DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Parts 320, 326, and 331

Final Rule Establishing an Administrative Appeal Process for the Regulatory Program of the Corps of Engineers

AGENCY: Army Corps of Engineers, DoD.

ACTION: Final rule.

SUMMARY: On July 19, 1995, the Corps of Engineers published notice in the **Federal Register** of a proposal to establish an administrative appeal process for the regulatory program of the Corps of Engineers, (33 CFR Parts 320–331). The notice period expired on September 5, 1995. The Corps has evaluated and addressed the issues raised in comments submitted in response to the proposed rule. Appropriate changes have been made to clarify and enhance the administrative appeal process for permit denials and declined permits published herein as a Final Rule.

EFFECTIVE DATE: This rule becomes effective on August 6, 1999.

FOR FURTHER INFORMATION CONTACT: Mr. Sam Collinson, Corps of Engineers Regulatory Branch, (202) 761–0199.

SUPPLEMENTARY INFORMATION:

I. Background

Shortly after coming into office in 1993, the Clinton Administration convened an interagency working group to address concerns with Federal wetlands policy. After hearing from States, tribes, developers, farmers, environmental interests, members of Congress, and scientists, the working group developed a comprehensive, 40-point plan (the Plan) to enhance wetlands protection, while making wetlands regulations more fair, flexible, and effective for everyone, including America's small landowners. The Plan was issued on August 24, 1993. It emphasizes improving Federal wetlands policy through various means, including streamlining wetlands permitting programs. One of several approaches identified in the Plan for achieving such streamlining was through the development by the Corps of an administrative appeal process, to be implemented after public rulemaking. The Plan provides that the process will be designed to allow for administrative appeal of Section 404 geographic jurisdictional determinations and permit denials.

On July 19, 1995, the Corps of Engineers published notice in the **Federal Register** of a proposal to establish an administrative appeal process for the regulatory program of the Corps of Engineers. The notice period expired on September 5, 1995. The Corps has evaluated and addressed the issues raised in comments submitted in response to the proposed rule. Appropriate changes have been made to clarify and enhance the administrative appeal process for permit denials and declined permits published herein as a Final Rule. In Fiscal Years 1995 to 1999 the President's budgets have included money to implement an administrative appeal process for permit denials and jurisdiction determinations. From FY 95 through FY 97 the Congressional appropriation for the Corps regulatory program was held level at $101 million. In FY 98 Congress appropriated $106 million. This funding in FY 98 allowed the Corps to move toward finalizing regulations for administrative appeals of permit denials and declined permits. Congress held the Corps regulatory program budget level again in FY 99 at $106 million. The President's Budget request for FY 00 of $117 million includes funds necessary to implement the appeals process for jurisdictional determinations as well as the appeals process for permit denials that we are finalizing with this rule. Should Congress provide the full request of $117 million in FY 00, we will proceed to implement the appeals process for jurisdictional determinations.

The rule adopted herein provides for the administrative appeal within the Corps of a denial with prejudice by the district engineer of a Department of the Army permit application, as well as the appeal of a declined proffered individual permit. Consistent with the Plan and as explained below, third parties may participate in the appeal process.

This rule does not establish, at this time, an appeal process for jurisdictional determinations or wetland delineations. We have carefully considered the issue, and have determined that given the resources available to the Corps at this time, we would be unable to administer an appeal process for jurisdictional determinations and wetland delineations in a timely manner without adversely affecting the overall performance of the Corps regulatory program. The employees dedicated to these new tasks would have to be taken from the existing district staffs, with the result that each district would have fewer project managers to evaluate permit applications and administer the rest of the program. Given this situation, we believe that our efforts should be concentrated to the extent possible on maintaining and improving the overall performance of the Corps regulatory program. Should additional resources become available at a later date, we will consider expanding the appeal process to include jurisdictional determinations and wetland delineations.

II. Comments on the Proposed Rule

A. General

Comments received on the proposed rule can be summarized under several broad headings. They are: (1) The type of actions reviewed and the extent of the review; (2) The identity and authority of the review officer (RO); (3) The identity and rights of appellants; (4) Enforcement-related issues; (5) Suggested procedural changes and clarifications; and (6) General expressions of both opposition and support of an administrative appeal process. The comments concerning each of these topics, including those that pertain to the appeal of permit denials and the terms and conditions of proffered individual permits, were carefully considered, and are addressed herein. Comments that pertain solely to the appeal of jurisdictional determinations are not addressed in this document. Consideration of those comments will be addressed at such time as the Corps may adopt an appeal process for jurisdictional determinations.

B. Discussion of Specific Comments

(1) Type of Actions Reviewed and Extent of Review

A number of comments were received requesting that the appeal process be expanded to include the assertion of discretionary authority, issuance of cease and desist orders, special conditions, denial without prejudice of a permit application, and delays in the evaluation of a permit application.

While we recognize the desire of various individuals and interest groups to expand the scope of the administrative appeal process to cover all regulatory decisions that may impact their respective interests, we have determined that there are several reasons why it would not currently be prudent to do so. First, some of the decisions that were suggested should be appealable are preliminary in nature. As a result, there often is not an adequate administrative record upon which to base a meaningful review. For example, the assertion of discretionary authority to require an individual permit for an activity is often based upon preliminary

indications that the potential adverse effects of a particular project on the environment, or other aspects of the public interest, may be more than minimal. In such cases, the individual permit process is needed to investigate the probable effect of the project on the public interest before making a final permit decision. In addition, the assertion of discretionary authority only addresses the form of authorization that is being considered, and not whether the proposed activity will be authorized. Second, we have limited resources to implement an administrative appeal process, and we could easily find ourselves to be overwhelmed by the demand for administrative review of a broad range of regulatory decisions. Given our FY 1998 appropriation from Congress, sufficient funds are available to implement properly an administrative appeal process for denied permits, and declined individual permits only. Third, we do not wish to encourage permit applicants to enter into a formal administrative appeal process without first utilizing the informal review process already available in Corps district offices. The informal district review process, generally based on additional information or a new interpretation of existing information, is the most timely and efficient means to resolve many issues, such as jurisdictional questions. Accordingly, at this time, we are limiting the administrative appeal process to denied permits, and to proffered individual permits that have been declined by the applicant.

Several of the comments received indicated that some parties believed that the appeal process would allow an applicant to appeal the terms and conditions of an individual permit, and begin work in jurisdictional areas, while the appeal was under way. This interpretation of the appeal process is incorrect. Permit conditions are an integral part of a permit, and cannot be treated as independent actions. No regulated activity would be allowed to begin in any jurisdictional waters of the United States until the applicant has accepted all the terms and conditions of the proffered permit. In cases where an individual permit has been accepted by the applicant, and the terms and conditions of such permit are subsequently unilaterally modified by the district engineer pursuant to 33 CFR 325.7, the permit may be declined by the permittee and appealed under this process, as long as no regulated activities have taken place in waters of the United States on the project site. Permit conditions are designed to ensure that the authorized project will be constructed, operated and maintained in such way that it would not cause significant degradation of the aquatic environment, or be contrary to the public interest; or to ensure compliance with legal requirements, such as Section 401 State water quality certification conditions, and the Endangered Species Act. In the case where an applicant declines a proffered individual permit because the applicant objects to the terms and conditions of the permit, the appeal process would proceed as follows. Should the applicant object to the terms and conditions of the individual permit, the applicant must write a letter to the district engineer explaining his objections to the permit. The district engineer, upon evaluation of the applicant's objections, may: (a) modify the permit to address all of the applicant's objections, or (b) modify the permit to address some, but not all, of the applicant's objections, or (c) not modify the permit, having determined that the permit should be issued as previously written. In the event that the district engineer agrees to modify the proffered individual permit to address all of the applicant's objections, the district engineer will issue such a modified permit. Should the district engineer modify the proffered permit to address some, but not all, of the applicant's objections, the district engineer will send the applicant such a modified permit and the decision document for the project. If the district engineer does not modify the proffered permit, the district engineer will offer the unmodified permit to the applicant a second time. In all cases, the second transmittal of the permit shall include a notification of appeal (NAP) form and a request for appeal (RFA) form (see definitions in 33 CFR 331.2). If the applicant subsequently declines any modified or unmodified permit, this declined permit may be appealed to the division engineer upon submittal of a completed RFA form. The completed RFA must be received by the division engineer within 60 days of the NAP.

There were several comments concerning the scope of the review process. Several commenters recommended that the review officer (RO) consider new information, conducting, in effect, a new and independent review. Other commenters indicated that new information should be accepted only if it serves to clarify existing issues, and did not raise new issues that were not considered in the Corps original evaluation of the permit application. After careful consideration, we have decided that the review undertaken by the RO would be limited to the existing administrative record; however, the RO may seek to clarify the record through consultation with the appellant and his agent(s), the district engineer, other Federal and state agency personnel, or other parties, as described in 33 CFR 331.3 and 331.7.

Accepting new information about the project during the appeal process would constitute a fundamental change of the administrative record. Such new information might well have resulted in a different permit decision had it been presented to the district engineer during the original permit evaluation process. It is essential that new information be accepted only at the district level, so that the district engineer's decision will reflect an accurate and comprehensive analysis of the data compiled in the administrative record. Furthermore, allowing an applicant to withhold potentially critical information from the district engineer might encourage forum-shopping, if an applicant were to believe that a more favorable decision might be obtained from the division engineer than from the district engineer.

(2) The Identity and Authority of the Review Officer (RO)

Comments were received regarding the appropriate person to serve as the RO, and the extent of the RO's authority. Most comments were concerned primarily with ensuring that the RO be independent and impartial, that the process be efficient, and that the RO have the authority to change the original permit decision. Some commenters also recommended that the RO be authorized to change unilaterally a district engineer's permit denial decision.

Suggestions were also received stating that the administrative appeal process should be conducted outside of the Corps of Engineers, e.g., by contracting with private consultants, utilizing administrative law judges, or referring the appeals to another Federal agency. Several commenters expressed strong support for retaining the appeal process within the Corps, while other commenters expressed an equally strong desire to transfer the appeal process to an independent third party in order to promote impartiality, to avoid the perception of bias, and to enhance the credibility of the process.

We have given careful consideration to whether the appeal process should be administered wholly within the Corps, or whether it should be administered by an independent third party. While the perception of agency bias is a serious concern, we believe that such perceptions cannot be avoided

absolutely, and that the negative connotations are far outweighed by having the appeal process managed by people who have the most experience with the Corps of Engineers regulatory program. Moving the appeal process outside the agency, either to another Federal agency, or by contracting with the private sector, even if a Corps representative were part of the process, would severely diminish the consistency and efficiency of the appeal process, and would raise serious legal questions. The Corps regulatory program is complex, and it is unlikely that individuals outside of the agency would have the perspective and long experience with the program that would be needed to conduct a thorough, timely review. Also, given the evolving nature of the policies, laws, regulations and court decisions that have shaped the Corps regulatory program, non-Corps review officers would have to be trained and updated on a regular basis in order to stay abreast of the changes. We believe that it would be difficult to provide this recurring training to individuals outside of the Corps. Furthermore, it would be imprudent and inappropriate to transfer the appeal process to a third party, because the Corps bears the statutory responsibility for full implementation of the regulatory program. Finally, it is noted that this rule does not diminish the right of an appellant to seek redress through the Federal courts if he receives an unfavorable decision from the Corps upon completion of the administrative appeal process.

Simplification and lower program costs were also offered as reasons for transferring the process to the private sector. We are not convinced that contracting the work would be simpler or less costly than administering the process internally. Corps involvement in the appeal process would still be necessary, particularly in the case where permit denial decisions were remanded to the district engineer for reconsideration as the result of a successful appeal. Further, contract management responsibilities would remain with the Corps, and could constitute a substantial administrative burden.

Efficiency was also cited by several commenters in support of establishing the appeal process as a single level of review at the division level. We have examined the issue, and agree that the operational efficiency of the appeal process would be maximized by a one-level review of the existing administrative record.

Several commenters expressed the view that the appeal process should grant authority to the division engineer to unilaterally overturn the permit decision of the district engineer. Otherwise, it was argued, the best result an appellant could hope for would be a new, time-consuming review by the same regulatory project manager who made the original permit recommendation to the district engineer. One commenter further stated that such a process is inconsistent with the Corps own assertion that an impartial, objective review requires the final permit decision be made at the division rather than district level.

We believe that the commenters failed to appreciate the positive aspects of limiting the review to ensure that the requisite procedural steps have been followed, that no material facts have been overlooked or misinterpreted, and that the permit decision is consistent with established policies and official guidance. If the division engineer determines that the administrative record is insufficient to support the decision, or that the decision is inconsistent with a requirement of law, regulation, an Executive Order, or officially-promulgated Corps policy or guidance, the division engineer will give specific instructions to the district engineer regarding corrective actions that must be taken in reconsidering the permit decision. These instructions would ensure that the district engineer's subsequent decision would be based on proper legal, factual, procedural, and policy grounds. Remanding the decision to the district engineer for corrective action also affirms the principle that the authority to make permit decisions rests with the district engineer, who is the person ultimately responsible for implementation of the regulatory program within his district. Furthermore, from a workload management perspective, Corps district staff are better prepared than division personnel to handle the day-to-day requirements of the permit evaluation process. In addition, an administrative appeal process that required a full public interest review would be more time consuming than a review of specific issues, and would in many cases duplicate work already done at the district level. Also, if after conducting an appellate review, the division engineer has reason to believe that the permit application should not be referred back to the district engineer for a final decision, the permit application may be elevated in accordance with 33 CFR 325.8(b)(4), and the division engineer will make the permit decision.

Another commenter suggested modifying the third sentence of Section 331.3(b)(2) to provide the RO more flexibility. It was suggested that we strike the wording, ''shall not substitute their judgment for that of the Corps district (when reviewing technical issues) unless the reviewed decision was clearly erroneous or omitted a material fact,'' and replace it with, ''shall provide a recommendation on the decision that is supported by clear and convincing evidence.'' We believe that under the original language, the RO has sufficient flexibility under the review process; however, we have reworded that section to clarify the meaning.

A comment was received suggesting more involvement by Corps headquarters to assure the consistency of appealed decisions and to facilitate adjustments in policy, as may become necessary. We agree that there is a need for Corps Headquarters to monitor the appeal process, especially during the period of initial implementation, but we believe that routine, case-by-case involvement is neither warranted nor practical. Corps Headquarters will provide training to the review officers to ensure understanding of the policy and procedures, and to ensure consistency of the process. Corps Headquarters will also provide support on a case by case basis in the evaluation of appealed actions, if requested by a division engineer.

Permit decisions made by a division engineer or higher authority may be appealed to an Army official at least one level higher than the decision-maker. This higher Army official shall make the decision on the merits of the appeal, and may appoint a qualified individual to act as a review officer (as defined in Section 331.2 of this Part). References to the division engineer in this Part shall be understood as also referring to higher-level Army authority when that authority is conducting an administrative appeal.

Several commenters suggested that, because of its unique organizational structure, appeals arising from decisions in the New England Division (NED) office should be directed to Corps headquarters rather than the division engineer. The Corps has recently reorganized the division offices. The former New England Division is now the New England District, and reports to the North Atlantic Division office. The former New England Division is consequently like the other Corps districts, and there is no need to set up a separate appeal process structure for the New England regional office.

(3) The Identity and Rights of the Appellant

A number of commenters expressed concerns that the proposed

administrative appeal process would unduly restrict who may pursue an appeal, that the scope of participation by the appellant was ill-defined, and that appellants should not be required to exhaust the administrative appeal process before seeking relief in the Federal courts.

In response to the question regarding who may pursue an appeal, the Corps has decided that, since the appeal process is limited at this time to the appeal of denied permits, and to the appeal of declined individual permits, appellants are properly limited to those parties who have had their permit applications denied, or to those parties proffered an individual permit by the district engineer. Expanding the appeal rights to third parties would potentially increase the number of appealable actions by an order of magnitude or more. This would simply be unworkable. With regard to the scope of participation by the appellant, we believe that the procedures outlined in 33 CFR 331.6 and 331.7 adequately describe the scope of participation of appellants and their agents. We have also added a definition of the term ''agent(s)'' to 33 CFR 331.2. With regard to the need to exhaust the administrative appeal process before seeking relief in the Federal courts, we believe that the administrative appeal process would serve to identify and correct any procedural shortcomings of the original permit evaluation process, and can lead to a resolution of problems without the added burden to both parties of an action in the Federal courts. Furthermore, requiring an appellant to exhaust the administrative appeal process does not prevent the appellant from seeking relief in the Federal courts should the appellant not be satisfied with the outcome of the appeal.

In response to requests for clarification of who may attend site investigations and appeal conferences to provide support and representation for the appellant, the rule has been written to allow the appellant's agent(s), as defined in 33 CFR 331.2, to participate in the process. The appellant's agent(s) may participate in the appeal conference and in any site investigations, as outlined in 33 CFR 331.7.

Numerous comments were received regarding third party involvement in the administrative appeal process. A number of commenters favored limiting third party involvement to the extent provided for in the proposed rule. Other commenters requested expansion of third party involvement. It was evident from several comments that some confusion exists regarding when third parties may participate in the appeal process. In order to clarify these issues, additional language has been added to the rule in 33 CFR 331.7 and 33 CFR 331.10. The supplementary language is intended to make it clear that there is no third party involvement in the appeal process itself. However, we have provided for interested parties to be involved in those cases where the division engineer has determined that the administrative record supporting a permit denial is inadequate, and has remanded the decision to the district engineer for further consideration. In such a case, any party who commented during the original permit review process will be advised that the decision is being reconsidered, and that they may submit supplemental comments. If the noted deficiency in the administrative record is serious enough to merit issuance of a new public notice, anyone may submit comments. Under these circumstances, the public interest review is starting anew, and there is no requirement that interested parties must have participated in the original permit review process.

(4) Enforcement-Related Issues

One commenter suggested that under the proposed rule the after-the-fact (ATF) permit process should more appropriately be titled an after-the-fact ''enforcement'' process. We believe that the existing language properly identifies that a permit application is being evaluated ''after-the-fact'' for an activity that has already occurred. It would be inappropriate to use the term ''after-the-fact enforcement'' since a permit may be granted as a result of the ATF review process. In certain cases involving alleged unauthorized activities, the Corps will afford the responsible party the opportunity to apply for an ATF permit. Once any initial corrective measures have been completed and the activity otherwise meets the criteria in 33 CFR 326.3(e), evaluating an ATF permit application is an appropriate response to an unauthorized activity. If an ATF permit is issued, such permit will alleviate adverse effects to the affected water of the United States through special conditions and/or compensatory mitigation requirements. The ATF process is one of several administrative remedies available to the Corps to resolve unauthorized activities.

Several commenters responded to our proposal to amend 33 CFR 326.3(e) to require a tolling agreement as a prerequisite to filing an administrative appeal of an adverse ATF permit decision. Several commenters recommended narrowing the scope of the proposed tolling agreement. As a result of further consideration, we have determined that it would be appropriate to limit the tolling agreement, and 326.3(e) has been amended by adding subparagraph (v).

This new provision would mandate that any party alleged to have engaged in an unauthorized activity, who files an ATF permit application that the Corps processes, has thereby agreed to a tolling of the Statute of Limitations, and, in addition, must sign an agreement to that effect. Such tolling agreement would state that, in exchange for the Corps accepting the ATF permit application and, if appropriate, considering the appeal of any ATF permit denial or declined individual permit, the party has agreed that the Statute of Limitations would be tolled for one year after the final action has been taken on the ATF permit decision, or any succeeding administrative appeal of an ATF permit denial has been finalized, whichever is later. The tolling period would terminate one year after a final decision on (1) the denial of an ATF permit application; or, (2) an appeal of such a denial decision, whichever is later. The one year post-decision period is necessary in the event that the United States determines that it would be appropriate to file an action in the Federal courts to obtain a satisfactory remedy for the unauthorized activity.

The tolling agreement would also state that permit applicants will not raise a Statute of Limitations defense in any subsequent enforcement action brought by the United States, with respect to the unauthorized activity for the period of time in which the Statute of Limitations is tolled. A party will be required to sign a separate tolling agreement for each individual unauthorized activity.

One commenter asked that the third sentence in Section 331.11 be revised to read ''* * * unless the Corps receives an ATF permit * * *'' because the commenter felt the Corps could not refuse a permit application. To the contrary, the Corps may refuse a permit application when any one of four situations exist as identified in 33 CFR 326.3(e)(1). For this reason, we believe that the current language is appropriate. Another commenter recommended that an appeal initiated in response to the Corps actions on unauthorized activities should not be processed until resolution of the alleged violation. As noted earlier, although protection of the environment is one of the Corps primary goals, there are some circumstances where allowing an appeal to proceed before an enforcement action is

concluded is appropriate. Accordingly, we are convinced that this decision must remain subject to the discretion of the district engineer.

Comments were received questioning the basis of the requirement that initial corrective measures must be completed before an appeal could be accepted. One comment stated that this requirement left an appellant little recourse; a result that appeared to be contrary to the purpose of these regulations. Another believed that such a requirement was premature because it presupposes that the appeal lacks merit. We disagree with both of these arguments. First, interim corrective measures are those actions which the district engineer believes to be necessary to prevent serious jeopardy to life, property, or important public resources. We believe that when such a situation exists, the district engineer must act promptly to require initial corrective measures to ensure that any unsafe or hazardous conditions are corrected. Second, a determination to require a corrective action does not prejudice an appeal, since it does not pass any judgment on the merits of the overall project; it is simply intended to eliminate or reduce unsafe conditions while the appeal is pending. Finally, the appellant always has the option of seeking relief from the Federal courts.

The proposed rule, in Section 331.11(b), concerned the calculation of potential penalties for unauthorized activities. That provision stated that ''[A]ny penalty imposed, as determined in the appropriate forum by the appropriate decision-maker, may also include in the calculation of penalty the time period involving the appeal process.'' This provision elicited comments stating that it was both ambiguous and potentially unlawful. The Corps takes no position on the legality of this provision. However, we have omitted this provision for several reasons. First, this particular provision was somewhat ambiguous in that it was not clear whether the time period of the appeal process could be used to increase or decrease the penalties for unauthorized activities. Second, the Corps realizes that it cannot dictate to a Federal court that the time period for the appeal process must be included in determining the penalty for unauthorized activities. A court must independently weigh the facts of a particular case in order to determine the appropriate extent of penalties for that case. By omitting this language, the Corps is not waiving its right to argue before a court that the time period for the appeal process should be included in the calculation of the penalty for those unauthorized activities. This explanation serves as notice to every appellant regarding ATF permit applications that the time it takes for an appeal to be resolved by the Corps may be included in the calculation of penalties for the unauthorized activities.

(5) Suggested Procedural Changes and Clarifications for Specific Sections

Section 331.3(a): One commenter suggested including ''prompt'' with ''fair, reasonable, and effective'' in describing the administrative appeal process to emphasize the Corps commitment to timely action on appeals. We agree that timely resolution of appeals is vital to the success of this program, as is reflected by the inclusion of time frames in the rule, and have revised this section to include the word ''prompt'.

Section 331.3(a)(2): One commenter suggested including the phrase ''based on the merits of the appeal'' in the first sentence. We agree with this suggestion, and have clarified the first sentence of 33 CFR 331.3(a)(2) to reflect this suggestion.

Section 331.4: Several commenters noted that the proposed rule did not contain a list of items that must be present in the administrative record that would be the subject of an administrative appeal. Because the administrative record for individual cases varies with the nature of each proposal, we do not believe it is necessary to identify items that could be in the administrative record. Each administrative record typically contains many common elements, such as a determination of jurisdiction, the permit application and supplemental information provided by the applicant, the public notice and mailing list, comments received in response to the notice, NEPA documentation (e.g., environmental assessment) and statement of findings (or a combined decision document), 404(b)(1) Guidelines evaluation, and related documents and correspondence.

One commenter suggested that the last three proposed words of Section 331.4 be deleted. We have reworded the paragraph in order to clarify that a standard form for submission of a Request For Appeal (RFA) will be provided to the potential appellant, along with the Notification of Appeal Process (NAP) standard form.

Section 331.5: This section has been modified to clarify the criteria for consideration of an appeal. Additionally, the criteria will be clearly outlined in the RFA form sent to the affected party with the NAP.

Section 331.5(b)(1): One commenter suggested that it may not be clear to permit applicants that endorsement of a proffered individual permit indicates acceptance of the permit in its entirety, and effects a waiver of the applicant's right to appeal the terms and conditions of the permit. We acknowledge that the wording of the preamble and the proposed rule may not be clear enough. Therefore, the wording of the final rule has been modified to state clearly that the acceptance of an individual permit results in the waiver of an applicant's right to appeal the terms and conditions of the permit. This provision will also be explained in the notification of applicant options (NAO) form attached to the proffered individual permit sent to an applicant.

Section 331.6: One commenter suggested that we change the rule so that the RFA must be filed within 60 days of the date that the applicant receives the NAP, rather than within 60 days of the date of the NAP. We have retained the wording of the proposed rule, because it allows the 60 day time period to be measured from a clear and verifiable date, whereas the date of receipt by the applicant would be difficult to verify.

One commenter suggested that it would be difficult for appellants to provide their reasons for appealing a permit denial within 60 days unless the Corps provides a rationale for the permit denial as part of the denial notification. In response to this request, the district engineer will provide a copy of the decision document with the NAP where the permit application has been denied. In response to one commenter who requested that permit decisions be made available to the public, permit decisions are currently available to the public under standard Freedom of Information Act procedures.

Section 331.7(d): Several commenters suggested that the RO should be required to notify the appellant a minimum number of days prior to the date of the appeal conference to ensure that the appellant has sufficient time to schedule and attend the meeting. We agree, and have incorporated a requirement into the rule that provides that the appellant be given 15 days notification of the date of the appeal conference (see 33 CFR 331.7(d)(1)).

One commenter suggested that it be made mandatory that complete transcripts be prepared for all presentations and discussions occurring during the appeal conference. We do not agree with that suggestion, because we believe that the cost of doing so would be burdensome, and that requiring transcripts would considerably delay the appeal process. However, we have required that the RO prepare a

memorandum for the record (MFR) to document the appeal conference (See 331.7(d)(7).) We believe that this process is adequate and not unduly burdensome or costly.

Section 331.7(e): One commenter suggested that the RO be allowed to communicate with both the appellant and the Corps district during the appeal process. Another commenter concurred with our initial proposal to prohibit any conversations between the RO and the parties to the appeal, and also suggested that the regulation should explicitly prohibit any conversations regarding the appeal between the RO and any third party. The final rule has been revised to allow the RO to communicate with all parties to the appeal, as well as outside sources. (See Sections 331.7(d) and 331.3(b)(2).) We anticipate that the RO may need to question the appellant and the Corps district staff to clarify the administrative record, and may also need to consult with technical experts, Corps Headquarters staff, Corps Office of Counsel, or other ROs, if the appeal raises technical issues, questions of national policy, interpretation of regulations, or legal or programmatic concerns.

Section 331.8(b): Several commenters suggested that a specific time period be included for soliciting comments from agencies and interested parties following a determination by the division engineer to remand the permit denial decision to the district engineer for reconsideration. Some commenters suggested a minimum of 15 days for opportunity to comment. We have provided additional information on time frames in this rule (see Section 331.10(b).) We have also clarified that where the reconsideration by the district engineer may involve substantial changes in the potential impacts of the project, a new public notice will be issued in accordance with the provisions of 33 CFR Part 325.

Some commenters suggested that there be an absolute time limit of 30 to 45 days for the district engineer to make a final decision on a remanded permit denial. We share the desire of the commenters for timely decisions; however, appealed permit denial cases are likely to be controversial, and/or may involve difficult issues that will require further agency coordination and public participation. Since we cannot anticipate all such issues and circumstances, we have elected not to establish any deadlines for the reconsideration of decisions remanded to the district engineer.

Section 331.10: Some commenters recommended that the district engineer not be required to re-open the public interest review process on remand of a permit denial decision. Another recommended that the public interest review process be re-opened for all remanded permit decisions. Depending on the issues raised in each remanded permit decision, there may be laws, regulations or other guidance that would require the re-opening of the public interest review process, including opportunity for comments from the public and/or Federal and State agencies. Therefore, we are neither requiring nor prohibiting this practice, but are retaining the original wording that makes this determination subject to the discretion of the district engineer.

One commenter suggested that the rule be clarified regarding the 404(q) elevation process. The administrative appeal regulation does not change any authorities or requirements of Section 404(q) of the Clean Water Act. Currently the U.S. Army Corps of Engineers has Memoranda of Agreement, under Section 404(q), with EPA, FWS and NMFS whereby policy issues and certain permit decisions can be elevated to higher headquarters for a decision. This regulation does not affect the Section 404(q) MOA elevation process. Specifically, policy issues can be raised at any time and the Corps will send Notice of Intent to Issue letters at the end of the appeal process for any permit decision that qualifies pursuant to the Section 404(q) MOAs. We have added a statement to the end of Section 331.10(b) to clarify that nothing in this rule precludes the agencies' authorities pursuant to Section 404(q) of the Clean Water Act.

(6) General Expressions of Opposition and Support

A number of comments were received related to the estimated costs of administering the proposed administrative appeal process. One commenter indicated that our estimated costs were too low. Two commenters said that our estimated costs were too high. Though the Corps has not had any experience with such a program, we believe that our original cost estimates are reasonable. It is probable that, at the start of the appeal process implementation period, there may be a greater number of appeals than we anticipate. Consequently, the appeal process may be slower than desired due to the workload. We anticipate that as the appeal process matures, appellants will be less inclined to file appeals in questionable or speculative cases, since there will be an established record of consistent regional and national decisions, and ROs will have become increasingly proficient in implementing the appeal process as they gain experience. We will continually evaluate the cost and results of our appeal process. This evaluation may result in future adjustments to ensure that costs of the appeal process are minimized, and that the consistency, efficiency and timeliness of our decisions are maximized.

III. Exhaustion of Administrative Remedies

In *Darby* v. *Cisneros,* 113 S.Ct. 2539 (1993), the Supreme Court recently held that persons subject to Federal agency regulation need not exhaust administrative remedies before filing a lawsuit in Federal district court, unless a statutory or regulatory provision requires such exhaustion. In response to *Darby* v. *Cisneros,* the Corps is including section 331.12 in this rule to make it explicit that persons dissatisfied with permit decisions must avail themselves of the administrative appeal process established in this rule, and have received a final Corps decision on the merits of the appeal, prior to seeking redress in the Federal courts.

IV. Application of Rule to Prior Regulatory Decisions

Affected parties may appeal permit denial decisions and declined permits where the permit denial or proffered individual permit occurs after March 9, 1999. Such requests will be accepted for administrative appeal in accordance with this regulation. Permit denials or proffered permits that were transmitted in writing to an affected party prior to the publication date of the final regulation will not be accepted under the appeal process. Additionally, if large numbers of RFAs are received under this provision, an RO may delay the initiation of processing an RFA for up to 6 months after the effective date of these regulations, if necessary.

One commenter asked whether the availability of an administrative appeal process would affect in-process litigation, initiated in response to a permit denied with prejudice after the date of the publication of the final rule in the **Federal Register**. That is, would this rule render the case as not ripe for judicial review. The appeal of permit denials and declined individual permits will be accepted by the Corps starting on today's date. Therefore, applicants must use the appeal process as of today's date and exhaust such administrative processes before seeking relief in the Federal courts. Furthermore, in it's discretion, the United States may agree to a suspension of on-going litigation if the litigant wishes to seek relief through initiation

of an administrative appeal, and if the government believes that such a suspension would be appropriate. The suspension of litigation to pursue an administrative appeal will not be construed as a waiver of any right to resume litigation in the event that an administrative remedy acceptable to the applicant is not achieved.

V. Environmental Documentation

We have determined that this action does not constitute a major Federal action significantly affecting the quality of the human environment, because the Corps has prepared appropriate environmental documentation, including an Environmental Impact Statement (EIS) when required, for all permit decisions. Therefore, environmental documentation under the National Environmental Policy Act (NEPA) is not required for this rule. Moreover, this proposed regulation for administrative appeals only establishes a one-level review for denied permits and declined individual permits, as needed to ensure that applicable regulations, policies, practices, and procedures (including the preparation of appropriate environmental documentation) have been appropriately followed.

VI. Executive Order 12291 and the Regulatory Flexibility Act

The Corps does not believe that this final rule meets the definition of a major rule under Executive Order 12291, and we therefore do not believe that a regulatory impact analysis is required. This final rule should reduce the burden on the public by offering an administrative appeal process for certain Corps decisions, and, in some instances, should allow the applicant to avoid the more time-consuming and costly alternative of challenging a Corps permit decision in the Federal courts.

We also do not believe that this final rule will have a significant impact on a substantial number of small entities pursuant to Section 605(b) of the Regulatory Flexibility Act of 1980, because this final rule only creates an optional review of certain decisions through an administrative appeal process. The final rule should be less time consuming and less costly to permit applicants who want to appeal a decision with which they disagree, but currently can only seek to have the decision reviewed through the Federal courts. Furthermore, since the administrative appeal would be optional at the applicant's or landowner's discretion, we have minimized the potential of any increased regulatory burden on small entities. If an applicant or landowner chooses to forego an appeal, the net effect of the final rule would be zero.

Note 1: The term ''he'' and its derivatives used in these regulations are generic and should be considered as applying to both male and female.

List of Subjects

33 CFR Part 320

Environmental protection, Intergovernmental relations, Navigation, Water pollution control, Waterways.

33 CFR Part 326

Investigations, Intergovernmental relations, Law enforcement, Navigation, Water pollution control, Waterways.

33 CFR Part 331

Administrative appeal, Navigation, Waterways, Environmental protection, Water pollution control.

Dated: March 3, 1999.

Joseph W. Westphal,

Assistant Secretary of the Army (Civil Works), Department of the Army.

Comments regarding new levels of bureaucracy and the legality of the proposed rule were adequately addressed in the preamble to the proposed rule. As noted in the preamble to this final rule, numerous substantive and procedural changes have been adopted as a result of the comments received. Accordingly, 33 CFR Parts 320 and 326 are hereby amended and 33 CFR Part 331 is added as follows:

PART 320—GENERAL REGULATORY POLICIES

1. The authority citations for Part 320 continue to read as follows:

Authority: 33 U.S.C. 401 *et seq.*; 33 U.S.C. 1344; 33 U.S.C. 1413.

2. Section 320.1(a)(2) is amended by revising the final sentence to read as set forth below.

§ 320.1 Purpose and Scope.

(a) * * *

(2) * * * A district engineer's decision on a permit denial or a declined individual permit is subject to an administrative appeal by the affected party in accordance with the procedures and authorities contained in 33 CFR Part 331. Such administrative appeal must meet the criteria in 33 CFR 331.5; otherwise, no administrative appeal of that decision is allowed. The terms ''permit denial'' and ''declined permit'' are defined at 33 CFR 331.2. There shall be no administrative appeal of any issued individual permit that an applicant has accepted, unless the authorized work has not started in waters of the United States, and that issued permit is subsequently modified by the district engineer pursuant to 33 CFR 325.7 (see 33 CFR 331.5(b)(1)). An applicant must exhaust any administrative appeal available pursuant to 33 CFR Part 331 and receive a final Corps decision on his permit application prior to filing a lawsuit in the Federal courts based on a permit denial, or the terms and conditions of a declined permit.

PART 326—ENFORCEMENT

1. The authority citations for Part 326 continue to read as follows:

Authority: 33 U.S.C. 401 *et seq.*; 33 U.S.C. 1344; 33 U.S.C. 1413.

2. Section 326.3(e) is amended by adding a new paragraph (e)(1)(v) to read as follows:

§ 326.3 Unauthorized Activities.

* * * * *

(e) * * *

(1) * * *

(v) No after-the-fact permit application will be accepted unless and until the applicant has furnished a signed statute of limitations tolling agreement to the district engineer. A separate statute of limitations tolling agreement will be prepared for each unauthorized activity. Any person who applies for an after-the-fact permit, where the application is accepted and processed by the Corps, thereby agrees that the statute of limitations regarding any violation associated with that application is tolled until one year after the final Corps decision, as defined at 33 CFR 331.10. Moreover, the applicant for an after-the-fact permit must also memorialize that agreement to toll the statute of limitations, by signing an agreement to that effect, in exchange for the Corps acceptance of the after-the-fact permit application, and/or any administrative appeal. Such agreement will state that, in exchange for the Corps acceptance of any after-the-fact permit application and/or any administrative appeal associated with the unauthorized activity, the responsible party agrees that the statute of limitations will be tolled until one year after the final Corps decision on the after-the-fact permit application or, if there is an administrative appeal, one year after the final Corps decision as defined at 33 CFR 331.10, whichever date is later.

Part 331 is added to read as follows:

PART 331—ADMINISTRATIVE APPEAL PROCESS

Sec.

Authority: 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413.

§ 331.1 Purpose and policy.

(a) *General.* The purpose of this Part is to establish policies and procedures to be used for the administrative appeal of permit applications denied with prejudice, and for the administrative appeals of declined individual permits. The appeal process will allow the affected party to pursue an administrative appeal of certain final Corps of Engineers decisions with which they disagree. The basis for an appeal, and the specific policies and procedures of the appeal process, are described in the following sections. It shall be the policy of the Corps of Engineers to promote and maintain an administrative appeal process that is independent, objective, fair, prompt, and efficient.

(b) This administrative appeal process provides only for the appeal of permit denials or declined individual permits.

(c) Permit decisions made by a division engineer or higher authority may be appealed to an Army official at least one level higher than the decision-maker. This higher Army official shall make the decision on the merits of the appeal, and may appoint a qualified individual to act as a review officer (as defined in § 331.2 of this Part). References to the division engineer in this Part shall be understood as also referring to higher-level Army authority when that authority is conducting an administrative appeal.

§ 331.2 Definitions.

The terms and definitions contained in 33 CFR Parts 320 through 330 are applicable to this regulation. In addition, the following terms are defined for the purposes of Part 331:

Affected party means a permit applicant who has received a permit denial, or who has declined a proffered individual permit.

Agent(s) means the affected party's business partner, attorney, consultant, engineer, planner, or any individual with legal authority to represent the appellant's interests.

Appealable action means a permit denial, or a declined individual permit, as these terms are defined below.

Appellant means an affected party who has filed an appeal of a permit denial or declined individual permit under the criteria and procedures of these regulations.

Declined permit means a proffered individual permit, including a letter of permission, that an applicant has refused to accept, because he has objections to the terms and conditions therein. A declined permit can also be an individual permit that the applicant originally accepted, but where such permit was subsequently modified by the district engineer, pursuant to 33 CFR 325.7, in such a manner that the resulting permit contains terms and conditions that lead the applicant to decline the modified permit, provided that the applicant has not started work in waters of the United States authorized by such permit. Where an applicant declines a permit (either initial or modified), the applicant does not have a valid permit to conduct regulated activities in waters of the United States, and must not begin construction of the work requiring a Corps permit unless and until the applicant receives and accepts a valid Corps permit.

Denial determination means a letter from the district engineer detailing the reasons a permit was denied with prejudice. The decision document for the project will be attached to the denial determination in all cases.

Notification of Applicant Options (NAO) means a fact sheet explaining an applicant's options with a proffered individual permit under the administrative appeal process.

Notification of Appeal Process (NAP) means a fact sheet that explains the criteria and procedures of the administrative appeal process. Every permit denial, and every proffered individual permit returned to the applicant for reconsideration after review by the district engineer in accordance with § 331.6(b), will have an NAP form attached.

Permit denial means a written denial with prejudice (see 33 CFR 320.4(j)) of an individual permit application as defined in 33 CFR 325.5(b).

Request for appeal (RFA) means the affected party's official request to initiate the appeal process. The RFA must include the name of the affected party, the Corps file number of the denied or declined individual permit application, the reason(s) for the appeal, and any supporting data and information. A grant of right of entry for the Corps to the project site is a condition of the RFA. A standard RFA form will be provided to the affected party with the NAP form. The affected party initiates the administrative appeal process by completing the RFA and returning it to the appropriate Corps of Engineers division office.

Review officer (RO) means the Corps official responsible for assisting the division engineer or higher authority responsible for rendering the final decision on the merits of an appeal.

§ 331.3 Review officer.

(a) *Authority.* (1) The division engineer has the authority and responsibility for administering a fair, reasonable, prompt, and effective administrative appeal process. The division engineer may act as the review officer (RO), or may delegate, either generically or on a case-by-case basis, any authority or responsibility described in this Part as that of the RO. However, the division engineer may not delegate any authority or responsibility described in this Part as that of the division engineer. Regardless of any delegation of RO authority or responsibility, the division engineer retains overall responsibility for the administrative appeal process.

(2) The RO will assist the division engineer in reaching and documenting the division engineer's decision on the merits of an appeal, if the division engineer has delegated this responsibility as explained above. The division engineer has the authority to make the final decision on the merits of the appeal. Neither the RO nor the division engineer has the authority to make a final decision to issue or deny any particular permit, pursuant to the administrative appeal process established by this Part. The authority to issue or deny permits remains with the district engineer. However, the division engineer may exercise the authority at 33 CFR 325.8(c) to elevate any permit application, and subsequently to make the final permit decision. In such a case, any appeal process of the district engineer's initial decision is terminated. If a particular permit application is elevated to the division engineer pursuant to 33 CFR 325.8(c), and the division engineer's decision on the permit application is a permit denial, or results in a declined permit, that permit denial or declined permit would be subject to an administrative appeal to the Chief of Engineers.

(3) *Qualifications.* The RO will be a Corps employee with extensive knowledge of the Corps regulatory program. Where the permit decision being appealed was made by the division engineer or higher authority, a

Corps official at least one level higher than the decision-maker shall make the decision on the merits of the RFA, and this Corps official shall appoint a qualified individual as the RO to conduct the appeal process.

(b) *General.* (1) *Independence.* The RO will not perform, or have been involved with, the preparation, review, or decision-making of the action being appealed. The RO will be independent and impartial in reviewing any appeal, and when assisting the division engineer to make a decision on the merits of the appeal.

(2) *Review.* The RO will conduct an independent review of the administrative record to address the reasons for the appeal cited by the applicant in the RFA. In addition, to the extent that it is practicable and feasible, the RO will also conduct an independent review of the administrative record to verify that the record provides an adequate and reasonable basis supporting the district engineer's decision, that facts or analysis essential to the district engineer's decision have not been omitted from the administrative record, and that all relevant requirements of law, regulations, and officially-promulgated Corps policy guidance have been satisfied. Should the RO require expert advice regarding any subject, he may seek such advice from any employee of the Corps or of another Federal or state agency, or from any recognized expert, so long as that person had not been previously involved in the action under review.

§ 331.4 Notification of appealable actions.

Affected parties will be notified in writing of a Corps decision on an appealable action. For permit denials, the notification must include a copy of the decision document for the permit application, an NAP fact sheet and an RFA form. For proffered individual permits, when the initial proffered permit is sent to the applicant, the notification must include an NAO fact sheet. For declined permits (*i.e.,* proffered individual permits that the applicant refuses to accept and sends back to the Corps), the notification must include an NAP fact sheet and an RFA form. Additionally, an affected party has the right to obtain a copy of the administrative record.

§ 331.5 Criteria.

(a) *Criteria for Appeal.* (1) *Submission of RFA.* The appellant must submit a completed RFA (as defined at § 331.2) to the appropriate division office in order to appeal a permit denial, or a declined individual permit. An individual permit that has been signed by the applicant, and subsequently unilaterally modified by the district engineer pursuant to 33 CFR 325.7, may be appealed under this process, provided that the applicant has not started work in waters of the United States authorized by the permit. The RFA must be received by the division engineer within 60 days of the date of the NAP.

(2) *Reasons for appeal.* The reason(s) for requesting an appeal of a permit denial, or a declined individual permit, must be specifically stated in the RFA, and must be more than a simple request for appeal because the affected party did not like the permit decision, or the permit conditions. Examples of reasons for appeals include, but are not limited to, the following: a procedural error, an incorrect application of law, regulation or officially-promulgated policy, omission of material fact, incorrect application of the Section 404(b)(1) Guidelines, or use of incorrect data.

(b) *Actions not appealable.* An action or decision is not subject to an administrative appeal under these regulations if it falls into one or more of the following categories:

(1) an individual permit decision (including a letter of permission or an individual permit with special conditions), where the permit has been accepted and signed by the permittee. By signing the permit, the applicant waives all right to appeal the terms and conditions of the permit, unless the authorized work has not started in waters of the United States, and that issued permit is subsequently modified by the district engineer pursuant to 33 CFR 325.7;

(2) any site specific matter that has been the subject of a final decision of the Federal courts;

(3) a final Corps decision that has resulted from additional analysis and evaluation, as directed by a final appeal decision;

(4) a permit denial without prejudice or a declined permit, where the controlling factor cannot be changed by the Corps decision-maker (e.g., the requirements of a binding statute, regulation, state Section 401 water quality certification, state Coastal Zone Management Act disapproval, etc. (See 33 CFR 320.4(j));

(5) a permit denial case where the applicant has subsequently modified the proposed project, because this would constitute an amended application that would require a new public interest review, rather than an appeal of the existing record and decision; or

(6) any request for the appeal of a denied permit or a declined individual permit, where the RFA has not been received by the division engineer within 60 days of the date of the NAP.

§ 331.6 Filing an appeal.

(a) An affected party appealing a permit denial or declined permit must submit an RFA that is received by the division engineer within 60 days of the date of the NAP. A flow chart of the appeal process is shown in Appendix A.

(b) In the case where an applicant objects to a proffered individual permit, the appeal process proceeds as follows. To initiate the appeal process regarding the terms and conditions of the permit, the applicant must write a letter to the district engineer explaining his objections to the permit. The district engineer, upon evaluation of the applicant's objections, may: modify the permit to address all of the applicant's objections, or modify the permit to address some, but not all, of the applicant's objections, or not modify the permit, having determined that the permit should be issued as previously written. In the event that the district engineer agrees to modify the proffered individual permit to address all of the applicant's objections, the district engineer will issue such modified permit, enclosing an NAP form as well. Should the district engineer modify the proffered individual permit to address some, but not all, of the applicant's objections, the district engineer will send the applicant such modified permit, an NAP form, and the decision document for the project. If the district engineer does not modify the proffered individual permit, the district engineer will offer the unmodified permit to the applicant a second time, enclosing an NAP form and a copy of the decision document. If the applicant still has objections, the applicant may decline such modified or unmodified permit; this declined individual permit may be appealed to the division engineer upon submittal of a complete RFA form. The completed RFA must be received by the division engineer within 60 days of the NAP. A flow chart of an applicant's options for a proffered individual permit is shown in Appendix B.

(c) The district engineer may not delegate his signature authority to deny the permit with prejudice, or to return an individual permit to the applicant with unresolved objections (see §§ 331.6 (b)(ii) and 331.6(b)(iii)).

(d) Affected parties may appeal permit denials or declined individual permits where the permit denial or the proffered individual permit occurs after March 9, 1999, but may not appeal permit denials or declined permits where the Corps took that action before March 9, 1999. All appeals must meet

the criteria set forth in § 331.5 of this Part.

§ 331.7 Review procedures.

(a) *General.* The administrative appeal process for permit denials and declined individual permits is a one level appeal, normally to the division engineer. The appeal process will normally be conducted by the RO. The RO will document the appeal process, and assist the division engineer to make a decision on the merits of the appeal. The division engineer may participate in the appeal process as the division engineer deems appropriate. The division engineer will make the decision on the merits of the appeal, and provide any instructions, as appropriate, to the district engineer.

(b) *Requests for the appeal of permit denials or declined individual permits.* Upon receipt of an RFA, the Corps shall review the RFA and the administrative record to determine whether the request meets the criteria for appeal. If the RFA meets the criteria for appeal, the RO will so notify the appellant in writing within 30 days of the receipt of the RFA. If the RO believes that the RFA does not meet the criteria for appeal (see § 331.5), the RO will make a recommendation on the RFA to the division engineer. If the division engineer determines that the RFA is not acceptable, the division engineer will notify the appellant of this determination by a certified letter detailing the reason(s) why the appeal failed to meet the criteria for appeal. No further administrative appeal is available, unless the appellant revises the RFA to correct the deficiencies noted in the division engineer's letter. The revised RFA must be received by the division engineer within 30 days of the date of the certified letter refusing the initial RFA. If the Corps determines that the revised RFA still fails to meet the criteria for appeal, the division engineer will notify the appellant of this determination by a certified letter within 30 days of the date of the receipt of the revised RFA, and will advise the appellant that the matter is not eligible for appeal. No further RFAs will be accepted after this point.

(c) *Site Investigations.* Within 30 days of receipt of a complete RFA, the RO should determine if a site investigation is needed to clarify the administrative record. The RO should conduct any such site investigation within 60 days of receipt of a complete RFA. The RO may also conduct a site investigation at the request of the appellant, provided the RO has determined that such an investigation would be of benefit in interpreting the administrative record. The appellant and the appellant's authorized agent(s) must be provided an opportunity to participate in any site investigation, and will be given 15 days notice of any site investigation. The RO will attempt to schedule the site investigation at the earliest practicable time acceptable to both the RO and the appellant. The site investigation should be scheduled in conjunction with the appeal review conference, where practicable. The RO, the appellant, the appellant's agent(s) and the Corps district staff are authorized participants at the site investigation. The RO may also invite any other party the RO has determined to be appropriate, such as any technical experts consulted by the Corps.

(d) *Appeal Conference.* Conferences held in accordance with this rule will be informal, and will be chaired by the RO. The purpose of the appeal conference is to provide a forum that allows the participants to discuss freely all relevant issues and material facts associated with the appeal. An appeal conference will be held for every appeal of a permit denial or a declined individual permit, unless the RO and the appellant mutually agree to forego a conference. The conference will take place within 60 days of receipt of an acceptable RFA, unless the RO determines that unforeseen or unusual circumstances require scheduling the conference for a later date. The purpose of the conference will be to allow the appellant and the Corps district representatives to discuss supporting data and information on issues previously identified in the administrative record, and to allow the RO the opportunity to clarify elements of the administrative record. Presentations by the appellant and the Corps district representatives may include interpretation, clarification, or explanation of the legal, policy, and factual bases for their positions. The conference will be governed by the following guidelines:

(1) *Notification.* The RO will set a date, time, and location for the conference. The RO will notify the appellant and the Corps district office in writing within 30 days of receipt of the RFA, and not less than 15 days before the date of the conference.

(2) *Facilities.* The conference will be held at a location that has suitable facilities and that is reasonably convenient to the appellant, preferably in the proximity of the project site. Public facilities available at no expense are preferred. If a free facility is not available, the Corps will pay the cost for the facility.

(3) *Participants.* The RO, the appellant, the appellant's agent(s) and the Corps district staff are authorized participants in the conference. The RO may also invite any other party the RO has determined to be appropriate, such as any technical experts consulted by the Corps, adjacent property owners or Federal or state agency personnel to clarify elements of the administrative record. The division engineer and/or the district engineer may attend the conference at their discretion. If the appellant or his authorized agent(s) fail to attend the appeal conference, the appeal process is terminated, unless the RO excuses the appellant for a justifiable reason. Furthermore, should the process be terminated in such a manner, the district engineer's original decision on the appealed action will be sustained.

(4) *The role of the RO.* The RO shall be in charge of conducting the conference. The RO shall open the conference with a summary of the policies and procedures for conducting the conference. The RO will conduct a fair and impartial conference, hear and fully consider all relevant issues and facts, and seek clarification of any issues of the administrative record, as needed, to allow the division engineer to make a final determination on the merits of the appeal. The RO will also be responsible for documenting the appeal conference.

(5) *Appellant rights.* The appellant, and/or the appellant's authorized agent(s), will be given a reasonable opportunity to present the appellant's views regarding the subject permit denial or declined permit.

(6) *Subject matter.* The purpose of the appeal conference will be to discuss the reasons for appeal contained in the RFA. Any material in the administrative record may be discussed during the conference, but the discussion should be focused on relevant issues needed to address the reasons for appeal contained in the RFA. The RO may question the appellant or the Corps representatives with respect to interpretation of particular issues in the record, or otherwise to clarify elements of the administrative record. Issues not identified in the administrative record by the date of the NAP for the application may not be raised or discussed, because substantive new information or project modifications would be treated as a new permit application (see § 331.5(b)(5)).

(7) *Documentation of the appeal conference.* The appeal conference is an informal proceeding, intended to provide clarifications and explanations of the administrative record for the RO and the division engineer; it is not intended to supplement the administrative record. Consequently,

the proceedings of the conference will not be recorded verbatim by the Corps or any other party attending the conference, and no verbatim transcripts of the conference will be made. However, after the conference, the RO will write a memorandum for the record (MFR) summarizing the presentations made at the conference, and will provide a copy of that MFR to the division engineer, the appellant, and the district engineer.

(8) *Appellant costs.* The appellant will be responsible for his own expenses for attending the appeal conference.

(e) *Basis of decision and communication with the RO.* The appeal of a permit denial or a declined individual permit is limited to the information contained in administrative record by the date of the NAP for the application, the proceedings of the appeal conference, and any relevant information gathered by the RO as described in § 331.5 of this Part. Neither the appellant nor the Corps may present new information not already contained in the administrative record, but both parties may interpret, clarify or explain issues and information contained in the record.

(f) *Applicability of appeal decisions.* Because a decision to deny or condition a permit depends on the facts, circumstances, and physical conditions particular to the specific project and site being evaluated, appeal decisions would be of little or no precedential utility. Therefore, an appeal decision of the division engineer is applicable only to the instant appeal, and has no other precedential effect. Such a decision may not be cited in any other administrative appeal, and may not be used as precedent for the evaluation of any other permit application. While administrative appeal decisions lack precedential value and may not be cited by an appellant or a district engineer in any other appeal proceeding, the Corps goal is to have the Corps regulatory program operate as consistently as possible, particularly with respect to interpretations of law, regulation, an Executive Order, and officially-promulgated policy. Therefore, a copy of each appeal decision will be forwarded to Corps Headquarters; those decisions will be periodically reviewed at the headquarters level for consistency with law, Executive Orders and policy. Additional official guidance will be issued as necessary to maintain or improve the consistency of the Corps' appellate and permit decisions.

§ 331.8 Timeframes for final appeal decisions.

The Corps will make a final decision on the merits of the appeal at the earliest practicable time, in accordance with the time limits set forth below. The administrative appeal process is initiated by the receipt of an RFA by the division engineer. The Corps will review the RFA to determine whether the action is appealable. If the division engineer determines that the action is not appealable, the division engineer will notify the appellant accordingly within 30 days of the receipt of the RFA. If the division engineer determines that the action is appealable and the RFA is complete, the RO will request the administrative record from the district engineer. The division engineer will make a final decision on the merits of the appeal within 90 days of the receipt of the complete RFA.

§ 331.9 Final appeal decision.

(a) In accordance with the authorities contained in § 331.3(b), the division engineer will make a decision on the merits of the appeal. While reviewing an appeal and reaching a decision on the merits of an appeal, the division engineer can consult with or seek information from any person, including the district engineer.

(b) The division engineer will disapprove the entirety of or any part of the district engineer's decision only if he determines that the decision on some relevant matter was arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the administrative record, or plainly contrary to a requirement of law, regulation, an Executive Order, or officially-promulgated Corps policy guidance. The division engineer will not attempt to substitute his judgment for that of the district engineer regarding a matter of fact, so long as the district engineer's determination was supported by substantial evidence in the administrative record, or regarding any other matter if the district engineer's determination was reasonable and within the zone of discretion delegated to the district engineer by Corps regulations. The division engineer may instruct the district engineer on how to correct any procedural error that was prejudicial to the appellant (i.e., that was not a ''harmless'' procedural error), or to reconsider the decision where any essential part of the district engineer's decision was not supported by accurate or sufficient information, or analysis, in the administrative record. The division engineer will document his decision on the merits of the appeal in writing, and provide a copy of this decision to the applicant (using certified mail) and the district engineer.

(c) The final decision of the division engineer on the merits of the appeal will conclude the administrative appeal process, and this decision will be filed in the administrative record for the project.

§ 331.10 Final Corps decision.

The final Corps decision on a permit application is the initial decision to issue or deny a permit, unless the permittee submits an RFA, and the division engineer accepts the RFA, pursuant to this Part. The final Corps decision on an appealed action is as follows:

(a) If the division engineer determines that the appeal is without merit, the final Corps decision is the district engineer's letter advising the applicant that the division engineer has decided that the appeal is without merit, and confirming the district engineer's initial permit decision; or

(b) If the division engineer determines that the appeal has merit, the final Corps decision is the district engineer's decision made pursuant to the division engineer's remand of the appealed action. The division engineer will remand the decision to the district engineer with specific instructions to review the administrative record, and to further analyze or evaluate specific issues. If the district engineer determines that the effects of the district engineer's reconsideration of the administrative record would be narrow in scope and impact, the district engineer must provide notification only to those parties who commented or participated in the original review, and would allow 15 days for the submission of supplemental comments. Where the district engineer determines that the effect of the district engineer's reconsideration of the administrative record would be substantial in scope and impact, the district engineer's review process will include issuance of a new public notice, and/or preparation of a supplemental environmental analysis and decision document (see 33 CFR 325.7). Subsequently, the district engineer's decision made pursuant to the division engineer's remand of the appealed action becomes the final Corps action. Nothing in this rule precludes the agencies' authorities pursuant to Section 404(q) of the Clean Water Act.

§ 331.11 Unauthorized activities.

Permit denials and declined individual permits associated with after-the-fact permit applications are appealable actions for the purposes of these regulations. If the Corps accepts

an after-the-fact permit application, an administrative appeal of a permit denial or declined individual permit may be filed and processed in accordance with these regulations subject to the provisions of paragraphs (a), (b), and (c) of this section.

(a) *Initial Corrective Measures.* If the district engineer determines that initial corrective measures are necessary pursuant to 33 CFR 326.3(d), an RFA for an appealable action will not be accepted by the Corps, until the initial corrective measures have been completed to the satisfaction of the district engineer.

(b) *Penalties.* If an affected party requests, under this Section, an administrative appeal of an appealable action prior to the resolution of the unauthorized activity, and the division engineer determines that the appeal has no merit, the responsible party remains subject to any civil, criminal, and administrative penalties as provided by law.

(c) *Tolling of Statute of Limitations.* Any person who applies for an after-the-fact permit, where the application is accepted and processed by the Corps, thereby agrees that the statute of limitations regarding any violation associated with that application is tolled until one year after the final Corps decision, as defined at 33 CFR 331.10. Moreover, the applicant for an after-the-fact permit must also memorialize that agreement to toll the statute of limitations, by signing an agreement to that effect, in exchange for the Corps acceptance of the after-the-fact permit application, and/or any administrative appeal(See 33 CFR 326.3(e)(1)(v).) No after-the-fact permit application or administrative appeal will be accepted until such written tolling agreement is furnished to the district engineer.

§ 331.12 Exhaustion of administrative remedies.

No affected party may file a legal action in the Federal courts based on a permit denial or declined individual permit until after a final Corps decision has been made and the appellant has exhausted all applicable administrative remedies under this Part. The appellant is considered to have exhausted all administrative remedies when a final Corps decision is made in accordance with § 331.10 of this Part.

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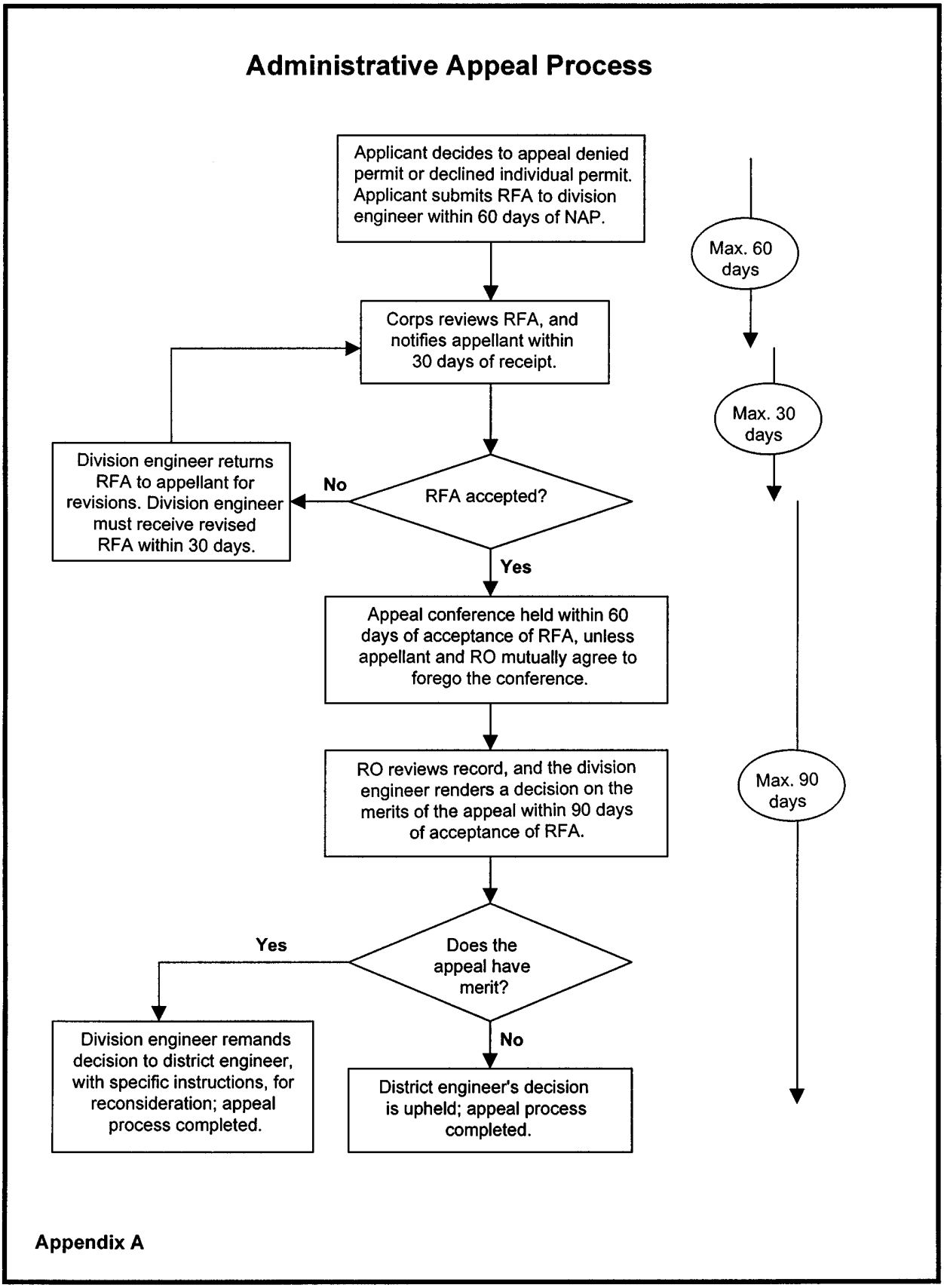
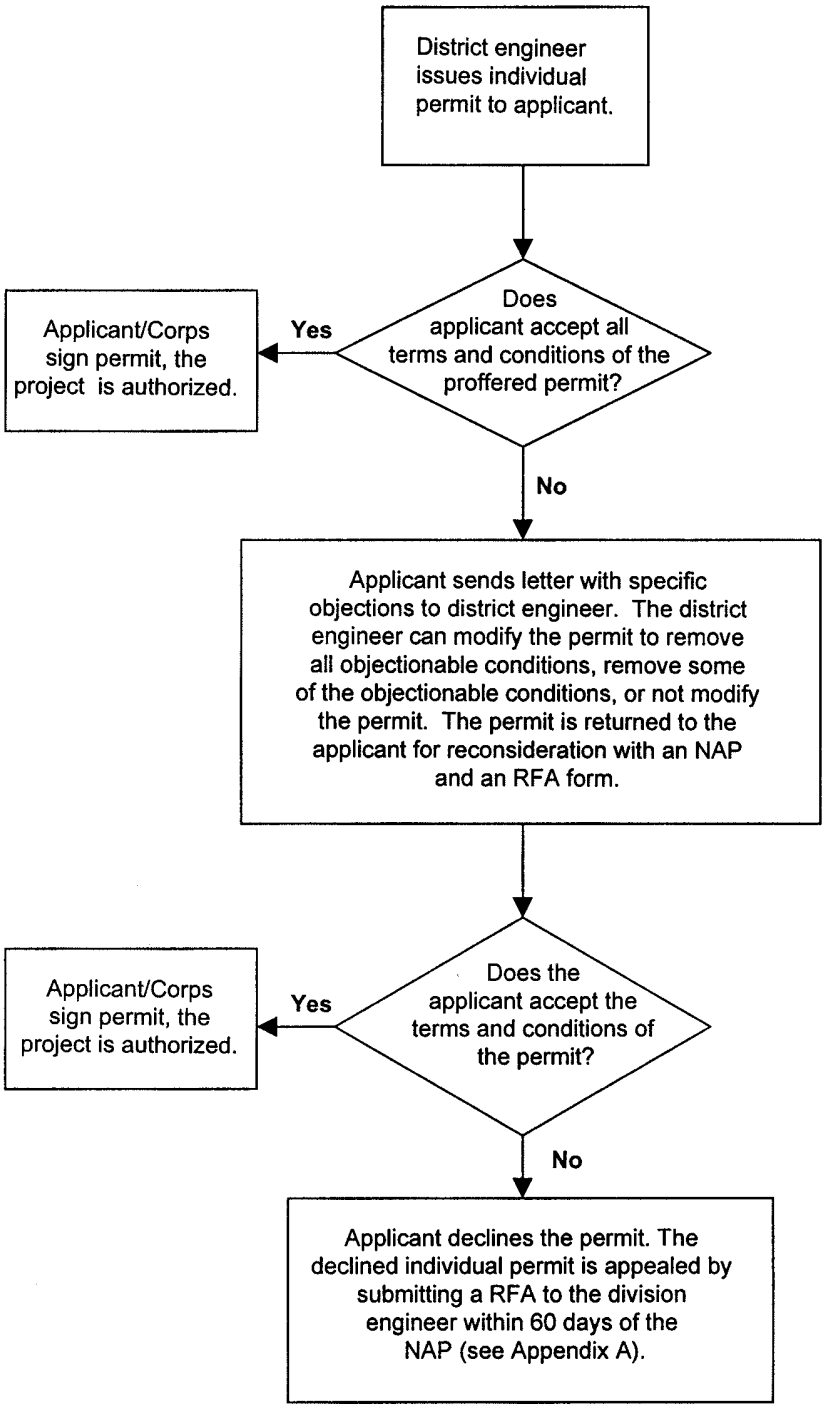

Administrative Appeal Process
Applicant decides to appeal denied permit or declined individual permit. Applicant submits RFA to division engineer within 60 days of NAP.
Max. 60 days
Corps reviews RFA, and notifies appellant within 30 days of receipt.
Max. 30 days
Division engineer returns RFA to appellant for revisions. Division engineer must receive revised RFA within 30 days.
No
RFA accepted?
Yes
Appeal conference held within 60 days of acceptance of RFA, unless appellant and RO mutually agree to forego the conference.
RO reviews record, and the division engineer renders a decision on the merits of the appeal within 90 days of acceptance of RFA.
Max. 90 days
Yes
Does the appeal have merit?
No
Division engineer remands decision to district engineer, with specific instructions, for reconsideration; appeal process completed.
District engineer's decision is upheld; appeal process completed.

Appendix A

Applicant Options with Proffered Individual Permit



Appendix B

[FR Doc. 99–5734 Filed 38–99; 8:45 am]
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