

SUMMARY

ENVIRONMENTAL IMPACT STATEMENT

On

Improving the Regulatory Process in

Southwest Florida

Lee and Collier Counties, Florida

1. Purpose and Need.

The Jacksonville District of the U.S. Army Corps of Engineers (Corps) prepared this Environmental Impact Statement (EIS) to improve review of future applications to fill wetlands.

Corps Permits. A landowner who desires to fill wetlands on his/her property must apply to the Corps for a Department of the Army Permit (Permit) under Section 404 of the Clean Water Act. The Corps decision whether to issue a Permit considers the benefit and detriments of the proposed fill on many factors, including wetland ecological values and functions, fish and wildlife habitat, water quality, natural resource conservation, economics, aesthetics, historic properties, flood hazards, land use, navigation, shore erosion, recreation, water supply and conservation, energy needs, public safety, food and fiber production, mineral needs, and property ownership. The applicant must demonstrate in the application that a non-wetland alternative is not available and that the proposed fill is the practicable alternative project design with the least damaging environmental effect. The Corps must also consider the effects of the proposed fill on species listed under the Endangered Species Act.

Problem to Be Addressed: The Corps initiated the EIS out of concern whether the incremental (permit-by-permit) reviews were adequately addressing cumulative and secondary effects of the wetland fill in the rapidly growing Southwest Florida area. The northwest corner of the EIS study area is roughly defined by the cities of Ft Myers/Sanibel, the northeast by Lehigh Acres/Immokalee, the southwest by Naples and the southeast by Everglades City. The area contains a number of important resources including protected species, wetlands, marine and estuarine resources, habitat preserves, sanctuaries, other public and private conservation lands, and other important ecological resources. Approximately 38% of the historic plant cover has been converted to agriculture, urban, suburban, and other economic activities. Ten species listed as Endangered or Threatened are found in the study area, plus sea turtles who nest on its beaches and the Florida manatee found it its open waters. Thirteen of the thirty seven waterbodies in the study area are listed by the State of Florida as partially or not meeting water quality standards.

2. Major Findings and Conclusions

A decision on an application for an individual permit is made after review of site-specific and project-specific information submitted by the landowner or provided by other sources. The information that is gathered is based on the understanding of what natural resource and other issues are applicable to the project. The evaluation considers and weighs the extent of adverse or beneficial effects on these issues. The decision authorizes the location and quantity of wetland fill and includes appropriate conditions .

The EIS discloses five sets of predicted futures (Ensembles). Each future maps different location and quantity of wetland fill. Also, each future includes legends that suggest various conditions or constraints applied to the permit decisions. Any location on the map therefore has an associated: location of fill (present or not), quantity of fill, and some condition or constraint. These attributes are

collectively called criteria. Therefore, there are five combinations of various criteria. Each map assumes all future permit decisions followed the suggested criteria. The EIS then compares the effects of each future on wetland fill, wildlife habitat, and other factors. Summary of the criteria and effects are found in Table 3.

Existing Conditions (No Action Alternative): The Corps presently makes its determinations of the benefit and detriments of proposed fills on a case-by-case basis. The factors to be considered, and the weight to be afforded each factor, are presently left to the professional judgment of the program manager with oversight from Regulatory Division management. The "no action" alternative would be to continue evaluating permit applications in the same manner as before the EIS.

Proposed Action. The Corps proposes to use the information in this EIS in the review of future permits. The information will be used to identify the issues that may be relevant to the project site, provide a source of information on potential effects of the project on various issues, to provide a reference on the potential effects of the location and quantity of fill, and to describe potential effects of alternative permit conditions or constraints. The Corps is not proposing to decide, based on this EIS, to establish the location of fill, quantity of fill, or on any condition or constraint on any piece of property. That decision can only be made after review of an application.

The EIS provides a set of standardized natural resource criteria in reviewing permit applications in Southwest Florida. This set is called the Permit Review Criteria and is found at Appendix H of the EIS. Important natural resource issues are shown on the companion Natural Resources Overlay Map. The map is divided into anticipated future use areas where a project may have a high potential for adverse effect on the natural resource. The program manager (person reviewing the permit application) would evaluate each application using the criteria and evaluations suggested in the EIS applicable to the important resources found in that area. Just as some areas have greater or lesser degrees of environmental importance, so does the review of applications require greater or lesser degrees of rigor. As seen, some areas have no issues mapped. For these areas, the program manager would continue to use his/her discretion as to the appropriate reviews .

The Natural Resources Overlay Map implements the proposed action, and will be used to determine the applicable permit review criteria. The map was created by the Corps based on evaluation of the effects of five future landscapes (called Ensembles) that suggested different locations of development and different criteria for the permitting of those developments. The comparison of the Ensembles allowed for the identification of areas where projects may have the greater impacts to natural resources.

Other Alternatives Considered: The issue is how the Corps considers available information on the effects of alternative locations, quantities and conditions of natural resources when deciding whether to issue a permit. An infinite number of potential locations and quantities of fill and types of conditions and constraints are available to be applied. Although an infinite number of alternative criteria and natural resource maps could be developed, all would simply be variations of the proposed action. They are all just variations on the way the Corps reviewer can find the applicable information on the same natural resource factors. Rather than set up and knock down a number of such "strawman" alternatives, the Corps felt it was better to develop one easily used set of criteria and a natural resource map to reference the information in the EIS since it can be easily modified in response to public concerns and changing conditions. The choice is really between "piecemeal" review of cumulative impacts and review of cumulative impacts using standardized criteria and a reasonable forecast of future conditions. Therefore, only the "No Action" alternative and the Proposed Action have been considered.

Summary of Environmental Effects of the Proposed Action: Implementation of the Permit Review Criteria will have the following effects compared to the no-action continuation of piecemeal review: less likely to have fragmentation of habitat; reduced cost for application preparation in some geographic areas; greater predictability for the applicant; create dialog for exploration of solutions rather

than surprising a future applicant when the natural resource reaches the point that "breaks the camel's back".

3. Determination of Future Conditions: A sizable part of this EIS has been concerned with analysis of land use patterns so as to determine the most likely future land use over the next 20+/- years. In conjunction with Corps wetland permits, such land use patterns have a tremendous cumulative environmental effect. For example, a permit to build a factory in an existing undisturbed area may have little environmental effect if the rest of the area remains undeveloped, but if the factory then results in extensive residential and commercial development, the cumulative environmental effect may be much greater.

To determine the anticipated "futures," the Corps initiated and hosted this group of community and agency representatives. The membership was balanced to represent the range of views of the community and to provide a mix of expertise for the development of alternatives. Through professionally facilitated meetings, the ADG defined 12 evaluation issues, agreed to 62 measurement factors, and then created and evaluated 28 alternatives. A final report of their work is found as an Appendix in the EIS. For the work of the ADG, the EIS study area was divided into sub-areas. Any individual ADG alternative only covered one of the four sub-areas. Several alternatives would apply to the same sub-area. The Corps used the ADG work to assemble the Ensembles which cover the entire study area. In turn, the Corps used the Ensembles to create the Natural Resources Overlay Map that is part of the proposed action.

The map accompanying the Ensemble depicts what the landscape may or may not look like in 20+/- years as a result of many individual decisions by the Corps, landowners, Counties, and others. Conversion of upland plant cover does not require a Corps Permit, but, based on previous permit applications, development of the uplands is sometimes impracticable without some wetland fill. Therefore both wetland and upland changes are shown by the Ensembles. Each Ensemble represented a possible future state:

Ensemble Q. Builds on the comprehensive plans and provides a larger acreage of development than the comprehensive plan.

Ensemble R. Represents the status quo and incorporates the Lee & Collier County Comprehensive Plans.

Ensemble S. Provides greater emphasis on listed species and their habitat, particularly wide-ranging species such as the Florida panther and Florida black bear. Contains restrictions on the clearing of native vegetation, preservation and restoration of habitat corridors and flowways, and increased regulatory and public awareness of the presence and extent of sensitive resources.

Ensemble T. Seeks to increase the area of preserves through restore, retrofit, and redevelopment of vacant lands within Lehigh Acres, greater protection afforded to isolated wetlands, and limitation on the extent of clearing & filling activities, within Golden Gate Estates and other areas. Agricultural activities would be limited to existing acreage with limited intensification therein.

Ensemble U. Proposes the largest area of preserve among the Ensembles through criteria that limit the conversion of natural vegetation to other land cover types. This criteria also seeks to increase the difficulty of placing fill in wetlands by strict application of the presumption that alternative non-wetland sites are available.

4. Issues Raised by the Public and Agencies. A number of issues were identified by the Alternatives Development Group and others. These include the following: property rights; water management; water quality; ecosystem function; wildlife habitat; listed species; regulatory efficiency and effectiveness; economic sustainability; local land use policy; avoidance of wetland impacts; mitigation;

cumulative/secondary impacts; restoration/retrofit; and public lands management/use. The Corps invited the assistance of the Alternatives Development Group (ADG), a group of community and agency representatives, for input in issues important to the community. Having obtained a preliminary look at issues important to the public, the Corps was able to develop its own Natural Resources Overlay Map and Permit Review Criteria, then proceed with public scoping of this EIS. This allowed the Corps to present a Draft EIS with a comprehensive review of the issues and in terms and terminology important to the community. The 189 day public comment period on the Draft EIS, including three public hearings, resulted in 1,098 pages (without enclosures) of additional input (plus 1,400+ letters from landowners in Lehigh Acres.)

5. Areas of Controversy. Decisions on permit applications and implementation of various other laws to protect environmental resources may be in conflict with certain plans for development and other land use changes. In addition, the question has been raised as to how much restriction on use of private property is justified by the public benefit of environmental protection. As long as there are strong and diverse viewpoints on these issues there will be a degree of controversy.

Comprehensive Plans. Although the Corps authority, based on federal laws, is independent of local authorities, one of the goals of this EIS is to better coordinate with local and State processes. For example, the Lee County Comprehensive Plan states "Permitted uses in Wetlands consist of very low density residential and recreational uses that will not adversely affect the ecological functions of wetlands" and, later, "...the county will not undertake an independent review of the impacts to wetlands..." Collier County's Area of Environmental Concern Overlay "...has no regulatory effect." Both Counties refer the landowner to state and federal permitting programs. Therefore, landowner will look to other parts of the County Plans for criteria on density, type of activity, etc., and, we hope, will be able to look at the EIS for criteria on wetlands and wetland related issues. The overlay map shows where the Permit Review Criteria issues overlap areas identified for development by the Comprehensive Plans. A potential conflict may occur if a project proposed in an area deemed appropriate by the Comprehensive Plan is determined by the Corps, after its review of the application, to have not addressed the natural resource degradation.

Lehigh Acres. Lehigh Acres was included in EIS study area because of its landscape importance for some natural resources. For example, Wood storks from Corkscrew Marsh forage in Lehigh Acres as well as other areas. If a lot owner fills a herbaceous marsh on his/her wetland, the population of this endangered species would decline. By including Lehigh Acres, the EIS can describe the past loss of marsh and present estimates of potential future loss of marsh for the rookery. The EIS presents Comprehensive Plan and four alternative maps (the 5 Ensembles) that incorporate ideas for changes in landscape and permit review criteria that may happen or were expressed as ideas to address a concern such as wildlife habitat loss. These ideas were addressing issues that affect the entire study area and the effort was not aimed at Lehigh or any other particular area. Although the Corps recognizes the Comprehensive Plan as the State and County preferred plan, the Plan does state "...the county will not undertake an independent review of the impacts to wetlands..." and refers the landowner to State and Federal permitting. The Corps, therefore, cannot simply defer to the Comprehensive Plan. Under the Clean Water Act, the Corps must make its independent decision whether to authorize lot owners to fill their wetlands. The EIS is not adding regulations. They already exist. The Corps is disclosing to the public the different impacts of alternative quantities of permitting. However, the Corps has always recognized in permit reviews that circumstances of single family lot owners are such that options such as purchasing other sites or changing site design are often not practicable alternatives to filling the wetlands on their lots. Based on public comments submitted, Lehigh Acres serves those that do not have alternative locations for homesites in the region. However, the continued authorization of wetland fill will contribute to wetland and habitat impacts such as disclosed in the EIS.

Property Value. There is no guarantee under the law that a landowner will be authorized to fill wetlands, if wetlands are on his/her property. None of the alternatives state that the Corps will or will not issue a permit. The EIS discloses the review criteria that will be used to assess potential impacts. The

EIS has not proposed to deny permits. That decision can only be made after a review of the individual circumstances of a lot owner based on information in his/her application. The Corps weighs the impacts to the environment and to the individual landowner. However, the EIS is disclosing what is the total environmental impact of prospective decisions to better understand the ecological context of the loss of the wetland on a single parcel.

Permitting cost. As public's concern for fate of remaining wetlands increases, additional administrative requirements have been added to the Nationwide Permits. Nationwide permits and General Permits are one method by which the Corps keeps permitting costs down. The Corps hopes to develop a General Permit written for Lehigh Acres and other areas in Southwest Florida to prevent permit cost burden.

Permitting uncertainty. For property with wetlands, permitting uncertainty already exists since there is no guarantee a permit will be issued. As the number of acres of wetlands in a region continue to be reduced, the general public's concern over the fate of the remaining ones typically increases. By preparing a 20 year estimate, the Corps is trying to identify problems and solutions particularly for those owners who will not be building until later. The EIS by itself is not pre-determining what the Corps permit decisions will be. The Corps is concerned with the apparent continued decline of wildlife populations, water quality, and other issues. If the Corps waits until the decline becomes critical some landowners may be surprised by a permit denial ("the straw that breaks the camels back"). Through this EIS the Corps is disclosing how much impact its program may have and has presented ideas for alternatives. The Corps hopes this results in public discussion of solutions. The Corps has not selected a plan of land acquisition or a plan to begin denying permits. The Corps has presented Draft Permit Review Criteria that identifies locations where projects have a greater potential to affect natural resource issues.

Vested Rights. The landowner, if he/she wishes to fill wetlands, must obtain a Corps permit in accordance with the Clean Water Act. A State or local permit or other development authorization does not override a federal law. The requirement for a Corps permit to place fill in wetlands was initiated by passage of Section 404 of the Clean Water Act of 1972. There are those who purchased lots before then that have been affected by this new law. Those who purchased after 1972 unfortunately may not have been aware of this. The law applies to all wetlands no matter when purchased.

Upland Activities. The EIS presents total projected impact, both resulting from Corps decisions and decisions of others, to provide context of Corps decisions. In some circumstances, the Corps will review the activities on uplands if they are a result of the wetland fill. For example, where wetland fill is the only way to provide access to an upland island, the Corps will typically include in its evaluation of effects the resulting impact on uplands. The EIS does not expand Corps permitting. However, if a change in activity on the upland, including agricultural activity, does not require wetland permit but adversely affects an endangered or threatened species, the landowner may have other obligations under the Endangered Species Act.

Property Rights. The Corps must and will ensure its actions that restrict use of property are just those that are authorized by law. However, the Corps will, within the limits of the law, fully consider the natural resource effects that may result if a requested wetland fill is authorized. Section 404 of the Clean Water Act is a restriction of the right of a landowner. But that restriction is limited to placement of fill in wetlands on the property. (The Endangered Species Act and other laws also are restrictions within designate limits). The Corps can and has asked questions related to these effects in permit reviews. The EIS reflects the Corps knowledge of location and assessment of natural resource effects prior to receipt of site-specific information. The permitting process is complicated and the Corps hopes the EIS will provide the landowner with better understanding of these effects in advance of application.

6. Implementation. The Corps decision whether or not to implement the Proposed Action will be made after considering comments submitted by the public on the EIS. If the proposed action is adopted, the Corps will use site-specific information provided by the applicant that addresses the issues raised by the

permit review criteria. Only after full information is available would a permit decision be made. Again, the permit review criteria do **not** pre-determine a result. Depending on a complete review of all factors, a permit may or may not be granted, regardless of the Natural Resources Overlay Map and regardless of the Permit Review Criteria.

Anticipated Future Actions: The Corps may, in geographic areas with fewer concerns, consider initiating development of General Permits or other mechanisms to expedite the administrative processes, including ones for Golden Gate Estates and Lehigh Acres. A General Permit is a type of permit issued by the Jacksonville District of the U.S. Army Corps of Engineers that authorizes a group of construction activities within the State of Florida, Commonwealth of Puerto Rico, or the Territory of the U.S. Virgin Islands for five years. If a landowner's proposed project is for the construction listed by the General Permit and if the project design matches the special conditions described in the General Permit, then the landowner applies for and the Corps issues a letter verifying in advance that the landowner's plan matches the General Permit. (This letter of verification is commonly referred to as "issuing a General Permit"). The landowner is thereby assured he/she has met requirements of the Clean Water Act and does not have the administrative burden of the individual permit review. Nationwide Permits are similar except the permits are issued from Washington, DC, although landowners receive their verifications from Jacksonville. The General Permits would apply to certain areas, such as Lehigh Acres and Golden Gate Estates, and would include conditions to address the concerns described in the Permit Review Criteria. For example, in Lehigh Acres the Corps might pursue a General Permit that authorizes fill of the individual wetlands on single family lots but with a funding mechanism where a large area of replacement wetlands are provided since preserving wetlands on a single lot is often impracticable. This would prevent the decline of wildlife habitat and provide an administrative process to keep permitting costs low. All these possible actions are, however, speculative at this time and are **not** within the scope of this EIS.

Refinement. The information used is necessarily based on regional or statewide mapping programs. The Corps will use site-specific information provided by the applicant that either confirms or finds the issue raised by the EIS as not applicable. The evaluation factors used to analyze the effects are not elaborate. Their purpose is to present the relationship of an individual permit to the whole. As these are used, the Corps will periodically evaluate, in cooperation with other agencies, the accumulation of permit decisions to evaluate trends.