venture Partners, Inc. (“CVP”) is a 501(c)(3) nonprofit organization that facilitates and assists community based projects, programs and initiatives that demonstrate the highest principles of economic, social and environmental sustainability. We work to bring the community’s voice to local government decision-making in matters related to planning, development, social and environmental justice, and other matters of general public interest. We are submitting our comments on behalf of Peter Hensel, Marla Orth, Peter Orth, and other residents of the Town of Corte Madera.

I’ve been a resident of Marin and an active participant in local planning and development matters in County for over 20 years, As president of Community Venture Partners, Inc., and based on my professional experience, I am an acknowledged expert in planning, land use, architecture, real estate finance and development and submit my comments as a licensed architect and real estate developer and former real estate broker specializing in land and investment opportunities.

Of particular relevance to this comment, as the founder of Tiburon Group, Inc., and a licensed real estate broker for 18 years, my company specialized in property and land acquisitions and acted as managing partners for a variety in investment partnerships. Clients that Tiburon Group advised included Prudential Insurance, Los Angeles, GE Capital, New York, Property Company of America, Tulsa, Gold Crown Management Corporation, Denver, The Leinbach Company, Oklahoma, Pacific Union Ventures, San Francisco, La Salle Partners, Chicago, Tomlin Properties, Dallas, Gold Crown Management Denver, and Westland Properties, Denver. (See “Exhibit 16 attached),

This letter is in response to the *Alternatives Analysis Final with Figures* posted by RWQCB at:
[http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/CorteMadera/404\(b\)\(1\)%20Alternatives%20Analysis/1000_Alt_Analysis_final%2012.01.14_w_figures.pdf](http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/CorteMadera/404(b)(1)%20Alternatives%20Analysis/1000_Alt_Analysis_final%2012.01.14_w_figures.pdf)

GENERAL COMMENTS & OVERRIDING CONSIDERATIONS

Those who prepared this *Alternatives Analysis Final with Figures/Off-Site Alternatives* appear to have little firsthand knowledge or experience in what is referred to as the “land business” in the real estate profession, or a great deal of knowledge about southern Marin, in general. This lack of understanding of what defines a development “opportunity” has dramatically skewed their results and generally invalidates their recommendations and conclusions.

The Applicant’s *Alternatives Analysis Final with Figures* (analysis of off-site alternatives) is fundamentally flawed in a number of important ways, which precludes it from consideration by your agency. The “Overriding Considerations” noted in our General Comment letter, dated January 13, 2017, are applicable.

1. Erroneous definitions: As we’ve noted, the Applicant’s analysis and conclusions in the *Alternatives Analysis Final with Figures/Off-Site Alternatives*, by Zentner and Zentner, are based on erroneous and self-serving definitions of the project’s “basic purpose” and “overall purpose,” and “practicable,” under the 404(b)(1) Guidelines.
2. Outdated market data: The financial analysis contained in the *Alternatives Analysis Final with Figures/Off-Site Alternatives* is based on studies that date back to 2009 through late 2012. That data is then somewhat magically adjusted for “inflation” and faulty forecast prognostications made by PKF without sufficient explanation or basis in fact. As such, the information, data, opinions and conclusions noted are incorrect and outdated to the point of being grossly inadequate to make a reasonable assessment of off-site alternatives. As we will discuss in our comment on *On-Site Alternatives Analysis Final with Figures and Attachments*, anticipated operating revenues and market demand, since 2013, in Marin County and particularly in the market of the subject property, has gone through significant increases in valuations, average room rental rates and overall hotel operating revenues, and therefore potential development opportunities (due to the economy finally emerging from the worst financial crisis and recession in more than 80 years and the ongoing extremely low interest rate environment) makes real estate investment far more feasible.
3. Lack of professional standards: The *Alternatives Analysis Final with Figures/Off-Site Alternatives* is mostly boilerplate marketing content that demonstrates little firsthand knowledge or experience in real estate development, real estate finance or the other aspects of what is commonly referred to as the “land business” in the real estate profession. This lack of understanding of what defines a development “opportunity” site has dramatically skewed the PKF results and generally invalidates their recommendations and conclusions.
4. Alternatives analysis is self-serving: The “Market Demand” and “Financial Analysis” by PKF Consulting that support the conclusions of the *Alternatives Analysis Final with Figures/Off-Site Alternatives* are not objective or comprehensive and only serve the needs and pre-determined outcomes desired by the developer, making them inadmissible under the 404(b)(1) Guidelines. This *Alternatives Analysis* reads as if it were a marketing brochure for the developer to convince potential investors, rather than an objective

analysis. By incredible coincidence, the “analysis” by PKF Consulting arrives at the conclusion that the developer’s preferred alternative location (which the Applicant has been promoting for a decade) is the *only possible* practicable alternative when compared to other off-site locations (for more discussion see our third comment letter on the *On-Site Alternatives Analysis Final with Figures and Attachments*).

5. Inconsistent analysis methodology: The Applicant’s parameters and filters used to rank, rate and otherwise evaluate off-site alternative are essentially arbitrary and not applied equally with objective rigor. Because of this, their conclusions are often incorrect. In fact, if their parameters and filters were fairly applied to the subject property, it would likely rank as one of the worst development / risk-reward opportunities, not the best, if an investor had to do a pure cash transaction (as they show).
6. The Regional Water Quality Control Board's review of this project is not exempt from the requirement of the California Environmental Quality Act (CEQA). The Applicant's Proposal is a “project” under CEQA, Pub. Res. Code § 21065, and thus requires full CEQA review. The Regional Board's 401 Certification review does not appear to fall within the certified regulatory program for the Regional Board's Water Quality Control (Basin)/208 Planning Program, as set forth at 14 Cal. Code Regs. § 15251(g). Even if the Board's 401 Certification Program were considered a part of the agency's certified program, the Board's CEQA review would still be required to comply with CEQA policies. Pub. Res. Code § 21080.5(d). At this juncture, however, we have not seen any attempt by the RWQCB to comply with CEQA's requirements as set forth in the Public Resources Code, including but not limited to a thorough evaluation of project impacts and avoidance of significant impacts based on feasible mitigation or project alternatives and responses to public comments. In addition please also note that the various Exhibits attached with this comment (EIRs, studies and independent analysis, expert opinions, legal comment letters, public comments, etc.) contain numerous citations, descriptions and references to unmitigated significant impacts and requirements under CEQA, all of which are hereby made a part of this comment letter and incorporated herein by reference.

For the reasons noted herein we ask RWQCB to deny the Application to fill the wetlands and destroy the contiguous wildlife habitat.

COMMENTS ON PART I OF THE APPLICANT’S ALTERNATIVES ANALYSIS

Re: *PART I: Purpose*

Under the *Purpose* section of the *Alternatives Analysis Final with Figures*, quoting the CFR statutes the Alternatives Analysis for off-site alternatives states

An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes. (40 CFR 230.10(a)(2) [Emphasis added]

Here again, the accuracy of the project purpose is paramount. The Applicant is again inferring that his definition of project purpose, which includes maximizing profits and capitalizing on market demand to the fullest extent possible justifies the goals and conclusions of their analysis. And under B. Organization the Applicant quotes the Guideline that

In accordance with US Environmental Protection Agency direction on 404(b)(1) analyses, this basic purpose must be relatively general and cannot be constrained to pre-select a particular site.

However, the Applicant then goes on to completely ignore the regulation in their analysis, and uses their own self-serving definitions to reach their desired pre-determined conclusions. We point this out, again, to emphasize the importance of determining the correct project purpose, as a first step in a proper evaluation of a permit application under the 404(b)(1) Guidelines. Guidance from the EPA and Army Corps has also emphasized this requirement, which is why it is listed as the first requirement under “Sequencing” statutes.

COMMENTS ON PART II OF THE APPLICANT’S ALTERNATIVES ANALYSIS

Re: **PART II: A. Project Summary**

Under A. Project Summary of the *Alternatives Analysis Final with Figures* it states

Construction of larger, denser facilities will require the fill of the 0.64 -acre pond, which is classified as jurisdictional waters, but is not a wetland.

As we have noted in our General Comment letter, the Applicant knows this to be false. It has been corrected by RWQCB, the Army Corps, the EPA, and even the Town’s third biology consultant, LSA Associates in their recent Recirculated DEIR (Exhibits 24a through 24g). Under the 404(b)(1) Guidelines, an applicant for a permit to fill a wetland is required to act in good faith. We question, then, why the Applicant continues to knowingly make false statements about the classification of the Corte Madera Inn pond.

We suggest that the Applicant will continue to flout the authority of the Guidelines unless or until a regulatory agency corrects this.

Re: **PART II: B. Project Setting, 2. Site History**

Under section B. Project Setting, Site History, of the *Alternatives Analysis Final with Figures* the Applicant states

The proposed project was under review by the Corps of Engineers (Corps) and Regional Water Quality Control Board (RWQCB) at the time but a local building moratorium was declared prior to final Town, Corps or RWQCB approval and the project was withdrawn. This moratorium is no longer in effect.

This paragraph **intentionally misconstrues the chronology and the true reasons and outcomes of those events** in what appears to be an attempt of influence a decision by RWQCB and to confuse the public about the applications true status. The record shows that the truth of these events is as follows:

1. At the time of the submission of this analysis The Corte Madera Inn Rebuild project **was not** under “review by the Regional Water Quality Control Board.” No application had been filed yet.
2. The Town of Corte Madera building moratorium on Tamal Vista Boulevard **did not in any way impact** this project, because the Town specifically exempted the Applicant’s project from that moratorium and deemed it “grandfathered.” In fact, the majority of the project’s local review continued unencumbered during the entire time of the moratorium.
3. The application **has never been** withdrawn either at the Town or at any regulatory agency. The project application at the Army Corps is now on inactive status only due to the Applicant’s failure to produce documents, including an Alternatives Analysis, that are required under the 404(b)(1) Guidelines.¹

We request that the RWQCB immediately challenge this **pattern of willful dishonesty and fabricating of facts**, which permeates all aspects of the Applicant’s proposal. We ask that you reject the Applicant’s submittals on this basis alone and that the entire application be denied until such time as the Applicant agrees to be forthright and to proceed in good faith.

The Guidelines require the agency to proceed in good faith and they require the same of the Applicant, and attempts to achieve a permit under false pretenses or by committing perjury are actionable.

Re: PART II: B. Project Setting, 3. Site Ecology

Under Section B. Project Setting, 3. Site Ecology of the *Alternatives Analysis Final with Figures* it states

Water quality in the pond is poor. The water sources are generally of relatively low quality and the lack of circulation in the pond concentrates pollutants.

The Applicant fails to disclose facts that are well established in the public record and which bear directly on RWQCB’s deliberations.

For example, the record shows that in testimony before the Corte Madera Planning Commission in March 22, 2016, Jim Martin of Environmental Collaborative, one of the three biologists who evaluated the project, commented that it was perfectly feasible to preserve and rejuvenate the pond and ensure its viability. However, he admitted that he wasn’t asked to study how to do that,

¹ As stated by Roberta Morganstern, Permit Manager at the Army Corps: *Monday November 7, 2016 I notified the applicant and Town that I had withdrawn the project from "active" status. The applicant had not requested an extension and the application is not complete because the alternatives analysis, National Marin Fisheries Service (NOAA) consultation response¹, public comments responses and sacred lands research have not been satisfied.*

in spite of the fact that available on-site alternatives existed - Alternative 2 under the recent EIR - and met the project objectives, except for the “condition” of maximizing profits for the developer.

In response to further questioning by the Commission’s chairman, Mr. Martin offered,

I would agree this looks like this is a remnant of an historic slough that went through that area ...that now has been largely isolated.

And that

The culvert that goes into the drainage ditch and then the boxed culvert under the freeway is no longer used by the city.... It’s been closed off... so what’s left is this largely silted 18 inch pipe that’s not functioning and no longer provides the flushing that’s needed there to maintain the water quality conditions.

Jim Martin went on to note that the pond was not being maintained to its full advantage, which was diminishing its viability. He noted that the historic “slide gates” that would provide natural flushing of the pond had been closed by the property owner and the Town’s staff. This reduction in the natural flushing of the pond and its connection to the greater wetlands across highway 101 appears to have been done intentionally, by the developer, to destroy it and the wildlife habitat in anticipation of this redevelopment, without consent or knowledge of the Town Council.

Mr. Martin’s testimony confirmed the public’s opinion that the pond is not “artificial,” and that the hotel owner and the Town have been neglecting the pond in order to declare it a “cesspool” and a “smelly swamp” that is beyond redemption, in order to get rid of it. Martin also advised the Commission that there are many other projects, some on larger scales, in the SF Bay Area, that have the same circulation problems, but that have been solved. He said, “It’s about improving circulation in that, you want to improve the water quality, you want to improve the ability to support emergent vegetation, and increase the habitat value.”²

Re: PART II: B. Project Setting, 3. Jurisdictional waters

Under Section B. Project Setting, 3. Jurisdictional waters of the *Alternatives Analysis Final with Figures* it states

The Corte Madera pond is not a wetland, but it is jurisdictional water under Section 404 of the CWA and is defined as an “Other Water”.

As noted throughout our comments and as supported by independent experts, including LSA Associates in their recent DEIR assessment (Exhibit 24g), we question why the Applicant continues to knowingly misstate established facts. There is no question that the pond is a wetland and a special aquatic site.

² Audio recording of the March 22, 2016 Corte Madera Planning Commission hearing, which can be accessed on the Town’s web site at: <http://www.ci.corte-madera.ca.us/531/Corte-Madera-Inn-Rebuild-Project>

Re: PART II: Section C. Basic Purpose

Under Section C. Basic Purpose, page 6, of the *Alternatives Analysis Final with Figures* it states

The Basic Purpose of this project is to develop a viable hotel complex capable of meeting the demand for central Marin hotel space.

Once again the Applicant uses a self-interested and incorrect definition of the project's purpose. "Meeting the demand," or "capitalizing on demand," or achieving "requisite returns" are not relevant criteria as considerations for approval of a permit under the 404(b)(1) Guidelines. In point of fact, profit and financial return maximizing are expressly prohibited from being considered in the permit approval process.

The Applicant is either doing this with intention to deceive the public or is confusing the ability to note that demand exists to justify a proposal with believing an applicant has some right to meet market demand or maximize financial benefits from that demand. Under this logic, if consultants had advised that market demand were 400 rooms (which in fact it probably is) then the Applicant would have used that number to justify approval for an even larger hotel.

Again, maximizing profit consideration is expressly prohibited from being a factor in consideration of a permit. Ironically however, in taking this position, the Applicant is making an even more convincing argument for an on-site alternative that preserves the pond. In fact, our analysis, which will be discussed at length in our comment letter on the *On-Site Alternatives Analysis Final with Figures and Attachments*, shows that demand in southern Marin is so great at this time that almost any location in Marin with a new hotel of any reasonable size (35 rooms or more) would easily be financially feasible, profitable and therefore, practicable.

Re: PART II: Section D. Project Demand

Under Section D. Project Demand, page 6, of the *Alternatives Analysis Final with Figures* it states

An extensive study of the market demand for a new hotel on the subject site was completed by PKF Consulting in March 2013 (Attachment A). The study considered the current demand at the existing Corte Madera In and other unfulfilled demand in the market.

The practicability calculations and conclusions used in the *Alternatives Analysis Final with Figures* and which are noted in the Applicant's Attachment "A" and used to justify the results of the *On-Site Alternatives Analysis Final with Figures and Attachments*, are entirely based on the opinions of PKF Consulting and paid for by the Applicant. We will comment on the quality and accuracy of that data and those opinions in our comment letter on the *On-Site Alternatives Analysis Final with Figures and Attachments*. However, suffice it to say, we reiterate the comments we made in our General Comments above, and wish to emphasize that the data in the PKF documents dates back to 2009 through 2013. As such, that information and data is outdated to the point of being irrelevant and grossly inadequate to make any reasonable determinations about practicability of off-site or on-site alternatives.

As we will show in our comment letter on the *On-Site Alternatives Analysis Final with Figures and Attachments*, hotel operating revenues and market demand the subject property market area, since the 2009 to 2013 time period, has increased dramatically. The Applicant's documents and analysis fail to acknowledge this, which significantly impacts the analysis' conclusions. The "Market Demand" study, by PKF Consulting, which the Applicant is wholly relying upon to justify their conclusions and financial analysis is therefore severely deficient.

"Meeting market demand" is not an admissible consideration

In both the *Alternatives Analysis Final with Figures* and the *On-Site Alternatives Analysis Final with Figures and Attachments*, the Applicant has based its practicability arguments on evidence of "market demand" for his preferred alternative. However, "market demand" is essentially irrelevant to a permit application review process, under the 404(b)(1) Guidelines. The Guidelines do not *require* the Applicant to demonstrate market demand to support practicability (i.e., a developer can build whatever they want, profitable or not, so long as they're not filling wetlands to do it). The Guidelines *allow* the Applicant to provide evidence regarding the practicability of different alternatives, which can include market demand or anything else they choose to submit.

However, as noted above, in this particular instance (in southern Marin), market demand is not even in question. What is ultimately in question is which practicable alternative is the least environmentally damaging project alternatives (the "LEDPA"), as prescribed in the 404(b)(1) Guidelines.

COMMENTS ON PART III OF THE APPLICANT'S ALTERNATIVES ANALYSIS

Re: PART III. Off Site Alternatives Analysis; A. Introduction and Purpose

Under A. *Introduction and Purpose*, the Applicant states

The purpose of the of-site alternatives analysis is to determine whether there are locations other than the proposed site where the project basic purpose could be practicably achieved while eliminating or reducing impacts to waters of the United States.

The aforementioned mischaracterization of the wetland as "waters of the United States" aside, we need to point out again that this entire section relies on an incorrect definition of "project basic purpose," as we have discussed in our first General Comment letter of 01-13-16. This erroneous definition permeates the entire argument presented and diminishes them to a point that they should be disregarded.

Re: PART III. Off Site Alternatives Analysis; C. Analysis Criteria

Under C. Analysis Criteria, 2. Physical conditions and size the Applicant states

*Sites where the physical conditions pose a significant constrain to development are considered not practicable; similarly, sites that are too small to put approximately **200 hotel rooms would also be inconsistent with the basic purpose.** [Emphasis added]*

Here is a clear instance where the Applicant's incorrect and self-serving definition of the projects basis purpose is used to justify and skew their analysis of off-site alternatives. As we've noted in our comment letters, the specific number of hotel rooms, which in this case is solely driven by the demands of the Marriott Corporation (the final end user of the proposed project) is not allowed to be included in project's basic or overall purpose, under the 404(b)(1) Guidelines. Yet, this criterion goes on to significantly impact the results of this Alternatives Analysis.

On this basis alone, we ask that the Applicant's Alternatives Analysis of off-site alternatives be rejected in its entirety, as biased, and submittals and request for RWQCB review be denied.

Under C. Analysis Criteria, 4. Consistent Land Use the Applicant states

The Corps has recognized in its review of 404(b)(1) analyses that alternative sites must be consistent with local zoning/General Plan requirements. Alternatively, if the existing land use designation for an alternative site is not consistent, the local jurisdiction must indicate that an amendment to bring it into conformance is practicable.

This is an instance where the Applicant is applying Guidelines criteria in an inconsistent and self-serving manner. Looking at each of the alternatives offered by the Applicant, the Corte Madera Inn Rebuild project site, as the Applicant has submitted it, appears to be the most problematic under these tests. Although all of the sites shown would require some regulatory or local agency approvals, no other site on the list involves

- a) The filling of a wetland and the associated agency approvals, *and*
- b) The destruction of valuable wildlife habitat, *and*
- c) A zoning ordinance amendment, *and*
- d) A Town General Plan amendment.

Objectively then, the Applicant would need to reduce the number of approvals and amendments required to make the site practicable under the same requirements they note. However, the Applicant's analysis fails to even mention this obvious challenge. In fact, in the case of the Corte Madera Inn these challenges are emphasized by the fact that the Town just spent two years creating and approving a new Community Plan and General Plan Amendments for the Tamal Vista Boulevard corridor, where the project is created. This makes their request for a General Plan Amendment to build their proposed hotels less likely than on other sites, which do not have all these challenges.

Logically, the most expedient way to ensure that the Applicant can monetize his asset and "capitalize" on the market demand would be to develop a slightly smaller hotel on the site in a

way that preserves and protects the wetland and wildlife habitat area. We will discuss this Alternative in detail in our third comment letter.

Under C. Analysis Criteria, 5. Availability / Land Costs the Applicant states

Alternative sites not presently owned by the applicant that could reasonably be obtained and used to fulfill the project purpose are considered for this analysis. Conversely, alternative sites that cannot be reasonably obtained and used to fulfill the project purpose are not practicable alternatives. Properties for which development applications have been submitted, or are already approved, are not practicable. For example, purchasing or otherwise gaining a controlling interest in a site where the owner has already initiated development approvals would pose significant cost and logistics constraints. Land subject to complex multiple ownership are similarly considered unavailable, as it is extremely difficult to acquire large tracts under multiple ownership.

Although these criteria all sound reasonable, they are essentially boilerplate gibberish that no respectable real estate broker specializing in land development would use to assist their client in finding a suitable location to develop a hotel or any other type of real estate development project. Unless one analyzes properties on a case by case basis, talks with actual property owners and assesses their needs and financial requirements, there is no possible apply these criteria to an overview, as the Applicant has done, in a productive or meaningful way. At the level of analysis presented by the Applicant in this *Off-Site Alternatives Analysis*, this amounts to conjecture and self-serving opinion with no basis in actual evidence (See our third comment letter on the *On-Site Alternatives Analysis Final with Figures and Attachments*).

Under: D. Evaluation of Practicability the Applicant states

Eight sites (not including the project site) were identified as potential project sites based on reviews of the Market Area in discussions with local planners and realtors (Figures 3 through 6). These sites were then assessed according to the criteria described above. There were no sites south of Corte Madera, a result of the dense development pattern and extent of marshlands, and very few other sites.

It is with regard to this section of the Alternatives Analysis that we find the greatest fault. Our general criticisms are that the list of sites noted is incomplete and that it was not derived based on methods used by professional real estate developers and investors when evaluating development site alternatives.

Determining development opportunity sites

Vacancy and other superficially observed characteristics do not necessarily define “opportunity” in the real estate development profession. The basis of any sound methodology to determine which sites represent an investment opportunity is the potential projected return on investment (ROI, which can be cash on cash, depreciation adjusted, tax adjusted, etc.) combined with other considerations about the market and general economics of the hotel industry in the selected region or the cost of funds, debt to equity ratios, tax considerations, public agency requirements, and most importantly the investment terms of purchase of the asset. In addition, supportive

public improvements, local planning and regional government projects or incentives in certain locations impact a developer's investment decisions.

In other words, if the cost of developing or renovating a hotel of "x" number of rooms is the same at both locations and the projected room rental rates are the same, then the transaction with better terms (less money invested up front) will produce the greatest return on investment. Similarly, if the purchase of one parcel of vacant land produces an unattractive overall rate of returns on investment because the terms of the transaction are challenging (high price, low loan to value terms, etc.), but another parcel of developed land, which has an economically obsolete building on it (commonly referred to as a "tear down"), provides a better overall return on investment (better terms, better tax implications, simpler entitlement process with local agencies, etc.), a reasonable investor will choose the latter.

Viewed through this lens many other potential development sites become potentially viable and practicable hotel development opportunities. For example, the Extended Stay America hotel at 1775 Francisco Boulevard in San Rafael, which is within the Corte Madera Inn competitive market area, was developed on a "tear down" site, which had economically obsolete buildings on it.

These examples explain the most fundamental principle of real estate: the principle of highest and best use. The Appraisal Institute defines "highest and best use" as

The reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, financially feasible, and that results in the highest value.

This implies that development will generally follow what the highest and best use of a particular property is at any given time, all factors considered.

In the case of the Corte Madera Inn property, the highest and best use at this time is for a hotel of almost any size and configuration. The market demand and quality of the location will support a wide variety of alternatives. As we will show in our third comment letter, this is not only supported by the facts of the situation, but has been determined by the Town of Corte Madera as the only use they will approve on that site.

Without a more detailed level of investigation simply driving around or looking at a map and selecting only obvious, vacant sites as "opportunities," as PK Associates did in 2013, is essentially meaningless. For this and the other reasons stated herein, it is our professional opinion that the Applicant's Alternatives Analysis is superficial and grossly inadequate for RWQCB to make any kind of meaningful determination.

Suffice it to say that the PKF analysis fails to adequately consider how sophisticated developers actually analyze investment opportunities. The evaluation of any investment is based on accepted industry standards for evaluating return on investment that although noted in the PKF analysis, are not applied correctly, which has skewed their findings significantly and paint a false picture of financial feasibility and therefore, practicability (See our third comment letter on the *On-Site*

Alternatives Analysis Final with Figures and Attachments for a complete explanation of investment analysis requirements).

Re: PART III: D. Off-Site Alternatives site by site analysis

Under such a short public review period we did not have time to physically inspect each alternative property noted by the Applicant. However, we can make these general comments and some specific comments on those properties with which we are knowledgeable.

Based on the sites we have evaluated, we have reason to suspect that the analysis and **descriptions of the sites shown are not accurate** or a reflection of their true development potential.

For example, the applicant deems Site #7 of the Alternative Sites in the Alternatives Analysis as not being “practicable” based on the fact that it would need to be rezoned. However, the site is already zoned for commercial development so any zoning approvals would not involve a General Plan Amendment as would the Corte Madera site. So why is it discounted?

Similarly, the applicant deems Site #6 of the Alternative Sites in the Alternatives Analysis as not being “practicable” solely based on the fact that these sites are “too small” to accommodate the Applicant’s demand to build a 200 room, dual branded, Marriott Residence Inn / Springhill Suites hotel complex. However, as we have already amply established, these self-serving criteria are not provided for under the 404(b)(1) Guidelines.

In other examples, the Analysis shows Alternative #3 as a potential alternative but that site is already part of the Restoration Hardware Redevelopment project and unavailable. It notes Site #4 as an alternatives but that site was dedicated to the County as open space years ago. These inclusions make us question the qualifications of the person(s) who created this Analysis. Did they do anything more than drive around in a car and makes some extemporaneous notes to compile this “study?”

Perhaps the most striking example is the Applicant’s “analysis” of Site #5.

Site #5 is not even correctly located. The site shown is a viable office building complex. Site #5 is actually located at the other end of Larkspur Landing Circle at the intersection of Sir Francis Drake Boulevard. The description provided could not be more incorrect. Our comments and corrections are interlineated in normal font below each section.

The site is non-native annual grassland, exposed rock slope, and fragments of native oak woodland and scrubland adjacent to HWY 101. No wetlands or listed species habitats were visible during our reviews.

The site is potentially large enough to host an alternative hotel complex but significantly constrained by both slopes and layout to make siting a hotel complex here not practicable; the site is largely made up of slopes that are greater than 20%.

These statements are patently false. The site is 10 acres. **90 percent of it consists of two rectangular sections both of which are essentially flat.** There could not be a better parcel of land for large development. The only sloping bench area is at the northern most part of the site. Topographic site plans available if required.

The analysis goes on to claim

There is no infrastructure suitable for a commercial development adjacent to the site. Local roadways are too narrow for commercial uses and the sewer and water lines are similarly constrained. The site is zoned for Planned Development.

All required utilities (“infrastructure”) are presently in the street. **There are no constraints whatsoever.** In fact, the site is **zoned only for commercial uses and it is also presently zoned for a hotel** and high density residential. No zoning or general plan amendment would be required.

Finally, the analysis states

There is no evidence that it is available at this time. This site is not practicable due to limited access size and development constraints and lack of suitable infrastructure.

The site is more than twice the size of the Corte Madera Inn property. It has unrestricted access for several hundred feet along Larkspur Landing Circle. The site has all required infrastructure in place. The site is presently under an EPA monitored remediation of the soils, which will be completed by late 2017, at which time the majority of the members of the board of directors of the present owner, the Ross Valley Sanitary District, have indicated that they will put the property up for sale. This fact has been extensively noticed in the County, discussed and public hearings for more than two years.

Additional alternative development sites that must be considered

On the basis of the criteria and methodologies noted above, our revised version of the opportunities map would add sites and potential “development site districts” to the map. We would also extend the market area south toward Sausalito because that area was summarily dismissed by the Applicant, we believe, without any actual investigation.

Our analysis is based on the more correct basic project purpose, which is “**to provide commercial hotel rooms in southern Marin County, CA.**”

Mill Valley / Strawberry:

- a) Open land on Redwood Highway along 101: east side frontage road, south of the Westamerica Bank and north of the Tamalpais Mill Valley Motel, approximately 4.3 acres flat and steep hillside. Strong highway visibility, few trees, infrastructure in place and utilities in the street, zoned for commercial, no County Plan Amendment required.
- b) Goodman’s Lumber along highway 101: west side frontage road, south of Blithedale Avenue exit, approximately 3.3 acres of flat, development property. City recently noted it

for higher density development in new General Plan 2040. Property is far below its highest and best use and business owner is struggling against big box retailers.

San Rafael:

- a) The Marin Square Shopping Center at Bellam Boulevard at highway 580: flat site, a failing, economically obsolete shopping center, approximately 5 acres, infrastructure in place and utilities in the street, zoned for all commercial, no zoning or plan amendment required.
- b) Office Depot / Dollar Tree Shopping Center at Anderson Drive and West Francisco Boulevard: flat site, a failing, economically obsolete shopping center and Office Depot recently acquired by Staples (Staples has a store less than one mile away – one location will be closed), approximately 3.95 acres, infrastructure in place and utilities in the street, zoned for all commercial, no zoning or plan amendment required.
- c) Other sites for smaller hotels in the 75 to 100 room range include assemblage sites in two potential development site districts along Anderson Drive southeast of Bellam Boulevard, and along East Francisco Boulevard the entire length. Many parcels are under developed, past their useful economic life and should be approached with purchase offers.

CONCLUSION

In light of these facts, in our opinion, the conclusions reached in the *Alternative Analysis Table 3: Alternative site Review Results* are incomplete, incorrect, and unsupported by evidence, and arrived at using methods that are not general accepted practice in the real estate profession. For this reason and the comments noted in this letter, we ask believe RWQCB has no choice but to reject the Applicant's analysis.

Respectfully submitted,



Bob Silvestri
President
Community Venture Partners, Inc.

LIST OF ATTACHED EXHIBITS

- 1-Exhibit I - E.Yates Comment Letter 01-20-2015
- 2-Exhibit II - E.Yates Comment Letter 08-19-2015
- 3-Exhibit III - E.Yates Comment Letter 12-19-2015
- 4-Exhibit IV - 2-9-16 ACR_comment_BCNH_CorteMadera_20160209 (2)
- 5-Exhibit V - Corte Madera Inn wetland & aquatic wildlife habitat Baye 021516
- 6-Exhibit VI - G.R. Kamman Hydrology comments_2-25-16
- 8-Exhibit VIII - Xavier Fernandez SF Bay Regional Water Quality Control Board Email
- 9-Exhibit IX - 061616 - CVP - Army Corps Public Notice 2000-255330N comment letter
- 10-Exhibit X - 061616 - CVP - Army Corps Comment Exhibits
- 11-Exhibit XI - 061616 M. Graf Comment Letter and Exhibits to CVP Letter
- 12-Exhibit XII-Corte Madera Inn Recirc EIR memo wigeongrass SAV & wetlands Baye 123116
- 13-Exhibit XIII - 7.16 Audubon Canyon
Ranch_comment_BCNH_CorteMadera_RDEIR_20161209
- 14-Exhibit XIV- Market Study & Financial Feasibility Evaluation by RHSW LLC
- 15-Exhibit XV - SF Bay Regional Water Quality Control Board Letter
- 16-Exhibit XVI - Robert Silvestri CV
- 16a-Exhibit XVII – Marin Hotel Group Letter
- 17-Exhibit XVII - 56-60MaderaBlvd Broker Brochure
- 18-Exhibit XVIII -TheRail_May2016_Web
- 19-Exhibit IXX - Marriott Corporation Letter
- 20-Exhibit XX-Journal of Environmental Law and Policy - Jon Schutz
- 21-Exhibit XXI -Yocum - Wetlands protection through impact avoidance
- 22-Exhibit XXIII -Evironmental Law Institute 2008
- 24-Exhibit 24a CorteMaderaInn_DEIRandAPPENDICES
- 24-Exhibit 24b Corte Madera Inn Draft EIR Alternatives
- 24-Exhibit 24c Corte Madera Inn REIR Alternative
- 24-Exhibit 24d November 2014 DEIR Corte Madera Inn EIR and
APPENDICES_201411221423255752
- 24-Exhibit 24e November 2015 FINAL CorteMaderaInn_FEIR
- 24-Exhibit 24f November 2016 Corte Madera Inn RDEIR2_WITH Appendices_FINAL
- 24-Exhibit 24g CorteMadera Inn Rebuild_RDEIR

Community Venture Partners, Inc.

A Catalyst for Sustainable Solutions

January 13, 2017

Xavier Fernandez
SF Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA, 94612

Re: Comment Letter on the Corte Madera Inn *On-Site Alternatives Analysis Final with Figures and Attachments* by Zentner and Zentner, as submitted The San Francisco Bay Regional Water Quality Control Board (404(b)(1) Alternatives Analysis for the Corte Madera Inn Rebuild Project; in response to the documents posted on the RWQCB web site under *Alternatives Analysis for the Project*, which are available for public review at: http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/CorteMadera.shtml

Dear Mr. Fernandez:

Community Venture Partners, Inc. (“CVP”) is a 501(c)(3) nonprofit organization that facilitates and assists community based projects, programs and initiatives that demonstrate the highest principles of economic, social and environmental sustainability. We work to bring the community’s voice to local government decision-making in matters related to planning, development, social and environmental justice, and other matters of general public interest. We are submitting our comments on behalf of Peter Hensel, Marla Orth, Peter Orth, and other residents of the Town of Corte Madera.

I have been an active participant in local planning and development matters in Marin County for over 20 years, As a resident of Marin, as president of Community Venture Partners, Inc., and based on my professional experience, I am an acknowledged expert in planning, land use, architecture, real estate finance and development and submit my comments as a licensed architect and former real estate developer and broker.

Of relevance to this comment, as the founder of Tiburon Group, Inc. and a licensed architect and former real estate broker (18 years), I’ve had extensive experience in project planning and architecture, project management and construction, and have acted as managing partner in a variety of real estate development projects. Tiburon Group, Inc. also specialized in real estate investment analysis, property acquisitions and financing (see Exhibit 16).

In addition, Community Venture Partners is advised by a distinguished list of real estate professionals including, John Flavin, former senior executive for the Oliver Carr Company, the Grosvenor Group, Gates Capital and the Opus South Corporation, Rick Harris, former Vice President of the Transportation Group at First Boston, Principle in charge of transportation finance at Morgan Stanley & Co., NYC, Managing Director of Public Finance for Dean Witter

Reynolds in San Francisco, and Burton Miller, a partner at Hornberger + Worstell in San Francisco, an award winning, international design firm that specializes in the hospitality sector and has developed projects around the world for every major hospitality provide.

This letter is in response to the “On-Site Alternatives Analysis Final with Figures and Attachments” as posted on your web site at:

[http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/CorteMadera/404\(b\)\(1\)%20Alternatives%20Analysis/On_site_AA_11%2030%201_%20final_w_figs_and_atts.pdf](http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/CorteMadera/404(b)(1)%20Alternatives%20Analysis/On_site_AA_11%2030%201_%20final_w_figs_and_atts.pdf)

GENERAL COMMENTS

The Applicant’s *On-Site Alternatives Analysis Final with Figures and Attachments* is fundamentally flawed in a number of important ways, which precludes it from consideration by your agency. The “Overriding Considerations” noted in our General Comment letter, dated January 13, 2017, and our comment letter on the *Alternatives Analysis Final with Figures* are applicable and all those comments are hereby incorporated herein by reference.

1. The Applicant’s analysis is based on incorrect definitions of the project’s purpose and what is or is not practicable: As we’ve noted, the Applicant’s analysis and conclusions in the *On-Site Alternatives Analysis Final with Figures and Attachments* continue to be based on erroneous and self-serving definitions of the project’s “basic purpose” and “overall purpose,” and what is “practicable,” under the 404(b)(1) Guidelines. We have commented on the Applicant’s incorrect assertions about these matters in our previous correspondence and comment letters and provided evidence in our attached Exhibits. Those comments and that evidence are incorporated herein by reference.
2. The scope of alternatives analyzed is unacceptably narrow and fails to meet the requirements of the 404 Guidelines. An insufficiently narrow and self-serving range of alternatives is a serious concern and in itself grounds for denial of a permit under the 404(b)(1) Guidelines.
3. The *On-Site Alternatives Analysis Final with Figures and Attachments* does not adequately address the LEDPA as required under the Guidelines. The importance of correctly identifying the LEDPA is repeatedly emphasized in the Guidelines and has been thoroughly tested in the courts.
4. Outdated information: The *On-Site Alternatives Analysis Final with Figures and Attachments* relies heavily on the financial information provided in the PKF Consultant’s study, which dates back to statistics from 2009 through late 2012. The Applicant’s conclusions regarding practicability are not based on any current facts or realistic data about present hotel operations and development rates, revenues, or costs. As such, the opinions and conclusions reached are skewed and do not provide a reasonable assessment of on-site alternatives. The Applicant fails to acknowledge that this significantly impacts the analysis’ conclusions. We have commented on the Applicant’s incorrect assertions about these matters in our previous correspondence and comment letters and provided

evidence in our attached Exhibits. Those comments and that evidence are incorporated herein by reference.

5. Irrelevant market demand data for permit consideration: The “Market Demand Analysis” by PKF Consulting that support the conclusions of the *On-Site Alternatives Analysis Final with Figures and Attachments* are not a consideration under the 404(b)(1) Guidelines. The Applicant is confusing their right to note market conditions with using it as an argument for what is practicable. Whether to build or not build whatever type of hotel they wish is not at issue. What are at issue are the significant environmental impacts of filling a federally designated wetland. Their inclusion of market data only serves the pre-determined outcomes desired by the developer.
6. Subjective financial analysis: The “Financial Analysis” by PKF Consulting that support the conclusions of the *On-Site Alternatives Analysis Final with Figures and Attachments* are not objective or comprehensive and only serve the needs and pre-determined outcomes desired by the developer, making them inadmissible under the 404(b)(1) Guidelines. This *Alternatives Analysis* reads as if it were a marketing brochure for the developer to convince potential investors, rather than an objective analysis. By incredible coincidence, the “analysis” by PKF Consulting arrives at the conclusion that the developer’s preferred alternative location (which the Applicant has been promoting for a decades) is the *only* practicable alternative when compared to other on-site locations. We have commented on the Applicant’s incorrect assertions about these matters in our previous correspondence and comment letters and provided evidence in our attached Exhibits. Those comments and that evidence are incorporated herein by reference.
7. The applicant’s accounting of the project history and the facts surrounding the previous EIRs, alternatives studies, local agency review, and restrictions of local planning regulations are in many instances incomplete or patently false. We have commented on the Applicant’s incorrect assertions about these matters in our previous correspondence and comment letters and provided evidence in our attached Exhibits. Those comments and that evidence are incorporated herein by reference.
8. The Regional Water Quality Control Board's review of this project is not exempt from the requirement of the California Environmental Quality Act (CEQA). The Applicant's Proposal is a “project” under CEQA, Pub. Res. Code § 21065, and thus requires full CEQA review. The Regional Board's 401 Certification review does not appear to fall within the certified regulatory program for the Regional Board's Water Quality Control (Basin)/208 Planning Program, as set forth at 14 Cal. Code Regs. § 15251(g). Even if the Board's 401 Certification Program were considered a part of the agency's certified program, the Board's CEQA review would still be required to comply with CEQA policies. Pub. Res. Code § 21080.5(d). At this juncture, however, we have not seen any attempt by the RWQCB to comply with CEQA's requirements as set forth in the Public Resources Code, including but not limited to a thorough evaluation of project impacts and avoidance of significant impacts based on feasible mitigation or project alternatives and responses to public comments. In addition please also note that the various Exhibits attached with this comment (EIRs, studies and independent analysis, expert opinions, legal comment letters, public comments, etc.) contain numerous citations, descriptions

and references to unmitigated significant impacts and requirements under CEQA, all of which are hereby made a part of this comment letter and incorporated herein by reference.

For the reasons noted herein we ask RWQCB to deny the Application to fill the wetlands and destroy the contiguous wildlife habitat.

Current zoning status of the property

Please note that presently, the Applicant does not have development rights under the Town's General Plan, nor zoning rights to redevelop the hotel proposed in Alternative 1. The proposed project will require a General Plan Amendment and rezoning of the parcel in order to proceed. Therefore, as it stands, the only practicable alternatives available to the Applicant at this time are No Project or Renovation of the existing 110 room hotel. Please also note that members of the Town Council have indicated that a General Plan amendment is by no means assured at this time.

Relevant project history with RWQCB

It should be noted that the Applicant and the Town have continued to misclassify the wetlands for more than three years despite being notified of the existence of submerged aquatic vegetation and photographic evidence. In fact, this was brought to their attention, and in fact, this was done by Xavier Fernandez of the San Francisco Regional Water Quality Control Board, in his email to the Corte Madera Planning Director, in April of 2016 (Exhibits 8 and 15), in which he states:

Dear Mr. Wolff:

We were sent the following photographs of the pond at the Corte Madera Inn Rebuild Project Site. The photographs were taken on April 13 when the water in the pond had been drawn down. The photographs clearly show submerged aquatic vegetation growing within the pond at the Corte Madera Inn Site. Based on this, the pond is a special aquatic site that needs to be preserved to the maximum extent practicable. As such, we plan to attend the Town Council meeting to inform the Council that they may be approving a project that we will not be able to permit under our regulations.

In support of this, in his comment letter of February 15 2016 (Exhibit 5) and again in his letter of December 31, 2016 (Exhibit 12), biologist Peter Baye, Ph.D. provided a complete discussion and analysis of the proper classification of the pond, as a special aquatic site, based on evidence of the existence of submerged aquatic vegetation. In the face of this evidence, the Town's two biologists, both having been chosen and paid for by the applicant, launched a scathing rebuttal, denying the existence of SAV. The Town also chose to ignore the evidence and pushed through approval at the Planning Commission level.¹ This letter was followed by other comment letters by Dr. Baye (Exhibit 12). We ask RWQCB to consider the comments of Dr. Baye in your review of this permit Application.

¹ For a complete recounting of the events surrounding the redevelopment of the Corte Madera Inn and the application for a permit from the Army Corps of Engineers, please see Exhibit 9.

General comment on financial feasibility and the determination of practicable alternatives

The Applicant's financial wherewithal, or the access to attractive financing, or lucrative contractual arrangements with third parties, or other such considerations are *not* allowable considerations in determining whether an alternative is practicable under the 404(b)(1) Guidelines. Development costs are to be examined from the perspective of what are reasonable costs for the proposed project, not whether the applicant can afford the cost of the alternative.²

The attached *The Corte Madera Inn Redevelopment: Market Survey and Financial Feasibility Evaluation* (Exhibit 14) analyzes this issue in depth and concludes that a review of existing market conditions substantiates the practicability and financial feasibility and development of on-site alternatives that also preserve the wetlands pond. This report concludes that Alternatives “B” and “C” and “D,” (these references being the labeling method used by the Applicant and the Town in their EIR documents) are all practicable and financially feasible, and readily available to both the applicant and any objective third party developer.³

It is important to note that the Preamble to the Guidelines states that

[i]f an alleged alternative is unreasonably expensive to the applicant, the alternative is not, 'practicable.'" Guidelines Preamble, "Economic Factors", 45 Federal Register 85343 (December 24, 1980). Therefore, to the extent that the individual homeowners and small businesses may typically be relevant consideration in determining what constitutes a practicable alternative. It is important to emphasize, however, that it is not a particular Applicant's financial standing that is the primary consideration for determining practicability, but rather characteristics of the project and what constitutes a reasonable expense for these projects that are most relevant to practicability determinations. [Emphasis added].

In addition, per 40 CFR 230.12(a)(3)(iv):

The burden of proof to demonstrate compliance with the Guidelines rests with the applicant; where insufficient information is provided to determine compliance, the Guidelines require that no permit be issued. [Emphasis added].⁴

And as explained in *The Federal Wetland Permitting Program: Avoidance And Minimization Requirements* by the Environmental Law Institute, March 2008, authored by Sandra S. Nichols, Jared Thompson, and Jessica Wilkinson, with valuable guidance and review by Annie Brock, James McElfish, and Bruce Myers;

² *Wetlands, supra* note 6. 294-295, *Yocom, supra* note 4, at 5.

³ See attached; *The Corte Madera Inn Market Study & Financial Feasibility Evaluation*, prepared by Maurice H. Bennett, manager of RHSW, LLC.

⁴ Quote from *Memorandum to the Field: Guidance on Flexibility of the 404(b)(1) Guidelines and Mitigation Banking* (Aug. 23, 1993 – Dec. 31, 1998, Department of the Army and Environmental Protection Agency).

Under *b. Feasibility* they state

Another key phrase in the definition of practicability (“available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purposes”⁵) is “capable of being done,” which the EPA refers to as “feasibility.” Federal policy has established that an applicant’s unwillingness—or in some cases inability—to pursue an alternative does not render it infeasible. [Emphasis added]

And under *c. Cost* they state

The mere fact that an alternative may cost more does not necessarily mean it is not practicable⁶

The alternatives considered are unacceptably narrow under the Guidelines.

In the RWQCB comment letter to the Town, regarding the 2015-2016 DEIR, it stated

Because the EIR only evaluates one alternative that avoids filling the pond and does not indicate that it will be implemented moving forward, the only permittable alternative (i.e., the LEDPA) may not have been included in the EIR. To rectify this situation, we recommend evaluating additional alternatives that avoid filling the pond, including, but not limited to: (1) renovating the existing hotel; (2) using a multi-story garage and shifting the position of the hotel to avoid the pond; (3) reducing the number of units to reduce the footprint of the hotel thereby avoiding the pond; (4) altering the types of rooms offered by the hotel to reduce the footprint thereby avoiding the pond; and (5) eliminating or reducing the size of some of the amenities offered by the hotel.

We fully support the RWQCB’s comment. It clearly notes the requirements of the 404(b)(1) Guidelines, which the Applicant has continued to ignore for more than three years. In particular, the applicant has refused to evaluate the “no project” alternative or a renovation of the existing hotel alternative, which is not only required under federal regulations but under the California Environmental Quality Act (CEQA), as well.

As published in *The Federal Wetland Permitting Program: Avoidance And Minimization Requirements* by the Environmental Law Institute, March 2008, authored by Sandra S. Nichols, Jared Thompson, and Jessica Wilkinson, with valuable guidance and review by Annie Brock, James McElfish, and Bruce Myers;

Under *1. Project Purpose, a. Burden of Proof*, it states

In a 1988 report on the § 404 program, the Government Accounting Office explained the concern that the Corps Districts were simply accepting project purposes asserted by

⁵ 40 CFR 230.10(a)(2)

⁶ RGL 93-02 Guidance on Flexibility at 3(a)(iii-v)

applicants without making the required independent finding.⁷ In an effort to establish clarity, EPA requested elevation of several applications, calling the problem of the Corps' failure to independently verify the information and analysis presented by § 404 permit applicants one of national concern. "We are concerned by matters of interpretation of the Guidelines... and the potential for site specific and cumulative environmental impacts as well as impacts on the integrity of the Section 404 program," EPA stated in the Old Cutler Bay elevation request.⁸

This concern was similarly expressed in the North Fork of the Hughes River elevation request.⁹ The EPA asserted that by relying on the applicant's alternatives analysis, the Corps had unnecessarily limited the scope of practicable alternatives that could meet the project purpose.¹⁰

The Applicant's failure to honestly assess the full range of practicable alternatives required is grounds for RWQCB to reject the Application.

Requirements to determine the LEDPA in evaluation Project Alternatives

The fundamental task before RWQCB is to determine the least environmentally damaging practicable alternative ("LEDPA") requirement in reviewing the application to fill the wetlands pond. The importance of this requirement cannot be overstated. It is our contention that the applicant's preferred proposal is not the LEDPA and that their conclusions regarding Alternative 2, which preserves the wetland pond, are incorrect because they are based on outdated and erroneous data, assumptions and analysis methodologies.

As noted by John Schulz, *The Steepest Hurdle in Obtaining A Clean Water Act Section 404 Permit: Complying with EPA's 404(b)(1) Guidelines' Least Environmentally Damaging Practicable Alternative Requirement*, (Exhibit 20) it states

An applicant for a 404 permit must demonstrate to the Corps that, among other things, the proposed project is the least environmentally damaging practicable alternative ("LEDPA") to achieve the project's purpose.¹¹

Further,

The 404(b)(1) Guidelines establish four prerequisites to approval, one of which, the basis for the LEDPA requirement, requires that there are no practicable alternatives to the

⁷ Government Accounting Office, RCED-88-10, Wetlands: Corps of Engineers Administration of Section 404 Permit Program, 26 (July 1988).

⁸ Old Cutler Elevation Request.

⁹ North Fork of Hughes River Army Response; Petro Star/Port Valdez Guidance, Hartz Mountain HQUSACE Findings (July 25, 1989).

¹⁰ Id.

¹¹ *The Steepest Hurdle in Obtaining A Clean Water Act Section 404 Permit: Complying with EPA's 404(b)(1) Guidelines' Least Environmentally Damaging Practicable Alternative Requirement*, 2005, John Schulz, B.A. Brigham Young University; J.D. University of California, Davis.

*proposed discharge that would have a less adverse effect on the aquatic environment.¹² Noncompliance with this requirement is a sufficient basis for the Corps to deny the project permit.¹³ The **LEDPA** determination is thus most important of the four prerequisites for determining compliance with the Guidelines.*

And under *III. LEDPA DETERMINATION* it states

*The **LEDPA** requirement is an attempt to avoid environmental impacts instead of mitigating them; "if destruction of an area of water of the United States may be avoided, it should be avoided."¹⁴ The Corps may only approve a project that is the **LEDPA**.¹⁵*

And

The alternatives analysis must be fair, balanced, and objective, "and not used to provide a rationalization for the applicant's preferred result."¹⁶ The applicant bears the burden of demonstrating to the Corps that no less environmentally damaging practicable alternative is available and that the project complies with the 404(b)(1) Guidelines.¹⁷

In this case, the Applicant has taken the opposite approach, adamantly refusing to make any changes to his preferred proposal, or to consider any less environmentally destructive alternatives, and generally flouting the authority of local, state and federal regulations.

It is our understanding that under 40 C.F.R. Section 230.10(a), "if destruction of an area of water of the United States may be avoided, it should be avoided,"¹⁸ and that The Corps may only approve a project that is the LEDPA,¹⁹ and that the LEDPA must be both practicable and the least environmentally damaging. The LEDPA's purpose is "avoiding significant impacts to the aquatic resources and not necessarily providing either the optimal project location or the highest and best property use."²⁰

¹² 40 C.F.R. § 230.10(a) (2005).

¹³ William Want, Law of Wetlands Regulation (6-24 (1989) 6-24. See Yocom

¹⁴ Fed. Reg. 85336, 85340 (Dec. 24, 1980);

¹⁵ *Appropriate Level of Analysis*, *supra* note 8, at 1; see also 40 C.F.R. §230.12(a)(3)(i) (2005).

¹⁶ Hartz Mountain

¹⁷ 40 CFR 230.12 (a)(3)(iv).

¹⁸ 45 Fed. Reg. 85336, 85340 (Dec. 24, 1980); see also 45 Fed. Reg. 85336, 85340 (Dec. 24, 1980); U.S. Army Corps of Engineers, *HQUSACE Review and Findings, Old Cutler Bay Permit 404(q) Elevation* (1990) 4 [hereinafter *Old Cutler*], at 5; U.S. Army Corps of Engineers, U.S. Army Corps of Engineers, *Plantation Landing Permit Elevation Decision* (1989) 2 [hereinafter *Plantation Landing*]; Yocom et al, *Protection Through Impact Avoidance: A discussion of the 404(b)(1) Alternatives Analysis, Wetlands: Volume 9, No. 21 1989*, by Thomas G. Yocom, Robert A Leidy and Clyde A Morris [hereinafter *Wetlands*].at 286.

¹⁹ U.S. EPA and U.S. Army Corps of Engineers, Memorandum to the Field, *Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements* (Aug. 23, 1993) 2, 3 [hereinafter *Appropriate Level of Analysis*], at 1; see also 40 C.F.R. §230.12(a)(3)(i) (2005).

²⁰ Yocom et al., *supra* note 3, at 283,295, and *Appropriate Level of Analysis*, *supra* note 4. The Corps has stated that the LEDPA determination "clearly is intended to discourage unnecessary filling or degradation of wetlands...." *Plantation Landing*

Similarly, “Making money” or “increasing a tax base”... are further examples of inappropriate basic project purposes under the Guidelines.²¹ I only bring this to your attention because these have been the predominant arguments that the applicant has made to the Town of Corte Madera, the Army Corps and RWQCB to gain approval.

Finally, according to Yocom, et al (Exhibit 21),

*There are instances where a “no-project” or “no-action” alternative may be considered a practicable means of achieving the basic project purpose.*²²

We believe the courts would find this to be true in this instance. As we have noted before, using these erroneous definitions of project purpose, based upon “capitalizing on demand” is not allowed as a condition to be granted a permit to fill the wetlands. “Capitalizing on demand,” or “maximizing returns” or meeting “requisite returns” (all these phrases in quotations are found in the Application) are not allowable considerations under the 404(b)(1) Guidelines. In fact, they are expressly prohibited from being considered in defining a project’s purpose and for permit approval.

The Applicant has referenced local agency documents such as the EIRs of record in its Application, but has not presented them to RWQCB, which you should be aware of. In addition to the information submitted by the Applicant, two other on-site alternatives were reviewed, known as “Alternative 2” in the project Draft EIR (Exhibits 24a through 24g), and “Alternative 4” in the project Revised EIR (Exhibits 24a through 24g).

Mitigation is not a consideration in determining the LEDPA

RWQCB should not consider the proposed mitigation for a project in determining the LEDPA.²³ It is our understanding that the courts have upheld this EPA policy to conduct its alternatives analysis without considering mitigation measures.²⁴

In this regard, please note that as stated in 40 CFR. § 230.10(a)(3),

*If the activity associated with a discharge is proposed for a “special aquatic site’ and 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.** [Emphasis added]*

It is our understanding that the alternatives analysis must be fair, balanced, and objective, "and not used to provide a rationalization for the applicant's preferred result (i.e., that no practicable

²¹ *Wetlands, supra*

²² *Wetlands, supra*

²³ 33 U.S.C. § 1344(a). The goal of the Section 404 regulatory program is to contribute to the national goal of no net loss of wetlands. U.S. EPA and U.S. Army Corps of Engineers, *Memorandum of Agreement (MOA); Clean Water Act Section 404(b)(1) Guidelines; Correction* (1990), 55 Fed. Reg. 9210, 9211 [hereinafter *EPA/ Corps MOA (1990)*]

²⁴ *Alameda Water and Sanitation Dist.*, 930 F.Supp. at 492.

alternatives exist).”²⁵ And, that “The applicant bears the burden of demonstrating to RWQCB that no less environmentally damaging practicable alternative is available and that the project complies with the 404(b)(1) Guidelines.”²⁶

Region IX EPA guidance on the issue of project alternatives is extensive.²⁷ EPA guidance suggests that under the “practicability presumption,” RWQCB will presume that practicable alternatives exist where the project is non-water dependent and will cause a discharge in a special aquatic site.”²⁸ The presumption is intended to “increase the burden on an applicant for a non-water dependent activity to demonstrate that no practicable alternative exists to his proposed discharge in a [SAS].”²⁹

Further, the Corps has stated that the

*Army Corps of Engineers is serious about protecting water of the United States, including wetlands, from unnecessary and avoidable loss... Further, the Corps should inform developers that special aquatic sites are not preferred sites for development and that non-water dependent activities will generally be discouraged in accordance with the Guidelines.*³⁰ *To rebut this [practicability] presumption and obtain approval for the proposed alternative, the applicant must show by clear and convincing evidence that there are no practicable alternatives which will not cause a discharge into a SAS.*³¹ *This presumption is intended to implement the Corps' policy that "from a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered" by the Guidelines. The presumption is intended to "increase the burden on an applicant for a non-water dependent activity to demonstrate that no practicable alternative exists to his proposed discharge in a [SAS]."*³² [Emphasis added]

Finally, it is our understanding that “any project that achieves the basic project purpose practicably should be considered.”³³ Under this guidance, Alternative 2 must be considered as the LEDPA. This is particularly the case in this instance where the Applicant’s financial feasibility analysis is so flawed (see sections of this comment letter, below). And, where the project proposed by the applicant is not the LEDPA, “the availability of a LEDPA, where it is

²⁵ U.S. Army Corps of Engineers, *Permit Elevation, Hartz Mountain Development Corporation* (1989) 2 [hereinafter *Hartz Mountain*].

²⁶ *Old Cutler, supra*; *Plantation Landing, supra* at 7; *Yocom, supra* at 283.

²⁷ *Wetlands, supra*

²⁸ 40 C.F.R. § 230.10(a)(3) (2005); 45 Fed. Reg. 85339. This presumption is intended to avoid impacts to the extent practicable. *EPA/Corps MOA (1990)*,

²⁹ 40 C.F.R. § 230.1(d) (2005).

³⁰ *Hartz Mountain, supra*

³¹ *Plantation Landing, supra* note 3, at 9, 12, 13-14; 45 Fed. Reg. 85336, 85339 (Dec. 24, 1980); see Department of the Army, South Pacific Division, Corps of Engineers *Review of Sundance Plaza Project Permit Denial* (Feb. 5, 2001), 1, 8.

³² John Schulz, *The Steepest Hurdle in Obtaining A Clean Water Act Section 404 Permit: Complying with EPA’s 404(b)(1) Guidelines’ Least Environmentally Damaging Practicable Alternative Requirement*, 5. Practicability Presumption.

³³ *Wetlands, supra*, at 294

truly available, is an adequate basis for EPA's determination that unacceptable adverse environmental effects will result."³⁴

Avoidance mitigation

As published in *The Federal Wetland Permitting Program: Avoidance And Minimization Requirements* by the Environmental Law Institute, March 2008, authored by Sandra S. Nichols, Jared Thompson, and Jessica Wilkinson, with valuable guidance and review by Annie Brock, James McElfish, and Bruce Myers (Exhibit 22);

Under *C. Information Specific to Alternatives Analysis or Mitigation Sequencing; Avoidance Mitigation* they note that

Avoidance mitigation best occurs in the planning and design stages of a project by configuring the site layout to avoid impacting an aquatic area or areas or by not implementing certain parts of an action. Project proponents should configure the proposed development or facility around natural flood plains and aquatic resources

Further, under *2. EPA's Guidelines for Permit Applications* they explain that

*For special aquatic sites such as wetlands, however, the Guidelines propose a more difficult test for avoidance with two presumptions. For proposed discharges to special aquatic sites **there is a presumption that an alternative site that is not a special aquatic site exists and a presumption that such a site will result in less adverse environmental impacts on the aquatic ecosystem.***³⁵ [Emphasis added].

And per A. *Avoidance: The Alternatives Analysis*

*The presumptions hold unless the applicant proves otherwise.*²⁶ *The standards for overcoming these presumptions and the other components of the alternatives analysis have been clarified by numerous administrative and legal decisions.*

And under *2. Practicability the ELI study states*

*"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.**"*³⁶

And

³⁴ See 56 Fed. Reg. 76-02 (Jan. 2, 1991) (stating that one of the reasons EPA denied the proposed Two Forks dam was because it would cause unacceptable loss and damage; the damage the dam would cause was unacceptable because the damage was avoidable. The damage was avoidable because the proposed project was not the LEDPA).

³⁵ 40 CFR 230.10(a)(3)

³⁶ 40 CFR 230.10

*In the Petro Star elevation request, EPA was concerned that a practicable alternative had been neglected.³⁷ The Army affirmed that the Corps was required to consider all **practicable** alternatives and not limit its analysis based on the applicant's assertion that the proposed project was more attractive.³⁸*

The Applicant has failed to adequately counter these presumptions and case law or adequately address these requirements of the Guidelines.

Re: Summary: Project Purpose

The On-Site Alternatives Analysis Final with Figures and Attachment; Summary, states

These alternatives were examined against the project basic purpose, which is to develop a viable hotel facility capable of capitalizing on the demand for central Marin hotel space.

As we continue to point out, the Applicant's definition of the project's purpose is contrary to both the spirit and the letter of the 404(b)(1) Guidelines. The Applicant's stated purposes are categorically disallowed under the Guidelines. Please see our General Comment letter of January 13, 2017, pages 4 through 6, for a complete discussion of our objections. The accuracy of the project purpose remains paramount. The Applicant is again inferring that his definition of project purpose, which includes maximizing profits and capitalizing on market demand justifies the goals and conclusions of their analysis. It is the duty of state and federal agencies to determine and correct the project purpose, and to inform the Applicant of that determination.

In this instance, that determination is paramount and must be made at the outset because the entirety of the Applicant's on-site alternatives analysis and their conclusions on what is or is not practicable rests on their erroneous and self-serving definition.

To reiterate, the proper project purpose for the Corte Madera Inn Rebuild is "to provide commercial hotel rooms in southern Marin County, CA.

Re: D. Current Conditions

Our comment here is that the physical condition of the existing hotel and the lack of competitive improvements over the years is the result of personal investment and management decisions made by the owner, which have no bearing whatsoever on the determination of the LEDPA or the permit decision before RWQCB. The Guidelines specifically ignore an applicant's ability to "cry poor" in order to obtain a permit to fill a wetland.

Re: Alternative 1, 2. Analysis

The Applicant introduces other benefits to their preferred alternative in an attempt to sway the RWQCB decision. These include noting that their goals are to improve safety conditions at the

³⁷ Petro Star/Port Valdez Elevation

³⁸ Petro Star/Port Valdez Guidance

vehicle entrance and others. What they fail to note is that all of the alternatives offer all of these same improvements and considerations.

Re: Alternative 1, Table I

As we will discuss in detail below, figures used in these calculations throughout the Application and Analysis, are incorrect, based on outdated data and faulty prognostications about average room rates, occupancy rates, and overall revenues, and show “costs” that may not even exist.

For example, the table shows a land cost of \$11 million. However, there is no evidence provided for that number other than the consultant’s and owner’s subjective opinions (e.g., no certified appraisal), and there is no disclosure of whether or not this is an actual cost to the owner, who may own the property free and clear at this point in time. In addition, the “inflation total” shown is based on arbitrary opinion. As we’ve noted in our letter to the Army Corps, in June of 2016, (Exhibit 9) the concept of presenting “value” in the form of “Value Less Land Development Costs” is extremely novel and so outside of any methodology in the real estate finance profession that it renders this outcome meaningless.

However, even if one accepted this methodology, which we do not, if we substitute the actual, current average daily room rental rates and overall operating revenues we show below, *every alternative produces a net positive and profitable result.*

This is important with reference to the practicability of Alternative 2, which we believe to clearly be the LEDPA.

The Applicant’s improper “project purpose” distorts conclusions regarding practicable alternatives

The Applicant’s claim that their preferred alternative, Alternative 1, is the only practicable alternative is solely based on the self-serving definition put forth in their analysis. The Applicant supports this argument by stating

Alternative 1 is practicable. It can achieve the overall project basic purpose. It is also economically feasible as the revenue/value from the number of units exceeds (barely) development costs.

And that

Alternative 2 is not practicable. It does not meet the project basic purpose as the number of rooms proposed will not generate sufficient revenue to offset construction costs. As well, the single -branding (also a result of the limited number of rooms) reduces marketability, sustainability, and potential values/ revenues significantly. As a result, it is not practicable as development costs exceed value/ revenues.

These statements are incorrect because (1) they rely on the Applicant’s incorrect definition of project purpose, and (2) on the data and analysis and economic forecasting provided by PFK, which is without question outdated and inaccurate.

In the opinion of several successful hotel developer/operators CVP interviewed in doing research to compose our comment letters, to state that only a dual-branded, 174 room, Marriott hotel would be “barely” profitable at the subject location was considered so absurd as to be laughable.

As evidenced in our comments to the Army Corps of Engineers, in June of 2016, other comment letters, and the *Best Western Corte Madera Inn Redevelopment: Market Study & Financial Feasibility Evaluation* by RHSW, LLC (Exhibit 14), the hotel market is so strong in southern Marin today that a new hotel of almost any reasonable type or size would only be unprofitable if the owner / developer (in the words of a hotel owner/operator we interviewed) “had no idea how to run a hotel.”

This is particularly true of a hotel on the subject site, because its location is far superior to any competition now or in the future.

The subject site is unique

No other hotel location in southern Marin has a highway on ramp / off ramp at its doorstep, is adjacent to the two biggest and most vibrant shopping centers in the County (which the Town plans to connect with a pedestrian walkway over highway 101), is perfectly flat and buildable, is within walking distance of every conceivable amenity, has un-matched highway visibility, and is so fully supported by the Town and local agencies.

In addition, it is important to note that the Applicant’s claim that the Town is determined to rigidly enforce height limits, setback limits and other such discretionary planning restrictions is false. These types of minor adjustments and accommodations can be granted under a variance without a zoning change or General Plan Amendment. And, in this case, where the Town is committed to seeing that the subject property remains a hotel use and only as hotel use, for the Applicant to claim that the Town will not accept adjustments to support anything but Alternative 1, is unfounded.

In the many years this project has been going through the public review process, it remains tremendous burden on the public to have to go to such extraordinary ends to counter these kinds of falsehoods this Applicant continues to promote. We pray that the RWQCB will act in the public’s best interest and not be swayed by the Applicant’s unsupported and self-serving claims.

Industry standards for evaluating development and investment opportunity

Determining development opportunity sites

The basis of any sound methodology to determine what represents an investment opportunity is the potential projected return on investment, combined with other considerations about the market and general economics of the hotel industry in the selected region. That return is significantly affected by the cost of funds, income tax considerations, public agency requirements, and most importantly the terms of purchase of the asset. In addition, supportive public improvements, local planning and regional government projects or incentives in certain locations might impact a developer’s investment decisions.

The evaluation of any investment is based on a fundamental value/return equation;

$$I / V = R$$

Net operating income (“I”) divided by value or price (“V”) equals capitalization rate (“R”)

This equation offers a way of “valuing” different investments apple to apples. In its simplest form, determining the capitalization rate or “cap rate” of an investment provides a way for the investor to compare one particular investment (e.g., in a new hotel development) with other investments competing for his capital (stocks, bonds, etc.). This methodology is irrefutable and the mostly widely used method in the industry.

The net operating income is, of course, tied to the operating costs of a particular hotel and the average room rental rates and overall net and gross revenues of the operations. It is therefore extremely important that the revenue assumptions used are accurate and based on actual statistical data, not casual observation. However, the accuracy of this data and its applicability to any one individual case study is absolutely critical.

The success or failure, or evaluation of investment returns and financial feasibility of a real estate investment is extremely specific in each case. Accordingly, there are no generic “returns” that can be calculated unless a plethora of facts are considered.

This considered, the data provided by the Applicant is extremely broad brush and significantly understates the potential operating revenues of a hotel at the Corte Madera Inn location and is therefore inadequate to make any reasonable determination regarding financial feasibility from data provided by the Applicant or the generic methodologies used to evaluate it.

Value / purchase price is typically the simplest thing to determine. However, in this instance that is not the case because the Applicant has owned the property for a long time and has not provided any information on their cost basis in the property. Their equity may be 100% if there is no debt.

Without knowing a developer’s true cost basis (equity) there is no way to honestly evaluate their return on investment or financial feasibility. This is a major flaw in the Applicant’s financial projections that they have failed to disclose.

That aside, overly simplistic, plug-in numbers do not help evaluate financial feasibility. In fact, every developer will have widely varying requirements. In addition the terms of purchase are an extremely important factor in determining actual cash on cash return on investment or return on risk capital, and therefore the “practicability” of a venture.

For example, if one seller wants \$1 million dollars all cash at closing for a property, while another seller with an equally attractive opportunity wants \$1 million for his property but is offering to “take back” a low interest rate loan, will also accept a second deed on another property in lieu of a down payment (no money down, upfront), and offers 20 years financing,

this will greatly impact any return on investment calculation. In fact, with the second option where the investor has no cash in the deal, the cash on cash return on investment and the internal rate of return (“IRR” - a term we will look at more closely) cannot even be calculated.

So, if the cost of developing or renovating an alternative of “x” number of rooms is the same and the projected room rental rates are the same and the purchase price is the same, then the transaction with better terms or greater financial leverage will produce the greatest return on investment.

The most fundamental principle of real estate is the principle of highest and best use. The Appraisal Institute defines “highest and best use” as

The reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, financially feasible, and that results in the highest value.

This implies that development will generally follow what the highest and best use of a particular property is at any given time, all factors considered. In this instance case of the Corte Madera Inn property, the highest and best use at this time is for a hotel of almost any size and configuration. The market demand and quality of the location will support a wide variety of alternatives. The Town of Corte Madera has also made it clear that a hotel use is the only use they will approve on the subject property.

Industry standards for evaluating return on investment

The PKF Market Analysis and Financial Analysis are the kind of brochure-ware that marketing firms promote to potential investors, in the absence of real analysis or hands on knowledge of how professional real estate investors evaluate “opportunities.” For example, PKF offers detailed comments on one of those investment analysis tools called Internal Rate of Return (IRR)

IRR is defined as

The discount rate at which the present value of future cash flow is equal to the initial investment.

Since that definition is as inscrutable as one can get, in simple terms it is a method of evaluating and comparing very specific aspects of investments that takes into account the timing of the cash investment requirements of that investment and the timing of the returns and other benefits that flow back to the investor.

For example, if one investment requires you to put up \$100,000 and promises to pay you back in ten years and pay you 10% interest in the meantime, by the end of ten years you’ll have made 10% per year (\$10,000 times 10 = \$100,000) in interest on your money. That is a simple 10% return on investment. However, if that \$100,000 investment can be put in over the first two years, and returns start to flow back to you, incrementally after four years, and there are tax advantages to doing that, and you are the beneficiary of accelerated depreciation write offs that benefit you as soon as the first year, and you are in a high tax bracket, the overall return on

investment benefits is indeed more complex, and in this case better than the first option. In fact, it is not unusual for an investment to appear to barely make a profit based on a simple return on investment calculation but make an enormous return using IRR. It all depends on the specific investment, the specific terms, and the specific investor's personal goals and financial situation. The permeations are almost infinite in their subtlety and complexity but it can have a dramatic impact on feasibility. But the calculation cannot be done generically, in advance, using abstract (and in the case of PKF) or forecasted numbers.

The factors involved in correctly analyzing financial feasibility based on return on investment are numerous

Some of the factors that are required to reasonably calculate return on investment and financial feasibility and therefore, practicability include are not limited to the following:

- Purchase price
- Loan to value used
- Debt to equity requirements
- All cash vs leveraged debt
- Term of long term financing in years
- Interest rate and terms of construction financing
- Interest rate and terms of “take out” permanent financing and whether it is fixed or adjustable or on a sliding scale.
- Refinancing options at stabilized operating revenues
- Terms of a purchase or redevelopment including cash requirements and debt availability
- The number and differing types of investor participants
- Preferred returns promised to different investor types
- Tax consequences for each of the investors, participants and partners
- Impacts of other assets pledged as collateral on cash requirements

This considered the sophisticated looking Financial Feasibility and IRR “analysis” presented by PKF is completely meaningless and there is no way to even address them. However, it is also dishonest and opaque in a way that hides the owner's actual investment return potential.

Their analysis pretends that all transactions, cash requirements, cash flows, leverage and other factors are the simplest possible and that the Applicant's “costs” for the land are actual costs. What is not disclosed is what is the developer's equity basis and tax basis in the property. Does he have debt on the project and if so, what are the costs associated? Can a buyer enter into a transaction using a tax free exchange? How much cash up front is required to invest in developing each of the alternatives? Would a developer who is not beholden to Marriott Corporation and interested in developing a hotel independently have significantly lower costs and better returns on investment?

All of this is critical to what is or is not practicable. None of it is factored into their analysis. However, even if we were to accept the PKF development costs and methodologies for a moment, their analysis still fails to provide any evidence that Alternative 2 is not the LEDPA.

Market demand and investment success is about more than just counting rooms or visitors

In point of fact, success in the hospitality industry, as in any other consumer services industry, is never simply a competition based on statistics, as the academic analysis by PKF suggests. The reason the Best Western Inn is losing its competitive edge is because like in any other business, new concepts and ideas and services continuously steal market share from their competitors. For example, laptop computers are now a commodity item. Most perform just as well as their competitors. So why then is there such loyalty to Apple and other top brands?

Similarly, with hotels and particularly in Marin County where uniqueness and innovation are so highly rewarded in retail, hospitality, dining and other service industries, developing a stale, generic hotel brand such as a Marriott Residence Inn or a Springhill Suites, or a Hilton Homestead Inn almost guarantees under-performance. Whereas, a unique, upscale hotel on the subject site, which not only preserved the pond but made it an asset and a showcase, would stand a much better chance of taking market share from competitors. This fatal flaw in the Applicant's approach permeates all aspects of their analysis and leads to their significant under estimation of the true revenue potential of the subject location. This has direct bearing on the practicability of an alternative that includes a smaller hotel that preserves the pond, such as Alternative 2.

An example of this is the fairly new Cavallo Point Lodge at Fort Baker. It has little competition in its niche, offers unique amenities (dramatically located on the Bay at the Golden Gate Bridge) and its pricing and high occupancy and overall operating revenues reflect that.

The PKF market analysis is extremely self-serving and incorrect

As we note throughout our comments is that the Applications financial analysis is deficient because of the outdated data it depends upon and the incorrect prognostications of the developer's consultant. For example, what is so bizarre about the PKF analysis of market demand is that it limits its comparative discussions (page 19) to only comparing the Marriott preferred proposal to a proposal by a competitor, the Hilton Corporation, as if this Applicant was about RQCB helping the developer decide about which company to do business with. The entire discussion presented has nothing to do with the 404(b)(1) Guidelines or the permit application process.

Again, on page 24 of the PKF Market Demand analysis, it shows ADR figures that are 38% lower than what current rental rate data actually shows. To further claim that a brand new hotel in the subject location, coming online in two years could not even command today's ADRs is nonsensical. Yet, it forms the foundation of the Applicant's entire argument about what is or is not practicable.

Recognizing this erroneous approach by PKF is significant because it is also applied to their arguments and financial projects used to claim that Alternative 2 is not practicable.

The industry standard for market data

As we noted in our comments on the *Alternatives Analysis Final with Figures/Off-Site Alternatives*, overall hotel operating revenues and market demand, since 2013, in Marin County

and particularly in the market of the subject property, have increased dramatically along with average room rental rates, and therefore have increased the potential development opportunities and the determination of what is practicable on the subject property.

Any professional analysis of market trends, operating revenues, and potential investment success needs to be grounded in definitive data. PKF is a marketing and economic forecasting firm and does not represent the industry standard for statistical resources. The accepted hotel industry standard is Smith Travel Services (“STR”). STR is not a consultant for hire. They are a fact based source for reliable data.

Confidential STR monthly and annual reports are based on actual data about room rental rates, operating revenues and expenses and overall profitability, submitted by its member hotel operators. It provides unbiased statistical of market health, market trends, and growth in each local market segment. Annual Reports by STR, the hotel industry statistical standard, show that the economic rebound over the past five years and the continued low interest rate environment has made many types of investments more feasible and attractive. The STR report for southern Marin, as of the end of November of 2016, shows an across the board increase in average room rental rates of more than 30% for hotels in the Marriott proposals market segment, and close to a **33% increase in average daily room rate (ADR)**.

STR data confirms the findings of the *Best Western Corte Madera Inn Redevelopment: Market Study & Financial Feasibility Evaluation* by RHSW, LLC.(Exhibit 14) and indicates that average room rates, occupancy rates, and overall revenues are even higher now than when that study was done in June of 2016 (approximately 2.5% higher). This means that the base ADR and RevPAR (average revenues) data used by PKF in the base study may be deficient by as much as 50%.

STR confirms the *Best Western Corte Madera Inn Redevelopment: Market Study & Financial Feasibility Evaluation* average daily room rate for the Marriott Courtyards Inn at Larkspur Landing. This property is arguably the best comp for evaluating the Applicant’s financial feasibility analysis. That said, what this shows is that the Applicant is asking RWQCB be to accept that a brand new Marriott residence Inn hotel at the subject location will only have an average room rental rate, projected for the next 5 years in the future of \$208 per night – more than 30% lower than the existing comparable suite at Larkspur Landing, a property which is almost two decades older. This makes no sense whatsoever.

Outdated financial data distorts the Applicant’s analysis conclusions

As we’ve noted, the Application relies on data and opinions provided by the PKF Consulting (referenced in the *Alternatives Analysis* as Attachment “A”). PKF Consulting based their entire financial analysis on data from the 2009 to late 2012 time period: a time when the national and local economy was still suffering from the worst financial crisis and recession in more than 80 years. Average rental rates and operating revenues from that period are outdated to the point of being valueless.

STR Reports show that average room rental rates and overall operating revenues have risen dramatically in the past five years. The Applicant is aware of this fact and PKF even acknowledges the beginnings of this trend in their data.

STR annual reports as of the end of November 2016 confirm that the data the PKF analysis presents (which is the basis of the Applicant's entire argument to support his preferred on-site alternative) is so skewed by historical events and so outdated that it should be disregarded. It fails to provide a realistic picture of the current hotel market in Marin and does not provide accurate information regarding the viability of either on-site or off-site alternatives and extinguishes the Applicant's arguments for why his preferred proposal is the only proposal that is feasible or practicable.

It is of great concern that the Applicant has relied on data that dramatically skews the overall operating revenues downward, far below what is achievable today. To an objective observer, the Applicant appears to be intentionally presenting PFK's skewed data and resultant financial pro forma in the *On-Site Alternatives Analysis*, in order to support a preposterous argument that the largest possible hotel to Marriott Corporation's exacting specifications, and fill in the wetlands as the only practicable alternative.

The *Best Western Corte Madera Inn Redevelopment: Market Study & Financial Feasibility Evaluation* by RHSW, LLC. (Exhibit 14), and current STR data shows that room rates and operating revenues are so strong at this time that almost any type and size of new hotel on the subject site (35 rooms or more) would likely be financially feasible and solidly profitable and therefore practicable, if managed correctly, including but not limited to renovating the existing hotel, adding on to the existing hotel, or building a smaller hotel, because the subject location is generally acknowledged as a triple "A" location and perhaps the best location in all of southern Marin.

Unless the Applicant is genuinely confused about the applicability of "market demand" as a determining factor under the 404(b)(1) Guidelines, this appears to be yet another attempt to approach the application review process on the Applicant's own terms and to their own benefit, while at the same time failing to actually address or submit the information, data and evidence to support their preferred alternative. In reality, evaluating market demand is up to the Applicant and his investors and bankers, based on their estimation of the quality of the investment opportunity.

It is of great concern to us, however, that the Applicant appears to be doing this intentionally in the hope that agencies such as RWQCB will not be sophisticated enough to properly analyze or question the Applicant's financial modeling or its conclusions.

In doing a recent check on the average room rental rates noted in the *Best Western Corte Madera Inn Redevelopment: Market Study & Financial Feasibility Evaluation* by RHSW, LLC., and looking at current market data provided by STR we find an average 30 percent increase across the boards in both room rates and profitability for hotels in the Applicant's market area in the past five years. In fact, the manager of a southern Marin hotel that would be direct competitor to any new or renovated hotel at the subject location, told CVP that the past year has been the "best year ever" for hotels in Marin.

Comment based on professional experience

I have been in active the fields of design, site planning, architecture, construction, and the real estate brokerage, investment and development industry for more than 45 years and hold and have held multiples licenses and certifications as evidence of that expertise (Exhibit 16). In that time I have designed, built and consulted on hundreds of projects: residential, institutional and commercial. I have acted as managing partner and principle in numerous of development and investment ventures.

It is my professional opinion that a qualified architect could quite easily design an attractive and marketable 140 to 150 room hotel on the subject site that would be financially feasible and practicable, while still retaining the wetlands pond and wildlife habitat area. Speaking candidly, the Applicant and PFK's arguments appear to be a transparent ruse to deceive the unsuspecting public in order to maximize the Applicant's personal financial gain. There is nothing illegal about that, however, it fails to address the purposes of the 404(b)(1) Guidelines and the Clean Water Act.

CVP has interviewed a number of successful, local hotel developer / operators, who have all confirmed our opinions on what is and is not financial feasible and therefore practicable on the subject site. In fact, one such developer has submitted a letter as evidence of their desire to purchase the property at its fair market, appraised value, to do just that (see Exhibit 16a).

Marriott Corporation's Comment letter

The Applicant has argued that constructing anything less than their preferred option (and filling in the pond), is not financially feasible. In their documents submitted to the Town of Corte Madera as part of their EIR, and incorporated in their Application by reference, they cite a letter from Marriott Corporation as evidence of financial feasibility, and therefore practicability, and their need to build one specific size and type of hotel that meets the needs of Marriott (Exhibit 19). However, the letter from Marriott Corporation does not offer an opinion of financial feasibility. The letter from Marriott Corporation simply states that if the smaller hotel is built (for Marriott), it would probably be a Residence Inn, instead of a dual-branded hotel with a Marriott Springhill Suites. But as we've shown, building a hotel to Marriott's specifications or recommendations is inadmissible as evidence for approval of a permit under the 404(b)(1) Guidelines. There are literally dozens of competitors to Marriott in the subject market area, which the Applicant has failed to consider, that would not require the same restrictions or design parameters. The Applicant provides no evidence that they have considered those alternatives in good faith.

The *Marin Lodging Market Survey & Financial Feasibility Evaluation* (Exhibit 5), and the market updates and related information we've provided based on STR Reports demonstrate that there is no evidence in the record (as required),³⁹ which would lead an objective reviewer to conclude that a different hotel design on the subject site would not be practicable.

³⁹ 40 CFR 230.12(a)(3)(iv).

The property is for sale except to qualified buyers

The property is listed as for sale with the real estate firm of Newmark, Cornish & Carey. They describe the property as an “Extremely Rare Central Marin Redevelopment Opportunity” (sales brochure, attached as (Exhibit 17). They have not indicated an asking price.

Qualified, local hotel developers / buyers, who wish to purchase the property and build a unique, new hotel of no more than 150 rooms, which would include the preservation and enhancement of the wetlands and the wildlife habitat, have contacted the representing brokers and inquired about receiving information packages in order to submit purchase offers and have been told that the owner is not accepting offers from hotel developers.

Although it is not unusual for a land owner to list property for sale, just to find out what kind of offers might be submitted, it is certainly unusual for a land owner to intentionally discourage offers from the most likely buyers. This is particularly true for this property. Since the inception of this project, the applicant has taken an “all or nothing” approach to gain approvals from the Town of Corte Madera. Throughout that process the developer has stated that unless they receive approval for their preferred project (currently 174 rooms), they will not build anything at all and sell it to the highest bidder. They have threatened that this highest bidder will likely be a car dealership, retail stores, or an office complex. None of these uses are considered desirable by the Town. In fact, Town Council members have said, repeatedly, that they will not approve retail, housing, car dealerships for that site and will only look favorably on a hotel as the primary use of the site.

It makes little sense then for the applicant to refuse offers from hotel operators and hotel developers, when those buyers would very likely be the highest bidders, again, unless the applicant is trying to manufacture “evidence” to present to the Town and the Corps, to substantiate their claim that their own preferred project is the only alternative that is financially feasible and therefore practicable.

In my professional opinion I can only surmise that the Applicant’s listing of the property for sale, while refusing to accept offers from bona fide buyers, appears to be a ruse to be able to contend (without perjuring themselves) that there are no buyers interested in their property, in order to argue that unless their preferred alternative, which includes filling the pond, is approved (the Marriott dual branded hotels) the hotel and the wetlands will continue to deteriorate.

DISCUSSION OF ALTERNATIVES ANALYSIS

Re: Introduction

The *On-Site Alternatives Analysis Final with Figures and Attachment; Introduction*, states

The off-site portion of the alternatives analysis was previously completed and has been reviewed by Corps of Engineers (Corps) and Regional Water Quality Control Board (RWQCB) staff. This on-site analysis incorporates and modifies portions of the off-site analysis and includes a new analysis of on -site alternatives.

In plain terms, this is just an unadulterated lie that appears to be designed to deceive the public and the local agency into believing this project has the approvals it needs to move forward and an attempt to intimidate RWQCB into believing that the Corps has already accepted the analysis. In point of fact, however, this nor any other alternatives analysis has *ever* been submitted much less reviewed by the Corps (or by RWQCB). That it has not been shown to the Army Corps is evidenced by the fact that its absence is the very reason the Corps has placed the project on inactive status.

Re: PART II. Project description and basis purpose

The On-Site Alternatives Analysis Final with Figures and Attachments B. Basic Purpose states

Both reports [by PFK] strongly recommended dual -branding as it will allow the hotel to: (1) take advantage of the variety of demand present in this region; that is, to accommodate both short -and long -term stays; and (2) capitalize on this demand and capture the higher value revenues that accompany these.

Here again, the Applicant justifies their conclusions based on erroneous reasoning about what constitutes “practicable” under the 404(b)(1) Guidelines. To “take advantage of... demand” or “capitalize on this demand and capture higher value revenues” are not conditions for approval of a permit to fill a wetland. In fact, as we have pointed out, they are expressly prohibited from consideration.

This also exposes the obviously conscious decision by the Applicant to use outdated information on average room rates, occupancy rates, and overall revenues, because the distortions of those outdated figures support his ability to “cry poor” and conclude that the only alternative that is viable is the same one the Applicant has been promoting for more than a decade.

The On-Site Alternatives Analysis Final with Figures and Attachments B. Project Demand

We have commented on the Applicant’s incorrect assertions about market demands in our previous comment letters. Those comments are hereby incorporated herein by reference.

As we’ve noted, both the *Alternatives Analysis Final with Figures* and the *On-Site Alternatives Analysis Final with Figures and Attachments*, the Applicant has based its practicability arguments on evidence of “market demand” for his preferred alternative. Although there is no relationship whatsoever between market demand and the financial success of a particular development proposal (in any economic times or market some projects will fail and some will succeed), as we’ve noted above, recent data regarding Marin’s vibrant economic environment, with high and rapidly rising room rental rates, increases the likelihood that a great variety of hotel types and sizes have a strong chance of being financially feasible on the subject site.

Re: PART III. On-site Alternatives Analysis Final with Figures and Attachments A. Practicability

We have commented on the Applicant's incorrect assertions about market demands in our previous comment letters. Those comments are hereby incorporated herein by reference. For more citations, data and analysis on practicable project alternatives please see our letter to Sahrye Cohen, Permit Manager at the Army Corps of Engineers, dated June 16, 2016 and attached as Exhibit 9.

CONCLUSION

Financially feasible and practicable alternatives exist, which provide for the redevelopment of the existing Best Western Corte Madera Inn hotel and the preservation of the Edgewater pond. Therefore, with all of the information presented in this comment considered, we respectfully request that the Army Corps deny the applicant a permit to fill in the special aquatic site, known as Edgewater Pond, located in Corte Madera, CA, because it is not the LEDPA and practicable alternatives exist that qualify as the LEDPA.

Thank you for the opportunity to submit our comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bob Silvestri', with a stylized flourish at the end.

Bob Silvestri
President
Community Venture Partners, Inc.

LIST OF ATTACHED EXHIBITS

- 1-Exhibit I - E.Yates Comment Letter 01-20-2015
- 2-Exhibit II - E.Yates Comment Letter 08-19-2015
- 3-Exhibit III - E.Yates Comment Letter 12-19-2015
- 4-Exhibit IV - 2-9-16 ACR_comment_BCNH_CorteMadera_20160209 (2)
- 5-Exhibit V - Corte Madera Inn wetland & aquatic wildlife habitat Baye 021516
- 6-Exhibit VI - G.R. Kamman Hydrology comments_2-25-16
- 8-Exhibit VIII - Xavier Fernandez SF Bay Regional Water Quality Control Board Email
- 9-Exhibit IX - 061616 - CVP - Army Corps Public Notice 2000-255330N comment letter
- 10-Exhibit X - 061616 - CVP - Army Corps Comment Exhibits
- 11-Exhibit XI - 061616 M. Graf Comment Letter and Exhibits to CVP Letter
- 12-Exhibit XII-Corte Madera Inn Recirc EIR memo wigeongrass SAV & wetlands Baye 123116
- 13-Exhibit XIII - 7.16 Audubon Canyon Ranch_comment_BCNH_CorteMadera_RDEIR_20161209
- 14-Exhibit XIV- Market Study & Financial Feasibility Evaluation by RHSW LLC
- 15-Exhibit XV - SF Bay Regional Water Quality Control Board Letter
- 16-Exhibit XVI - Robert Silvestri CV
- 16a-Exhibit XVII – Marin Hotel Group Letter
- 17-Exhibit XVII - 56-60MaderaBlvd Broker Brochure
- 18-Exhibit XVIII -TheRail_May2016_Web
- 19-Exhibit IXX - Marriott Corporation Letter
- 20-Exhibit XX-Journal of Environmental Law and Policy - Jon Schutz
- 21-Exhibit XXI -Yocum - Wetlands protection through impact avoidance
- 22-Exhibit XXIII -Evironmental Law Institute 2008
- 24-Exhibit 24a CorteMaderaInn_DEIRandAPPENDICES
- 24-Exhibit 24b Corte Madera Inn Draft EIR Alternatives
- 24-Exhibit 24c Corte Madera Inn REIR Alternative
- 24-Exhibit 24d November 2014 DEIR Corte Madera Inn EIR and APPENDICES_201411221423255752
- 24-Exhibit 24e November 2015 FINAL CorteMaderaInn_FEIR
- 24-Exhibit 24f November 2016 Corte Madera Inn RDEIR2_WITH Appendices_FINAL
- 24-Exhibit 24g CorteMadera Inn Rebuild_RDEIR

USB DRIVE of all Exhibits is sent and attached via US Mail.

From: [bsilvestri](#)
To: [Fernandez, Xavier@Waterboards](mailto:Fernandez,Xavier@Waterboards); [Michael Graf](#)
Subject: Typo Correction - Comment on the Corte Madera Inn Rebuild Project Alternatives Analysis
Date: Friday, January 13, 2017 5:45:29 PM
Attachments: [011316 CVP Comment to RWQCB on Corte Madera Inn Rebuild - On Site Alternatives Analysis Letter 3.pdf](#)

Dear Mr. Fernandez:

Please note that our third letter, which was sent to you at 3:39 pm today, had a slight typo in the title. The correct title for our "Letter 3" is - 011316 CVP Comment to RWQCB on Corte Madera Inn Rebuild - On Site Alternatives Analysis Letter 3

Note that it reads "On-Site Alternatives Analysis." The content of the letter is unchanged.

Thank you.

Bob Silvestri

----- Forwarded Message -----

Subject: Comment on the Corte Madera Inn Rebuild Project Alternatives Analysis

Date: Fri, 13 Jan 2017 15:39:03 -0800

From: bsilvestri <communityventurepartners@comcast.net>

To: Fernandez, Xavier@Waterboards <Xavier.Fernandez@waterboards.ca.gov>

CC: Michael Graf <mwgraf@aol.com>

Dear Mr. Fernandez:

We are herewith submitting three comment letters on the off-site and on-site 404(b)(1) Alternatives Analysis for the Corte Madera Inn Rebuild Project (attached).

Our comments are organized as follows:

LETTER 1: General comments, which will provide essential background information, data, reports, comments and expert opinions that provide RWQCB with a complete picture of the applicant's proposal and form the basis for our request to reject the application without comment.

LETTER 2: Comments on the "Alternatives Analysis Final with Figures" as posted on your web site at:

[http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/CorteMadera/404\(b\)\(1\)%20Alternatives%20Analysis/1000_Alt_Analysis_final%2012.01.14_w_figures.pdf](http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/CorteMadera/404(b)(1)%20Alternatives%20Analysis/1000_Alt_Analysis_final%2012.01.14_w_figures.pdf)

LETTER 3: Comments on the "On-Site Alternatives Analysis Final with Figures and Attachments" as posted on your web site at:

[http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/CorteMadera/404\(b\)\(1\)%20Alternatives%20Analysis/On_site_AA_11%2030%201_%20final_w_figs_and_atts.pdf](http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/CorteMadera/404(b)(1)%20Alternatives%20Analysis/On_site_AA_11%2030%201_%20final_w_figs_and_atts.pdf)

All attachments of Exhibits will be sent via US MAIL, today due to their size. We will attempt to send as many as we can via emails that follow this one.

Community Venture Partners, Inc. has been following the permit process of this project since its inception. As a locally based, community serving nonprofit organization, we have been working for over two years with a great many of Corte Madera residents, regarding this project, and have done our best to help their voices be heard.

Best,

Bob Silvestri

President

Community Venture Partners

A Catalyst for Sustainable Solutions

73 Surrey Avenue

Mill Valley, CA 94941

415.381.3887 Office

415.342.7877 Cell

<http://www.communityventurepartners.org>

<https://marinpost.org>

Remember: The [Amazon Foundation](#) will donate 1/2% of the total value of your purchases to Community Venture Partners, *every time you buy something on their site--* at no additional cost to you!

Just go to <http://smile.amazon.com>

Select Community Venture Partners as your designated charity...then shop the same way you normally would. **It's easy and free!**

Community Venture Partners, Inc.

A Catalyst for Sustainable Solutions

January 13, 2017

Xavier Fernandez
SF Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA, 94612

Re: Comment Letter on the Corte Madera Inn *On-Site Alternatives Analysis Final with Figures and Attachments* by Zentner and Zentner, as submitted The San Francisco Bay Regional Water Quality Control Board (404(b)(1) Alternatives Analysis for the Corte Madera Inn Rebuild Project; in response to the documents posted on the RWQCB web site under *Alternatives Analysis for the Project*, which are available for public review at: http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/CorteMadera.shtml

Dear Mr. Fernandez:

Community Venture Partners, Inc. (“CVP”) is a 501(c)(3) nonprofit organization that facilitates and assists community based projects, programs and initiatives that demonstrate the highest principles of economic, social and environmental sustainability. We work to bring the community’s voice to local government decision-making in matters related to planning, development, social and environmental justice, and other matters of general public interest. We are submitting our comments on behalf of Peter Hensel, Marla Orth, Peter Orth, and other residents of the Town of Corte Madera.

I have been an active participant in local planning and development matters in Marin County for over 20 years, As a resident of Marin, as president of Community Venture Partners, Inc., and based on my professional experience, I am an acknowledged expert in planning, land use, architecture, real estate finance and development and submit my comments as a licensed architect and former real estate developer and broker.

Of relevance to this comment, as the founder of Tiburon Group, Inc. and a licensed architect and former real estate broker (18 years), I’ve had extensive experience in project planning and architecture, project management and construction, and have acted as managing partner in a variety of real estate development projects. Tiburon Group, Inc. also specialized in real estate investment analysis, property acquisitions and financing (see Exhibit 16).

In addition, Community Venture Partners is advised by a distinguished list of real estate professionals including, John Flavin, former senior executive for the Oliver Carr Company, the Grosvenor Group, Gates Capital and the Opus South Corporation, Rick Harris, former Vice President of the Transportation Group at First Boston, Principle in charge of transportation finance at Morgan Stanley & Co., NYC, Managing Director of Public Finance for Dean Witter

Reynolds in San Francisco, and Burton Miller, a partner at Hornberger + Worstell in San Francisco, an award winning, international design firm that specializes in the hospitality sector and has developed projects around the world for every major hospitality provide.

This letter is in response to the “On-Site Alternatives Analysis Final with Figures and Attachments” as posted on your web site at:

[http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/CorteMadera/404\(b\)\(1\)%20Alternatives%20Analysis/On_site_AA_11%2030%201_%20final_w_figs_and_atts.pdf](http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/CorteMadera/404(b)(1)%20Alternatives%20Analysis/On_site_AA_11%2030%201_%20final_w_figs_and_atts.pdf)

GENERAL COMMENTS

The Applicant’s *On-Site Alternatives Analysis Final with Figures and Attachments* is fundamentally flawed in a number of important ways, which precludes it from consideration by your agency. The “Overriding Considerations” noted in our General Comment letter, dated January 13, 2017, and our comment letter on the *Alternatives Analysis Final with Figures* are applicable and all those comments are hereby incorporated herein by reference.

1. The Applicant’s analysis is based on incorrect definitions of the project’s purpose and what is or is not practicable: As we’ve noted, the Applicant’s analysis and conclusions in the *On-Site Alternatives Analysis Final with Figures and Attachments* continue to be based on erroneous and self-serving definitions of the project’s “basic purpose” and “overall purpose,” and what is “practicable,” under the 404(b)(1) Guidelines. We have commented on the Applicant’s incorrect assertions about these matters in our previous correspondence and comment letters and provided evidence in our attached Exhibits. Those comments and that evidence are incorporated herein by reference.
2. The scope of alternatives analyzed is unacceptably narrow and fails to meet the requirements of the 404 Guidelines. An insufficiently narrow and self-serving range of alternatives is a serious concern and in itself grounds for denial of a permit under the 404(b)(1) Guidelines.
3. The *On-Site Alternatives Analysis Final with Figures and Attachments* does not adequately address the LEDPA as required under the Guidelines. The importance of correctly identifying the LEDPA is repeatedly emphasized in the Guidelines and has been thoroughly tested in the courts.
4. Outdated information: The *On-Site Alternatives Analysis Final with Figures and Attachments* relies heavily on the financial information provided in the PKF Consultant’s study, which dates back to statistics from 2009 through late 2012. The Applicant’s conclusions regarding practicability are not based on any current facts or realistic data about present hotel operations and development rates, revenues, or costs. As such, the opinions and conclusions reached are skewed and do not provide a reasonable assessment of on-site alternatives. The Applicant fails to acknowledge that this significantly impacts the analysis’ conclusions. We have commented on the Applicant’s incorrect assertions about these matters in our previous correspondence and comment letters and provided

evidence in our attached Exhibits. Those comments and that evidence are incorporated herein by reference.

5. Irrelevant market demand data for permit consideration: The “Market Demand Analysis” by PKF Consulting that support the conclusions of the *On-Site Alternatives Analysis Final with Figures and Attachments* are not a consideration under the 404(b)(1) Guidelines. The Applicant is confusing their right to note market conditions with using it as an argument for what is practicable. Whether to build or not build whatever type of hotel they wish is not at issue. What are at issue are the significant environmental impacts of filling a federally designated wetland. Their inclusion of market data only serves the pre-determined outcomes desired by the developer.
6. Subjective financial analysis: The “Financial Analysis” by PKF Consulting that support the conclusions of the *On-Site Alternatives Analysis Final with Figures and Attachments* are not objective or comprehensive and only serve the needs and pre-determined outcomes desired by the developer, making them inadmissible under the 404(b)(1) Guidelines. This *Alternatives Analysis* reads as if it were a marketing brochure for the developer to convince potential investors, rather than an objective analysis. By incredible coincidence, the “analysis” by PKF Consulting arrives at the conclusion that the developer’s preferred alternative location (which the Applicant has been promoting for a decades) is the *only* practicable alternative when compared to other on-site locations. We have commented on the Applicant’s incorrect assertions about these matters in our previous correspondence and comment letters and provided evidence in our attached Exhibits. Those comments and that evidence are incorporated herein by reference.
7. The applicant’s accounting of the project history and the facts surrounding the previous EIRs, alternatives studies, local agency review, and restrictions of local planning regulations are in many instances incomplete or patently false. We have commented on the Applicant’s incorrect assertions about these matters in our previous correspondence and comment letters and provided evidence in our attached Exhibits. Those comments and that evidence are incorporated herein by reference.
8. The Regional Water Quality Control Board's review of this project is not exempt from the requirement of the California Environmental Quality Act (CEQA). The Applicant's Proposal is a “project” under CEQA, Pub. Res. Code § 21065, and thus requires full CEQA review. The Regional Board's 401 Certification review does not appear to fall within the certified regulatory program for the Regional Board's Water Quality Control (Basin)/208 Planning Program, as set forth at 14 Cal. Code Regs. § 15251(g). Even if the Board's 401 Certification Program were considered a part of the agency's certified program, the Board's CEQA review would still be required to comply with CEQA policies. Pub. Res. Code § 21080.5(d). At this juncture, however, we have not seen any attempt by the RWQCB to comply with CEQA's requirements as set forth in the Public Resources Code, including but not limited to a thorough evaluation of project impacts and avoidance of significant impacts based on feasible mitigation or project alternatives and responses to public comments. In addition please also note that the various Exhibits attached with this comment (EIRs, studies and independent analysis, expert opinions, legal comment letters, public comments, etc.) contain numerous citations, descriptions

and references to unmitigated significant impacts and requirements under CEQA, all of which are hereby made a part of this comment letter and incorporated herein by reference.

For the reasons noted herein we ask RWQCB to deny the Application to fill the wetlands and destroy the contiguous wildlife habitat.

Current zoning status of the property

Please note that presently, the Applicant does not have development rights under the Town's General Plan, nor zoning rights to redevelop the hotel proposed in Alternative 1. The proposed project will require a General Plan Amendment and rezoning of the parcel in order to proceed. Therefore, as it stands, the only practicable alternatives available to the Applicant at this time are No Project or Renovation of the existing 110 room hotel. Please also note that members of the Town Council have indicated that a General Plan amendment is by no means assured at this time.

Relevant project history with RWQCB

It should be noted that the Applicant and the Town have continued to misclassify the wetlands for more than three years despite being notified of the existence of submerged aquatic vegetation and photographic evidence. In fact, this was brought to their attention, and in fact, this was done by Xavier Fernandez of the San Francisco Regional Water Quality Control Board, in his email to the Corte Madera Planning Director, in April of 2016 (Exhibits 8 and 15), in which he states:

Dear Mr. Wolff:

We were sent the following photographs of the pond at the Corte Madera Inn Rebuild Project Site. The photographs were taken on April 13 when the water in the pond had been drawn down. The photographs clearly show submerged aquatic vegetation growing within the pond at the Corte Madera Inn Site. Based on this, the pond is a special aquatic site that needs to be preserved to the maximum extent practicable. As such, we plan to attend the Town Council meeting to inform the Council that they may be approving a project that we will not be able to permit under our regulations.

In support of this, in his comment letter of February 15 2016 (Exhibit 5) and again in his letter of December 31, 2016 (Exhibit 12), biologist Peter Baye, Ph.D. provided a complete discussion and analysis of the proper classification of the pond, as a special aquatic site, based on evidence of the existence of submerged aquatic vegetation. In the face of this evidence, the Town's two biologists, both having been chosen and paid for by the applicant, launched a scathing rebuttal, denying the existence of SAV. The Town also chose to ignore the evidence and pushed through approval at the Planning Commission level.¹ This letter was followed by other comment letters by Dr. Baye (Exhibit 12). We ask RWQCB to consider the comments of Dr. Baye in your review of this permit Application.

¹ For a complete recounting of the events surrounding the redevelopment of the Corte Madera Inn and the application for a permit from the Army Corps of Engineers, please see Exhibit 9.

General comment on financial feasibility and the determination of practicable alternatives

The Applicant's financial wherewithal, or the access to attractive financing, or lucrative contractual arrangements with third parties, or other such considerations are *not* allowable considerations in determining whether an alternative is practicable under the 404(b)(1) Guidelines. Development costs are to be examined from the perspective of what are reasonable costs for the proposed project, not whether the applicant can afford the cost of the alternative.²

The attached *The Corte Madera Inn Redevelopment: Market Survey and Financial Feasibility Evaluation* (Exhibit 14) analyzes this issue in depth and concludes that a review of existing market conditions substantiates the practicability and financial feasibility and development of on-site alternatives that also preserve the wetlands pond. This report concludes that Alternatives “B” and “C” and “D,” (these references being the labeling method used by the Applicant and the Town in their EIR documents) are all practicable and financially feasible, and readily available to both the applicant and any objective third party developer.³

It is important to note that the Preamble to the Guidelines states that

*[i]f an alleged alternative is unreasonably expensive to the applicant, the alternative is not, 'practicable.'" Guidelines Preamble, "Economic Factors", 45 Federal Register 85343 (December 24, 1980). Therefore, to the extent that the individual homeowners and small businesses may typically be relevant consideration in determining what constitutes a practicable alternative. **It is important to emphasize, however, that it is not a particular Applicant's financial standing that is the primary consideration for determining practicability, but rather characteristics of the project and what constitutes a reasonable expense for these projects that are most relevant to practicability determinations.** [Emphasis added].*

In addition, per 40 CFR 230.12(a)(3)(iv):

The burden of proof to demonstrate compliance with the Guidelines rests with the applicant; where insufficient information is provided to determine compliance, the Guidelines require that no permit be issued. [Emphasis added].⁴

And as explained in *The Federal Wetland Permitting Program: Avoidance And Minimization Requirements* by the Environmental Law Institute, March 2008, authored by Sandra S. Nichols, Jared Thompson, and Jessica Wilkinson, with valuable guidance and review by Annie Brock, James McElfish, and Bruce Myers;

² *Wetlands, supra* note 6. 294-295, *Yocom, supra* note 4, at 5.

³ See attached; *The Corte Madera Inn Market Study & Financial Feasibility Evaluation*, prepared by Maurice H. Bennett, manager of RHSW, LLC.

⁴ Quote from *Memorandum to the Field: Guidance on Flexibility of the 404(b)(1) Guidelines and Mitigation Banking* (Aug. 23, 1993 – Dec. 31, 1998, Department of the Army and Environmental Protection Agency).

Under *b. Feasibility* they state

Another key phrase in the definition of practicability (“available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purposes”⁵) is “capable of being done,” which the EPA refers to as “feasibility.” Federal policy has established that an applicant’s unwillingness—or in some cases inability—to pursue an alternative does not render it infeasible. [Emphasis added]

And under *c. Cost* they state

The mere fact that an alternative may cost more does not necessarily mean it is not practicable⁶

The alternatives considered are unacceptably narrow under the Guidelines.

In the RWQCB comment letter to the Town, regarding the 2015-2016 DEIR, it stated

Because the EIR only evaluates one alternative that avoids filling the pond and does not indicate that it will be implemented moving forward, the only permittable alternative (i.e., the LEDPA) may not have been included in the EIR. To rectify this situation, we recommend evaluating additional alternatives that avoid filling the pond, including, but not limited to: (1) renovating the existing hotel; (2) using a multi-story garage and shifting the position of the hotel to avoid the pond; (3) reducing the number of units to reduce the footprint of the hotel thereby avoiding the pond; (4) altering the types of rooms offered by the hotel to reduce the footprint thereby avoiding the pond; and (5) eliminating or reducing the size of some of the amenities offered by the hotel.

We fully support the RWQCB’s comment. It clearly notes the requirements of the 404(b)(1) Guidelines, which the Applicant has continued to ignore for more than three years. In particular, the applicant has refused to evaluate the “no project” alternative or a renovation of the existing hotel alternative, which is not only required under federal regulations but under the California Environmental Quality Act (CEQA), as well.

As published in *The Federal Wetland Permitting Program: Avoidance And Minimization Requirements* by the Environmental Law Institute, March 2008, authored by Sandra S. Nichols, Jared Thompson, and Jessica Wilkinson, with valuable guidance and review by Annie Brock, James McElfish, and Bruce Myers;

Under *1. Project Purpose, a. Burden of Proof*, it states

In a 1988 report on the § 404 program, the Government Accounting Office explained the concern that the Corps Districts were simply accepting project purposes asserted by

⁵ 40 CFR 230.10(a)(2)

⁶ RGL 93-02 Guidance on Flexibility at 3(a)(iii-v)

applicants without making the required independent finding.⁷ In an effort to establish clarity, EPA requested elevation of several applications, calling the problem of the Corps' failure to independently verify the information and analysis presented by § 404 permit applicants one of national concern. "We are concerned by matters of interpretation of the Guidelines... and the potential for site specific and cumulative environmental impacts as well as impacts on the integrity of the Section 404 program," EPA stated in the Old Cutler Bay elevation request.⁸

This concern was similarly expressed in the North Fork of the Hughes River elevation request.⁹ The EPA asserted that by relying on the applicant's alternatives analysis, the Corps had unnecessarily limited the scope of practicable alternatives that could meet the project purpose.¹⁰

The Applicant's failure to honestly assess the full range of practicable alternatives required is grounds for RWQCB to reject the Application.

Requirements to determine the LEDPA in evaluation Project Alternatives

The fundamental task before RWQCB is to determine the least environmentally damaging practicable alternative ("LEDPA") requirement in reviewing the application to fill the wetlands pond. The importance of this requirement cannot be overstated. It is our contention that the applicant's preferred proposal is not the LEDPA and that their conclusions regarding Alternative 2, which preserves the wetland pond, are incorrect because they are based on outdated and erroneous data, assumptions and analysis methodologies.

As noted by John Schulz, *The Steepest Hurdle in Obtaining A Clean Water Act Section 404 Permit: Complying with EPA's 404(b)(1) Guidelines' Least Environmentally Damaging Practicable Alternative Requirement*, (Exhibit 20) it states

An applicant for a 404 permit must demonstrate to the Corps that, among other things, the proposed project is the least environmentally damaging practicable alternative ("LEDPA") to achieve the project's purpose.¹¹

Further,

The 404(b)(1) Guidelines establish four prerequisites to approval, one of which, the basis for the LEDPA requirement, requires that there are no practicable alternatives to the

⁷ Government Accounting Office, RCED-88-10, Wetlands: Corps of Engineers Administration of Section 404 Permit Program, 26 (July 1988).

⁸ Old Cutler Elevation Request.

⁹ North Fork of Hughes River Army Response; Petro Star/Port Valdez Guidance, Hartz Mountain HQUSACE Findings (July 25, 1989).

¹⁰ Id.

¹¹ *The Steepest Hurdle in Obtaining A Clean Water Act Section 404 Permit: Complying with EPA's 404(b)(1) Guidelines' Least Environmentally Damaging Practicable Alternative Requirement*, 2005, John Schulz, B.A. Brigham Young University; J.D. University of California, Davis.

proposed discharge that would have a less adverse effect on the aquatic environment.¹² Noncompliance with this requirement is a sufficient basis for the Corps to deny the project permit.¹³ The LEDPA determination is thus most important of the four prerequisites for determining compliance with the Guidelines.

And under III. LEDPA DETERMINATION it states

The LEDPA requirement is an attempt to avoid environmental impacts instead of mitigating them; "if destruction of an area of water of the United States may be avoided, it should be avoided."¹⁴ The Corps may only approve a project that is the LEDPA.¹⁵

And

The alternatives analysis must be fair, balanced, and objective, "and not used to provide a rationalization for the applicant's preferred result."¹⁶ The applicant bears the burden of demonstrating to the Corps that no less environmentally damaging practicable alternative is available and that the project complies with the 404(b)(1) Guidelines.¹⁷

In this case, the Applicant has taken the opposite approach, adamantly refusing to make any changes to his preferred proposal, or to consider any less environmentally destructive alternatives, and generally flouting the authority of local, state and federal regulations.

It is our understanding that under 40 C.F.R. Section 230.10(a), "if destruction of an area of water of the United States may be avoided, it should be avoided,"¹⁸ and that The Corps may only approve a project that is the LEDPA,¹⁹ and that the LEDPA must be both practicable and the least environmentally damaging. The LEDPA's purpose is "avoiding significant impacts to the aquatic resources and not necessarily providing either the optimal project location or the highest and best property use."²⁰

¹² 40 C.F.R. § 230.10(a) (2005).

¹³ William Want, Law of Wetlands Regulation (6-24 (1989) 6-24. See Yocom

¹⁴ Fed. Reg. 85336, 85340 (Dec. 24, 1980);

¹⁵ *Appropriate Level of Analysis*, *supra* note 8, at 1; see also 40 C.F.R. §230.12(a)(3)(i) (2005).

¹⁶ Hartz Mountain

¹⁷ 40 CFR 230.12 (a)(3)(iv).

¹⁸ 45 Fed. Reg. 85336, 85340 (Dec. 24, 1980); see also 45 Fed. Reg. 85336, 85340 (Dec. 24, 1980); U.S. Army Corps of Engineers, HQUSACE Review and Findings, *Old Cutler Bay Permit 404(q) Elevation* (1990) 4 [hereinafter *Old Cutler*], at 5; U.S. Army Corps of Engineers, U.S. Army Corps of Engineers, *Plantation Landing Permit Elevation Decision* (1989) 2 [hereinafter *Plantation Landing*]; Yocom et al, *Protection Through Impact Avoidance: A discussion of the 404(b)(1) Alternatives Analysis, Wetlands: Volume 9, No. 21 1989*, by Thomas G. Yocom, Robert A Leidy and Clyde A Morris [hereinafter *Wetlands*].at 286.

¹⁹ U.S. EPA and U.S. Army Corps of Engineers, Memorandum to the Field, *Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements* (Aug. 23, 1993) 2, 3 [hereinafter *Appropriate Level of Analysis*], at 1; see also 40 C.F.R. §230.12(a)(3)(i) (2005).

²⁰ Yocom et al., *supra* note 3, at 283,295, and *Appropriate Level of Analysis*, *supra* note 4. The Corps has stated that the LEDPA determination "clearly is intended to discourage unnecessary filling or degradation of wetlands...." *Plantation Landing*

Similarly, “Making money” or “increasing a tax base”... are further examples of inappropriate basic project purposes under the Guidelines.²¹ I only bring this to your attention because these have been the predominant arguments that the applicant has made to the Town of Corte Madera, the Army Corps and RWQCB to gain approval.

Finally, according to Yocom, et al (Exhibit 21),

*There are instances where a “no-project” or “no-action” alternative may be considered a practicable means of achieving the basic project purpose.*²²

We believe the courts would find this to be true in this instance. As we have noted before, using these erroneous definitions of project purpose, based upon “capitalizing on demand” is not allowed as a condition to be granted a permit to fill the wetlands. “Capitalizing on demand,” or “maximizing returns” or meeting “requisite returns” (all these phrases in quotations are found in the Application) are not allowable considerations under the 404(b)(1) Guidelines. In fact, they are expressly prohibited from being considered in defining a project’s purpose and for permit approval.

The Applicant has referenced local agency documents such as the EIRs of record in its Application, but has not presented them to RWQCB, which you should be aware of. In addition to the information submitted by the Applicant, two other on-site alternatives were reviewed, known as “Alternative 2” in the project Draft EIR (Exhibits 24a through 24g), and “Alternative 4” in the project Revised EIR (Exhibits 24a through 24g).

Mitigation is not a consideration in determining the LEDPA

RWQCB should not consider the proposed mitigation for a project in determining the LEDPA.²³ It is our understanding that the courts have upheld this EPA policy to conduct its alternatives analysis without considering mitigation measures.²⁴

In this regard, please note that as stated in 40 CFR. § 230.10(a)(3),

*If the activity associated with a discharge is proposed for a “special aquatic site’ and 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.** [Emphasis added]*

It is our understanding that the alternatives analysis must be fair, balanced, and objective, "and not used to provide a rationalization for the applicant's preferred result (i.e., that no practicable

²¹ *Wetlands, supra*

²² *Wetlands, supra*

²³ 33 U.S.C. § 1344(a). The goal of the Section 404 regulatory program is to contribute to the national goal of no net loss of wetlands. U.S. EPA and U.S. Army Corps of Engineers, *Memorandum of Agreement (MOA); Clean Water Act Section 404(b)(1) Guidelines; Correction* (1990), 55 Fed. Reg. 9210, 9211 [hereinafter *EPA/ Corps MOA (1990)*]

²⁴ *Alameda Water and Sanitation Dist.*, 930 F.Supp. at 492.

alternatives exist).”²⁵ And, that “The applicant bears the burden of demonstrating to RWQCB that no less environmentally damaging practicable alternative is available and that the project complies with the 404(b)(1) Guidelines.”²⁶

Region IX EPA guidance on the issue of project alternatives is extensive.²⁷ EPA guidance suggests that under the “practicability presumption,” RWQCB will presume that practicable alternatives exist where the project is non-water dependent and will cause a discharge in a special aquatic site.”²⁸ The presumption is intended to “increase the burden on an applicant for a non-water dependent activity to demonstrate that no practicable alternative exists to his proposed discharge in a [SAS].”²⁹

Further, the Corps has stated that the

*Army Corps of Engineers is serious about protecting water of the United States, including wetlands, from unnecessary and avoidable loss... Further, the Corps should inform developers that special aquatic sites are not preferred sites for development and that non-water dependent activities will generally be discouraged in accordance with the Guidelines.*³⁰ *To rebut this [practicability] presumption and obtain approval for the proposed alternative, the applicant must show by clear and convincing evidence that there are no practicable alternatives which will not cause a discharge into a SAS.*³¹ *This presumption is intended to implement the Corps' policy that "from a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered" by the Guidelines. The presumption is intended to "increase the burden on an applicant for a non-water dependent activity to demonstrate that no practicable alternative exists to his proposed discharge in a [SAS]."*³² [Emphasis added]

Finally, it is our understanding that “any project that achieves the basic project purpose practicably should be considered.”³³ Under this guidance, Alternative 2 must be considered as the LEDPA. This is particularly the case in this instance where the Applicant’s financial feasibility analysis is so flawed (see sections of this comment letter, below). And, where the project proposed by the applicant is not the LEDPA, “the availability of a LEDPA, where it is

²⁵ U.S. Army Corps of Engineers, *Permit Elevation, Hartz Mountain Development Corporation* (1989) 2 [hereinafter *Hartz Mountain*].

²⁶ *Old Cutler, supra*; *Plantation Landing, supra* at 7; *Yocom, supra* at 283.

²⁷ *Wetlands, supra*

²⁸ 40 C.F.R. § 230.10(a)(3) (2005); 45 Fed. Reg. 85339. This presumption is intended to avoid impacts to the extent practicable. *EPA/Corps MOA (1990)*,

²⁹ 40 C.F.R. § 230.1(d) (2005).

³⁰ *Hartz Mountain, supra*

³¹ *Plantation Landing, supra* note 3, at 9, 12, 13-14; 45 Fed. Reg. 85336, 85339 (Dec. 24, 1980); see Department of the Army, South Pacific Division, Corps of Engineers *Review of Sundance Plaza Project Permit Denial* (Feb. 5, 2001), 1, 8.

³² John Schulz, *The Steepest Hurdle in Obtaining A Clean Water Act Section 404 Permit: Complying with EPA’s 404(b)(1) Guidelines’ Least Environmentally Damaging Practicable Alternative Requirement*, 5. Practicability Presumption.

³³ *Wetlands, supra*, at 294

truly available, is an adequate basis for EPA's determination that unacceptable adverse environmental effects will result."³⁴

Avoidance mitigation

As published in *The Federal Wetland Permitting Program: Avoidance And Minimization Requirements* by the Environmental Law Institute, March 2008, authored by Sandra S. Nichols, Jared Thompson, and Jessica Wilkinson, with valuable guidance and review by Annie Brock, James McElfish, and Bruce Myers (Exhibit 22);

Under C. Information Specific to Alternatives Analysis or Mitigation Sequencing; Avoidance Mitigation they note that

Avoidance mitigation best occurs in the planning and design stages of a project by configuring the site layout to avoid impacting an aquatic area or areas or by not implementing certain parts of an action. Project proponents should configure the proposed development or facility around natural flood plains and aquatic resources

Further, under 2. EPA's Guidelines for Permit Applications they explain that

*For special aquatic sites such as wetlands, however, the Guidelines propose a more difficult test for avoidance with two presumptions. For proposed discharges to special aquatic sites **there is a presumption that an alternative site that is not a special aquatic site exists and a presumption that such a site will result in less adverse environmental impacts on the aquatic ecosystem.***³⁵ [Emphasis added].

And per A. Avoidance: The Alternatives Analysis

*The presumptions hold unless the applicant proves otherwise.*²⁶ *The standards for overcoming these presumptions and the other components of the alternatives analysis have been clarified by numerous administrative and legal decisions.*

And under 2. Practicability the ELI study states

*"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.**"*³⁶

And

³⁴ See 56 Fed. Reg. 76-02 (Jan. 2, 1991) (stating that one of the reasons EPA denied the proposed Two Forks dam was because it would cause unacceptable loss and damage; the damage the dam would cause was unacceptable because the damage was avoidable. The damage was avoidable because the proposed project was not the LEDPA).

³⁵ 40 CFR 230.10(a)(3)

³⁶ 40 CFR 230.10

*In the Petro Star elevation request, EPA was concerned that a practicable alternative had been neglected.³⁷ The Army affirmed that the Corps was required to consider all **practicable** alternatives and not limit its analysis based on the applicant's assertion that the proposed project was more attractive.³⁸*

The Applicant has failed to adequately counter these presumptions and case law or adequately address these requirements of the Guidelines.

Re: Summary: Project Purpose

The On-Site Alternatives Analysis Final with Figures and Attachment; Summary, states

These alternatives were examined against the project basic purpose, which is to develop a viable hotel facility capable of capitalizing on the demand for central Marin hotel space.

As we continue to point out, the Applicant's definition of the project's purpose is contrary to both the spirit and the letter of the 404(b)(1) Guidelines. The Applicant's stated purposes are categorically disallowed under the Guidelines. Please see our General Comment letter of January 13, 2017, pages 4 through 6, for a complete discussion of our objections. The accuracy of the project purpose remains paramount. The Applicant is again inferring that his definition of project purpose, which includes maximizing profits and capitalizing on market demand justifies the goals and conclusions of their analysis. It is the duty of state and federal agencies to determine and correct the project purpose, and to inform the Applicant of that determination.

In this instance, that determination is paramount and must be made at the outset because the entirety of the Applicant's on-site alternatives analysis and their conclusions on what is or is not practicable rests on their erroneous and self-serving definition.

To reiterate, the proper project purpose for the Corte Madera Inn Rebuild is "to provide commercial hotel rooms in southern Marin County, CA."

Re: D. Current Conditions

Our comment here is that the physical condition of the existing hotel and the lack of competitive improvements over the years is the result of personal investment and management decisions made by the owner, which have no bearing whatsoever on the determination of the LEDPA or the permit decision before RWQCB. The Guidelines specifically ignore an applicant's ability to "cry poor" in order to obtain a permit to fill a wetland.

Re: Alternative 1, 2. Analysis

The Applicant introduces other benefits to their preferred alternative in an attempt to sway the RWQCB decision. These include noting that their goals are to improve safety conditions at the

³⁷ Petro Star/Port Valdez Elevation

³⁸ Petro Star/Port Valdez Guidance

vehicle entrance and others. What they fail to note is that all of the alternatives offer all of these same improvements and considerations.

Re: Alternative 1, Table I

As we will discuss in detail below, figures used in these calculations throughout the Application and Analysis, are incorrect, based on outdated data and faulty prognostications about average room rates, occupancy rates, and overall revenues, and show “costs” that may not even exist.

For example, the table shows a land cost of \$11 million. However, there is no evidence provided for that number other than the consultant’s and owner’s subjective opinions (e.g., no certified appraisal), and there is no disclosure of whether or not this is an actual cost to the owner, who may own the property free and clear at this point in time. In addition, the “inflation total” shown is based on arbitrary opinion. As we’ve noted in our letter to the Army Corps, in June of 2016, (Exhibit 9) the concept of presenting “value” in the form of “Value Less Land Development Costs” is extremely novel and so outside of any methodology in the real estate finance profession that it renders this outcome meaningless.

However, even if one accepted this methodology, which we do not, if we substitute the actual, current average daily room rental rates and overall operating revenues we show below, *every alternative produces a net positive and profitable result.*

This is important with reference to the practicability of Alternative 2, which we believe to clearly be the LEDPA.

The Applicant’s improper “project purpose” distorts conclusions regarding practicable alternatives

The Applicant’s claim that their preferred alternative, Alternative 1, is the only practicable alternative is solely based on the self-serving definition put forth in their analysis. The Applicant supports this argument by stating

Alternative 1 is practicable. It can achieve the overall project basic purpose. It is also economically feasible as the revenue/value from the number of units exceeds (barely) development costs.

And that

Alternative 2 is not practicable. It does not meet the project basic purpose as the number of rooms proposed will not generate sufficient revenue to offset construction costs. As well, the single -branding (also a result of the limited number of rooms) reduces marketability, sustainability, and potential values/ revenues significantly. As a result, it is not practicable as development costs exceed value/ revenues.

These statements are incorrect because (1) they rely on the Applicant’s incorrect definition of project purpose, and (2) on the data and analysis and economic forecasting provided by PFK, which is without question outdated and inaccurate.

In the opinion of several successful hotel developer/operators CVP interviewed in doing research to compose our comment letters, to state that only a dual-branded, 174 room, Marriott hotel would be “barely” profitable at the subject location was considered so absurd as to be laughable.

As evidenced in our comments to the Army Corps of Engineers, in June of 2016, other comment letters, and the *Best Western Corte Madera Inn Redevelopment: Market Study & Financial Feasibility Evaluation* by RHSW, LLC (Exhibit 14), the hotel market is so strong in southern Marin today that a new hotel of almost any reasonable type or size would only be unprofitable if the owner / developer (in the words of a hotel owner/operator we interviewed) “had no idea how to run a hotel.”

This is particularly true of a hotel on the subject site, because its location is far superior to any competition now or in the future.

The subject site is unique

No other hotel location in southern Marin has a highway on ramp / off ramp at its doorstep, is adjacent to the two biggest and most vibrant shopping centers in the County (which the Town plans to connect with a pedestrian walkway over highway 101), is perfectly flat and buildable, is within walking distance of every conceivable amenity, has un-matched highway visibility, and is so fully supported by the Town and local agencies.

In addition, it is important to note that the Applicant’s claim that the Town is determined to rigidly enforce height limits, setback limits and other such discretionary planning restrictions is false. These types of minor adjustments and accommodations can be granted under a variance without a zoning change or General Plan Amendment. And, in this case, where the Town is committed to seeing that the subject property remains a hotel use and only as hotel use, for the Applicant to claim that the Town will not accept adjustments to support anything but Alternative 1, is unfounded.

In the many years this project has been going through the public review process, it remains tremendous burden on the public to have to go to such extraordinary ends to counter these kinds of falsehoods this Applicant continues to promote. We pray that the RWQCB will act in the public’s best interest and not be swayed by the Applicant’s unsupported and self-serving claims.

Industry standards for evaluating development and investment opportunity

Determining development opportunity sites

The basis of any sound methodology to determine what represents an investment opportunity is the potential projected return on investment, combined with other considerations about the market and general economics of the hotel industry in the selected region. That return is significantly affected by the cost of funds, income tax considerations, public agency requirements, and most importantly the terms of purchase of the asset. In addition, supportive public improvements, local planning and regional government projects or incentives in certain locations might impact a developer’s investment decisions.

The evaluation of any investment is based on a fundamental value/return equation;

$$I / V = R$$

Net operating income (“I”) divided by value or price (“V”) equals capitalization rate (“R”)

This equation offers a way of “valuing” different investments apple to apples. In its simplest form, determining the capitalization rate or “cap rate” of an investment provides a way for the investor to compare one particular investment (e.g., in a new hotel development) with other investments competing for his capital (stocks, bonds, etc.). This methodology is irrefutable and the mostly widely used method in the industry.

The net operating income is, of course, tied to the operating costs of a particular hotel and the average room rental rates and overall net and gross revenues of the operations. It is therefore extremely important that the revenue assumptions used are accurate and based on actual statistical data, not casual observation. However, the accuracy of this data and its applicability to any one individual case study is absolutely critical.

The success or failure, or evaluation of investment returns and financial feasibility of a real estate investment is extremely specific in each case. Accordingly, there are no generic “returns” that can be calculated unless a plethora of facts are considered.

This considered, the data provided by the Applicant is extremely broad brush and significantly understates the potential operating revenues of a hotel at the Corte Madera Inn location and is therefore inadequate to make any reasonable determination regarding financial feasibility from data provided by the Applicant or the generic methodologies used to evaluate it.

Value / purchase price is typically the simplest thing to determine. However, in this instance that is not the case because the Applicant has owned the property for a long time and has not provided any information on their cost basis in the property. Their equity may be 100% if there is no debt.

Without knowing a developer’s true cost basis (equity) there is no way to honestly evaluate their return on investment or financial feasibility. This is a major flaw in the Applicant’s financial projections that they have failed to disclose.

That aside, overly simplistic, plug-in numbers do not help evaluate financial feasibility. In fact, every developer will have widely varying requirements. In addition the terms of purchase are an extremely important factor in determining actual cash on cash return on investment or return on risk capital, and therefore the “practicability” of a venture.

For example, if one seller wants \$1 million dollars all cash at closing for a property, while another seller with an equally attractive opportunity wants \$1 million for his property but is offering to “take back” a low interest rate loan, will also accept a second deed on another property in lieu of a down payment (no money down, upfront), and offers 20 years financing,

this will greatly impact any return on investment calculation. In fact, with the second option where the investor has no cash in the deal, the cash on cash return on investment and the internal rate of return (“IRR” - a term we will look at more closely) cannot even be calculated.

So, if the cost of developing or renovating an alternative of “x” number of rooms is the same and the projected room rental rates are the same and the purchase price is the same, then the transaction with better terms or greater financial leverage will produce the greatest return on investment.

The most fundamental principle of real estate is the principle of highest and best use. The Appraisal Institute defines “highest and best use” as

The reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, financially feasible, and that results in the highest value.

This implies that development will generally follow what the highest and best use of a particular property is at any given time, all factors considered. In this instance case of the Corte Madera Inn property, the highest and best use at this time is for a hotel of almost any size and configuration. The market demand and quality of the location will support a wide variety of alternatives. The Town of Corte Madera has also made it clear that a hotel use is the only use they will approve on the subject property.

Industry standards for evaluating return on investment

The PKF Market Analysis and Financial Analysis are the kind of brochure-ware that marketing firms promote to potential investors, in the absence of real analysis or hands on knowledge of how professional real estate investors evaluate “opportunities.” For example, PKF offers detailed comments on one of those investment analysis tools called Internal Rate of Return (IRR)

IRR is defined as

The discount rate at which the present value of future cash flow is equal to the initial investment.

Since that definition is as inscrutable as one can get, in simple terms it is a method of evaluating and comparing very specific aspects of investments that takes into account the timing of the cash investment requirements of that investment and the timing of the returns and other benefits that flow back to the investor.

For example, if one investment requires you to put up \$100,000 and promises to pay you back in ten years and pay you 10% interest in the meantime, by the end of ten years you’ll have made 10% per year (\$10,000 times 10 = \$100,000) in interest on your money. That is a simple 10% return on investment. However, if that \$100,000 investment can be put in over the first two years, and returns start to flow back to you, incrementally after four years, and there are tax advantages to doing that, and you are the beneficiary of accelerated depreciation write offs that benefit you as soon as the first year, and you are in a high tax bracket, the overall return on

investment benefits is indeed more complex, and in this case better than the first option. In fact, it is not unusual for an investment to appear to barely make a profit based on a simple return on investment calculation but make an enormous return using IRR. It all depends on the specific investment, the specific terms, and the specific investor's personal goals and financial situation. The permeations are almost infinite in their subtlety and complexity but it can have a dramatic impact on feasibility. But the calculation cannot be done generically, in advance, using abstract (and in the case of PKF) or forecasted numbers.

The factors involved in correctly analyzing financial feasibility based on return on investment are numerous

Some of the factors that are required to reasonably calculate return on investment and financial feasibility and therefore, practicability include are not limited to the following:

- Purchase price
- Loan to value used
- Debt to equity requirements
- All cash vs leveraged debt
- Term of long term financing in years
- Interest rate and terms of construction financing
- Interest rate and terms of “take out” permanent financing and whether it is fixed or adjustable or on a sliding scale.
- Refinancing options at stabilized operating revenues
- Terms of a purchase or redevelopment including cash requirements and debt availability
- The number and differing types of investor participants
- Preferred returns promised to different investor types
- Tax consequences for each of the investors, participants and partners
- Impacts of other assets pledged as collateral on cash requirements

This considered the sophisticated looking Financial Feasibility and IRR “analysis” presented by PKF is completely meaningless and there is no way to even address them. However, it is also dishonest and opaque in a way that hides the owner's actual investment return potential.

Their analysis pretends that all transactions, cash requirements, cash flows, leverage and other factors are the simplest possible and that the Applicant's “costs” for the land are actual costs. What is not disclosed is what is the developer's equity basis and tax basis in the property. Does he have debt on the project and if so, what are the costs associated? Can a buyer enter into a transaction using a tax free exchange? How much cash up front is required to invest in developing each of the alternatives? Would a developer who is not beholding to Marriott Corporation and interested in developing a hotel independently have significantly lower costs and better returns on investment?

All of this is critical to what is or is not practicable. None of it is factored into their analysis. However, even if we were to accept the PKF development costs and methodologies for a moment, their analysis still fails to provide any evidence that Alternative 2 is not the LEDPA.

Market demand and investment success is about more than just counting rooms or visitors

In point of fact, success in the hospitality industry, as in any other consumer services industry, is never simply a competition based on statistics, as the academic analysis by PKF suggests. The reason the Best Western Inn is losing its competitive edge is because like in any other business, new concepts and ideas and services continuously steal market share from their competitors. For example, laptop computers are now a commodity item. Most perform just as well as their competitors. So why then is there such loyalty to Apple and other top brands?

Similarly, with hotels and particularly in Marin County where uniqueness and innovation are so highly rewarded in retail, hospitality, dining and other service industries, developing a stale, generic hotel brand such as a Marriott Residence Inn or a Springhill Suites, or a Hilton Homestead Inn almost guarantees under-performance. Whereas, a unique, upscale hotel on the subject site, which not only preserved the pond but made it an asset and a showcase, would stand a much better chance of taking market share from competitors. This fatal flaw in the Applicant's approach permeates all aspects of their analysis and leads to their significant under estimation of the true revenue potential of the subject location. This has direct bearing on the practicability of an alternative that includes a smaller hotel that preserves the pond, such as Alternative 2.

An example of this is the fairly new Cavallo Point Lodge at Fort Baker. It has little competition in its niche, offers unique amenities (dramatically located on the Bay at the Golden Gate Bridge) and its pricing and high occupancy and overall operating revenues reflect that.

The PKF market analysis is extremely self-serving and incorrect

As we note throughout our comments is that the Applications financial analysis is deficient because of the outdated data it depends upon and the incorrect prognostications of the developer's consultant. For example, what is so bizarre about the PKF analysis of market demand is that it limits its comparative discussions (page 19) to only comparing the Marriott preferred proposal to a proposal by a competitor, the Hilton Corporation, as if this Applicant was about RQCB helping the developer decide about which company to do business with. The entire discussion presented has nothing to do with the 404(b)(1) Guidelines or the permit application process.

Again, on page 24 of the PKF Market Demand analysis, it shows ADR figures that are 38% lower than what current rental rate data actually shows. To further claim that a brand new hotel in the subject location, coming online in two years could not even command today's ADRs is nonsensical. Yet, it forms the foundation of the Applicant's entire argument about what is or is not practicable.

Recognizing this erroneous approach by PKF is significant because it is also applied to their arguments and financial projects used to claim that Alternative 2 is not practicable.

The industry standard for market data

As we noted in our comments on the *Alternatives Analysis Final with Figures/Off-Site Alternatives*, overall hotel operating revenues and market demand, since 2013, in Marin County

and particularly in the market of the subject property, have increased dramatically along with average room rental rates, and therefore have increased the potential development opportunities and the determination of what is practicable on the subject property.

Any professional analysis of market trends, operating revenues, and potential investment success needs to be grounded in definitive data. PKF is a marketing and economic forecasting firm and does not represent the industry standard for statistical resources. The accepted hotel industry standard is Smith Travel Services (“STR”). STR is not a consultant for hire. They are a fact based source for reliable data.

Confidential STR monthly and annual reports are based on actual data about room rental rates, operating revenues and expenses and overall profitability, submitted by its member hotel operators. It provides unbiased statistical of market health, market trends, and growth in each local market segment. Annual Reports by STR, the hotel industry statistical standard, show that the economic rebound over the past five years and the continued low interest rate environment has made many types of investments more feasible and attractive. The STR report for southern Marin, as of the end of November of 2016, shows an across the board increase in average room rental rates of more than 30% for hotels in the Marriott proposals market segment, and close to a **33% increase in average daily room rate (ADR)**.

STR data confirms the findings of the *Best Western Corte Madera Inn Redevelopment: Market Study & Financial Feasibility Evaluation* by RHSW, LLC.(Exhibit 14) and indicates that average room rates, occupancy rates, and overall revenues are even higher now than when that study was done in June of 2016 (approximately 2.5% higher). This means that the base ADR and RevPAR (average revenues) data used by PKF in the base study may be deficient by as much as 50%.

STR confirms the *Best Western Corte Madera Inn Redevelopment: Market Study & Financial Feasibility Evaluation* average daily room rate for the Marriott Courtyards Inn at Larkspur Landing. This property is arguably the best comp for evaluating the Applicant’s financial feasibility analysis. That said, what this shows is that the Applicant is asking RWQCB be to accept that a brand new Marriott residence Inn hotel at the subject location will only have an average room rental rate, projected for the next 5 years in the future of \$208 per night – more than 30% lower than the existing comparable suite at Larkspur Landing, a property which is almost two decades older. This makes no sense whatsoever.

Outdated financial data distorts the Applicant’s analysis conclusions

As we’ve noted, the Application relies on data and opinions provided by the PKF Consulting (referenced in the *Alternatives Analysis* as Attachment “A”). PKF Consulting based their entire financial analysis on data from the 2009 to late 2012 time period: a time when the national and local economy was still suffering from the worst financial crisis and recession in more than 80 years. Average rental rates and operating revenues from that period are outdated to the point of being valueless.

STR Reports show that average room rental rates and overall operating revenues have risen dramatically in the past five years. The Applicant is aware of this fact and PKF even acknowledges the beginnings of this trend in their data.

STR annual reports as of the end of November 2016 confirm that the data the PKF analysis presents (which is the basis of the Applicant's entire argument to support his preferred on-site alternative) is so skewed by historical events and so outdated that it should be disregarded. It fails to provide a realistic picture of the current hotel market in Marin and does not provide accurate information regarding the viability of either on-site or off-site alternatives and extinguishes the Applicant's arguments for why his preferred proposal is the only proposal that is feasible or practicable.

It is of great concern that the Applicant has relied on data that dramatically skews the overall operating revenues downward, far below what is achievable today. To an objective observer, the Applicant appears to be intentionally presenting PFK's skewed data and resultant financial pro forma in the *On-Site Alternatives Analysis*, in order to support a preposterous argument that the largest possible hotel to Marriott Corporation's exacting specifications, and fill in the wetlands as the only practicable alternative.

The *Best Western Corte Madera Inn Redevelopment: Market Study & Financial Feasibility Evaluation* by RHSW, LLC. (Exhibit 14), and current STR data shows that room rates and operating revenues are so strong at this time that almost any type and size of new hotel on the subject site (35 rooms or more) would likely be financially feasible and solidly profitable and therefore practicable, if managed correctly, including but not limited to renovating the existing hotel, adding on to the existing hotel, or building a smaller hotel, because the subject location is generally acknowledged as a triple "A" location and perhaps the best location in all of southern Marin.

Unless the Applicant is genuinely confused about the applicability of "market demand" as a determining factor under the 404(b)(1) Guidelines, this appears to be yet another attempt to approach the application review process on the Applicant's own terms and to their own benefit, while at the same time failing to actually address or submit the information, data and evidence to support their preferred alternative. In reality, evaluating market demand is up to the Applicant and his investors and bankers, based on their estimation of the quality of the investment opportunity.

It is of great concern to us, however, that the Applicant appears to be doing this intentionally in the hope that agencies such as RWQCB will not be sophisticated enough to properly analyze or question the Applicant's financial modeling or its conclusions.

In doing a recent check on the average room rental rates noted in the *Best Western Corte Madera Inn Redevelopment: Market Study & Financial Feasibility Evaluation* by RHSW, LLC., and looking at current market data provided by STR we find an average 30 percent increase across the boards in both room rates and profitability for hotels in the Applicant's market area in the past five years. In fact, the manager of a southern Marin hotel that would be direct competitor to any new or renovated hotel at the subject location, told CVP that the past year has been the "best year ever" for hotels in Marin.

Comment based on professional experience

I have been in active the fields of design, site planning, architecture, construction, and the real estate brokerage, investment and development industry for more than 45 years and hold and have held multiples licenses and certifications as evidence of that expertise (Exhibit 16). In that time I have designed, built and consulted on hundreds of projects: residential, institutional and commercial. I have acted as managing partner and principle in numerous of development and investment ventures.

It is my professional opinion that a qualified architect could quite easily design an attractive and marketable 140 to 150 room hotel on the subject site that would be financially feasible and practicable, while still retaining the wetlands pond and wildlife habitat area. Speaking candidly, the Applicant and PFK's arguments appear to be a transparent ruse to deceive the unsuspecting public in order to maximize the Applicant's personal financial gain. There is nothing illegal about that, however, it fails to address the purposes of the 404(b)(1) Guidelines and the Clean Water Act.

CVP has interviewed a number of successful, local hotel developer / operators, who have all confirmed our opinions on what is and is not financial feasible and therefore practicable on the subject site. In fact, one such developer has submitted a letter as evidence of their desire to purchase the property at its fair market, appraised value, to do just that (see Exhibit 16a).

Marriott Corporation's Comment letter

The Applicant has argued that constructing anything less than their preferred option (and filling in the pond), is not financially feasible. In their documents submitted to the Town of Corte Madera as part of their EIR, and incorporated in their Application by reference, they cite a letter from Marriott Corporation as evidence of financial feasibility, and therefore practicability, and their need to build one specific size and type of hotel that meets the needs of Marriott (Exhibit 19). However, the letter from Marriott Corporation does not offer an opinion of financial feasibility. The letter from Marriott Corporation simply states that if the smaller hotel is built (for Marriott), it would probably be a Residence Inn, instead of a dual-branded hotel with a Marriott Springhill Suites. But as we've shown, building a hotel to Marriott's specifications or recommendations is inadmissible as evidence for approval of a permit under the 404(b)(1) Guidelines. There are literally dozens of competitors to Marriott in the subject market area, which the Applicant has failed to consider, that would not require the same restrictions or design parameters. The Applicant provides no evidence that they have considered those alternatives in good faith.

The *Marin Lodging Market Survey & Financial Feasibility Evaluation* (Exhibit 5), and the market updates and related information we've provided based on STR Reports demonstrate that there is no evidence in the record (as required),³⁹ which would lead an objective reviewer to conclude that a different hotel design on the subject site would not be practicable.

³⁹ 40 CFR 230.12(a)(3)(iv).

The property is for sale except to qualified buyers

The property is listed as for sale with the real estate firm of Newmark, Cornish & Carey. They describe the property as an “Extremely Rare Central Marin Redevelopment Opportunity” (sales brochure, attached as (Exhibit 17). They have not indicated an asking price.

Qualified, local hotel developers / buyers, who wish to purchase the property and build a unique, new hotel of no more than 150 rooms, which would include the preservation and enhancement of the wetlands and the wildlife habitat, have contacted the representing brokers and inquired about receiving information packages in order to submit purchase offers and have been told that the owner is not accepting offers from hotel developers.

Although it is not unusual for a land owner to list property for sale, just to find out what kind of offers might be submitted, it is certainly unusual for a land owner to intentionally discourage offers from the most likely buyers. This is particularly true for this property. Since the inception of this project, the applicant has taken an “all or nothing” approach to gain approvals from the Town of Corte Madera. Throughout that process the developer has stated that unless they receive approval for their preferred project (currently 174 rooms), they will not build anything at all and sell it to the highest bidder. They have threatened that this highest bidder will likely be a car dealership, retail stores, or an office complex. None of these uses are considered desirable by the Town. In fact, Town Council members have said, repeatedly, that they will not approve retail, housing, car dealerships for that site and will only look favorably on a hotel as the primary use of the site.

It makes little sense then for the applicant to refuse offers from hotel operators and hotel developers, when those buyers would very likely be the highest bidders, again, unless the applicant is trying to manufacture “evidence” to present to the Town and the Corps, to substantiate their claim that their own preferred project is the only alternative that is financially feasible and therefore practicable.

In my professional opinion I can only surmise that the Applicant’s listing of the property for sale, while refusing to accept offers from bona fide buyers, appears to be a ruse to be able to contend (without perjuring themselves) that there are no buyers interested in their property, in order to argue that unless their preferred alternative, which includes filling the pond, is approved (the Marriott dual branded hotels) the hotel and the wetlands will continue to deteriorate.

DISCUSSION OF ALTERNATIVES ANALYSIS

Re: Introduction

The *On-Site Alternatives Analysis Final with Figures and Attachment; Introduction*, states

The off-site portion of the alternatives analysis was previously completed and has been reviewed by Corps of Engineers (Corps) and Regional Water Quality Control Board (RWQCB) staff. This on-site analysis incorporates and modifies portions of the off-site analysis and includes a new analysis of on -site alternatives.

In plain terms, this is just an unadulterated lie that appears to be designed to deceive the public and the local agency into believing this project has the approvals it needs to move forward and an attempt to intimidate RWQCB into believing that the Corps has already accepted the analysis. In point of fact, however, this nor any other alternatives analysis has *ever* been submitted much less reviewed by the Corps (or by RWQCB). That it has not been shown to the Army Corps is evidenced by the fact that its absence is the very reason the Corps has placed the project on inactive status.

Re: PART II. Project description and basis purpose

The On-Site Alternatives Analysis Final with Figures and Attachments B. Basic Purpose states

Both reports [by PFK] strongly recommended dual -branding as it will allow the hotel to: (1) take advantage of the variety of demand present in this region; that is, to accommodate both short -and long -term stays; and (2) capitalize on this demand and capture the higher value revenues that accompany these.

Here again, the Applicant justifies their conclusions based on erroneous reasoning about what constitutes “practicable” under the 404(b)(1) Guidelines. To “take advantage of... demand” or “capitalize on this demand and capture higher value revenues” are not conditions for approval of a permit to fill a wetland. In fact, as we have pointed out, they are expressly prohibited from consideration.

This also exposes the obviously conscious decision by the Applicant to use outdated information on average room rates, occupancy rates, and overall revenues, because the distortions of those outdated figures support his ability to “cry poor” and conclude that the only alternative that is viable is the same one the Applicant has been promoting for more than a decade.

The On-Site Alternatives Analysis Final with Figures and Attachments B. Project Demand

We have commented on the Applicant’s incorrect assertions about market demands in our previous comment letters. Those comments are hereby incorporated herein by reference.

As we’ve noted, both the *Alternatives Analysis Final with Figures* and the *On-Site Alternatives Analysis Final with Figures and Attachments*, the Applicant has based its practicability arguments on evidence of “market demand” for his preferred alternative. Although there is no relationship whatsoever between market demand and the financial success of a particular development proposal (in any economic times or market some projects will fail and some will succeed), as we’ve noted above, recent data regarding Marin’s vibrant economic environment, with high and rapidly rising room rental rates, increases the likelihood that a great variety of hotel types and sizes have a strong chance of being financially feasible on the subject site.

Re: PART III. On-site Alternatives Analysis Final with Figures and Attachments A. Practicability

We have commented on the Applicant's incorrect assertions about market demands in our previous comment letters. Those comments are hereby incorporated herein by reference. For more citations, data and analysis on practicable project alternatives please see our letter to Sahrye Cohen, Permit Manager at the Army Corps of Engineers, dated June 16, 2016 and attached as Exhibit 9.

CONCLUSION

Financially feasible and practicable alternatives exist, which provide for the redevelopment of the existing Best Western Corte Madera Inn hotel and the preservation of the Edgewater pond. Therefore, with all of the information presented in this comment considered, we respectfully request that the Army Corps deny the applicant a permit to fill in the special aquatic site, known as Edgewater Pond, located in Corte Madera, CA, because it is not the LEDPA and practicable alternatives exist that qualify as the LEDPA.

Thank you for the opportunity to submit our comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bob Silvestri', with a stylized flourish at the end.

Bob Silvestri
President
Community Venture Partners, Inc.

LIST OF ATTACHED EXHIBITS

- 1-Exhibit I - E.Yates Comment Letter 01-20-2015
- 2-Exhibit II - E.Yates Comment Letter 08-19-2015
- 3-Exhibit III - E.Yates Comment Letter 12-19-2015
- 4-Exhibit IV - 2-9-16 ACR_comment_BCNH_CorteMadera_20160209 (2)
- 5-Exhibit V - Corte Madera Inn wetland & aquatic wildlife habitat Baye 021516
- 6-Exhibit VI - G.R. Kamman Hydrology comments_2-25-16
- 8-Exhibit VIII - Xavier Fernandez SF Bay Regional Water Quality Control Board Email
- 9-Exhibit IX - 061616 - CVP - Army Corps Public Notice 2000-255330N comment letter
- 10-Exhibit X - 061616 - CVP - Army Corps Comment Exhibits
- 11-Exhibit XI - 061616 M. Graf Comment Letter and Exhibits to CVP Letter
- 12-Exhibit XII-Corte Madera Inn Recirc EIR memo wigeongrass SAV & wetlands Baye 123116
- 13-Exhibit XIII - 7.16 Audubon Canyon Ranch_comment_BCNH_CorteMadera_RDEIR_20161209
- 14-Exhibit XIV- Market Study & Financial Feasibility Evaluation by RHSW LLC
- 15-Exhibit XV - SF Bay Regional Water Quality Control Board Letter
- 16-Exhibit XVI - Robert Silvestri CV
- 16a-Exhibit XVII – Marin Hotel Group Letter
- 17-Exhibit XVII - 56-60MaderaBlvd Broker Brochure
- 18-Exhibit XVIII -TheRail_May2016_Web
- 19-Exhibit IXX - Marriott Corporation Letter
- 20-Exhibit XX-Journal of Environmental Law and Policy - Jon Schutz
- 21-Exhibit XXI -Yocum - Wetlands protection through impact avoidance
- 22-Exhibit XXIII -Evironmental Law Institute 2008
- 24-Exhibit 24a CorteMaderaInn_DEIRandAPPENDICES
- 24-Exhibit 24b Corte Madera Inn Draft EIR Alternatives
- 24-Exhibit 24c Corte Madera Inn REIR Alternative
- 24-Exhibit 24d November 2014 DEIR Corte Madera Inn EIR and APPENDICES_201411221423255752
- 24-Exhibit 24e November 2015 FINAL CorteMaderaInn_FEIR
- 24-Exhibit 24f November 2016 Corte Madera Inn RDEIR2_WITH Appendices_FINAL
- 24-Exhibit 24g CorteMadera Inn Rebuild_RDEIR

USB DRIVE of all Exhibits is sent and attached via US Mail.