Federal Register

Tuesday,
March 28, 2000

Part III

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; Final Rule

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 Army Corps of Engineers published notice in the **Federal Register** of a proposal to establish an administrative appeal process for the regulatory program of the Department of the Army. The comment period expired on September 5, 1995. The Corps evaluated and addressed the issues raised in comments submitted in response to the proposed rule. In the March 9, 1999, **Federal Register**, the Corps published a final rule establishing an administrative appeal process for permit denials and declined individual permits. Due to budget constraints, the Corps delayed publication of an administrative appeal process for jurisdictional determinations. On September 29, 1999, the President signed the Corps Fiscal Year 2000 appropriations bill which provided funds to administer a one-step appeal process for jurisdictional determinations. The final rule published today establishes a one step administrative appeal process for jurisdictional determinations. In addition, minor changes have been made to clarify the administrative appeal process for permit denials and declined individual permits. These revised regulations contain the complete administrative appeal process for jurisdictional determinations, permit denials, and declined individual permits.

DATES: This rule becomes effective on March 28, 2000.

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 White House Wetlands 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 the development by the Corps of an administrative appeal process to be implemented after public rulemaking. The Plan discusses an administrative appeal process for Section 404 geographic jurisdictional determinations (JDs) and permit denials. This rule is also contained in the Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions pursuant to Executive Order 12866.

On July 19, 1995, the Corps of Engineers (Corps) published a notice in the **Federal Register** (60 FR 37280) proposing to establish an administrative appeal process for the Department of the Army regulatory program (33 CFR Parts 320–331). The comment period expired on September 5, 1995. The Corps evaluated and addressed the comments submitted in response to the proposed rule. In the March 9, 1999, issue of the **Federal Register** (64 FR 11708), the Corps published a final rule establishing an administrative appeal process for permit denials and declined permits. That rule became effective on August 6, 1999. Due to budget constraints, the Corps delayed the establishment and implementation of an administrative appeal process for JDs. The final rule published today establishes an administrative appeal process for JDs. The administrative appeal process for JDs applies only to geographical JDs that are approved by the Corps of Engineers. In addition, minor edits have been made to clarify the administrative appeal process for permit denials and declined individual permits. That existing process has not been changed by this rule. Published herein is the consolidated 33 CFR Part 331, containing the complete administrative appeal process for JDs, permit denials, and declined individual permits. In Fiscal Years 1995 to 2000 the President's budgets have included money to implement an administrative appeal process for permit denials and JDs. From Fiscal Year (FY) 1995 through FY 1997 the Congressional appropriations for the Department of the Army regulatory program was held level at $101 million. In FY 1998 and FY 1999 Congress appropriated $106 million each year. This funding increase in FY 98 and FY 99 allowed the Corps to finalize regulations to establish and implement an administrative appeal process for permit denials and declined individual permits. In FY 2000 Congress appropriated sufficient funds to implement the administrative appeal process for JDs, that we are finalizing with this consolidated rule, as well as the existing administrative appeal process for permit denials and declined individual permits. The consolidated rule for the administrative appeal process published today provides for the administrative appeal, within the Corps, of an approved JD, a denial with prejudice by the district engineer of a Department of the Army permit application, and/or a declined individual permit (i.e., an individual permit refused by the applicant because of objections to the terms or special conditions of the proffered permit). The appeal process allows administrative appeal of such decisions to the Corps under Section 404 of the Clean Water Act, Section 10 of the Rivers and Harbors Act, and Section 103 of the Marine Protection, Research, and Sanctuaries Act.

The revised rule provides for the addition of an administrative appeal process for JDs. Although some minor editing of the permit denial appeal regulation has been done, the existing process has not been modified. However, we have published 33 CFR Part 331 in its entirety to include the administrative appeal process for approved JDs and to provide a **Federal Register** document that contains the administrative appeal rule in its entirety. The preamble discussion that follows only addresses comments relating to the administrative appeal process for JDs. The comments relating to the administrative appeal process for permit denials and declined individual permits were discussed in the preamble of the final regulation published in the March 9, 1999, **Federal Register** document.

II. Comments on the Proposed Rule

A. General

Comments received on the proposed rule can be summarized under several broad headings: (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) the finality of JDs; (5) enforcement-related issues; (6) suggested procedural changes and clarifications; and (7) general expressions of both opposition and support of adoption of an administrative

appeal process. The following discussion of comments is divided into these topics and additional comments on specific sections of the regulation are discussed later in the text.

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, delays in the evaluation of a permit application, JDs regarding minor incidental discharges associated with excavation and landclearing activities, and the applicability of exemptions and general permits. Those comments were addressed in the March 9, 1999, **Federal Register** document. For the reasons stated in the March 9, 1999, **Federal Register** document, the Corps is not including an administrative appeal process for determining whether or not a particular activity requires a Section 404 and/or Section 10 permit. It should be noted that the biggest concern of applicants and landowners was the geographic extent of waters of the United States on their property (e.g., wetlands delineation).

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 does not raise new issues that were not considered in the Corps original evaluation of the JD and/or 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.

In the revised rule, we are providing an opportunity for a landowner or applicant to request reconsideration of an approved JD by the district engineer if he has new information that may affect the district engineer's decision concerning a particular JD. (See 33 CFR 331.6(c).) It is essential that new information can only be accepted 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. Accepting new information concerning a JD or project during the appeal process would constitute a fundamental change of the administrative record. Such new information might have resulted in a different JD or permit decision had it been presented to the district engineer during the original decision process. Furthermore, allowing an applicant to withhold potentially critical information from the district engineer and submit it during the appeal process might encourage forum-shopping, if an applicant believes that a more favorable decision might be obtained from the division engineer than from the district engineer. Therefore, once a landowner or applicant submits a request for an appeal of an approved JD or permit denial, he cannot submit new information.

(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 the independence and impartiality of the RO, ensuring the fairness of the administrative appeal process, and providing the RO with the authority to change the original decision regarding the appealed decision. Some commenters also recommended authorizing the RO to unilaterally change a district engineer's permit decision.

Some commenters stated 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. Simplification and lower program costs were also offered by commenters as reasons for transferring the process to the private sector. 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 reviewed and considered these comments in the context of permit denials and declined individual permits, as discussed in the March 9, 1999, **Federal Register** document. Our responses to those comments also apply to the administrative appeal of approved JDs. Further, Congress in the FY 2000 appropriation for the regulatory program required a one step process for the administrative appeal of JDs.

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 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.

These comments were addressed in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program. The responses published in that **Federal Register** document also apply to the administrative appeal process for approved JDs. For the administrative appeal of JDs, the authority to make the final appeal decision for approved JDs can be delegated to the ROs or other appropriate officials.

Another commenter suggested modifying the third sentence of § 331.3(b)(2) to provide the RO more flexibility. This commenter recommended striking the phrase "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 replacing it with "shall provide a recommendation on the decision that is supported by clear and convincing evidence." This comment was addressed in the March 9, 1999, **Federal Register** document announcing the final rule for the administrative appeal process for the Corps regulatory program.

A comment was received suggesting more involvement by Corps headquarters to ensure consistency of appealed decisions and to facilitate adjustments in policy, if necessary.

This comment was addressed in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program.

Several commenters suggested that, because of its unique organizational structure, appeals of decisions made by the New England Division office should be directed to Corps headquarters rather than the division engineer. This comment was addressed in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program.

(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. Several commenters recommended broadening the definition of the term "affected party" to include adjacent landowners and the general public. 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.

For permit denials and declined individual permits, these comments were addressed in the March 9, 1999, **Federal Register** document.

In response to the question regarding who may pursue an appeal, the Corps has modified the definition of the term "affected party" to include the permit applicant, the landowner, or the lease, easement, or option holder. The affected party must have received an approved JD or permit denial, or declined a proffered individual permit. Expanding the administrative appeal process to third parties would potentially increase the number of appealed actions by an order of magnitude or more. This would simply be unworkable.

We do not agree that third parties should be allowed to appeal JDs because JDs are primarily site-specific evaluations of technical criteria, such as tide lines or high water marks, hydric soils, hydrophytic vegetation, wetland hydrology, and interstate commerce connections. Adjacent landowners do not typically have knowledge of, or sufficient interest in, a property to become involved in such determinations. Often an adjacent landowner's interests are related to issues other than effects to aquatic resources. We believe that such interests are best addressed by local land use plans and zoning ordinances rather than by seeking to control potential development by challenging Corps JDs. In addition, broadening the definition of "affected party" for JDs to include adjacent landowners and the general public would likely produce a tremendous workload increase for the Corps. The Corps annually conducts approximately 60,000 JDs. Consequently, we have decided not to broaden our definition of "affected party" to include adjacent landowners and/or the general public. JDs are not subject to a public interest review or third party participation. JD appeals are limited to parties who have the requisite legal interest in the land that is under jurisdictional review. While the appeals regulation provides for some third party involvement, a few commenters have questioned whether the Corps has provided the appropriate level of public involvement. Consequently, the Corps will evaluate the first year of operation of the appeal process relative to third party involvement and will propose any appropriate modification to ensure effective public involvement in the appeal process.

(4) The Finality of Jurisdictional Determinations

A number of comments urged that approved JDs be recognized as "final agency actions" apparently under the view that JDs could thereby be immediately appealed in Federal court. However, even final agency actions must be "ripe" before a court can review them. In the past, a number of courts have held that jurisdictional determinations are not ripe for review until a landowner who disagrees with a JD has gone through the permitting process. The Federal Government believes this is the correct result, and nothing in today's rule is intended to alter this position. Ultimately, ripeness is a question that only the reviewing court can answer, and the Agency cannot satisfy ripeness concerns simply by declaring that an agency action is "final." Furthermore, JDs are not necessarily "final" even as an administrative matter. Physical circumstances can change over time, and the scope of regulatory jurisdiction when a JD is initially performed might be different from the scope of jurisdiction when a permit application is reviewed or when an enforcement action is taken. Accordingly, we have decided not to address in this rulemaking when a JD should be considered a final agency action.

(5) Enforcement-Related Issues

Many commenters questioned our proposal that, as a general rule, JDs made in the context of an enforcement case should not be administratively appealable under this rule, unless an after-the-fact (ATF) permit application was accepted by the Corps. In the proposed rule published in the July 19, 1995, **Federal Register** notice, the district engineer could accept, in exceptional circumstances, an appeal of a JD associated with an unauthorized activity without accepting an ATF permit application.

In response to these comments, we continue to believe that normally it is not appropriate to provide for appeals of approved JDs associated with unauthorized activities, except when the Corps has accepted an ATF permit application and denied it. However, we recognize that there can be rare cases where the interests of justice, fairness and administrative efficiency would be served by allowing the district engineer to accept an appeal of an approved JD without an ATF permit application. Therefore, we have determined that § 331.11 will be adopted as proposed so that the Corps ability to resolve enforcement actions expeditiously is preserved and so that there is not disparate treatment of JDs embodied in EPA and Corps administrative orders.

One commenter suggested that under the proposed rule the ATF permit process should more appropriately be titled an after-the-fact "enforcement" process. This comment was addressed in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program.

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 discussed in the March 9, 1999, **Federal Register** document, we determined that it would be appropriate to limit the tolling agreement, and 326.3(e) was amended by adding subparagraph (v). This subparagraph has been revised to include approved JDs.

Sections 326.3(e)(1)(v) and 331.11(c) state that any person alleged to have engaged in an unauthorized activity, who is either allowed to appeal an approved JD or files an ATF permit application that is accepted and processed by the Corps, agrees to a tolling of the Statute of Limitations and must sign an agreement to that effect.

The tolling agreement would state that, in exchange for the Corps accepting the approved JD appeal or ATF permit application, the ATF permit applicant or recipient of an approved JD associated with an unauthorized activity has agreed that the Statute of Limitations would be suspended until one year after the final action has been taken on the approved JD appeal, ATF permit decision, or declined ATF individual permit.

The tolling agreement also applies to any succeeding administrative appeal of an ATF permit denial or declined ATF individual permit. The tolling period would terminate one year after a final decision on (1) the appeal of an approved JD; (2) the appeal of a proffered ATF permit; (3) the denial of an ATF permit application; or, (4) 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 approved JD appellants and 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 suspended. A separate tolling agreement is required for each unauthorized activity.

One commenter asked that the third sentence in § 331.11 be revised to indicate that the Corps "receives" rather than "may accept" an after-the-fact permit application, because the commenter believes the Corps could not refuse a permit application. This comment was addressed in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program.

Comments were received questioning the basis of the requirement that initial corrective measures must be completed before an appeal could be accepted. One commenter stated that this requirement left an appellant little recourse, a result that appeared to be contrary to the purpose of the rule. Another believed that such a requirement was premature because it presupposes that the appeal lacks merit. These comments were addressed in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program.

The proposed rule published in the July 19, 1995, **Federal Register** notice, in § 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. In the March 9, 1999, **Federal Register** document, we addressed the comments concerning that issue and explained why that provision was omitted from the final rule.

(6) Suggested Procedural Changes and Clarifications for Specific Sections

Section 331.1: We have revised this section to state that approved JDs, in addition to permit denials with prejudice and declined individual permits, are subject to the administrative appeal process. We have also revised paragraph (b) of this section to describe the level of decision maker and removed paragraph (c) from this section.

Section 331.2: In this section, we have modified some definitions and added new definitions. These changes are discussed below.

Affected party: We have modified the definition of this term to include landowners and lease, easement, or option holders as affected parties. An individual who has an identifiable and substantial legal interest in the property is also considered an "affected party" for the purposes of this rule. We have also inserted the phrase "approved JD" into the definition since the revised rule now includes approved JDs as appealable actions.

Appealable Action: We have inserted the term "an approved JD" into the definition of this term since the revised rule now includes approved JDs in the administrative appeal process.

Approved jurisdictional determination: We have added a definition of this term to this section.

Basis of jurisdictional determination: We added a definition of this term to § 331.2 since the revised rule now includes approved JDs as appealable actions.

Declined permit: We have inserted the word "special" before the word "conditions" throughout the definition of this term to clarify that general conditions required by Corps regulations are not appealable. Also, special conditions added to an individual permit are usually the reason why proffered individual permits are declined by applicants.

Jurisdictional determination (JD): We have added a definition of this term to § 331.2 since the revised rule now includes approved JDs as appealable actions.

Several commenters said that it was not clear that "jurisdictional determinations" includes "wetland delineation." We have modified the language in the introductory comments in the preamble and the language in the rule to clarify that wetland delineations and wetland delineation verifications are jurisdictional determinations. We believe the definition of the term "jurisdictional determination" now clearly includes both the finding of Corps regulatory jurisdiction (*i.e.* a determination of the presence of waters of the United States on a parcel of land) and the delineation of boundaries of waters of the United States, including wetlands, on a parcel of land.

Several commenters noted that some sections of the proposed rule referred to the "current Federal manual for identifying and delineating wetlands" and the 1987 *Corps of Engineers Wetlands Delineation Manual* as if they were the same.

We acknowledge that this can be confusing. We have changed language in the introductory comments in the preamble and language in the rule to clarify that the 1987 *Corps of Engineers Wetlands Delineation Manual* is the currently accepted Federal manual for identifying and delineating wetlands. Recognizing that a new Federal wetland delineation manual or additional guidance or criteria may be developed in the future, all references within the rule to a delineation manual are made generically as "the current regulatory criteria for identifying and delineating wetlands" to minimize the impact to this rule in the event of adoption of a new manual. We have also inserted the phrase "and associated guidance" to refer to the guidance that was issued by the Corps in 1992 to clarify the use of the 1987 *Corps of Engineers Wetlands Delineation Manual* and address any potential future guidance that may be issued for a new Federal wetland delineation manual.

Notification of Appeal Process (NAP): We have modified the definition of this term by inserting the phrase "approved JD" into the list of actions that are subject to the administrative appeal process.

Preliminary JDs: We have added a definition of this term to this section.

Proffered Permit: We added a definition of this term to § 331.2 to clarify this term to distinguish the

initial proffered permit which is not appealable from the second proffered permit which is an appealable action.

Request for Appeal (RFA): We have modified the definition of this term by inserting the phrase "approved JD" into the list of actions that are subject to the administrative appeal process. We have also added the phrase "* * * to allow the RO to conduct field tests or sampling for purposes directly related to the appeal * * *" to the end of the third sentence to clarify the reasons necessary for the right of entry.

Tolling agreement: We have added a definition of this term to this section.

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.

This comment was addressed in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program.

Section 331.3(a)(2): One commenter suggested including the phrase "based on the merits of the appeal" in the first sentence.

This comment was addressed in the March 9, 1999, **Federal Register** document announcing the final rule for the administrative appeal process for the Corps regulatory program.

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.

These comments were addressed in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program. We have added a sentence to this section stating that, for approved JDs, the notification must include an NAP fact sheet, an RFA form, and a basis for JD.

Section 331.5: This section has been revised to include approved JDs as appealable actions. In § 331.5(a)(2) we have added "incorrect application of the current regulatory criteria and associated guidance for identifying and delineating wetlands" as a reason for appeal. We have also revised § 331.5(b) by adding three more actions that are not appealable. These actions are: approved JDs associated with an individual permit where the permit has been accepted and signed by the permittee, preliminary JDs, and previously approved JDs that have been superceded by another approved JD.

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 special conditions of the permit. This comment was addressed in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program.

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. One commenter suggested that it would be difficult for appellants to provide their reasons for requesting an appeal within 60 days unless the Corps provides a rationale as part of the JD or permit denial notification. Another commenter requested that information concerning JDs and permit decisions be made available to the public.

For permit denials and declined individual permits, these comments were addressed in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program. We have modified and expanded § 331.4 to clarify that for JDs, the affected party will be sent a "basis of JD" summarizing the information used by the Corps to make the approved JD.

One commenter suggested modifying the sentence addressing "right of entry" in § 331.6 of the proposed rule published in the July 19, 1995, **Federal Register** notice to specify that any field tests or sampling by the RO be "for purposes directly related to the appeal." In the final rule published in the March 9, 1999, **Federal Register** document, we had moved this provision from § 331.6 and added it to the definition of "request for appeal" in § 331.2. In the revised rule published today, we have added "to allow the RO to clarify elements of the record or to conduct field test or sampling for purposes directly related to the appeal" to the end of the third sentence of that definition.

We have modified this section to include approved JDs as appealable actions. We have also added a sentence to § 331.6(e) to require a recipient of a general permit authorization or individual permit to complete the appeal process prior to commencing work in waters of the United States on the project site, if he does not accept the approved JD associated with that general permit authorization or individual permit or the special conditions of the proffered individual permit.

Section 331.7: We have revised this section to include approved JDs as appealable actions.

One commenter asked what the status of a permit application would be during the time an appeal of the JD for the project site is being considered. We acknowledge that there are no provisions addressing this situation in the rule. We understand this concern and are planning to issue guidance to the districts which will allow them flexibility to take appropriate action on individual applications. The district engineer can either continue or suspend the evaluation of the permit application until the appeal is resolved, depending on case-specific considerations. For instance, it may be in the interest of the applicant to continue evaluation of the permit application if the applicant is appealing the geographic limits of waters of the United States or if the applicant needs to comply with other laws which involve extended periods of review, such as consultation under Section 7 of the Endangered Species Act. However, in cases where the Corps must respond to a request for authorization within a specific time period (*e.g.*, the 30-day preconstruction notification period for certain nationwide permit activities), the district engineer should consider the PCN to be incomplete until the administrative appeal process for the approved JD has been completed. If the appeal concerns the issue of jurisdiction, it may be appropriate to suspend permit evaluation until the appeal is resolved, since a subsequent determination of "no jurisdiction" would obviate the need to continue the permit evaluation process. Due to the multitude of factors that must be considered for this issue, we have decided not to modify the rule to address this issue, but retain flexibility in the regulation and provide guidance to Corps districts concurrent with implementation of this rule.

Section 331.7(c) (Proposed § 331.8(a)): A number of commenters recommended that we allow division ROs to conduct site visits on appeals of JDs. The JD appeal process proposed in the July 19, 1995, **Federal Register** notice was a two level process, with the first level appeal to the district office that conducted the original JD. The second level appeal would have been to the division office. The district RO would have been allowed to conduct site visits, but not the division RO. In the interests of fairness to appellants, program efficiency, and cost effectiveness, we

have modified the JD appeal process to a one level appeal to the division engineer. Consequently, the division RO will conduct site visits, if necessary, for the purpose of clarifying the administrative record.

Another commenter indicated that we should be required to obtain the landowner's permission before conducting a site inspection and that the landowner and his consultants be allowed to attend.

We believe that if a landowner wishes to request a review of a JD, he must make the site available to the district regulatory staff because a site visit is, under most circumstances, essential to adequately review a particular JD. The RFA is conditioned to grant the Corps right of entry to the project site. Section 331.7(c) requires the RO to notify the appellant and the appellant's authorized agents at least 15 days prior to the site investigation, to provide the appellant and his authorized agents the opportunity to attend the site investigation.

We received many comments concerning the deadlines proposed for appeals of approved JDs. Only one commenter strongly opposed the proposed deadlines; that commenter wanted all decisions reached within 120 days. Most of the commenters acknowledged that there may be seasonal constraints involved in making wetland determinations, unique site conditions, or other circumstances that may affect the timeliness of such decisions. One commenter wanted even greater flexibility than the proposed 12 month time period when there are extenuating circumstances, but another commenter was concerned that Corps districts may request an extension of time due to a "wet" season to gain additional time and delay their decisions. Two commenters suggested we follow the same time deadlines as NRCS.

After considering these comments and our proposed deadlines, we believe the time periods are reasonable, and we have retained them in the final rule. We will monitor the JD appeals program and if significant delays are occurring, we will revisit this issue. We have also added text to this section that explains how extenuating circumstances concerning site visits, such as seasonal hydrology, winter weather, or disturbed site conditions, should be addressed.

Section 331.7(d) (Proposed as § 331.7(d)(1)): Several commenters requested clarification of the purpose, location, and notification requirements for the approved JD appeal meeting. These comments, sometimes contradictory, suggested that the meetings should be: (1) informal; (2) more structured; (3) limited to clarification of the administrative record; (4) open to the oral presentation of the appellant's case; and (5) limited to the district staff asking questions rather than providing an opportunity to discuss settlement. One commenter suggested that approved JD appeal meetings should be held in the Corps office.

The language of this section has been modified to clarify that these meetings will be scheduled by the RO to review and discuss issues directly related to the approved JD under appeal. Additionally, we have revised this section to state that that the approved JD meeting should be held at a location of reasonable convenience to the appellant and near the parcel subject to the approved JD, since the site may be a considerable distance from the Corps office. Consequently, we anticipate that the RO may have to travel frequently and have included this factor in our estimate of the cost of the appeal process.

Section 331.7(e)(1) (Formerly § 331.7(d)(1)): 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 addressed this comment in the March 9, 1999, **Federal Register** document announcing the final rule for the administrative appeal process for the Corps regulatory program.

One commenter suggested that it be made mandatory that complete transcripts be prepared for all presentations and discussions occurring during the appeal conference.

This comment was addressed in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program.

Section 331.7(f) (Formerly § 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.

We addressed these comments in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program. Those responses also apply to the administrative appeal process for approved JDs.

Section 331.7(g) (Formerly § 331.7(f)): We have revised this section to include approved JDs.

Section 331.10: We have made a few minor revisions to this section to clarify that this section applies to Corps permit decisions and not to approved JDs.

In § 331.10(a), we have clarified that the final letter to the applicant will include the original permit denial or proffered permit.

In § 331.10(b), the fourth sentence has been revised by adding the phrase "permit decisions" to clarify that the requirements listed in that sentence apply only to permit denials or declined individual permits.

One commenter observed that this section was silent with respect to the roles of the EPA and the NRCS in final agency decisions regarding JDs. This commenter argued that JDs are not only the responsibility of the Corps and that the appeals process should address other authorities in this regard. This rule is promulgated under authority of the Corps of Engineers and thus addresses only Corps approved jurisdictional determinations. Whether or not appeals are available for jurisdictional determinations by other agencies and the process for such appeals lies within the respective authorities of NRCS and EPA. Thus, this rule does not provide for appeal of such jurisdictional determinations, and nothing in this rule is intended to alter or abridge the authority of any other federal agency with respect to jurisdictional determinations for which they are responsible. To further clarify this issue the definition for "Approved Jurisdictional Determination" provides that such JDs, which are the only JDs that can be appealed, are "Corps" determinations.

Section 331.11: We have revised this section to include approved JDs associated with permit denials and declined individual permits attendant with after-the-fact permit applications. We have also adopted the language in the July 19, 1995, proposed regulation indicating that normally approved JDs associated with unauthorized activities are not appealable except where an after the fact permit application has been accepted by the Corps and denied, unless the Corps determines that extraordinary circumstances warranted such an appeal.

In the last sentence of § 331.11(c), we have also replaced the word "written" with "signed" to clarify that a signed tolling agreement must be submitted to the district engineer before an after-the-fact permit application or an

administrative appeal associated with an unauthorized activity will be accepted by the district engineer.

Section 331.12: We have revised the last sentence of this section to clarify that this section only applies to permit denials or proffered permits.

(7) General Expressions of Opposition and Support

A number of comments addressed 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.

We addressed these comments in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program.

III. Application of Rule to Prior Regulatory Decisions

Affected parties may appeal approved JDs for those determinations occurring on or after March 28, 2000. Such requests will be accepted for administrative appeal in accordance with this regulation. Approved JDs completed prior to the publication date of the final regulation will not be accepted under the appeal process. During the initial implementation period of these regulations, the RO may delay the processing an RFA for up to 60 days after March 28, 2000.

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 comment was addressed in the March 9, 1999, **Federal Register** document containing the final rule for the administrative appeal process for the Corps regulatory program.

IV. 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 prepares appropriate environmental documentation, including Environmental Impact Statements when required, for all permit decisions. Therefore, environmental documentation under the National Environmental Policy Act (NEPA) is not required for the revision of this rule. Furthermore, JDs do not authorize an applicant or landowner to conduct work in waters of the United States if a Section 404 and/or Section 10 permit is required. JDs only describe presence and extent of waters of the United States based on standard technical criteria. Therefore, environmental documentation under the NEPA is not required for these actions. Moreover, this regulation for administrative appeal only establishes a one-level review for approved JDs, 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.

V. Executive Order 12291 and the Regulatory Flexibility Act

We do not believe that this revision of the final rule meets the definition of a major rule under Executive Order 12291, and therefore we do not believe that a regulatory impact analysis is required. The revised final rule should reduce the burden on the public by offering an administrative appeal process for certain Corps decisions, and, in many 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 revision of the 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 the revised final rule only creates an optional review of jurisdictional determinations 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 prior to March 9, 1999, could only seek to have the decision reviewed through the Federal courts. In addition, this rule establishes an opportunity for affected parties to appeal approved JDs, which was not available in the past. Furthermore, since the administrative appeal process is optional (*i.e.*, 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: 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

Administrative practice and procedure, Dams, Environmental protection, Intergovernmental relations, Navigation (water), Water pollution control, Waterways.

33 CFR Part 326

Administrative practice and procedure, Intergovernmental relations, Investigations, Law enforcement, Navigation (water), Penalties, Water pollution control, Waterways.

33 CFR Part 331

Administrative practice and procedure, Environmental protection, Navigation (water), Water pollution control, Waterways.

Dated: March 22, 2000.

Joseph W. Westphal,

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

Accordingly, 33 CFR, Chapter II is amended 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. Amend § 320.1 by revising the last five sentences of paragraph (a)(2) to read as follows:

§ 320.1 Purpose and scope.

(a) * * *

(2) * * * A district engineer's decision on an approved jurisdictional determination, 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 "approved jurisdictional determination," "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 affected party must exhaust any administrative appeal available pursuant to 33 CFR Part 331 and receive a final Corps decision on the appealed action prior to filing a lawsuit in the Federal courts (see 33 CFR 331.12).

* * * * *

PART 326—ENFORCEMENT

3. 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; 33 U.S.C. 2101.

4. Amend § 326.3 to revise paragraph (e)(1)(v) to read as follows:

§ 326.3 Unauthorized activities.

* * * * *

(e) * * *

(1) * * *

(v) No appeal of an approved jurisdictional determination (JD) associated with an unauthorized activity or 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 appeals an approved JD associated with an unauthorized activity or applies for an after-the-fact permit, where the application is accepted and evaluated by the Corps, thereby agrees that the statute of limitations regarding any violation associated with that application is suspended until one year after the final Corps decision, as defined at 33 CFR 331.10. Moreover, the recipient of an approved JD associated with an unauthorized activity or an application 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 suspended (i.e., 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.

* * * * *

5. Revise part 331 to read as follows:

PART 331—ADMINISTRATIVE APPEAL PROCESS

Sec.

331.1 Purpose and policy.
331.2 Definitions.
331.3 Review officer.
331.4 Notification of appealable actions.
331.5 Criteria.
331.6 Filing an appeal.
331.7 Review procedures.
331.8 Timeframes for final appeal decisions.
331.9 Final appeal decision.
331.10 Final Corps decision.
331.11 Unauthorized activities.
331.12 Exhaustion of administrative remedies.
Appendix A to Part 331—Administrative Appeal Process for Permit Denials and Proffered Permits
Appendix B to Part 331—Applicant Options With Initial Proffered Permit
Appendix C to Part 331—Administrative Appeal Process for Approved Jurisdictional Determinations
Appendix D to Part 331—Process for Unacceptable Request for Appeal

Authority: 33 U.S.C. 401 *et seq.*, 1344, 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 approved jurisdictional determinations (JDs), permit applications denied with prejudice, and declined permits. The appeal process will allow the affected party to pursue an administrative appeal of certain 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) *Level of decision maker.* Appealable actions decided 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). References to the division engineer in this Part shall be understood as also referring to a higher level Army official when such official is conducting an administrative appeal.

§ 331.2 Definitions.

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

Affected party means a permit applicant, landowner, a lease, easement or option holder (*i.e.*, an individual who has an identifiable and substantial legal interest in the property) who has received an approved JD, permit denial, or 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 an approved JD, a permit denial, or a declined permit, as these terms are defined in this section.

Appellant means an affected party who has filed an appeal of an approved JD, a permit denial or declined permit under the criteria and procedures of this part.

Approved jurisdictional determination means a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. Approved JDs are clearly designated appealable actions and will include a basis of JD with the document.

Basis of Jurisdictional determination is a summary of the indicators that support the Corps approved JD. Indicators supporting the Corps approved JD can include, but are not limited to: indicators of wetland hydrology, hydric soils, and hydrophytic plant communities; indicators of ordinary high water marks, high tide lines, or mean high water marks; indicators of adjacency to navigable or interstate waters; indicators that the wetland or waterbody is of part of a tributary system; or indicators of linkages between isolated water bodies and interstate or foreign commerce.

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 special 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 special 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.

Jurisdictional determination (JD) means a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344) or a written determination that a waterbody is subject to regulatory jurisdiction under Section 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*). Additionally, the term includes a written reverification of expired JDs and a written reverification of JDs where new information has become available that may affect the previously written determination. For example, such geographic JDs may include, but are not limited to, one or more of the following determinations: the presence or absence of wetlands; the location(s) of the wetland boundary, ordinary high water mark, mean high water mark, and/or high tide line; interstate commerce nexus for isolated waters; and adjacency of wetlands to other waters of the United States. All JDs will be in writing and will be identified as either preliminary or approved. JDs do not include determinations that a particular activity requires a DA permit.

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

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

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).

Preliminary JDs are written indications that there may be waters of the United States on a parcel or indications of the approximate location(s) of waters of the United States on a parcel. Preliminary JDs are advisory in nature and may not be appealed. Preliminary JDs include compliance orders that have an implicit JD, but no approved JD.

Proffered permit means a permit that is sent to an applicant that is in the proper format for the applicant to sign (for a standard permit) or accept (for a letter of permission). The term "initial proffered permit" as used in this part refers to the first time a permit is sent to the applicant. The initial proffered permit is not an appealable action. However, the applicant may object to the terms or conditions of the initial proffered permit and, if so, a second reconsidered permit will be sent to the applicant. The term "proffered permit" as used in this part refers to the second permit that is sent to the applicant. Such proffered permit is an appealable action.

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 approved JD, denied permit, or declined permit, the reason(s) for the appeal, and any supporting data and information. No new information may be submitted. A grant of right of entry for the Corps to the project site is a condition of the RFA to allow the RO to clarify elements of the record or to conduct field tests or sampling for purposes directly related to the appeal. A standard RFA form will be provided to the affected party with the NAP form. For appeals of decisions related to unauthorized activities a signed tolling agreement, as required by 33 CFR 326.3(e)(1)(v), must be included with the RFA, unless a signed tolling agreement has previously been furnished to the Corps district office. The affected party initiates the administrative appeal process by providing an acceptable RFA to the appropriate Corps of Engineers division office. An acceptable RFA contains all the required information and provides reasons for appeal that meets the criteria identified in § 331.5.

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.

Tolling agreement refers to a document signed by any person who appeals an approved JD associated with an unauthorized activity or applies for an after-the-fact (ATF) permit, where the application is accepted and evaluated by the Corps. The agreement states that the affected party agrees to have the statute of limitations regarding any violation associated with that approved JD or application "tolled" or temporarily set aside until one year after the final Corps decision, as defined at § 331.10. No ATF permit application or administrative appeal associated with an unauthorized activity will be accepted until a tolling agreement is furnished to the district engineer.

§ 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. With the exception of JDs, as described in this paragraph (a)(1), the division engineer may not delegate any authority or responsibility described in this part as that of the division engineer. For approved JDs only, the division engineer may delegate any authority or responsibility described in this part as that of the division engineer, including the final appeal decision. In such cases, any delegated authority must be granted to an official that is at the same or higher grade level than the grade level of the official that signed the approved JD. Regardless of any delegation of authority or responsibility for ROs or for final appeal decisions for approved JDs, 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 in paragraph (a)(1) of this section. 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 nor to make an approved JD, 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 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 those activities that are eligible for an appeal. For approved JDs, the notification must include an NAP fact sheet, an RFA form, and a basis of JD. 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 an approved JD, a permit denial, or a declined 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 an approved JD, a permit denial, or a declined 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 approved JD, 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 current regulatory criteria and associated guidance for identifying and delineating wetlands; incorrect application of the Section 404(b)(1) Guidelines (see 40 CFR Part 230); or use of incorrect data. The reasons for appealing a permit denial or a declined permit may include jurisdiction issues, whether or not a previous approved JD was appealed.

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

(1) An individual permit decision (including a letter of permission or a standard permit with special conditions), where the permit has been accepted and signed by the permittee. By signing the permit, the applicant waives all rights 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 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;

(6) Any request for the appeal of an approved JD, a denied permit, or a declined permit where the RFA has not been received by the division engineer within 60 days of the date of the NAP;

(7) A previously approved JD that has been superceded by another approved JD based on new information or data submitted by the applicant. The new approved JD is an appealable action;

(8) An approved JD associated with an individual permit where the permit has been accepted and signed by the permittee;

(9) A preliminary JD; or

(10) A JD associated with unauthorized activities except as provided in § 331.11.

§ 331.6 Filing an appeal.

(a) An affected party appealing an approved JD, 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. Flow charts illustrating the appeal process are in the Appendices of this part.

(b) In the case where an applicant objects to an initial proffered individual permit, the appeal process proceeds as follows. To initiate the appeal process regarding the terms and special 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 initial proffered individual permit to address all of the applicant's objections, the district engineer will proffer such modified permit to the applicant, enclosing an NAP fact sheet and an RFA form as well. Should the district engineer modify the initial proffered individual permit to address some, but not all, of the applicant's objections, the district engineer will proffer such modified permit to the applicant, enclosing an NAP fact sheet, RFA form, and a copy of the decision document for the project. If the district engineer does not modify the initial proffered individual permit, the district engineer will proffer the unmodified permit to

the applicant a second time, enclosing an NAP fact sheet, an RFA form, and a copy of the decision document. If the applicant still has objections, after receiving the second proffered permit (modified or unmodified), the applicant may decline such proffered permit; this declined 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 an initial proffered individual permit is shown in Appendix B of this part. A flow chart of the appeal process for a permit denial or a declined permit (*i.e.*, a proffered permit declined after the Corps decision on the applicant's objections to the initial proffered permit) is shown in Appendix A of this part. A flow chart of the appeal process for an approved jurisdictional determination is shown in Appendix C of this part. A flow chart of the process for when an unacceptable request for appeal is returned to an applicant is shown in Appendix D of this part.

(c) An approved JD will be reconsidered by the district engineer if the affected party submits new information or data to the district engineer within 60 days of the date of the NAP. (An RFA that contains new information will either be returned to the district engineer for reconsideration or the appeal will be processed if the applicant withdraws the new information.) The district engineer has 60 days from the receipt of such new information or data to review the new information or data, consider whether or not that information changes the previously approved JD, and, reissue the approved JD or issue a new approved JD. The reconsideration of an approved JD by the district engineer does not commence the administrative appeal process. The affected party may appeal the district engineer's reissued or new approved JD.

(d) 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. The district engineer may delegate signature authority for JDs, including approved JDs.

(e) Affected parties may appeal approved JDs where the determination was dated after March 28, 2000, but may not appeal approved JDs dated on or before March 28, 2000. The Corps will begin processing JD appeals no later than May 30, 2000. All appeals must meet the criteria set forth in § 331.5. If work is authorized by either general or individual permit, and the affected party wishes to request an appeal of the JD associated with the general permit authorization or individual permit or the special conditions of the proffered individual permit, the appeal must be received by the Corps and the appeal process concluded prior to the commencement of any work in waters of the United States and prior to any work that could alter the hydrology of waters of the United States.

§ 331.7 Review procedures.

(a) *General.* The administrative appeal process for approved JDs, permit denials, and declined 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 in making 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 approved JDs, permit denials, or declined permits.* Upon receipt of an RFA, the RO shall review the RFA to determine whether the RFA is acceptable (*i.e.*, complete and meets the criteria for appeal). If the RFA is acceptable, the RO will so notify the appellant in writing within 30 days of the receipt of the acceptable RFA. If the RO determines that the RFA is not complete the RO will so notify the appellant in writing within 30 days of the receipt of the RFA detailing the reason(s) why the RFA is not complete. 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 or the RO's letter. The revised RFA must be received by the division engineer within 30 days of the date of the Corps letter indicating that the initial RFA is not acceptable. If the RO determines that the revised RFA is still not complete, the RO will again so notify the appellant in writing within 30 days of the receipt of the RFA detailing the reason(s) why the RFA is not complete. If the division engineer determines that the revised RFA is still not acceptable, 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 an acceptable RFA, the RO should determine if a site investigation is needed to clarify the administrative record. The RO should normally conduct any such site investigation within 60 days of receipt of an acceptable 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 any site investigation at the earliest practicable time acceptable to both the RO and the appellant. The RO, the appellant, the appellant's agent(s) and the Corps district staff are authorized participants at any 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. For permit denials and declined permit appeals, any site investigation should be scheduled in conjunction with the appeal review conference, where practicable. If extenuating circumstances occur at the site that preclude the appellant and/or the RO from conducting any required site visit within 60 days, the RO may extend the time period for review. Examples of extenuating circumstances may include seasonal hydrologic conditions, winter weather, or disturbed site conditions. The site visit must be conducted as soon as practicable as allowed by the extenuating circumstances, however, in no case shall any site visit extend the total appeals process beyond twelve months from the date of receipt of the RFA. If any site visit delay is necessary, the RO will notify the appellant in writing.

(d) *Approved JD appeal meeting.* The RO may schedule an informal meeting moderated by the RO or conference call with the appellant, his authorized agent, or both, and appropriate Corps regulatory personnel to review and discuss issues directly related to the appeal for the purpose of clarifying the administrative record. If a meeting is held, the appellant will bear his own

costs associated with necessary arrangements, exhibits, travel, and representatives. The approved JD appeal meeting should be held at a location of reasonable convenience to the appellant and near the site where the approved JD was conducted.

(e) *Permit denials and declined permits appeal conference.* Conferences held in accordance with this part 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 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.

(f) *Basis of decision and communication with the RO.* The appeal of an approved JD, a permit denial, or a declined permit is limited to the information contained in the administrative record by the date of the NAP for the application or approved JD, the proceedings of the appeal conference, and any relevant information gathered by the RO as described in § 331.5. 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.

(g) *Applicability of appeal decisions.* Because a decision to determine geographic jurisdiction, deny a permit, or condition a permit depends on the facts, circumstances, and physical conditions particular to the specific project and/or 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 jurisdictional determination or 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 Division Engineer will make a final decision on the merits of the appeal at the earliest practicable time, in accordance with the following time limits. 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 RFA is acceptable. The Corps will notify the appellant accordingly within 30 days of the receipt of the RFA in accordance with § 331.7(b). If the Corps determines that the RFA is acceptable, the RO will immediately request the administrative record from the district engineer. The division engineer will normally make a final decision on the merits of the appeal within 90 days of the receipt of an acceptable RFA unless any site visit is delayed pursuant to § 331.7(c). In such case, the RO will complete the appeal review and the division engineer will make a final appeal decision within 30 days of the site visit. In no case will a site visit delay extend the total appeal process beyond twelve months from the date of receipt of an acceptable RFA.

§ 331.9 Final appeal decision.

(a) In accordance with the authorities contained in § 331.3(a), 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 applicant 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, confirming the district engineer's initial decision, and sending the permit denial or the proffered permit for signature to the appellant; 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. For permit decisions, 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 permit decision. Nothing in this part precludes the agencies' authorities pursuant to Section 404(q) of the Clean Water Act.

§ 331.11 Unauthorized activities.

Approved JDs, permit denials, and declined permits associated with after-the-fact permit applications are appealable actions for the purposes of this part. If the Corps accepts an after-the-fact permit application, an administrative appeal of an approved JD, permit denial, or declined permit 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 an approved JD 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 an approved JD, if the district engineer determines that the interests of justice, fairness, and administrative efficiency would be served thereby. Furthermore, no such appeal will be accepted if the unauthorized activity is the subject of a referral to the Department of Justice or the EPA, or for which the EPA has the lead enforcement authority or has requested lead enforcement authority.

(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 appeals an approved JD associated with an unauthorized activity or 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 approved JD or application is tolled until one year after the final Corps decision, as defined at § 331.10. Moreover, the recipient of an approved JD associated with an unauthorized activity or 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 administrative appeal associated with an unauthorized activity or after-the-fact permit application will be accepted until such signed tolling

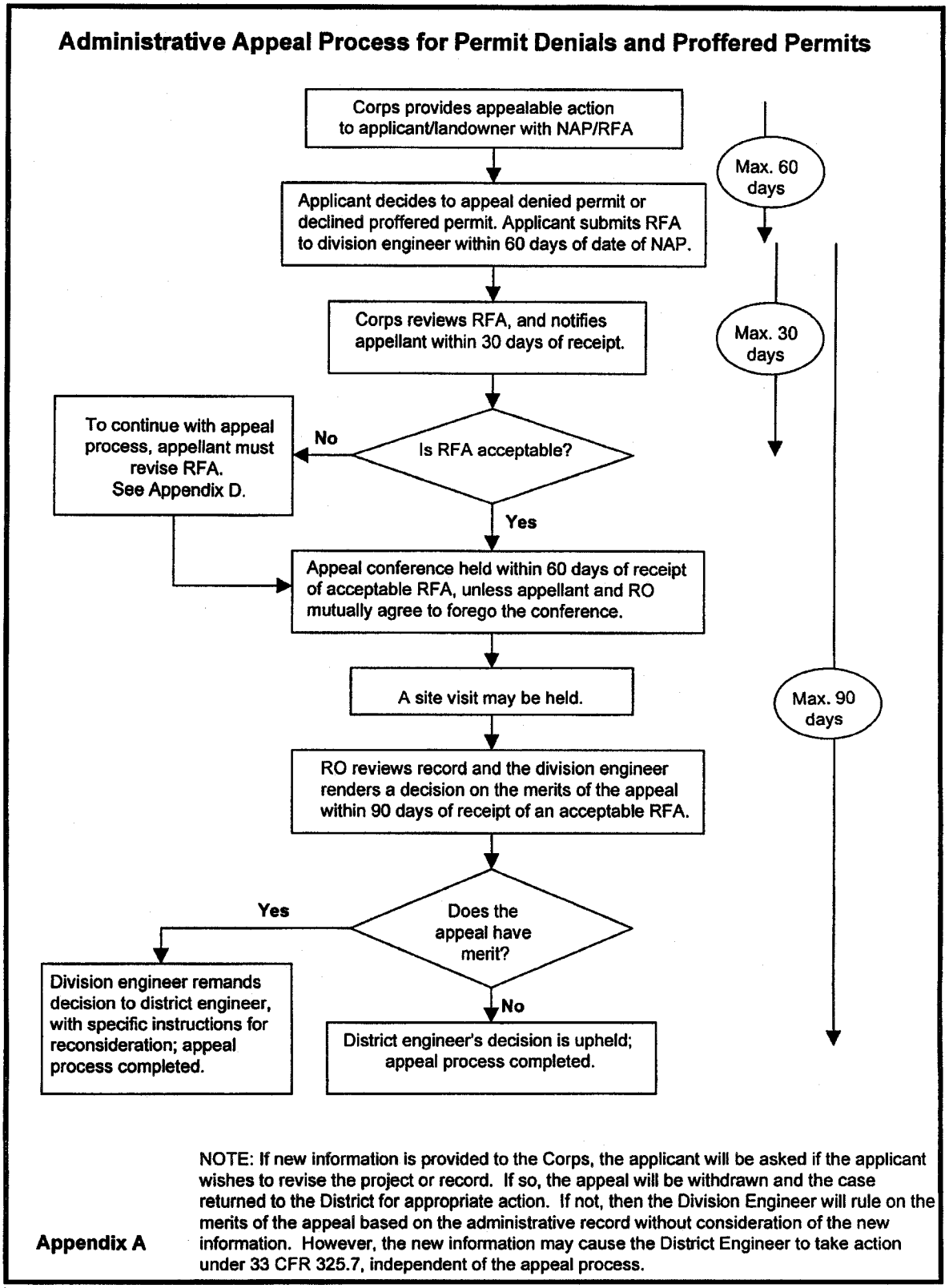
agreement is furnished to the district engineer.

§ 331.12 Exhaustion of administrative remedies.

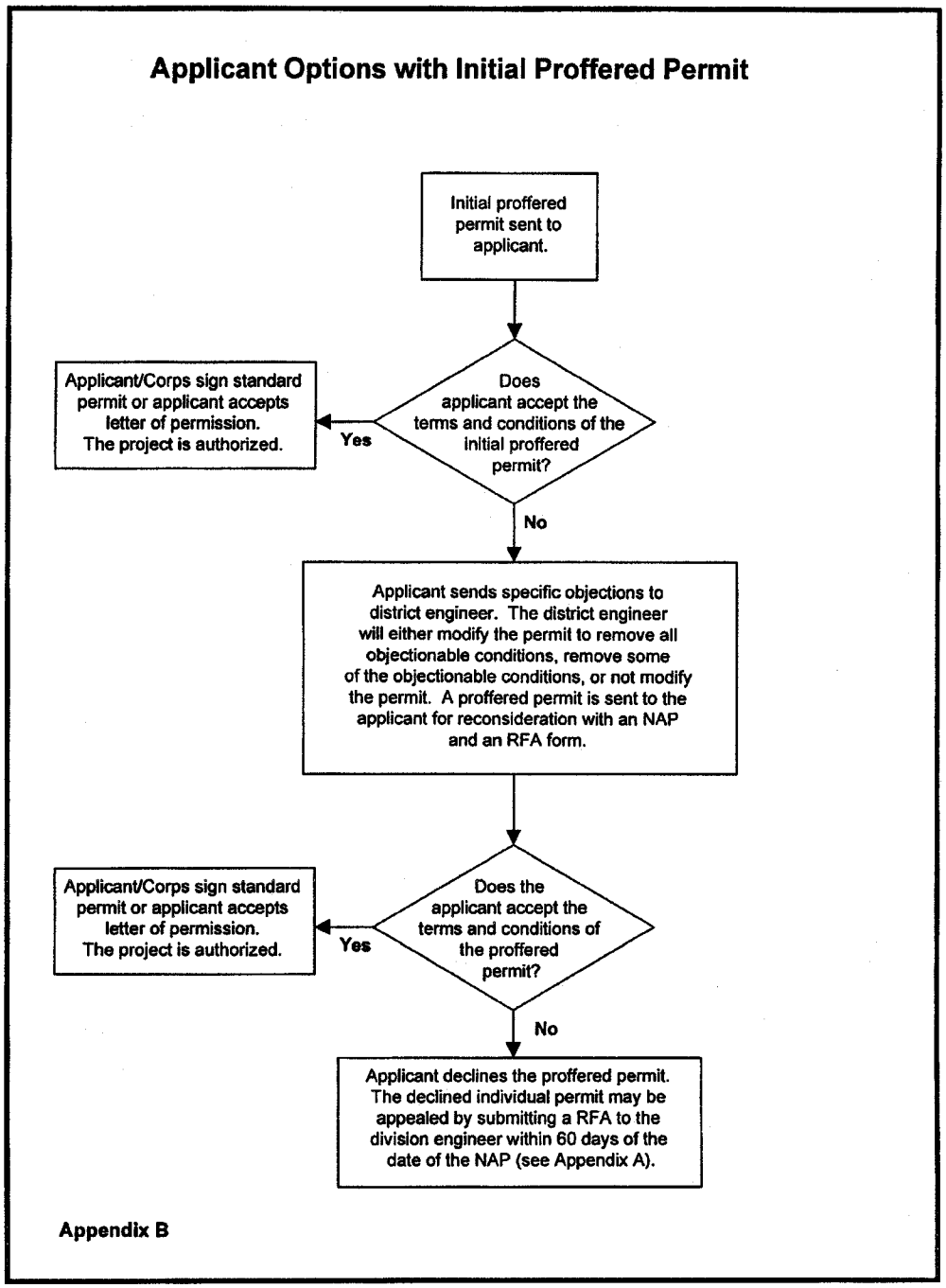
No affected party may file a legal action in the Federal courts based on a permit denial or a proffered permit until after a final Corps decision has been made and the appellant has exhausted all applicable administrative remedies under this part. The appellant is considered to have exhausted all administrative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

BILLING CODE 3710–92–P

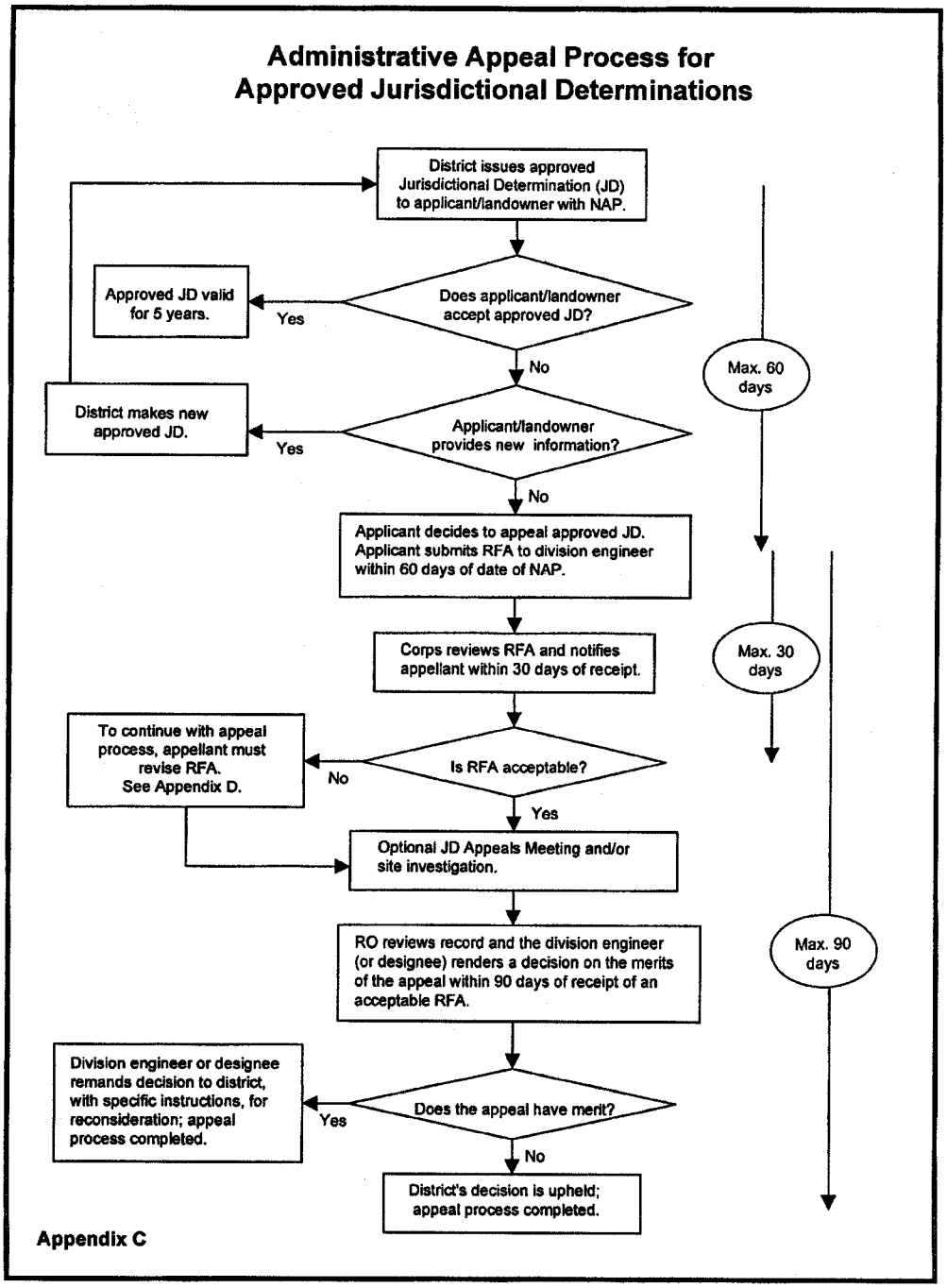
Appendix A to Part 331—Administrative Appeal Process for Permit Denials and Proffered Permits



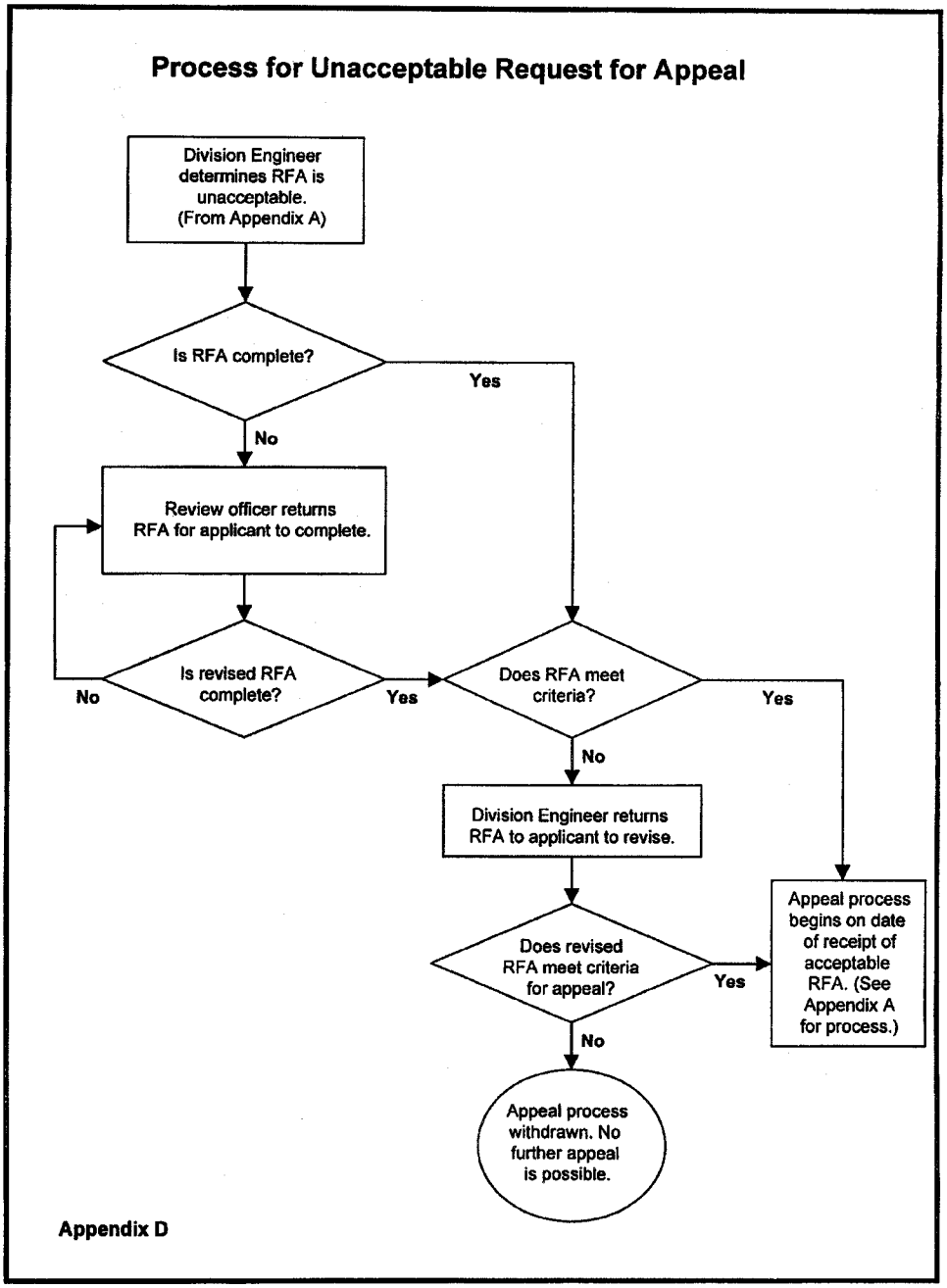
Appendix B to Part 331—Applicant Options With Initial Proffered Permit



Appendix C to Part 331—Administrative Appeal Process for Approved Jurisdictional Determinations



Appendix D to Part 331—Process for Unacceptable Request for Appeal



[FR Doc. 00–7439 Filed 3–27–00; 8:45 am]
BILLING CODE 3710–92–C