ADMINISTRATIVE APPEAL DECISION

APPLICATION NUMBER 199901942 BY MAINE MOORINGS, L.L.C.

NEW ENGLAND DISTRICT

Date: APR 30 2001

Review Officer("RO"): Roberto Barbosa, U.S. Army Corps of Engineers, North Atlantic Division, Brooklyn, New York.

Appellant's Representative: Paul Revere, III, Law Offices of Paul Revere, III, Centerville, Massachusetts.

Receipt of Request for Appeal: 25 August 2000

Date of Acceptance of the Request for Appeal: 20 November 2000

Appeal Conference Date: 31 January 2001

Background: On 8 July 1999, and after coordinating previous enforcement matters with staff members from New England District's Regulatory Branch ("the District"), Maine Moorings, L.L.C. ("the Appellant") applied for an after-the-fact permit to maintain twelve moorings at six different locations in Penobscot Bay, Maine. The Appellant proposed to maintain two moorings in navigable waters of the United States adjacent to the following sites: Camp Island, McGlathery Island, Merchant Island, Duck Harbor off Isle Au Haut, Herrick Cove off Herrick, and Barred Island. The Appellant's work required a Department of the Army ("DA") authorization pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403 (1999)).

Initially, the Appellant sought a permit pursuant to the Department of the Army Programmatic General Permits for the State of Maine, which allows expedited review and permit issuance of permit applications meeting certain specific criteria. After completing the expedited application review, the District determined that it would require an individual DA authorization for the completed project and it informed the Appellant by letter on 26 October 1999.

On 8 February 2000, the District issued a 30-day Public Notice describing the completed work and requesting comments. In response, the District received approximately 300 items of correspondence during and after the close of comments for the Public Notice. All comments objected to the proposal and many commentors requested that the District hold a public hearing on the completed project.

In a letter dated 20 March 2000, the District forwarded to the Appellant correspondence received in response to the Public Notice and outlined the central concerns raised in the

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correspondence. The District informed the Appellant that based on the District's review of the information received up to that date, the District could not conclude that the Appellant's proposal was in the public interest. In a letter dated 19 April 2000, the Appellant responded to the District letter and the enclosed comments and addressed each of the issues raised in the District's 20 March 2000 letter. The District denied the Appellant's application and informed the Appellant by letter dated 28 June 2000. The letter also directed the Appellant to remove all tackles from navigable waters of the United States, which the Appellant subsequently did.

Administrative Appeal Process: North Atlantic Division ("HQNAD") received the Appellant's request for appeal on 25 August 2000. In addition to the accepted reasons for appeal listed and discussed below, the Appellant also requested to appeal the District's decision to require an individual DA authorization. The Appellant also requested that HQNAD exercise its authority to elevate the Appellant's application instead of remanding it to the District. By letter dated 19 September 2000, HQNAD informed the Appellant that the District's decision to require an individual DA authorization was not an appealable action.

After discussing with the Appellant various aspects of its request for appeal and after clarifying that executing a tolling agreement was not needed, on 20 November 2000 HQNAD accepted the reasons for appeal listed and discussed below. On 31 January 2001, the RO conducted an appeal conference with representatives of the Appellant and the District.

Accepted Reasons for Appeal:

1. New England District's denial was arbitrary and capricious because it had authorized similar proposals in the same general area as the appellant's proposal.

2. New England District committed an error of law when it considered impacts and effects not caused by changes to the physical environment resulting from the installation of the moorings.

3. New England District's denial was against the weight of the evidence, which demonstrated that the moorings did not impact anchorage or navigation and were not contrary to the public interest.

4. New England District did not individually consider the merits and impacts of each mooring location.

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Evaluation of the Reasons for Appeal and Instructions to the New England District Engineer ("DE"):

First Reason for Appeal: New England District's denial was arbitrary and capricious because it had authorized similar proposals in the same general area as the appellant's proposal.

Determination on the Merits of This Reason for Appeal - This reason for appeal does not have merit: The District properly distinguished the Appellant's proposal from the projects the Appellant used as comparison. Furthermore, the Corps of Engineers regulations, 33 C.F.R. Part 320 et seq. (2000), require for each proposal, an individualized determination of the applicable public interest review factors and their relative weight in the evaluation process.

Required Action: No action required.

Discussion: In its request for appeal ("RFA") and at the appeal conference, the Appellant stated that although the District denied the Appellant's proposal, the District authorized similar proposals near two of the Appellant's sites. The Appellant compared its proposal to an approved project by Dirigo Aquaculture ("Dirigo") located near the Appellant's site off Barred Island. The District authorized Dirigo to install two 22-foot by 44-foot mussel rafts within an area approximately 100 feet by 435 feet as a test project to determine the site's viability for a commercial aquaculture venture. The Appellant noted that Dirigo's project is located in an area suitable for anchorage. The Appellant stated that the authorized structure represented a greater hazard to navigation than the two moorings the Appellant installed at the site. The Appellant stated that, unlike anchored vessels or vessels using moorings, Dirigo's is a fixed structure that does not swing as vessels would when wind and currents change. In addition, the Appellant indicated that if the test project proved successful, the next step would inevitably require a larger structure occupying a larger portion of the area suitable for anchorage at that site.

The Appellant also compared its proposal to a project by Billings Diesel and Marine ("Billings"). The District authorized Billings to maintain as installed eleven rental moorings in Allen Cove and seven rental moorings in Burnt Cove. The Appellant noted that the moorings in Allen Cove are located approximately 2 miles north of the Appellant's Camp Island site and near the Deer Island Thorofare, a busy passage within Penobscot Bay. The Appellant also noted that although Billings was present at the Allen Cove site, Billings did not have a presence at Burnt Cove, where Billings installed seven of its moorings. In addition, the Appellant noted that Burnt Cove was a sheltered cove with adequate conditions for anchorage.

The District distinguished both permitted structures from the Appellant's proposal. With regard to Dirigo's project, the District stated that the permittee will be required to remove all structures at the end of three years. In addition, the District noted that, unlike the Appellant's proposal, the permittee oversees the permitted structure daily. With regard to Billings' project, the District stated that the moorings it authorized had been in place for

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approximately 20 years, the Town of Stonington Harbor Master had issued permits for the moorings annually since they were first installed, and that the moorings were near the applicant's facilities. The District also stated that, notwithstanding the similarities that the Dirigo and the Billings projects may have with the Appellant's project, the District must make a case-by-case determination of the relevant public interest review factors and their proper weight in the evaluation process. The District stated that the Appellant could not conclude that because its project may be similar to other permitted proposals the Appellant will be successful in receiving a DA permit.

I have determined that the District properly distinguished the Appellant's proposal from the Dirigo and the Billings projects. The Corps of Engineers' policies for evaluating permit application state, in relevant part, "[e]valuation of the probable impacts which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments." 33 C.F.R. § 320.4(a)(1) (2000). The Dirigo project is an aquaculture project and as such has a clearly different project purpose than the Appellant's proposal. Furthermore, Dirigo's project is limited to a single site while Appellant's proposal is located in six different sites within Penobscot Bay. Thus, the reasonably foreseeable benefits and detriments that would result from Dirigo's project are different from the reasonably foreseeable benefits and detriments that would result from the Appellant's proposal. In addition, the impacts and benefits that would accrue from a single-site proposal such as Dirigo's are different from those impacts and benefits from a multiple-site proposal. Therefore, the evaluation of probable impacts and the relevant public interest review factors in each case would be different.

Concerning the Billings project, the District properly noted that Billings installed the moorings 20 years earlier. This fact distinguishes how the District weighs the relevant public interest review factors. Part of the general criteria that a District must consider in the evaluation of every permit application is described in Part 320, which states "[w]here there are unresolved conflicts as to resource use, [the District will consider] the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work." 33 C.F.R. § 320.4(a)(2)(ii) (2000). Because Billings has used both sites for mooring vessels for approximately 20 years, it is probable that at the time Billings applied for a DA permit there were no longer any unresolved conflicts regarding resource use. Furthermore, the Town of Stonington harbor master, the Town official responsible for regulating mooring privileges, has approved Billings' moorings every year since their installation. In contrast, the Town of Stonington harbor master has declined to renew the Appellant's permit to maintain moorings. In addition, the benefits and detriments that would accrue from the Appellant's proposal would be different from the benefits and detriments that would accrue from Billings' proposal because Billings' permit allow it to keep 18 moorings in two sites while the Appellant proposes to keep twelve moorings on six sites different from Billings.'

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I have also determined that the District properly concluded that the relevance of each public interest review factor, which supports the District's decision to issue or deny a permit, depends upon a case-by-case analysis of the specifics of each proposal. Part 320 states:

> [t]he specific weight of each [public interest review] factor is determined by its importance and relevance to the particular proposal. Accordingly, how important a factor is and how much consideration it deserves will vary with each proposal. A specific factor may be given great weight on one proposal, while it may not be present or as important on another. 33 C.F.R. § 320.4(a)(3) (2000).

The District made a project-specific analysis of the impacts that would result from the Appellant's proposal that considered the six project sites, the comments received in response to the Public Notice, and the Appellant's information and response to the Public Notice comments. The regulations require the District to consider, as part of its public interest review, the specific issues, concerns, and objections the application under review raises. Therefore, the regulations allow the District to reach different conclusions on similar applications in the same general area.

In this case, and as stated above, the projects the Appellant relies on can be distinguished from the Appellant's proposal, with respect to the sites, and the issues and concerns identified during the public interest review process. Therefore, I have determined that this reason for appeal does not have merit.

Second Reason for Appeal: New England District committed an error of law when it considered impacts and effects not caused by changes to the physical environment resulting from the installation of the moorings.

Determination on the Merits of This Reason for Appeal - This reason for appeal has partial merit: The Appellant correctly asserts that the District did not apply the proper standard of review in considering the impacts of the proposed project. The standard of review the Appellant asserted (e.g., impacts caused solely by changes to the physical environment), however, is not the correct standard of review. As stated in the regulations, the Corps apply a standard of reasonableness when it performs its public interest review analysis, a standard the District did not apply.

Required Action: The District is directed to review the administrative record and revise its analysis of the relevant public interest review factors for the Appellant's proposal consistent with 33 C.F.R. § 320.4(a)(1) the Discussion section of this reason for appeal, and, as appropriate, with the Discussion section of the other reasons for appeal in this Appeal Decision.

Discussion: The Appellant stated that in its decision document, the District referred to impacts that were uncertain or speculative. Specifically, the Appellant referred to the District's statements that the proposal "could" affect navigation, "could" create a

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"potential" safety issue, and that vessel owners "could" be excluded from the areas currently used for anchoring. The Appellant also stated that when the District considered impacts to natural resources located in adjacent islands, the District relied on impacts that are beyond the scope of the Corps' public interest review. In support of its assertions, the Appellant cited *Mall Properties, Inc. v. Marsh*, 672 F.Supp. 561 (D. Mass., 1987).

In *Mall Properties*, the plaintiff challenged a decision from the U.S. Army Corps of Engineers denying a permit to fill tidal wetlands to construct a shopping mall. The basis for the denial was the socio-economic impacts of the proposed mall on neighboring communities. The United States District Court for the District of Massachusetts reversed the Corps' decision and remanded it for reconsideration concluding, in part, "the Corps may not properly consider economic factors unrelated to impacts on the physical environment . . . ." *Id.* at 569.

In response, the District stated that as part of its public interest review process it must consider every direct, indirect, secondary, and cumulative impact, and not just impacts and effects directly caused by changes to the physical environment.

I have determined that the Appellant is correct in stating that the District did not apply the proper standard of review in considering the impacts that would result from the Appellant's proposal. The Appellant's stated standard of review, however, is also incorrect. I have determined that the proper standard of review applicable to the public interest review factors outlined in 33 C.F.R. § 320.4(a)(1) is whether the benefits and detriments that would result from a project are reasonably foreseeable.

The regulations regarding the evaluation of public interest review factors in every permit application read, in relevant part, as follows:

> The decision whether to issue a permit will be based on an evaluation of the *probable* impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. Evaluation of the *probable* impacts which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which *reasonably* may be expected to accrue from the proposal must be balanced against its *reasonably foreseeable* detriments. (Emphasis added). 33 C.F.R. § 320.4(a)(1) (2000).

The District is incorrect in asserting that it must consider every direct, indirect, secondary, and cumulative impact. Before considering an identified impact, Districts must first determine whether the impacts it identifies are probable (i.e., likely to happen). After identifying all probable impacts, Districts then identify the relevant public interest review factors and determine whether the benefits and detriments that may accrue from a proposal are reasonably foreseeable. In this case, the District did not reach a conclusion regarding whether the impacts it discussed in the decision document were probable or whether the benefits and

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detriments for the relevant public interest review factors were reasonably foreseeable.

Conversely, the Appellant puts forth a more restrictive standard of review. Relying on *Mall Properties*, the Appellant states that the District should consider only those impacts resulting from changes to the physical environment. Contrary to the Appellant's assertion, in *United States v. Alaska*, 503 U.S. 569 (1992), the Supreme Court applied well-established standards of review to evaluate agency interpretation of congressional statutes and concluded that 33 C.F.R. § 320.4(a)(1) is permissible construction of Section 10 of the Rivers and Harbors Act of 1899 ("Section 10")[1].

In *U.S. v. Alaska*, the Corps of Engineers issued a permit pursuant to Section 10 to build port facilities to the City of Nome. The permit required the State of Alaska to submit a disclaimer of rights to additional submerged lands that it could claim within its boundaries if the construction of the port facilities moved the coastline seaward. The disclaimer provided that Alaska reserved its right to the accreted submerged lands pending a decision by a court of competent jurisdiction that federal officials lacked authority to compel a disclaimer of sovereignty as a condition of permit issuance. Because of subsequent developments, Alaska and the Federal government engaged in litigation to resolve the issue of whether the Secretary of the Army acted within his discretion in conditioning approval of the permit to the City of Nome.

As part of the decision, and after recognizing the breadth of the language contained in Section 10, the Court conducted a detailed analysis of the history of the public interest review factors and stated:

> [t]he regulations at issue in this lawsuit, therefore, reflect a broad interpretation of agency power under § 10 that was consistent with the language used by Congress and was well settled by this Court and the Army Corps of Engineers. With respect to the breadth of the Corps' public interest review, these regulations are substantially the same as those adopted in 1976 [currently contained in 33 C.F.R. § 320.4(a)(1)]. These regulations guide the Secretary's consideration of "public interest" factors to evaluate in determining whether to issue a permit under § 10 of the [Rivers and Harbors Act of 1899]. 503 U.S. 569, 582-583 (1992).

By upholding the validity of 33 C.F.R. § 320.4(a)(1), the Court accepted as consistent with the statutory language the breadth of public interest review factors that the Corps may consider in the evaluation of a permit application and the standard of review that the

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[1] Section 10 provides in relevant part "[t]he creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any . . . structures in any . . . water of the United States . . .except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of , any port, roadstead, haven, harbor, canal, lake, harbor or refuge . . . unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same." 33 U.S.C. § 403 (1999).

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Corps applies to evaluate these factors: whether the benefits and detriments of a proposal are reasonably foreseeable.

The standard of review described above is consistent with previously promulgated Corps of Engineers regulatory guidance promulgated specifically in response to *Mall Properties, Inc.* Regulatory Guidance Letter 88-13 ("NEPA Scope of Analysis; *Mall Properties, Inc. vs. Marsh*"), issued on 3 November 1988 and expired on 31 December 1990[2], discusses the District Court's decision in *Mall Properties, Inc.* and concludes, in part, that "[w]hile all direct, indirect, and cumulative impacts flowing from our permit action should be considered, it is important to give such impacts appropriate weight in your permit decision. More strongly related indirect impacts should be given heavy consideration, while more 'attenuated' impacts should be considered, but less heavily." Considering probable impacts and reasonably foreseeable benefits and detriments, as discussed above, is fully consistent with this guidance.

For the reasons discussed above, I have determined that this reason for appeal has merit.

Third Reason for Appeal: New England District's denial was against the weight of the evidence, which demonstrated that the moorings did not impact anchorage or navigation and were not contrary to the public interest.

Determination on the Merits of This Reason for Appeal – This reason for appeal has merit: I have determined that, when reviewed against applicable standards, the administrative record does not support the District's conclusion regarding adverse impacts to navigation, recreation, safety, or to general environmental concerns. In addition, administrative record does not support the District's conclusion that there is no public or private need for the Appellant's proposal. The District inadequately considered the lack of state and local regulation of some of the Appellant's sites. Because the District did not apply the proper standard of review to the public interest review factors, I cannot conclude that the moorings would impact anchorage or navigation, or that the Appellant's proposal would be contrary to the public interest.

Required Action: The District is directed to review and supplement as appropriate the administrative record for consistency with the requirements of 33 C.F.R. §§ 320.4, 325 Appendix B, the Discussion section of this reason for appeal, and, as appropriate, with the Discussion section of the other reasons for appeal in this Appeal Decision.

Discussion: As stated in the discussion of the previous reason for appeal, 33 C.F.R. § 320.4(a) describes the public interest review policies that the Corps of Engineer must apply to the review of all permit applications. 33 C.F.R. § 320.4(a)(1) lists the public interests review factors that the Corps of Engineers must consider and sets forth the proper standard of review for those factors. 33 C.F.R. § 320.4(a)(2) provides general

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[2] Corps' Regulatory Guidance Letters ("RGLs") contain a date of issuance and of expiration. Unless superceded by specific provisions of subsequently issued regulations or RGLs, however, the guidance the Corps provides in the RGLs generally remains valid after the expiration date. See *HQUSACE's Review and Finding, Baldwin County EMC – Frank A Hughes Section 404(q) Referral*, January 3, 2001, p.8, n.1

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criteria that the Corps of Engineers must consider in the evaluation of every application as follows

> (i) The relative extent of the public and private need for the proposed structure or work:
> (ii) Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and
> (iii) The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited. 33 C.F.R. § 320.4(a)(2) (2000).

Finally, 33 C.F.R. § 320.4(a)(3) states that the weight of each public interest review factor will depend on the specifics of each project, but that full consideration will be given to all comments on the proposal. In making a decision on a permit application, Districts must apply 33 C.F.R. § 320.4(a) and 33 C.F.R. § 325, Appendix B ("NEPA Implementation Procedures for the Regulatory Program") to identify the impacts of a proposed activity, what reasonably foreseeable benefits and detriments will accrue from a project, and how Districts would weigh each relevant public interest review factor. To determine whether this reason for appeal has merit, the District's decision on the Appellant's proposal is reviewed for compliance and consistency with these standards.

In its decision document and at the appeal conference, the District stated that the Appellant's proposal would adversely affect navigation, recreation, safety, and general environmental concerns. These adverse effects, which appear to originate in the public comments received in response to the proposal, were the basis for the District's decision to deny issuance of a Department of the Army permit for the Appellant's project. In addition, the administrative record did not fully address the issue of public and private need for the proposed work. For these reasons, each of the relevant public interest review factors (navigation, recreation, safety, and general environmental concerns) and the issue of public and private need for the project are discussed below. Because the District advances the same reason to find adverse impacts to navigation, recreation, and safety, I address these public interest review factors concurrently.

A. Navigation, Recreation, and Safety: The District found that the Appellant's proposal would adversely affect these factors because the proposed commercial moorings for rent would render unavailable a portion of the anchorage area currently used by vessel operators for anchoring at no cost to the public at each proposed site. With regard to navigation, I have determined that the administrative record does not support the District's conclusion regarding the adverse impacts to navigation resulting from the Appellant's proposal. Specifically, the administrative record does not support a determination that the installation of the moorings, or its reasonably foreseeable use, would create a navigation hazard or would unduly interfere with navigation. The District did not rebut or contest the Appellant's assertion that it placed the moorings in areas unsuitable or ill suited for anchoring. Furthermore, the District admitted that that in

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nearly all sites privately owned moorings are currently present. Although the decision document raised the issue of commercial moorings in these areas as creating a precedent, the District's attempt to distinguish the Appellant's proposed moorings from the existing moorings based on its intended use (i.e., private versus commercial) fails to discuss what impacts to navigation would result from the Appellant's moorings that the private moorings do not cause.

The District also failed to identify and discuss what specific navigation hazard the Appellant's proposal would create. With the exception of the moorings installed near Duck Harbor, the District did not explicitly state that the Appellant's moorings would interfere with navigation. With regard to the Duck Harbor moorings, the District received correspondence from the National Park Service expressing concern regarding the Appellant's proposal and its potential interference with a passenger ferry to Isle Au Haut. However, in its decision document the District did not discuss or rebut statements contained in a letter dated 8 November 1999 where the Appellant asserts it contacted Captain Lawson, the ferry operator of the Isle Au Haut ferry, who allegedly stated that the Appellant's moorings would not interfere with ferry service to or from Isle Au Haut.

In addition, the District failed to discuss what reasonably foreseeable benefits to navigation that the Appellant's proposal would have. In the administrative record and the appeal conference, the Appellant indicated that the proposed moorings provided an easier, safer, and more reliable alternative to moorings. The District did not rebut or contest the Appellant's statement that it placed the moorings in areas unsuitable or ill suited for anchoring and the District concurred with the Appellant as to ease and convenience of using moorings instead of anchoring. If the Appellant's assertions were correct, its proposal would augment mooring opportunities at these sites and thus would be a benefit to navigation. Because the District failed to analyze or discuss in the administrative record most of its conclusions regarding the reasonably foreseeable benefits to navigation resulting from the Appellant's proposal, I have concluded that the administrative record does not support the District's assessment of the impacts to navigation that would result from the Appellant's proposal.

With regard to impacts to recreation, I have determined that the administrative record does not support the District's conclusion regarding the adverse impacts to recreation resulting from the Appellant's proposal. The District concluded that the reduction in space available to anchor at no cost to the public would adversely affect recreation. The District, however, failed to demonstrate that the Appellant's proposal would create a user conflict because the District did not advance evidence to challenge the Appellant's assertion that the selected sites were unsuitable or ill suited for anchoring.

The District and the Appellant did agree on the differences in behavior between anchored vessels and vessels using moorings. Both parties also agreed that common navigation practice for vessels seeking to anchor near moorings is to drop anchor at a location that does not prevent vessels from using the nearby mooring. The District stated that because of this accepted navigation practice the Appellant's moorings would prevent other vessels

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from anchoring near the moorings, thus excluding other boaters who would have otherwise used these areas.

The administrative record, however, does not support the District's conclusion. As noted above, the District failed to analyze, discuss, or rebut the Appellant's assertion that it would install the moorings in areas unsuitable or ill suited for anchoring. In addition, the District did not discuss the severity of the perceived impingement on boaters seeking to anchor at the sites. Furthermore, the District supported its conclusion by relying on comments received without discussing the merits of these comments, the District's decision to accept or concur with these comments, or the basis for disagreeing with the Appellant's assertions. Moreover, the District failed to identify and discuss what reasonably foreseeable benefits to recreation would have accrued from the Appellant's proposal. The Appellant, the District, and some commentors who objected to the proposal agreed that the moorings could attract boaters who felt more comfortable using moorings as opposed to anchoring at the sites. The District's failure to consider these and other potential benefits to recreation, and its failure to determine whether these benefits are reasonably foreseeable, results in an unbalanced presentation and evaluation of this public interest review factor. Because the District failed to analyze or discuss in the administrative record most of its conclusions regarding the reasonably foreseeable benefits and detriments to recreation resulting from the Appellant's proposal, I have concluded that the administrative record does not support the District's assessment of the impacts to recreation that would result from the Appellant's proposal.

With regard to safety, the administrative record fails to show that the proposed project would create a reasonably foreseeable safety hazard. The District stated that because the Appellant would manage the moorings from a "remote location" the Appellant would lack sufficient control over the moorings. The District stated that this lack of control could create a safety hazard due to overloading of the moorings or inadequate maintenance to ensure serviceability. At the appeal conference, the Appellant described the maintenance measures it takes to ensure that the moorings are serviceable and stated that it performs the same maintenance measures with approximately 600 other moorings that it owns and operates. The Appellant also stated at the appeal conference that an implicit assumption is that vessel owners and operators will use the moorings in a safe, prudent, and reasonable manner and that boaters who choose to anchor at these sites will also do so in a safe and prudent manner. In addition, the administrative record shows that the Appellant was amenable to incorporating special conditions to address the District's and the public's concerns.

The administrative record does not support the District's conclusion regarding potential safety concerns due to the Appellant's absence from the project sites and it is not consistent with the standard of review set forth in 33 C.F.R. § 320.4(a)(1). The decision document lacks an analysis to support its conclusion on this matter (i.e., why the "remote" management of the moorings would create a safety hazard). Specifically, the District failed to discuss what aspect or aspects of the remote management element of the Appellant's proposal would create a safety hazard. Moreover, the District's conclusion fails to address whether the impacts attributable to the Appellant's absence from the

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project sites are probable, as required by 33 C.F.R. §320.4(a)(1). In addition, the District failed to discuss whether there are reasonably foreseeable benefits on this matter. Because the District failed to analyze or discuss in the administrative record most of its conclusions regarding the reasonably foreseeable benefits and detriments to recreation resulting from the Appellant's proposal, I have concluded that the administrative record does not support the District's assessment of the impacts to recreation that would result from the Appellant's proposal.

At the appeal conference, the Appellant stated that although its main offices are located in Camden, Maine, it recently opened an office near the proposed moorings in Eggemoggin Reach. For the purposes of this discussion, I am disregarding the Appellant's statement regarding the new Eggemoggin Reach office. The Appellant provided this information after it received the Notification of Appeal Process, and as such is new information that must be excluded pursuant to 33 C.F.R. § 331.7(f).

B. General Environmental Concerns: With regard to this public interest review factor, the District concluded that the Appellant's proposal could result in the exploitation of natural resources in islands adjacent to the project sites. I have determined that the administrative record does not support the District's conclusion regarding the effects of the Appellant's proposal on this matter.

The District's conclusion on this public interest review factor is inconsistent with its conclusion for the previous public interest review factors. In its decision document, the District advanced two inconsistent arguments. The District concluded that the Appellant's proposal would reduce available space for those boaters wanting to drop anchor at these sites. Therefore, maintaining the moorings would reduce the number of vessels that would use these areas. The District also concluded that maintaining the moorings would cause the exploitation of adjacent upland resources. Because the underlying assumptions supporting each conclusion are mutually exclusive, the District cannot advance both conclusions to support its decision.

If the Appellant's proposal does exclude boaters who would otherwise use these sites to anchor, the number of vessels that would use these sites to moor or anchor, at most, would not exceed the number of vessels that could safely anchor in these areas in the absence of moorings. In this scenario, the potential to impact adjacent uplands resulting from boaters that choose to disembark on nearby island should be no greater than if no moorings were present. Conversely, if the total number of vessels that could safely use these sites with the moorings is less than the number of vessels that could safely anchor in the absence of moorings, the potential to impact adjacent upland should be less than in the absence of moorings at these sites. Furthermore, the District puts forth no justification or evidence to support its conclusion that the presence of the Appellant's moorings is more likely to cause boaters to disembark onto adjacent islands and exploit their natural resources.

The basis for the District's conclusion with regards to impacts to islands near the Appellant's project sites does not satisfy the criteria set forth in 33 C.F.R. § 320.4(a). At

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the appeal conference, the Review Officer asked the District what was the basis of its conclusion on this public interest factor. The District stated that it based its conclusion on comments received from the public. The evaluation of public interest review factors set forth in 33 C.F.R. § 320.4(a)(1) requires a DE to consider only probable impacts and then to balance the benefits that are reasonably foreseeable to accrue from a proposal with the reasonably foreseeable detriments anticipated from the project. In addition, and pursuant to 33 C.F.R. § 320.4(a)(3), the Corps must fully consider all public comments but it must also accord appropriate weight to each comment. In this case, the District considered the comments received regarding this proposal. The District, however, failed to analyze and discuss whether it would be a reasonably foreseeable detriment to expect that the Appellant's proposal would exploit adjacent uplands. Furthermore, the decision document does not discuss or explain the District's decision to adopt the public comments on this matter. Because the District failed to analyze or discuss in the administrative record most of its conclusions regarding the reasonably foreseeable benefits and detriments to safety resulting from the Appellant's proposal, I have concluded that the administrative record does not support the District's assessment of the impacts to safety that would result from the Appellant's proposal.

C. Public and Private Need for the Project: Pursuant to 33 C.F.R. § 320.4(a)(2)(i), the Corps of Engineers must consider as part of its evaluation of every application, the relative extent of the public and private need for a proposal. Subsumed in the District's evaluation of the relevant public interest review factors for the Appellant's proposal is a conclusion that the Appellant had not justified a need for the proposed project. After reviewing the administrative record and the appeal conference memorandum dated 22 February 2001, I have determined that the District improperly concluded that there did not appear to be a need for the Appellant's project.

In its decision document, the District stated that there did not appear to be an overwhelming environmental or navigational need for the proposed moorings in these locations that would justify the potential impacts. At the appeal conference, the RO asked the Appellant what was the public and private need for the project. The Appellant stated that its proposal would provide an easier, safer, and more reliable alternative to anchoring and that it installed the moorings in areas unsuitable or ill suited for anchoring. In addition, at the appeal conference the District concurred with the Appellant that, generally, using a mooring is safer and more reliable than anchoring. Because the District did not advance evidence to rebut the Appellant's assertion that the selected sites were unsuitable or ill suited for anchoring, the decision document lacks sufficient information to ascertain whether the Appellant's proposal serves a public or private need.

Analysis of the District's Decision: The central reason the District advanced in support of its decision was its concern that the Appellant's proposal either would exclude some boaters from the areas suitable for anchoring or would require them to pay to use the Appellant's moorings. The District stated in the decision document that the Town of Stonington harbor master regulates two of the sites where the Appellant installed its moorings and at the appeal conference, the District stated that Isle Au Haut apparently has a harbor master. All other sites are under the jurisdiction of the Maine Land Use

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Regulation Commission ("LURC"). The District concluded in the decision document that "[a]lthough the Corps does not typically exert discretionary authority over private single moorings in the presence of a harbormaster, in this case we believe it will be necessary."

The District is aware that the State of Maine provides two avenues to regulate the construction on structures in its waters. Pursuant to Maine state law, local governments can appoint a harbor master, who would be responsible for assigning mooring privileges and for directing masters or owners of vessels to remove their moorings when appropriate. The local governments that have chosen not to administer land use controls at the local levels (e.g., appointing a harbor master) are under the jurisdiction of LURC. The Maine legislature created LURC in 1971 to serve as the planning and zoning authority for these local governments and other areas lacking any form of local government. Based on statements made during the appeal conference, it appears that LURC has authority to regulate moorings but it chooses not to exercise it. Therefore, both LURC and local governments can exercise control over the structures that applicants proposed to construct or install within their jurisdiction by appointing a harbor master or through other means.

Thus, the issue becomes how should the District consider the state and local government's non-regulation of moorings in its waters given that the District failed to discuss and demonstrate that the Appellant's proposal would adversely affect navigation, recreation, safety, and general environmental concerns. I have determined that the District may consider in its decision-making process the user conflict aspect of the Appellant's proposal and the reduction in area available for first-come-first-serve anchorage. The District, however, must also consider, as part of its weighing process required in 33 C.F.R. § 320.4(a), that local governments have the ability to appoint a harbor master if they choose to do so, and that the state government has chosen not to regulate these activities in unauthorized areas.

For the reasons discussed above, I have determined that this reason for appeal has merit.

Fourth Reason for Appeal: New England District did not individually consider the merits and impacts of each mooring location.

Determination on the Merits of This Reason for Appeal – This reason for appeal has merit: The District's decision not to consider the merits and impacts of each mooring location is not consistent with the public interest review evaluation policy set forth in 33 C.F.R. § 320.4(a), the NEPA implementation procedures in 33 C.F.R. Part 325, Appendix B, and officially promulgated regulatory guidance. Failing to consider the impacts of the Appellant's proposal at each location unduly limits the District's ability to conduct an effective alternative analysis and to meet the requirements of the relevant regulations.

Required Action: The District is directed to review and supplement as appropriate the administrative record consistent with the requirements of 33 C.F.R. §§ 320.4, 325 Appendix B, Regulatory Guidance Letter 84-09, the Discussion section of this reason for

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appeal, and, as appropriate, with the Discussion section of the other reasons for appeal in this Appeal Decision.

Discussion: There is no dispute that the District did not consider the merits of each individual site in making its decision. At the appeal conference, the District admitted it did not make its decision on the Appellant proposal on a site-by-site basis because the District makes its decision to issue or deny a permit application based on the proposal as a whole. Therefore, the scope of the inquiry on this reason for appeal is limited to whether the regulations allow the District, and specifically the DE, not to consider the benefits and detriments of the Appellant's proposal at each site. I have determined that the District may make its decision based on the entirety of the Appellant's proposal. I have further determined, however, that not considering the site-specific benefits and detriments of each mooring site is not consistent with the requirements of 33 C.F.R. §§ 320.4(a)(2)(ii), 325 Appendix B, (7), and previously promulgated regulatory guidance.

Not considering the impacts of the moorings at each location is not consistent with the Corps of Engineers' public interest review policies. The Corps of Engineers' regulations states, in relevant part "[t]he following general criteria will be considered in the evaluation of every application . . . (ii) Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work." 33 C.F.R. § 320.4 (a)(2) (2000). The Appellant's proposal could potentially create an unresolved resource use conflict because it may reduce the area available for anchoring at no cost. Thus, the District was required to identify reasonable alternative locations and methods to accomplish the objectives of the Appellant's proposal.

The uncertainty regarding the suitability of each proposed sited for anchoring prevents the District from undertaking an adequate alternative analysis. Furthermore, alternative, the decision document refers in passing to alternative sites and alternative rental mooring areas in addition to the no action alternative. The decision document, however, is silent on whether these alternatives are practicable to the Appellant. Therefore, the District's alternative analysis does not meet the criteria set forth in 33 C.F.R. § 320.4(a)(2)(ii).

Not considering the site-specific impacts of the Appellant's moorings is not consistent with the requirements of 33 C.F.R. Part 325 Appendix B ("NEPA Implementation Procedures for the Regulatory Program"). Paragraph Seven of Part 325 Appendix B states, in relevant part:

> [w]here the district engineer determines that there are unresolved conflicts concerning alternative uses of available resources, the [environmental assessment] shall include a discussion of the reasonable alternatives to be considered by the ultimate decision-maker. The decision options available to the Corps, which embrace all of the applicant's alternatives, are issue the permit, issue with modifications, or deny the permit. Modifications are limited to those project modifications within the scope of established

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permit conditioning policy (See 33 CFR 325.4). 33 C.F.R. § 325 Appendix B, (7) (2000).

The permit conditioning policy set forth in 33 C.F.R. § 325.4 states that the Corps will add special conditions to a permit when necessary to satisfy legal requirements or "to otherwise satisfy the public interest requirement. Permit conditions will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts and reasonably enforceable." 33 C.F.R. § 325.4(a) (2000). Failing to consider site-specific impacts prevents the District from determining whether the Appellant can modify its proposal in a manner that addresses public interest concerns, both general and site-specific. Furthermore, the administrative record shows that although the Appellant was amenable to discussing changes or special conditions to its proposal, the District chose not to pursue this matter with the Appellant. For these reasons, the District's alternative analysis for the Appellant's proposal does not satisfy all the requirements of 33 C.F.R. § 325 Appendix B, (7).

The District's decision not to consider the merits of each mooring site is inconsistent with previously issued guidance. Regulatory Guidance Letter ("RGL") 84-09 ("Permit Decision Documentation") clarifies the scope and level of documentation appropriate in certain areas of the public interest review process. This RGL states, in relevant part, that "district commanders should establish a screening process to insure that all cases . . . which involve a permit denials are thoroughly documented. The documentation should clearly show the weighing process used to balance project benefits against detriments . . . The record must reflect the balance of advantageous effects versus harmful effects." The RGL states, with regards to practicable alternatives, that "[t]he discussion of practicable alternatives . . . should be guided by the rule of reason, and should consider alternatives both in terms of the applicant's wishes and capabilities, and in terms of the need for or purpose to be served by the proposed activity." Not considering the impacts of the proposed moorings at each site limits the District's ability to consider an adequate range of practicable alternatives.

Based on the previous discussion, I have determined that this reason for appeal has merit.

Conclusion: For the reasons stated above, I have determined that the First Accepted Reason for Appeal does not have merit, that the Second Accepted Reason for Appeal has partial merit, and that the Third and Fourth Accepted Reasons for Appeal have merit.

M. Stephen Rhoades

M. STEPHEN RHOADES
Brigadier General, U.S. Army
Commanding