

review of an appeal case and when determining the merits of the appeal.

(2) *Review.* The RO will conduct an independent analysis of the existing administrative record to ensure that the district's decision complies with legal, regulatory, and policy requirements, that omissions of material facts have not occurred, and that the record is sufficient to support conclusions and the ultimate decision. The District RO has the discretion to gather additional information when deemed necessary. When reviewing technical issues, Division RO's shall not substitute their judgment for that of the Corps district unless the reviewed decision was clearly erroneous or omitted a material fact. An RO who lacks specific expertise with regard to a specific appealed issue will obtain the assistance of another RO or other recognized expert from an office outside the Regulatory Branch or from a District other than the District where the appeal was initiated.

(c) *Jurisdictional determinations.* (1) *District RO.* The Corps district RO shall be, or have the support of, a recognized expert with extensive experience in conducting and reviewing wetland delineations and performing and reviewing jurisdictional determinations. The district RO shall report directly to the Regulatory Branch Chief. This arrangement will insure that the district RO is removed from day-to-day involvement in routine jurisdictional determinations made by Regulatory Branch project managers, unit chiefs, and section chiefs. For any case where the jurisdictional determination was made by the Regulatory Branch Chief or higher authority, or the individual(s) who normally acts as the district RO has participated in the decision or otherwise advised the decision-maker, or at the District Engineer's discretion, the District Engineer or a Corps official at least one level higher than the decision-maker shall appoint a qualified independent RO to conduct the appeal process.

(2) *Division RO.* The division RO responsible for appeals of a district RO's decision shall generally be the same RO(s) that is responsible for appeals of permit denials described in paragraph (d) of the section.

(d) *Permit denials.* The ROs responsible for appeals involving permit denials shall be officials in Division regulatory offices with extensive knowledge of all aspects of the Corps regulatory program. For any case where the permit decision was made by the Division Engineer or higher authority, an agency official at least one level higher than the decision-maker shall

appoint a qualified independent RO to conduct the appeal process.

#### **§ 331.4 Notification of appealable actions.**

Every final jurisdictional determination and permit denial must be provided in writing to the affected party. For permit denials, the notification will also include a copy of the decision document. Additionally, an affected party has the right to review and obtain copies of the administrative record. Each notification letter will include a NAP and an RFA.

#### **§ 331.5 Criteria.**

(a) *Criteria for appeal.* The reason(s) or basis(es) for requesting the appeal must be specifically stated and must be more than a simple request for appeal because the affected party did not like the decision. Examples of reasons or bases for appeals include, but are not limited to, the following: a procedural error, an incorrect application of policy or regulations, omission of material fact, incorrect application of Federal Wetland delineation manual, lack of interstate commerce nexus, incorrect application of 404(b)(1) Guidelines under the Clean Water Act, or use of incorrect data.

(b) *Actions not appealable.* An action or decision is not subject to an administrative appeal under these regulations if it falls into one or more of the following categories:

(1) a jurisdictional determination associated with an individual permit (including an individual permit with special conditions), or the permit itself, where the permit has been accepted and signed by the permittee;

(2) any site specific matter that has been the subject of a final judicial decision; or

(3) a final agency decision that has resulted from additional analysis and evaluation, as directed by a final appeal decision.

(4) any matter that can not be controlled or changed by the Corps decision-maker (e.g., The requirement of a binding statute, regulation, state Section 401 water quality certification, etc.)

#### **§ 331.6 Filing appeals.**

An affected party must file an RFA that is received by the Corps within 60 days from the date of the letter notifying the affected party of the appealable action. In any case where work is authorized to commence prior to the end of this 60 day period, either by general or individual permit, and the permittee wishes to request an appeal, the appeal must be received by the Corps and the appeal process concluded prior to the commencement of any work

in the area identified as waters of the United States, and prior to any work that could alter the hydrology of waters of the United States. Additionally, the affected party must grant a right of entry to the RO to inspect the property and to conduct appropriate field tests and sampling that the RO determines may be necessary.

#### **§ 331.7 Review procedures.**

(a) *General.* (1) *Jurisdiction determinations.* The administrative appeals process for jurisdiction determinations is a two level appeal process. The first level appeal is to a specialist review officer in a Corps district office. The landowner will be able to present information to the RO, or the RO may obtain information, for the administrative record. The second level appeal is to an RO in a Corps Division office. This review will be limited to the administrative record developed during the first level appeal, which would include any information provided by the landowner as part of that record.

(2) *Permit denials.* The administrative appeals process for permit denials is a one level appeal process to the Division Engineer. The appeals process will be conducted by a RO in the Division office. The division RO will prepare the record, an analysis, and a recommendation for the Division Engineer. The Division Engineer may participate in the appeals process as the Division Engineer deems appropriate. The Division Engineer will make the decision on the merits of the appeal.

(b) *Acceptance of the request for appeal.* Within 30 days after receipt of the RFA, the RO shall review the appellant's RFA and the administrative record. If, within this 30 day period, the RO determines that the RFA does not meet the criteria for appeal (see § 331.5), the RO will notify the appellant in writing by certified mail of this determination and the reason(s) why the appeal failed to meet applicable criteria. No further administrative appeal is available, unless within 30 days from his receipt of the letter refusing his appeal, the appellant can refute the reason(s) for failing the criteria for appeal. The appellant may submit a revised RFA, if the reason(s) for failing applicable criteria have been remedied and the revised RFA is received by the Corps within 30 days from the date the appellant received notification that the original RFA failed to meet the criteria for appeal. If the RO determines that the revised RFA still does not meet the criteria for appeal, the RO will notify the appellant in writing of that fact by certified mail within 30 days advising