DEPARTMENT OF DEFENSE

Department of the Army

Corps of Engineers

33 CFR Parts 320, 326 and 331

Proposal To Establish an Administrative Appeal Process for the Regulatory Programs of the Corps of Engineers

AGENCY: Corps of Engineers, Army Department, DOD.

ACTION: Proposed rule.

SUMMARY: The Corps of Engineers is proposing to establish an administrative appeal process to include in its regulatory program regulations (33 CFR parts 320–330). There is currently no administrative appeal process under which parties may contest Corps of Engineers regulatory determinations. Adverse decisions must be challenged in Federal District Court, and this formal judicial process may be time-consuming and financially burdensome for many parties. The proposed rule would provide permit applicants and landowners an opportunity to appeal permit denials and jurisdictional determinations.

DATES: Comments must be received by September 5, 1995.

ADDRESSES: Comments should be submitted in writing to: Office of the Chief of Engineers, ATTN: CECW–OR, 20 Massachusetts Avenue NW., Washington, DC 20314–1000. Comments will be available for examination in Corps District and Division offices or at the Office of the Chief of Engineers, Room 6225, Pulaski Building, 20 Massachusetts Avenue NW., Washington, DC 20314–1000.

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

SUPPLEMENTARY INFORMATION:

I. Background

Shortly after coming into office, the Clinton Administration convened an interagency working group to address legitimate concerns with Federal wetlands policy. After hearing from States, developers, farmers, environmental interests, members of Congress, and scientists, the working group developed a comprehensive, 40-point plan to enhance wetlands protection, while making wetlands regulations more fair, flexible, and effective to 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 is through development by the Corps of a Clean Water Act Section 404 administrative appeals process, to be implemented after a public rulemaking. The Plan provides that the process will be designed to allow for administrative appeals of Section 404 geographic jurisdictional determinations, permit denials, and administrative penalties.

The rule proposed herein is responsive to the President's directive. The appeal process is designed to allow administrative appeals to the Corps regarding two distinct decisions: (1) That a geographic area, including a particular parcel of property that is determined to be a wetland as defined in 33 CFR 328.3(b) and delineated in accordance with the Federal manual for delineating and identifying wetlands, is subject to Corps regulatory jurisdiction pursuant to Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899; and (2) denial with prejudice by the District Engineer of a Department of the Army permit, which includes cases where a proffered permit is refused by the applicant because the applicant objects to the terms or special conditions of the proffered permit and the permit is subsequently denied with prejudice by the District Engineer. Consistent with the Plan and as explained below, third parties can participate only in applicant appeals of permit denials.

As indicated above, the Plan also addresses administrative appeals of administrative penalty assessments. Section 309(g) of the CWA authorizes the Corps and EPA to assess administrative penalties for, among other things, unauthorized discharges of dredged or fill material into wetlands and other waters of the United States in violation of Section 404. The CWA establishes two classes of administratively assessed penalties, which differ with respect to maximum assessment and prescribed procedure. EPA and the Corps have implemented the requirements of Section 309(g) as follows. With regard to EPA, proposed assessments of Class II administrative penalties for Section 404 violations can be reviewed by an Administrative Law Judge through a hearing process, the procedures for which are set forth at 40 CFR Part 22. EPA proposed assessments of Class I administrative penalties can be reviewed by a Presiding Officer through a hearing process according to procedures set forth at 40 CFR Part 28. (Note that EPA issued a proposed rule establishing such procedures, see 56 FR 29996 (July 1, 1991); pending issuance of a final rule, the EPA is applying the proposed rule as EPA guidance.) With regard to the Corps, proposed assessments of Class I administrative penalties, like EPA's process, can be reviewed by a Presiding Officer through a hearing process according to procedures set forth at 33 CFR 326. The Corps is developing, but has not yet proposed, regulations for assessing Class II administrative penalties. The Corps expects that its Class II regulations will be similar to those of EPA's.

Also consistent with the Administration Wetlands Plan, the August 1993 Interagency Memorandum of Agreement (MOA) between the Department of Agriculture, the Environmental Protection Agency, the Department of the Interior and the Department of the Army concerning the delineation of wetlands for purposes of Section 404 of the CWA and Subtitle B of the Food Security Act, provides that persons who are adversely affected by Natural Resources Conservation Service (NRCS) wetland delineations on agricultural lands may appeal such wetland delineations under NRCS administrative appeal procedures published at 7 CFR Part 614. Under these procedures, any person who is adversely or potentially adversely affected by an NRCS wetland delineation can appeal that decision. This may be an owner, operator, tenant or partner of the farm to which the NRCS decision applies. The NRCS appeals procedures currently has four levels: (1) The District Conservationist, (2) the Area Conservationist, (3) the State Conservationist, and (4) the Chief of NRCS. The decision of the Chief is final. However, as a result of USDA reorganization the current NRCS appeals process is being revised. Furthermore, according to the MOA, in circumstances where a landowner submits an appeal to NRCS and the State Conservationist is considering a change in the original delineation made by NRCS, the State Conservationist notifies the appropriate Corps and EPA officials to provide those agencies an opportunity for their participation and input on the appeal. The Fish and Wildlife Service is also consulted. The Corps and EPA reserve the right, on a case-by-case basis, to determine that a revised delineation resulting from an NRCS appeal is not valid for the purposes of Section 404 jurisdiction. However, any subsequent jurisdiction determination by the Corps would be

appealable under the appeals process being proposed today.

The proposed administrative appeal process for a final Corps jurisdiction determination is a two-level process. The initial appeal is to an independent jurisdictional expert within a Corps District Office. The second level appeal would be to a regulatory expert within a Corps Division Office. Depending on the specific issues raised the individuals responsible for the appeal process may consult technical experts from other Corps offices. The proposed administrative appeal process for permit denials is a one-level process. The appeal would be to the Corps Division Office. The appeal process would be conducted by a Review Officer in the Division Regulatory Office and the final appeal decision would be made by the Division Engineer. In cases where an applicant refuses a proffered permit because of objectionable conditions, the District Engineer will review the case and will deny the permit, issue the permit without the condition, or offer the applicant a permit with different conditions, which if refused would be denied. In those cases where such proffered permits are denied the applicant may appeal the denial to the Division Engineer.

Filing of a jurisdictional determination appeal under this rule will be limited to the permit applicant or the landowner (i.e., and individual who has an identifiable and substantial legal interest in the property.) The authorized agent of the permit applicant or the landowner may also file the appeal.

Most Corps districts currently have an informal consultation procedure wherein disagreements on jurisdictional determinations or permit decisions are discussed between the Corps Project Manager/supervisor and the landowner/agent/consultant. Based upon additional information or differing interpretations of the data or issues, the preliminary jurisdictional determination or permit decision may be revised or conditioned to the mutual satisfaction of the parties. The Corps encourages the continued use of the informal consultation process as the most efficient and responsive means of resolving jurisdictional and permit issues. If informal consultation proves fruitless, the proposed administrative appeals process provides a formal administrative course of action.

Corps districts also respond to jurisdictional queries by providing an ''office'' jurisdictional determination, based on a review of wetland inventory maps, State or local wetland maps, topographic maps, soils maps, aerial photography, and land-use plans or studies. These office or preliminary jurisdictional determinations are advisory in nature and provided primarily for planning purposes and may not be appealed.

To ensure compliance with national policies and procedures, and consistency among the administrative appeals officers within Division and District regulatory offices, the administrative appeals program will be monitored by the office of the Chief of Engineers. Implementing guidance will be provided when deemed appropriate.

As discussed in further detail below, additional manpower and funding would be necessary for the Corps to implement an administrative appeals process for its regulatory program. The President has included $6 million for the administrative appeals process in the FY 96 budget submitted to Congress. Additionally, training will be necessary for the additional personnel hired to hear the appeal cases and some organizational adjustments may be needed to accommodate an appeals process. Given these considerations, we anticipate that implementation of an administrative appeals process could be accomplished no later than 6 months after the effective date of a final rule. Review officers at Divisions and Districts may begin hearing cases before the projected implementation date if funding, staffing, and training are completed.

II. Proposed Rule Organization

The proposed administrative appeals process rule is organized into the following sections:

Section 331.1, *Purpose and Policy,* describes the basic purpose of the proposed rule and the Corps of Engineers policies regarding the appeals process.

Section 331.2, *Definitions,* contains the definitions of important terms that are used throughout the proposed rule. The following terms are defined in this section: Wetland delineation, jurisdictional determination, permit denial, appealable action, affected party, appellant, review officer, notification of appeals process, and request for appeal.

Section 331.3, *Review Officers,* describes the independence, authority and organizational location of the review officers (ROs). ROs for jurisdictional determinations would be located in District and Division regulatory offices and the ROs for permit denials would be located in Division regulatory offices.

Section 331.4, *Notification of Appealable Actions,* would require that the Corps district office send notification of each appealable action to the affected party in writing. Each notification would contain additional information on the administrative appeals process and provide a form that the affected party must use to request an appeal.

Section 331.5, *Criteria,* describes the criteria which must be met for an action to qualify for the appeals process and also lists specific situations which would preclude an action from qualifying for the appeals process.

Section 331.6, *Filing Appeals,* provides 60 days from the date on the letter of notification of the appealable action, for the affected party to submit a request for appeal to the Corps. In filing the appeal, the affected party must also grant the Corps the right of entry onto the property in order to conduct appropriate field testing and data collection.

Section 331.7, *Review Procedures,* describes the procedures for reviewing a request for appeal (RFA). First, the RFA must be complete and meet the established criteria for appeal. If requested, or determined to be necessary, the RO also has the discretion to conduct a review meeting with the appellant for jurisdictional determinations. For permit denials, an appeal review conference will be held within 60 days after receipt of the RFA. Procedures for conducting the conference are included.

Section 331.8, *Timeframes for Final Appeals Decisions,* establishes the maximum time limits for Corps final appeals decisions.

Section 331.9, *Final Appeals Decisions,* describes the potential outcomes of an appeal process for an appealable action and concludes the administrative appeals process. Additionally, this section discusses the timeframes for the ROs, District Engineers and Division Engineers to reach a final decision on the merits of the appeal.

Section 331.10, *Final Agency Decisions,* describes when a final agency decision has been made for an action that has been appealed.

Section 331.11, *Unauthorized Activities,* discusses the policies and procedures for administrative appeals of appealable actions involving unauthorized activities.

Finally, section 331.12, *Exhaustion of Administrative Remedies,* describes the administrative process and remedies that an appellant must exhaust before he can seek further review or relief from an adverse action through a judicial action in Federal District Court.

III. Administrative Appeal of Jurisdictional Determinations

A. Background

In the day to day implementation of the Clean Water Act Section 404 Regulatory Program, the Corps of Engineers has the primary responsibility for determining whether any particular geographic area, including a wetland, is subject to Corps regulatory authority under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899. The administrative appeals process would apply to jurisdictional determinations of geographic extent of waters of the United States.

Currently, the 1987 Corps of Engineers Wetland Delineation Manual (1987 Manual) is used for wetland delineations, which may be performed by Corps, Environmental Protection Agency or Natural Resources Conservation Service employees, the applicant, or a private consultant hired by the applicant. However, if the wetland delineation is performed by the applicant or the applicant's consultant, it is the Corps' responsibility to verify the accuracy of the wetland delineation. Wetland delineations typically constitute two separate determinations: first, a decision that an area falls within the technical definition of a wetland; and second, the establishment of how much of the area is wetland, i.e., the boundary or dividing line between wetlands and uplands by applying the 1987 Manual. When a wetland delineation is part of a jurisdictional determination, which establishes whether a particular area is subject to regulatory authority under section 404 of the Clean Water Act, decisions regarding presence, scope and extent of wetlands, adjacency of wetlands to a waterbody, and the interstate commerce nexus for isolated waters would be appealable under this proposed rule.

The proposed rule would establish a two level administrative appeals process for jurisdictional determinations. The first level appeal would be conducted by a review officer (RO) located in a Corps District regulatory office. Larger districts may require more than one RO. The second level appeal would be conducted by a review officer in the Corps Division regulatory office. While we are proposing a two level appeal process for jurisdictional determinations, we are seeking comments on whether the appeals process should be a one level appeals process and, if so, whether the appeal should be to the District or Division Engineer.

B. First Level Appeal—District Office

The District Engineer, or designee, is responsible for the review of and decision on the first level appeal of jurisdictional determinations. The District Engineer may retain or delegate either or both, the RO responsibilities and the appeals decision to the same or different Corps officials.

We are proposing that the RO should be, or should have the support of, a qualified delineation specialist who has extensive experience in applying the technical criteria of the current wetland delineation manual, is familiar with local geophysical and climatological conditions, and has extensive experience in the determination of jurisdiction. Based on our review of regulatory program requirements and past experiences, we believe that Corps personnel in the respective districts are the best trained and most experienced wetland delineators. Additionally, expert wetland delineators in District offices are usually very experienced with regional geographic jurisdiction issues. Our review also focused on the importance of ensuring that the RO be insulated from the influence of the District's regulatory staff responsible for the appealable action. Therefore, we are also proposing that the RO report directly to the District's Regulatory Branch Chief. This arrangement would remove the RO from day-to-day involvement in routine delineation and jurisdictional decisions made by Regulatory Branch project managers, unit chiefs, and section chiefs. For matters involving routine delineation and jurisdictional decisions, the RO would be equal or above all decision-makers in the Regulatory Branch Office, except for the Regulatory Branch Chief. Furthermore, any particular RO would be disqualified from a case if the RO had worked directly on the case, had involvement in reviewing or providing guidance on the case, or if the decision-maker on the action was the Regulatory Branch Chief, or higher level official. In such circumstances, the Regulatory Branch Chief or higher level decision-maker (at least one level higher than the decision-maker) would appoint an independent RO. We are proposing to locate the RO with the Regulatory Branch Offices within the Districts, because we believe it is critical for the ROs to maintain a high level of expertise and experience with local wetland and jurisdictional issues. Furthermore, the ROs could also administer the Corps Wetland Delineator Certification Program and conduct in-house supplemental training in jurisdictional determinations.

The proposed administrative appeals process for jurisdictional determinations would be initiated by the landowner filing a request for appeal (RFA). The appeal must be filed within 60 days of the issuance of a formal jurisdictional determination by the Corps. If work is authorized prior to the end of this 60 day period, either by general or individual permit, and a permittee wishes to request an appeal, the appeal must be filed and the appeal process completed prior to the commencement of any work in the area identified as waters of the U.S., or any work that could alter the hydrology of the waters. Unauthorized work may not be conducted to avoid regulatory jurisdiction over an area by alteration of its wetland characteristics.

The 60-day filing deadline is considered to provide adequate time for an appellant to submit an appeal. It is recognized, however, that in some cases data cannot be obtained in certain seasons or is complicated by disturbed site conditions. Under these circumstances, the appellant may include in the RFA a request for a time extension and provide reasons to support the request. The appeals Review Officer (RO) will consider the request and may grant a reasonable extension of time to enable the appellant to gather and submit additional data. The RO also has discretion to extend the time period for such circumstances to gather data or conduct research that is deemed necessary to reach a valid conclusion. We are proposing that, in such circumstances, the time for the total appeals process (from receipt of the RFA to the RO's decision on the merits of the appeal) will be completed as soon as possible but will not extend beyond twelve months from the date of receipt of the appellant's complete RFA. As an option to this twelve month maximum time frame, we are also seeking comments on establishing the maximum time frame for an extension at nine months.

The RO's evaluation process of the appeal includes a review of the appellant's RFA, supporting data, the Corps jurisdictional determination, and any other available data to determine if a site visit and/or any additional information is needed to complete the review. The RO will complete this review of the administrative record within 30 days of receipt of the appellant's complete RFA. If the RO determines that no additional data is required and that no site visit is necessary or requested by the appellant, a decision on the merits of the appeal will be made within 60 days after receipt of the complete RFA. If the RO

determines that additional data is needed, or if a site visit is necessary or requested, the RO will schedule the completion of this work at the earliest practicable time. The RO, or other designated Corps official, would then make a decision on the merits of the appeal within 30 days after the receipt of new information, completion of the site visit, or the collection of data. However, in no case shall the data collection or site visit extend the total appeals review time for the RO, or other designated Corps official, to make a decision on the merits of the appeal beyond twelve months after receipt of the RFA.

In completing the evaluation process, the District RO will either: (1) Determine that the appeal has no merit; (2) determine that the appeal has merit and notify the Corps regulatory official of the appropriate course of action to be taken; or (3) determine that the appeal has merit and revise the jurisdictional determination. The Corps jurisdictional determination resulting from the appeal will be considered the final Corps jurisdictional determination, unless the appellant submits an RFA to the Division RO as described below.

C. Second Level Appeal—Division Office

The Division Engineer, or designee, is responsible for the review of and decision on the second level appeal of jurisdictional determinations. The Division Engineer may retain or delegate either or both, the RO responsibilities and the appeals decision to the same or different Corps officials.

We expect that normally the ROs in the Division Office would be the same ROs that conduct the administrative appeal or permit denials which is described in more detail later. While these Division ROs would normally be a regulatory expert or have the support of a regulatory expert, they may have limited jurisdictional determination expertise. Depending on the jurisdiction issue raised and the expertise of the Division RO, the Division RO will obtain the assistance of experts from a District Office other than the District Office where the appeal was initiated.

The appellant may appeal the formal jurisdiction decision resulting from the first level appeal at the District Office by filing an RFA with the Division Office within 60 days of such final jurisdiction decision. Within 15 days of receipt of the RFA by the Division Office, the District Office will forward the administrative record of the jurisdictional determination to the Division RO. The administrative record will include any information provided by the appellant during the first level appeal.

The Division Office review will be limited to the administrative record prepared during the District Office appeal review. Therefore, the appellant must submit any relevant information at that time. The Division Office RO will reach a final decision on the administrative appeal within 60 days of receipt of the RFA.

In completing the evaluation process, the Division RO will either: (1) Determine that the appeal has no merit; or (2) determine that the appeal has merit and notify the Corps District regulatory official of the appropriate course of action to be taken. The Corps jurisdictional determination resulting from the second level appeal will be considered the final Corps jurisdictional determination.

D. Costs

Because of the variable scope of wetlands among Corps districts and developmental pressures on those wetlands, limited data is available to assess the potential cost of the administrative appeal program for wetland delineations and jurisdictional determinations. However, assuming that 10% of the approximately 35,000 jurisdictional determinations conducted annually by Corps Districts are appealed, and that the average costs associated with each appeal is $1200–1500 (Salary/travel/data collection), the annual cost of the program could range from $4.2–$5.25 million.

IV. Administrative Appeal of Permit Denials

The proposed rule provides permit applicants with an opportunity to seek a timely and objective reconsideration of an adverse permit decision in a non-judicial forum. Only a denial with prejudice of a Department of the Army permit application, or the applicant's rejection of a proffered permit containing special conditions that are unacceptable to an applicant and subsequently denied by the District Engineer, would be subject to the administrative appeal process. A denial with prejudice occurs when the permit is denied based upon the project's failing to meet public interest criteria and/or guidelines specified in Corps regulations (33 CFR Parts 320 through 330) and EPA regulation (40 CFR Part 230). Conversely, a denial without prejudice would not be subject to an administrative appeal, because such a denial is a *pro forma* action based on the applicant's failure to obtain requisite approval from another regulatory entity, and is not a Corps decision made on the merits of a completed public interest review and Section 404(b)(1) analysis. Further, if the applicant endorses and accepts a permit that is modified, conditional, and/or mitigated, the permit is not subject to an administrative appeal.

Additionally, the Corps of Engineers, through a separate rule-making proposal, will be proposing to make permit decisions within 90 days from the date of public notice for a proposed project, except for limited situations which preclude the Corps from making a decision due to other regulatory or legal requirements. As part of this rule-making proposal, we are seeking comments on whether the failure of the Corps to reach a permit decision within established deadlines should be viewed as a permit denial and subject to an administrative appeal.

The intent of this administrative appeal process is to provide a venue wherein the appellant will have an opportunity to have an independent evaluation conducted of the Corps' denial of a permit, including a proffered permit containing special conditions unacceptable to the applicant which is subsequently denied by the District Engineer.

Several options were considered for the identity of the permit denial Review Officer (RO) and the appeals decision-maker. An analysis of the options resulted in a determination that the Division Office could best meet the goals of providing an objective forum, ensuring the availability of well-qualified ROs, achieving an acceptable level of cost-effectiveness, promoting administrative efficiency, and providing the greatest access and convenience to appellants.

The need to ensure an impartial and objective review was considered to be the most important factor in implementing a valid administrative appeals process for permit denials. We believe this goal is attained by placing the review function at the Division level with the Division Engineer making the appeal decision rather than within Corps Districts. The Division RO would exercise a delegated authority to act on behalf of the Division Engineer, in conducting the administrative appeals process. The Division Engineer would make the decision on the merits of the appeal and direct the District Engineer to implement administrative appeal remedies or proceed with the permit denial. It is anticipated that Division RO candidates will likely be drawn from present Corps staff at HQ, Divisions, and Districts, and that they will represent the best trained and most experienced regulatory experts available.

The essence of the appeals process is an independent analysis of the existing administrative record to ensure that the district's decision complies with legal, regulatory, and policy requirements, that omissions of material facts have not occurred, and that the record is sufficient to support conclusions of the permit decision that was made. The process provides for a review conference at which Corps personnel and the applicant, authorized agent, and/or consultant may meet with the Division RO to provide clarification of information in the administrative record. The record may not, however, be supplemented by new data since this would constitute an amended application that may initiate a new public interest review rather than an appeal of the existing record and decision. Further, in reviewing technical issues, Division Engineers will not substitute their judgment for that of the District Engineers unless the issue falls within the ''clearly erroneous or omission of material fact'' category.

Under the proposed rule concerning permit denials, the Division Engineer's determination will not constitute a final agency decision; but would conclude with a finding that would be sent to the District Engineer whose decision was being appealed. This finding would either: (1) Determine that the appeal has no merit; or (2) determine that the appeal has merit and notify the District Engineer of further analysis and evaluation needed before the District Engineer can make the final agency decision on the permit application.

The re-opening of the public interest review and 404(b)(1) Guidelines analysis may be a limited review, if the noted deficiencies are narrow in scope and impact. The supplemental review process will include notice to all parties who commented on or participated in the original review. However, if the noted deficiencies are substantial in scope and impact, the issuance of a new public notice, opportunity to request a public hearing, and preparation of a supplemental environmental analysis and decision document may be required (see 33 CFR 325.7). This would allow new interested parties an opportunity to offer their views for the District Engineer's reconsideration of the permit application.

Upon conclusion of the re-evaluation, if the District Engineer determines that the proposed action is contrary to the public interest and/or 404(b)(1) Guidelines, the original denial will be reaffirmed and the decision will not be subject to further administrative appeal. Further challenge must be through the judicial process. If the re-evaluation results in a determination that a permit should be issued, that decision will be based on a supplemental administrative record and with the benefit of additional input from all interested parties. Furthermore, the determination to issue a permit may be subject to the 404(q) elevation process, but is not open to further administrative appeals.

Additionally, as discussed above, an appeal could be initiated for a decision to issue a permit with special condition(s) that the applicant finds unacceptable, and thus refuses to accept the permit. However, if the administrative appeal of a permit decision was sought by an applicant because of special conditions the applicant considered unacceptable, the applicant is appealing the permit decision, not just the special condition(s) of the proffered permit. The District Engineer, when evaluating the permit decision for a proffered permit that was not accepted by an applicant, will decide, upon further evaluation, either to: (1) Reaffirm the decision to deny the permit; or (2) issue the permit with special condition(s) different from those in the original proffered decision. Appellants must be aware, therefore, that the rejection of a proffered permit would not result in a simple ''yes'' or ''no'' on the merits of a special condition(s). Rather, the entire decision making process is opened for consideration of public interest review criteria and 404(b)(1) Guidelines analysis by the DE in reaching a final permit decision. Furthermore, a decision that has undergone a reevaluation as directed by the Division Engineer can not be further administratively appealed.

Based on past regulatory program experience, it is reasonable to estimate that annually 250 permit denials may be appealed under the proposed rule. To accommodate this increased work effort, it would be necessary to establish one to two RO positions in each of the ten Corps Divisions to implement the administrative appeals process. It is estimated that the resulting annual expense would be $2.5 million. These costs include:

20 ROs	$1,840,000
RO's travel & per diem/per appeal ($750×250)	187,500
Additional travel & per diem for Corps staff ($400×250)	100,000
supplemental Public Notice and Additional District Office Review of Appeals (250 cases at $1,500)	375,000
Total	2,502,500

V. Third Party Appeals

An ideal administrative appeal regulation for some people would be one that allows all third parties to request an administrative appeal of jurisdictional determinations and permit decisions. We understand this position. However, such a program would be much more expensive and require many more people to administer than that contemplated in this proposal. Congress is considering appropriating a small budget increase to allow the Corps to implement the proposed administrative appeal process. It appears unlikely that Congress would fund the costs of an expanded administrative appeals process, the benefits of which we do not believe would justify the costs. While this regulation would not allow third party appeals, it does provide for third party input in permit denial cases where the District Engineer is reconsidering the permit denial, as discussed below.

Under the proposed rule, the applicant or the landowner, is the only individual who may initiate an appeal of a formal jurisdictional determination. In proposing this rule the Corps recognizes that there may be other parties having an interest in a jurisdictional determination. However, these interests are not the primary property interests. Third party appeals related to such secondary property interests could raise a number of property rights issues. Third party involvement would reduce the efficiency of the process since third parties are not likely to readily obtain the permission of landowners to enter onto the property to conduct the technical, on-site surveys that are critical to validate jurisdictional determinations, including wetland delineations. Further, if the Corps determines that an area is a geographic area subject to Corps regulatory authority, substantial development proposals would likely trigger permit requirements and provide third parties with an opportunity to participate through the public interest review process.

Under the proposed rule, the applicant is the only individual who may initiate an appeal of a permit decision. However, full participation by third parties is provided for in the appeal process if the Division Engineer's determination is to refer the file back to the District Engineer for re-evaluation. It was determined that it was not necessary to provide for third party participation in the RO's permit review conference, since third parties had an ample opportunity to provide comments

or concerns and submit substantive evidence during the public notice phase of the permit evaluation process and again to provide comments if the District Engineer is reconsidering the application because the Division Engineer determines that the appeal had merit. Further, the President's plan did not contemplate nor recommend the administrative appeal of permit issuances. These decisions are considered valid reflections of the public interest since they have already undergone rigorous review, with input from numerous agencies and the general public, and these decisions may be elevated by some Federal agencies pursuant to Section 404(q) Memorandum of Agreement. Expanding the appeal process to permit issuance decisions would also significantly expand the potential number of appeals since the Corps annually issues approximately 10,000 standard permits nationwide. Opening these decisions to administrative challenge would have severe adverse effects on the overall efficiency and cost of the regulatory program. Furthermore, judicial review is available to affected third parties.

VI. Unauthorized Activities

As a general rule, jurisdictional determinations made in the context of an enforcement case can not be administratively appealed under this rule. We are concerned that the public interest in expeditious and efficient resolution of an enforcement action should not ordinarily be delayed by administrative appeals of jurisdictional determinations made for purposes of that enforcement action. However, the District Engineer, in his or her discretion, is authorized by this rule to make exceptions to this general rule, and to allow the administrative appeal of a jurisdiction determination made in the context of an enforcement action if the District Engineer believes that the interests of justice, fairness, and administrative efficiency would be served thereby.

In certain cases involving unauthorized activities, the Corps will afford the responsible party the opportunity to apply for an after-the-fact permit. In many instances this approach obviates the need for a formal enforcement action and expedites the restoration of the affected wetland. The use of this after-the-fact permit approach can, however, be affected by statute of limitations complications. Further, engaging in an Administrative Appeal regarding an activity involving an enforcement case might raise issues regarding application of Statute of Limitations with respect to potential enforcement actions.

Consequently, we propose to amend 33 CFR 326.3(e) to include a new subparagraph (v). This new provision would require those parties alleged to have engaged in an unauthorized activity to sign a statute of limitations tolling agreement prior to filing an after-the-fact permit application. Subsequent to acceptance of an after-the-fact permit application by the Corps, an applicant may appeal a jurisdiction determination and/or a denial of an after-the-fact permit. Such tolling agreement would state that, in exchange for the Corps' considering the appeal of a jurisdictional determination or the after-the-fact permit application, or both, the party would agree that the statute of limitations would be tolled until one year after the final action has been taken on a jurisdictional determination appeal or the after-the-fact permit decision has been made (whichever is later), or one year after any succeeding administrative appeal of an after-the-fact permit decision has been finalized. Such 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 should only be required to sign one tolling agreement regardless of the number of appeals sought involving a single unauthorized activity. For example, a party sings a tolling agreement to appeal a jurisdictional determination, then applies for and receives an after-the-fact permit decision, and then appeals the permit decision, the tolling agreement will remain in effect until one year after the date that the after-the-fact permit decision has been made final.

Although we are planning to consolidate and propose revisions to the Corps Regulatory Program Regulations at 33 CFR Parts 320–330, within the next year, it is important that we make this minor amendment in conjunction with this proposed rule on administrative appeals to avoid creating undue confusion among the regulated community. This confusion would stem from the fact that, even if we were to make the proposed change to subparagraph (v), we would still have to include a provision in the administrative appeals regulation requiring that every applicant who applies for an after-the-fact permit prior to the effective date of subparagraph (v), sign a tolling agreement prior to filing an administrative appeal. This provision is necessary to address those parties that apply for after-the-fact permits between now and the effective date of subparagraph (v). If we were to wait until we revise 33 CFR Parts 320–330 to propose subparagraph (v), then this group of after-the-fact permit applicants would only increase in number, further contributing to the confusion that this provision could create.

VII. 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 § 331.12 in this proposed rule to make it explicit that persons dissatisfied with jurisdictional determinations or permit decisions must avail themselves of the administrative appeals process(es) proposed in this rule and received a final agency decision prior to seeking redress in the Federal courts.

VIII. Application of Rule to Prior Regulatory Decisions

We are proposing that when the final administrative appeals process is adopted that certain actions completed prior to the effective date of the final regulation be allowed to be appealed in accordance with this regulation. We believe that it would be appropriate to accept administrative appeals of final jurisdictional determinations and permit denials, that were transmitted in writing to an affected party one year prior to the effective date of the final regulation, if the affected party submits a request for appeal (RFA) to the Corps within 60 days of the effective date of the final rule.

It should be noted by potential appellants of prior regulatory decisions that the criteria for appeal must be met, or the request for appeal will be rejected by the Corps. 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 implementation date of these regulations, if necessary.

IX. Environmental Documentation

We have made a preliminary determination that this action does not constitute a major Federal action significantly affecting the quality of the human environment, because the Corps prepares appropriate environmental documentation, including an Environmental Impact Statement (EIS)

when required, for all permit decisions. Furthermore, wetland delineations and jurisdictional determinations do not result in an applicant or landowner being able to conduct work in waters of the United States without a required permit authorization, but only describe and determine the scope and extent of waters of the United States under Corps regulatory jurisdiction based on technical criteria that is established separately. Therefore, environmental documentation under the National Environmental Policy Act (NEPA) is not required for those actions. Moreover, this proposed regulation for administrative appeals only adds an optional one-level review to permit denials, to insure that applicable regulations, policies, practices, and procedures (including the preparation of appropriate environmental documentation) have been appropriately followed.

X. Executive Order 12291 and the Regulatory Flexibility Act

The Corps does not believe that this proposed regulation meets the definition of a major rule under Executive Order 12291, and we therefore do not believe a regulatory impact analysis is required. This proposed rule should reduce the burden on the public by offering an administrative appeal process for certain Corps decisions, and in many instances, should avoid the more time consuming and costly alternative of appealing a decision under judicial review.

We also do not believe that this proposed regulation 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 proposed regulation only creates an optional review of certain decisions through an administrative appeal process. The proposed 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 an appeal through the judicial system. 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 proposed regulation 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.

John H. Zirschky,

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

Accordingly, 33 CFR Parts 320 and 326 are proposed to be amended and 33 CFR Part 331 is proposed to be added as follows:

PART 320—GENERAL REGULATORY POLICIES

1. The authority citation for Part 320 continues 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 decision to deny a permit or a Corps jurisdictional determination is subject to an administrative appeal by the landowner or permit applicant 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 there is no administrative appeal of that decision. An applicant or landowner must exhaust any administrative appeal available pursuant to the 33 CFR Part 331 and receive a final agency decision prior to filing suit in Federal District Court.

PART 326—ENFORCEMENT

1. The authority citation for Part 326 continues 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 permit application will be accepted unless and until the applicant has furnished a signed statute of limitations tolling agreement to the district engineer. A single statute of limitations tolling agreement will be prepared for each unauthorized activity. 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 after-the-fact permit decision or, if there is an administrative appeal, one year after the final agency decision as defined at 33 CFR 331.9, which ever is later.

Part 331 is added to read as follows:

PART 331—ADMINISTRATIVE APPEALS PROCESS

Sec.

331.1 Purpose and policy.
331.2 Definitions.
331.3 Review officers.
331.4 Notification of appealable actions.
331.5 Criteria.
331.6 Filing appeals.
331.7 Review procedures.
331.8 Timeframes for appeals decisions.
331.9 Final appeals decisions.
331.10 Final agency decisions.
331.11 Unauthorized activities.
331.12 Exhaustion of administrative remedies.

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

§ 331.1 Purpose and policy.

(a) *General.* The purpose of this regulation is to establish administrative appeals policies and procedures for final Corps of Engineers geographic jurisdictional determinations and permit denials with prejudice. The appeals process will allow landowners and permit applicants to pursue an administrative appeal of a final Corps of Engineers decision or determination with which they disagree. The basis for an appeal and the specific policies and procedures of the appeals process are described in the following sections. It shall be the policy of the Corps of Engineers to promote and maintain an administrative appeals process that is independent and objective, fair and equitable, and efficient and cost-effective.

(b) *Jurisdictional determinations.* Under the Corps of Engineers regulatory program, landowners and permit applicants may request, and/or receive, final Corps jurisdictional determinations to determine the presence and extent of wetlands, scope and extent of other waters of the United States, and whether the property or

waterbody is subject to Department of the Army jurisdiction. Therefore, such geographic jurisdictional determinations are vitally important decisions to landowners and permit applicants. These decisions affect whether or not the Corps has regulatory jurisdiction, and whether a permit is required for work involving regulated discharges and activities. The administrative appeal process shall apply to these decisions.

(c) *Permit denials.* Permit decisions that result in denial with prejudice may be appealed under the administrative appeal process.

§ 331.2 Definitions.

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

(a) *Jurisdictional determination* means a written Corps determination that a wetland (as determined and defined by a wetland delineation) and/or waterbody is subject to regulatory jurisdiction under section 404 of the Clean Water Act or a written Corps determination that a waterbody is subject to regulatory jurisdiction under sections 9 and 10 of the Rivers and Harbors Act of 1899. Additionally, the term includes a written reverification of expired jurisdictional determinations and a written reverification of jurisdictional determinations where new information has become available that may affect the previous written determination. For example, such geographic jurisdictional determinations may include, but are not limited to, one or more of the following determinations: presence/absence of wetlands, wetland/upland boundary, ordinary high water mark, mean high water mark, high tide line, interstate commerce nexus for isolated waters, and adjacency of wetlands to a waterbody. All jurisdictional determinations will be in writing and will be identified as either preliminary or final jurisdictional determinations. Some office, or preliminary, jurisdictional determinations are provided to applicants or landowners, generally to indicate the presence or absence of wetlands or waterbodies. They are advisory in nature and may not be appealed. Final jurisdictional determinations will be provided in writing and will be certified as a final jurisdictional determination and may be appealed.

(b) *Wetland delineation* means a Corps of Engineers (Corps) delineation, or verification of a delineation submitted by an applicant or consultant, indicating the size and boundaries of a subject property that is a wetland in accordance with the current Federal manual for identifying and delineating wetlands (FDM). Additionally, the term includes reverification of expired wetland delineations and reverification of wetland delineations where new information has become available that may affect the final delineation.

(c) *Permit denial* means a written Corps denial with prejudice (see 33 CFR 320.4(j)) of an individual standard permit as defined in 33 CFR 325.5(b). Permit denials also include cases where a proffered individual permit is refused by the applicant in writing because the applicant objects to the terms or special conditions of the proffered permit and the permit is subsequently denied with prejudice by the District Engineer. If the applicant refuses a proffered general permit, the District Engineer will not deny a permit for the proposed project based on that refusal. The applicant must apply for an individual permit. If that individual permit is subsequently denied with prejudice, then the applicant may request an appeal of that denial.

(d) *Appealable action* means a written final jurisdictional determination or permit denial as those terms are defined in paragraphs (a) and (c) of this section.

(e) *Affected party* means a permit applicant or landowner (i.e., an individual who has an identifiable and substantial legal interest in the property) that has received a final jurisdictional determination, or permit denial as those terms are defined in paragraphs (a) and (c) of this section.

(f) *Appellant* means an affected party who has filed an appeal under the criteria and procedures of these regulations.

(g) *Review officer (RO)* means the Corps of Engineers agency official responsible for the review and final decision on the merits of an appeal or review and recommendation to the Corps agency official making the final decision on the merits of an appeal. The RO, and/or the appeals decision-maker, is the District Engineer, or the Division Engineer as appropriate, or their designee(s).

(h) *Notification of appeals process (NAP)* means the information fact sheet which explains the administrative appeals process, criteria, and procedures. The NAP will accompany all final wetland delineations, jurisdictional determinations, and permit denials, as these terms are defined herein.

(i) *Request for appeal (RFA)* means the affected party's official request to appeal an appealable action with which he disagrees. The RFA will include required information to identify the affected party, proposed project, reason(s) for the appeal, and any supporting data and information. The format and required information of the RFA will be provided to the affected party at the time of notification of appeals process. The affected party initiates the administrative appeals process by completing and returning the RFA to the appropriate Corps of Engineers office.

§ 331.3 Review officers.

(a) *Authority.* The District Engineer, or the Division Engineer as appropriate, has the authority and responsibility for administering a fair, reasonable, and effective administrative appeal process. The District Engineer, or the Division Engineer as appropriate, may act as the 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 District Engineer, or the Division Engineer as appropriate, may not delegate any authority or responsibility described in this Part as that of the District Engineer, or the Division Engineer, respectively. Regardless of any delegation of RO authority or responsibility, the District Engineer or the Division Engineer as appropriate, retains overall responsibility for the administrative appeal process.

(1) *Jurisdiction determinations.* The District and Division ROs have the authority to make a decision on the merits of the appeal. Furthermore, the District RO has the discretion to make a new jurisdiction determination.

(2) *Permits denials.* The RO will prepare an analysis and recommendation for the Division Engineer. The Division Engineer has the authority to make the final decision on the merits of the appeal. Under the appeal process, neither the RO nor the Division Engineer has the authority to make a final decision to issue or deny any particular permit. The authority to issue or deny permits remains with the District Engineer. However, the Division Engineer may exercise the authority at § 325.8(c) to elevate the permit case and then may make the final permit decision.

(b) *General.* (1) *Independence.* The ROs shall be located in the Corps Division and District regulatory offices, unless specifically appointed as described in paragraphs (b), (c) and (d) of this section. The ROs will not perform or have been involved with the preparation, review, or decision making of the action being appealed. During the appeal process, the ROs shall maintain independence and objectivity in their

review of an appeal case and when determining the merits of the appeal.

(2) *Review.* The RO will conduct an independent analysis of the existing administrative record to ensure that the district's decision complies with legal, regulatory, and policy requirements, that omissions of material facts have not occurred, and that the record is sufficient to support conclusions and the ultimate decision. The District RO has the discretion to gather additional information when deemed necessary. When reviewing technical issues, Division RO's shall not substitute their judgment for that of the Corps district unless the reviewed decision was clearly erroneous or omitted a material fact. An RO who lacks specific expertise with regard to a specific appealed issue will obtain the assistance of another RO or other recognized expert from an office outside the Regulatory Branch or from a District other than the District where the appeal was initiated.

(c) *Jurisdictional determinations.* (1) *District RO.* The Corps district RO shall be, or have the support of, a recognized expert with extensive experience in conducting and reviewing wetland delineations and performing and reviewing jurisdictional determinations. The district RO shall report directly to the Regulatory Branch Chief. This arrangement will insure that the district RO is removed from day-to-day involvement in routine jurisdictional determinations made by Regulatory Branch project managers, unit chiefs, and section chiefs. For any case where the jurisdictional determination was made by the Regulatory Branch Chief or higher authority, or the individual(s) who normally acts as the district RO has participated in the decision or otherwise advised the decision-maker, or at the District Engineer's discretion, the District Engineer or a Corps official at least one level higher than the decision-maker shall appoint a qualified independent RO to conduct the appeal process.

(2) *Division RO.* The division RO responsible for appeals of a district RO's decision shall generally be the same RO(s) that is responsible for appeals of permit denials described in paragraph (d) of the section.

(d) *Permit denials.* The ROs responsible for appeals involving permit denials shall be officials in Division regulatory offices with extensive knowledge of all aspects of the Corps regulatory program. For any case where the permit decision was made by the Division Engineer or higher authority, an agency official at least one level higher than the decision-maker shall appoint a qualified independent RO to conduct the appeal process.

§ 331.4 Notification of appealable actions.

Every final jurisdictional determination and permit denial must be provided in writing to the affected party. For permit denials, the notification will also include a copy of the decision document. Additionally, an affected party has the right to review and obtain copies of the administrative record. Each notification letter will include a NAP and an RFA.

§ 331.5 Criteria.

(a) *Criteria for appeal.* The reason(s) or basis(es) for requesting the appeal must be specifically stated and must be more than a simple request for appeal because the affected party did not like the decision. Examples of reasons or bases for appeals include, but are not limited to, the following: a procedural error, an incorrect application of policy or regulations, omission of material fact, incorrect application of Federal Wetland delineation manual, lack of interstate commerce nexus, incorrect application of 404(b)(1) Guidelines under the Clean Water Act, 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) a jurisdictional determination associated with an individual permit (including an individual permit with special conditions), or the permit itself, where the permit has been accepted and signed by the permittee;

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

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

(4) any matter than can not be controlled or changed by the Corps decision-maker (e.g., The requirement of a binding statute, regulation, state Section 401 water quality certification, etc.)

§ 331.6 Filing appeals.

An affected party must file an RFA that is received by the Corps within 60 days from the date of the letter notifying the affected party of the appealable action. In any case where work is authorized to commence prior to the end of this 60 day period, either by general or individual permit, and the permittee wishes to request an appeal, the appeal must be received by the Corps and the appeal process concluded prior to the commencement of any work in the area identified as waters of the United States, and prior to any work that could alter the hydrology of waters of the United States. Additionally, the affected party must grant a right of entry to the RO to inspect the property and to conduct appropriate field tests and sampling that the RO determines may be necessary.

§ 331.7 Review procedures.

(a) *General.* (1) *Jurisdiction determinations.* The administrative appeals process for jurisdiction determinations is a two level appeal process. The first level appeal is to a specialist review officer in a Corps district office. The landowner will be able to present information to the RO, or the RO may obtain information, for the administrative record. The second level appeal is to an RO in a Corps Division office. This review will be limited to the administrative record developed during the first level appeal, which would include any information provided by the landowner as part of that record.

(2) *Permit denials.* The administrative appeals process for permit denials is a one level appeal process to the Division Engineer. The appeals process will be conducted by a RO in the Division office. The division RO will prepare the record, an analysis, and a recommendation for the Division Engineer. The Division Engineer may participate in the appeals process as the Division Engineer deems appropriate. The Division Engineer will make the decision on the merits of the appeal.

(b) *Acceptance of the request for appeal.* Within 30 days after receipt of the RFA, the RO shall review the appellant's RFA and the administrative record. If, within this 30 day period, the RO determines that the RFA does not meet the criteria for appeal (see § 331.5), the RO will notify the appellant in writing by certified mail of this determination and the reason(s) why the appeal failed to meet applicable criteria. No further administrative appeal is available, unless within 30 days from his receipt of the letter refusing his appeal, the appellant can refute the reason(s) for failing the criteria for appeal. The appellant may submit a revised RFA, if the reason(s) for failing applicable criteria have been remedied and the revised RFA is received by the Corps within 30 days from the date the appellant received notification that the original RFA failed to meet the criteria for appeal. If the RO determines that the revised RFA still does not meet the criteria for appeal, the RO will notify the appellant in writing of that fact by certified mail within 30 days advising

the appellant that the matter can not be appealed.

(c) *Site visits.* If within 30 days from receipt of the RFA the RO determines that additional field data and sampling are necessary, or if the appellant requests a site visit, the RO will conduct a site visit. The RO has the discretion to conduct a site visit, except when the applicant requests one, in which case a site visit shall be conducted. The appellant, or the appellant's authorized agent, must participate in the site visit if he has requested that one be conducted. If a site visit is conducted, the RO will schedule the completion of the site visit at the earliest practicable time. When practicable the site visit should be scheduled in conjunction with the review conference or meeting, if one is held. Site visits will not be conducted by Division ROs for appeals of District RO decisions on jurisdiction determinations.

(d) *Meetings and conferences*—(1) *Jurisdictional determinations meetings.* The District RO may schedule a meeting with the appellant, his or her authorized agent, or both, and appropriate Corps regulatory personnel to review and discuss issues directly related to the appeal. Additionally, the appellant may request that such a review meeting be held. However, the final decision on whether to conduct a review meeting shall be at the discretion of the District RO. If a meeting is held, the appellant will bear his or her own costs associated with necessary arrangements, exhibits, travel, and representatives. The Division RO will not conduct any jurisdictional determination meetings or discussions with any party, including the District RO.

(2) *Permit denial conferences.* An appeal review conference (conference) will be held for every permit denial appeal, unless the RO and the appellant mutually agree to forego a conference. When held, 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 conference will be governed by the following:

(i) *Notification.* The RO will set a date, time, and location for the conference and notify in writing the appellant and the Corps District regulatory office within 30 days of receipt of the RFA.

(ii) *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. Where public facilities are available at no expense, these facilities are preferred. If a free facility is not available, the charges for the facility will be borne by the Corps District regulatory office.

(iii) *Participants.* The RO, appellant, the appellant's authorized agent or consultant, and the Corps District staff are authorized participants in the conference. The Division Engineer and/or the District Engineer may choose to attend or not to attend at their discretion. If the appellant does not attend the conference, the appeals process is terminated with prejudice, unless the RO excuses the appellant for a justifiable reason. Furthermore, should the process be terminated with prejudice, the original permit denial decision shall be sustained.

(iv) *The role of the RO.* The RO shall be in charge of conducting the conference. He shall open the conference with a summary of the policies and procedures for conducting the conference as described in these regulations. The RO's responsibilities are to conduct a fair and impartial conference, to hear and fully consider all relevant issues and facts, and to clarify any matters necessary to make a final determination on the merits of the appeal.

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

(vi) *Subject matter.* The conference will be limited to matters contained within the existing administrative record. The RO may ask the Corps District representatives or the appellant to respond regarding particular matters of the relevant record, regarding the appellant's assertions or exhibits, or to clarify elements in the administrative record. New issues may not be raised or discussed.

(vii) *Testimony and transcripts.* There will be no sworn testimony and no cross examination during the conference. The RO may tape-record and/or have a transcript prepared of the conference. The tape and/or transcript is for use by the RO to review the proceeding of the conference and to assist in the preparation of the RO's findings. A tape-recording or transcript is optional, at the RO's discretion. However, if none is planned or requested by the RO, the appellant may contract and bear the expense for such a record if so desired. Any tape or transcript would become part of the administrative record of the appeal process and must be made available to all parties upon request.

(viii) *Appellant costs.* The appellant will bear his own costs associated with necessary arrangements, exhibits, travel, and consultants.

(e) The appeal of a District jurisdictional determination to the Division office will be limited to the administrative record. The RFA will be accepted upon receipt by the appropriate Division office. The Division RO will base the appeal decision on the administrative record provided by the District office. Therefore, the appellant must provide to the District office all relevant information to be entered into the administrative record during the District jurisdictional determination appeal. The Division RO will not meet or have conversations with any interested party, including the District RO or Corps District personnel, the appellant or the appellant's agent, regarding this matter.

§ 331.8 Timeframes for final appeals 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 in the following paragraphs.

(a) *Jurisdictional determination appeals.*

(1) *District level appeal.*

(i) *Normal timeframe.* If the RFA meets the criteria for appeal and the District RO determines that a site visit is not necessary, the District RO, or designated Corps official, will make a final decision on the merits of the appeal within 60 days from receipt of the RFA, or the revised RFA, except as provided in paragraphs (a)(1)(ii) and (a)(1)(iii) of this section.

(ii) *Extenuating circumstances.* If extenuating circumstances are present at the site that preclude the appellant and/or the District RO from conducting the site visit or gathering necessary information, the District RO may grant a time extension. Examples of extenuating circumstances may include seasonal hydrology conditions, winter weather, or disturbed site conditions. However, in no case shall the data collection or site visit period extend the total appeals review process beyond twelve months from the date of receipt of the RFA. If a time extension is granted for information and data gathering, the District RO will notify the appellant in writing. The District RO will complete the appeals review and make a final decision within 30 days of the site visit or data collection time extension period.

(iii) *New information.* During the course of the appeals review, the appellant may present new information not available at the time the appeal was submitted. The District RO, at the

District RO's discretion, may extend the time period for making the final decision to 30 days beyond the date of receipt of additional information submitted by the appellant, unless conditions as described in paragraph (a)(1)(ii) of this section exist.

(2) *Division level appeal.* The Division RO, or designated Corps official, will make a final decision on the merits of the appeal within 60 days of receipt of the RFA.

(b) *Permit denials.* The Division Engineer will make a final decision on the merits of the appeal within 90 days of receipt of the RFA, or the revised RFA.

§ 331.9 Final appeals decisions.

(a) In accordance with the authorities contained in § 331.3(b), the Corps appeal decision will either:

(1) determine that the appeal has no merit;

(2) determine that the appeal has merit; or

(3) for jurisdictional determinations only, at the District level the RO, or designated Corps official, may determine that the appeal has merit and revise the jurisdictional determination.

(b) The Corps will document the appeal decision, addressing the conclusions reached on the merits of the appellant's appeal. If the Corps determines that the appeal has merit (paragraph (b)(2) above), the RO will notify the district of further analysis and evaluation needed before the district can make a final agency decision. The RO will notify the appellant and the appropriate Corps office of the final appeal decision on the merits of the appeal in writing. The appellant will be notified by certified mail.

(c) The final appeal decision of the Division RO, the designated Corps official, or the Division Engineer, as appropriate, concludes the administrative appeal process and will be included in the administrative records. There is no further administrative appeal of the appealable action.

§ 331.10 Final agency decisions.

(a) *Jurisdictional Determinations.* The final agency decision on a jurisdictional determination that has been appealed will be made by one of the following methods:

(1) If the Division RO, or designated Corps official, determines that the appeal has no merit, then the final agency decision is the original jurisdiction determination or a District RO, or designated Corps official, corrected jurisdiction determination, as appropriate; or

(2) If the Division RO, or designated Corps official, determines that the appeal has merit, the Division RO, or designated Corps official, will provide direction to the original decision-maker or the District RO, as appropriate, to complete the administrative record and/or further analyze or evaluate specific issues. Subsequently, the final agency decision is the final jurisdictional determination made pursuant to the Division RO's, or designated Corps official's appeal decision; or

(3) If the appellant accepts the agency decision based on the District RO's, or designated Corps official's appeal decision (see § 331.9) or does not appeal to the Division Engineer, then that decision becomes the final agency decision. However, in such cases, the appellant has acted without exhausting all the administrative remedies under this rule. (See § 331.12).

(b) *Permit denials.* The final agency decision on a permit denial that has been appealed will be made by one of the following methods:

(1) If the Division Engineer determines that the appeal has no merit, the final agency decision is the District Engineer's denial decision; or

(2) If the Division Engineer determines that the appeal has merit, the Division Engineer will provide direction to the District Engineer to complete the administrative record and/or further analyze or evaluate specific issues. Subsequently, the final agency decision is the District Engineer's final decision made pursuant to the Division Engineer's appeal decision.

§ 331.11 Unauthorized activities.

Jurisdictional determinations and permit denials 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 jurisdictional determination and/or a permit denial may be filed and processed in accordance with these regulations subject to the provisions of paragraphs (a), (b), and (c) of this section. An appeal of jurisdictional determinations associated with unauthorized activities will normally not be accepted unless the Corps accepts an after-the-fact permit application. However, in rare cases, the District Engineer may accept an appeal of such a jurisdictional determination, if the District Engineer determines that the interests of justice, fairness, and administrative efficiency would be served thereby.

(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.

(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 RO determines that the appeal has no merit, the responsible party remains subject to any civil, criminal, and administrative penalties as provided by law. Any 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.

(c) *Tolling of statute of limitations.* The RFA associated with unauthorized activities must include a signed statute of limitations tolling agreement. (See 33 CFR 326.3(e)(1)(v).) No administrative appeal will be accepted until such agreement is furnished to the district engineer.

§ 331.12 Exhaustion of administrative remedies.

Applicants or landowners may not file a legal action in Federal District Court challenging a jurisdiction determination or a permit denial until after a final agency decision has been made on the permit application (i.e., permit issuance or denial) and the appellant has exhausted all applicable administrative remedies under this Part. If an appellant is challenging a permit denial, the appellant exhausts all administrative remedies when a final agency decision is made in accordance with § 331.10(b).

Gregory D. Showalter,

Army Federal Register Liaison Officer.

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