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permit situation following a consideration of whether the violation being resolved was knowing or intentional and other indications of the need for a penalty. For example, where an unauthorized fill meets the terms and conditions of NWP 13, the DE can consider the appropriateness of allowing the residual fill to remain, in situations where said fill would normally have been permitted under NWP 13. A knowing, intentional, willful violation should be the subject of an enforcement action leading to a penalty, rather than an after-the-fact authorization. Use of after-the-fact NWP authorization must be consistent with the terms of the Army/EPA Memorandum of Agreement on Enforcement. Copies are available from each district engineer.

PART 331—ADMINISTRATIVE APPEAL PROCESS

§ 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.

Denied 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 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 “talled” 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
§ 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 NAP 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 Corps policy guidance; omission of material fact; incorrect application of the current regulatory criteria and associated guidance for identifying and...
§ 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, 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 RFA is not acceptable, the RO will so notify the appellant in writing within 30 days of the receipt of the unacceptable RFA. If the RO determines that the RFA is not acceptable, 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. 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 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 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
§331.7 their positions. The conference will be governed by the following guidelines:

(1) **Notification.** The RO will set a
date, time, and location for the con-
ference. The RO will notify the appel-
ellant 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 fa-
cilities and that is reasonably conven-
ient to the appellant, preferably in the
proximity of the project site. Public fa-
cilities available at no expense are pre-
ferred. If a free facility is not avail-
able, the Corps will pay the cost for the
facility.

(3) **Participants.** The RO, the appel-
ellant, the appellant's agent(s) and the
Corps district staff are authorized par-
ticipants 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 jus-
tifiable 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 proce-
dures for conducting the conference.
The RO will conduct a fair and impar-
tial conference, hear and fully consider
all relevant issues and facts, and seek
clarification of any issues of the ad-
ministrative record, as needed, to allow
the division engineer to make a final
determination on the merits of the ap-
peal. 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 op-
portunity to present the appellant's
views regarding the subject permit de-
nial 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 administra-
tive record may be discussed during the
conference, but the discussion should
be focused on relevant issues needed to
address the reasons for appeal con-
tained in the RFA. The RO may ques-
tion the appellant or the Corps rep-
resentatives with respect to interpreta-
tion of particular issues in the record,
or otherwise to clarify elements of the
administrative record. Issues not iden-
tified 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 con-
ference.** 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 con-
ference, the RO will write a memo-
randum for the record (MFR) summa-
rizing 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 per-
mit is limited to the information con-
tained 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 in-
formation gathered by the RO as de-
scribed in §331.5. Neither the appellant
nor the Corps may present new infor-
mation not already contained in the
administrative record, but both parties
may interpret, clarify or explain issues

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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 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 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 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
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§ 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.

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.
APPENDIX A TO PART 331—ADMINISTRATIVE APPEAL PROCESS FOR PERMIT DENIALS AND PROFFERED PERMITS

Administrative Appeal Process for Permit Denials and Proffered Permits

- Corps provides appealable action to applicant/landowner with NAP/RFA.
  - Applicant decides to appeal denied permit or declined proffered permit. Applicant submits RFA to division engineer within 60 days of date of NAP.
  - Corps reviews RFA, and notifies appellant within 30 days of receipt.
  - To continue with appeal process, appellant must revise RFA. See Appendix D.
  - Is RFA acceptable?
    - No
      - Appeal conference held within 60 days of receipt of acceptable RFA, unless appellant and RO mutually agree to forego the conference.
      - A site visit may be held.
    - Yes
      - RO reviews record and the division engineer renders a decision on the merits of the appeal within 90 days of receipt of an acceptable RFA.
  - Does the appeal have merit?
    - Yes
      - Division engineer remands decision to district engineer, with specific instructions for reconsideration; appeal process completed.
    - No
      - District engineer's decision is upheld; appeal process completed.

NOTE: If new information is provided to the Corps, the applicant will be asked if the applicant wishes to revise the project or record. If so, the appeal will be withdrawn and the case returned to the District for appropriate action. If not, then the Division Engineer will rule on the merits of the appeal based on the administrative record without consideration of the new information. However, the new information may cause the District Engineer to take action under 33 CFR 325.7, independent of the appeal process.
Applicant Options with Initial Proffered Permit

Initial proffered permit sent to applicant.

Does applicant accept the terms and conditions of the initial proffered permit?

Yes

Applicant sends specific objections to district engineer. The district engineer will either modify the permit to remove all objectionable conditions, remove some of the objectionable conditions, or not modify the permit. A proffered permit is sent to the applicant for reconsideration with an NAP and an RFA form.

No

Applicant/Corps sign standard permit or applicant accepts letter of permission. The project is authorized.

Does the applicant accept the terms and conditions of the proffered permit?

Yes

Applicant/Corps sign standard permit or applicant accepts letter of permission. The project is authorized.

No

Applicant declines the proffered permit. The declined individual permit may be appealed by submitting a RFA to the division engineer within 60 days of the date of the NAP (see Appendix A).
Appendix C

Administrative Appeal Process for Approved Jurisdictional Determinations

District issues approved Jurisdictional Determination (JD) to applicant/landowner with NAP.

Approved JD valid for 5 years.

Yes

District makes new approved JD.

No

Does applicant/landowner accept approved JD?

Applicant/landowner provides new information?

 Applicant decides to appeal approved JD. Applicant submits RFA to division engineer within 60 days of date of NAP.

Applicant provides new RFA within 30 days of receipt.

Corps reviews RFA and notifies applicant within 30 days of receipt.

To continue with appeal process, applicant must revise RFA. See Appendix D.

Is RFA acceptable?

Yes

Optional JD Appeals Meeting and/or site investigation.

RO reviews record and the division engineer (or designee) renders a decision on the merits of the appeal within 90 days of receipt of an acceptable RFA.

Does the appeal have merit?

Yes

District's decision is upheld; appeal process completed.

No

Division engineer or designee remands decision to district, with specific instructions, for reconsideration; appeal process completed.

Max. 60 days

Max. 30 days

Max. 90 days
APPENDIX D TO PART 331—PROCESS FOR UNACCEPTABLE REQUEST FOR APPEAL

Process for Unacceptable Request for Appeal

Division Engineer determines RFA is unacceptable. (From Appendix A)

Is RFA complete?

Yes

Review officer returns RFA to applicant to complete.

No

Is revised RFA complete?

Yes

Does RFA meet criteria?

No

Division Engineer returns RFA to applicant to revise.

Yes

Appeal process begins on date of receipt of acceptable RFA. (See Appendix A for process.)

Does revised RFA meet criteria for appeal?

Yes

Appeal process withdrawn. No further appeal is possible.

No

Appeal process begins on date of receipt of acceptable RFA. (See Appendix A for process.)