

**U.S. ARMY CORPS OF ENGINEERS  
NORTH ATLANTIC DIVISION  
DATE: 29 April 2002**

**ADMINISTRATIVE APPEAL DECISION**

**FRANK ATTANASIO, PHILADELPHIA DISTRICT FILE NO. 199900072-46**

**Review Officer:** James W. Haggerty, U.S. Army Corps of Engineers (Corps), North Atlantic Division

**Appellant:** Frank Attanasio

**Appellant's Agent:** Lawrence Silver, Attorney at Law, 848-E West Bay Avenue, Barnegat, New Jersey

**Date of Receipt of Request for Appeal (RFA):** 10 October 2000

**Date of Acceptance of RFA:** 8 November 2001

**Appeal Conference/Site Visit Date:** 29 January 2002

**HQNAD-ACCEPTED REASONS FOR APPEAL:**

HQNAD reviewed the Agent's Request for Appeal and determined that the request encompassed four allegations as follows (condensed and categorized for brevity and clarity):

- a) The Philadelphia District ("the District") used incorrect information, specifically pertaining to impacts to waters of the United States and project purpose, in its denial of the permit application;
- b) The District committed an error in determining that a 1.9-acre lot (Lot 3) is adjacent to navigable waters of the United States as defined in 33 C.F.R. 328.3 (a)(3);
- c) The District's determination of jurisdiction was improper in that it allegedly did not include field inspections;
- d) The District erroneously failed to authorize filling of Lot 3 under Nationwide Permit No. 26 (NWP 26) despite the fact they authorized filling of an adjacent lot (Lot 1) under this NWP.

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It was determined that the first three allegations constituted valid reasons for appeal whereas the fourth did not. This is because the Administrative Appeal regulations only allow affected parties to appeal three types of actions: approved jurisdictional determinations, declined individual permits, and individual permit denials. The District's decision that an individual after-the-fact permit is necessary for Lot 3 is not an appealable action because it does not fall into one of these categories.

The Agent was informed of our decision regarding the accepted and rejected reasons for appeal in an 8 November 2001 letter, and after initially disagreeing, he agreed verbally on 30 November 2001 to the above categorization of the valid reasons for appeal.

**BACKGROUND INFORMATION:**

On 17 July 2000, the District denied a Department of the Army permit application by Mr. Frank Attanasio to maintain as completed the unauthorized discharge of fill material into approximately 1.9 acres of freshwater wetlands on a site identified as Lot 3, Block 325-52, Little Egg Harbor Township, Ocean County, New Jersey. The District maintains that this work is regulated by the Department of the Army pursuant to Section 404 of the Clean Water Act (86 Stat. 816; 33 U.S.C. 1344).

According to information supplied by the Appellant and the District, this mainland site historically contained a tidal marsh that was adjacent to Great Bay, which separates the mainland from a barrier island along the Atlantic Ocean. At some point prior to implementation of Clean Water Act jurisdiction for this property on 25 July 1975, dredged material from construction of nearby tidal lagoons was placed on the site. That activity is considered authorized pursuant to 33 C.F.R. 330.3 (a) inasmuch as it occurred prior to the phase-in date of Clean Water Act jurisdiction. The District indicates in the administrative record that the grade of the site was raised sufficiently so that groundwater-driven wetlands could no longer exist thereupon. However, the District believes that during ensuing years after the placement of dredged material, the site developed freshwater wetland characteristics due to collection of runoff from impervious surfaces on surrounding residential properties, and poor site drainage.

On 21 May 1996, a U.S. Fish & Wildlife Service (FWS) biologist reported to the District that the site had been recently filled. The District determined that a permit had not been issued for this work, and a District representative conducted a site inspection on 21 August 1996 to ascertain whether wetlands existed on the site prior to the placement of fill. As a result of a synthesis of data gathered during and after the inspection, the District concluded that the entire 1.9-acre lot contained freshwater wetlands at the time it was filled by the Appellant. The District issued a written Cease and Desist Order to the Appellant on 8 November 1996 and requested information from him to assist in the District's investigation of the violation. In an 8 December 1996 letter, the Appellant provided the information requested by the District. He also stated he had been given verbal authorization by an unnamed District representative to fill Lot 3, received previous

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written approval from the District to fill adjacent Lot 1, which he also owns, and explained that the New Jersey Department of Environmental Protection (NJDEP) had approved the filling of both lots. Thus, the Appellant believed he had obtained in good faith all necessary Federal and state approvals for development of both parcels. The District authorized filling of Lot 1 on 25 March 1992, under authority of NWP 26, determining that freshwater wetlands existed at that time on the entire 0.97-acre lot. These freshwater wetlands also developed from collection of runoff and poor drainage.

By letter dated 16 January 1997, the District issued a second Cease and Desist Order, with an additional requirement for the Appellant remove the fill on Lot 3 in its entirety. The Appellant responded in a 21 January 1997 letter, contending that the wetlands in question were artificially created, alleging the District inspected the incorrect lot, and requesting a meeting with the District to discuss the matter.

An on-site meeting occurred on 26 March 1997, attended by the Appellant, his environmental consultant, and representatives of the District and Little Egg Harbor Township. The District performed additional analysis to support their contention that wetlands previously existed on the entire lot. The Appellant restated that he had received verbal approval to fill Lot 3 and noted that the District had previously been copied on letters from NJDEP indicating that: 1) filling of the two lots was authorized by NJDEP; and 2) NJDEP determined that the extent of wetlands on the two lots totaled only 0.79 acres. The Appellant relied upon this information in determining the entire project qualified for authorization under NWP 26 without notification to the District since less than one acre of wetlands was being filled.

The filling of Lot 3 by the Appellant altered local drainage patterns, and caused numerous complaints of flooding on neighboring residential properties to the south and west, beginning in the autumn of 1995. On 1 April 1997, the Appellant's consultant proposed construction of a drainage swale around the periphery of the western and southern portions of the site as a measure to alleviate flooding. The District verbally directed the Appellant to perform this work on 29 April 1997, but the Appellant deferred this work pending receipt of a written order from the District. Subsequently, the Appellant believed the need for this work was obviated once he submitted the permit application. The Appellant finally constructed the swale on 20 February 1998.

The District received the permit application on 29 September 1997, but processing was delayed because the Appellant had not constructed the swale. On 14 April 1998, the Appellant requested a one-year postponement in the processing of his application due to health problems. The District did not grant his request, and the Appellant then refused to provide necessary additional information in support of his application for a period of several months. During this period, the Appellant contacted a number of elected officials, including President Clinton, and media representatives in attempts to publicize his case. The District finally received the information necessary from the Appellant to complete the permit application on 25 January 1999.

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The District issued a public notice on 11 February 1999 for a 30-day comment period. In response to the public notice, the District received objection letters from the U.S. Environmental Protection Agency (EPA), National Marine Fisheries Service (NMFS) and FWS. EPA specifically indicated they did not believe the placement of fill complied with the Section 404 (b)(1) of the Clean Water Act Guidelines. They believed the project was non-water dependent; no attempt had been made to avoid, minimize, or compensate the adverse impacts which have resulted from the fill; and the wetland area in question was considered to be high in ecological value. NMFS and FWS requested additional information relating to project purpose, and FWS requested an alternatives analysis and a fill removal and site restoration plan. The Appellant responded to these comments in a letter to the District dated 28 March 1999, but he did not provide the specific information requested by the agencies.

During the ensuing months, the District continued to process the application, although the administrative record indicates little contact occurred between the parties. The District held a meeting with the Appellant on 1 February 2000 during which they advised him of the potential of his application being denied. The District indicated they would entertain an amended application if the Appellant were to provide a specific project purpose and a thorough discussion of off-site alternatives as well as on-site wetland avoidance and impact minimization measures. Such information is required for the District to evaluate whether the project complies with the Section 404 (b)(1) Guidelines.

In a 9 March 2000 letter, the District restated their offer to have the Appellant submit an amended application with the information indicated above. The District also offered to reevaluate its decision that waters of the United States existed on the entire 1.9-acre project site prior to the placement of fill material in 1995. This was dependent upon the Appellant submitting sufficient site-specific soil, vegetative and hydrologic information to substantiate his claim that a smaller extent of wetlands existed on the site prior to its filling in 1995. The District's letter provided a 30-day period for a response by the Appellant. The Appellant did not provide any response to the letter, and the District denied the permit application on 17 July 2000.

**INFORMATION RECEIVED DURING THE APPEAL REVIEW AND ITS DISPOSITION:**

- 1) The District provided a copy of the complete administrative record, which included files from the enforcement and permit processing phases of this project. This information was considered in the appeal review process.
- 2) An Appeal Conference and site inspection were held on 29 January 2002, the results of which were considered in this process.

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3) A Memorandum of Agreement between the Department of the Army and the State of New Jersey, dated 4 March 1993, specifying the extent of waters of the United States to be regulated by NJDEP pursuant to Section 404 of the Clean Water Act was also considered in this process, along with a 7 April 1995 aerial photograph downloaded from the world wide web courtesy of the U.S. Geological Survey.

**EVALUATION OF THE REASONS FOR APPEAL, HQNAD FINDINGS AND INSTRUCTIONS FOR SUBSEQUENT DISTRICT ACTION:**

**First Accepted Reason for Appeal:** The District allegedly utilized incorrect data, specifically pertaining to impacts to waters of the United States and project purpose, in its denial of the application.

**Determination on the Merits of This Reason for Appeal—This Reason for Appeal Has Partial Merit:** There are two specific issues to be evaluated as part of reviewing this reason for appeal. The first issue is whether the administrative record sufficiently demonstrates that the District had jurisdictional primacy over NJDEP on this site, and whether its decision to conduct its own jurisdictional determination was proper. The second issue is whether the District acted correctly in establishing the basic project purpose upon which they evaluated whether the placement of fill for this project complied with the Section 404 (b)(1) Guidelines.

With regard to the first issue, 33 C.F.R. 331.5 (a)(2) states that use of incorrect data in an appealable action is a valid reason for appeal, and that jurisdictional issues may be included as reasons for appealing a permit denial whether or not an approved jurisdictional determination was appealed. Pursuant to 40 C.F.R. 233.71, NJDEP has regulated the filling of most freshwater wetlands and waterbodies in the State of New Jersey since EPA approved transfer of the administration of the Section 404 program, with an effective date of 2 March 1994. As a prerequisite of this transfer, NJDEP and the Corps entered into a Memorandum of Agreement on 4 March 1993. Part III of this memorandum specified the extent of state-regulated waters of the United States. With particular relevance to the present case, Part III (B)(4) specifies that NJDEP will not assume Section 404 jurisdiction over tidal waterbodies and adjacent wetlands, up to the head of tide. Part III (A) states that the Corps also retains Section 404 authority over wetlands adjacent to tidal waters, located partially or entirely within 1,000 feet of the mean high water mark of tidal waterbodies. Conversely, NJDEP assumed Section 404 jurisdiction for wetlands and waterbodies located upstream of the head of tide.

The project vicinity in this case contains an extensive network of tidal lagoons, which greatly complicates the question of jurisdictional primacy. The site itself is concurrently landward of the head of tide of two lagoons to the west of the site (Lake Huron Lagoon and Lake Superior Lagoon), but below the head of tide and within 1,000 feet of the mean high water line of three other lagoons. One of these is between Lake Superior Drive and West Anchor Drive, and the second is between West Anchor Drive and West Brig Drive,

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both to the south of the project site. The third lagoon is east of Radio Road, generally east of the project site. Therefore, the administrative record must show that the site contains wetlands that are adjacent to one of these three lagoons, in order for the District to prove it has Section 404 jurisdiction on this site instead of NJDEP.

On Page 7 of a 21 October 1996 Memorandum for the Record, the District states that the wetlands on the site are adjacent to Great Bay via "...numerous tidal lagoons adjacent to the property." However, there is no substantiation of this statement, except in a 3 December 1997 Memorandum for the Record which establishes that the wetlands on the site are adjacent to Lake Huron Lagoon. (This topic is further discussed below with regard to the second accepted reason for appeal.) As indicated previously, the site lies above the head of tide of Lake Huron Lagoon, thus the District cannot claim adjacency thereto to establish they have primacy of Section 404 jurisdiction on this site. Other data in the administrative record, including road maps and U.S. Geological Service topographic surveys, indicate the site is physically separated by several hundred feet from the three lagoons south and east of the site. The barriers of separation include commercial and residential buildings, local streets, and a local thoroughfare. Unlike its documented determination that Lot 3 is adjacent to Lake Huron Lagoon, the District offers no evidence or analysis to support its broad claim of adjacency of the site to "numerous tidal lagoons". Thus, the District's statement cited above is not supported by substantial evidence in the administrative record.

Another jurisdiction-based issue is associated with the delineation of wetlands on this site. Since 9 August 1991, NJDEP has been the lead agency for performing wetland jurisdictional determinations in the State of New Jersey, in accordance with Local Operating Procedures agreed to by them and the Corps' Philadelphia and New York Districts. The stated purpose of the procedures is "...to minimize, to the maximum extent practicable, duplication regarding the delineation of Federal and State regulated waters and wetlands within the State of New Jersey." An NJDEP jurisdictional determination is provided in a document called a Letter of Interpretation (LOI).

The administrative record indicates that an LOI issued on 7 June 1994 by NJDEP stated that the extent of wetlands on Lot 3 encompassed 0.50 acres, not the 1.9 acres claimed by the District, that these wetlands were hydrologically isolated. The Appellant states that the District should have accepted NJDEP's determination in accordance with the Local Operating Procedures. Under the Local Operating Procedures, NJDEP is required to send the Corps a copy of every jurisdictional determination confirmation letter along with a copy of the final, approved survey of the limits of regulated waters and wetlands on the site plus a copy of the technical information used in establishing the boundaries of regulated waters and wetlands. In this case, the administrative record indicates that NJDEP sent the District a copy of the confirmation letter and the survey, but no technical information. The District indicates they attempted to obtain field notes from NJDEP's site inspection, and felt compelled to perform their own determination after NJDEP informed them they were unable to locate their field notes. The District also indicates

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their decision to perform their own determination was based in part upon review of aerial photography and past experience with this specific area, factors which led them to believe the true extent of wetlands on the site was more extensive than determined by NJDEP.

The LOI stated that the Appellant was entitled to rely upon the jurisdictional determination for a period of five years. It is important to note that the NJDEP LOI was issued greater than one year prior to the placement of fill on Lot 3 by the Appellant. Thus, it is inherently more reliable than the District's post-filling determination, which was performed one year *after* the Appellant filled the site.

In terms of understanding the specific parameters associated with this case, it is important to note the following chronology of the various types of approvals obtained by the Appellant to develop Lots 1 & 3:

**7 March 1991**—NJDEP issued authorization under a statewide general permit for development of Lot 1, which has an area of 0.97 acres. This general permit authorized filling less than one acre of a freshwater wetland or open water area, which is not part of a surface water tributary system (i.e. isolated waters) as determined by NJDEP. Since the lot was less than one acre, it was not necessary for NJDEP to issue an LOI documenting the extent of wetlands thereupon.

**25 March 1992**—The District confirmed that proposed filling of Lot 1 was permissible under NWP 26, stating that the lot consisted entirely of isolated freshwater wetlands, which developed from collection of runoff from neighboring properties after the site was previously filled before the inception of the Clean Water Act. The Appellant placed clean fill material on this lot shortly after receipt of this authorization.

**7 June 1994**—NJDEP issued an LOI indicating Lots 1 & 3 contained a combined total of 0.79 acres of wetlands—0.50 acres on Lot 3, and 0.29 acres on Lot 1.

*(NOTE: this determination was based upon conditions as they then existed on Lot 1, upon which the Appellant placed additional fill in 1992. NJDEP determined that 0.29 acres of the 0.97-acre lot still contained wetlands despite the additional fill. The administrative record indicates the District was aware of the issuance of this LOI when they first visited Lot 3 on 21 August 1996. During the 26 March 1997 site inspection, the District informed the Appellant that they considered the LOI to be flawed, since NJDEP's determination was made after Lot 1 was filled in 1992. However, Lot 3 [unlike Lot 1] had not been recently filled, thus the District could have elected to accept NJDEP's determination for Lot 3 since normal circumstances existed thereupon at the time the LOI was issued.)*

**19 May 1995**—As a modification of NJDEP's 7 March 1991 authorization, they authorized filling of 0.80 acres of *isolated* freshwater wetlands on Lots 1 & 3 for construction of retail stores.

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The Appellant indicated that he received verbal authorization from an unnamed District representative to fill Lot 3 subsequent to his receipt of the 19 May 1995 NJDEP approval. The District's stated rationale was that since Lot 3 was adjacent to Lot 1, authorization had previously been issued under NWP 26 for Lot 1, and the area to be filled was less than one acre, the work was permissible under NWP 26 without a requirement for the Appellant to formally notify the District or obtain advance written authorization. The Appellant proceeded to fill Lot 3 during July & August 1995, with a good faith belief he had obtained the necessary Federal and State approvals. Although the work was ineligible for authorization under NWP 26, given the fact the site is adjacent to Lake Huron Lagoon, this was based upon a subtlety in the regulations that is not readily discernible to the general public.

The Local Operating Procedures allow the Corps to retain the right to perform jurisdictional determinations in enforcement matters; thus, the District did not run afoul of any regulations or policies when they performed their own jurisdictional determination for Lot 3. However, after consideration of the particular circumstances described above; the intent of the Local Operating Procedures; and in the interest of fairness to the Appellant, we find that the District's decision to perform its own jurisdictional determination for Lot 3 lacks reasonableness.

With regard to the second issue, the administrative record shows that the Appellant was provided with multiple opportunities by the District to clarify the exact nature of his proposed development of the site, prior to issuance of the public notice. The District also took the extraordinary step of meeting with the Appellant on 1 February 2000 in a last-ditch effort to attempt to clarify the project purpose, before completing its review of the permit application. Originally, the Appellant indicated he proposed to construct a small retail establishment on the site, but his permit application indicated the purpose of the fill was to make the level of the site suitable for construction. The District had the Appellant select the appropriate depiction of his project purpose from two choices and included the Appellant's selection in the public notice. The District then utilized the project purpose selected by the Appellant for evaluating the project's compliance with the Section 404 (b)(1) of the Clean Water Act Guidelines.

The Appellant concedes that he received poor advice from his former environmental consultant on this issue, and this resulted in his failure to provide a more specific project purpose to the District. He believes the lack of a specific project purpose led to the substantive objections of EPA, NMFS and FWS to the project. We duly recognize the Appellant's contention and the fact that he is not well versed in the nuances of the permit process; nonetheless, we find that the District acted properly in this regard and this aspect of this reason for appeal is without merit.

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**Second Accepted Reason for Appeal:** The District allegedly committed an error in determining that the 1.9-acre lot is adjacent, as defined in 33 C.F.R. 328.3 (a)(3), to navigable waters of the United States.

**Determination on the Merits of This Reason for Appeal—This Reason for Appeal Does Not Have Merit:** The administrative record indicates that the District has correctly determined that the lot in question is adjacent to navigable waters.

**Appeal Decision Findings Discussion:** Throughout the permit process, the Appellant maintained his belief that the filling of Lot 3 was permissible under NWP 26. The District analyzed this issue in a Memorandum for the Record dated 3 December 1997. They stated that Lot 3 contained a remnant of a formerly extant large contiguous wetland adjacent to Great Bay, and that the site contained a drainage ditch, which is connected to a catch basin and stormwater drainage pipe that conveys flow into Lake Superior Lagoon. Since this artificial lagoon is subject to the ebb and flood of the tide, it is considered to be a navigable water of the United States in accordance with 33 C.F.R. 329.4. The District properly concluded that the drainage ditch is a tributary to navigable waters, and is therefore considered itself to be a water of the United States in accordance with 33 C.F.R. 328.3 (a)(5) and current policies and procedures.

This drainage ditch, depicted schematically on a survey of the property attached to the 3 December 1997 memorandum, was not visually evident during the 29 January 2002 site inspection. The District contends that the ditch existed on the site when they initially inspected it, but the Request for Appeal alleges that uplands surround the catch basin ditch and there is no direct hydrologic connection between the wetlands on the site and the catch basin. On this basis, and the fact that NJDEP authorized the filling of Lots 1 & 3 under a statewide general permit for fills in isolated waters and wetlands, the Appellant believed the wetlands are isolated.

Adjacency determinations are always exceedingly difficult in situations such as this where sites have undergone multiple disturbances, especially those which drastically alter the original characteristics of the site. Additional complicating factors are that over five years have elapsed since the District conducted its first inspection of the site, and the frequent use of the site by area children results in additional incremental disturbances. Given the heavy usage of the site by children for recreational purposes, it is entirely reasonable the ditch may have been disturbed beyond recognition. Nevertheless, the District sufficiently documented its presence in an attachment to the 3 December 1997 memorandum. In accordance with 33 C.F.R. 328.3 (c), wetlands on the site would still be considered to be adjacent to navigable waters even if separated by man-made influences. The Appellant did not demonstrate that ditch did not exist on the site as of the date of the District's inspection; therefore, we cannot find merit to this reason for appeal.

**Required Action:** No action required.

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**Third Accepted Reason for Appeal:** The District's determination of jurisdiction was improper in that it did not include field inspections.

**Determination on the Merits of This Reason for Appeal—This Reason for Appeal Does Not Have Merit:** The administrative record clearly indicates that the District performed site inspections on 21 August 1996 and 26 March 1997 to establish the extent of jurisdiction on the site. The District also reviewed historic aerial photography of the site, as well as the Ocean County Soil Survey and a U.S. Geological Service topographic map of the area, to assist in making their determination. During these inspections they properly followed the required field analysis procedures set forth in the *1987 Corps of Engineers Wetland Delineation Manual*, collecting soil, vegetative and hydrologic information at five sampling points during the first inspection and two additional sampling points during the second inspection, and recording their observations on Wetland Delineation Data Forms as directed by Manual. The determination regarding the extent of wetlands is sufficiently supported by information shown on the Data Forms.

**Required Action:** No action required.

**OVERALL CONCLUSION/REQUIRED ACTION:** HQNAD finds that the District followed all appropriate procedures and policies in its denial of the after-the-fact permit application, and the administrative record adequately supports the rationale for such decision, except for the underlying jurisdictional issues discussed in this document. HQNAD acknowledges that the jurisdictional issues in this case were difficult because of extensive site disturbances between the time of the NJDEP field jurisdictional determination and the CENAP after-the fact determination, as well as the issue of the location of the state's jurisdiction versus the Corps' jurisdiction.

In accordance with 33 CFR 331.9 (a), this matter is hereby remanded to the Philadelphia District Commander for the following three actions:

- 1) To clearly determine whether the District, or the NJDEP, has jurisdictional primacy on the site pursuant to Section 404 of the Clean Water Act;
- 2) To determine the proper jurisdictional "footprint" on Lot 3, if the Corps has jurisdictional primacy versus the NJDEP;
- 3) To revisit the permit denial decision in view of the outcomes of the above-listed jurisdictional reviews.

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In order to establish Corps jurisdictional primacy, the District will need to substantiate that the wetlands on Lot 3 are adjacent to at least one of the three tidal lagoons south and east of the site, referenced previously in this memorandum. In the event adjacency cannot be definitively determined, the District would have to rescind its 17 July 2000 denial of the permit application and fill removal order.

If the District can substantiate adjacency of the wetlands on Lot 3 to at least one of the aforementioned tidal lagoons, the jurisdictional “footprint” on the site is to be re-determined, including information available from the NJDEP pre-filling field determination. This is to be followed by a re-evaluation of the final decision to deny the permit application, in view of any changed circumstances surrounding the permit decision. A new public interest process may be appropriate if the District Commander determines that the circumstances have substantially changed. Regardless of the final disposition of this matter, the District is reminded that there may be a need to supplement to the existing decision documentation, especially the Section 404 (b)(1) of the Clean Water Act Guidelines Evaluation.

RECOMMENDED: \_\_\_\_\_/s/\_\_\_\_\_  
JAMES W. HAGGERTY  
NAD Regulatory Appeals Review Officer

CONCUR: \_\_\_\_\_/s/\_\_\_\_\_  
THOMAS M. CREAMER  
Chief of Operations – HQNAD

APPROVED: \_\_\_\_\_/s/\_\_\_\_\_  
M. STEPHEN RHOADES  
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