may condition permits to require permittees to pay inspection expenses pursuant to the authority contained in section 9701 of Pub L. 97–258 (33 U.S.C. 9701). The collection and disposition of inspection expense funds obtained from applicants will be administered in accordance with the relevant Corps regulations governing such funds.

(d) *Non-compliance.* If a district engineer determines that a permittee has violated the terms or conditions of the permit and that the violation is sufficiently serious to require an enforcement action, then he should, unless at his discretion he deems it inappropriate: (1) First contact the permittee;

(2) Request corrected plans reflecting actual work, if needed; and

(3) Attempt to resolve the violation. Resolution of the violation may take the form of the permitted project being voluntarily brought into compliance or of a permit modification (33 CFR 325.7(b)). If a mutually agreeable solution cannot be reached, a written order requiring compliance should normally be issued and delivered by personal service. Issuance of an order is not, however, a prerequisite to legal action. If an order is issued, it will specify a time period of not more than 30 days for bringing the permitted project into compliance, and a copy will be sent to the appropriate state official pursuant to section 404(s)(2) of the Clean Water Act. If the permittee fails to comply with the order within the specified period of time, the district engineer may consider using the suspension/revocation procedures in 33 CFR 325.7(c) and/or he may recommend legal action in accordance with § 326.5.

§ 326.5 Legal action.

(a) *General.* For cases the district engineer determines to be appropriate, he will recommend criminal or civil actions to obtain penalties for violations, compliance with the orders and directives he has issued pursuant to §§ 326.3 and 326.4, or other relief as appropriate. Appropriate cases for criminal or civil action include, but are not limited to, violations which, in the district engineer's opinion, are willful, repeated, flagrant, or of substantial impact.

(b) *Preparation of case.* If the district engineer determines that legal action is appropriate, he will prepare a litigation report or such other documentation that he and the local U.S. Attorney have mutually agreed to, which contains an analysis of the information obtained during his investigation of the violation or during the processing of a permit application and a recommendation of appropriate legal action. The litigation report or alternative documentation will also recommend what, if any, restoration or mitigative measures are required and will provide the rationale for any such recommendation.

(c) *Referral to the local U.S. Attorney.* Except as provided in paragraph (d) of this section, district engineers are authorized to refer cases directly to the U.S. Attorney. Because of the unique legal system in the Trust Territories, all cases over which the Department of Justice has no authority will be referred to the Attorney General for the trust Territories. Information copies of all letters of referral shall be forwarded to the appropriate division counsel, the Office, Chief of Engineers, ATTN: DAEN-CCK, the Office of the Assistant Secretary of the Army (Civil Works), and the Chief of the Environmental Defense Section, Lands and Natural Resources Division, U.S. Department of Justice.

(d) *Referral to the Office, Chief of Engineers.* District engineers will forward litigation reports with recommendations through division offices to the Office, Chief of Engineers, ATTN: DAEN-CCK, for all cases that qualify under the following criteria:

(1) Significant precedential or controversial questions of law or fact;

(2) Requests for elevation to the Washington level by the Department of Justice;

(3) Violations of section 9 of the Rivers and Harbors Act of 1899;

(4) Violations of section 103 the Marine Protection, Research and Sanctuaries Act of 1972;

(5) All cases involving violations by American Indians (original of litigation report to DAEN-CCI with copy to DAEN-CCK) on reservation lands or in pursuit of specific treaty rights;

(6) All cases involving violations by officials acting on behalf of foreign governments; and

(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; request 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.