

(7) Cases requiring action pursuant to paragraph (e) of this section.

(e) *Legal option not available.* In cases where the local U.S. Attorney declines to take legal action, it would be appropriate for the district engineer to close the enforcement case record unless he believes that the case warrants special attention. In that situation, he is encouraged to forward a litigation report to the Office, Chief of Engineers, ATTN: DAEN-CCK, for direct coordination through the Office of the Assistant Secretary of the Army (Civil Works) with the Department of Justice. Further, the case record should not be closed if the district engineer anticipates that further administrative enforcement actions, taken in accordance with the procedures prescribed in this part, will identify remedial measures which, if not complied with by the parties responsible for the violation, will result in appropriate legal action at a later date.

**§ 326.6 Class I administrative penalties.**

(a) *Introduction.* (1) This section sets forth procedures for initiation and administration of Class I administrative penalty orders under section 309(g) of the Clean Water Act, and section 205 of the National Fishing Enhancement Act. Under section 309(g)(2)(A) of the Clean Water Act, Class I civil penalties may not exceed \$11,000 per violation, except that the maximum amount of any Class I civil penalty shall not exceed \$27,500. Under section 205(e) of the National Fishing Enhancement Act, penalties for violations of permits issued in accordance with that Act shall not exceed \$11,000 for each violation.

(2) These procedures supplement the existing enforcement procedures at §§ 326.1 through 326.5. However, as a matter of Corps enforcement discretion once the Corps decides to proceed with an administrative penalty under these procedures it shall not subsequently pursue judicial action pursuant to § 326.5. Therefore, an administrative penalty should not be pursued if a subsequent judicial action for civil penalties is desired. An administrative civil penalty may be pursued in conjunction with a compliance order; re-

quest for restoration and/or request for mitigation issued under § 326.4.

(3) *Definitions.* For the purposes of this section of the regulation:

(i) *Corps* means the Secretary of the Army, acting through the U.S. Army Corps of Engineers, with respect to the matters covered by this regulation.

(ii) *Interested person outside the Corps* includes the permittee, any person who filed written comments on the proposed penalty order, and any other person not employed by the Corps with an interest in the subject of proposed penalty order, and any attorney of record for those persons.

(iii) *Interested Corps staff* means those Corps employees, whether temporary or permanent, who may investigate, litigate, or present evidence, arguments, or the position of the Corps in the hearing or who participated in the preparation, investigation or deliberations concerning the proposed penalty order, including any employee, contractor, or consultant who may be called as a witness.

(iv) *Permittee* means the person to whom the Corps issued a permit under section 404 of the Clean Water Act, (or section 10 of the Rivers and Harbors Act for an Artificial Reef) the conditions and limitations of which permit have allegedly been violated.

(v) *Presiding Officer* means a member of Corps Counsel staff or any other qualified person designated by the District Engineer (DE), to hold a hearing on a proposed administrative civil penalty order (hereinafter referred to as "proposed order") in accordance with the rules set forth in this regulation and to make such recommendations to the DE as prescribed in this regulation.

(vi) *Ex parte communication* means any communication, written or oral, relating to the merits of the proceeding, between the Presiding Officer and an interested person outside the Corps or the interested Corps staff, which was not originally filed or stated in the administrative record or in the hearing. Such communication is not an "ex parte communication" if all parties have received prior written notice of the proposed communication and have been given the opportunity to participate herein.

(b) *Initiation of action.* (1) If the DE or a delegatee of the DE finds that a recipient of a Department of the Army permit (hereinafter referred to as "the permittee") has violated any permit condition or limitation contained in that permit, the DE is authorized to prepare and process a proposed order in accordance with these procedures. The proposed order shall specify the amount of the penalty which the permittee may be assessed and shall describe with reasonable specificity the nature of the violation.

(2) The permittee will be provided actual notice, in writing, of the DE's proposal to issue an administrative civil penalty and will be advised of the right to request a hearing and to present evidence on the alleged violation. Notice to the permittee will be provided by certified mail, return receipt requested, or other notice, at the discretion of the DE when he determines justice so requires. This notice will be accompanied by a copy of the proposed order, and will include the following information:

(i) A description of the alleged violation and copies of the applicable law and regulations;

(ii) An explanation of the authority to initiate the proceeding;

(iii) An explanation, in general terms, of the procedure for assessing civil penalties, including opportunities for public participation;

(iv) A statement of the amount of the penalty that is proposed and a statement of the maximum amount of the penalty which the DE is authorized to assess for the violations alleged;

(v) A statement that the permittee may within 30 calendar days of receipt of the notice provided under this subparagraph, request a hearing prior to issuance of any final order. Further, that the permittee must request a hearing within 30 calendar days of receipt of the notice provided under this subparagraph in order to be entitled to receive such a hearing;

(vi) The name and address of the person to whom the permittee must send a request for hearing;

(vii) Notification that the DE may issue the final order on or after 30 calendar days following receipt of the notice provided under these rules, if the

permittee does not request a hearing; and

(viii) An explanation that any final order issued under this section shall become effective 30 calendar days following its issuance unless a petition to set aside the order and to hold a hearing is filed by a person who commented on the proposed order and such petition is granted or an appeal is taken under section 309(g)(8) of the Clean Water Act.

(3) At the same time that actual notice is provided to the permittee, the DE shall give public notice of the proposed order, and provide reasonable opportunity for public comment on the proposed order, prior to issuing a final order assessing an administrative civil penalty. Procedures for giving public notice and providing the opportunity for public comment are contained in §326.6(c).

(4) At the same time that actual notice is provided to the permittee, the DE shall provide actual notice, in writing, to the appropriate state agency for the state in which the violation occurred. Procedures for providing actual notice to and consulting with the appropriate state agency are contained in §326.6(d).

(c) *Public notice and comment.* (1) At the same time the permittee and the appropriate state agency are provided actual notice, the DE shall provide public notice of and a reasonable opportunity to comment on the DE's proposal to issue an administrative civil penalty against the permittee.

(2) A 30 day public comment period shall be provided. Any person may submit written comments on the proposed administrative penalty order. The DE shall include all written comments in an administrative record relating to the proposed order. Any person who comments on a proposed order shall be given notice of any hearing held on the proposed order. Such persons shall have a reasonable opportunity to be heard and to present evidence in such hearings.

(3) If no hearing is requested by the permittee, any person who has submitted comments on the proposed order shall be given notice by the DE of any final order issued, and will be

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given 30 calendar days in which to petition the DE to set aside the order and to provide a hearing on the penalty. The DE shall set aside the order and provide a hearing in accordance with these rules if the evidence presented by the commenter in support of the commenter's petition for a hearing is material and was not considered when the order was issued. If the DE denies a hearing, the DE shall provide notice to the commenter filing the petition for the hearing, together with the reasons for the denial. Notice of the denial and the reasons for the denial shall be published in the FEDERAL REGISTER by the DE.

(4) The DE shall give public notice by mailing a copy of the information listed in paragraph (c)(5), of this section to:

- (i) Any person who requests notice;
- (ii) Other persons on a mailing list developed to include some or all of the following sources:

(A) Persons who request in writing to be on the list;

(B) Persons on "area lists" developed from lists of participants in past similar proceedings in that area, including hearings or other actions related to section 404 permit issuance as required by § 325.3(d)(1). The DE may update the mailing list from time to time by requesting written indication of continued interest from those listed. The DE may delete from the list the name of any person who fails to respond to such a request.

(5) All public notices under this subpart shall contain at a minimum the information provided to the permittee as described in § 326.6(b)(2) and:

- (i) A statement of the opportunity to submit written comments on the proposed order and the deadline for submission of such comments;
- (ii) Any procedures through which the public may comment on or participate in proceedings to reach a final decision on the order;
- (iii) The location of the administrative record referenced in § 326.6(e), the times at which the administrative record will be available for public inspection, and a statement that all information submitted by the permittee and persons commenting on the proposed order is available as part of the

administrative record, subject to provisions of law restricting the public disclosure of confidential information.

(d) *State consultation.* (1) At the same time that the permittee is provided actual notice, the DE shall send the appropriate state agency written notice of proposal to issue an administrative civil penalty order. This notice will include the same information required pursuant to § 326.6(c)(5).

(2) For the purposes of this regulation, the appropriate State agency will be the agency administering the 401 certification program, unless another state agency is agreed to by the District and the respective state through formal/informal agreement with the state.

(3) The appropriate state agency will be provided the same opportunity to comment on the proposed order and participate in any hearing that is provided pursuant to § 326.6(c).

(e) *Availability of the administrative record.* (1) At any time after the public notice of a proposed penalty order is given under § 326.6(c), the DE shall make available the administrative record at reasonable times for inspection and copying by any interested person, subject to provisions of law restricting the public disclosure of confidential information. Any person requesting copies of the administrative record or portions of the administrative record may be required by the DE to pay reasonable charges for reproducing the information requested.

(2) The administrative record shall include the following:

- (i) Documentation relied on by the DE to support the violations alleged in the proposed penalty order with a summary of violations, if a summary has been prepared;
- (ii) Proposed penalty order or assessment notice;
- (iii) Public notice of the proposed order with evidence of notice to the permittee and to the public;
- (iv) Comments by the permittee and/or the public on the proposed penalty order, including any requests for a hearing;
- (v) All orders or notices of the Presiding Officer;
- (vi) Subpoenas issued, if any, for the attendance and testimony of witnesses

and the production of relevant papers, books, or documents in connection with any hearings;

(vii) All submittals or responses of any persons or comments to the proceeding, including exhibits, if any;

(viii) A complete and accurate record or transcription of any hearing;

(ix) The recommended decision of the Presiding Officer and final decision and/or order of the Corps issued by the DE; and

(x) Any other appropriate documents related to the administrative proceeding;

(f) *Counsel.* A permittee may be represented at all stages of the proceeding by counsel. After receiving notification that a permittee or any other party or commenter is represented by counsel, the Presiding Officer and DE shall direct all further communications to that counsel.

(g) *Opportunity for hearing.* (1) The permittee may request a hearing and may provide written comments on the proposed administrative penalty order at any time within 30 calendar days after receipt of the notice set forth in §326.6(b)(2). The permittee must request the hearing in writing, specifying in summary form the factual and legal issues which are in dispute and the specific factual and legal grounds for the permittee's defense.

(2) The permittee waives the right to a hearing to present evidence on the alleged violation or violations if the permittee does not submit the request for the hearing to the official designated in the notice of the proposed order within 30 calendar days of receipt of the notice. The DE shall determine the date of receipt of notice by permittee's signed and dated return receipt or such other evidence that constitutes proof of actual notice on a certain date.

(3) The DE shall promptly schedule requested hearings and provide reasonable notice of the hearing schedule to all participants, except that no hearing shall be scheduled prior to the end of the thirty day public comment period provided in §326.6(c)(2). The DE may grant any delays or continuances necessary or desirable to resolve the case fairly.

(4) The hearing shall be held at the district office or a location chosen by

the DE, except the permittee may request in writing upon a showing of good cause that the hearing be held at an alternative location. Action on such request is at the discretion of the DE.

(h) *Hearing.* (1) Hearings shall afford permittees with an opportunity to present evidence on alleged violations and shall be informal, adjudicatory hearings and shall not be subject to section 554 or 556 of the Administrative Procedure Act. Permittees may present evidence either orally or in written form in accordance with the hearing procedures specified in §326.6(i).

(2) The DE shall give written notice of any hearing to be held under these rules to any person who commented on the proposed administrative penalty order under §326.6(c). This notice shall specify a reasonable time prior to the hearing within which the commenter may request an opportunity to be heard and to present oral evidence or to make comments in writing in any such hearing. The notice shall require that any such request specify the facts or issues which the commenter wishes to address. Any commenter who files comments pursuant to §326.6(c)(2) shall have a right to be heard and to present evidence at the hearing in conformance with these procedures.

(3) The DE shall select a member of the Corps counsel staff or other qualified person to serve as Presiding Officer of the hearing. The Presiding Officer shall exercise no other responsibility, direct or supervisory, for the investigation or prosecution of any case before him. The Presiding Officer shall conduct hearings as specified by these rules and make a recommended decision to the DE.

(4) The Presiding Officer shall consider each case on the basis of the evidence presented, and must have no prior connection with the case. The Presiding Officer is solely responsible for the recommended decision in each case.

(5) *Ex Parte Communications.* (i) No interested person outside the Corps or member of the interested Corps staff shall make, or knowingly cause to be made, any ex parte communication on the merits of the proceeding.

(ii) The Presiding Officer shall not make, or knowingly cause to be made,

any ex parte communication on the proceeding to any interested person outside the Corps or to any member of the interested Corps staff.

(iii) The DE may replace the Presiding Officer in any proceeding in which it is demonstrated to the DE's satisfaction that the Presiding Officer has engaged in prohibited ex parte communications to the prejudice of any participant.

(iv) Whenever an ex parte communication in violation of this section is received by the Presiding Officer or made known to the Presiding Officer, the Presiding Officer shall immediately notify all participants in the proceeding of the circumstances and substance of the communication and may require the person who made the communication or caused it to be made, or the party whose representative made the communication or caused it to be made, to the extent consistent with justice and the policies of the Clean Water Act, to show cause why that person or party's claim or interest in the proceedings should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(v) The prohibitions of this paragraph apply upon designation of the Presiding Officer and terminate on the date of final action or the final order.

(i) *Hearing Procedures.* (1) The Presiding Officer shall conduct a fair and impartial proceeding in which the participants are given a reasonable opportunity to present evidence.

(2) The Presiding Officer may subpoena witnesses and issue subpoenas for documents pursuant to the provisions of the Clean Water Act.

(3) The Presiding Officer shall provide interested parties a reasonable opportunity to be heard and to present evidence. Interested parties include the permittee, any person who filed a request to participate under 33 CFR 326.6(c), and any other person attending the hearing. The Presiding Officer may establish reasonable time limits for oral testimony.

(4) The permittee may not challenge the permit condition or limitation which is the subject matter of the administrative penalty order.

(5) Prior to the commencement of the hearing, the DE shall provide to the Presiding Officer the complete administrative record as of that date. During the hearing, the DE, or an authorized representative of the DE may summarize the basis for the proposed administrative order. Thereafter, the administrative record shall be admitted into evidence and the Presiding Officer shall maintain the administrative record of the proceedings and shall include in that record all documentary evidence, written statements, correspondence, the record of hearing, and any other relevant matter.

(6) The Presiding Officer shall cause a tape recording, written transcript or other permanent, verbatim record of the hearing to be made, which shall be included in the administrative record, and shall, upon written request, be made available, for inspection or copying, to the permittee or any person, subject to provisions of law restricting the public disclosure of confidential information. Any person making a request may be required to pay reasonable charges for copies of the administrative record or portions thereof.

(7) In receiving evidence, the Presiding Officer is not bound by strict rules of evidence. The Presiding Officer may determine the weight to be accorded the evidence.

(8) The permittee has the right to examine, and to respond to the administrative record. The permittee may offer into evidence, in written form or through oral testimony, a response to the administrative record including, any facts, statements, explanations, documents, testimony, or other exculpatory items which bear on any appropriate issues. The Presiding Officer may question the permittee and require the authentication of any written exhibit or statement. The Presiding Officer may exclude any repetitive or irrelevant matter.

(9) At the close of the permittee's presentation of evidence, the Presiding Officer should allow the introduction of rebuttal evidence. The Presiding Officer may allow the permittee to respond to any such rebuttal evidence submitted and to cross-examine any witness.

(10) The Presiding Officer may take official notice of matters that are not reasonably in dispute and are commonly known in the community or are ascertainable from readily available sources of known accuracy. Prior to taking official notice of a matter, the Presiding Officer shall give the Corps and the permittee an opportunity to show why such notice should not be taken. In any case in which official notice is taken, the Presiding Officer shall place a written statement of the matters as to which such notice was taken in the record, including the basis for such notice and a statement that the Corps or permittee consented to such notice being taken or a summary of the objections of the Corps or the permittee.

(11) After all evidence has been presented, any participant may present argument on any relevant issue, subject to reasonable time limitations set at the discretion of the Presiding Officer.

(12) The hearing record shall remain open for a period of 10 business days from the date of the hearing so that the permittee or any person who has submitted comments on the proposed order may examine and submit responses for the record.

(13) At the close of this 10 business day period, the Presiding Officer may allow the introduction of rebuttal evidence. The Presiding Officer may hold the record open for an additional 10 business days to allow the presentation of such rebuttal evidence.

(j) *The decision.* (1) Within a reasonable time following the close of the hearing and receipt of any statements following the hearing and after consultation with the state pursuant to §326.6(d), the Presiding Officer shall forward a recommended decision accompanied by a written statement of reasons to the DE. The decision shall recommend that the DE withdraw, issue, or modify and issue the proposed order as a final order. The recommended decision shall be based on a preponderance of the evidence in the administrative record. If the Presiding Officer finds that there is not a preponderance of evidence in the record to support the penalty or the amount of the penalty in a proposed order, the

Presiding Officer may recommend that the order be withdrawn or modified and then issued on terms that are supported by a preponderance of evidence on the record. The Presiding Officer also shall make the complete administrative record available to the DE for review.

(2) The Presiding Officer's recommended decision to the DE shall become part of the administrative record and shall be made available to the parties to the proceeding at the time the DE's decision is released pursuant to §326.6(j)(5). The Presiding Officer's recommended decision shall not become part of the administrative record until the DE's final decision is issued, and shall not be made available to the permittee or public prior to that time.

(3) The rules applicable to Presiding Officers under §326.6(h)(5) regarding ex parte communications are also applicable to the DE and to any person who advises the DE on the decision or the order, except that communications between the DE and the Presiding Officer do not constitute ex parte communications, nor do communications between the DE and his staff prior to issuance of the proposed order.

(4) The DE may request additional information on specified issues from the participants, in whatever form the DE designates, giving all participants a fair opportunity to be heard on such additional matters. The DE shall include this additional information in the administrative record.

(5) Within a reasonable time following receipt of the Presiding Officer's recommended decision, the DE shall withdraw, issue, or modify and issue the proposed order as a final order. The DE's decision shall be based on a preponderance of the evidence in the administrative record, shall consider the penalty factors set out in section 309(g)(3) of the CWA, shall be in writing, shall include a clear and concise statement of reasons for the decision, and shall include any final order assessing a penalty. The DE's decision, once issued, shall constitute final Corps action for purposes of judicial review.

(6) The DE shall issue the final order by sending the order, or written notice of its withdrawal, to the permittee by

certified mail. Issuance of the order under this subparagraph constitutes final Corps action for purposes of judicial review.

(7) The DE shall provide written notice of the issuance, modification and issuance, or withdrawal of the proposed order to every person who submitted written comments on the proposed order.

(8) The notice shall include a statement of the right to judicial review and of the procedures and deadlines for obtaining judicial review. The notice shall also note the right of a commenter to petition for a hearing pursuant to 33 CFR 326.6(c)(3) if no hearing was previously held.

(k) *Effective date of order.* (1) Any final order issued under this subpart shall become effective 30 calendar days following its issuance unless an appeal is taken pursuant to section 309(g)(8) of the Clean Water Act, or in the case where no hearing was held prior to the final order, and a petition for hearing is filed by a prior commenter.

(2) If a petition for hearing is received within 30 days after the final order is issued, the DE shall:

(i) Review the evidence presented by the petitioner.

(ii) If the evidence is material and was not considered in the issuance of the order, the DE shall immediately set aside the final order and schedule a hearing. In that case, a hearing will be held, a new recommendation will be made by the Presiding Officer to the DE and a new final decision issued by the DE.

(iii) If the DE denies a hearing under this subparagraph, the DE shall provide to the petitioner, and publish in the FEDERAL REGISTER, notice of, and the reasons for, such denial.

(1) *Judicial review.* (1) Any permittee against whom a final order assessing a civil penalty under these regulations or any person who provided written comments on a proposed order may obtain judicial review of the final order.

(2) In order to obtain judicial review, the permittee or commenter must file a notice of appeal in the United States District Court for either the District of Columbia, or the district in which the violation was alleged to have occurred,

within 30 calendar days after the date of issuance of the final order.

(3) Simultaneously with the filing of the notice of appeal, the permittee or commenter must send a copy of such notice by certified mail to the DE and the Attorney General.

[54 FR 50709, Dec. 8, 1989, as amended at 69 FR 35518, June 25, 2004]

## PART 327—PUBLIC HEARINGS

### Sec.

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AUTHORITY: 33 U.S.C. 1344; 33 U.S.C. 1413.

SOURCE: 51 FR 41249, Nov. 13, 1986, unless otherwise noted.

### §327.1 Purpose.

This regulation prescribes the policy, practice and procedures to be followed by the U.S. Army Corps of Engineers in the conduct of public hearings conducted in the evaluation of a proposed DA permit action or Federal project as defined in §327.3 of this part including those held pursuant to section 404 of the Clean Water Act (33 U.S.C. 1344) and section 103 of the Marine Protection, Research and Sanctuaries Act (MPRSA), as amended (33 U.S.C. 1413).

### §327.2 Applicability.

This regulation is applicable to all divisions and districts responsible for the conduct of public hearings.

### §327.3 Definitions.

(a) *Public hearing* means a public proceeding conducted for the purpose of acquiring information or evidence which will be considered in evaluating a proposed DA permit action, or Federal project, and which affords the public an opportunity to present their views, opinions, and information on such permit actions or Federal projects.