

§ 331.7

33 CFR Ch. II (7-1-06 Edition)

(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