

DEPARTMENT OF DEFENSE**Department of the Army****Corps of Engineers****33 CFR Parts 320, 326 and 331****Proposal To Establish an Administrative Appeal Process for the Regulatory Programs of the Corps of Engineers**

AGENCY: Corps of Engineers, Army Department, DOD.

ACTION: Proposed rule.

SUMMARY: The Corps of Engineers is proposing to establish an administrative appeal process to include in its regulatory program regulations (33 CFR parts 320–330). There is currently no administrative appeal process under which parties may contest Corps of Engineers regulatory determinations. Adverse decisions must be challenged in Federal District Court, and this formal judicial process may be time-consuming and financially burdensome for many parties. The proposed rule would provide permit applicants and landowners an opportunity to appeal permit denials and jurisdictional determinations.

DATES: Comments must be received by September 5, 1995.

ADDRESSES: Comments should be submitted in writing to: Office of the Chief of Engineers, ATTN: CECW–OR, 20 Massachusetts Avenue NW., Washington, DC 20314–1000. Comments will be available for examination in Corps District and Division offices or at the Office of the Chief of Engineers, Room 6225, Pulaski Building, 20 Massachusetts Avenue NW., Washington, DC 20314–1000.

FOR FURTHER INFORMATION CONTACT: Mr. Sam Collinson or Mr. Michael L. Davis, Corps of Engineers Regulatory Branch, (202) 761–0199.

SUPPLEMENTARY INFORMATION:**I. Background**

Shortly after coming into office, the Clinton Administration convened an interagency working group to address legitimate concerns with Federal wetlands policy. After hearing from States, developers, farmers, environmental interests, members of Congress, and scientists, the working group developed a comprehensive, 40-point plan to enhance wetlands protection, while making wetlands regulations more fair, flexible, and effective to everyone, including America's small landowners. The Plan was issued on August 24, 1993. It

emphasizes improving Federal wetlands policy through various means, including streamlining wetlands permitting programs. One of several approaches identified in the Plan for achieving such streamlining is through development by the Corps of a Clean Water Act Section 404 administrative appeals process, to be implemented after a public rulemaking. The Plan provides that the process will be designed to allow for administrative appeals of Section 404 geographic jurisdictional determinations, permit denials, and administrative penalties.

The rule proposed herein is responsive to the President's directive. The appeal process is designed to allow administrative appeals to the Corps regarding two distinct decisions: (1) That a geographic area, including a particular parcel of property that is determined to be a wetland as defined in 33 CFR 328.3(b) and delineated in accordance with the Federal manual for delineating and identifying wetlands, is subject to Corps regulatory jurisdiction pursuant to Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899; and (2) denial with prejudice by the District Engineer of a Department of the Army permit, which includes cases where a proffered permit is refused by the applicant because the applicant objects to the terms or special conditions of the proffered permit and the permit is subsequently denied with prejudice by the District Engineer. Consistent with the Plan and as explained below, third parties can participate only in applicant appeals of permit denials.

As indicated above, the Plan also addresses administrative appeals of administrative penalty assessments. Section 309(g) of the CWA authorizes the Corps and EPA to assess administrative penalties for, among other things, unauthorized discharges of dredged or fill material into wetlands and other waters of the United States in violation of Section 404. The CWA establishes two classes of administratively assessed penalties, which differ with respect to maximum assessment and prescribed procedure. EPA and the Corps have implemented the requirements of Section 309(g) as follows. With regard to EPA, proposed assessments of Class II administrative penalties for Section 404 violations can be reviewed by an Administrative Law Judge through a hearing process, the procedures for which are set forth at 40 CFR Part 22. EPA proposed assessments of Class I administrative penalties can be reviewed by a Presiding Officer through a hearing process according to procedures set forth at 40 CFR Part 28.

(Note that EPA issued a proposed rule establishing such procedures, see 56 FR 29996 (July 1, 1991); pending issuance of a final rule, the EPA is applying the proposed rule as EPA guidance.) With regard to the Corps, proposed assessments of Class I administrative penalties, like EPA's process, can be reviewed by a Presiding Officer through a hearing process according to procedures set forth at 33 CFR 326. The Corps is developing, but has not yet proposed, regulations for assessing Class II administrative penalties. The Corps expects that its Class II regulations will be similar to those of EPA's.

Also consistent with the Administration Wetlands Plan, the August 1993 Interagency Memorandum of Agreement (MOA) between the Department of Agriculture, the Environmental Protection Agency, the Department of the Interior and the Department of the Army concerning the delineation of wetlands for purposes of Section 404 of the CWA and Subtitle B of the Food Security Act, provides that persons who are adversely affected by Natural Resources Conservation Service (NRCS) wetland delineations on agricultural lands may appeal such wetland delineations under NRCS administrative appeal procedures published at 7 CFR Part 614. Under these procedures, any person who is adversely or potentially adversely affected by an NRCS wetland delineation can appeal that decision. This may be an owner, operator, tenant or partner of the farm to which the NRCS decision applies. The NRCS appeals procedures currently has four levels: (1) The District Conservationist, (2) the Area Conservationist, (3) the State Conservationist, and (4) the Chief of NRCS. The decision of the Chief is final. However, as a result of USDA reorganization the current NRCS appeals process is being revised. Furthermore, according to the MOA, in circumstances where a landowner submits an appeal to NRCS and the State Conservationist is considering a change in the original delineation made by NRCS, the State Conservationist notifies the appropriate Corps and EPA officials to provide those agencies an opportunity for their participation and input on the appeal. The Fish and Wildlife Service is also consulted. The Corps and EPA reserve the right, on a case-by-case basis, to determine that a revised delineation resulting from an NRCS appeal is not valid for the purposes of Section 404 jurisdiction. However, any subsequent jurisdiction determination by the Corps would be