



Mid-South Agricultural and Environmental Law Conference

*Practice in front of the
National Appeals Division*

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What NAD Is, What It Does, and How It Fits

The National Appeals Division (NAD) is an administrative appeal arm of the U.S. Department of Agriculture, and, as such, NAD has jurisdiction to hear certain appeals from determinations made by the Farm Service Agency (FSA), Natural Resources Conservation Service (NRCS), Federal Crop Insurance Corporation (FCIC), Risk Management Agency (RMA), and Rural Development (RD). In essence, NAD is a fundamental part of any legal matter involving those agencies because Congress has mandated that all administrative remedies be exhausted prior to bringing an action against the Secretary of Agriculture, the U.S. Department of Agriculture, or any agency (one of those listed above), office, officer, or employee of the Department. Thus, except for certain limited cases, you must pursue an appeal with NAD in order to “exhaust” your administrative remedies prior to pursuing legal action against any of those agencies mentioned above.

Background and Legal Support

As part of the Department of Agriculture Reorganization Act of 1994, Congress created NAD to handle administrative appeals arising from decisions issued by specified agencies. *Pub. L. 103-354 (October 13, 1994); 108 Stat. 3178; 7 U.S.C. § 6992 (2014)*. FSA, NRCS, FCIC, and RD are specifically included in the list of agencies for which the National Appeals Division will hear appeals. *Id.*; *7 U.S.C. § 6991 (2014)*.

In that same Act, Congress mandated the exhaustion of remedies. *7 U.S.C. § 6912(e) (2014)*. *But see Dawson Farms LLC v. Farm Service Agency*, 504 F.3d 592, 602-606 (5th Cir. 2007), wherein the Fifth Circuit joins with the Eighth and Ninth Circuits holding that *7 U.S.C. § 6912(e)* is not jurisdictional but a codification of judicial doctrine of exhaustion of remedies (i.e. jurisprudential). Determinations of the NAD Director, both on the merits and regarding whether an issue is appealable, are administratively final. *7 U.S.C. § 6992(d), 6998(b) (2014)*. Further, should no Director review request be made of a NAD Administrative Judge¹ determination, that determination becomes administratively final as well. *7 U.S.C. § 6997(d) (2014)*. *See also Bartlett v. U.S. Dept. of Agriculture*, 716 F.3d 464, 473 (8th Cir. 2013).

In 1996, Congress created the Risk Management Agency (RMA) whose tasks include supervising the FCIC and administering all aspects of all programs under the Federal Crop Insurance Act. *7 U.S.C. § 6933 (2014)*. RMA is included in the list of agencies subject to appeal review by NAD. *7 C.F.R. § 11.1 (Agency)*.

¹ The regulations refer to National Appeals Division Hearing Officers. *7 C.F.R. § 11.1 et seq.* The Director of NAD changed the Hearing Officer title to Administrative Judge in December 2014. Any reference in this document to Administrative Judge(s) is intended to mean the same as the term “Hearing Officer” as used in the regulations at 7 C.F.R. Part 11.



NAD's Jurisdiction, Generally

In simple terms, NAD has jurisdiction to hear appeals of decisions that are adverse to a participant issued by one of the statutorily/regulatorily enumerated agencies. So who is a participant and what is a decision that is adverse?

A participant is defined by regulation as an “individual or entity whose right to participate in or receive a payment, loan, loan guarantee, or other benefit in accordance with any program of an agency to which the regulations in this part apply is affected by a decision of such agency.” 7 U.S.C. § 6991 (2014); 7 C.F.R. 11.1 (*Participant*). Thus, a participant would most often be a producer, borrower, or, in the instance of crop insurance, an insured.

Adverse decisions are defined as those administrative decisions made by an agency, and its officers, employees or committee, that are adverse to a participant. *Id.*; 7 C.F.R. 11.1 (*Adverse Decision*). (Also contained within the definition is denial of equitable relief or failure to issue a decision or otherwise act on a request within prescribed timeframes or a reasonable time.)

Reading the definitions together then results in the conclusion that NAD has jurisdiction to hear appeals from individuals or entities whose right to participate in or receive a payment, loan, loan guarantee, or other benefit in accordance with any program of an enumerated agency within the regulatory framework of Title 7 of the Code of Federal Regulations is adversely affected by one of those agencies. Said another way, if a producer is denied the right to participate in a USDA program or receive a payment or benefit (within the confines of those USDA agencies listed in the previous section), NAD most likely has jurisdiction to hear that appeal.

Furthermore, the regulations governing each agency usually contain a subpart regarding appeal procedures. The regulations governing the Federal Crop Insurance Corporation are found at 7 C.F.R. Part 400. The appeal procedures are found in Subpart J. The regulations at 7 C.F.R. § 400.91 express a list of some of the types of crop insurance adverse decisions appealable to NAD. The regulations governing the Farm Service Agency are found in several different sections within Title 7. The general appeal regulations are found at 7 C.F.R. § 780. There are several other sections throughout Title 7 regarding appeals for FSA, NRCS, and RD.

Additionally, the NAD Director has the authority to grant participants equitable relief. 7 U.S.C. § 6998 (2014); 7 C.F.R. § 11.9(e). That authority is confined to the limitations of 7 U.S.C. § 7996. *Id.* Thus, the NAD Director can grant equitable relief to participants who are not in compliance with the requirements of price or income support programs, or production or market loan assistance programs. 7 U.S.C. § 7996(a)(2)(A) (2014). Specifically excluded from equitable relief are the crop insurance program and agricultural credit programs. 7 U.S.C. § 7996(a)(2)(B) (2014).

Moreover, a discussion of administrative jurisdiction is never complete without mention of the 2009 *Union Pacific Railroad* case. *Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng's &*



Trainmen Gen. Comm. of Adjustment, Cent. Region, 130 S.Ct. 584 (2009). In that case, the U.S. Supreme Court extended to administrative agencies the general principal that they cannot, by regulation or decision, decline to exercise the jurisdiction which is given them by Congress. *Id. at 590*. One could argue this means that any agency regulation which attempts to except certain types of adverse decisions from review from NAD are ineffective and should be ignored.

Common Appealable Decisions

It would be impossible to list all the different types of NAD appealable decisions here. However, I can describe some of the more common types of decisions for each agency. For FSA, NAD receives a myriad of adverse determinations. Some of the common ones involve payment limitation and eligibility (7 C.F.R. §§ 795 and 1400), loan denial (7 C.F.R. §§ 761.6 and 780), and denial of indemnity and disaster program eligibility or payment (See generally 7 C.F.R. § 760). Common NRCS adverse decisions often deal with the Environmental Quality Incentives Program (EQIP) (7 C.F.R. §§ 1466.30, 614, and 780), wetland determinations (7 C.F.R. §§ 12.12, 614, and 780), and enrollment program denials such as denials of enrollment in the Conservation Reserve Program (CRP) (7 C.F.R. §§ 1410.59, 614, and 780). A few of the most common types of appealable crop insurance decisions include the “Notice of Ineligibility” (7 C.F.R. § 400.682(e)), a denial of written agreement (7 C.F.R. § 457.8¶(18)(o)), and large claim denial (7 C.F.R. § 457.8¶(20)). NAD also hears appeals of Final Agency Determinations and Interpretation of Procedures if they meet jurisdictional requirements. (7 C.F.R. § 457.8¶(20)(a)(1); ¶(20)(a)(1)(iv); 7 C.F.R. § 400.768(g); NAD Case No. 2011S000634). Finally, Rural Development encompasses several mission areas. Common agriculturally-related adverse decisions include denials of grant program funds like the Value-Added Producer Grant (VAPG) (7 C.F.R. § 4284).

If Unsure, Request Appealability Review

Sometimes, participants are informed that the decision is not appealable because it is not adverse to them individually but generally applicable to all similarly situated participants. The term “general applicability” is used throughout the regulations to describe a type of decision that is not appealable. In 7 C.F.R. § 400.91(e), the prohibition on appeal of generally applicable determinations is explained in this manner, “[n]otwithstanding any other provision, this [subpart J] does not apply to any decision made by [RMA] that is generally applicable to all similarly situated program participants. Such decisions are also not appealable to NAD.” In 7 C.F.R. § 780.5(a)(1), the regulations for Farm Service Agency state, “[d]ecisions that are not appealable under this part shall include the following: (1) Any general program provision or program policy or any statutory or regulatory requirement that is applicable to similarly situated participants....”

Congress specifically prescribed determinations of appealability to the Director of NAD. 7 U.S.C. § 6992(d). Because of this, after explaining that decisions regarding generally applicable matters are not appealable, the regulations usually contain a somewhat confusing additional sentence or section stating that the NAD Director determines appealability. The remainder of the



regulation at 7 C.F.R. § 400.91(e) states, “[i]f the Agency determines that a decision is not appealable because it is a matter of general applicability, the participant must obtain a review by the Director of NAD . . . that the decision is not appealable before the participant may file suit against the Agency.” 7 C.F.R. § 400.91(e). See also 7 C.F.R. § 780.5(c).

The regulations also contain more specific references to general applicability. For instance, in 7 C.F.R. § 400.768(g), the regulations provide that all Final Agency Determinations are generally applicable and not appealable to NAD. However, again, the regulations specifically state that a participant must request a determination from NAD regarding appealability before pursuing any other action against FCIC.

Thus, in certain instances participants are regulatorily required to obtain a determination from NAD regarding the appealability of an agency decision, but, in all instances, a participant may request an appealability determination. Therefore, in my opinion, there is certainly no harm in requesting an appealability determination if you are unsure whether the determination can be appealed or not. Moreover, should NAD receive an appeal request of an agency decision that is not appealable, NAD will usually issue, of its own accord, an appealability determination. Redacted versions of appealability determinations are published on NAD’s searchable website: http://www.nad.usda.gov/public_search.html.

Limitations to NAD Jurisdiction for Crop Insurance

Practically speaking, however, in crop insurance cases, FCIC and/or RMA are not the primary point of contact for insureds. That role is reserved to the Approved Insurance Provider, defined at 7 U.S.C. § 1502 (2014), as a private insurance company approved by FCIC “to provide insurance coverage to producers participating in the Federal crop insurance program....”

- ***Insurance Company Decisions***

Generally, decisions issued by an Approved Insurance Provider are not appealable to NAD. Insurance companies are not agencies within the definition set forth in 7 C.F.R. § 11.1 (Agency). The simple process of collecting premiums provides an example of how this works. The Approved Insurance Provider, per the Standard Reinsurance Agreement, is responsible for sending billing notices and statements directly to insureds. It is only when the insured fails to pay the amount due by the termination date that the Approved Insurance Provider must notify FCIC of the existence of the delinquent debt. 7 C.F.R. § 400.682(b).² After notification, FCIC sends

² Seven C.F.R. § 400.682 replaces 400.680 effective February 12, 2014, applicable to the 2015 and succeeding crop years for all crops with a contract change date after the effective date. *General Administrative Regulations; Subpart C, Mutual Consent Cancellation, Subpart F, Food Security Act of 1985 and Subpart U, Ineligibility for Programs Under the Federal Crop Insurance Act, 79 Fed. Reg. 2075 -2084 (January 13, 2014) (amending 7 C.F.R. § 400.680).*



notice of the ineligible status to the producer. 7 C.F.R. § 400.682(c). In this process, only the notice of ineligible status would be appealable to the National Appeals Division because it is the only action taken by FCIC. See 7 U.S.C. § 6991 (2014) (*Adverse decision*).

The rare exception to this limitation is in a situation where the adverse decision is ultimately made by RMA but communicated to the participant by the insurance provider. In these cases, even though the letter the participant receives is issued by the insurance provider, NAD may take jurisdiction of the case based on an adverse decision issued by RMA to the insurance provider specific to a participant. See NAD Case Nos. 2012E000136 and 2013W000438R for instances in which NAD took jurisdiction of crop insurance cases based on an Approved Insurance Provider letter issued to the producer.

- *Claim Denials*

Pursuant to the Standard Reinsurance Agreement, the insurance provider adjusts claims, other than some large claims. The Standard Reinsurance Agreement governs the relationship between Approved Insurance Providers and FCIC. In Appendix I, Section IV, the Agreement provides that all insurance providers shall comply with FCIC's Large Claims Procedures. The Large Claims Procedures are found in the Large Claims Handbook (FCIC 14040). The Large Claims Handbook explains that in claims where the production loss or indemnity will likely exceed \$500,000, the insurance provider must notify RMA. *Large Claims Handbook, Part 4B*. RMA will then determine whether the insurance provider will adjust the claim or whether RMA will get involved in the adjustment process. *Large Claims Handbook, Part 4D-E*. If RMA adjusts the claim, then the denial is an adverse decision within the definition found at 7 C.F.R. § 11.1(*Adverse Decision*). Otherwise, denial of a claim is a decision made by the insurance provider and, as stated above, generally not appealable to NAD. But, again, see NAD Case No. 2012E000136 (involves denial of a claim by an AIP, but NAD accepted jurisdiction).

- *Good Farming Practices*

In 2000, Congress passed the Agricultural Risk Protection Act limiting NAD's jurisdiction over certain crop insurance denials. *Pub. L. 106-224, (June 20, 2000); 114 Stat. 378; 7 U.S.C. §1508 (2014)*. Pursuant to 7 U.S.C. § 1508(a)(3)(A)(iii), crop insurance coverage does not cover losses caused by a failure to follow good farming practices. (2014). Moreover, a denial of a loss based on failure to follow good farming practices is no longer included in the definition of adverse decision. 7 U.S.C. §1508(a)(3)(B)(ii)(I) (2014).

Practitioner Tips

There are a few housekeeping matters practitioners should know before filing an appeal to NAD. First, NAD adjudications fall within Section 504 of the Administrative Procedures Act. *Lane v. U.S. Dept. of Agriculture*, 120 F.3d 106, 110 (8th Cir. 1997); *Aageson Grain & Cattle v. U.S.*



Dept. of Agriculture, 500 F.3d 1038, 1043 (8th Cir. 2007); 5 U.S.C. § 500 *et seq.* Second, the burden is on the appellant to prove that the “adverse decision of the agency was erroneous by a preponderance of the evidence.” 7 *C.F.R.* § 11.8(e). Third, Congress mandated the information and documents on which NAD must base its determinations. 7 *U.S.C.* § 6998(c) (2014). NAD’s decisions must be based on the information contained in the case record (which includes both documentation and hearing testimony), and the laws and regulations applicable to the matter at issue. *Id.* Fourth, the Equal Access to Justice Act (EAJA) applies to NAD proceedings. *Lane*, 120 F.3d at 110; *Aageson Grain & Cattle*, 500 F.3d at 1045.

What to Expect After You File an Appeal

The appropriate NAD regional office will send a “Notice of Appeal” which assigns the case to a NAD Administrative Judge. The agency is provided 12 days to submit the Agency Record unless the date falls on a holiday or a date the government is closed, and the appellant is provided 17 days to submit evidence. The Administrative Judge will hold a prehearing conference call with the appellant and the agency before the hearing to identify all potential issues and prepare the parties for the hearing.

During the prehearing, the appeal parties should expect the Administrative Judge to do a number of things including but not limited to:

- determining whether there is mediation pending between the agency and the appellant, or if the appellant is in bankruptcy;
- determining whether any third or interested parties should be identified;
- verifying that a complete copy of the Agency Record has been provided to the appellant and to the Administrative Judge;
- identifying and framing the matter(s) in dispute and the issue(s) to be resolved;
- advising the parties concerning the nature of the evidence that may be presented at the hearing;
- explaining the hearing process;
- explaining how exhibits will be handled during the hearing;
- requesting that the agency identify the regulations and statutes it believes to be applicable to the adverse decision;
- encouraging stipulations to undisputed facts to expedite the hearing;
- obtaining agreement among the parties as to the date, time, and location of the hearing; and
- determining the need for translators, accommodations for those with disabilities, and other administrative matters.

An appellant has a right to a hearing within 45 days of NAD’s receipt of a perfected appeal request. Additionally, an appellant has the right to a hearing in his state of residence or at a location otherwise convenient to him, the agency, and NAD. 7 *C.F.R.* § 11.8(c). The appellant also has the right to choose the form of the hearing: in-person, by telephone, or a record review.



7 C.F.R. § 11.8(c)(5)(i); 7 C.F.R. § 11.6(b)(2). The NAD Administrative Judge presides over the hearing and controls the proceeding in the manner most likely to obtain facts relevant to the matters at issue while maintaining order. There are generally four main parts to a NAD hearing which are:

1. Housekeeping – Administrative Judge will reconfirm issues, put parties under oath, explain hearing process;
2. Opening statements – each side gives a brief statement of its position, Administrative Judge enters Agency Record and exhibits, resolves any objections to documents;
3. Evidence and testimony – each side explains their case in detail by presenting testimony and documents, opportunity for questions and rebuttal, Administrative Judge may ask questions; and
4. Closing – opportunity for closing statements by parties and wrap up by Administrative Judge.

Options After Appeal

The Administrative Judge has 30 days from the date the record closes to issue a determination in cases where the hearing was by telephone or in-person. In a record review, the Administrative Judge has 45 days from the date Appellant requests the record review to issue a determination. 7 C.F.R. § 11.8(f). The Agency head has 15 business days after date of receipt of an appeal determination to request a Director review, but Appellant has 30 calendar days to request review. 7 C.F.R. § 11.9. Either party has 5 business days to respond to a Request for Director Review. *Id.*

Be Courteous and File an Appeal

I conclude with two more suggestions. They may, in fact, be the most important suggestions. First, be courteous. Understand that often the agency representative is not the decision maker who issued your client's adverse decision. Also, agencies are almost never represented by counsel, so although the representative should have the applicable regulations and have a working knowledge of them, he is not an attorney.

Second, when in doubt, appeal. You only have, in most cases, 30 days to file your appeal. If you miss that window, the consequences can be disastrous to your client. So, when you are unsure about your options, file an appeal.