

## MEMORANDUM OF DECISION

SUBJECT: Department of the Army Permit Denial Appeal Review for Permit Application No. 199901232, TIP U-2912, Owen Drive Extension

1. Appellant: North Carolina Department of Transportation (NCDOT)  
C/O Mr. William D. Gilmore, P.E., Manager  
Planning and Environmental Branch  
Division of Highways  
Post Office Box 25201  
Raleigh, North Carolina 27611-5201

2. Background:

a. The denied roadway project was proposed as a four-lane curb and gutter facility, approximately two miles long, entirely on new location, from U.S. Highway 301 at Owen Drive to NC Highway 87 at East Mountain Drive (SR 2283) (Figure 1.) The project will be referred to as the Owen Drive Extension. The appellant proposed to fill 6.3 acres of streamhead/mixed hardwood and loblolly pine flatwood wetlands located on the Cape Fear River floodplain terrace. In addition, the appellant proposed to fill 246 feet of perennial stream. Due to the instability (high organic content) of soils in the project area, portions of the roadbed are proposed to be undercut and backfilled to support the new road. NCDOT also proposed to install several cross-pipes to allow for surface water exchange from one side of the road to the other. The cross-pipes would be installed at the lowest elevation of each wetland impacted by the project.

b. On 19 July 1999, the above-numbered permit application was denied with prejudice by the District Engineer, Wilmington District (CESAW), U.S. Army Corps of Engineers (Corps) because the District Engineer determined that the proposed project did not comply with Title 40 Code of Federal Regulations Part 230 (Section 404(b)(1) Guidelines of the Clean Water Act (40 CFR Part 230.)) Specifically, the denial was based on the appellant failing to demonstrate that there was no practicable alternative to the proposed discharge that would have less adverse effect on a high quality aquatic ecosystem.

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c. By letter dated 21 July 1999, Governor James B. Hunt, Jr., Governor of the State of North Carolina, strongly urged the District Engineer to grant approval for this project. By letter dated 19 August 1999, a Request For Appeal was submitted by the NCDOT containing four reasons for their appeal.

(1) Incorrect application of Section 404(b)(1) Guidelines and reliance on incorrect data.

(2) Reliance on incorrect data and failure to balance mitigation alternatives.

(3) Incorrect application of regulations requiring public interest review balancing favorable impacts against detrimental impacts pursuant to Title 33 Code of Federal Regulations Parts 325.2 and 331.2 (33 CFR 325.2 and 331.2).

(4) Incorrect application of regulations and procedural error in not allowing appellant to respond to agency comments and not providing reasons for denial pursuant to 33 CFR 325.2 and 331.2.

### 3. Analysis of the Appeal:

#### a. Incorrect Application of Section 404(b)(1) Guidelines and Reliance on Incorrect Data

(1) Appellant states that they followed NEPA procedure in evaluating practicable alternatives in the completed Environmental Assessment (EA) and Findings of No Significant Impact (FONSI) in accordance with Section 404(b)(1) Guidelines.

(a) In November 1992, CESAW received a copy of the Fayetteville Urban Area Thoroughfare Plan. Part of that plan was a proposed alignment for Owen Drive Extension. On 26 January 1993 (letter erroneously dated 1992), CESAW notified the appellant that the alignment of the proposed Owen Drive Extension may cause significant impacts to wetlands and suggested the appellant examine other alternatives to this alignment. Since the 26 January 1993, letter, CESAW, has repeatedly (in letters written by either CESAW or the resource agencies and forwarded to appellant by CESAW on: 2 February 1993, 1 June 1995, 29 August 1996, 20 May 1997, 2 June 1997 (U.S. Fish and Wildlife Service (FWS)), 13 August 1997, 5 September 1997 (North Carolina Wildlife Resources Commission (NCWRC)), 29 September 1997 (FWS), 9 June 1998 (FWS), 12 June 1998 (National Marine Fisheries Service (NMFS)), 19 June 1998 (NCWRC), 15 March 1999, 9 June 1999) requested information on other possible alternative

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alignments, and suggested three alternatives: Wilkes Road, US 301, or East Mountain Drive. The additional information on the alternatives was necessary to enable CESAW to perform a comprehensive alternatives analysis according to the Section 404(b)(1) Guidelines. Section 404(b)(1) mandates that the Corps use its Section 404 authority through the application of guidelines developed by the Administrator of the U. S. Environmental Protection Agency (EPA), in conjunction with the Secretary of the Army.

(i) The Guidelines at 40 CFR 230.10(a) state that no discharge of dredged or fill material may be permitted if there is a practicable alternative to the proposed discharge which would have less adverse effect on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purpose.

(ii) The "Purpose and need" section (III.A.) in the decision document reads as follows: "The stated purpose of this project (as provided in NCDOT EA dated 3-10-95 and has not been amended) is to provide a missing link in the corridor from Fort Bragg to I-95 utilizing the All American Freeway, Owen Drive, the proposed Owen Drive Extension, and a portion of NC 87. In addition, the EA provides information relative to the Fayetteville Thoroughfare plan, economic development and traffic volumes and capacity. The Corps concurs with the purpose and need statement."

(iii) As written, the appellant's stated overall project purpose is defined so narrowly that it seems to ensure that no practicable alternative to the Owen Drive Extension could exist. Even though CESAW stated in their decision document that they had accepted the overall project purpose, they obviously did not accept the appellant's overall project purpose, as written, but broadened it to include "providing a corridor from Fort Bragg to I-95 using the All American Freeway, Owen Drive, a yet to be determined alignment between Owen Drive and NC 87, and a portion of NC 87." CESAW's rejection of the appellant's project purpose is alluded to in the decision document (III.B.2.a.), but the conflict between this action and CESAW's prior statement of acceptance of the appellant's project purpose is not reconciled anywhere in the decision document. It should be noted, however, that in the Environmental Assessment, NCDOT, in spite of its declared narrow overall project purpose, fleetingly entertained Wilkes Road as an alternative before dismissing it.

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(iv) The major reason given by NCDOT for the rejection of the Wilkes Road alternative was that it was not feasible because it would require the construction of an additional interchange at NC 87, and this interchange would be too close to an existing interchange. The distance between the existing interchange and the interchange at Wilkes Road would be less than a mile and the minimum recommended distance between interchanges is at least one mile. This spacing does not appear to be a hard and fast requirement but a standard designed to attain safe and efficient utilization of the highway. CESAW and NCWRC presented the NCDOT with examples where NCDOT recently made design exceptions for interchanges within one mile of each other. CESAW also requested NCDOT to provide information relating to other possible alternative alignments. NCDOT did not provide that information, and therefore, NCDOT was unable to demonstrate to CESAW that the Wilkes Road alignment (or any other suggested alignment) was not a practicable and available reasonable alternative that would accomplish the project purpose.

(b) The guidelines further provide two specific rebuttable presumptions relating to all discharges in special aquatic sites. The first presumption (40 CFR 230.10(a)(3)) states that where an activity associated with a discharge, which is proposed for a special aquatic site (wetlands are defined in Subpart E as being special aquatic sites), is not "water dependent", practicable alternatives (not involving special aquatic sites) are presumed to be available unless clearly demonstrated otherwise. The second (40 CFR 230.10(a)(3)) states that alternatives in non-special aquatic sites are presumed to have less adverse impact on the aquatic ecosystem than discharges into aquatic sites unless clearly demonstrated otherwise. So, in summary, the guidelines presume that alternatives to discharges in special aquatic sites are available and they are less damaging.

(i) It is incumbent upon the applicant to rebut these presumptions. If the applicant is unable or unwilling to rebut these presumptions, then a DA permit can not be issued for that project. In this instance, the appellant did not submit sufficient information to rebut the presumptions set forth in the 404(b)(1) Guidelines.

(ii) In addition to the rebuttable presumptions, the guidelines also place other restrictions on the discharge and requires the Corps to document the potential long and short term effects of the discharge. Under 40 CFR 230.12, the Corps is required to make a written determination on the project's compliance with the Guidelines. While CESAW's written determination could have been presented in a more concise format, CESAW did address all of

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the Section 404(b)(1) issues in the decision document. Overall, CESAW properly performed a Section 404(b)(1) analysis and came to the proper conclusion based on the available information supplied by NCDOT.

(2) NCDOT states that CESAW improperly relied on agency statements that NCDOT did not use appropriate and practicable measures to minimize potential harm to the aquatic ecosystem as required by Section 404(b)(1) Guidelines (40 CFR 230.10-230.12.). Appellant claims that CESAW denied the permit because of statements made in the 11 June 1999 letter from EPA, which CESAW took at face value. In addition, NCDOT claims that NCDOT took measures to avoid and minimize wetland impacts and that other statements made in the EPA letter are in error.

(i) Nowhere in the administrative record is it shown that CESAW denied this permit on the basis of the language in the EPA letter. CESAW made an independent evaluation of the project according to the Section 404(b)(1) Guidelines and based their decision to deny on the appellant not submitting sufficient information to rebut the presumptions. As discussed below in paragraph 3(b)(1)(a), minimization of impacts and mitigation for the impacts cannot be evaluated until the determination has been made that no alternative exists that is less environmentally damaging. Absent additional information, CESAW could not make that determination.

(3) Appellant states that claims made by review agencies with respect to quality of the wetlands impacted and impacts to water quality by the Owen Drive Extension alternative are based on incorrect data.

(i) See Attachment 1 for Review Officer record of site investigation concerning the quality of the respective wetlands.

(ii) Appellant claims that the language in the EPA letter concerning the quality of the wetlands is in error and that the Corps should have relied on the factual information contained in the letters from North Carolina Department of Environment, Health and Natural Resources (NCDENR), NCWRC, and FWS. In fact, both the FWS (letter dated 10 June 1999) and NCWRC (letter dated 2 July 1999) letters conclude that the wetlands on the Wilkes Road alternative are lower in quality than those on the Owen Drive Extension alternative, and both state that a less damaging alternative exists that will accomplish the project purpose.

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(iii) WQC was received for the Owen Drive Extension, which indicates that the proposed project would not violate State and Federal standards. It does not indicate whether the proposed project will cause more or less impact to water quality than another alternative. In fact, the NCDENR WQC specifically points out (Condition #8) that the WQC should not be interpreted [to mean] that DWQ believes there is no practical alternative to this design.

b. Reliance on Incorrect Data and Failure to Balance Mitigation Alternatives

(1) Appellant states that the amount of impacts to wetlands under the Wilkes Road alternative has been underestimated. Appellant's position is that the figure that has been put forth is about 2.7 acres while that figure should actually be about 4.8 acres. Furthermore, they posit that if one discounts the impacts to the soil road, transmission line area and ditch, then the impacts to the wetlands on the Owen Drive Extension alternative are 4.98 acres, which is just slightly more than the impacts proposed for the Wilkes Road alternative. Additionally, appellant feels that if one takes into consideration the mitigation that has been offered, then the impacts on the Owen Drive Extension alternative are less than the impacts for the Wilkes Road alternative.

(a) The 2.7-acre figure for the Wilkes Road alternative was taken from information submitted to CESAW by the NCDOT. On 14 July 1999, a FAX was sent from NCDOT to CESAW. The fax contained a document titled, "Table 1: Alternative Analysis (updated 2/5/99)". In the table, under the category of "Wetland Acres Impacted", a figure of 4.8 acres is presented for the Wilkes Road alternative, but that figure is footnoted. The footnote reads, "Field delineated. During the final design, minimization efforts could reduce the wetland impacts to 2.7 acres." While the footnote states that it is possible to reduce the impacts to 2.7 acres, in actuality, because these wetlands are located within the interchange ramps, construction methods would likely impact the entire 4.8 acres. Therefore, a more realistic figure for the Wilkes Road alternative is 4.8 acres of wetland impact. However, the wetlands on the Wilkes Road alternative appear to be of lower quality than are those on the Owen Drive Extension alternative. (See Attachment 1) While it may appear that the acreage is similar, it is doubtful that the overall impacts would be similar.

(b) Generally, impacts to higher quality wetlands are more damaging to the environment than are impacts to lower quality wetlands. In addition, as was discussed in the Appeals Conference (see Attachment 2), the 4.8-acre figure for the Wilkes Road alternative includes wetlands in the direct footprint of the ramps plus secondary impacts caused by the construction activity itself. The acreage figure for the Owen Drive alternative does not

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contain any acreage for the secondary impacts associated with construction. If that acreage were included for this alternative, it is likely that this figure would exceed the original 6.3 acres.

(2) Appellant claims that CESAW failed to utilize the mitigation offered by NCDOT to balance the impacts.

(a) In accordance with the 6 February 1990 Memorandum of Agreement (MOA) between EPA and the Department of the Army concerning the determination of mitigation under the Section 404(b)(1) Guidelines, the sequencing approach to mitigation is set forth. Basically, this means that mitigation is not considered as a factor in favor of permit issuance but is considered only after the permit proposal has met permit criteria independently of the mitigation. The Corps first makes a determination that potential impacts have been avoided to the maximum extent practicable, that remaining unavoidable impacts will be mitigated to the extent appropriate and practicable by requiring steps to minimize impacts and, finally, that compensation is provided for aquatic resource values. The MOA states: "Compensatory mitigation may not be used as a method to reduce environmental impacts in the evaluation of the least environmentally damaging practicable alternatives for the purposes of requirements under Section 230.10(a)."

(b) In their review, CESAW has correctly evaluated the project and the appellant's proposed mitigation under the procedure specified in the MOA.

c. Incorrect Application of Regulations Requiring Public Interest Review Balancing Favorable Impacts Against Detrimental Impacts Pursuant to 33 CFR 320.1 & 320.4

(1) Appellant feels that because of the overall public benefits which would accrue from this project, the Public Interest Review should have tipped the balance in favor of the project.

(a) It should be noted that CESAW did not find that this project was contrary to the public interest. In general, most projects proposed by governmental entities are in the general public interest. In this instance, the permit was not denied because it was contrary to the public interest, but because it did not satisfy the Section 404(b)(1) guidelines. As the regulations state in 33 CFR 320.4(a)(1), no permit can be granted until the guidelines have been satisfied. Therefore, CESAW correctly applied the regulations, which require a public interest review balancing the detrimental impacts against the favorable impacts.

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(b) The Public Interest Review in the decision document is contained in Paragraph III. The section is titled "Environmental and Public Interest Factors Considered:." In addition, the analyses of several of the public interest factors, as stipulated by 33 CFR 320.4(a)(1), are contained in various places in the decision document.

(2) Appellant states that large sums of money have been spent or have been committed for this project. Right-of-way for the Owen Drive Extension alternative has been purchased and five homes/businesses have been condemned and relocated.

(a) See paragraph 3.e.(2) below.

d. Incorrect Application of Regulations and Procedural Error in not Allowing Appellant to Respond to Agency Comments and not Providing reasons for Denial Pursuant to 33 C.F.R. 325.2 & 331.2

(1) Appellant asserts that they were not offered the opportunity to respond to the comments received in response to the public notice.

(a) While no record of a formal pre-application consultation exists in the administrative record, numerous records of correspondence (letters written by CESA W or resource agencies and forwarded to the appellant on: 2 February 1993, 1 June 1995, 29 August 1996, 20 May 1997, 2 June 1997 (FWS), 13 August 1997, 5 September 1997 (NCWRC), 29 September 1997 (FWS), 9 June 1998 (FWS), 12 June 1998 (NMFS), 19 June 1998 (NCWRC), 15 March 1999, 9 June 1999) are present. These indicate that CESA W, prior to the submittal of the application, repeatedly advised the appellant that the proposed project would impact high quality wetlands, and that the CESA W believed alternatives were available which would be less damaging to the aquatic resource.

(b) No record of when the application was considered complete was entered into the administrative record, so it is not possible to determine whether the mandatory timeframes had been met. A public notice for the project was issued and circulated to the Federal and State resource agencies and to the general public.

(c) Comments on the project were received by CESA W and considered in the evaluation of the permit. During the Public Notice comment period CESA W requested (letter dated 9 June 1999) that NCDOT provide information on the alternative sites. The letter requests



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that "NCDOT should examine the feasibility of connecting the proposed Owen Drive Extension to East Mountain Drive further west than is currently proposed, relocating the entire Owen Drive Extension to the west, and upgrading existing facilities including Wilkes Road, East Mountain Drive, and U.S. 301/Business 95. All information, including wetlands data, should be provided for each of these alternatives at the same level of detail that is provided for the proposed project." By letter dated 18 June 1999, and signed by William D. Gilmore, P.E., Manager, Project Development and Environmental Analysis Branch, NCDOT responded to the CESAW 9 June 1999, letter. In that letter, Mr. Gilmore stated: "It is our belief that further studies, as requested, will take significant time and resources and not result in a change of this application and decision process from the Department's perspective. For this reason, we respectfully request that a decision on the proposed project be made solely on the information contained in the application." In essence, when NCDOT was requested to provide additional information, they stated that they didn't feel it would change the NCDOT's position on this application. Additionally, NCDOT requested CESAW to not only make a decision on the permit application but to base it entirely on what is currently in the application. (See also discussion in Attachment 2)

(i) The comments received in response to the 3 June 1999, public notice echoed the same concerns that had been received in response to previous public notices. On several occasions these comments had been sent to NCDOT for their response; however, NCDOT did not submit a response to CESAW on these issues. The administrative record does show that all of the comments received in response to the 3 June 1999, public notice were transmitted under a cover letter to the appellant on 7 July 1999. However, the transmittal letter did not specifically request NCDOT to respond to the comments nor did it contain reference to a time period for a response. A statement was included which invited NCDOT to call the Corps if NCDOT had any questions. The administrative record does not indicate whether any other communication was accomplished telephonically or by e-mail.

(ii) Procedures under 33 CFR 325.2(3) call for the Corps to furnish an applicant with substantive comments for his information and any information he may wish to offer. Technically, the wording in the letter could have been clearer, and a statement specifically requesting the appellant to provide additional information could have been added, but the transmittal of the comments was in accordance with the regulations at 33 CFR 325.2(a)(3). Considering the many prior opportunities that NCDOT had to respond to essentially identical comments, it does not appear that the lack of a specifically worded invitation in this one letter denied the appellant the opportunity to respond to comments generated from the public notice.

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(2) Appellant raises the issue that the District Engineer weighted the letters recommending denial more heavily than those recommending the issuance of a permit.

(a) During the Corps review of any standard permit application, the process involves the evaluation of many factors. Federal and State resource agencies are responsible for ensuring that the proposed activity is in compliance with the rules and regulations that they each administer. It is incumbent upon the Corps (and even mandated in some instances) to weigh some comments more heavily than other comments, depending upon their substance. However, the decision whether to issue or deny a permit is not a matter of popular vote and the number of letters (or signatures on petitions), either pro or con, does not determine the outcome.

(b) It appears that CESAW considered all of the comments in making their decision and not just the comments that were made against the project.

(3) Appellant states that they were not provided with a copy of the decision document with their denial letter.

(a) CESAW prepared a decision document, and because the decision was a denial, 33 CFR 331.2 requires the decision document to be attached to the Denial Letter. The appellant claims the decision document was not attached to the Denial Letter and that they were never advised in writing of the reasons for the denial.

(b) While the reason for denial was stated in the copy of the denial letter, this is not in accordance with 33 CFR 331.2. This is a procedural error, and although it could impact on the timeliness of the appellant's RFA submittal, it has no bearing whatsoever on the permit decision.

e. Other Issues Reviewed in Response to the RFAs

(1) Alternatives Analysis: Headquarters has issued two official guidance documents concerning the level of review required when evaluating the alternatives available to applicants: 1. Regulatory Guidance Letter (RGL) 95-1, "Guidance on Individual Permit Flexibility for Small Landowners", and 2. Memorandum to the Field, "Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements." RGL 95-1 is guidance for reviewing projects proposed by small landowners and is not applicable in this case. The latter document institutes flexibility into the process for projects with minor impacts on the aquatic environment. Those projects that have more than a minor impact will be

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subjected to a more detailed level of analysis to determine compliance with all of the provisions of the Guidelines. CESAW, in completing its review, was in compliance with this Corps official policy guidance.

(2) **Practicability of Available Alternatives:** One of the main reasons given for the appeal was that the NCDOT had already expended large sums of money toward the construction of Owen Drive Extension, including final design plans and the purchase of right-of-way, and therefore, practicable alternatives were not available to them. It should be noted that NCDOT expended these monies after having been advised by CESAW that the NCDOT preferred alternative would impact high quality wetlands and that it appeared to CESAW that less damaging alternatives were available. The decision document mentions that the NCDOT began acquiring right-of-way in July 1996 (this information was not supported in the administrative record with a letter, memorandum, or telephone conversation record), yet the application for the project was not received by CESAW until 28 February 1997. A memorandum issued by Corps Headquarters on 3 September 1992, (SUBJECT: HQUSACE Review of a Tennessee Department of Transportation Project Pursuant to 33 CFR 325.8), treated a similar subject, the practicability of alternatives when some of the expenditures occurred prior to submission of a permit application to the Corps. The conclusion of the guidance was that pre-application expenditure of monies was not a legitimate reason to preclude the consideration of other alternatives when applying the Section 404(b)(1) guidelines.

4. **Findings:** Based on a review of the administrative record, an onsite field investigation by the Review Officer, and an Appeal Conference with the Review Officer, appellant, appellant's agents, and representatives of the Wilmington District, U.S. Army Corps of Engineers, I find the following:

a. One aspect of the Review Procedure, as specified in the Corps of Engineers Permit Regulations (33 CFR 331.2.) may not have been followed by CESAW. Specifically, the administrative record does not demonstrate that CESAW furnished the appellant a copy of the decision document at the time the denial letter was transmitted (33 CFR 331.2.)

b. The appellant did not rebut the presumptions in the 404(b)(1) Guidelines (40 CFR 230) that for non-water dependent projects there is an available practicable alternative which does not involve a special aquatic site, and that the alternative has less adverse impact on the aquatic ecosystem.

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c. An onsite investigation demonstrated that the wetlands on the appellant's preferred alignment appear to be of higher quality than the wetlands on the alternative Wilkes Road alignment.

d. The appellant's overall project purpose, while narrowly stated in the EA and affirmed as acceptable by CESA W in the decision document, was not the overall project purpose that was the object of the District Engineer's alternatives analysis as prescribed under the Section 404(b)(1) guidelines.

e. Several documents referred to in the decision document were not included in the administrative record (See Attachment 3, Project History).

5. Decision:

a. The administrative record provides an adequate and reasonable basis for the District's decision.

b. Facts or analysis essential to the District's decision were not omitted from the administrative record. All information submitted by the applicant and other parties are contained in the administrative record.

c. All relevant requirements of law, regulations, and officially-promulgated Corps of Engineers policy and guidance have been satisfied.

d. The appeal is without merit. I sustain the denial of Department of the Army permit application number 199901232.

e. The decision document shall be modified to reflect that the District Engineer did not accept the appellant's project purpose as written. The project purpose for which the District Engineer performed the alternatives analysis, as stipulated in the Section 404(b)(1) guidelines, needs to be clearly stated and the record needs to reflect the reasons for not accepting the appellant's stated project purpose.

f. The administrative record shall be modified by inclusion of records of meetings, conversations, data, etc., which have been referred to in the decision document but are not contained in the administrative record. If this is not possible, all reference to them shall be struck

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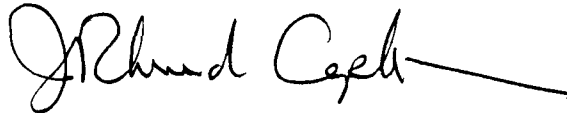
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from the decision document. (Note: The presence/absence of these documents had no bearing on my findings, but their absence is noted to bring this oversight to the attention of the Wilmington District to enable them to make the administrative record complete.)

g. Henceforth, for all Department of the Army permit decisions that are denied by CESAW, the applicant shall be furnished with a copy of the decision document at the time the denial letter is transmitted to them (33 CFR 331.2).

3 Attachments

A handwritten signature in black ink, appearing to read "J. Richard Capka", with a long horizontal line extending to the right from the end of the signature.

J. RICHARD CAPKA  
Brigadier General, USA  
Commanding