UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

MAY 25 2006

Colonel Alex Dornstauder
District Engineer, Los Angeles District
U.S. Army Corps of Engineers
P.O. Box 532711
Los Angeles, California 90053-2325

Subject: Public Notice (PN) 2003-00826-SDM Whetstone Ranch

Dear Colonel Dornstauder:

By our letter dated 1 July 2005, EPA issued a determination that permitting the proposed Whetstone Ranch development under Clean Water Act (CWA) Section 404 represented a substantial and unacceptable impact on aquatic resources of national importance (ARNI). We explained why the application did not conform to EPA's 404(b)(1) Guidelines and the National Environmental Policy Act (NEPA). On 18 January 2006, you hosted a meeting in Los Angeles with representatives of EPA headquarters, Region 9, and Office of Research and Development, during which we discussed many of the concerns raised in our correspondence. Attached please find our final comments and recommendations with respect to the Corps' regulatory actions on this project.

The attached comments detail our concerns regarding the Corps' issuance of a permit for the proposed project based on: (1) the lack of an adequate analysis of alternatives to demonstrate the maximum practicable level of avoidance and minimization of adverse impacts to waters of the U.S. (waters) as required by CWA Section 404(b)(1); (2) the lack of an adequate compensatory mitigation plan to replace the functions and values of waters lost to unavoidable impacts; and (3) the limiting of the Corps' NEPA "scope of analysis" through an unrealistic, impracticable "no federal action" alternative which fails to meet the project purpose. Pursuant to 40 CFR 230.12(a)(3)(iv), the 404(b)(1) Guidelines and NEPA, we recommend the Corps reconsider its findings, require meaningful compliance from the applicant, or deny the permit.

We remain concerned with the approach being taken within the Los Angeles Corps District toward NEPA compliance. The narrow "scope of analysis" determination on this proposed project seems significantly different from the approach taken by the Corps for other projects, such as the proposed Lone Mountain or Estrella developments. For both master-planned developments, the Corps expanded its scope of analysis to the entire project area, and we applaud this decision. In contrast, the Whetstone EA limits its scope of analysis to the direct impacts and limited upland areas. We urge the Corps to re-examine the full range of impacts of this project on the human environment with an expanded scope of analysis to conform with recent guidance from the Council on Environmental Quality (CEQ), the 1987 CEQ decision document regarding the Corps' NEPA regulations, and the most recent court rulings in the *Save Our Sonoran v. Flowers* (Lone Mountain) case.

The Los Angeles Corps District has successfully pursued comprehensive planning and permitting strategies in California that could be readily adapted for use in Arizona, e.g., Special Area Management Plans (SAMPs) in Orange, Riverside, and San Diego counties. These comprehensive strategies will accommodate continued growth and development in Southern California while ensuring compliance with federal regulations promulgated under NEPA and the CWA, and the continued protection of public health and the environment. Comprehensive approaches such as these, adapted to Arizona and the San Pedro River Basin, would help to address potentially significant cumulative impacts posed by Whetstone, and the reasonably foreseeable development in the upper San Pedro River watershed.

We look forward to working with you to resolve our environmental concerns. Please refer questions regarding our CWA comments to Tim Vendlinski, manger of the Wetlands Regulatory Office, at 415-972-3464, and questions related to our NEPA comments to Duane James, manager of the Environmental Review Office, at 415-972-3988.

Sincerely,

Alexis Strauss 25 May 2006
Alexis Strauss
Director, Water Division

cc: Gen. Schroedel, U.S. Army Corps of Engineers, South Pacific Division
Granta Nakayama, Assistant Administrator, OECA

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EPA DETAILED COMMENTS ON THE ENVIRONMENTAL ASSESSMENT FOR THE WHETSTONE RANCH MASTER PLANNED COMMUNITY

I. Background

The San Pedro River watershed is unquestionably an aquatic resource of international ecological importance and is considered one of the most significant perennial undammed desert rivers in the United States.[1, 2]The ecosystem of the river supports 400 species of migratory birds (more than half of the U.S. total), 40 species of reptiles and amphibians, and 80 species of mammals (including the jaguar), and provides a unique refuge for many federally listed threatened or endangered species.[1, 2] In recognition of the San Pedro River's significance, Congress established the San Pedro River Riparian National Conservation Area (NCA) in 1988, the first of its kind in the nation.

The physical, chemical, and biological integrity of the San Pedro River is sustained by functions of its ephemeral and intermittent tributary stream network. Relatively intact low-order ephemeral streams, adequately buffered from human disturbance, perform a diversity of hydrologic, biogeochemical and habitat support functions that directly affect the integrity and functional condition of higher-order waters downstream. The loss of these waters results in increased costs associated with flood control facilities, as well as the increased need and associated development of drinking water and wastewater treatment infrastructure.[3]

Ephemeral aquatic systems also support diverse habitats for wildlife unique to the region, valuable both intrinsically and as a defining character of the region's natural heritage. Wildlife populations depend on the relatively moist channels as a network of corridors used for breeding, shelter, foraging, and dispersal. Development in and around these channels fragments habitat and eliminates much, if not all, of the habitat support functions provided by these waters.

The permit area for Whetstone Ranch is an 8,200-acre (12.5 square mile) subdivision of the approximately 15,500-acre Whetstone Ranch project.[4] Whetstone Ranch represents one of the largest residential subdivisions proposed to the Corps in the state of Arizona, and is the largest proposed to date in this vital and sensitive watershed. The project site is a relatively undisturbed desert grassland environment, characterized by a dense network of 475 acres of braided ephemeral streams directly tributary to the San Pedro River. The proposed project would eliminate 51 acres of these waters via direct discharges of fill material, a significant amount of jurisdictional waters. Spread broadly across the site in over 350 locations, the proposed 51 acres of discharges would severely fragment the remaining "avoided" waters and degrade ecosystem processes and functions.

In addition to surface hydrological and biological functions, the project is likely to affect groundwater resources at the San Pedro River already exhibiting declining water levels due to

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[1]USFWS Endangered Species Bulletin, January/February 2004, Volume XXIX No. 1.
[2] The Nature Conservancy. http://www.lastgreatplaces.org/SanPedro.html
[3] Bull, L.J. and Kirkby, M.J., eds. 2002. Dryland Rivers: Hydrology and Geomorphology of Semi-arid Channels. John Wiley and Sons.
[4] Whetstone Ranch Southeastern Arizona Governments Organization 208 Plan Amendment, at 1 (Nov. 2001), as amended January 23, 2006.

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groundwater pumping.[5, 6, 7] The increase in groundwater pumping required to serve Whetstone Ranch, combined with the removal of 51 acres of tributary waters, may exacerbate this degradation. The project will also substantially reduce the capacity of aquatic and terrestrial organisms to enter and leave riverine waters of the U.S. through large, contiguous patches of intact habitat. The proposed project site is presently composed of, and surrounded for several miles by, a functioning desert mosaic of native plant communities. Development of this site will disrupt food webs and destroy migration networks which, on the landscape scale, are difficult or impossible to mitigate.

The goal of the Clean Water Act is to maintain and restore the physical, chemical, and biological integrity of the nation's waters. Ephemeral tributaries to the San Pedro River are critical to the maintenance of watershed functions and services. Despite improvements to mitigation requirements and oversight under the CWA §404 program, a significant net loss of headwater streams continues to occur in many watersheds, including the San Pedro River watershed. As proposed, Whetstone Ranch would result in the net loss of 51 acres of ephemeral tributaries, and would have additional substantial impacts to the watershed.

II. CWA Compliance and the §404(b)(1) Guidelines

EPA respectfully disagrees with the Corps' finding that Whetstone Ranch, as proposed, complies with the CWA §404(b)(1) Guidelines (Guidelines). The Guidelines at 40 CFR 230.10(a)-(d) provide independent tests against which every application for a Department of the Army permit must be measured. Applicants must comply with the restrictions on discharges described in the Guidelines related to a) the analysis of alternatives; b) water quality and other environmental effects; c) aquatic ecosystem degradation; and d) the mitigation of impacts. The EA is the Corps' NEPA decision document for its permit action under the CWA and thus it must satisfy the alternatives analysis requirements of the Guidelines. Based on the alternative analysis in the EA, we cannot confirm that the project complies with the Guidelines' restrictions on discharges, particularly the key considerations of alternatives that minimize impacts to the extent practicable, and compensatory mitigation for those that remain. In addition, the conceptual "no federal action" alternative served to limit the Corps' NEPA scope of analysis in this EA without adequate demonstration that the alternative could be accomplished, or meaningfully avoid federally regulated discharges.

A. The EA Makes Improper and Inconsistent use of "Project Purpose"

The Guidelines at 40 CFR 230.10(a) require the applicant to clearly demonstrate that the "preferred" alternative is the Least Environmentally Damaging Practicable Alternative (LEDPA) that achieves the project purpose. An alternative is considered "practicable" if it is "available and capable of being done after taking into consideration cost, existing technology, and logistics

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[5] AZ Dept. of Water Resources. http://www.azwater.gov/dwr/Content/Find_by_Program/Rural_Programs/content/map/UppSanPedPar.htm

[6] Upper San Pedro Partnership. http://www.usppartnership.com/documents/USPP%20answers%20to%20public%20questions%201-05.doc

[7] Phoenix New Times. http://www.phoenixnewtimes.com/Issues/2005-08-04/news/dougherty_full.html

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in light of overall project purposes (emphasis added)." The Corps has determined the overall project purpose[8] for Whetstone Ranch is as follows:

> *(T)o develop a master-planned community consisting of residential, commercial, and recreational facilities, including all appurtenant features such as building pads, roads and utilities in the Benson, Arizona area is* (sic) *proximate to local, regional, and national transportation facilities.* (EA p. 3)

As detailed in our previous correspondence, we believe this type of project purpose is problematic under the Guidelines because 1) it bundles functionally independent project features as essential project components, thereby constraining the available alternatives and 2) it allows an applicant to reject any alternative which may be inconsistent with a particular master plan.

Nevertheless, if the Corps accepts "master-planned" as a legitimate part of the project purpose statement, then "master-planned" must be meaningful in both its 404 and NEPA contexts. In the Whetstone Ranch EA, achieving the project purpose—a "master-planned" community—is treated as essential for the 404(b)(1) alternatives analysis, but treated as relatively unimportant in the Corps' NEPA scope of analysis determination (discussed in detail in Section III, below). We are concerned by the inconsistent and contradictory treatment of project purpose in the EA, and urge the Corps to reconcile these inconsistencies.

B. The Project Proposal Does Not Comply With the Guidelines' Alternatives Test

1. *The "No Federal Action" Alternative Does Not Meet the Project Purpose*

In its regulations implementing NEPA, the Council on Environmental Quality (CEQ) considers the alternatives analysis section the "heart" of NEPA analysis.[9] Both NEPA and CWA require that the Corps consider alternatives to Whetstone Ranch as proposed, and the alternatives under both statutes customarily include a "no federal action" alternative (*i.e.*, avoiding all federally regulated discharges).[10]

The alternatives analysis in the EA for Whetstone Ranch concludes that the applicant could not practicably achieve the overall project purpose (*i.e.*, development of a large master-planned community as described above) without filling waters of the U.S. and thus obtaining a Corps permit. The "no federal action" alternative was therefore properly eliminated from further evaluation in the 404(b)(1) alternatives analysis. However, the EA asserts that the applicant could nevertheless practicably develop a similar, large development on the site, without the need

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[8] The title of Section C. 3., "**Corps' Determination of Basic Project Purpose (Water Dependency Test)**," suggests that water dependency and basic project purpose are equivalent, and that therefore, basic project purpose is not applicable here because the project includes no special aquatic sites. Limiting the role of the basic project purpose statement in this way is inconsistent with the Corps' or EPA's interpretation of the regulations nationally. A lack of special aquatic sites dispenses with the regulatory presumption that less damaging alternatives exist, but it does not dispense with the basic project purpose. Although defining a basic project purpose helps determine whether a project is water-dependent, the main function of the basic project purpose statement is to frame the scope of the alternatives to consider. Cost, logistical and technological considerations then refine the "basic" purpose to become the "overall" purpose forming the foundation of a more detailed, formal alternatives analysis.

[9] *See* 40 C.F.R. §1502.14.

[10] NEPA requires consideration of the "no action" alternative. *See* 33 CFR Part 325, Appendix B.7.a.

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for 404 permit authorization.[11] If a development similar enough to the proposed project which meets the applicant's goals is practicable without a permit, no permit may be issued pursuant to the regulations (40 CFR 230.10(a))

The brief rationale for the theoretical "no permit" alternative is not well-supported in the EA's alternatives analysis. The factors that constitute "practicability" under the Guidelines (*e.g.*, costs and logistics) are not considered, even though there are significant cost considerations, frequently acknowledged by developers of master-planned communities in the Arizona desert, involved with spanning wide ephemeral washes like those at Whetstone Ranch.[12] Significant costs associated with designing the development's traffic circulation system over 8,200 acres would be required if the applicant were to avoid all waters of the U.S. on the site. Pulte Homes, which has an option to purchase 6,000 acres of this development, has already initiated the process of final platting of several large blocks of land. The alternatives analysis has no discussion of these costs which would be incurred in a no-action/no-permit alternative.

Significant logistical considerations involving the installation and efficient use of utility services (*e.g.*, water and sewer lines) and roadway networks would hamper the practicability of the "no federal action" alternative. There is no discussion in the alternatives analysis of whether or how under a "no federal action" alternative the Whetstone Ranch applicant could practicably develop a traffic circulation system that could meet current standards for design, setback, and emergency and fire vehicle access. As with costs, logistical considerations have been acknowledged in detail in the recent past by other master-plan developers seeking 404 permits from the Corps in Arizona. The EA for Whetstone Ranch, in contrast, makes no mention of these factors at any level of analysis.

2. *Impacts of the "No Federal Action" Alternative*

Notwithstanding the concerns noted above with regard to meeting project purposes and being practicable in a real-world sense, evaluation of the "no federal action" alternative must weigh the relative environmental impacts of a project that would not require a federal permit against those that would result from a permitted project.[13] For this comparison to be meaningful, a "no federal action" alternative must provide a realistic benchmark to compare the magnitude of environmental effects likely from various project alternatives requiring permitted discharges. The discussion of the "no federal action" alternative does not accurately represent these impacts, thus compounding the aforementioned problems regarding its analytical utility in the regulatory process. The alternatives analysis reasons that the project as proposed is preferable to the "no federal action" alternative because the latter would require more intensive, more environmentally damaging development outside waters of the U.S. in order to be affordable:

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[11] Under the no Federal action, the applicant would develop "[w]ith the same number of residential units and expanded footprint .... Rather than a larger master plan, the residential and commercial uses would be developed on a more ad hoc basis...." EA p. 9.

[12] The Tartesso West alternatives analysis, for example, stated that "using spans rather than culverts would greatly increase project costs .... [and] the applicant has stated that it does not consider boring all utility crossings to be a practicable alternative from a cost/benefit standpoint."

[13] CEQ Guidance, *"Forty Most Asked Questions Concerning CEQ's NEPA Regulations,"* 23 March 1981 http://ceq.eh.doe.gov/NEPA/regs/40/1-10.HTM

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"The Applicant would abandon all plans for creating buffers and open space along wash corridors in order to maximize developable land and to partially offset the cost of constructing spans or bridges and boring utility lines. Since the buffers and open space would not be required for mitigation, the Applicant would be free to develop right up to the edge of the ordinary high water mark of the washes (i.e., waters of the U.S.). (EA p. 9)

However, this language does not address the actual environmental constraints on development posed by the proposed project site. Natural stream channels in desert ecosystems are shaped by major storm events which cause the channels to migrate laterally as flows continuously cut new braided drainages through historic streambeds. This natural drainage pattern poses no threat in an undeveloped area, but it can be problematic in developed regions where storm flows must be more predictable for public safety. As a practical matter, the ongoing changes in natural channel morphology would require setbacks to development, thus cutting substantially into the availability of developable land. It is premature to state that, absent a permit, the builders of Whetstone Ranch would "develop right up to the edge" of the washes in order to offset higher costs. The 25-foot "primary buffer" repeatedly cited in the EA as habitat mitigation may be required by local flood control authorities. In addition, the EA does not assess the validity of the above claim to "abandon all plans for ... open space" in the context of aesthetic marketability or overall project purpose (which includes "recreational facilities...and all appurtenant features").

In sum, the EA's assumptions regarding the "no federal action" alternative are not supported by facts. The EA does not properly analyze practicability pursuant to factors outlined by the Guidelines. It also paints a false picture of the environmental baseline that the Corps needs before it can fairly analyze the merits of each alterative. The Corps relies on this unrealistic "no federal action" alternative to argue that the Corps should limit its NEPA scope of analysis over the project area. As discussed in greater detail in Section III, the "no action" alternative for Whetstone Ranch is not a scenario available to the applicant to distinguish the matter from the Ninth Circuit Court of Appeals' 2005 decision in *Save Our Sonoran.*

3. *The Alternatives Analysis Lacks Appropriate and Necessary Detail*

In addition to the "no federal action" alternative, the EA briefly considers on- and off-site alternatives to the proposed permit action. This discussion remains substantially deficient in scope and detail. Off-site alternatives are excluded for various unsubstantiated reasons. For example, screening criteria such as overall project size (3,000-acre minimum), distance to Benson and/or Tucson (5 miles), and assertions about climate are not supported by comparative or qualitative argument. Basic comparisons (using tables or charts) of the differences among alternatives for factors of interest (*e.g.,* transportation infrastructure costs or other constraints) are missing from the EA. As the alternatives analysis does not address these fundamental concerns, the off-site alternatives analysis is deficient.

The analysis of on-site alternatives also lacks sufficient detail, consisting of three "strawman" alternatives to the proposed project. The "Residential Only" alternative is

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dismissed[14] as not meeting the project purpose; the "Mass Grade" alternative is rejected for the "obvious adverse environmental effect of filling all washes on the site" (EA p. 11); and the "Original Concept Plan (*i.e.*, the design presented in the PN filling 70 acres of waters) is more damaging than the current state of project design. Whether the comparison of the "Original" plan with the current proposal is meaningful is unknown, as the process for impact reduction from 70 to 51 acres is not revealed in the EA.

Throughout our discussions with the Corps and applicant, we were frequently informed that design details such as lot layout or preliminary platting were not available. However, the EA suggests that these details are not only available, but that the applicant achieved avoidance of substantial areas with potential impacts by adjustments to these design details, including lot configurations (EA p. 1). While the applicant's reduction of direct impacts is a positive change from the initial proposal, the Guidelines require permit denial of any proposal which has not demonstrably avoided and minimized impacts *to the greatest extent practicable*. Although the Corps' alternatives analysis asserts that the project as proposed meets this requirement, it does not demonstrate how it has been achieved. If the Corps was provided with information specific to lot layout that helped guide its determination of compliance with 404(b)(1), these details should be included in the final alternatives analysis to support the Corps' findings. Alternatively, if the applicant withheld this information from the Corps (as it did from EPA), a determination of compliance is clearly premature as the government lacks project-specific detail sufficient to determine whether any additional impacts could be practicably avoided.

EPA acknowledges that complete avoidance of waters of the U.S. may be impracticable at this site; indeed, as we have argued above, we believe this is very likely the case as a matter of costs and/or logistics. However, if the Corps truly believes the "no federal action" (100% avoidance) alternative would realistically result in similar development of the site, it follows that avoidance beyond that which is currently proposed is practicable. We recommend that the Corps require a clear demonstration of the design methods used for the avoidance proposed to date, and a credible showing that the practicable limits of those efforts have been exhausted.

Finally, EPA also believes the integrity of any on-site avoidance is brought into question by a "flexibility" condition that the Corps has proposed for this permit (Draft Permit Condition C; *see also* section III.B.7 of the EA).[15] This flexibility provision would allow the applicant to shift the location of impacts as it develops the property, as long as the permitted maximum (51 acres) is not cumulatively exceeded by the project. Thus, impacts to a given reach could be substantially increased if the applicant decides to shift part of its fill allowance and increase

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[14] The EA states that "(the Residential Only alternative) was determined to not fulfill the overall project purpose and therefore was not examined in detail by the Corps." As project purpose appears to be the only factor applied to analyze this alternative, it is unclear why the "no federal action" alternative avoided dismissal on the same grounds. EA p. 11

[15] Draft permit condition d.iii.A. presents an additional corollary to the "flexibility" clause, by allowing a future owner of a subdivided parcel within Whetstone Ranch to fill or alter up to the entire 51 acres (or the current balance of the remaining impact allowance). The possible future impact of this condition is of great concern to EPA. Not only does this open the possibility that entire reaches could be filled for sub-projects unforeseen today (as opposed to merely "swapping" road crossing locations), it invites future appeals for impacts beyond the permitted "cap" in later phases of development. As the "flexibility" of the permit stands, the early project phases could use up the permitted allowance, leaving project phases 10-15+ years from now needing additional acreage under the permit. EPA recommends that this permit condition be modified or removed.

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fragmentation of that reach by installing additional crossings. This shift would theoretically mean an impacted stream reach elsewhere on the property would benefit from fewer impacts. However, the Corps' discussion of avoidance in the alternatives analysis provides insufficient data to conclude that this would be appropriate or beneficial.

C. The Project Proposal Does Not Comply With the Guidelines' Mitigation Test

The applicant's November 2005 Mitigation Plan, incorporated in the EA, does not provide adequate compensation for the proposed resource losses because its preservation-to-loss ratio is unacceptably low. The plan proposes to compensate for the direct loss of 51 acres of waters with preservation and enhancement of approximately 6 acres of off-site waters within a 144-acre parcel. The proposal is to retire agricultural use on the parcel, remove invasive vegetation, and manage the parcel as open space under the protection of restrictive covenants similar to that of the on-site avoided areas. [16] Management of the preserve areas would be the responsibility of the future Homeowners' Association. [17] Although the EA and mitigation plan characterize the compensatory mitigation ratio as greater than 3:1, this ratio is artificially inflated by including many non-waters of the U.S. and the on-site avoidance areas (the latter were already used to argue that the proposal was less damaging than the alternatives[18]). We estimate that the actual compensatory mitigation ratio under this proposal is less than 0.2 acres preserved for every acre destroyed.

EPA believes the proposed preservation-to-loss ratios at a less than 1:1 acreage basis is inadequate and will erode the future effectiveness of the regulatory program in the arid southwest. The amount of compensatory mitigation required of a project is appropriately dependent upon the functions lost as result of the impacts authorized by the permit action. Preservation and enhancement are normally key aspects of mitigation for impacts to ephemeral streams due to the extreme difficulty in effectively recreating these resources. However, area-dependent functions (*e.g*, foraging patch size), if not lost, are clearly impaired with a net loss of aquatic acreage, and preservation-only mitigation by definition results in a net loss of aquatic acreage. Ignoring the functions that acreage itself provides is inconsistent with the goals of the Corps' mitigation RGL 02-2, the Mitigation Action Plan, and the proposed rulemaking on compensatory mitigation. For these reasons, we urge the Corps to require additional compensatory mitigation at Whetstone Ranch, including increased functional enhancements over a substantially greater amount of acreage of preserved waters of the U.S.

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[16] The draft permit allows recordation of restrictive covenants up to one year after development begins. This is a very generous amount of time where the "preserve areas" would be subject to intensive human intrusion and construction impacts without the benefit of deed restrictions or other interim protections. EPA believes any "grace period" on recording final preserve areas should be significantly shorter and should begin, at the latest, with availability of final project plans, not the beginning of development.

[17] As is being explored elsewhere in Arizona, Community Stewardship Organizations may provide viable alternatives to HOA management. See *e.g.*, http://www.sonoran.org/programs/cso/si_cso_main.html

[18] The appropriate sequencing of mitigation efforts (avoid, minimize, and then compensate) under the Guidelines and interagency mitigation agreements prohibits applicants from "buying down" impacts via compensatory mitigation. Applicants must first demonstrate that their proposed discharges represent the LEDPA through impact avoidance and minimization, and then provide compensatory mitigation for unavoidable impacts. The Public Interest Review (EA p. 75) and response to comments (EA p. 65) both suggest that the project as proposed *with compensatory mitigation* is the LEDPA. If the on-site preserves are intended to be *compensatory* acreage, they cannot be used to make the project proposal appear "less damaging" than the other alternatives.

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III. NEPA Compliance

As the federal agency responsible for authorizing discharges of dredged or fill material into waters of the U.S., the Corps has a responsibility under the National Environmental Policy Act (NEPA) to analyze the environmental consequences of their permit actions. The Corps exercises considerable discretion in determining the scope of its NEPA analysis case-by-case, based primarily upon criteria outlined in "Appendix B" of the Corps' NEPA regulations. Under these criteria, the scope of the Corps' NEPA analysis may be based on aspects of the upland facility in the immediate vicinity of the regulated activity that affect the location and configuration of the regulated activity. The Corps has determined that its scope of analysis over the Whetstone Ranch site is limited to the 475 acres of waters, plus a 25-foot lateral upland corridor buffering the jurisdictional waters (EA p.7).[19]

A. Scope of Analysis

1. *Waters of the U.S. Dominate the Project Landscape*

The Corps' scope of analysis is too narrow in light of the topography and distribution of waters at the site. The proposed Whetstone Ranch site is a large rectangle encompassing an extensive, dendritic, capillary-like assemblage of ephemeral wash and desert grassland habitats. A side-by-side comparison of the jurisdictional determinations made by the Corps at Whetstone and at Lone Mountain (the latter site which is the subject of the Ninth Circuit Court of Appeals decision discussed below) reveals a remarkable similarity with regard to the distribution of jurisdictional waters that traverse both project areas.

The Corps asserts in the EA that the percentage of jurisdictional waters of the U.S. at Whetstone Ranch is relatively small (approximately 5.8%), which the Corps argues warrants a narrow scope of analysis. However, this contention is inconsistent with the Corps' decision to increase the scope of analysis over the entire Lone Mountain project area, which had a 5% density of waters of the U.S. Moreover, while the Corps' NEPA regulations require the Corps to consider the amount of the project area subject to Corps jurisdiction, the jurisdictional area in most upland settings (where most non-water-dependent projects are typically proposed) will be a relatively low percentage of the total land area, and this proportion is expected to fluctuate only a few percent across various sites. As a result, we believe that the physical distribution of aquatic resources, under most circumstances, is a more important factor in the determination of proper scope of analysis than a gross percentage of jurisdictional area. Nevertheless, whether one considers the proportion or the distribution of waters at Whetstone, it is clear that the facts closely resemble those at issue in the Lone Mountain matter.

[19] The Corps proposes to permit a total acreage "cap" for fill not to exceed 51 acres of waters, but allow the permittee to shift or pool the locations of individual discharge points as the specific planning of the project evolves over time.

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2. *Applicable Case Law Calls for an Expanded Scope of Analysis*

The 1987 CEQ decision document (52 Fed. Reg. 33217) establishes that to the extent relevant case law interprets the scope of analysis requirement, the Corps is bound to consider it in applying its NEPA regulations. The Ninth Circuit Court of Appeals' 2005 decision in *Save Our Sonoran*, 408 F.3d 1113 (9th Cir. 2005), which directly addresses the manner in which the Corps should extend its NEPA scope of analysis over residential master planned communities located in Sonoran desert ephemeral wash ecosystems, would appear very relevant to the Whetstone permit decision.

In *Save Our Sonoran*, the Ninth Circuit found that the Corps permit action affected the entire Lone Mountain site due to the distribution of waters on the landscape.[20] The Ninth Circuit found it significant that, without a permit from the Corps, the permittee would have been unable to achieve its project purpose[21] on such topography, as aspects of the upland facility (*i.e.*, a master-planned community) clearly affected the location and configuration of fill activities.[22]

In the Response to Comments, which the Corps adopts in the EA, the Corps addresses the applicability of *Save Our Sonoran* by stating:

> *"[I]n the case of Whetstone Ranch, unlike Save Our Sonoran, the Applicant has presented a "no Federal action" alternative that demonstrates that development would occur on much of the Property whether or not a Corps permit is issued for the Project. As such, the Corps is lacking control of activities in upland areas outside the scope of analysis. The fact that the applicant in Save Our Sonoran could not develop their property without a CWA Section 404 permit is a significant distinguishing factor here." (EA p. 57)*

We disagree with the Corps' rationale stated above. The Ninth Circuit found that the "key district court finding" in *Save Our Sonoran* was that the no action alternative "would not allow the site to be developed in a manner that would accomplish the applicant's project purpose." 408 F.3d at 1125 (emphasis added). However, the Corps acknowledges in its discussion of the Whetstone Ranch "no federal action" alternative that it "would not meet the overall project purpose." (EA p. 9). Thus, Whetstone Ranch may not be distinguished from Lone Mountain by reference to the applicant's "no federal action" alternative If the Corps can distinguish Whetstone from the Lone Mountain matter on this basis, the reasoning still fails based upon factors discussed above regarding the viability of the "no federal action" alternative (*i.e.*, costs and logistics). We recommend that the Corps reconsider the applicability of *Save Our Sonoran*

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[20] "…. the district court correctly determined that the Corps improperly constrained its NEPA analysis. Because the jurisdictional waters run throughout the property like capillaries through tissue, any development the Corps permits would have an effect on the whole property. The NEPA analysis should have included the entire property." Id. at 1122.

[21] "It is also of importance to our conclusion regarding the Corps' NEPA responsibility that the Corps concluded that the "no action" alternative -- denying the permit -- would have the effect of halting the project." Id.

[22] "[B]ecause the uplands are inseparable from the washes, the district court was correct to conclude that the Corps' permitting authority, and likewise the court's authority to enjoin development, extended to the entire project." Id. at 1124.

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to the Whetstone Ranch matter.[23]

3. *The "Flexibility" Permit Condition Also Calls for Expanded Scope of Analysis*

As discussed above in our discussion of noncompliance with the Guidelines, the Corps has included a "flexibility" condition in the proposed permit for Whetstone Ranch that would allow the applicant to shift the location of impacts as it develops the property. This flexibility condition provides an additional reason why the Corps' NEPA scope of analysis should be expanded. Consistent with Appendix B of the Corps' regulations, areas opened to development by a change in discharge location, which would not otherwise be practicable to develop, should be subject to the Corps' geographic scope of analysis under NEPA. It follows that if the level of uncertainty in project planning is so great at permit issuance that *universal* flexibility is required across the site (as is proposed), it would seem appropriate that the Corps scope of analysis would likewise be universal over project activities facilitated by the regulated discharges. EPA considers this "floating impact" concept to be incompatible with a limited "scope of analysis" determination because uncertain discharge points can lead to more damaging and unforeseen consequences, individually and cumulatively.

B. Indirect Impacts

As the EA lacks the proper scope of analysis, it does not adequately address the proposed project's indirect impacts to the Upper San Pedro River Basin. The regulations at 40 CFR Part 1508.8 state that "indirect effects may include growth-inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." The EA's analysis of impacts to the San Pedro River (EA p. 31) incorporates only small portions of the Basin, and provides no data to refute both EPA and the U.S. Fish and Wildlife Service's concerns regarding potentially significant indirect impacts to the Upper San Pedro River. The Corps' statement (EA p. 64) that the agency has "no control over whether groundwater is used on the Project and the amount of water so used" is not sufficient to satisfy the analytical requirements of NEPA in light of the indirect impacts from Whetstone Ranch in the Benson area.

In addition, transportation impacts such as traffic and the degradation of air quality are inadequately addressed in the EA. While the EA estimates 135,000 trips per day, and notes that there will be "some permanent increase in vehicle emissions" (p. 35-36), the EA assumes without any further analysis that there will be no significant impacts to air quality in the long or short term. For example, there is no assessment of the potential PM_{10} emissions associated with on-road vehicle exhaust, reentrained road dust from unpaved roads, and emissions from associated road construction over the 15 to 20 year build-out process. The EA lacks the needed supporting analysis of the air quality impacts of the development of Whetstone Ranch on the air

[23] We note that in response to the Ninth Circuit's 2005 decision, the Corps properly expanded its NEPA scope of analysis over the entire Lone Mountain project area, and conducted an expanded environmental assessment of the project. As a result, the preliminary injunction was recently lifted by the district court in 2006. *See Save Our Sonoran, Inc. v. Flowers*, 2006 U.S. Dist. LEXIS 26185 (D. Ariz. May 2, 2006). We believe the Corps would be acting consistently with its Lone Mountain permit decision by expanding its scope of analysis in the Whetstone permit decision.

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quality in Tucson, which has a CO maintenance area 21 miles from Whetstone Ranch. At a minimum, the potential for impacts such as these must be meaningfully analyzed and disclosed in the context of current regional conditions before a FONSI is supportable.

C. Cumulative Impacts

We are concerned that the indirect effects of Whetstone Ranch and reasonably foreseeable development including road networks, additional commercial and residential expansion, schools, and water and waste infrastructure, have not been adequately addressed in the EA. While the document notes that sixty-six developments in the Upper San Pedro watershed are currently authorized by CWA § 404 nationwide permits (NWPs), the EA does not discuss other large projects such as Dragoon Mountain Ranch or Smith Ranch, as well as pending development under the Benson General Plan. The EA should not dismiss the impacts of these developments as cumulatively insignificant without analysis. We urge the Corps to provide a more detailed assurance that the past, present and reasonably foreseeable development in the Benson area will not result in significant cumulative impacts to the quality of the human environment.

IV. Conclusion

While EPA acknowledges the regulatory challenges posed by development on the scale of Whetstone Ranch, we are very concerned that in the last two years, larger and more complex projects are providing less project-specific detail regarding practicable impact avoidance than their smaller mixed-use project counterparts. We believe that permitting projects the size and scope of Whetstone Ranch requires high quality data, adequate public disclosure, and thorough impact analyses.

The regulations at 40 CFR 230.12(a)(3)(iv) require the District Engineer to make a finding of noncompliance (permit denial) if there is not sufficient information to determine whether a proposed discharge complies with the substantive requirements of the Guidelines. EPA Region IX believes that the current Whetstone Ranch application and proposed permit do not provide sufficient information to determine compliance with the Guidelines.

The EA does not demonstrate that Whetstone Ranch, as proposed, complies with the Guidelines' restrictions on discharges, particularly with regard to the requirements that all impacts have been avoided and/or minimized to the extent practicable, with appropriate and adequate compensation for truly unavoidable impacts. Pursuant to 40 CFR 230.12(a)(3)(iv), the 404(b)(1) Guidelines and NEPA, we recommend the Corps reconsider its findings, require meaningful compliance from the applicant, or deny the permit.

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