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## **An Agricultural Law Research Article**

### **USDA's National Appeals Division Procedures and Practice**

by

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# USDA’s National Appeals Division Procedures and Practice

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## An Agricultural Law Research Article

# USDA's National Appeals Division Procedures and Practice

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## I. Introduction

The National Appeals Division (NAD) of the United States Department of Agriculture (USDA) was established in late 1994<sup>1</sup> in the wake of a broader USDA reorganization mandated by the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994.<sup>2</sup> NAD was assigned responsibility for program participant appeals of adverse decisions by certain agencies and offices within USDA, as assigned by the Secretary.

NAD is an organization within USDA that is formally independent from all other agencies and offices of the Department, including USDA officials at the state and local level.<sup>3</sup> This is a significant change from USDA's pre-NAD appeals systems, in which a disputed agency decision would be reviewed by an employee of the same agency, often a peer or supervisor of the original decision-maker. In contrast, NAD is organizationally housed within USDA's Office of the Secretary and is therefore formally independent of other USDA agencies, including those whose decisions it reviews.<sup>4</sup> However, NAD remains subject to the general supervision of and policy direction by the Secretary of Agriculture.<sup>5</sup> The NAD Director is appointed by and reports directly to the Secretary of Agriculture, whose authority over NAD may not be delegated to any other USDA officer or employee.<sup>6</sup>

An interim final rule setting forth the procedures for NAD appeals was published in the *Federal Register* on December 29, 1995.<sup>7</sup> This interim final rule was effective until June 23, 1999, when final NAD rules of procedure were issued and took effect.<sup>8</sup> The final rule applies to all covered agency

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<sup>1</sup> See 59 Fed. Reg. 66,517, 66,518 (1994) (notice of department reorganization).

<sup>2</sup> Pub. L. No. 103-354, tit. II, subtit. H, §§ 271-283, 108 Stat. 3178, 3228-3235 (codified at 7 U.S.C. §§ 6991-7002).

<sup>3</sup> 7 C.F.R. § 11.2 (2003).

<sup>4</sup> 7 U.S.C. § 6992(a); 7 C.F.R. § 11.2 (2003).

<sup>5</sup> 7 U.S.C. § 6992(a), (c); 7 C.F.R. § 11.2 (2003).

<sup>6</sup> 7 U.S.C. § 6992(b)(1), (c); 7 C.F.R. § 11.2 (2003). The NAD Director serves for a six-year term and may be removed only for cause. 7 U.S.C. § 6992(b)(2). The NAD Director cannot be a political appointee or non-career employee. *Id.* § 6992(b)(3).

<sup>7</sup> 60 Fed. Reg. 67,298, 67,308-18 (1995).

<sup>8</sup> 64 Fed. Reg. 33,367, 33,373-78 (1999). Technical corrections were issued on August 9, 1999. 64 Fed. Reg. 43,043 (1999).

decisions issued after June 23, 1999, all covered agency adverse decisions on which timely NAD appeals had not yet been taken as of June 23, 1999, and NAD appeals that were pending on that date.

The NAD rules of procedure appear in the Code of Federal Regulations at 7 C.F.R. Part 11. This article reviews these rules and highlights some key points for attorneys representing program participants in the NAD process.

## **II. Overview of the NAD Process**

The NAD appeal process begins when a USDA program participant requests an appeal of an “adverse decision” issued by one of the USDA agencies whose program determinations are appealable to NAD. For some adverse decisions, the participant must first seek “informal review” by the deciding agency before appealing to NAD. In other cases, informal review and/or mediation are optional steps that a participant may pursue before requesting an appeal.

After the appeal request is filed, a date will be set for an in-person evidentiary hearing before a NAD hearing officer. Shortly before this date, the hearing officer and the parties will have a pre-hearing conference, usually on the telephone.

Depending on the outcome of the hearing, either the participant or the agency may ask the NAD Director to perform a record review of the hearing officer’s determination. If neither party requests Director review, the hearing officer’s determination becomes the final administrative decision.

Final NAD determinations are subject to review in the federal district courts. A program participant who receives an unfavorable final NAD determination can also ask the Secretary of Agriculture to review that determination before or instead of seeking judicial review.

A program participant may also seek review by the NAD Director of an agency determination that a particular adverse decision is not appealable.

## **III. A Participant Can Appeal an Adverse Decision by an Agency**

As discussed above, NAD’s purpose is to provide an independent forum within USDA for program participants to seek administrative appeals of adverse agency decisions. Critical questions presented by this purpose for anyone seeking to use the NAD process are: What is an “adverse decision” and who qualifies as a “participant”? What agencies’ decisions fall under the authority of NAD? These questions are discussed in detail in this section.

### **A. What Is an Adverse Decision?**

Under the NAD statute, an adverse decision appealable to NAD is defined as:<sup>9</sup>

an administrative decision made by an officer, employee, or committee of an agency that is adverse to a participant. The term includes a denial of equitable relief by an agency or the failure of an agency to issue a decision or otherwise act on the request or right of the participant. The term does not include a decision over which the Board of Contract Appeals has jurisdiction.

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<sup>9</sup> 7 U.S.C. § 6991(1).

As USDA noted in its prefatory comments to the interim final NAD rule, this definition is quite broad.<sup>10</sup> The NAD rule gives some shape to the statutory definition by providing several examples of the types of adverse decisions that are appealable to NAD. These examples include the following:<sup>11</sup>

1. Denial of participation in an agency program;
2. Denial of benefits under an agency program;
3. A decision related to compliance with program requirements;
4. The making or amount of payments or other program benefits under an agency program; and
5. A determination that a parcel of land is a wetland or is highly erodible land.

These regulatory examples provide some guidance for understanding the scope of the statutory definition. Nonetheless, in many cases questions remain for would-be appellants. Some of these questions are discussed in this section.

### **1. Claims and Disputes Expressly Not Appealable to NAD**

The NAD rule sets out a lengthy list of categories of agency decisions that are not appealable to NAD.<sup>12</sup> The list expands upon the limited exclusion mentioned in the NAD statute<sup>13</sup> by adding 10 specific categories of decisions or claims that NAD will not review. The effect of these exclusions is to generally limit NAD's authority to reviewing decisions relating to eligibility and benefits under substantive USDA programs while excluding disputes arising under non-program contracts, generally applicable federal statutes, or other laws for which alternative appeal forums are available.

Specifically, appeals to NAD are not available for the following:<sup>14</sup>

- a. Claims arising under programs subject to USDA appeal proceedings set out in 7 C.F.R. Part 1;<sup>15</sup>

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<sup>10</sup> 60 Fed. Reg. 67,298, 67,301 (1995) (prefatory comments to interim final rule) (stating that the statute defines "adverse decision" too broadly to limit by regulation).

<sup>11</sup> 7 C.F.R. § 11.3(a) (2003).

<sup>12</sup> The limitations arise under the regulatory definition of "participant" rather than the definition of "adverse decision." 7 C.F.R. § 11.1, "Participant" (2003). It is clear from the prefatory comments to the interim final rule, however, that the intent of this language was to use limit the *types* of claims that could be brought to NAD and not to limit *who* could be an appellant. See, 60 Fed. Reg. 67,298, 67,301 (1995) (prefatory comments to interim final rule) (identifying the motivations for this approach as the broad statutory definition of "adverse decision" and the Secretary's statutory authority to define "participant").

<sup>13</sup> 7 U.S.C. § 6991(1) (excluding decisions "over which the Board of Contract Appeals has jurisdiction").

<sup>14</sup> 7 C.F.R. § 11.1, "Participant" (2003). As discussed in more detail later in this article, the NAD rule also states that the NAD process "may not be used to seek review of statutes or USDA regulations issued under Federal law." 7 C.F.R. § 11.3(b) (2003).

<sup>15</sup> These appeal proceedings apply to a wide range of USDA regulatory concerns, including animal health and welfare standards, mandatory assessments for commodity promotion, agricultural marketing agreements, Packers and Stockyards Act enforcement, Perishable Agricultural Commodities Act enforcement, grain standards, Capper-Volstead Act enforcement, and implementation of the Program Fraud Civil Remedies Act of 1986. See C.F.R. § 1.131 and 7 C.F.R. Part 1, Subparts I, L (2003).

- b. Decisions subject to the jurisdiction of USDA's Board of Contract Appeals or otherwise governed by federal contracting laws and regulations;<sup>16</sup>
- c. Claims arising under the Freedom of Information Act;<sup>17</sup>
- d. Suspension and disbarment disputes;<sup>18</sup>
- e. Decisions under Commodity Credit Corporation export programs;<sup>19</sup>
- f. Disputes between reinsured companies and the Federal Crop Insurance Corporation;<sup>20</sup>
- g. Determinations under the federal crop insurance programs whether an insured has followed "good farming practices";<sup>21</sup>
- h. Tenant grievances or appeals prosecutable under specific provisions of the Rural Housing Service's multi-family housing program;<sup>22</sup>
- i. Claims arising out of an employment relationship with an agency or office of USDA, including personnel, equal employment opportunity, and other disputes;
- j. Claims under the Federal Tort Claims Act<sup>23</sup> or the Military Personnel and Civilian Employees Claims Act of 1964;<sup>24</sup>

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16. Rules for USDA's Board of Contract Appeals can be found at 7 C.F.R. Part 24. Federal contracting laws and regulations may provide for other forums and rules as well.

17. Freedom of Information Act determinations by USDA are appealable under regulations found at 7 C.F.R. Part 1, Subpart A..

18. Suspension and disbarment disputes may be heard under rules at 7 C.F.R. Parts 1407 and 3017, among others.

19. Provisions for appeals of CCC export program decisions can be found at 7 C.F.R. §§ 1484.76, 1485.20, 1494.901.

20. Disputes between reinsured companies and the FCIC under the terms of a reinsurance agreement are addressed at 7 C.F.R. § 400.169.

21. This category of determination was specifically removed from NAD's jurisdiction by the 2000 Agricultural Risk Protection Act. Pub. L. No. 106-224, 114 Stat. 358, 378, § 123 (codified at 7 U.S.C. § 1508(a)(3)(B)(ii)(I) (providing that no such determination shall be considered an "adverse decision" for NAD purposes). Instead of the NAD process, FCIC is to provide a separate, informal administrative review process for such determinations. 7 U.S.C. § 1508(a)(3)(B)(ii). Rules for this process can be found at 7 C.F.R. Part 400, Subpart J. Insureds have the right to proceed directly to judicial review of such a determination by FCIC without exhausting any administrative review processes. 7 U.S.C. § 1508(a)(e)(B)(iii); 7 C.F.R. § 400.96(b) (2003).

22. Tenant grievances and appeals and under the RHS multi-family housing program are heard under rules at 7 C.F.R. Part 1944, Subpart L.

23. 28 U.S.C. §§ 2671 et seq.

24. 31 U.S.C. § 3721.



- k. Determination complaints prosecutable under specified USDA nondiscrimination regulations;<sup>25</sup> or
- l. Decisions in proceedings before Tobacco Marketing Quota Review Committees under the Agricultural Adjustment Act of 1938.<sup>26</sup>

## 2. Adverse Decisions and Allegations of Discrimination

From this list of claims not appealable to NAD, the exclusion of discrimination complaints may be the source of some confusion and therefore merits additional comment.

### a. NAD Exclusion No Longer Tracks Location of Key Nondiscrimination Regulation

USDA issued a final rule in November, 1999, making changes to its nondiscrimination regulations.<sup>27</sup> Most importantly for NAD purposes, the 1999 rule moved the regulation governing nondiscrimination in programs and activities conducted by USDA from Subpart B of 7 C.F.R. Part 15 to a new 7 C.F.R. Part 15d. There was no Part 15d at the time the final NAD rule was issued and no conforming amendment was made to the NAD rule when the nondiscrimination regulations were moved; therefore, complaints under Part 15d are not included in the list of specifically enumerated exclusions from the NAD process. Because the NAD exclusion related to discrimination complaints is not written to suggest that additional, undesignated provisions are also covered, the language of the current NAD rule would lead a reader to conclude that Part 15d complaints are not excluded from the NAD process.<sup>28</sup>

This issue is important for would-be NAD appellants because the nondiscrimination provisions in the newly designated Part 15d are the primary nondiscrimination provisions governing programs conducted by USDA, i.e., those programs otherwise likely to afford recourse to NAD.<sup>29</sup> Of the five discrimination complaint processes that are specifically excluded under the NAD rule, only one—Part 15e (nondiscrimination on the basis of handicap in programs administered by USDA)—directly relates to complaints of

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25. These regulations are found at 7 C.F.R. Parts 15, 15a, 15b, 15e, and 15f.

26. 7 U.S.C. §§ 1361 et seq, Note that this exclusion was adopted with the final rule on June 23, 1999, and was not part of the interim final rule in effect from December 1995 to June 1999. See 64 Fed. Reg. 33,367,33,368 (1999) (prefatory comments to final rule).

<sup>27</sup> 64 Fed. Reg. 66,709 (1999) (codified at 7 C.F.R. pts. 15 and 15d).

<sup>28</sup> Compare the language of 7 C.F.R. § 11.1, “Participant (10)” (2003) (excluding claims arising under “discrimination complaints prosecutable under the nondiscrimination regulations at 7 C.F.R. parts 15, 15a, 15b, 15e, and 15f”) with the language of 7 C.F.R. § 11.1, “Participant (4)” (2003) (excluding claims arising under “[s]uspension and debarment disputes, *including, but not limited to*, those falling within the scope of 7 C.F.R. parts 1407 and 3017”) (emphasis added).

<sup>29</sup> The Part 15d provisions prohibit discrimination in “any program or activity conducted by the United States Department of Agriculture” on the basis of race, color, religion, sex, age, national origin, marital status, familial status, sexual orientation, disability, or because all or part of an individual’s income is derived from any public assistance program. 7 C.F.R. § 15d.2 (2003).

discriminatory conduct by USDA.<sup>30</sup> Thus, someone reading the current NAD rule might reasonably conclude that a complaint of discriminatory conduct by USDA on a protected basis other than handicap could be brought to NAD.

Although the NAD rule no longer reflects it, USDA seems to have maintained its position that NAD lacks jurisdiction over all discrimination complaints.<sup>31</sup> The provisions now located in the new Part 15d were clearly excluded from the NAD process when in their original location at Part 15, Subpart B. Because of this and because USDA strongly reasserted its position that discrimination complaints fall outside NAD's authority when the final NAD rule was issued,<sup>32</sup> it seems probable that the exclusion of complaints under Part 15d would be enforceable, though contrary to the plain language of the regulation.<sup>33</sup>

#### **b. NAD Appeals Involving Substantive Disputes and Discrimination Complaints**

Excluding allegations of discrimination from the NAD process can present complications for persons who seek to appeal agency decisions that involve both program-related disputes that are clearly within NAD's jurisdiction and alleged discriminatory conduct. Despite the added allegations of discrimination, it should be possible to fully pursue any program issues in an appeal before NAD.

For example, imagine that a farmer who has been prevented from planting a crop due to flooding applies for and is denied assistance under the Farm Service Agency's (FSA) Noninsured Crop Disaster Assistance Program (NAP). The farmer requests an appeal of the denial, a decision clearly within NAD's jurisdiction. As bases for challenging the agency decision, the farmer argues that the agency miscalculated the affected acreage and erroneously concluded that the farmer was ineligible for NAP because she did not have the resources to plant, grow, and harvest the crop. The farmer also alleges that the denial decision was motivated by gender discrimination. This farmer should be allowed to pursue a NAD appeal of the acreage calculation and eligibility determination under standard NAD procedures. If the farmer raises her discrimination allegations in the appeal request or at any point during the NAD process, she will be referred to the USDA procedures for filing a discrimination complaint, but her appeal on the program issues should continue.

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<sup>30</sup> Three of the nondiscrimination provisions specifically excluded from NAD's jurisdiction address discrimination perpetrated by recipients of USDA assistance. See 7 C.F.R. pt 15 (2003) (nondiscrimination by recipients of federal assistance); 7 C.F.R. pt. 15a (2003) (nondiscrimination by education programs or activities receiving federal assistance); 7 C.F.R. pt. 15b (2003) (nondiscrimination on the basis of handicap by recipients of federal assistance). Another excluded provision concerns adjudications of pre-1998 discrimination complaints under a special statutory limitations waiver. See 7 C.F.R. pt. 15f (2003) (adjudications under § 741 of the 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Bill, Pub. Law. No. 105-277).

<sup>31</sup> Consideration of whether excluding allegations of discriminatory conduct by USDA agencies from NAD's jurisdiction is a reasonable interpretation of the NAD authorizing statute is beyond the scope of this article.

<sup>32</sup> See 64 Fed. Reg. 33,367, 33,372 (1999) (prefatory comments to final rule) ("USDA already has a separate administrative process for review of discrimination complaints. NAD does not have the ability or capacity to undertake consolidated civil rights appeals that exceed the scope of the purpose for which it was established.").

<sup>33</sup> Note, however, that the relocation of provisions in Part 15, Subpart B, to Part 15d was foreseeable when the final NAD rule was issued. A formal proposal to make such a change had been issued in October 1998. 63 Fed. Reg. 62,962 (1998).

### **c. Allegations of Discrimination in the Pre-NAD Informal Review Process**

As discussed in detail later in this article, agencies whose adverse program decisions are subject to NAD review typically have a process for informal review of such decisions before an appeal to NAD. In some cases such informal review processes are mandatory before appeal to NAD is available. It is important therefore that USDA program participants and their representatives understand how an allegation of discrimination will be addressed in these informal review processes. For example, the Farm Service Agency policies for pre-NAD informal review of adverse decisions do not allow that review to proceed once an allegation of discrimination is made.<sup>34</sup> How such allegations are handled and the impact on review of related program issues may affect a would-be appellant's choice to use an optional informal review process or to raise any discrimination issues in such a process.

### **3. When Is an Agency's Failure to Act an Adverse Decision?**

NAD's regulatory definition of "adverse decision" narrows the statutory definition somewhat by setting a time limit on when an agency's failure to act becomes an adverse decision. The rule states that an agency's failure to issue a decision or otherwise act becomes an adverse decision if the act is not performed within the timeframes specified by agency program statutes or regulations or within a reasonable time if timeframes are not specified in such statutes or regulations. . . .<sup>35</sup>

Similar "specified timeframes" and "reasonable time" language is used in the NAD rule provision setting time limits for requesting a NAD appeal.<sup>36</sup> The result is that the rule imposes time limits on filing a failure-to-act appeal that are not required by the statutory language. As explained in the prefatory comments to the final NAD rule, the intent of such limits is to "bring finality to agency decisions and programs."<sup>37</sup>

The prefatory comments provide an example related to an agency's failure to act within specified deadlines for action. The comments state that<sup>38</sup>

[i]f a regulation states that the agency will act on a given application in 60 days, a participant may not rest on his or her rights for a year before appealing to NAD because the agency never acted on the applications.

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<sup>34</sup> See FSA Handbook 1-APP (Revision 1), Program Appeals, Mediation, and Litigation, page 9-2, para. 253.B (Aug. 15, 1997) ("If at any time during the informal appeal process a producer alleges discrimination, the appeal process shall immediately cease and the complaint shall be submitted to the appropriate officials. . . . No action shall be taken regarding the matter under appeal until instructions are received from the [FSA] National Office.").

<sup>35</sup> 7 C.F.R. § 11.1, "Adverse decision" (2003).

<sup>36</sup> See 7 C.F.R. § 11.6(b)(1) (2003) ("In the case of the failure of an agency to act on the request or right of a recipient, a participant personally must request such hearing not later than 30 days after the participant knew or reasonably should have known that the agency had not acted within the timeframes specified by agency program regulations, or, where such regulations specify no timeframes, not later than 30 days after the participant reasonably should have known of the agency's failure to act.").

<sup>37</sup> 64 Fed. Reg. 33,367, 33,371 (1999) (prefatory comments to final rule).

<sup>38</sup> 64 Fed. Reg. 33,367, 33,371 (1999) (prefatory comments to final rule).

Unfortunately for USDA program participants, it is impossible to deduce from this example what period might be considered “reasonable” when no timeframes for agency action are specified.

## **B. Who Is a Participant?**

The NAD rule defines a participant as<sup>39</sup>

any individual or entity who has applied for, or 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.

This definition is broad and rather straightforward. Nonetheless, when issuing the final NAD rule in June 1999, USDA observed that the concept of participant did not encompass all persons who might be affected by, and therefore have an interest in, a particular appeal.<sup>40</sup> In recognition of this, the final NAD rule includes a provision allowing other parties to participate in NAD appeals under certain circumstances.<sup>41</sup> The provision establishes two categories of such parties.

### **1. “Third Parties” Allowed Full Participation in Appeals**

Persons whose rights are directly affected by the appeal are designated “third parties” for NAD purposes.<sup>42</sup> The NAD rule defines “third party” to include<sup>43</sup>

any party for which a [NAD determination] could lead to an agency action on implementation that would be adverse to the party thus giving such party a right to a [NAD] appeal.

Examples of such persons given in the rule are a tenant affected by a landlord's appeal of a shared payment, a co-recipient of a payment affected by an appeal by another recipient, or heirs of an estate affected by an appeal by another heir.<sup>44</sup> The prefatory comments state that NAD intends by this provision to<sup>45</sup>

include all parties in the initial NAD appeal and prevent a secondary appeal by a third party who did not receive notice of the appeal, but who is adversely affected by the agency implementation of the NAD determination of appeal, and who thus would then be entitled to an appeal of his own that could lead to a contradictory result.

Under the NAD rule, third parties whose identity as such is known to NAD will receive notice of the appeal affecting their rights and will have a right to participate fully in the appeal, including the right to seek Director review of the hearing officer's determination (discussed

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<sup>39</sup> 7 C.F.R. § 11.1, “Participant” (2003). The NAD statute grants the Secretary of Agriculture the authority to define “participant” by regulation for NAD purposes. 7 U.S.C. § 6991(9).

<sup>40</sup> See 64 Fed. Reg. 33,367, 33,369-70 (1999) (prefatory comments to final rule).

<sup>41</sup> 7 C.F.R. § 11.15 (2003).

<sup>42</sup> 7 C.F.R. § 11.15 (2003).

<sup>43</sup> 7 C.F.R. § 11.15(a) (2003).

<sup>44</sup> 7 C.F.R. § 11.15 (2003).

<sup>45</sup> 64 Fed. Reg. 33,367, 33,369 (1999) (prefatory comments to final rule).

below).<sup>46</sup> Importantly, third parties who receive notice of an appeal affecting their rights will be bound by the final NAD determination, whether or not they exercise their right to participate in the appeal.<sup>47</sup>

The prefatory comments to the final NAD rule give an example of a third party appeal situation, slightly modified here:<sup>48</sup>

Suppose an agency determines that a recipient sharing in a payment with two other persons is entitled to 25 percent of the total payment, and the recipient appeals. NAD determines that the agency decision was erroneous, and the agency implements the NAD determination by paying the appellant 50 percent of the total payment. Without a provision for the other two recipients (whose aggregate share of the payment has decreased from 75 percent to 50 percent) to be notified of and participate in the appeal, they would not be bound by the first NAD determination and could themselves bring subsequent appeals of their decreased payment shares.

## **2. “Interested Parties” Allowed to Participate But Not Seek Review**

Persons who are indirectly affected by a NAD appeal determination but whose rights are not affected are designated “interested parties” under the NAD rule.<sup>49</sup> The NAD rule states, seemingly exclusively, that interested parties include (1) guaranteed lenders having an interest in a guaranteed loan borrower’s appeal, and (2) reinsured companies<sup>50</sup> having an interest in an appeal by a person insured under a crop insurance policy.<sup>51</sup>

Interested parties may participate in the hearing of an appeal that may indirectly affect them. The NAD rule states, however, that “such participation does not confer the status of an appellant” upon the interested party, and interested parties are not entitled to request Director

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<sup>46</sup> 7 C.F.R. § 11.15(a) (2003). The prefatory comments indicate that USDA also believes that third parties, as defined here, are entitled to seek judicial review of a final NAD determination.

<sup>47</sup> 7 C.F.R. § 11.15(a) (2003).

<sup>48</sup> 64 Fed. Reg. 33,367, 33,369-70 (1999) (prefatory comments to final rule).

<sup>49</sup> 7 C.F.R. § 11.15 (2003). The critical distinction between third parties and interested parties seems to be that third parties could have their own NAD appeal rights arising out of the implementation of an appeal determination while interested parties would have no appeal rights of their own regardless of the outcome of the appeal.

<sup>50</sup> The NAD rule and prefatory comments confusingly use both “reinsured company” and “reinsurance company” to refer to crop insurance companies who have entered into a reinsurance agreement with FCIC. Compare 7 C.F.R. § 11.1, “Participant (6)” and 7 C.F.R. § 11.15 (2003). FCIC consistently refers to these companies as “reinsured companies,” and that term will be used throughout this article except in direct quotes from the NAD rule. See 7 C.F.R. § 400.90, “Reinsured company” (2003).

<sup>51</sup> 7 C.F.R. § 11.15(b) (2003). The prefatory comments suggest that guaranteed lenders and reinsured companies may only be examples of interested parties, but the rule language is written more restrictively. Compare 64 Fed. Reg. 33,367, 33,369 (1999) (prefatory comments to final rule) (“there may be an interested party that desires to receive notice of and perhaps participate in an appeal . . . e.g., guaranteed lenders and reinsurance companies”) and 7 C.F.R. § 11.15(b) (2003) (“the respective guaranteed lender or reinsurance company having an interest in a participant’s appeal . . . may participate in the appeal as an interested party”).

review of hearing officer determinations.<sup>52</sup> There is no requirement under the NAD rule that interested parties be notified of an appeal that may affect them.<sup>53</sup> Neither is there a provision for such notice in Risk Management Agency (RMA) regulations setting out the procedures for internal review of adverse agency decisions under the federal crop insurance programs.<sup>54</sup> However, the prefatory comments to the final RMA appeal procedures state that a reinsured company will be notified in writing of any appeal affecting a policy the company insures, according to provisions of federal crop insurance handbooks.<sup>55</sup>

The status of guaranteed lenders as “interested parties” under the final NAD rule is a significant change from the interim final rule in effect from December 1995 to June 1999.<sup>56</sup> The interim final rule provided that a guaranteed loan applicant or borrower had to be joined by the lender in any appeal to NAD.<sup>57</sup> Under the final rule, a borrower or applicant may appeal FSA actions related to a guaranteed loan alone, and the lender has the option of participating as an “interested party.” Note that the FSA guaranteed loan regulations have not been amended to reflect this change since the final NAD rule was issued.<sup>58</sup>

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<sup>52</sup> 7 C.F.R. § 11.15(b) (2003). The prefatory comments indicate USDA’s position that interested parties, as defined here, are not entitled to seek judicial review of a final NAD determination. 64 Fed. Reg. 33,367, 33,370 (1999) (prefatory comments to final rule).

<sup>53</sup> In prefatory comments to the final NAD rule, USDA stated that the issue of notice to interested parties should be addressed in the rules of the deciding agency because “NAD does not have the resources, capability, or function to carry out that mission.” 64 Fed. Reg. 33,367, 33,370 (1999) (prefatory comments to final rule). USDA also rejected a suggestion that reinsured companies be allowed to request Director review of hearing officer decisions, stating that a reinsured company “is not the recipient of the adverse decision” having a statutory right to appeal. 64 Fed. Reg. 33,367, 33,370 (1999) (prefatory comments to final rule).

<sup>54</sup> See 7 C.F.R. pt. 400, subpt. J (2003).

<sup>55</sup> See 67 Fed. Reg. 13,249, 13,250 (2002) (prefatory comments to final rule) (“reinsured companies will be notified in writing of any appeal of a FCIC decision regarding a policy that the reinsured company insures”).

<sup>56</sup> See 64 Fed. Reg. 33,367, 33,370 (1999) (prefatory comments to final rule) (“USDA is striking the requirement in . . . the interim final rule that guaranteed lenders jointly appeal to NAD with borrowers”).

<sup>57</sup> See 7 C.F.R. § 11.1, “Participant” (1999).

<sup>58</sup> See 7 C.F.R. § 762.104(a) (2003).

### 3. “Authorized Representatives” Permitted—But Participant Signatures Still Required

The NAD rule allows participants to have representation by attorneys or non-attorneys.<sup>59</sup> For a person to be allowed to represent a participant in NAD proceedings, that person must become an “authorized representative” by filing a declaration with NAD stating that the participant has given written authorization for the representation in the appeals process for a specified decision or decisions.<sup>60</sup> A copy of the participant’s written authorization must be attached to the declaration.<sup>61</sup> Although not required by the NAD rule, it is probably prudent to include a copy of the declaration and written authorization with the initial submission at each level of an appeal. Prefatory comments to the interim final rule indicate that form language for the declaration can be obtained from NAD.<sup>62</sup>

An unusual aspect of representation in the NAD process is the requirement that the participant *personally* sign the request for NAD review at each level of that process. This requirement applies to requests for Director review of nonappealability,<sup>63</sup> appeal requests,<sup>64</sup> and requests for Director review.<sup>65</sup> For entity participants, the requirement extends to the signature of “a responsible officer or employee.”<sup>66</sup> This means that an attorney (or other individual) who has been authorized to represent a participant in the NAD process must nonetheless secure the client’s personal signature to proceed to each succeeding stage of an appeal. This can be very important, given the relatively short timeframes in the NAD process.

NAD acknowledges that the personal signature requirement is “not a statutory jurisdictional prerequisite for perfecting a timely appeal.”<sup>67</sup> However, NAD justifies the personal signature requirement by the need to “ensure that participants are giving informed consent to the

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<sup>59</sup> 7 C.F.R. § 11.1, “Authorized representative” (2003).

<sup>60</sup> 7 C.F.R. § 11.6(c) (2003). The declaration must be made expressly under penalty of perjury as set out 28 U.S.C. § 1746. Prefatory comments to the interim final rule state that the declaration is deemed necessary to assure NAD that “purported representatives are who they actually claim to be.” See 60 Fed. Reg. 67,298, 67,304 (1995) (prefatory comments to interim final rule).

<sup>61</sup> 7 C.F.R. § 11.6(c) (2003).

<sup>62</sup> 60 Fed. Reg. 67,298, 67,304 (1995) (prefatory comments to interim final rule).

<sup>63</sup> 7 C.F.R. § 11.6(a)(1) (2003). The requirement that the participant personally sign a request for Director review of an agency’s nonappealability determination was added in the final NAD rule issued in June 1999. NAD stated that this was a clarification of intent that had been expressed in the prefatory comments to the interim final rule but had not been incorporated into the rule itself. See 64 Fed. Reg. 33,367, 33,369 (1999) (prefatory comments to final rule).

<sup>64</sup> 7 C.F.R. § 11.6(b)(2) (2003).

<sup>65</sup> 7 C.F.R. § 11.9(a) (2003). A personal signature from the participant is apparently not required when requesting reconsideration of Director review determinations. See 7 C.F.R. § 11.11 (2003) and 60 Fed. Reg. 67,298, 67,304 (1995) (prefatory comments to interim final rule) (“... requiring that [participants] personally sign requests for Director review of appealability, requests for hearing, and requests for Director review of Hearing Officer determinations (Sec. 11.9(a)). . . .”).

<sup>66</sup> See 64 Fed. Reg. 33,367, 33,369 (1999) (prefatory comments to final rule).

<sup>67</sup> 64 Fed. Reg. 33,367, 33,369 (1999) (prefatory comments to final rule).

decisions undertaken in their behalf by their representatives.”<sup>68</sup> According to comments accompanying the interim final rule, the personal signature requirement obliges participants to “tak[e] personal responsibility” and be “fully aware of the implications of actions being taken on their behalf” in the appeals process while requiring authorized representatives to “keep participants informed in order to get their signature.”<sup>69</sup> Finding the burden imposed by the personal signature requirement to be light, NAD noted that documents can be submitted by mail or facsimile transmission.<sup>70</sup>

In prefatory comments to the final NAD rule issued in 1999, USDA “clarified” that “the reasonable interpretation of this requirement is vested in the NAD Hearing Officers or Director in individual cases.”<sup>71</sup> This suggests a possibility that appeal requests submitted without the personal signature of the participant may be allowed on a case-by-case basis. It is not clear how much latitude this interpretive authority offers, however, since the same passage in the prefatory comments states: “it is reasonable to expect that authorized representatives seeking to file appeals before NAD would check the rules of the forum for filing requirements.”<sup>72</sup>

### **C. What Agencies’ Decisions Are Covered?**

The NAD statute specifies the USDA agencies whose program decisions, if otherwise satisfying the “adverse decision” requirements, are appealable to NAD.<sup>73</sup> The statute also authorizes the Secretary of Agriculture to designate other USDA agencies as agencies covered by the NAD appeal process. USDA has implemented this authority by establishing the following as “agencies” for NAD purposes:<sup>74</sup>

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<sup>68</sup> 60 Fed. Reg. 67,298, 67,304 (1995) (prefatory comments to interim final rule).

<sup>69</sup> 60 Fed. Reg. 67,298, 67,304 (1995) (prefatory comments to interim final rule).

<sup>70</sup> 60 Fed. Reg. 67,298, 67,304 (1995) (prefatory comments to interim final rule). This finding does not acknowledge the burdens on participants who reside some distance from either their representative or a fax machine.

<sup>71</sup> 64 Fed. Reg. 33,367, 33,369 (1999) (prefatory comments to final rule).

<sup>72</sup> 64 Fed. Reg. 33,367, 33,369 (1999) (prefatory comments to final rule).

<sup>73</sup> 7 U.S.C. § 6991(2). These agencies are: the Consolidated Farm Service Agency; the Commodity Credit Corporation (with respect to domestic programs); the Farmers Home Administration; the Federal Crop Insurance Corporation; the Rural Development Administration; the Natural Resources Conservation Service; and any state, county, or area committee established under § 8(b)(5) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. § 590h(b)(5)). Due to agency restructuring and renaming, not all of the agencies named in the statute are specifically included in the NAD rule definition of “agency,” but all functions implied by the list in the NAD statute are covered by the final rule.

<sup>74</sup> 7 C.F.R. § 11.1, “Agency” (2003).



1. The Commodity Credit Corporation (CCC), with respect to domestic programs;<sup>75</sup>
2. The Farm Service Agency (FSA);<sup>76</sup>
3. The Federal Crop Insurance Corporation (FCIC);
4. The Natural Resources Conservation Service (NRCS);<sup>77</sup>
5. The Risk Management Agency (RMA);<sup>78</sup>
6. The Rural Business-Cooperative Service (RBS);
7. Rural Development (RD);<sup>79</sup>
8. The Rural Housing Service (RHS);
9. The Rural Utilities Service (RUS), except programs authorized by the Rural Electrification Act of 1936,<sup>80</sup> which includes the Rural Telephone Bank Act;
10. A state, county, or area committee established under § 8(b)(5) of the Soil Conservation and Allotment Act;<sup>81</sup> and
11. Any predecessor or successor agency to the above-named agencies, and any other agency or office of USDA that the Secretary may designate.

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<sup>75</sup> The limitation to domestic programs is not specified in the NAD rule definition of “agency,” but is clear in the statute and is apparently implemented in the NAD rule through the provision excluding appeals of decisions under CCC export programs. See 7 C.F.R. § 11.1, “Participant (5)” (2003).

<sup>76</sup> Created in 1994 as the Consolidated Farm Service Agency, and so designated in the NAD statute, this agency is the successor to USDA’s Agricultural Stabilization and Conservation Service (ASCS) and Farmers Home Administration (FmHA). See 7 U.S.C. § 6932. The agency’s title was changed to Farm Service Agency in 1995. 60 Fed. Reg. 56,391, 56,392 (1995) (discussion in prefatory comments to final rule making revisions to delegations of authority within USDA). When NAD was established, it was specifically assigned responsibility for administrative appeals formerly performed by ASCS’s National Appeals Division and FmHA’s National Appeals Staff. 7 U.S.C. § 6993; 59 Fed. Reg. 66,517, 66,518 (1994).

<sup>77</sup> NCRS is the successor agency to the former Soil Conservation Service. See 7 C.F.R. § 1781.2(a) (2003). When NAD was established, it was assigned responsibility for administrative appeals arising both from Soil Conservation Service decisions and from the decisions of that agency’s successor. 7 U.S.C. § 6993; 59 Fed. Reg. 66,517, 66,518 (1994).

<sup>78</sup> The Federal Agriculture Improvement and Reform Act of 1996 directed the Secretary of Agriculture to establish an Office of Risk Management to supervise the Federal Crop Insurance Corporation (FCIC) and other crop insurance-related programs. Pub. L. No. 104-127, tit. I, subtit. H, § 194(a), 110 Stat. 888, 945 (codified at 7 U.S.C. § 6933). The new RMA assumed FCIC supervisory functions from FSA in May 1996. 64 Fed. Reg. 33,367, 33,368 (1999) (prefatory comments to final rule).

<sup>79</sup> USDA noted in the prefatory comments to the final NAD rule that: “In many States and at the national office level, decisions relating to programs of the Rural Housing Service (RHS), Rural Business-Cooperative Service (RBS), and Rural Utilities Service (RUS) may be issued under the auspices of ‘Rural Development.’ Accordingly, USDA adds Rural Development (RD) to the definition of ‘agency’ to avoid any confusion as to whether such decisions are subject to appeal to NAD.” 64 Fed. Reg. 33,367, 33,368 (1999) (prefatory comments to final rule).

<sup>80</sup> 7 U.S.C. §§ 901 *et seq.*

<sup>81</sup> 16 U.S.C. § 590h(b)(5).

The applicability of the NAD appeal process to disputes arising under the federal crop insurance programs is sufficiently complicated to warrant some further discussion. NAD had initially proposed to allow insureds under federal crop insurance policies to use the NAD process to appeal decisions made by reinsured companies.<sup>82</sup> This was changed in the interim final rule in response to comments from reinsured companies that providing NAD appeals for such decisions was contrary to the NAD statute, would breach the terms of reinsurance agreements between the companies and USDA, and would overwhelm NAD with thousands of appeals.<sup>83</sup> The interim change was carried over into the final NAD rule, such that only crop insurance decisions made by FCIC or RMA are appealable to NAD.<sup>84</sup> The prefatory comments to the interim final NAD rule suggest that decisions still committed to FCIC and RMA include decisions regarding yield and coverage that are based on FCIC actuarial data and decisions concerning eligibility to participate in the federal crop insurance program.<sup>85</sup> NAD therefore has no jurisdiction over appeals by insureds of adverse decisions made by companies reinsured by FCIC. Disputes between insured parties and the reinsured companies are governed by the terms of the insurance contracts.

As mentioned earlier, one type of crop insurance determination that is made by FCIC is also excluded from NAD's jurisdiction. FCIC's determination of whether a particular insured has followed "good farming practices" was specifically removed from NAD's jurisdiction by the 2000 Agricultural Risk Protection Act.<sup>86</sup> Instead of the NAD process, FCIC is to provide a separate, informal administrative review process for such determinations,<sup>87</sup> and insureds are given the right to proceed directly to judicial review of such a determination by FCIC without exhausting any administrative review processes.<sup>88</sup>

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<sup>82</sup> 60 Fed. Reg. 27,044, 27,045 (1995) (proposed to have been codified at § 11.1, "Participant").

<sup>83</sup> See 60 Fed. Reg. 67,298, 67,301 (1995) (prefatory comments to interim final rule) ("In response to these comments, USDA has dropped decisions of reinsured companies as decisions that participants may appeal under this part.").

<sup>84</sup> 7 C.F.R. § 11.1, "Participant" (2003). See 7 C.F.R. § 400.91(b)(2) (2003).

<sup>85</sup> 60 Fed. Reg. 67,298, 67,301 (1995) (prefatory comments to interim final rule). Prefatory comments to the final FCIC/RMA informal review regulations give the following specific example of a decision by the agency that would give rise to informal review and NAD appeal rights: "Under 7 CFR part 400, subpart U, either FCIC or the reinsured companies make the initial determination that an insured owes a debt and that the debt has not been timely paid [making the insured ineligible for crop insurance] . . . For reinsured policies, the reinsured company provides notice to the producer that the producer owes a debt and the producer must be given an opportunity to dispute the debt. After this process is complete and the debt is determined to be delinquent, the reinsured company notifies FCIC, who then verifies that the debt is delinquent before listing the producer on the Ineligible List. . . . Even though FCIC only verifies the debt, since it is the agency that determines that the producer is ineligible, producers are entitled to appeal FCIC's listing of them on the Ineligible List." 67 Fed. Reg. 13,249, 13,250 (2002) (prefatory comments to final rule).

<sup>86</sup> Pub. L. No. 106-224, 114 Stat. 358, 378, § 123 (codified at 7 U.S.C. § 1508(a)(3)(B)(ii)(I)) (providing that no such determination shall be considered an "adverse decision" for NAD purposes).

<sup>87</sup> 7 U.S.C. § 1508(a)(3)(B)(i). Rules for this process can be found at 7 C.F.R. Part 400, Subpart J.

<sup>88</sup> 7 U.S.C. § 1508(a)(e)(B)(iii).

As discussed earlier in this article, disputes between reinsured companies and FCIC are also not appealable to NAD.<sup>89</sup> NAD stated in the prefatory comments to the interim final rule that<sup>90</sup>

Contract disputes between reinsured companies and FCIC will be appealable to the USDA Board of Contract Appeals as provided in its rules. Non-contract related decisions of FCIC that are adverse to reinsured companies may be settled with the agency or by resort to legal action in a court of competent jurisdiction.

In comments to the final NAD rule, USDA rejected a suggestion on behalf of crop insurance companies that NAD be available to hear disputes not subject to appeal to USDA's Board of Contract Appeals. Noting that NAD was "established as a forum primarily for producer appeals," and stating that it found no gap in a company's right to appeal to the Board and an insured's right to appeal to NAD, USDA found that the proposed "safety provision" was unnecessary and inappropriate.<sup>91</sup>

#### **IV. The NAD Director Determines What Decisions Are Appealable**

As set out above, NAD was established to provide a forum for review of adverse program decisions—e.g., eligibility or benefits levels—by certain USDA agencies. Although the definition of "adverse decision" for this purpose is very broad, there is one important limitation on the appealability of agency program decisions.

##### **A. No Appeal for "Matters of General Applicability"**

Although not explicitly set out in the regulatory or statutory definitions of "adverse decision," agency determinations that apply generally to all participants are not considered adverse to an individual and are therefore not appealable to NAD.<sup>92</sup> NAD noted in comments to its interim final rule that this is the only statutory limitation on appealability of agency decisions.<sup>93</sup>

Examples of "matters of general applicability" might be: the CCC's determination of a crop's average market price used to calculate benefits under the Noninsured Crop Disaster Assistance Program (NAP)<sup>94</sup>; area income limits used to determine eligibility for RHS single-family housing loans<sup>95</sup>; or the counties included in a USDA disaster designation, making producers in those counties eligible for FSA Emergency loans.<sup>96</sup>

Agencies whose decisions fall under NAD's jurisdiction will have their own interpretations of what this limitation means. For example, NRCS has published a regulation that purports to exclude

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<sup>89</sup> 7 C.F.R. § 11.1, "Participant (6)" (2003). See also 7 C.F.R. § 400.91(b)(1) (2003).

<sup>90</sup> 60 Fed. Reg. 67,298, 67,301 (1995) (prefatory comments to interim final rule).

<sup>91</sup> 64 Fed. Reg. 33,367, 33,370 (1999) (prefatory comments to final rule).

<sup>92</sup> 7 U.S.C. § 6992(d); 7 C.F.R. § 11.6(a)(2) (2003).

<sup>93</sup> 60 Fed. Reg. 67,298, 67,301 (1995) (prefatory comments to interim final rule).

<sup>94</sup> 7 C.F.R. § 1437.11(a)(2) (2003).

<sup>95</sup> See 7 C.F.R. § 3550.53(a) (2003).

<sup>96</sup> See 7 C.F.R. pt. 764 (2003).

the following categories of decisions from the appeals process: (1) general program requirements that apply to all participants; (2) science-based formulas and criteria; (3) procedural decisions relating to the administration of programs; and (4) denials due to lack of funds or authority.<sup>97</sup> Regulations related to administrative appeals of decisions by RBS, RHS, and RUS provide that, in addition to the exclusions set out in the NAD rule, decisions are not appealable if they concern (1) interest rates (other than a claim that the wrong interest rate has been applied), (2) agency refusals to request administrative waiver of program requirements, and (3) denials of assistance “due to lack of funds or authority to guarantee.”<sup>98</sup> And FSA’s internal appeal regulations provide that no reconsideration or appeal may be sought from (1) “any general program provision or program policy, or any statutory or regulatory requirement that is applicable to all similarly situated participants,” or (2) “[m]athematical formulas established under a statute or program regulations, and decisions based solely on the application of those formulas.”<sup>99</sup>

## **B. Agency Determinations of Nonappealability Are Themselves Appealable**

The limitation on appeals of generally applicable determinations means that it is not unusual for a program participant who receives an adverse decision to be informed by the agency that the decision is not appealable. However the final authority to determine appealability of any adverse decision rests with the NAD Director.<sup>100</sup> If an agency states that an adverse action is not appealable, a participant can request “Director review” to decide the issue.

Director review of an agency determination of nonappealability must be requested within 30 calendar days of the participant’s receiving notice that the agency considers its decision to be nonappealable.<sup>101</sup> Note that although agencies are expected to provide notice of the right to seek Director review of a nonappealability determination, USDA has not made that a requirement in the NAD rule, and NAD will presumably not waive this 30-day limit for participants who were not informed by an agency of their right to seek Director review.<sup>102</sup> The request for Director review of a

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<sup>97</sup> 7 C.F.R. § 614.5 (2003).

<sup>98</sup> 7 C.F.R. § 1900.56 (2003).

<sup>99</sup> 7 C.F.R. § 780.2(c), (d) (2003).

<sup>100</sup> 7 U.S.C. § 6992(d). The Director may delegate this authority to “any subordinate [NAD] official . . . other than a Hearing Officer.” 7 C.F.R. § 11.6(a)(3) (2003). The subordinate official’s determination is considered to be the Director’s determination and is not subject to further review by the Director.

<sup>101</sup> 7 C.F.R. § 11.6(a)(1) (2003). This 30-day time limit is not provided by statute, but was adopted by NAD when implementing the Director’s authority to make appealability determinations. See 7 U.S.C. § 6992(d). Other NAD time limits are expressly set out in the NAD statute. See 7 U.S.C. § 6996(b) (setting 30-day limit to request appeal hearing), 7 U.S.C. § 6998(a)(1) (setting 30-day limit for participant to request Director review of hearing officer determination), and 7 U.S.C. § 6998(a)(2) (setting 15-business day limit for agency to request Director review of hearing officer determination).

<sup>102</sup> See 64 Fed. Reg. 33,367, 33,371 (1999) (prefatory comments to final rule) (“USDA agrees that information on such appeal rights should be given by agencies when a decision is issued with a statement that it is not appealable. As with other notice requirements, however, USDA does not mandate this requirement on agencies in this final rule.”). In another context, the prefatory comments to the final rule stated that notice of specific rights in the NAD process is made “by [the] final rule itself.” 64 Fed. Reg. 33,367, 33,371-72 (1999) (prefatory comments to final rule).

nonappealability determination must be in writing and must be personally signed by the participant who is requesting the review.<sup>103</sup>

The NAD rule states only that the Director will determine whether the decision is a matter of general applicability.<sup>104</sup> It does not provide guidance as to the basis for this determination. The Director's determination on the issue of appealability is a final administrative determination and is binding on the agency and the participant.<sup>105</sup> If the Director determines that the agency decision is appealable, the participant will be notified of his or her right to proceed with an appeal.<sup>106</sup> Any appeal taken must be requested within 30 calendar days of the participant's receiving notice that the Director has determined the agency decision to be appealable.<sup>107</sup> If the Director determines that the agency decision is not appealable, the participant may seek relief from the Secretary and/or seek judicial review of the agency decision, as discussed later in this article.<sup>108</sup>

### **C. Challenging an Agency's Nonappealability Determination**

The concept of nonappealability is distinct from the categories of agency decisions that are excluded from NAD's jurisdiction. The excluded decisions are not appealable to NAD, regardless of how adverse the decision or how individualized the basis for the decision, because they have been explicitly removed from NAD's jurisdiction. This is typically because other forums exist for resolving those disputes. Nonappealability issues considered by the NAD Director will typically concern agency adverse decisions that are of a type clearly within NAD's jurisdiction, such as program eligibility or benefits calculations. The focus of the nonappealability determination is whether the challenged portion of the agency's decision is based on the specific circumstances of the individual participant.

In light of this focus, in many instances a closer look at an adverse decision determined to be nonappealable by an agency can reveal a dispute that is specific to the participant and is therefore appealable. Such may be the case if the agency's adverse decision is actually based on (1) an underlying and perhaps unarticulated factual dispute about the participant's specific circumstances, or (2) a dispute about the application of agency regulations to the participant's specific circumstances.

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<sup>103</sup> 7 C.F.R. § 11.6(a)(1) (2003). See the discussion earlier in this article of NAD's personal signature requirement. As noted there, the requirement that the participant personally sign a request for Director review of an agency's nonappealability determination was added in the final NAD rule issued in June 1999. See 64 Fed. Reg. 33,367, 33,369 (1999) (prefatory comments to final rule).

<sup>104</sup> 7 C.F.R. § 11.6(a)(2) (2003). USDA had originally proposed to provide that the Director would use "any information the Director determines is necessary" when making appealability determinations. See 60 Fed. Reg. 27,044, 27, 046 (1995) (proposed to have been codified at 7 C.F.R. § 11.6(b)(2)). This language was deleted when the interim final rule was issued, apparently in response to comments suggesting that the information to be considered should be defined. See 60 Fed. Reg. 67,298, 67,303 (1995) (prefatory comments to interim final rule). Although no longer explicitly stated, it still appears to be USDA's position that the Director may use "any information necessary" in these determinations. See 60 Fed. Reg. 67,298, 67,303 (1995) (prefatory comments to interim final rule) ("USDA has revised this subsection to reflect the statute and not specify anything regarding what information the Director may or may not use.").

<sup>105</sup> 7 C.F.R. § 11.6(a)(2) (2003).

<sup>106</sup> 7 C.F.R. § 11.6(a)(2) (2003).

<sup>107</sup> 7 C.F.R. § 11.6(b)(1) (2003).

<sup>108</sup> 7 U.S.C. §§ 6998(d), 6999.

This can be demonstrated by looking again at the examples given above of typical “matters of general applicability.” For each of these three examples, an agency determination of nonappealability due to the general applicability of the rule may be masking a truly appealable issue. First, consider the determination of average market price used to calculate NAP benefits. While market price appears to be a quintessential “matter of general applicability,” suppose that the participant is arguing that the crop has two distinct markets based on two end uses, but the agency has set only one price, using the lower-value end use. The program rules provide that separate average market prices are to be determined “as practicable for each intended use of a crop within a State for a crop year.”<sup>109</sup> The “as practicable” language in the rule suggests that an agency’s refusal to determine separate market prices for different intended uses of a crop should be appealable because a participant could present evidence to that determination of a specific market price for the crop’s higher-value end use is practicable for the agency.<sup>110</sup>

With respect to area income limits used by RHS to determine eligibility for single-family housing loans, an adverse decision based on these limits should be appealable if the participant is arguing that the agency erroneously found that the limits were exceeded, e.g., by miscalculating the participant’s income or by wrongly determining the size of the participant’s household.<sup>111</sup> Denial of eligibility for an FSA Emergency loan because the participant does not operate in a county covered by a Secretarial disaster designation can present appealable issues if, for example, the participant is arguing that the agency erroneously disregarded the participant’s lease arrangement with a landowner in a designated county.

Of course, not every agency adverse decision will be appealable. The purpose of these examples is to emphasize that what *is* appealable may not be apparent from the wording of the agency’s decision and to suggest that, in many cases, participants do have circumstance-based arguments that belie the “general applicability” of an agency’s adverse decision.

#### **D. Exhausting the Remedy of Nonappealability Review**

If a participant is informed by an agency that an adverse decision is nonappealable and there is a possibility that the participant would want to pursue judicial review of the adverse decision (discussed later in this article), it is important for the participant to request Director review of the nonappealability determination and thereby “exhaust” administrative remedies. As discussed in more detail later in this article, federal law prohibits courts from hearing challenges to USDA decisions if the challenger has not exhausted the minimum required review procedures that are available for the decision.<sup>112</sup>

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<sup>109</sup> 7 C.F.R. § 1437.11(a)(4) (2003).

<sup>110</sup> Evidence that it is practicable for the agency to set separate prices for distinct end uses might include: (1) the agency’s establishment of separate prices for the same crop in other states or in the same state in other years, (2) the agency’s establishment of separate prices for similar end uses of other crops, or (3) the availability of commercial market price indicators for the intended use.

<sup>111</sup> See 7 C.F.R. § 3550.53(a) (2003).

<sup>112</sup> 7 U.S.C. § 6912(e). The NAD rule also imposes an exhaustion requirement. See 7 C.F.R. § 11.2(b) (2003). The new RMA appeal regulations go so far as to state that a NAD Director determination of nonappealability must be obtained before seeking judicial review. 7 C.F.R. § 400.96(a)(2) (2003).

Although the NAD rule states that matters of general applicability are not subject to appeal,<sup>113</sup> this is not an invitation for participants or their representatives to make their own determinations of what is appealable nor to rely on agency pronouncements about the nonappealability of an adverse decision. To ensure that judicial review will be available, participants should always take the precaution of obtaining a NAD Director determination of nonappealability before attempting to bring a court action, even when the nonappealability of the decision seems clear and the choice to seek judicial review has been made.

The cost of foregoing this step was paid by the plaintiffs in *Bastek v. FCIC*, who had filed a judicial review action challenging the indemnity calculation for their crop insurance loss claims.<sup>114</sup> The Second Circuit Court of Appeals held that judicial review of the agency decision was barred because the farmers had failed to exhaust their administrative remedies by seeking a final appealability determination from NAD. The court rejected the farmers' argument that because their claims involved a matter of general applicability outside NAD's jurisdiction, they were excused from the exhaustion requirement. Finding that no exception from the exhaustion requirement was available, the court held that the farmers were required to either pursue a NAD appeal or obtain a determination of nonappealability from the NAD Director. Because the time for requesting such a determination had long passed when the court rendered its decision, the farmers were left without any forum for their challenge. The district court in *Bentley v. Glickman* followed the reasoning in *Bastek*, holding that "failure to seek review of a determination of non-appealability issue mandates a conclusion that Plaintiff has not exhausted his appeals."<sup>115</sup>

As discussed in the judicial review section of this article, other courts have been more willing to consider exceptions to the exhaustion requirement and entertain facial challenges to agency regulations and policies despite plaintiffs' failures to obtain final NAD determinations of nonappealability.<sup>116</sup> Although the possibility of making a successful exception argument would be very important to a participant who inadvertently missed the chance to obtain a final NAD determination of nonappealability, one could never be certain that an exception would be granted. Therefore it would never be advisable to willingly forego the NAD appealability review process. The time and expense required to request and receive Director review of an agency nonappealability determination is relatively slight compared with the risk of being left with no remedy at all.

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<sup>113</sup> 7 C.F.R. § 11.6(a)(2) (2003).

<sup>114</sup> 145 F.3d 90 (2d Cir. 1998), *cert. denied*, 525 U.S. 1016 (1998).

<sup>115</sup> 234 B.R. 12, 19 (N.D.N.Y. 1999).

<sup>116</sup> See *McBride Cotton & Cattle Corp. v. Veneman*, 290 F.3d 973 (9th Cir. 2002); *Gold Dollar Warehouse, Inc. v. Glickman*, 211 F.3d 93 (4th Cir. 2000); *Pringle v. United States*, 1998 U.S. Dist. LEXIS 19378, at \*14-15 (E.D. Mich. Dec. 9, 1998).

## V. Requesting an Appeal of an Adverse Agency Decision

Although the NAD process was designed to be “farmer friendly,”<sup>117</sup> the NAD rule still establishes basic requirements that an appeal request must satisfy.<sup>118</sup> These requirements can present some complicated issues for persons seeking admittance to the NAD process. These requirements and related issues are discussed here.

### A. NAD Appeal Request Requirements

The basic requirements for requesting a NAD appeal are as follows:<sup>119</sup>

1. The request must be in writing;
2. It must be personally signed by the participant;<sup>120</sup>
3. It must include a copy of the adverse agency decision letter (if available);
4. It must include a brief statement explaining why the participant believes that the agency's decision is wrong; and
5. It must be “filed” within 30 days of:
  - a. The participant's first receiving notice of the adverse decision;
  - b. The date the participant knew or reasonably should have known that the agency had not acted within the timeframes specified by agency program regulations;
  - c. The date the participant reasonably should have known of the agency's failure to act, where agency regulations specify no timeframe, or
  - d. The participant's receiving notice of a determination by the NAD Director that an agency's decision is appealable.

The NAD rule provides that a participant “must” send the agency a copy of the hearing request and “may” send the agency a copy of the adverse decision to be reviewed but states immediately thereafter that “failure to do either will not constitute grounds for dismissal of the appeal.”<sup>121</sup> Given that failure to send these items is not grounds for dismissal of an appeal, it is not clear what distinguishes the “must” and “may” tasks set out in the rule. It is possible that failure to send the required notice to the agency would delay the scheduling of a NAD hearing.

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<sup>117</sup> See, e.g., 60 Fed. Reg. 67,298, 67,302 (1995) (prefatory comments to interim final rule) (“Congress intended that these proceedings be farmer-friendly so that farmers would not be required to hire attorneys to use the NAD appeal process.”).

<sup>118</sup> See 7 C.F.R. § 11.6(b) (2003).

<sup>119</sup> 7 C.F.R. § 11.6(b) (2003).

<sup>120</sup> See the discussion earlier in this article of the personal signature requirement.

<sup>121</sup> 7 C.F.R. § 11.6(b)(2) (2003). See also 60 Fed. Reg. 67,298, 67,303 (1995) (prefatory comments to interim final rule) (“In either case, failure of the participant to send such copies to the agency is not jurisdictional and therefore will not be grounds for dismissal of an appeal.”).



### **Requirements of a Perfected NAD Appeal Request**

1. Written request for a NAD hearing or record review,
2. Personally signed by the USDA program participant,
3. Briefly stating the reason(s) that the agency's action—a decision or a failure to act—was wrong,
4. With a copy of the adverse agency decision attached (if available), and
5. Timely filed.

(A copy of the appeal request should also be sent to the agency)

### **B. Participant Not Bound by Brief Statement Setting Out Agency Error**

The requirement that a participant requesting a NAD appeal provide some statement of the error in the agency's decision provoked comments to the initial NAD proposed rule protesting that this was too great a burden to impose at the appeal request stage and might lead participants to believe that they need an attorney.<sup>122</sup> USDA responded to those comments when issuing the interim final rule, stating that the use of the word "wrong" in the requirement was intentionally used to "avoid any requirement that a participant state why a decision was 'erroneous' or 'did not conform to published law or regulation' or similar language."<sup>123</sup> Instead, USDA stated that the requirement is for the participant to tell NAD "what is wrong with the decision that causes one to appeal it."<sup>124</sup>

Importantly, the comments state that the "initial position is not binding" and is intended only to provide NAD "a little bit more information that will allow for efficient administration of appeals."<sup>125</sup>

### **C. What Constitutes "Filing" for NAD Purposes**

The NAD rule provides that appeal requests and any other documents are deemed "filed" (1) when a copy is delivered in person to NAD, (2) when postmarked, or (3) when a complete facsimile copy is received by NAD.<sup>126</sup> The time for filing expires on the last day of the filing period at 5:00 p.m. local time for the NAD office where the document is submitted.<sup>127</sup> If the last day for filing falls on a weekend, federal holiday, or any other day when NAD is not open for business, the time for filing is extended to the close of business on the next working day.<sup>128</sup>

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<sup>122</sup> See 60 Fed. Reg. 67,298, 67,304 (1995) (prefatory comments to interim final rule).

<sup>123</sup> 60 Fed. Reg. 67,298, 67,304 (1995) (prefatory comments to interim final rule).

<sup>124</sup> 60 Fed. Reg. 67,298, 67,304 (1995) (prefatory comments to interim final rule).

<sup>125</sup> 60 Fed. Reg. 67,298, 67,304 (1995) (prefatory comments to interim final rule).

<sup>126</sup> 7 C.F.R. § 11.14(a) (2003).

<sup>127</sup> 7 C.F.R. § 11.14(c) (2003).

<sup>128</sup> 7 C.F.R. § 11.14(b) (2003).

#### **D. Filed Within 30 Days**

The NAD statute and rule provide that a participant who receives notice of an adverse agency decision has 30 days to request an appeal of that decision to NAD.<sup>129</sup> NAD has interpreted this to mean 30 calendar days.<sup>130</sup> In prefatory comments to the interim final NAD rule, USDA made somewhat conflicting statements about the interpretation of this 30-day requirement.

First, in comments related to the interim final rule, USDA stated that the 30-day period “will function in effect as a statute of limitations; it will be up to the agency, not NAD, to raise the jurisdictional issue before NAD as to the fact that a participant's appeal is untimely.”<sup>131</sup> In the same section, USDA stated, “the agency bears the burden of proving untimeliness of the appeal to NAD.”<sup>132</sup>

The comments related to the interim final rule state: “USDA considers the 30-day requirement for filing an appeal to be jurisdictional in nature; thus, NAD has no authority . . . to hear an appeal unless filed within the 30-day time period as required.”<sup>133</sup> These later comments suggest that NAD will itself raise the question of timeliness of the appeal request, even if the agency and participant agree that the appeal should proceed. Reports from actual cases indicate that this is NAD's practice.

#### **E. Informal Review: Exhaustion Issues and Restarting the Clock**

As discussed in more detail later in this article, some agencies offer participants the opportunity to seek review by the agency itself of an adverse decision before beginning the NAD appeal process. Depending on the agency involved and the type of decision, this “informal review” may be optional for the participant or it may be mandatory.<sup>134</sup> If such review by the agency is mandatory, the participant will not be allowed to bring an appeal before NAD if the informal review remedy is not exhausted.<sup>135</sup> It is therefore critical that participants and their representatives understand when informal review is required and what the timeframes are for seeking such review.

If a participant pursues informal review by the deciding agency and the agency confirms its prior adverse decision or issues a modified decision that is adverse to the participant, the participant has 30 days after notice of the outcome of the informal review to request a NAD appeal. This is because each decision in an agency's informal review process, whether mandatory or optional, is deemed a new “adverse decision” triggering a new 30-day time period for requesting a NAD appeal.<sup>136</sup>

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<sup>129</sup> 7 U.S.C. § 6996(b); 7 C.F.R. § 11.6(b)(1) (2003).

<sup>130</sup> 7 C.F.R. § 11.1, “Days” (2003).

<sup>131</sup> 60 Fed. Reg. 67,298, 67,302 (1995) (prefatory comments to interim final rule).

<sup>132</sup> 60 Fed. Reg. 67,298, 67,302 (1995) (prefatory comments to interim final rule).

<sup>133</sup> 60 Fed. Reg. 67,298, 67,303 (1995) (prefatory comments to interim final rule).

<sup>134</sup> See 7 C.F.R. § 11.5 (2003).

<sup>135</sup> 7 C.F.R. § 11.5(a) (2003).

<sup>136</sup> See 60 Fed. Reg. 67,298, 67,302 (1995) (prefatory comments to interim final rule).

## F. Notice Issues

In many cases, it is not easy for a participant to know when notice of an adverse decision is first “received,” thus starting the 30 days to request a NAD appeal. Similarly, participants do not always know the point at which an agency’s delay in acting on a request becomes a failure to act that triggers the countdown for requesting a NAD appeal.

### 1. NAD Begins Counting 30 Days Even if Statutory Written Notice Not Provided

The NAD statute requires the Secretary of Agriculture (presumably acting through his or her agencies) to provide *written* notice to a participant within 10 working days of making an adverse decision.<sup>137</sup> The notice must also set out the participant’s rights to a NAD appeal or other review of the decision.

USDA has interpreted NAD’s jurisdiction to hear participant appeals to end on the 30th day after a participant receives notice of any kind of an adverse decision, even if the required written notice is never sent.<sup>138</sup> USDA stated in comments to the interim final NAD rule that interpreting the statutory notice requirement to mean that the 30-day timeframe for requesting a NAD appeal does not begin until the participant receives written notice of the adverse decision “would mean conversely that a participant achieves no standing to appeal an adverse decision to NAD until the participant receives a notice of appeal rights.”<sup>139</sup> Rejecting such an outcome, USDA concluded that the 30-day limit commences with the participant’s first notice of the decision, whether written or not.<sup>140</sup> In prefatory comments to the final NAD rule, USDA rejected a suggestion that the NAD process should be used to coerce agencies to satisfy their statutory notice obligations, stating that “[a]gency notices to participants of appeal rights are beyond the scope of this final rule.”<sup>141</sup>

USDA seems to have concluded that if an agency’s failure to provide written notice of an adverse decision means that the 30-day countdown for requesting a NAD appeal does not start, then there could be no NAD jurisdiction until written notice is provided, even in cases of an agency’s failure to act, where no notice of any kind is ever given.<sup>142</sup> A problem with this conclusion is that there is a difference between an agency’s decision to deny a benefit and an agency’s failure to act on a participant’s request for that benefit, and there is no need to have both bases for appeal treated the same for the matter of timeliness.<sup>143</sup> What is sufficient to allow

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<sup>137</sup> 7 U.S.C. § 6994.

<sup>138</sup> See discussion at 60 Fed. Reg. 67,298, 67,303-04 (1995) (prefatory comments to interim final rule).

<sup>139</sup> 60 Fed. Reg. 67,298, 67,303-04 (1995) (prefatory comments to interim final rule).

<sup>140</sup> 60 Fed. Reg. 67,298, 67,304 (1995) (prefatory comments to interim final rule). See also an extensive discussion of this issue in the comments to the final NAD rule at 64 Fed. Reg. 33,367, 33,371 (1999).

<sup>141</sup> 64 Fed. Reg. 33,367, 33,370 (1999) (prefatory comments to final rule).

<sup>142</sup> See 64 Fed. Reg. 33,367, 33,371 (1999) (prefatory comments to final rule) (“To require a written decision from the agency before a participant may appeal essentially stops a participant’s ability to appeal agency inaction, contrary to Congressional intent.”).

<sup>143</sup> An example of the fundamental difference between denial and non-action can be seen in FSA’s loan servicing programs. If a delinquent FSA borrower has a pending application for loan servicing, the borrower is protected from attempts by FSA to collect against the security property and the agency must continue to release income from the sale of security property to cover the borrower’s essential living and operating expenses. See 7 C.F.R. §§ 1951.907(c)(3), 1962.17(b)(2)(i) (2003). Once a loan servicing application is

a participant to seek a NAD appeal need not correspond completely with what will begin the 30-day timeframe to foreclose appeal rights. An argument can be made that it is difficult to understand how USDA can argue that its expressed desire for an “efficient NAD appeals process”<sup>144</sup> justifies ignoring a participant’s statutory right to written notice of adverse decisions.<sup>145</sup>

An alternative interpretation of the NAD statute provisions apparently not considered by USDA when developing the NAD rules of procedure is that the statutory notice requirement protects participants from losing appeal rights from agency decisions while still permitting access to the NAD process for participants who are challenging an agency’s failure to act. NAD clearly has authority under the statute to hear appeals arguing that an agency has failed to act, and it is within NAD’s discretion under the rule to determine whether such an appeal is timely, comes too late (meaning the participant has waited an unreasonably long time to bring the appeal), or comes too soon (meaning the agency has not been given a “reasonable” time to act on the participant’s request) and may be renewed at a later time if necessary. Nothing about requiring written notice of actual agency decisions before triggering a participant’s burden to timely request an appeal would limit this authority or discretion. USDA’s own remarks in the prefatory comments to the interim final and final NAD rules support this reading of the statute.<sup>146</sup>

The written notice requirement need not even forestall appeals by participants who have received oral notice of decisions with no forthcoming written confirmation.<sup>147</sup> Instead, the statutory notice requirement is most reasonably incorporated into the NAD process as a procedural protection ensuring that participants have at least some minimum time period after receiving an agency’s *written* notice of the adverse decision and appeal rights before the opportunity to

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denied, however, FSA will proceed to accelerate the loan, deny further releases of income, and begin liquidation of the security. A failure by FSA to provide written notice of a loan servicing denial and appeal rights is categorically different from a failure by FSA to make a decision on a loan servicing application within the prescribed timeframe. A borrower who does not appeal FSA’s failure to timely decide on his or her application still has a chance that FSA’s decision, however late, will be to *approve* the application. A borrower faced with an ambiguous denial has no such chance.

<sup>144</sup> 64 Fed. Reg. 33,367, 33,371 (1999) (prefatory comments to final rule) (“Each agency subject to NAD jurisdiction handles decisions in various ways and to attempt to specify that only ‘final’ adverse decisions will count does not provide for an efficient NAD appeals process.”).

<sup>145</sup> Similarly, USDA’s statement that deciding agencies may recall and reissue decisions to allow the 30-day clock to begin anew if notice is a problem is at best baffling in light of the statutory notice provision. See 64 Fed. Reg. 33,367, 33,371 (1999) (prefatory comments to final rule). The statute does not give a deciding agency the discretion to decide whether to provide notice that will clearly inform a participant of an adverse decision and available appeal rights; it is the agency’s obligation to do so. The burden is not on participants to persuade agencies to give them notice.

<sup>146</sup> See 60 Fed. Reg. 67,298, 67,303 (1995) (prefatory comments to interim final rule) (“While section 274 of the Act places a requirement on agencies, it has no bearing on the *authority of NAD to hear an appeal* by a participant.”) (emphasis added); 64 Fed. Reg. 33,367, 33,371 (1999) (prefatory comments to final rule) (“the requirement for notice of an agency adverse decision in Sec. 274 of the Reorganization Act is *not a prerequisite for NAD jurisdiction*.”) (emphasis added).

<sup>147</sup> The statement in the prefatory comments to the final rule that “if an administrative decision adversely affects a participant, it is an adverse decision subject to appeal under the statute regardless of whether the agency has sent out the formal letter with formal appeal rights” is true, but it does not support allowing agencies to forego the required notice and still see participants’ appeal rights barred. 64 Fed. Reg. 33,367, 33,371 (1999) (prefatory comments to final rule).

request a NAD appeal is foreclosed. If the Secretary of Agriculture disregards her statutory duty to provide timely written notice of adverse decisions and appeal rights, it can be argued that a reasonable interpretation of congressional intent in creating NAD is that the Secretary would then be barred—whether acting as the deciding agency or as NAD—from denying the participant the right to request a NAD appeal on the grounds that the request is untimely.

Arguably, USDA's expressed desire to avoid "unnecessary litigation over who got what notice when"<sup>148</sup> would seemingly be best accomplished by incorporating the written notice requirement into the NAD process. This would ensure that notice of adverse decisions and appeal rights is documented in a participant's file with the agency. Under the current system, establishing a participant's "first notice" of an adverse decision can force the NAD hearing officer to decide whom to believe, a situation seemingly just as likely to lead to litigation.

## **2. When Should a Participant Know That an Agency Has Failed to Act?**

As discussed earlier, NAD appeal rights are available when agencies fail to act on participant requests or applications. However, it is not entirely clear when a participant's 30 days to request an appeal of an agency's failure to act are triggered.

In some cases, a statute or regulation may prescribe a timeframe in which participants' requests or applications are to be acted upon. In such cases, an adverse decision due to failure to act occurs when those timeframes are not met.<sup>149</sup> At the same time, however, the participant's right to request an appeal of the failure to act lasts for 30 days after the participant "knew or reasonably should have known that the agency had not acted within the timeframes specified."<sup>150</sup> This would presumably allow a participant to argue that the 30 days for filing a NAD appeal do not necessarily begin on the first day that a regulatory timeframe goes unsatisfied. Prefatory comments to the interim final NAD rule support this presumption, stating that "reasonably" was added to this phrase expressly "to add flexibility to the 'should have known' standard."<sup>151</sup> The analysis is complicated, however, by remarks in the prefatory comments to the final NAD rule. In those comments, USDA rejected a suggestion to require agencies to notify participants of prescribed deadlines, stating "[p]articipants are deemed to have knowledge of published laws and regulations."<sup>152</sup> It is not clear how this imputed knowledge of program deadlines relates to the "reasonably should have known" standard for determining whether a failure-to-act appeal request is timely.

In other cases, there are no prescribed timeframes for when a participant's request or application must be acted upon. In those situations, an adverse decision due to failure to act

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<sup>148</sup> 64 Fed. Reg. 33,367, 33,371 (1999) (prefatory comments to final rule).

<sup>149</sup> 7 C.F.R. § 11.1, "Adverse decision" (2003).

<sup>150</sup> 7 C.F.R. § 11.6(b)(1) (2003).

<sup>151</sup> See 60 Fed. Reg. 67,298, 67,303 (1995) (prefatory comments to interim final rule).

<sup>152</sup> 64 Fed. Reg. 33,367, 33,371 (1999) (prefatory comments to final rule). The comments continued: "Requiring an agency to specify timeframes for all actions in regulations, or to notify participants of such timeframes, is beyond the scope of this rule and the mission of NAD." *Id.* The comments also suggest that allowing participants to appeal agency inaction without prescribing some limit to that right would be "contrary to . . . principles of sovereign immunity." *Id.*

occurs when the agency fails to act “within a reasonable time.”<sup>153</sup> At the same time, a participant’s right to request a NAD appeal of an agency’s failure to act lasts for 30 days after the participant “reasonably should have known of the agency’s failure to act.”<sup>154</sup> Putting these elements together compounds the reasonability determination: A NAD appeal must be requested within 30 days of the date the participant reasonably should have known that the agency failed to act within a reasonable time. No further guidance on this standard is found in NAD materials or case law.

### **G. Electing a Hearing or Record Review**

It is advisable that participants specify in their NAD appeal requests whether they are exercising their right to an evidentiary hearing or requesting “record review” of the case. NAD will presume that a hearing is desired unless the right to a hearing is waived by requesting record review,<sup>155</sup> but specifying the participant’s choice either way will avoid confusion.

In a record review, the NAD hearing officer makes a determination based on the agency record<sup>156</sup> of the case and other information submitted by the parties, including information submitted by affidavit or declaration.<sup>157</sup> If an adverse agency decision includes allegations of program violations that might be the basis for criminal prosecution, e.g., for mail fraud or other federal criminal offenses, a participant might want to elect to have the appeal proceed as a record review to avoid testifying at an evidentiary hearing.

## **VI. Stages of Review of Adverse Agency Decisions**

There are up to six stages of review contemplated in the NAD appeals process, only half of which are actually conducted by NAD. If a participant wishes to proceed to the next level of review, some stages of this process are mandatory and some are optional. Whether the stage is mandatory or not depends on which agency made the decision and the level within the agency at which the decision was made.

Where a stage in the NAD process is optional, the choice whether to pursue that stage before proceeding is a judgment call. Factors to be considered when deciding whether to pursue optional stages of review may include: added time (for better or worse), added effort and perhaps expense, the likelihood of receiving a favorable outcome, and whether the participant’s case would be strengthened by the opportunity for an additional level of review.

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<sup>153</sup> 7 C.F.R. § 11.1, “Adverse decision” (2003).

<sup>154</sup> 7 C.F.R. § 11.6(b)(1) (2003).

<sup>155</sup> 7 C.F.R. § 11.6(b)(2) (2003) (“Instead of a hearing, the participant may request a record review.”).

<sup>156</sup> As discussed later in this article, the “agency record” includes all materials “prepared or reviewed by the agency in its consideration and decisionmaking process.” 7 C.F.R. § 11.1, “Agency record” (2003).

<sup>157</sup> 7 C.F.R. § 11.1, “Record review” (2003).

## **A. Stage One—Informal Review at the Field Office Level**

USDA agency decisions that are adverse to program participants are most often made at the local field service level. The NAD statute requires agencies to provide internal review of adverse decisions if requested by the participant,<sup>158</sup> and most agencies have regulations providing for such reviews, often confusingly termed “appeals.”<sup>159</sup>

A decision by the agency after informal review is considered a new adverse decision for NAD purposes and triggers a new 30-day timeframe to request a NAD appeal.<sup>160</sup>

### **1. When Is Informal Review Required?**

The NAD statute does not require participants to exhaust available internal review procedures before appealing to NAD. Instead, it gives participants the power to request informal review but permits an appeal of any adverse decision directly to NAD.<sup>161</sup> The NAD rule, however, has made exhaustion of informal review by the agency a prerequisite to accessing the NAD process for certain adverse decisions made by FSA.<sup>162</sup>

#### **a. Informal Review *Optional* for FSA Adverse Decisions Under Farm Credit Programs**

The final NAD rule issued in June, 1999, made a change to the informal review requirements by expressly excluding FSA credit program decisions from mandatory informal review.<sup>163</sup> Under the final rule, FSA field office level decisions under farm credit programs are not subject to mandatory informal review before a participant can request a NAD appeal.<sup>164</sup> Informal review of such decisions is available at the participant’s option.<sup>165</sup>

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<sup>158</sup> 7 U.S.C. § 6995.

<sup>159</sup> See 7 C.F.R. pt. 614 (NRCS), pt. 780 (CCC, FCIC, FSA, and NRCS), and pt. 1900 (RBS, RHS, and RUS) (2003).

<sup>160</sup> 60 Fed. Reg. 67,298, 67,302 (1995) (prefatory comments to interim final rule).

<sup>161</sup> 7 U.S.C. § 6995 (“the agency shall hold, at the request of the participant, an informal hearing on the decision”); 7 U.S.C. § 6996(a) (“a participant shall have the right to appeal an adverse decision to [NAD] for an evidentiary hearing. . .”).

<sup>162</sup> 7 C.F.R. § 11.5(a) (2003).

<sup>163</sup> See 64 Fed. Reg. 33,367, 33,369 (1999) (prefatory comments to final rule). The comments state that this is a clarification of the provision’s scope.

<sup>164</sup> 7 C.F.R. § 11.5(a) (2003).

<sup>165</sup> See 7 C.F.R. § 762.104 (guaranteed loans); 7 C.F.R. § 1910.4(h)(5) (direct loan making); 7 C.F.R. § 1951.904(a)(4) (direct loan servicing) (2003).

**b. Informal Review *Required* for FSA Non-Credit Adverse Decisions Issued by Agency or Committee Employees at the Field Office Level**

A participant who receives an adverse decision “issued at the field service office level by an officer or employee of FSA, or by any employee of a[n FSA] county or area committee” under a non-credit program is required by the NAD rule to seek review of the decision by the FSA county or area committee “with responsibility for the adverse decision at issue” before requesting a NAD appeal.<sup>166</sup> Requirements for requesting such a review and review procedures are set out at 7 C.F.R. Part 780. A participant affected by such a decision who fails to properly and timely request informal review by the county or area committee will not be able to request a NAD appeal.<sup>167</sup>

FSA’s administrative appeal regulations phrase the standard for mandatory informal review somewhat differently. According to those regulations, informal review is mandatory for any adverse decision made by “personnel subordinate to the county committee.”<sup>168</sup> In this context, “subordinate” means that the FSA county committee is the next higher reviewing authority for the decision. This different construction of the standard is not a substantive difference on its face, but if there is any question about whether informal review is required of any adverse decision, the participant should seek guidance from NAD well in advance of NAD and FSA deadlines.

**c. Informal Review *Optional* for FSA Non-Credit Adverse Decisions Issued by Other Decision Makers**

If an adverse decision in an FSA non-credit program is made by someone other than a field service level officer or employee of FSA or an FSA county or area committee employee, informal review of that decision is not required before requesting a NAD appeal.<sup>169</sup> This means that if an adverse decision is made by a higher-level FSA employee or a county or area committee, informal review of the decision within FSA is optional.<sup>170</sup>

**d. Informal Review *Optional* for All Other Agencies’ Adverse Decisions**

Participants in programs not administered by FSA have the option of requesting informal review of adverse decisions by the reviewing agency before appealing to NAD, but such review is not required.<sup>171</sup>

Confusingly, NRCS regulations at 7 C.F.R. Part 614 purport to impose a mandatory informal review requirement on participants who receive adverse technical determinations

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<sup>166</sup> 7 C.F.R. § 11.5(a) (2003).

<sup>167</sup> 7 C.F.R. § 11.5(a) (2003) (“a participant must seek [such] informal review . . . before NAD will accept an appeal. . .”).

<sup>168</sup> 7 C.F.R. § 780.1, “Final decision” (2003).

<sup>169</sup> 7 C.F.R. § 11.5(a), (b) (2003).

<sup>170</sup> This is consistent with the FSA standard, mentioned above, that informal review is mandatory for decisions made by personnel “subordinate to the county committee.” 7 C.F.R. § 780.1, “Final decision” (2003).

<sup>171</sup> 7 C.F.R. § 11.5(b) (2003). See, e.g., 7 C.F.R. § 400.92(a) (2003) (“ . . . nothing in this subpart prohibits a participant from filing an appeal of an adverse decision directly with NAD . . . without first requesting administrative review or mediation under this subpart.”).



from NRCS related to the major conservation and farm programs, including wetlands and highly erodible lands determinations. Those regulations state: “participants wishing to appeal must exhaust any appeal procedures through the FSA county committee prior to appealing to NAD.”<sup>172</sup> As stated earlier, however, the NAD rule only imposes mandatory informal review requirements where an adverse decision has been made by “an officer or employee of FSA, or by any employee of a[n FSA] county or area committee.”<sup>173</sup> Because NAD and not the deciding agency is the final authority on whether NAD will hear an appeal, it would be prudent for a participant faced with an adverse technical determination from NRCS to seek early guidance from NAD about the mandatory or optional nature of informal review.<sup>174</sup>

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<sup>172</sup> 7 C.F.R. § 614.101(a)(2) (2003).

<sup>173</sup> 7 C.F.R. § 11.5(a) (2003). The prefatory comments to the interim final rule establishing FSA’s appeal procedures at 7 C.F.R. Part 780 make a clear distinction between decisions made by FSA and those made by NRCS: “Part 780 includes procedures for the handling of appeals of *NRCS technical determinations* to FSA county and area committees. Part 780 *also* includes procedures for the *mandatory appeal of certain FSA adverse decisions* to such committees as required by 7 CFR 11.5(a) of the NAD rules of procedure.” 60 Fed. Reg. 67,298, 67,307 (1995) (prefatory comments to interim final rule) (emphasis added).

<sup>174</sup> Prefatory comments to NRCS appeal regulations suggest that this exhaustion requirement is drawn from statutory language requiring that FSA county and area committees have “initial jurisdiction” over administrative appeals from adverse decisions under the conservation programs in question, including technical determinations by NRCS. See 60 Fed. Reg. 67,298, 67,307 (1995) (prefatory comments to interim final rule). However, this statutory language provides that such jurisdiction exists only “until such time as an adverse decision . . . is referred to the National Appeals Division for consideration.” 7 U.S.C. § 6932. Because the only way that an adverse decision can be “referred” to NAD is for the adversely affected participant to request a NAD appeal, it can be argued that this statutory provision would most properly be interpreted as ensuring that participants who desire informal review by the FSA committee are ensured access to such review, but not establishing an exhaustion requirement that overrides the clear right of participants under the NAD statute to appeal adverse agency decisions to NAD. 7 U.S.C. § 6996(a).

Interpreting the language at 7 U.S.C. § 6932 to create new rights for participants and not new burdens is supported by the change that this statutory provision made to informal review procedures for these technical determinations. Under regulations in effect when § 6932 was enacted, participants adversely affected by an SCS (the predecessor to NRCS) decision in the conservation programs were *required* to seek reconsideration by the decision maker before any higher-level review was available. See 7 C.F.R. § 614.4 (1994). If reconsideration was requested and the decision was not changed, further review of the decision was only available within SCS. 7 C.F.R. § 614.5 (1994). Arguably, the most logical interpretation of the “initial jurisdiction” language in § 6932 is that Congress was disapproving of the regulatory requirement that an adversely affected participant first seek reconsideration by the initial decision maker and was intending to provide recourse to another review authority. That is in fact what is now available under NRCS appeal provisions. See 7 C.F.R. § 614.101(a) (2003). It can be argued that USDA’s mistake was in interpreting Congress’s mandate to *allow* recourse to FSA committees as a mandate to *require* recourse to FSA committees, an interpretation that cannot be reconciled with the provisions of the contemporaneously enacted NAD statute.

### **e. Informal Review of an Agency's Failure to Act Is *Optional*, If Available**

Most internal agency regulations providing for informal review contemplate review only of affirmative acts of decision making by the agency.<sup>175</sup> The NAD rule similarly does not address informal review in cases of adverse decisions resulting from an agency's failure to act on a participant request. A reasonable conclusion would therefore seem to be that informal review of an agency's failure to act is not mandatory, assuming such review would even be available.

Once again, however, the NRCS administrative appeal provisions are unique, and uniquely confusing. Those provisions expressly provide that they apply to "the failure of an official of NRCS to issue a technical determination or decision."<sup>176</sup> The applicability of informal review provisions to an agency's failure to act would be noteworthy but nothing more in the case of optional informal review. However, because NRCS purports to make informal review by FSA county and area committees mandatory before a participant may begin the NAD appeal process, this provision becomes more important and more likely a stumbling block to would-be NAD appellants. If NAD enforces the NRCS mandatory informal review provision, NRCS's express inclusion of failures to act puts participants desiring a NAD appeal in the difficult position of having to first seek informal review by an FSA committee of NRCS non-action when the FSA informal review procedures do not contemplate non-action reviews. To ensure that NAD appeal rights are preserved, participants faced with a failure by NRCS to issue a decision or technical determination should seek guidance from NAD as early as possible about informal review requirements.

## **2. Informal Review Requirements**

Procedures and timeframes for requesting informal review of adverse decisions are spelled out in each agency's regulations. Those regulations control a participant's ability to access any informal review processes and what the processes entail. If informal review is mandatory, these regulations can have a significant impact on whether a participant will ultimately have recourse to a NAD appeal.

### **a. Agency Administrative Appeal Regulations**

A brief overview of agency informal review requirements is set out here. Participants and their representatives should consult the current published regulations for the deciding agency to learn the details of the process and check for any changes.

#### **(1) Farm Service Agency and FSA Committees**

Regulations governing informal review of adverse decisions made by FSA employees, committees, or committee employees can be found at 7 C.F.R. Part 780.<sup>177</sup> These include the procedures for mandatory informal review of certain FSA decisions, as discussed above.<sup>178</sup>

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<sup>175</sup> See 7 C.F.R. pt. 780 (2003) (referring to decisions "made" and "rendered"); 7 C.F.R. § 1900.55(a) (2003) (" . . . the decision maker will inform the participant of the decision. . . .").

<sup>176</sup> 7 C.F.R. § 614.3 (2003).

<sup>177</sup> 7 C.F.R. pt. 780 (2003).

<sup>178</sup> 7 C.F.R. § 11.5(a) (2003); 7 C.F.R. § 780.1, "Final decision" (2003). See 60 Fed. Reg. 67,298, 67,307 (1995) (prefatory comments to interim final rule).

FSA's informal review regulations contemplate two forms of internal review: "reconsideration," which is review by the same decision maker, and "appeal," which is review by the next higher authority.<sup>179</sup> In either case, a request for informal review of an FSA decision must be made within 30 days after written notice of the decision is "mailed or otherwise made available" to the participant.<sup>180</sup>

## **(2) Commodity Credit Corporation**

FSA's informal review regulations at 7 C.F.R. Part 780, discussed above, also govern informal review of adverse decisions by the Commodity Credit Corporation and adverse decisions in programs administered by FSA on behalf of CCC.<sup>181</sup>

## **(3) Federal Crop Insurance Corporation and Risk Management Agency**

Since May 3, 1996, the federal crop insurance programs have been administered by the Risk Management Agency.<sup>182</sup> Policies under these programs are reinsured by FCIC or, in limited circumstances, may be offered directly by FCIC.<sup>183</sup> Depending on the circumstances, therefore, either RMA or FCIC could make a decision that would be adverse to a participant in the federal crop insurance programs and give rise to NAD appeal and informal review rights.

In general, informal review of adverse decisions made by FCIC or RMA is governed by regulations made effective on April 22, 2002, and codified at 7 C.F.R. Part 400, Subpart J.<sup>184</sup> The provisions are the same whether RMA or FCIC is the decision maker. Informal review is available to program participants for (1) adverse decisions related to insurance policies issued directly by FCIC,<sup>185</sup> (2) adverse decisions made by FCIC or RMA related to policies issued by private insurance companies and reinsured by FCIC, and (3) determinations by FCIC or RMA of "good farming practices."<sup>186</sup>

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<sup>179</sup> 7 C.F.R. § 780.1, "Appeal," "Reconsideration" (2003).

<sup>180</sup> 7 C.F.R. § 780.8(a) (2003).

<sup>181</sup> 7 C.F.R. § 780.2(a)(1)(i), (a)(2) (2003). See also 60 Fed. Reg. 67,298, 67,307 (1995) (prefatory comments to interim final rule).

<sup>182</sup> See 64 Fed. Reg. 52,678, 52,678 (1999) (prefatory comments to proposed rule to have been codified at 7 C.F.R. pts. 400, 780). Administration of federal crop insurance programs had previously been assigned to FSA..

<sup>183</sup> 7 C.F.R. § 457.2(b) (2003).

<sup>184</sup> 67 Fed. Reg. 13,249-13,252 (2002) (codified at 7 C.F.R. pt. 400, subpt. J).

<sup>185</sup> Although FCIC currently is not issuing crop insurance policies directly, it retains the authority to do so. 67 Fed. Reg. 13,249, 13,249-50 (2002) (prefatory comments to final rule). Informal review of decisions related to policies issued directly by FCIC is available to the extent the decisions involve: (1) denial of participation, (2) compliance, or (3) payments or other benefits under the policies. 7 C.F.R. § 400.91(c) (2003). Under this provision, participants may seek review if the decision affects payments made directly to them or payments made to a third-party, such as an assignee. 7 C.F.R. § 400.91(c)(4) (2003). See also 67 Fed. Reg. 13,249, 13,250 (2002) (prefatory comments to final rule).

<sup>186</sup> 7 C.F.R. § 400.91(a) (2003).

Informal review of adverse FCIC or RMA decisions before requesting a NAD appeal is expressly at the participant's option.<sup>187</sup>

Participants who receive adverse decisions issued by FCIC or RMA may request "administrative review" of such decisions.<sup>188</sup> A request for administrative review must be filed within 30 days of the participant's receipt of written notice of the adverse decision.<sup>189</sup>

The informal review provisions for FCIC and RMA decisions are notably different from those of other USDA agencies because they purport to require participants to choose between administrative review and mediation of an adverse decision.<sup>190</sup> As discussed later in this article, this limitation will not necessarily be effective against participants who request a NAD appeal, but one should nonetheless be aware of the provision. Participants challenging a determination of good farming practices should also be aware that the agency considers such decisions subject only to administrative review and not subject to mediation.<sup>191</sup>

#### **(4) Natural Resources Conservation Service**

Informal review of NRCS technical determinations is governed by regulations at 7 C.F.R. Part 614, which is divided into three subparts. The first subpart sets out general provisions governing all NRCS informal review proceedings.<sup>192</sup> Notably, these provisions allow participants to seek informal review of any "NRCS technical determination or decision that affects the legal substantive status of the land, though it may not necessarily be adverse."<sup>193</sup> This is made somewhat clearer by another provision stating that informal review of NRCS determinations is available "even though [the determinations] may not affect the landowner's or program participant's eligibility for USDA program benefits."<sup>194</sup> Also notable is that NRCS informal review procedures are expressly available for "the failure of an official of NRCS to issue a technical determination or decision."<sup>195</sup>

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<sup>187</sup> 7 C.F.R. § 400.92(a) (2003) (" . . . nothing in this subpart prohibits a participant from filing an appeal of an adverse decision directly with NAD in accordance with part 11 of this title without first requesting administrative review or mediation under this subpart.").

<sup>188</sup> 7 C.F.R. §§ 400.90, "Administrative review," 400.91(c) (2003).

<sup>189</sup> 7 C.F.R. § 400.95(a) (2003).

<sup>190</sup> See 7 C.F.R. §§ 400.93(a), 400.94(a) (2003).

<sup>191</sup> 7 C.F.R. § 400.93(a) (2003).

<sup>192</sup> 7 C.F.R. pt. 614, subpt. A (2003).

<sup>193</sup> 7 C.F.R. § 614.2, "Adverse technical determination" (2003).

<sup>194</sup> 7 C.F.R. § 614.3(b) (2003).

<sup>195</sup> 7 C.F.R. § 614.3(c) (2003).

(a) *Informal Review of NRCS Determinations Under Title XII Conservation Programs*

The second subpart of the NRCS appeal regulations governs informal review of NRCS determinations in conservation programs under Title XII of the Food Security Act of 1985.<sup>196</sup> These are the major conservation programs of interest to most USDA program participants:<sup>197</sup> Highly Erodible Land Conservation (“Sodbuster”); Wetland Conservation (“Swampbuster”); the Conservation Reserve Program; the Wetlands Reserve Program;<sup>198</sup> the Agricultural Water Quality Incentives Program; and the Environmental Easement Program.

Informal review of a final technical determination issued by NRCS under the Title XII conservation programs is available through appeal to the FSA county or area committee with jurisdiction over the participant’s operation.<sup>199</sup> As discussed earlier, NRCS believes that informal review by an FSA county or area committee of final technical determinations is mandatory before participants will have recourse to the NAD process.<sup>200</sup> However, this interpretation is not consistent with the NAD rule provision setting out when informal agency review is mandatory.<sup>201</sup>

The NRCS informal review regulations do not set out the procedures for appealing a final technical determination to an FSA county or area committee. It seems likely that the FSA procedures at Part 780, discussed above, would apply, but it is advisable to seek guidance from NRCS and FSA if the final written determination does not provide clear instructions for appeal.

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<sup>196</sup> 7 C.F.R. pt. 614, subpt. B (2003). See Food Security Act of 1985, Pub. L. No. 99-198, tit. XII, 99 Stat. 1354, 1504 (1985) (codified as amended in scattered sections of 16 U.S.C.).

<sup>197</sup> 7 C.F.R. § 614.100 (2003).

<sup>198</sup> See 7 C.F.R. § 1467.17(a) (2003).

<sup>199</sup> 7 C.F.R. §§ 614.104(a), 780.9(a) (2003).

<sup>200</sup> See 7 C.F.R. § 614.101(a)(2) (2003).

<sup>201</sup> See 7 C.F.R. § 11.5 (2003).

*(b) Informal Review of NRCS Determinations Under All Other Conservation Programs*

The third subpart of the NRCS appeal regulations sets out provisions for informal review of NRCS determinations under all conservation programs not covered by Subpart B.<sup>202</sup> These programs include:<sup>203</sup> the Great Plains Conservation Program,<sup>204</sup> the Rural Abandoned Mine Program,<sup>205</sup> Emergency Watershed Projects, the Rural Clean Water Program,<sup>206</sup> the Colorado River Basin Salinity Control Program,<sup>207</sup> the Forestry Incentives Program,<sup>208</sup> the Water Bank Program,<sup>209</sup> Flood Prevention and Watershed Protection Programs, and the Emergency Wetlands Reserve Program.<sup>210</sup>

Participants in these programs may request an informal hearing before the NRCS State Conservationist of NRCS determinations under these programs made by the designated conservationist.<sup>211</sup> A request for an informal hearing must be filed within 30 days after written notice of a final decision is “mailed or otherwise made available” to the participant.<sup>212</sup> Note that this is different from the NAD process and most informal review procedures in that the participant’s receiving notice of a decision is not the trigger for the 30-day period, but rather the agency’s sending of the notice.

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<sup>202</sup> 7 C.F.R. pt. 614, subpt. C (2003). See 60 Fed. Reg. 67,298, 67,307 (1995) (prefatory comments to interim final rule) (“Subpart C of the revised part 614 consolidates appeal procedures for all other existing NRCS programs in part 614.”).

<sup>203</sup> 7 C.F.R. § 614.200 (2003). Additional programs are covered by this subpart due to incorporation of the procedures by reference.

<sup>204</sup> See 7 C.F.R. § 631.13 (2003).

<sup>205</sup> See 7 C.F.R. § 632.40 (2003).

<sup>206</sup> See 7 C.F.R. § 634.30 (2003).

<sup>207</sup> See 7 C.F.R. § 702.20 (2003).

<sup>208</sup> See 7 C.F.R. § 701.76(a) (2003).

<sup>209</sup> See 7 C.F.R. § 752.28 (2003).

<sup>210</sup> See 7 C.F.R. § 623.20 (2003).

<sup>211</sup> 7 C.F.R. § 614.201 (2003).

<sup>212</sup> 7 C.F.R. § 614.202(a) (2003).

### **(5) Rural Business-Cooperative Service, Rural Housing Service, Rural Utilities Service, and Rural Development**

Informal review of adverse decisions issued by RBS, RHS, and RUS is governed by provisions at 7 C.F.R. Part 1900, Subpart B.<sup>213</sup> In many states, decisions under programs administered by these agencies are issued by a “Rural Development” office, and any such decisions should similarly be governed by those informal review provisions.<sup>214</sup>

Subpart B of Part 1900 purports to set out “procedures for use by USDA personnel and program participants to ensure that full and complete consideration is given to program participants who are affected by an agency adverse decision.”<sup>215</sup> Unfortunately for participants in these agencies’ programs, no informal review “procedures” whatsoever are set out in the regulations. The regulations state only that a “participant affected by an adverse decision of an agency is entitled . . . to an opportunity for a separate informal meeting with the agency before commencing an appeal to NAD.”<sup>216</sup> And, similarly, that participants “also have the right . . . to seek mediation involving any adverse decision appealable under this subpart. . . .”<sup>217</sup> No timeframes are specified, no decision makers are identified, and no criteria for review are set out.<sup>218</sup> Participants in programs administered by these agencies should seek guidance directly from the agency regarding informal review procedures.

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<sup>213</sup> 7 C.F.R. § 11.5(b) (2003). Specifically, the provisions discussed here apply to decisions made by an agency and related to “direct loans, loan guarantees, and grants under the following programs: RUS Water and Waste Disposal Facility Loans and Grants Program; RHS Housing and Community Facilities Loan Programs; RBS Loan, Grant, and Guarantee Programs and the Intermediary Relending Program; and determinations of the Rural Housing Trust 1987-1 Master Servicer.” 7 C.F.R. § 1900.53(b), (c) (2003).

<sup>214</sup> See 64 Fed. Reg. 33,367, 33,368 (1999) (prefatory comments to final rule).

<sup>215</sup> 7 C.F.R. § 1900.52 (2003).

<sup>216</sup> 7 C.F.R. § 1900.55(b) (2003).

<sup>217</sup> 7 C.F.R. § 1900.55(c) (2003).

<sup>218</sup> The exhibits to Subpart B include several form letters to be used to advise program participants of decisions and review options. However, because these exhibits have not been modified since 1990 they relate to decisions under loan programs formerly administered by the Farmers Home Administration and discuss agency review procedures that were eliminated when NAD was established.

### **b. 90-Day “Finality Rule” for FSA Committee Decisions**

As part of the 1990 Farm Bill, Congress enacted language providing that except in cases of fraud or other misconduct, decisions of FSA state, county, and area committees would become final after 90 days, and USDA could not later attempt to recover overpayments that were made based on those decisions.<sup>219</sup> This has become known as the “Finality Rule” or “90-Day Rule.”

The 2002 Farm Bill, enacted on May 13, 2002, made two notable changes to the 90-day finality rule.<sup>220</sup> First, certain types of FSA committee decisions are now expressly excluded from application of the finality rule. Under the amended statute, decisions made by FSA state, county, or area committees related to loan making or loan servicing and FSA state, county, or area committee decisions under a conservation program administered by NRCS are expressly not covered by the 90-day finality rule.<sup>221</sup>

Second, the 2002 Farm Bill significantly limits the time in which FSA may exercise an exception to the finality rule. Under the statute, the 90-day finality rule does not apply if the committee’s decision is appealed or is modified by the FSA Administrator.<sup>222</sup> In the past, some program participants who attempted to enforce the 90-day finality rule found the modification exception to be a stumbling block, because the agency believed there to be no time limit on when the Administrator could modify a committee decision. As part of the 2002 Farm Bill, Congress included language providing that the exceptions will only limit the effectiveness of the finality rule if they are implemented within the 90-day period.<sup>223</sup> This means that an FSA committee decision will be final after 90 days, and the FSA Administrator’s power to modify the decision must now be exercised within those 90 days, or not at all.

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<sup>219</sup> Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, tit. XI, subtit. C, § 1132(a), 104 Stat. 3359, 3512 (1990) (was codified as amended at 7 U.S.C. § 1433e(g)). That provision was repealed and replaced by the NAD statute. Pub. L. No. 103-354, tit. II, subtit. H, § 281, 108 Stat. 3178, 3233 (1994) (repealing 7 U.S.C. § 1433e and enacting 7 U.S.C. § 7001).

<sup>220</sup> Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, tit. I, subtit. F, § 1613(i) 116 Stat. 134, 221 (2002) (codified at 7 U.S.C. § 7001(a)).

<sup>221</sup> 7 U.S.C. § 7001(a)(1)(B).

<sup>222</sup> 7 U.S.C. § 7001(a)(2).

<sup>223</sup> Pub. L. No. 107-171, tit. I, subtit. F, § 1613(i) 116 Stat. 134, 221 (2002) (codified at 7 U.S.C. § 7001(a)(2)).



## **B. Stage Two—Mediation**

Program participants who live in states with USDA-certified mediation programs have the right under the NAD statute to request mediation of adverse agency decisions.<sup>224</sup> The NAD rule expands this right to a certain extent, giving participants the right to “utilize *any* available alternative dispute resolution (ADR) or mediation program” prior to a NAD appeal hearing.<sup>225</sup> An important question for participants under the expanded NAD provision is whether the deciding agency will in fact participate in the requested ADR process, and the answer appears to be different for different agencies.<sup>226</sup> In any event, NAD does not regulate the mediation process nor the procedures agencies recognize for triggering mediation or another ADR process.<sup>227</sup> These are governed by individual agencies’ regulations and policies. The NAD rule recognizes participants’ right to seek mediation of adverse decisions, but is otherwise concerned with mediation and ADR only to the extent they affect the timeframe for requesting a NAD appeal.<sup>228</sup>

### **1. Mediation Requests and Time Limits for Requesting a NAD Appeal**

Mediation or ADR can be requested at any time prior to a NAD hearing. If mediation or ADR is requested before a NAD appeal request is filed, the 30-day deadline for requesting a NAD appeal hearing stops running until mediation or ADR is concluded.<sup>229</sup> If mediation or ADR is unsuccessful, the participant has only the remaining days to request a NAD appeal.<sup>230</sup> For example, if the participant waits 10 days after receiving notice of an adverse determination before requesting mediation, the 30-day countdown stops on Day 10. If mediation is unsuccessful, the appellant then has 20 calendar days left to request an appeal.

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<sup>224</sup> 7 U.S.C. § 6995.

<sup>225</sup> 7 C.F.R. § 11.5(c) (2003) (emphasis added).

<sup>226</sup> See 7 C.F.R. § 780.6 (2003) (FSA rule—mediation only in certified states); 7 C.F.R. § 400.94(f) (2003) (FCIC/RMA rule—mediation “or other forms of alternative dispute resolution” in certified or noncertified states); 7 C.F.R. §§ 614.102(a)(1), 614.203(a) (2003) (NRCS rule—mediation in certified or noncertified states); 7 C.F.R. § 1900.55(c) (2003) (RBS/RHS/RUS/RD rule—mediation only in certified states).

<sup>227</sup> See 64 Fed. Reg. 33,367, 33,370 (1999) (prefatory comments to final rule) (“The mediation process between participants and agencies is not the subject of this final rule. . . . Comments regarding the length of time agencies allow for mediation to be requested and the length of time they permit for mediation to continue therefore are outside the scope of this rule and are not addressed herein.”).

<sup>228</sup> 64 Fed. Reg. 33,367, 33,370 (1999) (prefatory comments to final rule) (“Mediation is relevant to this rule only with respect to the determination of when a participant’s right to appeal to NAD begins to toll.”).

<sup>229</sup> 7 C.F.R. § 11.5(c)(1) (2003).

<sup>230</sup> 7 C.F.R. § 11.5(c)(1) (2003).

CAUTION: Seeking mediation or another form of ADR to resolve a dispute over an agency adverse decision will only *toll* the time limit for requesting a NAD appeal. There is no new 30-day time period for submitting a NAD appeal request if the dispute is not resolved in mediation or ADR.

If mediation or ADR is unsuccessful, the participant will only have the days remaining from the original 30 day time period to request a NAD appeal.

If mediation or ADR is requested after the participant has filed a request for a NAD hearing but before the hearing starts, the participant waives the right (discussed below) to have a hearing within 45 days of submitting the appeal request,<sup>231</sup> but the participant does have the right to a NAD hearing within 45 calendar days after the mediation or ADR is concluded.<sup>232</sup> Many attorneys and advocates advise participants to file a NAD appeal request at the same time they request mediation or ADR. This way there is less risk of missing the NAD appeal deadline, which can happen if there is confusion about when mediation or ADR has ended or if there is limited time remaining in the 30-day period.

## 2. Agency Mediation Regulations

As mentioned earlier, the various agencies whose adverse program decisions are appealable to NAD have different regulations governing mediation of those decisions. Participants and their representatives should carefully review the mediation provisions applicable to the particular agency if they are interested in pursuing mediation or another form of ADR.

### a. Farm Service Agency, FSA Committees, and Commodity Credit Corporation

Regulations governing administrative appeals of decisions by FSA, FSA committees, and the CCC provide that

[p]articipants have the right to seek mediation involving any decision appealed under this part . . . if the mediation program of the State where the participant's farming operation . . . is located has been certified by the Secretary for the program involved in the agency decision.<sup>233</sup>

Under these regulations, mediation may be sought prior to pursuing informal review by the agency. The time limitations for seeking such review are stayed "pending timely pursuit and completion of the mediation process."<sup>234</sup> The regulations do not specify the timeframe for requesting mediation.

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<sup>231</sup> See 7 C.F.R. § 11.8(c)(1) (2003).

<sup>232</sup> 7 C.F.R. § 11.5(c)(2) (2003).

<sup>233</sup> 7 C.F.R. § 780.6 (2003). In cases where a participant has more than one farming operation, it must be the operation "giving rise to the decision."

<sup>234</sup> 7 C.F.R. § 780.6 (2003).

### **b. Federal Crop Insurance Corporation *and* Risk Management Agency**

FCIC/RMA regulations provide that participants “have the right to seek mediation or other forms of alternative dispute resolution” of adverse agency decisions.<sup>235</sup> This right is not limited to states with USDA-certified mediation programs.<sup>236</sup> The regulations require that a request for mediation be filed no later than 30 days after the participant receives written notice of the adverse decision.<sup>237</sup>

FCIC/RMA regulations purport to require participants to choose between informal review and mediation as pre-NAD dispute resolution processes.<sup>238</sup> The inconsistency of this provision with the NAD rule is discussed later in this article. It is important, however, for participants to be aware of and prepared for the agency’s position. As also mentioned earlier, mediation is not available (nor is the NAD process) for FCIC/RMA determinations of good farming practices.<sup>239</sup>

### **c. Natural Resources Conservation Service**

NRCS regulations provide for mediation of program decisions upon the request of the landowner or program participant.<sup>240</sup> The right to mediation is guaranteed under these regulations in states with USDA-certified mediation programs.<sup>241</sup> In states without USDA-certified mediation programs, NRCS regulations authorize mediation but do not appear to guarantee it. Instead, mediation is available by a “qualified representative of a local conservation district,” if the district chooses to participate, or by “other individuals” if all of the parties agree.<sup>242</sup>

NRCS regulations provide little in the way of specific procedures for requesting and proceeding with mediation of adverse decisions. It appears that mediation requests are to be submitted directly to NRCS, which will then notify other federal agencies as it deems appropriate.<sup>243</sup> Mediation of preliminary technical determinations under Title XII conservation programs must be requested within 30 days of the participant’s receiving notice of the determination.<sup>244</sup> This timeframe may also apply to non-Title XII programs, but this is not directly stated in the regulations. For complete requirements of NRCS mediations, participants should seek guidance directly from NRCS.

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<sup>235</sup> 7 C.F.R. § 400.94(a) (2003).

<sup>236</sup> 7 C.F.R. § 400.94(f) (2003).

<sup>237</sup> 7 C.F.R. § 400.94(c) (2003).

<sup>238</sup> 7 C.F.R. §§ 400.93(a), 400.94(a) (2003).

<sup>239</sup> 7 C.F.R. § 400.93(a) (2003).

<sup>240</sup> 7 C.F.R. §§ 614.102(a)(1), 614.203(a) (2003).

<sup>241</sup> 7 C.F.R. §§ 614.102(a)(1)(i), 614.203(a)(1) (2003).

<sup>242</sup> 7 C.F.R. §§ 614.102(a)(1)(ii), 614.203(a)(2) (2003).

<sup>243</sup> See 7 C.F.R. § 614.102(a)(2) (2003).

<sup>244</sup> 7 C.F.R. §§ 614.101(a)(1)(ii), 614.103(a)(1) (2003).

#### **d. Rural Business-Cooperative Service, Rural Housing Service, Rural Utilities Service, and Rural Development**

As is true for informal review procedures, the regulations governing administrative review of RBS, RHS, and RUS adverse decisions provide no guidance to program participants as to how to request mediation or how mediation might proceed. The regulations merely restate the statutory right to seek mediation of adverse decisions, but purport to limit mediation rights to states whose mediation programs have been certified by USDA to handle disputes in the program at issue.<sup>245</sup>

#### **C. Stage Three—NAD Appeal Hearing (or Record Review)**

As contemplated by Congress when it set out the framework for the new appeals agency, the NAD Director has delegated to a staff of hearing officers located throughout the country the authority to hear and decide appeals in the first instance.<sup>246</sup> Hearing officers are supervised by NAD Assistant Directors.<sup>247</sup> There are three Assistant Directors who have responsibility for the Eastern, Southern, and Western Regional Offices located, respectively, in Indianapolis, Indiana; Memphis, Tennessee; and Lakewood, Colorado.<sup>248</sup>

Once an appeal request is filed, the “participant” is called an “appellant.”<sup>249</sup> Appellants have the right to an attorney or other representative in a NAD hearing.<sup>250</sup> As discussed earlier in this article, representatives must file certain declarations with NAD to be authorized to represent appellants in the NAD process.<sup>251</sup>

Appellants have the right to an in-person appeal hearing, but telephone hearings and record review are also available if requested.<sup>252</sup> This discussion of NAD appeal procedures will primarily assume that the appellant is pursuing an in-person hearing. Some points related to record reviews and telephone hearings are also noted.

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<sup>245</sup> 7 C.F.R. § 1900.55(c) (2003).

<sup>246</sup> See 7 U.S.C. § 6992(e); 7 C.F.R. § 11.22(d) (2003). The NAD Director has also assumed the authority to make delegations to subordinate officers of the authority to review hearing officer determinations and make appealability determinations. See 7 C.F.R. § 11.9(d)(3) (2003). Unlike the delegation of first-level appeals to hearing officers, however, these delegations do not affect how such requests are filed.

<sup>247</sup> 7 C.F.R. § 11.22(d) (2003).

<sup>248</sup> 7 C.F.R. § 11.21 (2003).

<sup>249</sup> 7 C.F.R. § 11.1, “Appellant” (2003).

<sup>250</sup> 7 C.F.R. §§ 11.1, “Authorized representative,” 11.6(c) (2003).

<sup>251</sup> 7 C.F.R. § 11.6(c) (2003).

<sup>252</sup> 7 U.S.C. § 6997(c)(2).

## 1. *De Novo* Hearing or Review

NAD hearing officers conduct *de novo* reviews of agency adverse decisions.<sup>253</sup> The NAD statute provides that hearing officers

shall consider information presented at the hearing without regard to whether the evidence was known to the agency officer, employee, or committee making the adverse decision at the time the adverse decision was made.<sup>254</sup>

The NAD rule modifies this language somewhat, stating that hearing officers “will allow the presentation” of any such information.<sup>255</sup> The statute is clear, however, that information must not only be accepted, it must be considered by the hearing officer.

The *de novo* nature of the NAD appeal hearing allows appellants to present evidence and arguments that were not available to the agency when it made its decision. In support of this, the NAD statute provides that hearing officers “shall not be bound by previous findings of fact by the agency in making a determination. . . .”<sup>256</sup> USDA has interpreted the provision to authorize NAD to raise its own issues in any appeal as well as allowing the agency to present new arguments. In prefatory comments to the interim final NAD rule, USDA stated that “[t]he parties or NAD may raise any new issue as long as it conforms to the facts and law and regulations.”<sup>257</sup>

One limitation on NAD’s authority to make *de novo* factual findings is revealed in prefatory comments to the interim final NAD rule. In response to a suggestion that NAD would be “bound by prior findings of fact by an agency or NAD . . . in another matter,” USDA stated:<sup>258</sup>

USDA agrees that a Hearing Officer should not issue a contrary factual determination regarding the same appellant in a different matter where that factual determination was directly addressed in the other matter.

## 2. The “Record” for NAD Appeals

Appellants need to understand what “the record” means in the NAD appeal process and what responsibility they bear to make an appeal record that includes the issues and information they believe is needed for a proper appeal determination.

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<sup>253</sup> See 60 Fed. Reg. 67,298, 67,306 (1995) (prefatory comments to interim final rule) (“USDA finds nothing in the statute to support anything other than a *de novo* review of agency decisions by NAD.”).

<sup>254</sup> 7 U.S.C. § 6997(c)(3).

<sup>255</sup> 7 C.F.R. § 11.8(c)(5)(ii) (2003).

<sup>256</sup> 7 U.S.C. § 6997(c)(2). See also 7 C.F.R. § 11.10(a) (2003).

<sup>257</sup> 60 Fed. Reg. 67,298, 67,306 (1995) (prefatory comments to interim final rule).

<sup>258</sup> 60 Fed. Reg. 67,298, 67,306 (1995) (prefatory comments to interim final rule).

### **a. Three Types of Record**

There are three different definitions of “record” in the NAD rule. First, the “agency record” means all of the materials maintained by an agency related to an adverse decision that are submitted to NAD by an agency in connection with an appeal.<sup>259</sup> This includes all materials “prepared or reviewed by the agency during its consideration and decisionmaking process.”<sup>260</sup> It does not include records or information “not related to the adverse decision at issue.”<sup>261</sup> The agency record is deemed admitted as evidence in a NAD hearing or record review.<sup>262</sup> The appellant’s right to obtain the agency record is discussed later in this article under Pre-Hearing Preparation.

Second, the “hearing record” means all documents, evidence, and other materials generated in relation to a hearing.<sup>263</sup> In addition to any evidence presented at the hearing, the hearing record includes the hearing transcript, if any, and post-hearing submissions submitted by any party.<sup>264</sup>

Third, the “case record” means all the documents and materials maintained by the Secretary related to an adverse decision, including both the agency record and the hearing record.<sup>265</sup> Prefatory comments to the interim final NAD rule clarify that if the appeal proceeds to Director review, the case record will also include the request for Director review and any other “arguments or information” accepted by the Director.<sup>266</sup>

### **b. Making the Record in a NAD Appeal**

A NAD appeal hearing should be viewed as an appellant’s last chance to raise claims and submit evidence into the record for his or her case. This will be critical not only for informing the hearing officer’s determination but throughout the succeeding stages of the dispute—up to and through judicial review. Although there may be limited exceptions, the parties will generally be bound by the record made and issues raised before the NAD hearing officer. Careful thought and preparation are needed to ensure that the record before the NAD hearing officer is as complete as possible and that all claims are raised, even if the hearing officer or agency tries to discourage them.

The record made before the NAD hearing officer will be the record reviewed by the NAD Director if either party requests Director review of the hearing officer’s determination.<sup>267</sup> Although the Director has the discretion to accept “other arguments or information” when

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<sup>259</sup> 7 C.F.R. § 11.1, “Agency record” (2003).

<sup>260</sup> 7 C.F.R. § 11.1, “Agency record” (2003).

<sup>261</sup> 7 C.F.R. § 11.1, “Agency record” (2003).

<sup>262</sup> 7 C.F.R. § 11.1, “Agency record” (2003).

<sup>263</sup> 7 C.F.R. § 11.1, “Hearing record” (2003).

<sup>264</sup> 60 Fed. Reg. 67,289, 67,300 (1995) (prefatory comments to interim final rule).

<sup>265</sup> 7 C.F.R. § 11.1, “Case record” (2003).

<sup>266</sup> 60 Fed. Reg. 67,289, 67,300 (1995) (prefatory comments to interim final rule).

<sup>267</sup> 7 C.F.R. § 11.9(d)(1) (2003).

conducting the review,<sup>268</sup> the Director need not accept such information and does not have the authority to conduct another hearing.<sup>269</sup> Of course, appellants should take advantage of the opportunity to submit additional arguments or information on Director review if necessary. Appellants must understand, however, that this opportunity to submit written arguments or information that may or may not be accepted is necessarily more limited than the right to submit written or testimonial evidence and argument in the NAD hearing. If an appellant believes that the hearing record is inadequate, the Director review process is an opportunity to argue that the case should be resubmitted to the hearing officer for further proceedings or a new hearing.<sup>270</sup>

If the appellant's case is not successfully resolved in the NAD process, and the appellant seeks judicial review of the case, the court will ordinarily be limited to conducting a review of the NAD case record and considering only those issues and arguments presented in the NAD appeal.<sup>271</sup>

Finally, the NAD Director has the authority to grant equitable relief to program participants in certain circumstances.<sup>272</sup> Although this authority is vested in the Director and not the hearing officers, the Director relies upon the record made before the hearing officer when determining whether to grant such relief.<sup>273</sup> Appellants who want to request equitable relief, even in the alternative, must therefore insist on making a record for such relief before the hearing officer, though the hearing officer will make no determination on the request.

### 3. Bases for NAD Hearing Officer Determinations

Under the NAD statute, the hearing officer must base his or her appeal determination on information from the case record, laws applicable to the matter at issue, and applicable regulations published in the *Federal Register*.<sup>274</sup> The NAD rule also requires the hearing officer to make determinations consistent with the laws and regulations of the agency and the generally applicable interpretations of such laws and regulations.<sup>275</sup>

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<sup>268</sup> 7 U.S.C. § 6998(b); 7 C.F.R. § 11.9(d)(1) (2003).

<sup>269</sup> See 7 U.S.C. § 6998(b); 7 C.F.R. § 11.9(d)(1) (2003).

<sup>270</sup> See 7 U.S.C. § 6998(b); 7 C.F.R. § 11.9(d)(1) (2003).

<sup>271</sup> See, e.g., *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 714-15 (1963) (“[t]he reviewing function is one ordinarily limited to consideration of the decision of the agency . . . and of the evidence on which it was based”); *Sims v. Apfel*, 530 U.S. 103, 112 (2000) (O’Connor, J., concurring in part) (“In most cases, an issue not presented to an administrative decision maker cannot be argued for the first time in federal court. On this underlying principle of administrative law, the Court is unanimous.”).

<sup>272</sup> 7 U.S.C. § 6998(d).

<sup>273</sup> See 60 Fed. Reg. 67,298, 67,305-06 (1995) (prefatory comments to interim final rule).

<sup>274</sup> 7 U.S.C. § 6998(c). See also 7 C.F.R. § 11.10(c) (2003). The regulations used will be those in effect on the date of the adverse decision or the date on which the acts that gave rise to the adverse decision occurred, whichever is appropriate.

<sup>275</sup> 7 C.F.R. § 11.10(b) (2003).

NAD's reliance on agency laws and regulations when making an appeal determination is not subject to argument by an appellant that the law or regulation in question is improper. NAD will not entertain challenges to the laws or regulations themselves. As USDA stated in the prefatory comments to the interim final NAD rule,<sup>276</sup>

NAD has no jurisdiction over questions of law or the appropriateness of agency regulations. It simply decides the factual matter of whether an agency complied with such laws and regulations in rendering an adverse decision.

The NAD rule itself explicitly provides that NAD procedures "may not be used to seek review of statutes or USDA regulations issued under Federal Law."<sup>277</sup> Appellants should not conclude from this language disclaiming jurisdiction that exhaustion of NAD remedies is unnecessary if the claim is purely a regulatory or statutory challenge. The section on Exhausting the Remedy of Nonappealability Review earlier in this article discusses the importance of exhausting NAD remedies even if the issue seems outside NAD's jurisdiction.

Though NAD's obligation to render determinations consistent with provisions of applicable statutes and regulations is clear,<sup>278</sup> its reliance on an agency's "generally applicable interpretations" of such provisions as bases for reviewing adverse decisions is open to more scrutiny. In response to comments to the interim final NAD rule, USDA rejected arguments that the statute limits NAD to considering only statutes and promulgated regulations when reviewing an agency's decision.<sup>279</sup> Instead, USDA insisted that NAD was not authorized to make its own legal interpretations and was required to follow the generally applicable statements of agency policy, whether or not those statement were published in the *Federal Register*.<sup>280</sup> Although not stated in so many words, this suggests that NAD will look to agency manuals, handbooks, and policy directives as statements of the law when reviewing agency adverse decisions.

When the final NAD rule was issued in 1999, USDA explicitly affirmed its earlier analysis and continued use of the "generally applicable interpretations" language as bases for hearing

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<sup>276</sup> 60 Fed. Reg. 67,298, 67,301 (1995) (prefatory comments to interim final rule).

<sup>277</sup> 7 C.F.R. § 11.3(b) (2003). See also 60 Fed. Reg. 67,298, 67,301 (1995) (prefatory comments to interim final rule) (" . . . NAD may not be used by program participants for the purpose of challenging the validity of USDA regulations issued pursuant to statutory authority.") and 60 Fed. Reg. 67,298, 67,306 (1995) (prefatory comments to interim final rule) ("USDA uses this language here to make clear again that NAD is not a forum for appellants to challenge agency statutes, regulations, or the generally applicable interpretations of those statutes and regulations.").

<sup>278</sup> See 7 U.S.C. § 6998(c).

<sup>279</sup> 60 Fed. Reg. 67,298, 67,306 (1995) (prefatory comments to interim final rule).

<sup>280</sup> 60 Fed. Reg. 67,298, 67,306 (1995) (prefatory comments to interim final rule) ("Some generally applicable interpretations actually may have been published once as a notice in the Federal Register, others may be based on case law interpreting a particular program provision in a particular Federal court jurisdiction or state court jurisdiction for programs in which state law is the applicable law. Still other generally applicable statements may be based on the previous advice of the Office of the General Counsel regarding a statute or regulation that constitutes the official legal position of USDA. In any of these described cases, for example, NAD could not ignore the generally applicable statements and base its determinations on legal interpretations that it is not authorized by the Act to make.").



officer determinations.<sup>281</sup> However, USDA also suggested in prefatory comments to the final rule that appellants can argue in a NAD hearing that a particular unpublished, generally applicable interpretation of statute and/or regulations, is arbitrary and may not be relied upon.<sup>282</sup> According to these comments, an appellant should be able to argue in a NAD appeal that an agency manual or handbook provision or policy directive is inconsistent with the laws or regulations it interprets.<sup>283</sup> Indeed, the comments state that NAD “cannot rely” upon an agency’s arbitrary interpretation of law or regulation to sustain an agency adverse decision.<sup>284</sup> Though USDA thus apparently intended that NAD would entertain certain challenges to agency interpretations of law or regulation, it is notable that these comments directly contradict the prefatory comments to the interim final NAD rule, which stated that appellants could not use the NAD process to “challenge . . . the generally applicable interpretations of [agency] statutes and regulations.”<sup>285</sup>

Appellants who are unable to convince NAD to accept a challenge to unpublished agency policies and legal interpretations may have a good chance of success bringing their challenges to the federal courts. As observed by Christopher R. Kelley in “Notes on the USDA National Appeals Division Appeal Process”:<sup>286</sup>

The courts have not been reluctant to overturn agency decisions that are based on outcome-determinative “rules” that were not duly promulgated under the rulemaking procedures of the APA. . . . The case law and the legal literature concerning the enforceability of so-called “non-rule ‘rules,’” such as internal agency directives, is extensive and should be consulted if the agency’s position is supported only by an internal agency directive.

As noted by Kelley, the Fifth Circuit Court of Appeals’ 1999 decision in *Davidson v. Glickman* provides a recent example of a federal court rejecting a USDA agency’s use of an internal policy directive to determine rights and penalties under a federal farm program.<sup>287</sup>

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<sup>281</sup> See 64 Fed. Reg. 33,367, 33,372 (1999) (prefatory comments to final rule) (“For the reasons set forth in . . . the preamble to the interim final rule, USDA finds this language appropriate and declines to remove it as requested in the comments.”)

<sup>282</sup> 64 Fed. Reg. 33,367, 33,372 (1999) (prefatory comments to final rule) (“[I]nclusion of this language does not reflect an intent to bind NAD to arbitrary interpretations of statutes or regulations by agency officials. Any unpublished, generally applicable interpretations of laws and regulations may be relied upon only to the extent permitted by the APA and interpretations thereof by relevant caselaw.”).

<sup>283</sup> 64 Fed. Reg. 33,367, 33,372 (1999) (prefatory comments to final rule).

<sup>284</sup> 64 Fed. Reg. 33,367, 33,372 (1999) (prefatory comments to final rule).

<sup>285</sup> 60 Fed. Reg. 67,298, 67,306 (1995) (prefatory comments to interim final rule).

<sup>286</sup> Christopher R. Kelley, *Notes on the USDA National Appeals Division Appeal Process*, 1999 ARK. L. NOTES 61, 68 (citing, as a “good place to begin,” Robert A. Anthony, “*Interpretive Rules, “Legislative” Rules and “Spurious” Rules: Lifting the Smog*,” 8 ADMIN. L.J. 1 (1994), and Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like--Should Federal Agencies Use Them To Bind the Public?*, 41 DUKE L.J. 1311 (1992)).

<sup>287</sup> 169 F.3d 996 (5th Cir. 1999).

#### 4. Appellant's Burden: Preponderance of the Evidence

The appellant has the burden of proving by a preponderance of the evidence that the adverse decision made by the agency was in error.<sup>288</sup> At least one court has suggested that in certain cases the Due Process Clause of the U.S. Constitution may require a shifting of the burden to the agency.<sup>289</sup> And Kelley notes that in at least one Director review determination, the NAD Director deemed it the agency's responsibility to "provide evidence of a scheme or device" on the farmer's part to evade farm program payment limitations.<sup>290</sup>

Due process considerations aside, it is important for appellants and their representatives to be mindful of the burden of proof while preparing for a NAD appeal hearing. In particular, appellants must understand that their burden is not merely to demonstrate—through expert testimony, legal argument, or otherwise—that an alternative factual determination or program interpretation by the agency was possible. Rather, the appellant must demonstrate that the agency's decision was *unreasonable*, whether due to reliance on incorrect facts, violation of program procedures, or some other error.

#### 5. Ex Parte Communications on the Merits Prohibited

Ex parte communications regarding the merits of a NAD appeal are prohibited.<sup>291</sup> This prohibition is in effect "from the point at which the appeal is filed . . . through the issuance of a final determination by the Director" after Director review and applies "to any officer or employee of [NAD]."<sup>292</sup> NAD personnel are prohibited from communicating about the merits of a pending appeal "with any person having an interest in the appeal, including any person in an advocacy or investigatory capacity."<sup>293</sup> The rules are reciprocal, prohibiting interested parties from making or knowingly causing to be made to any NAD employee or officer an ex parte communication "relevant to the merits of the appeal."<sup>294</sup>

Parties are not prohibited from contacting NAD personnel with "requests for status reports" or "inquiries on [NAD] procedure."<sup>295</sup> Nor are parties prohibited from discussing the

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<sup>288</sup> 7 C.F.R. § 11.8(e) (2003). The NAD statute places the burden on the appellant, but does not specify the standard. 7 U.S.C. § 6997(c)(4).

<sup>289</sup> *Vandervelde v. Espy*, 908 F. Supp. 11, 16-18 (D.D.C. 1995) (suggesting in dicta that due process may require the government to prove by clear and convincing evidence an allegation that a program participant has acted in bad faith).

<sup>290</sup> Kelley, *Notes on the USDA National Appeals Division Appeal Process*, 1999 ARK. L. Notes at 66 (citing *In re Tommy Hayre, et al.*, Case Nos. 97000365 W to -368 W (Dec. 2, 1997) at 4).

<sup>291</sup> 7 C.F.R. § 11.7 (2003). Ex parte communication is defined in the NAD rule as "an oral or written communication to any officer or employee of [NAD] with respect to which reasonable prior notice is not given . . . in reference to any matter or proceedings connected with the appeal involved. 7 C.F.R. § 11.1, "Ex parte communication" (2003).

<sup>292</sup> 60 Fed. Reg. 67,298, 67,304 (1995) (prefatory comments to interim final rule).

<sup>293</sup> 7 C.F.R. § 11.7(a)(1) (2003).

<sup>294</sup> 7 C.F.R. § 11.7(b) (2003).

<sup>295</sup> 7 C.F.R. § 11.1, "Ex parte communication" (2003). See also 7 C.F.R. § 11.7(a)(1)(i) (2003) ("This prohibition does not apply to . . . [d]iscussions of procedural matters related to an appeal.").

merits of an appeal with NAD personnel if “all parties to the appeal have been given notice and an opportunity to participate.”<sup>296</sup>

NAD personnel who receive an unauthorized ex parte communication must place in the hearing record for the appeal any written communication received and written responses sent, a memorandum stating the substance of any oral communication received, and a memorandum stating the substance of any oral responses made.<sup>297</sup> A party who knowingly makes or causes to be made an ex parte communication in violation of this rule risks adverse action on the party’s interest in the appeal. To the extent it is “consistent with the interests of justice and the policy of the underlying program,” the hearing officer or Director may require the party violating the ex parte prohibition to show cause why the party’s claims or interest in the appeal should not be “dismissed, denied, disregarded, or otherwise adversely affected” due to the violation.<sup>298</sup>

Importantly, the prohibition on ex parte communication does not apply to requests for Director review of the appealability of an adverse decision.<sup>299</sup> In prefatory comments to the interim final NAD rule, USDA justified this distinction by stating that the Director “should be entitled to greater flexibility in contacting the agency and the USDA Office of the General Counsel to obtain information useful in making determinations as to whether particular adverse decisions are matters of general applicability.”<sup>300</sup> Ex parte communication is also not prohibited on requests for Director reconsideration “unless the Director decides to grant the request.”<sup>301</sup>

## 6. Hearing Procedures

Although NAD hearings are intended to be informal, they follow established patterns and present certain procedural requirements. These are discussed here. Appellants and representatives facing a NAD appeal hearing may want to consider obtaining a copy of the current National Appeals Division Guide, which is the internal procedural manual used by NAD’s hearing officers.<sup>302</sup>

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<sup>296</sup> 7 C.F.R. § 11.7(a)(1)(ii) (2003). If any such communication occurs, a memorandum of the discussion must be included in the hearing record. 7 C.F.R. § 11.7(a)(2) (2003).

<sup>297</sup> 7 C.F.R. § 11.7(c) (2003).

<sup>298</sup> 7 C.F.R. § 11.7(d) (2003).

<sup>299</sup> See 60 Fed. Reg. 67,298, 67,304 (1995) (prefatory comments to interim final rule).

<sup>300</sup> 60 Fed. Reg. 67,298, 67,304 (1995) (prefatory comments to interim final rule).

<sup>301</sup> 60 Fed. Reg. 67,298, 67,304 (1995) (prefatory comments to interim final rule).

<sup>302</sup> The current NAD Guide was issued in September 2002, replacing a prior undated “NAD Hearing Officer Manual.” A copy of the Guide should be obtainable upon request from the regional NAD office. Alternatively, a copy may be requested under NAD’s Freedom of Information Act (FOIA) provisions found at 7 C.F.R. §§ 11.30 through 11.33.

### **a. Notice of Hearing Schedule and Location**

The NAD Director, through the Regional Assistant Director, will assign a hearing officer to the appeal. The appellant and the agency will be notified of the name of the hearing officer and the appellant will be advised of the right to request a telephone hearing.<sup>303</sup> This notice must also advise the appellant and the agency of certain documents that will be required for the appeal.<sup>304</sup> The regulations do not specify the timeframe for this notice.

Unless waived by the appellant, a NAD appeal hearing must be conducted within 45 days of the appeal request.<sup>305</sup> At least 14 days prior to the hearing, NAD must provide the appellant, any authorized representative of the appellant, and the agency with notice of the hearing date, time, and place.<sup>306</sup> The hearing will be held in the state where the appellant resides or at a location that is otherwise convenient to the appellant, the agency, and NAD.<sup>307</sup> This notice must also notify all parties of the right to obtain an official record of the hearing.<sup>308</sup>

### **b. Pre-Hearing Conference**

NAD hearings are almost always preceded by a pre-hearing conference to “attempt to resolve the dispute or to narrow the issues involved.”<sup>309</sup> The NAD rule provides that hearing officers should require a pre-hearing conference “whenever appropriate.”<sup>310</sup> Prefatory comments to the interim final rule suggest that a pre-hearing conference will always be required.<sup>311</sup> The conference will be by telephone unless the hearing officer and all parties agree to hold it in person.<sup>312</sup> The rules do not specify when the conference will be held.

The pre-hearing conference is designed to avoid surprises at the hearing by narrowing the appeal issues and helping to clarify the basis for the agency’s decision. For appellants new to the appeal process and in cases presenting complicated issues, the pre-

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<sup>303</sup> 7 C.F.R. § 11.8(b)(2) (2003).

<sup>304</sup> 7 C.F.R. § 11.8(b)(2) (2003).

<sup>305</sup> 7 C.F.R. § 11.8(c)(1) (2003).

<sup>306</sup> 7 C.F.R. § 11.8(c)(3) (2003).

<sup>307</sup> 7 C.F.R. § 11.8(c)(3) (2003). The statute only requires that the location be convenient to the appellant and NAD. 7 U.S.C. § 6997(c)(1). The NAD rule added the provision that the hearing officer “also may take into account the convenience of the agency in picking a hearing site.” 60 Fed. Reg. 67,298, 67,305 (1995) (prefatory comments to interim final rule).

<sup>308</sup> 7 C.F.R. § 11.8(c)(3) (2003).

<sup>309</sup> 7 C.F.R. § 11.8(c)(4) (2003).

<sup>310</sup> 7 C.F.R. § 11.8(c)(4) (2003).

<sup>311</sup> 60 Fed. Reg. 67,298, 67,305 (1995) (prefatory comments to interim final rule) (“A pre-hearing conference will be required. . .”).

<sup>312</sup> 7 C.F.R. § 11.8(c)(4) (2003).

hearing conference is also an opportunity to make sure that all parties are prepared for the hearing. It may also give the appellant some preparation time to respond to new issues raised during the conference. Appellants are advised to give some thought to preparation for the pre-hearing conference, having an understanding of the issues presented by the agency decision and the evidence needed to show agency error.

### **c. Pre-Hearing Exchange of Documents**

Neither the NAD statute nor its implementing regulations provide for pre-hearing discovery. The regulations do provide, however, that the appellant and the agency must submit specified documents prior to the scheduled hearing.<sup>313</sup> The hearing officer is authorized to set a “reasonable” deadline for these submissions.<sup>314</sup>

The appellant must provide: (1) a short statement of why the agency decision is wrong; (2) a copy of any document not in the agency record that the appellant anticipates introducing at the hearing; and (3) a list of anticipated witnesses and a brief description of the evidence each witness will offer.<sup>315</sup>

#### **The Appellant’s Required Pre-Hearing Submissions**

1. Short statement of why the agency decision (or failure to act) is wrong.
2. A copy of any document not in the agency record that the appellant anticipates introducing at the hearing.
3. A list of anticipated witnesses and a brief description of the evidence each witness will offer.

The agency must provide: (1) a copy of the adverse decision being challenged; (2) a written explanation of the agency’s position, including the regulatory or statutory basis for the decision; (3) a copy of any document not in the agency record that the agency anticipates introducing at the hearing; and (4) a list of anticipated witnesses and a brief description of the evidence each witness will offer.<sup>316</sup>

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<sup>313</sup> 7 C.F.R. § 11.8(c)(2) (2003).

<sup>314</sup> 7 C.F.R. § 11.8(c)(2) (2003).

<sup>315</sup> 7 C.F.R. § 11.8(c)(2)(i) (2003).

<sup>316</sup> 7 C.F.R. § 11.8(c)(2)(ii) (2003).

### **The Agency's Required Pre-Hearing Submissions**

1. A copy of the adverse decision being challenged.
2. A written explanation of the agency's position, including regulatory or statutory bases for the decision.
3. A copy of any document not in the agency record that the agency anticipates introducing at the hearing.
4. A list of anticipated witnesses and a brief description of the evidence each witness will offer.

After an appeal is filed, the agency is required to “promptly” provide NAD with a copy of the agency record.<sup>317</sup> Appellants also have the right to request a copy of the agency record after an appeal is filed,<sup>318</sup> but NAD has refused to provide notice of this right to appellants.<sup>319</sup> If an appellant does request a copy of the agency record, the NAD rule requires the agency to provide the copy “within 10 days of the receipt of the request by the agency.”<sup>320</sup> Because the timeframe for providing the copy is based on the agency's receipt of the request, appellants would be well advised to use return receipts, personal delivery, or some other means of submitting a request that allows the appellant to track the request and response. The NAD rule does not specify any effect of an agency's failure to timely provide a copy of the agency record.

Any materials in the agency record will be deemed admitted as evidence at the hearing.<sup>321</sup> As discussed earlier, the agency record includes “all materials prepared or reviewed by the agency during its consideration and decision making process.”<sup>322</sup> If an appellant believes that any such materials have been omitted from the agency record, the appellant might consider making a written request for the inclusion of the specific materials to the agency with a copy to NAD indicating that the agency record is not complete. If the appellant believes that relevant materials not properly part of the agency record are maintained by the agency, the appellant should request these materials and offer them as

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<sup>317</sup> 7 C.F.R. § 11.8(b)(1) (2003).

<sup>318</sup> 7 C.F.R. § 11.8(b)(1) (2003).

<sup>319</sup> See 64 Fed. Reg. 33,367, 33,371-72 (1999) (prefatory comments to final rule) (“Appellants are placed on notice of their right to request and receive copies of the agency record by this final rule itself and a further requirement for agencies to provide such notice is beyond the scope of this rule. Further, requiring the agency to present such information at the hearing runs contrary to the statutory requirement that the appellant must prove the agency decision erroneous. This places the burden of going forward in the appeal on the appellant. If the agency fails to provide an adequate response to the appellant by failing to provide information, it runs the risk of losing the appeal.”).

<sup>320</sup> 7 C.F.R. § 11.8(b)(1) (2003).

<sup>321</sup> 7 C.F.R. § 11.1, “Agency record” (2003).

<sup>322</sup> 7 C.F.R. § 11.1, “Agency record” (2003).

evidence at the hearing. If necessary, the appellant may use the Freedom of Information Act (FOIA) process to obtain the agency materials, but no such process should be needed for materials in the appellant's own files. Appellants should keep in mind that certain agency materials may be exempt from production under FOIA, and in any case requests should be made early to allow for the request to be processed in time for review of the materials before the hearing.

#### **d. NAD's Subpoena Power**

The appellant and the agency have the right to request the NAD hearing officer to subpoena witnesses and evidence.<sup>323</sup> The hearing officer must obtain the concurrence of the Director before issuing any subpoena.<sup>324</sup> Subpoenas for the production of evidence may be requested and issued "at any time while the case is pending" before NAD.<sup>325</sup> Subpoenas requiring the attendance of a witness must be requested in writing at least 14 days before the scheduled date of a hearing.<sup>326</sup> If granted, a subpoena requiring the attendance of a witness must be issued at least seven days prior to the scheduled hearing date.<sup>327</sup>

The standard for granting a subpoena for the production of evidence is that the requesting party establishes that production of the documentary evidence "is necessary and reasonably calculated to lead to information which would affect the final determination or is necessary to fully present the case" before NAD.<sup>328</sup> The standard for granting a subpoena for requiring the attendance of a witness is that the requesting party establishes that (1) the witness—either a USDA representative or a private individual— possesses information that is pertinent and necessary for disclosure of all relevant facts which could impact the final determination, (2) the information cannot be obtained except through testimony of the person, and (3) the testimony cannot be obtained absent issuance of a subpoena.<sup>329</sup>

The requesting party must arrange for service of the subpoena<sup>330</sup> and must pay service costs and reasonable transportation and subsistence costs incurred by witnesses.<sup>331</sup> USDA must pay costs associated with the appearance of a Department employee whose

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<sup>323</sup> 7 C.F.R. § 11.8(a)(2) (2003).

<sup>324</sup> 7 C.F.R. § 11.8(a)(2) (2003).

<sup>325</sup> 7 C.F.R. § 11.8(a)(2)(i) (2003).

<sup>326</sup> 7 C.F.R. § 11.8(a)(2)(ii) (2003).

<sup>327</sup> 7 C.F.R. § 11.8(a)(2)(ii) (2003).

<sup>328</sup> 7 C.F.R. § 11.8(a)(2)(iii)(A) (2003).

<sup>329</sup> 7 C.F.R. § 11.8(a)(2)(iii)(B) (2003).

<sup>330</sup> 7 C.F.R. § 11.8(a)(2)(iv) (2003). Service may be made by registered or certified mail, or by personal delivery of a copy of the subpoena to the person named therein by any person who is not a party and who is not less than 18 years of age. Proof of service shall be made by filing with the hearing officer or Director who issued the subpoena a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service in person or by return receipts for certified or registered mail. 7 C.F.R. § 11.8(a)(2)(iv) (2003).

<sup>331</sup> 7 C.F.R. § 11.8(a)(2)(v) (2003).

role as a witness arises out of his or her official duties, regardless of which party requested the subpoena.<sup>332</sup> Failure to pay costs associated with a subpoena is sufficient grounds for striking subpoenaed evidence.<sup>333</sup> The Director may enforce a subpoena through the United States District Court in the jurisdiction where the subpoenaed witness resides.<sup>334</sup> Testimony required by subpoena may be presented at the hearing either in person or telephonically, at the discretion of the Director or hearing officer.<sup>335</sup>

Although the NAD rule contemplates subpoenas of USDA employees, it also states that “[w]hen appropriate, agency witnesses requested by the appellant will be made available at the hearing.”<sup>336</sup> The NAD Guide states that: “[s]ubpoenas ordinarily are not necessary to produce witnesses or documents from the agency. The agency is responsible for ensuring the participation of any USDA employee who is called as a witness by either party.”<sup>337</sup> An appendix to the NAD Guide includes a form letter that hearing officers are to send to USDA employees whose testimony is deemed “pertinent and necessary.”<sup>338</sup> The letter states: “USDA employees are required to comply with such requests as a condition of their employment.”<sup>339</sup>

Thus, NAD is authorized to issue subpoenas,<sup>340</sup> the NAD rule and Guide set out specific criteria for reviewing subpoena requests,<sup>341</sup> and NAD has assumed the authority to compel attendance by needed USDA employee witnesses even without a subpoena.<sup>342</sup> Nonetheless, appellants have reported difficulty acquiring requested documents and securing the attendance of requested agency employees at NAD hearings. It appears that NAD interprets the necessity and relevancy of agency employee testimony much more narrowly than appellants and their representatives would like. Appellants should be aware of

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<sup>332</sup> 7 C.F.R. § 11.8(a)(2)(v) (2003).

<sup>333</sup> 7 C.F.R. § 11.8(a)(2)(v) (2003).

<sup>334</sup> 7 C.F.R. § 11.8(a)(2)(vi) (2003).

<sup>335</sup> 7 C.F.R. § 11.8(a)(3) (2003).

<sup>336</sup> 7 C.F.R. § 11.8(c)(5)(ii) (2003).

<sup>337</sup> NAD Guide at 28 (Sept. 2002). The hearing officer manual in use until September 2002 had stated more directly that “[n]o subpoenas should be required for Department employees.” NAD Hearing Officer Manual at 23 (undated).

<sup>338</sup> See NAD Guide at App. 6, p. 115, “Letter Requesting Attendance of USDA Employee at Hearing” (Sept. 2002).

<sup>339</sup> See NAD Guide at App. 6, p. 115, “Letter Requesting Attendance of USDA Employee at Hearing” (Sept. 2002).

<sup>340</sup> 7 U.S.C. § 6997(a)(2).

<sup>341</sup> 7 C.F.R. § 11.8(a)(2)(iii) (2003); NAD Guide, Appendix 6, “Subpoenas” at App. 6, pp. 107-115 (Sept. 2002).

<sup>342</sup> See NAD Guide at App. 6, p. 115, “Letter Requesting Attendance of USDA Employee at Hearing” (Sept. 2002).



and prepared for this situation. If at all possible appellants should not rely solely upon the availability of subpoenaed evidence or testimony to support their case because this evidence or testimony may not be forthcoming. If a properly filed subpoena request is denied, the appellant should be prepared to present the case without the requested evidence. At the same time—and without jeopardizing the determination on the merits—the appellant should consider putting into the hearing record a written and/or oral objection to the subpoena denial, laying out the basis for the subpoena request.

#### **e. The Hearing**

Although NAD hearings are considered to be “informal,” they are conducted under procedural requirements and evidentiary rules that provide some protections and safeguards for appellants and also impose some requirements. As mentioned earlier, the appellant has the right to a hearing within 45 days of the appeal request.<sup>343</sup> This right belongs the appellant alone; if the appellant wishes to waive this right and seek a postponement of the hearing date—for example, to allow more time to gather and prepare evidence—such a request should be granted.

NAD hearings are typically conducted in person, though an appellant may agree to a telephone hearing.<sup>344</sup> The NAD rule gives great discretion to NAD regarding the conduct of an individual hearing.<sup>345</sup> However, the NAD Guide lays out a standard format for the conduct of appeal hearings and appellants should expect that this format will be followed by hearing officers.<sup>346</sup> The hearing officer will typically begin the hearing with brief prefatory remarks.<sup>347</sup> The appellant and the agency will have the opportunity to make an opening statement before presenting evidence.<sup>348</sup> The NAD rule guarantees both the appellant and the agency the right to present oral and documentary evidence, oral testimony of witnesses, and arguments in support of the party’s position.<sup>349</sup> All parties have the right to controvert evidence relied on by another party and to question all witnesses.<sup>350</sup> The hearing officer may also ask questions “to obtain information and clarify for the record any items that are unclear, confusing or conclusory.”<sup>351</sup> Witnesses at NAD hearings are under oath.<sup>352</sup>

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<sup>343</sup> 7 C.F.R. § 11.8(c)(1) (2003).

<sup>344</sup> 7 C.F.R. § 11.8(c)(5)(i) (2003).

<sup>345</sup> See 7 C.F.R. § 11.8(c)(5)(ii) (2003) (“The hearing will be conducted . . . in the manner determined by [NAD] most likely to obtain the facts relevant to the matter or matters at issue.”).

<sup>346</sup> See NAD Guide at App. 3, pp. 59-64 (Sept. 2002).

<sup>347</sup> NAD Guide at 33 & App. 3, pp. 59-60 (Sept. 2002).

<sup>348</sup> NAD Guide at 33 & App. 3, p. 60 (Sept. 2002).

<sup>349</sup> 7 C.F.R. § 11.8(c)(5)(ii) (2003).

<sup>350</sup> 7 C.F.R. § 11.8(c)(5)(ii) (2003).

<sup>351</sup> NAD Guide at 37 (Sept. 2002).

<sup>352</sup> 7 U.S.C. § 6997(a)(2); 7 C.F.R. § 11.8(a)(2) (2003).

Appellants should be prepared to authenticate any documentary evidence presented at the hearing and should have copies of documents for all parties, as well as for the hearing officer.<sup>353</sup> Documents should be identified by exhibit numbers. It is also a good practice to provide the hearing officer with a list of exhibits. Because the hearing will be recorded and any further review will be based on the record that includes the hearing recording, references to documents and other exhibits during the hearing should be specific so that anyone listening to the tape will understand precisely what documents are being referred to.

As discussed earlier, the hearing officer will allow evidence to be presented at the hearing by any party “without regard to whether the evidence was known to [the agency] at the time the adverse decision was made.”<sup>354</sup> The hearing officer may also accept evidence without regard to whether the evidence could be admitted in a judicial proceeding.<sup>355</sup> The NAD rule also gives the hearing officer the authority to exclude proffered evidence, information, or questions that are “irrelevant, immaterial, or unduly repetitious” and to “confine the presentation of facts and evidence to pertinent matters.”<sup>356</sup>

After all evidence has been presented and testimony is concluded, the parties will have the opportunity to summarize their respective positions.<sup>357</sup>

The hearing officer must make a tape recording of the hearing proceedings. The tape will serve as the official record of the hearing.<sup>358</sup> Any party has the right to request that a verbatim transcript be made of the hearing recording and that this transcript be made the official record of the hearing.<sup>359</sup> The party who requests the transcript must pay the cost of the transcription service, must provide a certified copy of the transcript to the hearing officer at the party’s expense, and must allow any other party to purchase a copy from the transcription service.<sup>360</sup>

If no party requests transcription of the hearing recording, or if an appellant chooses not to purchase a transcription ordered by another party, the appellant can obtain a copy of the tape-recorded hearing record.<sup>361</sup>

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<sup>353</sup> NAD Guide at 35-37 (Sept. 2002).

<sup>354</sup> 7 C.F.R. § 11.8(c)(5)(ii) (2003).

<sup>355</sup> 7 C.F.R. § 11.8(c)(5)(ii) (2003).

<sup>356</sup> 7 C.F.R. § 11.8(c)(5)(ii) (2003).

<sup>357</sup> NAD Guide at 39 & App. 3, p. 60 (Sept. 2002).

<sup>358</sup> 7 C.F.R. § 11.8(c)(5)(iii) (2003).

<sup>359</sup> 7 C.F.R. § 11.8(c)(5)(iii) (2003).

<sup>360</sup> 7 C.F.R. § 11.8(c)(5)(iii) (2003).

<sup>361</sup> See NAD Guide at 32 (Sept. 2002).

#### **f. If a Party Fails to Appear**

The final NAD rule issued in 1999 resolved a conflict in the interim final rule regarding the hearing officer's duty when a party fails to appear at a hearing.<sup>362</sup>

##### **(1) Hearing May Be Rescheduled or Canceled**

If either the appellant or the agency representative is absent when the hearing is scheduled to begin, no appearance is made on behalf of the absent party, and no arrangements have been made to reschedule the hearing, the hearing officer may cancel the hearing unless the absent party "has good cause" for the failure to appear.<sup>363</sup> If the absent party demonstrates good cause for the failure to appear, the hearing officer "shall" reschedule the hearing, unless all parties agree to proceed without a hearing.<sup>364</sup> The permissive language used in the rule suggests that the hearing officer may also reschedule the hearing even if the absent party does not demonstrate good cause.

##### **(2) Resolving the Appeal When the Hearing is Canceled**

If the hearing is canceled due to a party's failure to appear, the hearing officer will have three options for resolving the appeal.<sup>365</sup> First, the hearing officer may dismiss the appeal.<sup>366</sup> Second, the hearing officer may treat the appeal as a record review and issue a determination based on the agency record and the hearing record developed before the hearing date.<sup>367</sup> Third, the hearing officer may accept evidence into the hearing record from any party present at the scheduled hearing, provide any absent party with a copy of the new evidence and an opportunity to respond to the new evidence within 10 days, and issue a determination based upon this record.<sup>368</sup>

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<sup>362</sup> See discussion at 64 Fed Reg. 33,367, 33,369 (1999) (prefatory comments to final rule).

<sup>363</sup> 7 C.F.R. § 11.8(c)(6)(i) (2003).

<sup>364</sup> 7 C.F.R. § 11.8(c)(6)(iii) (2003). The regulations do not specify the timeframe in which an absent party must establish the cause for failure to appear.

<sup>365</sup> 7 C.F.R. § 11.8(c)(6)(i) (2003). The regulations provide no guidance for how a hearing officer will determine which option to exercise.

<sup>366</sup> 7 C.F.R. § 11.8(c)(6)(i)(C) (2003).

<sup>367</sup> 7 C.F.R. § 11.8(c)(6)(i)(A) (2003). Although the language of § 11.8(c)(6)(ii) suggests that the hearing officer must always allow those parties present at the hearing to submit evidence, § 11.8(c)(6)(i)(A) clearly provides the hearing officer the authority to conduct a record review without accepting further evidence from any party.

<sup>368</sup> 7 C.F.R. § 11.8(c)(6)(i)(B) (2003).

### (3) Absent Parties and Appellants' Rights

Appellants have a statutory right to an appeal hearing within 45 days of NAD's receipt of their appeal requests.<sup>369</sup> Presumably, an appellant's own failure to appear at a scheduled hearing, even with good cause, is a waiver of this right. However, it does not seem reasonable that an appellant could be forced to yield this statutory right through a regulation granting hearing officers authority to reschedule hearings if a non-appellant party—an agency representative or third party—fails to appear, whether or not the absence is due to good cause.

The authority granted to hearing officers under the absent-party provision of the NAD rule presents an even greater risk to appellants' statutory hearing rights if the hearing is canceled. As discussed above, if a hearing is canceled due to a party's failure to appear the NAD rule authorizes the hearing officer to dismiss the appeal or proceed with a record review.<sup>370</sup> If the hearing officer elects record review, the rule further authorizes the officer to choose whether or not to allow the party or parties who do appear to submit evidence.<sup>371</sup> This regulatory authority fails to recognize appellants' statutory appeal rights in a number of respects. First, it should be obvious that the failure of anyone other than the appellant to appear at a scheduled hearing could never be proper grounds for dismissing an appellant's appeal. Second, the failure of a non-appellant party to appear at the scheduled hearing should have no effect on an appellant's statutory right to receive an in-person hearing.<sup>372</sup> And third, a non-appellant party's failure to appear could not reasonably be the basis for preventing an appellant from entering evidence into the hearing record.<sup>373</sup>

It may be reasonable to conclude that NAD would not construe its rules and hearing officers would not exercise their discretion under those rules to threaten an appellant's statutory rights. However USDA chose to promulgate rules that, on their face, authorize NAD hearing officers to do just that. For their own protection, therefore, appellants and their authorized representatives should make themselves familiar with the rights afforded to NAD appellants under the statute.

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<sup>369</sup> 7 U.S.C. § 6997(b).

<sup>370</sup> 7 C.F.R. § 11.8(c)(6)(i) (2003).

<sup>371</sup> 7 C.F.R. § 11.8(c)(6)(i)(A), (B) (2003).

<sup>372</sup> See 7 U.S.C. § 6997(c)(2).

<sup>373</sup> The appellant's statutory right to present evidence is presumed under 7 U.S.C. § 6997(c)(3): "The hearing officer shall consider information presented at the hearing . . . [and] . . . allow the submission of information by the appellant or the agency after the hearing to the extent necessary to respond to new facts, information, arguments, or evidence presented or raised by the agency or appellant."

### **g. Post-Hearing Procedures**

After an appeal hearing, the hearing record is kept open for a certain period to allow the appellant or the agency to respond to “new facts, information, arguments, or evidence” that was presented or raised at the hearing.<sup>374</sup> The NAD rule provides that this period will typically be 10 days, but that the hearing officer is authorized to establish a different period of time.<sup>375</sup> Any new information that is submitted by any party will be added to the hearing record.<sup>376</sup> The rule also provides that copies of the new information must be sent to the other party by the submitting party.<sup>377</sup> The hearing officer has the discretion whether to allow the other party to respond to any post-hearing submission.<sup>378</sup>

Appellants and their authorized representatives should strongly consider preparing and submitting a post-hearing letter or memorandum that lays out the appellant’s case, incorporating responses to the arguments and evidence presented by the agency and any other party at the appeal hearing. Entering a cohesive, written representation of the appellant’s case in the hearing record can be invaluable, both when the hearing officer is making the initial determination and upon further review by the NAD Director or a court.

If the agency or any other party makes post-hearing submissions, an appellant is generally well advised to request the opportunity to respond to those submissions.

### **h. Notice of the Hearing Officer Determination**

The hearing officer must issue a “notice of determination” to the appellant, any authorized representative, and the agency within 30 days after the closing date of the hearing record.<sup>379</sup> If no additional information is submitted by either party, the determination must be issued within 30 days after the hearing.<sup>380</sup> If the appellant requested a record review, the determination must be issued within 45 days after NAD received the record review request.<sup>381</sup> The hearing officer may request that the NAD Director establish an earlier or later deadline for issuing the determination.<sup>382</sup>

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<sup>374</sup> 7 C.F.R. § 11.8(c)(7) (2003). The NAD statute provides that the period for post-hearing submissions must be “reasonable.” 7 U.S.C. § 6997(c)(3). This language may provide support for a request by an appellant that a period greater than 10 days be established in certain circumstances or that an alternative period shorter than 10 days is inappropriate.

<sup>375</sup> 7 C.F.R. § 11.8(c)(7) (2003).

<sup>376</sup> 7 C.F.R. § 11.8(c)(7) (2003).

<sup>377</sup> 7 C.F.R. § 11.8(c)(7) (2003). No penalty is set out for failing to provide such copies.

<sup>378</sup> 7 C.F.R. § 11.8(c)(7) (2003).

<sup>379</sup> 7 C.F.R. § 11.8(f) (2003).

<sup>380</sup> 7 C.F.R. § 11.8(f) (2003).

<sup>381</sup> 7 C.F.R. § 11.8(f) (2003).

<sup>382</sup> 7 U.S.C. § 6997(d); 7 C.F.R. § 11.8(f) (2003).

The notice of determination will include a copy of the procedures for requesting Director review.<sup>383</sup>

If no party makes a proper request for review of the hearing officer determination by the NAD Director, the hearing officer determination becomes the final NAD determination.<sup>384</sup> This determination is then subject to judicial review.<sup>385</sup>

#### **D. Stage Four—NAD Director Review**

If the appellant or the agency is dissatisfied with the hearing officer's determination, either may request a review of the determination by the NAD Director.<sup>386</sup> As discussed earlier in this article, "third parties" as defined for NAD purposes may also request Director review of NAD hearing officer determinations.<sup>387</sup>

##### **1. Requesting Director Review**

An appellant who desires Director review must request it within 30 calendar days of receiving the NAD hearing officer's determination.<sup>388</sup> Although the rules do not so specify, this 30-day period presumably also applies to requests for Director review made by non-appellant third parties. A request for Director review submitted by an appellant (or third party) must be in writing and personally signed by the appellant (or third party), and must set out "specific reasons" why the hearing officer determination is wrong.<sup>389</sup> At the same time that the Director review request is submitted, a copy should be sent to every other party to the appeal, including the agency.<sup>390</sup>

#### **Director Review Sought by the Appellant**

1. Written request;
2. Signed personally by the appellant;
3. Made not later than 30 days after the date that the appellant received the determination; and
4. Stating specific reasons why the hearing officer determination is wrong.

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<sup>383</sup> 7 C.F.R. § 11.8(f) (2003).

<sup>384</sup> 7 U.S.C. § 6997(d); 7 C.F.R. § 11.8(f) (2003).

<sup>385</sup> See 7 U.S.C. §§ 6997(d), 6999.

<sup>386</sup> 7 C.F.R. § 11.9 (2003).

<sup>387</sup> 7 C.F.R. § 11.15(a) (2003).

<sup>388</sup> 7 C.F.R. § 11.9(a)(1) (2003).

<sup>389</sup> 7 C.F.R. § 11.9(a)(1) (2003).

<sup>390</sup> 7 C.F.R. § 11.9(a)(3) (2003). The regulations do not specify a penalty for failing to provide the copies.

An agency that desires Director review of a NAD hearing officer determination must request it within 15 business days of receiving the determination.<sup>391</sup> Only the head of an agency can request Director review; local and state staff cannot.<sup>392</sup> An agency's Director review request must be in writing and must set out "specific reasons why the agency believes the determination is wrong, including citations of statutes or regulations that the agency believes the determination violates."<sup>393</sup> At the time an agency submits a Director review request, it should send a copy to the appellant and any other party to the appeal.<sup>394</sup>

#### **Director Review Sought by the Agency**

1. Written request;
2. Made by the head of the agency;
3. Made not later than 15 business days after the date that the agency received the determination;
4. Stating specific reasons why the hearing officer determination is wrong; and
5. Including citations to the law that the agency believes the hearing officer determination violates.

The NAD Director must promptly notify all parties to an appeal when a request for Director review is filed.<sup>395</sup> The other parties to the appeal have five business days after receiving a copy of the Director review request to submit a written response to the request.<sup>396</sup>

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<sup>391</sup> 7 C.F.R. § 11.9(a)(2) (2003).

<sup>392</sup> 7 C.F.R. § 11.9(a)(2) (2003).

<sup>393</sup> 7 C.F.R. § 11.9(a)(2) (2003).

<sup>394</sup> 7 C.F.R. § 11.9(a)(3) (2003). The regulations do not specify a penalty for failing to provide the copies.

<sup>395</sup> 7 C.F.R. § 11.9(b) (2003).

<sup>396</sup> 7 C.F.R. § 11.9(c) (2003).

## 2. Bases for and Standard of Review

The NAD rule states that the standard of review for the Director's review of a NAD hearing officer determination will be whether that determination was supported by substantial evidence.<sup>397</sup> This rather deferential "substantial evidence" standard was not specified in the NAD statute.<sup>398</sup> The Director review determination is based on a review of the agency record, the hearing record, the request for Director review, any responses to the request for Director review, and "such other arguments or information as may be accepted by the Director."<sup>399</sup> Prefatory comments to the interim final NAD rule state that if the Director review determination is based on any additional information submitted in the Director review process, "the Director shall note the reasons for use of such new information in the final determination."<sup>400</sup>

The Director has the authority to uphold, reverse, or modify the hearing officer determination.<sup>401</sup> If the Director concludes that the hearing record is inadequate or that "new evidence has been submitted," the Director may remand all or a portion of the case to the hearing officer.<sup>402</sup> On remand, the hearing officer will either conduct further proceedings to complete the record or will hold a new hearing, at the Director's discretion.<sup>403</sup>

Once issued, the Director review determination becomes a final NAD determination, subject to judicial review.<sup>404</sup>

## 3. Timing of a Director Review Determination

The NAD statute and rule require the Director to complete the review and either issue a final determination or remand the case to the hearing officer within a set period of time. If the request for Director review was made by an appellant, the statute and rule require the Director to issue a determination or remand order within 30 business days of receiving the written request.<sup>405</sup> If the request for Director review was made by the head of an agency, the statute and rule require the Director to issue a determination or remand order within 10 business days after receiving the request.<sup>406</sup>

Despite the clear timeframes in the statute and rule, the prefatory comments to the interim final NAD rule state that these deadlines "may be unrealistic" and that "USDA believes

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<sup>397</sup> 7 C.F.R. § 11.9(d)(1) (2003). The review is conducted by either the NAD Director or a designee. 7 C.F.R. § 11.9(d)(3) (2003).

<sup>398</sup> See 7 U.S.C. § 6998(b).

<sup>399</sup> 7 C.F.R. § 11.9(d)(1) (2003).

<sup>400</sup> 60 Fed. Reg. 67,298, 67,305 (1995) (prefatory comments to interim final rule).

<sup>401</sup> 7 C.F.R. § 11.9(d)(1) (2003).

<sup>402</sup> 7 C.F.R. § 11.9(d)(1) (2003).

<sup>403</sup> 7 C.F.R. § 11.9(d)(1) (2003).

<sup>404</sup> 7 C.F.R. § 11.9(d)(1) (2003).

<sup>405</sup> 7 U.S.C. § 6998(b)(2); 7 C.F.R. § 11.9(d)(2)(ii) (2003).

<sup>406</sup> 7 U.S.C. § 6998(b)(1); 7 C.F.R. § 11.9(d)(2)(i) (2003).



the failure to meet these deadlines does not deprive the Director of jurisdiction to reach a determination or issue a remand order. . . .<sup>407</sup> In practice, appellants report that the deadlines for Director review determinations are often not met, with months sometimes passing before a determination is issued on Director review.

As discussed by Kelley, the legal consequences of the Director's failure to meet the statutory and regulatory deadline for issuing a determination are unclear.<sup>408</sup> In *Passarell v. Glickman*, appellants sought a declaratory judgment that they were eligible for USDA farm program benefits.<sup>409</sup> NAD hearing officers had determined that the farmers were not eligible. Although the Director had reversed the hearing officer determinations and remanded the cases for new hearings, he failed to do so until almost two months after the 30-day period for Director review had passed. The appellants argued that they were entitled to a determination of eligibility due to the Director's failure to decide within the statutory period, while USDA argued that the 30-day deadline was not mandatory. The United States District Court for the District of Columbia rejected as "nonsensical" USDA's position that the statutory deadline was aspirational rather than mandatory and compared the agency's argument to that effect to the war-is-peace doublespeak of George Orwell's *1984*.<sup>410</sup> Despite the strongly worded opinion rejecting USDA's position that the statutory timeframe was not mandatory, the court found the appropriate remedy to be a remand to NAD for a new evidentiary hearing—precisely the relief that had been awarded in the belated Director review determination. The court, however, did stipulate that the new hearing officer determination would be the final agency determination for the case and that if that determination was not issued within 30 days after the court's order was entered, the court would order that the appellants were entitled to the payments they sought.<sup>411</sup>

In the case of *Beard v. Glickman*, the U.S. District Court for the Central District of California concluded that the NAD Director's failure to issue a Director review determination within the time prescribed in the statute would not make the determination ineffective.<sup>412</sup> The farmers in that case had been successful before the NAD hearing officer, and the agency had sought Director review. The Director issued a late Director review determination finding in favor

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<sup>407</sup> 60 Fed. Reg. 67,298, 67,305 (1995) (prefatory comments to interim final rule). In full, the comments read: [T]he deadlines set by the Act for the Director to issue a final determination or to remand to the Hearing Officer may be unrealistic at any given time because of caseload or the complexities of a particular appeal. Although USDA believes the failure to meet these deadlines does not deprive the Director of jurisdiction to reach a determination or issue a remand order, it fully intends to follow such deadlines to the extent possible in order to deliver fairly considered determinations of the Director that will withstand judicial review. Hastily rendered determinations that fail to develop an adequate decision for judicial review do not benefit either USDA or appellants. Therefore, while USDA has added no provision affirmatively authorizing the Director to extend the period for issuance of determinations, USDA recognizes that it may be necessary for the Director to do so in individual cases in order to facilitate a fair and equitable resolution of the appeal. Equitable, in this sense, refers to equal participation in and consideration of parties' submissions in the Director review process.

<sup>408</sup> Kelley, *Notes on the USDA National Appeals Division Appeal Process*, 1999 ARK. L. NOTES at 68-69.

<sup>409</sup> *Passarell v. Glickman*, No. 95-2122, 1997 U.S. Dist. LEXIS 2719 (D.D.C. Mar. 6, 1997).

<sup>410</sup> *Passarell v. Glickman*, No. 95-2122, 1997 U.S. Dist. LEXIS 2719, at \*7-8 (D.D.C. Mar. 6, 1997).

<sup>411</sup> *Passarell v. Glickman*, No. 95-2122, 1997 U.S. Dist. LEXIS 2719, at \*11 (D.D.C. Mar. 6, 1997).

<sup>412</sup> 189 F. Supp. 2d 994 (C.D. Cal. 2001).

of the agency and reversing the hearing officer's determination. The farmers sued, arguing that the hearing officer determination in their favor must be implemented because the late Director review determination was ineffective. The court disagreed. The court held that in the absence of statutory language specifying the consequence of noncompliance with a deadline, the federal courts were not authorized to impose their own sanction.<sup>413</sup>

A series of United States Supreme Court and Circuit Court decisions concerning statutory deadlines for agency action in a variety of other contexts provides support for the *Beard* court's analysis.<sup>414</sup> The Supreme Court held in *Brock v. Pierce County* that if a statute sets a deadline for agency action but does not specify a consequence for failure to meet that deadline, "courts should not assume that Congress intended the agency to lose its power to act."<sup>415</sup> Courts have relied on this principle to refuse to divest an agency of its power to act "even when significant private interests are threatened by the government's failure to comply with statutorily prescribed time requirements."<sup>416</sup>

The Supreme Court in *Brock* left open the possibility that a statutory deadline for agency action could be found to bar later action even without explicit statutory language setting out that consequence.<sup>417</sup> However, the most recent Supreme Court decision in this line of cases suggests that the courts will look especially hard at statutory deadlines enacted after the Court's 1986 *Brock* decision—such as those in the NAD statute. In *Barnhart v. Peabody Coal Co.*, the Court observed that when statutory deadlines enacted after 1986 are at issue, Congress should be presumed to be aware of courts' unwillingness to "readily infer congressional intent" to limit an agency's power

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<sup>413</sup> 189 F. Supp. 2d at 999-1000 (citing *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63-64 (1993); *United States v. Montalvo-Murillo*, 495 U.S. 711, 717 (1990); *Brock v. Pierce County*, 476 U.S. 253, 260-62 (1986)). In a rather confusing additional comment, the court seems to have looked to explanatory remarks issued by USDA as evidence of *Congressional* intent with respect to this issue. See *Id.* at 1000-01 (stating ". . . legislative history contemplated a situation such as the one in the present case. . . ." but then referring to and citing only the prefatory comments to the interim final NAD rule which state that "it may be necessary" for the Director to extend the response time in certain situations).

414. In addition to the cases discussed here, see *Regions Hospital v. Shalala*, 522 U.S. 448, 460 (1998); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63-64 (1993); *General Motors Corp. v. United States*, 496 U.S. 530, 541 (1990); *United States v. Montalvo-Murillo*, 495 U.S. 711, 718-719 (1990); *Marshall Durbin Food Corp. v. Interstate Commerce Comm'n*, 959 F.2d 915, 919-20 (11<sup>th</sup> Cir.

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476 U.S. 253, 260 (1986). As the Court noted, this analysis had already been adopted by a number of Circuit Courts when *Brock* was decided. 476 U.S. at 259. By 1994, when the NAD statute was enacted, the D.C. Circuit Court of Appeals was declaring this principle "well settled." *Gottlieb v. Pena*, 41 F.3d 730, 733 (D.C. Cir. 1994).

416. *Gallagher v. National Transportation Safety Board*, 953 F.2d 1214, 1223 (10<sup>th</sup> Cir. 1992).

417. 476 U.S. at 262, n. 9 ("We need not, and do not, hold that a statutory deadline for agency action can never bar later action unless that consequence is stated explicitly in the statute.)

to act “merely from a specification to act by a certain time.”<sup>418</sup> The Court concluded in *Peabody Coal* that if Congress intended that failure to meet a statutory deadline would divest an agency of the power to act, it “would surely not have couched its intent in language *Brock* had already held to lack any clear jurisdictional significance.”<sup>419</sup>

### **E. Stage Five—NAD Director Reconsideration**

Although the NAD statute does not contemplate further review within NAD after a Director review determination is issued, USDA has determined that the NAD Director has “inherent authority” to review his or her final determinations to correct any errors.<sup>420</sup> Therefore, the NAD rule provides a right to request reconsideration of a Director review determination if either the appellant or the agency believes that the determination is wrong.<sup>421</sup> It is important to be aware, however, that Director review determinations generally do not inform appellants of their right to seek reconsideration by the Director.

USDA has deemed the Director’s reconsideration authority to be limited to the correction of errors. Prefatory comments to the final NAD rule give examples of such errors including “wrong dates, wrong amounts, wrong regulations, or wrong statutes.”<sup>422</sup> The comments emphasize that reconsideration “is not another step in the appeal process” and parties seeking reconsideration should not expect “changes of interpretations or opinions.”<sup>423</sup>

Because the purpose of reconsideration is to correct “errors,” USDA has determined that the parties will not require much time to make a reconsideration request.<sup>424</sup> The NAD rule provides that a request for reconsideration by either the appellant or the agency must be submitted within 10 calendar days of the receipt of the Director review determination.<sup>425</sup> The reconsideration request must be in writing and must contain a detailed statement of a material error of fact in the Director review

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418. 123 S. Ct. 748, 756, 154 L. Ed. 653, 666 (2003).

419. 123 S. Ct. 757, 154 L. Ed. at 668.

<sup>420</sup> See 60 Fed. Reg. 67,298, 67,306 (1995) (prefatory comments to interim final rule) (“USDA has determined that the Director has limited inherent authority to reconsider final determinations of the Director even though provisions for such authority have not been specifically stated in the Act.”); 64 Fed. Reg. 33,367, 33,372 (1999) (prefatory comments to final rule) (“Section 11.11 was added to the interim final rule to reflect the inherent authority of a decisionmaker under general principles of law to review his or her decisions to correct errors.”).

<sup>421</sup> 7 C.F.R. § 11.11 (2003).

<sup>422</sup> 64 Fed. Reg. 33,367, 33,372 (1999) (prefatory comments to final rule).

<sup>423</sup> 64 Fed. Reg. 33,367, 33,372 (1999) (prefatory comments to final rule).

<sup>424</sup> 64 Fed. Reg. 33,367, 33,372 (1999) (prefatory comments to final rule) (errors “should be quickly detectable upon reading the determination and reviewing the record” and “[a] request for reconsideration under this provision should not require a great deal of time for research, and rarely should require additional time for gathering information and evidence.”).

<sup>425</sup> 7 C.F.R. § 11.11(a) (2003).

determination or a detailed explanation of how the Director review determination is contrary to statute or regulations.<sup>426</sup>

#### **Reconsideration of a Director Review Determination**

1. Written request;
2. Made not later than 10 calendar days after receiving the Director review determination;
3. Containing either (or both)
  - a. A detailed statement of a material error of fact in the Director review determination; or
  - b. A detailed explanation of how the Director review determination is contrary to statute or regulations.

Once a request for reconsideration has been filed, the Director will issue a notice to all parties informing them whether the request meets the requirements.<sup>427</sup> If the reconsideration request does meet the requirements, the notice to the other parties to the appeal will include a copy of the reconsideration request, and these parties will be given an opportunity to file a response.<sup>428</sup> The response must be filed within five calendar days of receiving notification of the reconsideration request.<sup>429</sup>

The NAD rule states that the Director will issue a determination on a reconsideration request within five calendar days of receiving responses from the other parties to the appeal.<sup>430</sup> The Director's reconsideration determination is final and is not appealable within NAD.<sup>431</sup>

#### **F. Stage Six—Discretionary Review by Agency Head and/or Secretary of Agriculture**

Under the NAD statute, the Secretary of Agriculture retains the authority to grant relief—equitable or otherwise—to a program participant even after a final

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<sup>426</sup> 7 C.F.R. § 11.11(a) (2003).

<sup>427</sup> 7 C.F.R. § 11.11(b) (2003).

<sup>428</sup> 7 C.F.R. § 11.11(b) (2003).

<sup>429</sup> 7 C.F.R. § 11.11(b) (2003).

<sup>430</sup> 7 C.F.R. § 11.11(c) (2003).

<sup>431</sup> 7 C.F.R. § 11.11(c) (2003).

determination has been made in the NAD process.<sup>432</sup> Similarly, several USDA agencies whose decisions are subject to NAD review—FSA, CCC, RMA, and NRCS—reserve authority in their internal appeal regulations for the agency head to reverse or modify adverse decisions at any time.<sup>433</sup> Decisions under these provisions are entirely discretionary and cannot be challenged.

There are no statutory or regulatory specifications for requesting the Secretary of Agriculture to grant relief in an individual case or for requesting an agency head to reverse or modify an adverse decision. It would seem that such requests would best be made by writing a letter setting out the case and the need and basis for relief, enclosing all relevant materials.

It is likely that the Secretary and agency heads rarely grant this type of relief. However, requesting discretionary relief from the Secretary or an agency head may well be worth the effort, particularly if judicial review, discussed next, is infeasible. Preparing a request for discretionary relief from the Secretary or agency head should not require much time or effort if the NAD process has been exhausted, since all of the arguments and materials should already be gathered. If the participant has been precluded from seeking NAD relief due to missed deadlines and would therefore also be precluded from judicial review, a request for discretionary relief will likely be the only chance for having the adverse decision modified or reversed.

### **G. Stage Seven—Judicial Review**

The six stages of review of adverse agency decisions discussed thus far in this article all occur within USDA. That is, they involve review by either the USDA agency that made the adverse decision or by another decision maker within USDA having the authority to tell the agency that it is wrong—NAD or the Secretary of Agriculture. Once a participant has either exhausted or given up on avenues for relief within USDA, one final possible stage of review remains: judicial review by a federal district court.<sup>434</sup>

Judicial review may be unattractive to program participants due to cost, the likelihood of an extended delay in receiving any relief, and the heavy burden on a participant of proving his or her case. Because of these factors many, perhaps most, participants who are unable to obtain relief within USDA decide not to pursue judicial review.

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<sup>432</sup> 7 U.S.C. § 6998(d).

<sup>433</sup> See 7 C.F.R. § 780.11(b) (2003) (FSA, CCC, FCIC, and NRCS); 7 C.F.R. § 614.4 (2003) (NRCS technical determinations); 7 C.F.R. § 400.97 (2003) (RMA).

<sup>434</sup> 7 U.S.C. § 6999. In *Deaf Smith County Grain Processors, Inc. v. Glickman*, the D.C. Circuit Court of Appeals interpreted this section of the NAD statute to provide that all final NAD determinations are reviewable by the federal district courts, including determinations in which the participant is claiming improper denial of farm program payments. 162 F.3d 1206, 1213 (D.C. Cir. 1998). Prior to the enactment of the NAD statute, USDA had routinely argued that judicial review of agency denials of farm program payments could only be heard by the U.S. Court of Federal Claims if the amount at issue totaled more than \$10,000. *Id.* See also *Farmers & Merchants Bank of Eaton, Georgia v. United States*, 43 Fed. Cl. 38, 44 (1999) (the NAD statute “requires all parties dissatisfied with a decision of the FSA to pursue a mandatory administrative appeal to the NAD, which may be reviewed exclusively by the district courts”).

## 1. Exhaustion of Administrative Remedies

More important for the purposes of this article than possible infeasibility of judicial review is the risk that it will be simply unavailable. Judicial review of an adverse agency decision will only be available if the participant has first “exhausted administrative remedies.” This means that the participant has taken advantage of the minimum required USDA review procedures that are applicable to the decision. Federal law prohibits courts from hearing challenges to USDA decisions if the challenger has not exhausted these remedies.<sup>435</sup>

### a. What Remedies Must Be Exhausted?

With respect to USDA decisions that fall under the jurisdiction of NAD, a key question for judicial review is: what administrative remedies must be pursued to satisfy the exhaustion requirement?

#### (1) The Typical Case—Obtain at Least a NAD Hearing Officer Determination

The NAD statute provides that a NAD “final determination” will be subject to judicial review.<sup>436</sup> The statute does not define “final determination,” but both the statute and the NAD rule make it clear that a hearing officer determination, a Director review determination, or a Director reconsideration determination can be a final NAD determination that is eligible for judicial review.<sup>437</sup> In other words, the only NAD procedure that must be pursued in order to exhaust administrative remedies is the initial appeal before the hearing officer; further review by the Director is not required before seeking judicial review.<sup>438</sup>

#### (2) Decisions Determined Nonappealable by NAD—Directly to Judicial Review

A USDA program participant may seek judicial review of an adverse agency decision without obtaining a final NAD determination if NAD has determined that the decision is “nonappealable.” As discussed earlier in this article, program participants should not rely on agency pronouncements that a decision is nonappealable nor on their own conclusions about whether an adverse decision is appealable to NAD. To ensure that judicial review will be available, program participants should always take the precaution of obtaining a NAD Director determination of nonappealability before attempting to bring a court action.

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<sup>435</sup> 7 U.S.C. § 6912(e). The NAD rule also imposes an exhaustion requirement, see 7 C.F.R. § 11.2(b) (2003), as do some agency appeal regulations, 7 C.F.R. § 400.96(a)(1) (2003).

<sup>436</sup> 7 U.S.C. § 6999.

<sup>437</sup> See 7 U.S.C. §§ 6997(d), 6998(b); 7 C.F.R. § 11.2(b) (2003).

<sup>438</sup> See 7 C.F.R. § 11.2(b) (2003) (“program participants *shall* seek review of an adverse decision before a Hearing Officer of the Division, and *may* seek further review by the Director, under the provisions of this part prior to seeking judicial review”) (emphasis added). See *also* 60 Fed. Reg. 67,298, 67,301 (1995) (prefatory comments to interim final rule) (“exhaustion of the procedures for Hearing Officer review of an adverse decision under this part is required before a program participant may seek judicial review of an adverse decision”); 60 Fed. Reg. 67,298, 67,303 (1995) (prefatory comments to interim final rule) (“USDA considers exhaustion of an appeal to the Hearing Officer mandatory prior to seeking judicial review, regardless of the basis for the appeal”).

### (3) Determinations of Good Farming Practices in Crop Insurance Cases—Directly to Judicial Review

In the 2000 Agricultural Risk Protection Act, Congress provided that FCIC determinations whether an insured under a federal crop insurance policy has followed “good farming practices” are not appealable to NAD.<sup>439</sup> As discussed earlier in this article, FCIC is to provide a separate, informal administrative review process for such determinations.<sup>440</sup> Congress also specifically provided that insureds have the right to proceed directly to judicial review of such determinations without exhausting any administrative review processes.<sup>441</sup>

#### b. Exhaustion Requirement Applies to *Issues* and Not Agency Decision Generally

When thinking about the exhaustion requirement, it is important to understand that the requirement applies to *each separate issue* that a program participant might wish to raise in a judicial review action. A participant will generally not be allowed to present to a court arguments for overturning an agency decision that were not presented in the NAD appeal. Federal courts considering this point have consistently concluded that only issues actually raised in USDA administrative appeals will be considered preserved for judicial review.<sup>442</sup> As the Third Circuit Court of Appeals stated in *Kleisser v. U.S. Forest Service*, the issues raised in the administrative appeal and the issues presented for judicial review “must be so similar that the district court can ascertain that the agency was on notice of, and had an opportunity to consider and decide, the same claims now raised in federal court.”<sup>443</sup>

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<sup>439</sup> Pub. L. No. 106-224, 114 Stat. 358, 378, § 123 (codified at 7 U.S.C. § 1508(a)(3)(B)(ii)(I)) (providing that no such determination shall be considered an “adverse decision” for NAD purposes).

<sup>440</sup> 7 U.S.C. § 1508(a)(3)(B)(i); 7 C.F.R. pt. 400, subpt. J (2003).

<sup>441</sup> 7 U.S.C. § 1508(a)(e)(B)(iii). See also 7 C.F.R. § 400.96(b) (2003).

<sup>442</sup> See *Bass v. USDA*, 211 F.3d 959, 964 (5th Cir. 2000); *Bentley v. USDA*, 234 B.R. 12, 17 (N.D.N.Y. 1999); *Gregson v. U.S. Forest Service*, 19 F. Supp. 2d 925, 930 (E.D. Ark. 1998); *Idaho Sporting Congress, Inc. v. Rittenhouse*, 1999 U.S. Dist. LEXIS 23230, at \*58 (D. Idaho July 27, 1999), *aff'd* 232 F.3d 894 (9th Cir. 2000). See also *Sims v. Apfel*, 530 U.S. 103, 112 (2000) (O'Connor, J., concurring in part) (“In most cases, an issue not presented to an administrative decision maker cannot be argued for the first time in federal court. On this underlying principle of administrative law, the Court is unanimous.”).

<sup>443</sup> 183 F.3d 196, 202 (3d Cir. 1999).

### **c. If Administrative Remedies Were Not Exhausted—Limited Exceptions May Allow Judicial Review**

There are limited exceptions to the exhaustion requirement, and these have been endorsed to varying degrees by federal courts in NAD exhaustion cases. Because of the limited scope and uncertain availability of these exceptions, participants should never rely on being able to take advantage of them. If there is any possibility that a participant will want to seek judicial review, exhaustion of at least the minimum required steps in the NAD process should be pursued as a precautionary measure. This is true even if the issue or claim seems outside of NAD's scope of authority. The exceptions discussed here are perhaps best viewed as an argument of last resort.<sup>444</sup>

The statutory provision requiring exhaustion of NAD appeal procedures before bringing an action for review of an adverse agency decision is found at 7 U.S.C. § 6912(e). This provision makes exhaustion mandatory not only for the NAD process but also for all other administrative appeals procedures within USDA, prohibiting any person from bringing suit against any agency, officer, or employee of USDA, or against USDA itself, unless that person has exhausted administrative appeal procedures.<sup>445</sup>

Several federal courts have interpreted the § 6912 exhaustion requirement. Unfortunately there is little consistency among the decisions to guide program participants in their evaluation of the likelihood of making a successful exception argument. At one end of the spectrum is the 1998 decision in *Bastek v. FCIC*,<sup>446</sup> in which the Second Circuit Court of Appeals in a very strongly worded opinion seemed to reject the possibility of any exceptions to the § 6912 exhaustion requirement. The court held that the statute set out an explicit requirement for exhaustion and therefore exceptions were not available.<sup>447</sup> Finding that the plaintiffs had failed to exhaust their

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<sup>444</sup> Discretionary review by the Secretary of Agriculture or agency head (discussed in this article as Stage Six of the NAD process) would remain available even after an unsuccessful judicial review effort. 7 U.S.C. § 6998(d); 7 C.F.R. § 780.11(b) (2003) (FSA, CCC, FCIC, and NRCS); 7 C.F.R. § 614.4 (2003) (NRCS technical determinations); 7 C.F.R. § 400.97 (2003) (RMA). As discussed earlier, however, the chance of obtaining relief under this type of review is likely quite small.

<sup>445</sup> The provision states:

Notwithstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction against—

- (1) the Secretary;
- (2) the Department; or
- (3) an agency, office, officer, or employee of the Department.

7 U.S.C. § 6912(e).

<sup>446</sup> 145 F.3d 90 (2d Cir. 1998).

<sup>447</sup> See also *Calhoun v. USDA Farm Serv. Agency*, 920 F. Supp. 696, 702 (N.D. Miss. 1996) (finding that “[t]he scope of allowable exceptions in the context of statutorily required exhaustion is extremely narrow,” rejecting the “statutory interpretation” and “futility” exceptions in that context, and holding that even allowable exceptions are available only at the court’s discretion); *Bentley v. Glickman*, 234 B.R. 12, 19 (N.D.N.Y. 1999) (bound by *Bastek*, the court concluded that “failure to seek review of a determination of non-appealability issue mandates a conclusion that Plaintiff has not exhausted his appeals” and held that the futility exception is not available where exhaustion is required by statute).



administrative remedies by seeking a final determination from NAD, the court concluded that judicial review was barred. The court held that even if the claims involved a matter of general applicability outside NAD's jurisdiction, as the plaintiffs argued, they were required by § 6912 to obtain a determination of nonappealability from the NAD Director.

The Second Circuit's *Bastek* decision favorably quoted the 1995 district court decision in *Gleichman v. USDA*<sup>448</sup> for the proposition that § 6912 is an explicit statutory exhaustion requirement for which judicial exceptions were not available.<sup>449</sup> It is notable, however, that the district court in *Gleichman* did allow an exception to the exhaustion requirement for the plaintiff's constitutional due process claim, noting that USDA had conceded that "exhaustion is not required for challenges to the constitutionality of the agency's statutes or regulations."<sup>450</sup> It may be reasonable to conclude that the Second Circuit would therefore also recognize a constitutional exception to the § 6912 requirement.<sup>451</sup>

At the other end of the spectrum is *McBride Cotton & Cattle Corp. v. Veneman*,<sup>452</sup> in which the Ninth Circuit Court of Appeals explicitly rejected the *Bastek* analysis and concluded that exceptions to the § 6912 exhaustion requirement were possible. The court held that a statutory exhaustion requirement is only a complete bar to a court's jurisdiction if the statutory language was "sweeping and direct" and did more than simply restate the requirement that claims must be exhausted.<sup>453</sup> Finding that § 6912 was merely a codification of the general exhaustion requirement, the court held that exceptions to the requirement were available. Looking to the facts of the case, the court found that the plaintiffs would not have been allowed to raise their constitutional and statutory challenges to general USDA policy in a NAD appeal and therefore their failure to exhaust administrative remedies was excused.<sup>454</sup> Faced with a similar argument in *Bastek*, the Second Circuit found that the plaintiffs were required to obtain a final Director determination of nonappealability and could not presume NAD's lack of jurisdiction.<sup>455</sup>

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<sup>448</sup> 896 F. Supp. 42 (D. Me. 1995).

<sup>449</sup> See *Bastek*, 145 F.3d at 94-95.

<sup>450</sup> *Gleichman*, 896 F. Supp. at 46.

<sup>451</sup> From the court's decision, it appears that the plaintiffs in *Bastek* did not claim such an exception.

<sup>452</sup> 290 F.3d 973 (9th Cir. 2002).

<sup>453</sup> *Id.* at 978 (citing *Weinberger v. Salfi*, 422 U.S. 749 (1975) and *Anderson v. Babbitt*, 230 F.3d 1158, 1162 (9th Cir. 2000)). *Accord Amercian Growers Ins. Co. v. FCIC*, 210 F. Supp. 2d 1088 (S.D. Iowa 2002) (holding that the § 6912 exhaustion requirement did not divest the court's jurisdiction and citing *Weinberger*); *Farmers Alliance Mut. Ins. Co. v. FCIC*, 2001 U.S. Dist. LEXIS 241, at \*2 n. 1, \*7 (D. Kan. Jan. 3, 2001) (holding that "the failure of a plaintiff to exhaust administrative remedies is not a jurisdictional matter" and finding that § 6912(e) is "precisely the type of language held in *Weinberger* not to limit federal jurisdiction").

<sup>454</sup> 290 F.3d at 982.

<sup>455</sup> *Bastek*, 145 F.3d at 95.

Because of the vast differences in courts' interpretations of the § 6912 exhaustion requirement, a participant's likelihood of successfully arguing for even the most limited exception to that requirement will depend in no small part on the court in which he or she brings suit. The Second Circuit Court of Appeals and at least one district court in Maine and one in Mississippi have taken a hard line on exceptions under § 6912 and seem to be willing to consider, at most, exceptions based on constitutional challenges to the agency adverse decision. On the other hand, the Fourth and Ninth Circuit Courts of Appeal along with individual district courts in Alabama, Iowa, Kansas, Michigan, Minnesota, and North Dakota appear willing to consider arguments for exceptions from the NAD exhaustion requirement based on unconstitutionality of the agency action, futility, equitable estoppel, and lack of an administrative remedy, and perhaps other grounds as well.<sup>456</sup>

It is important to remember that, as the district court emphasized in *Calhoun v. USDA Farm Serv. Agency*, it is within a court's discretion to grant or deny an exception to an exhaustion requirement.<sup>457</sup> There is no right to an exception, no matter how clearly a participant may seem to qualify for one. Because of all of these uncertainties, the risks of being barred from judicial review are so great that it is advisable to always

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<sup>456</sup> In *Cottrell v. United States*, the district court rejected USDA's argument that § 6912 exhaustion was a jurisdictional requirement precluding the court from consideration of the case "in any manner." 213 B.R. 33, 37 (M.D. Ala. 1997). Despite the participant's "undisputed" failure to exhaust, the court went on to consider an equitable estoppel exception to the § 6912 exhaustion requirement. The exception was ultimately denied because the court found that there had been no detrimental reliance on the agency's affirmative misconduct. *Id.* at 40.

Following *Cottrell*, the district court in *Pringle v. United States* rejected USDA's argument that § 6912 divested the court of the power "under any circumstances" to excuse the plaintiffs' failure to exhaust. 1998 U.S. Dist. LEXIS 19378, at \*14-15 (E.D. Mich. Dec. 9, 1998). The court held that it retained jurisdiction despite the statutory exhaustion requirement and found that an exception was warranted since NAD had already denied appeals in two "identical" cases and the plaintiffs had merely chosen to "forego the expense of pursuing a meaningless administrative appeal," avoiding "an exercise in futility." *Id.* at \*13, \*15.

In *Gold Dollar Warehouse, Inc. v. Glickman*, the Fourth Circuit Court of Appeals allowed a facial challenge to agency regulations to proceed without exhaustion of NAD remedies, but required exhaustion for the participants' as-applied challenge to the regulations. 211 F.3d 93 (4th Cir. 2000). The court quoted § 6912, but did not discuss exhaustion jurisprudence generally. Instead, the court found that the facial challenge could not be brought before NAD because the NAD rule prohibits challenges to agency regulations; therefore, the court held, exhaustion was not required. *Id.* at 99 (citing 7 C.F.R. § 11.3(b)).

In *Wiley v. Glickman*, the district court found that § 6912 "does not require exhaustion of a colorable constitutional challenge to generally applicable agency action." No. A3-99-32 (D.N.D. Apr. 7, 1999) (order granting preliminary injunction).

The district court in *In re 2000 Sugar Beet Crop Insurance Litigation* professed to be adopting the exhaustion analysis in *Bastek*, but then proceeded to consider the availability of three categories of "exceptions to statutory exhaustion"—a colorable constitutional claim, a showing of irreparable harm if exhaustion were required, and a showing that the "purposes of exhaustion" would not be met by requiring additional administrative proceedings. 228 F. Supp. 2d 999, 1006 (D. Minn. 2002) (quoting *Anderson v. Sullivan*, 959 F.2d 690, 693 (8th Cir. 1992)). The court also recognized an exhaustion exception in cases of "[p]urely legal questions, involving no agency fact-finding." *Id.* at 1003 n. 5.

<sup>457</sup> 920 F. Supp. at 702.

pursue at least the minimum required NAD process—appeal before a hearing officer or Director review of a nonappealability determination—before pursuing judicial review.

## 2. Standard of Review Used by the Federal Courts

Judicial review of an adverse agency action that has been reviewed by NAD or determined to be nonappealable by the NAD Director will be conducted under the provisions of the Administrative Procedure Act (APA).<sup>458</sup> It will be the participant's obligation to demonstrate to the court that the challenged decision is unlawful under the APA standards. Note that the court will typically be reviewing the latest USDA decision; this means that the participant will be directly challenging the adverse agency decision only if the decision was not appealable to NAD. If the agency decision was reviewed by NAD—whether by a hearing officer alone or also the Director—the participant's judicial action will be challenging the NAD determination that upheld the agency decision.<sup>459</sup>

The APA standard most often applicable to judicial review of agency decisions is whether the decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>460</sup> Under that standard, the court considers only “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”<sup>461</sup> The court reviews factual findings by the agency only to ensure that the findings are supported by “substantial evidence” in the record.<sup>462</sup> Under this standard, there must be “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>463</sup>

The APA thus provides for a very deferential review by the courts of NAD and USDA agency decisions.<sup>464</sup> A court is typically not able to reopen the record and consider new facts or arguments.<sup>465</sup> The court is not allowed to substitute its judgment for the agency's as to

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<sup>458</sup> 7 U.S.C. § 6999. The APA is set out at 5 U.S.C. §§ 701-706.

<sup>459</sup> See, e.g., *Bass v. USDA*, 211 F.3d 959, 961 (5th Cir. 2000) (“After extensive administrative proceedings, [plaintiff] sought judicial review of the valuation ruling by the Director of the USDA's National Appeals Division.”); *Beard v. Glickman*, 189 F. Supp. 2d 994, 998 (C.D. Cal. 2001) (“The decision by the Director of the NAD is reviewed under the APA.”).

<sup>460</sup> 5 U.S.C. § 706(2)(A).

<sup>461</sup> *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, (1971).

<sup>462</sup> 5 U.S.C. § 706(2)(E).

<sup>463</sup> *Pierce v. Underwood*, 487 U.S. 552, 564 (1988) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

<sup>464</sup> See, e.g., *Nichols v. Glickman*, 156 F. Supp. 2d 1173, 1177 (D. Ore. 2001) (“Because this case involves judicial review of a final agency action under the Administrative Procedure Act, this court has a narrow role.”); *Belgard v. USDA*, 185 F. Supp. 2d 647, 653 (W.D. La 2001) (“The standard of review for judicial review of decisions made by administrative agencies is one of great deference and does not include a *de novo* review of the facts.”).

<sup>465</sup> See, e.g., *Guy v. Glickman*, 945 F. Supp. 324, 329 (D.D.C. 1996) (“It is well settled that judicial review of agency action is generally restricted to the full administrative record before the agency at the time the decision was made.”).

what the “proper” outcome should be.<sup>466</sup> Instead, the court is limited to reviewing the administrative record and determining whether the agency’s decision was reasonable. The court may disagree with the agency—that is, it may find that it would have decided differently—but still hold that the agency’s decision was reasonable and therefore must be upheld.<sup>467</sup>

What all of this means in practice is that a USDA program participant bringing a suit for judicial review will have to show the court that it was unreasonable for NAD to have upheld the agency adverse decision (and for the agency to have issued it in the first place). It will not be enough to show that the participant’s interpretation of the facts, law, or policies is *more* reasonable than the agency’s. The court must be led to conclude that the agency’s decision was *unreasonable* even under the rather deferential standards discussed here.

Because of this burden on the participant, and because the court will only be able to review the administrative record that was before NAD, it is critical for program participants to establish in the NAD hearing the basis for a claim that the agency’s position was unreasonable. Evidence, including expert testimony if needed, should be presented to NAD to demonstrate that the agency’s position could not be considered reasonable—whether because of reliance on erroneous facts, misinterpretation or misapplication of relevant regulations and policies, application of an unlawful regulation or policy, or some other defect. As discussed earlier in this article, the NAD hearing must be used not only to show why the participant’s position is correct, but also to specifically demonstrate why the agency’s position is incorrect.

## **VII. Addressing Inconsistencies Between Agency and NAD Appeal Regulations**

As discussed earlier in this article, some agencies’ informal review regulations also make statements concerning NAD appeal procedures or requirements. In some cases, agencies’ statements about a participant’s rights in the NAD process conflict with the final NAD rule. This may be due to changes made in the final NAD rule<sup>468</sup> or an agency’s misinterpretation and/or misstatement of NAD procedures.

Agencies control the procedures for informal review of their decisions—so long as minimum statutory requirements are satisfied. However, it is important to remember that the NAD rule and NAD policies control how NAD appeals will be handled, what the requirements are to perfect a NAD appeal request, and what rights are afforded in the NAD process. Whatever an agency’s regulations may say about a NAD requirement or

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<sup>466</sup> See, e.g., *Downer v. United States*, 97 F.3d 999, 1002 (8th Cir. 1996) (“the reviewing court may not substitute its judgment for that of the agency”).

<sup>467</sup> See, e.g., *Israel v. USDA*, 282 F.3d 521, 526 (7th Cir. 2002) (“even if we disagree with an agency’s action, we must uphold the action if the agency considered all of the relevant factors and we can discern a rational basis for the agency’s choice”).

<sup>468</sup> When the interim final NAD rule was issued, USDA also issued “conforming changes to the former appeal rules of USDA agencies whose adverse decisions are now subject to NAD review.” 64 Fed. Reg. 33,367 (1999) (prefatory comments to final rule); 60 Fed. Reg. 67,298, 67,301 (1995) (prefatory comments to interim final rule). When the NAD rule was finalized in 1999, however, USDA did not make corresponding changes to agencies’ informal review regulations. See 64 Fed. Reg. 33,367 (1999) (prefatory comments to final rule) (noting that final agency regulations would be issued “at a later date”).

timeframe, the participant's rights and obligations will be governed by the NAD rules of procedure at 7 C.F.R. Part 11.<sup>469</sup> This is a critical point, whether an inconsistency in the agency rule wrongly expands apparent NAD rights and induces a participant to wait too long to appeal or otherwise fail to satisfy NAD's requirements, or contracts apparent NAD rights and induces a participant to believe that the NAD process is unavailable.

One example of an inconsistency between agency and NAD appeal regulations mentioned earlier is the ability of a borrower under USDA's guaranteed farm loan program to request a NAD appeal without being joined by the guaranteed lender. The final NAD rule issued in June 1999 removed the requirement that a borrower be joined by the lender in any appeal under the guaranteed loan program.<sup>470</sup> However, FSA's guaranteed loan regulations have not been modified to reflect this change and continue to state that borrowers can only appeal to NAD if the lender joins.<sup>471</sup> If participants in the guaranteed loan program look only to the agency regulations for guidance about appeal rights and do not examine the NAD rule, they may mistakenly forego an appeal because they believe that the lender must join.

Examples of inconsistencies attributable to an agency's misinterpretation or misstatement of NAD procedures can be found in the new FCIC and RMA appeal procedures issued in March of 2002. These regulations were promulgated almost three years after the final NAD rule was issued but nonetheless include two notable inconsistencies with the NAD rule. First, in the prefatory comments to the rule, the agency states that "[u]ntil 7 C.F.R. Part 11 is revised, reinsured companies are not permitted to directly participate in the administrative review process."<sup>472</sup> This is clearly a misstatement of the NAD rule, which explicitly provides for participation by reinsured companies in NAD appeals as "interested parties."<sup>473</sup>

Second, the new FCIC/RMA appeal regulations state: "[t]he time for appeal to NAD is suspended from the date of receipt of a request for administrative review . . . until the conclusion of the administrative review . . . . The participant will have only the remaining time to appeal to NAD after the conclusion of the administrative review. . . ."<sup>474</sup> This also is a misstatement of USDA's expressed interpretation of the NAD rules of procedure. In prefatory comments to the interim final NAD rule, promulgated in March 1995, USDA expressly stated that the 30-day period for

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<sup>469</sup> See, e.g., 64 Fed. Reg. 33,367, 33,369 (1999) (prefatory comments to final rule) ("Any inconsistency with the interim final rule at 7 CFR part 780 will be corrected when that rule is finalized but in the meantime NAD will apply these rules in determining the acceptability of an appeal to NAD of a farm credit decision by FSA.").

<sup>470</sup> See 64 Fed. Reg. 33,367, 33,370 (1999) (prefatory comments to final rule) ("USDA is striking the requirement in . . . the interim final rule that guaranteed lenders jointly appeal to NAD with borrowers").

<sup>471</sup> 7 C.F.R. § 762.104(a) (2003).

<sup>472</sup> 67 Fed. Reg. 13,249, 13,250 (2002) (prefatory comments to final rule).

<sup>473</sup> 7 C.F.R. § 11.15(b) (2003) ("the . . . reinsurance company having an interest in a participant's appeal under this part may participate in the appeal as an interested party. . . .").

<sup>474</sup> 7 C.F.R. § 400.92(b) (2003).

requesting a NAD appeal begins *anew* at the end of every level of the informal review process.<sup>475</sup>

The FCIC/RMA appeal rules include three other provisions that may raise questions of inconsistency with the NAD rule. First, the FCIC/RMA appeal regulations provide that participants can choose either informal review or mediation of an adverse decision, but not both.<sup>476</sup> This contradicts the NAD rule, which allows participants to both exercise informal review procedures and “utilize any available alternative dispute resolution (ADR) or mediation program.”<sup>477</sup> A NAD Regional Director has indicated that NAD would permit participants under federal crop insurance programs to pursue mediation prior to a NAD appeal hearing, even if a participant had exercised informal review procedures.<sup>478</sup> Whether the agency would participate in such mediations is not clear.

Third, the FCIC/RMA appeal rules state that once a participant has requested informal review, the participant “may not participate in a NAD hearing until such administrative review . . . is concluded.”<sup>479</sup> Under normal circumstances, this would be an accurate description of the sequence of events. However, if the informal review process drags out so long as to suggest a failure to act on the agency’s part, the provision should not be able to prohibit a participant from bringing a NAD appeal challenging either the underlying adverse decision or the agency’s failure to act on the informal review request.

Finally, the FCIC/RMA provision for mediation of adverse decisions states that if “a new adverse decision that raises new matters or relies on different grounds is issued as a result of mediation,” the participant will have a new 30-day period in which to request a NAD appeal.<sup>480</sup> While NAD does consider the 30-day timeframe for requesting an appeal to begin anew with a new adverse agency decision,<sup>481</sup> this is not expressed explicitly as relating to mediation or ADR results.<sup>482</sup> The NAD rule assumes

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<sup>475</sup> See 60 Fed. Reg. 67,298, 67,302 (1995) (prefatory comments to interim final rule) (“ . . . USDA interprets a decision at each level of agency informal review as a new adverse decision for purposes of calculating the timeliness of a participant’s appeal to NAD. . . .”).

<sup>476</sup> 7 C.F.R. §§ 400.93(a), 400.94(a) (2003).

<sup>477</sup> 7 C.F.R. § 11.5(c) (2003) (“A participant *also* shall have the right to utilize any available alternative dispute resolution (ADR) or mediation program . . . in order to attempt to seek resolution of an adverse decision of an agency prior to a NAD hearing.”) (emphasis added).

<sup>478</sup> Telephone conversation with William A. Crutchfield, Sr., Regional Director for the NAD Eastern Region, June 4, 2002.

<sup>479</sup> 7 C.F.R. § 400.92(b) (2003).

<sup>480</sup> 7 C.F.R. § 400.94(d) (2003).

<sup>481</sup> See 60 Fed. Reg. 67,298, 67,302 (1995) (prefatory comments to interim final rule) (“USDA interprets a decision at each level of agency informal review as a new adverse decision for purposes of calculating the timeliness of a participant’s appeal to NAD”).

<sup>482</sup> In the comments to the final NAD rule USDA explicitly rejected a suggestion to mandate that agencies issue new adverse decisions—restarting the 30-day timeframe—at the conclusion of mediation. See 64 Fed. Reg. 33,367, 33,370 (1999) (prefatory comments to final rule).

that mediation will not result in new adverse decisions restarting the 30-day period to request a NAD appeal.<sup>483</sup> FCIC/RMA's statement of the timing for requesting a NAD appeal is not binding on NAD and will not give participants a remedy if NAD determines that the 30-day period has expired. Participants should therefore promptly seek guidance from NAD if there is any question whether the 30-day period is merely tolled, as in the typical case, or begins anew.

## **VIII. Issues Following Successful NAD Appeals**

Even program participants who are successful in the NAD process may sometimes experience obstacles to full enjoyment of the relief they have won. Two general categories of post-appeal issues are discussed here.

### **A. Implementation of Appeal Determinations**

Implementation of successful administrative appeals has been a source of friction between USDA and program participants. The NAD statute requires that when a final NAD appeal determination is returned to an agency, the head of the agency must implement the determination within 30 calendar days of the effective date.<sup>484</sup> To understand what this requirement means, we must know what is intended by "implement" and what is considered the "effective date" of a determination.

#### **1. Defining "Implement": What Is Required of the Agency?**

"Implement" is defined in the NAD statute as taking "those actions necessary to effectuate fully and promptly a final determination of [NAD] not later than 30 calendar days after the effective date of the final determination."<sup>485</sup> The regulatory definition is slightly different. It omits the timeframe and states that an agency implements a NAD determination by taking action "in order fully and promptly to effectuate a final determination" by NAD.<sup>486</sup>

In the prefatory comments to the interim final NAD rule issued in 1995, USDA stated its position that "[i]mplementation of a NAD decision only requires an agency to move to the next step of agency consideration of a benefit or application."<sup>487</sup> Directing agencies "only" to "move to the next step" would seem to be a rather minimalist interpretation of the statutory mandate that agencies "fully" and promptly effectuate NAD determinations. USDA nonetheless rescinded even this directive when the final NAD rule was issued in 1999, stating that the "next step" interpretation came from the farm credit appeals system, and, since NAD reviews decisions, from a variety of USDA programs the Department would "decline[]" to adopt any express guidance regarding implementation."<sup>488</sup> Therefore, although it

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<sup>483</sup> See 7 C.F.R. § 11. 5(c)(1) (2003).

<sup>484</sup> 7 U.S.C. § 7000. See also 7 C.F.R. § 11.12(a) (2003).

<sup>485</sup> 7 U.S.C. § 6991(8).

<sup>486</sup> 7 C.F.R. § 11.1, "Implement" (2003).

<sup>487</sup> 60 Fed. Reg. 67,298, 67,306 (1995) (prefatory comments to interim final rule).

<sup>488</sup> 64 Fed. Reg. 33,367, 33,372 (1999) (prefatory comments to final rule). The final rule comments suggest that a "uniform implementation rule" would be preferable to one relevant solely to the credit programs, and indicate that USDA is waiting "until experience with a unified appeals process provides a clear picture of what

is difficult to imagine under which program an agency could fail to take at least the “next step” and still be meeting its implementation obligation, the NAD rule fails to expressly require an agency to take the next step that would have occurred if the agency had not made the adverse decision in the first place.

## 2. Starting the 30-Day Countdown: When Is the Effective Date?

As stated above, the NAD statute requires full implementation (whatever that may mean) of a final NAD determination within 30 calendar days of the “effective date.” Congress included this requirement in two separate sections of the NAD statute. Regrettably, the two sections reference two different effective dates. In the statutory definition of “implement,” the 30 days are counted from the “effective date of the final determination.”<sup>489</sup> However, the “effective final date of the determination” is established in the NAD statute as “the date of filing of an application, the date of the transaction or event in question, or the date of the original adverse decision, whichever is applicable.”<sup>490</sup> Given the timeframes in the NAD appeal process, it would be so rare as to be essentially impossible for an agency to receive, let alone “implement,” a final NAD determination within 30 days of the determination effective date under this definition. Therefore we must look to the statutory section setting out the implementation mandate, in which the 30-day period for implementation is counted from the “effective date of the notice of the final determination.”<sup>491</sup> The NAD rule also refers to the “notice of the final determination” effective date as the starting point for the 30-day implementation period.<sup>492</sup>

Unfortunately for program participants seeking timely implementation of a favorable NAD appeal determination, neither the NAD statute nor the rule set out how to determine the effective date of a “notice of the final determination.” NAD hearing officer determinations and Director review determinations are dated but do not explicitly state an “effective date.” Guidance on the issue of when the 30-day implementation period begins to run can be found in the factual background set out in *First National Bank v. Glickman*,<sup>493</sup> one of very few court decisions to directly address the issue of an agency’s duty to “fully and promptly” implement NAD determinations.<sup>494</sup> In *First National Bank*, the court quoted from a “Notice of Conclusion of Appeal” issued to the agency by NAD informing the agency that the appeal in question was administratively concluded and that the agency had “had thirty days from the

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uniform implementation rule would work for all agencies under the jurisdiction of NAD.” *Id.* Given that USDA had almost four years of experience with the unified NAD appeals process when those comments were made, some might conclude that the Department has no intention of providing specific implementation guidance to agencies in the foreseeable future.

<sup>489</sup> 7 U.S.C. § 6991(8).

<sup>490</sup> 7 U.S.C. §§ 6997(e), 6998(e). See also 7 C.F.R. § 11.12(b) (2003); 60 Fed. Reg. 67,298, 67,306 (1995) (prefatory comments to interim final rule) (“It is the position of USDA with respect to implementation, however, that . . . the applicable date of the decision is the date of the decision of the body from which the NAD appeal is brought.”).

<sup>491</sup> 7 U.S.C. § 7000.

<sup>492</sup> See 7 C.F.R. § 11.12(a) (2003).

<sup>493</sup> 1998 U.S. Dist. LEXIS 22433 (N.D. Tex. Apr. 3, 1998).

<sup>494</sup> See also *Cooper v. Glickman*, 50 F. Supp. 2d 489 (M.D.N.C. 1999).



date of the hearing officer's decision to implement [that] decision.”<sup>495</sup> The NAD hearing officer determination in the case was issued on May 3, 1996, and the court concluded that the agency’s 30-day implementation period “expired” on June 2, 1996.<sup>496</sup> From this case, then, it would appear that both NAD and the courts would count the 30-day implementation period from the date that the hearing officer or Director review determination is issued.<sup>497</sup>

### 3. Agency Refusals to Implement NAD Determinations

As discussed in the preceding paragraphs, the NAD statute and rule require that agencies “shall” implement NAD determinations within 30 calendar days.<sup>498</sup> This language would seem to make it clear that USDA agencies do not have the discretion to refuse to implement a NAD determination that is favorable to the participant. Nonetheless, participants have at times found themselves faced with an agency’s refusal to implement final NAD determinations, and courts have reached drastically different conclusions about participants’ rights to compel implementation of a favorable NAD determination.

In *First National Bank*, FSA had “refused to implement” the NAD hearing officer’s determination in a guaranteed loan making case.<sup>499</sup> The court found that the agency had unlawfully required the bank and borrower to “start over” with a new application, rather than acting on the original loan application as directed by the hearing officer’s determination and as required by the implementation mandate of the NAD statute and rule.<sup>500</sup> In *Cooper v. Glickman*, however, the court came to the rather remarkable conclusion that FSA’s decision to “ignore” a NAD determination “because [FSA] disagreed with its conclusion” was itself subject to a deferential APA review.<sup>501</sup> Stating, “this Court does not necessarily agree with the Secretary’s deliberate decision to ignore the NAD ruling,” the court nonetheless allowed the decision to stand, finding that FSA’s refusal to implement “had some basis in fact and was neither arbitrary, capricious, an abuse of discretion, nor or [sic] contrary to law.”<sup>502</sup>

USDA program participants can hope that the decision in *Cooper* will be viewed as an aberration; the unusual facts of that case would support an argument that it should be distinguished.<sup>503</sup> In the typical case, one would not expect a court to interpret the NAD

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<sup>495</sup> *Id.* at \*7 (emphasis in original).

<sup>496</sup> *Id.*

<sup>497</sup> The agency in the *First National Bank* case did not dispute the calculation of the implementation time period.

<sup>498</sup> 7 U.S.C. § 7000; 7 C.F.R. § 11.12(a) (2003).

<sup>499</sup> 1998 U.S. Dist. LEXIS 22433, at \*33-\*34 (N.D. Tex. April 3, 1998).

<sup>500</sup> *Id.* at \*8.

<sup>501</sup> 50 F. Supp. 2d 489, 507 (M.D.N.C. 1999).

<sup>502</sup> *Id.*

<sup>503</sup> The farmers in *Cooper* did not challenge the agency’s failure to implement the NAD determination until after a subsequent appeal in which NAD reversed itself on the key issue—whether a loan buyout offer remained open. This led the court to conclude that “. . . NAD effectively reversed the November 1996 NAD ruling which declared the January 1996 buyout offer valid for ninety (90) days. The [agency] was therefore justified in failing to implement the buyout order issued by NAD.” *Id.*

statute's "the agency shall implement" language as affording an agency any discretion to come to its own conclusion about the correctness of a NAD determination. NAD's status as an "independent" appeals body free from the direction or control of other USDA agencies<sup>504</sup> would seem to be rendered meaningless if those agencies remain free to disregard NAD determinations.

One specific implementation issue that has caused consternation for program participants is whether an agency whose adverse decision is reversed by NAD may demand current financial records or other updated information before proceeding with the participant's request. USDA has taken the position that agencies may request updated information as part of the "implementation" of a NAD determination.<sup>505</sup> The court in *Cooper* agreed, holding that consideration of a participant's changed circumstances was a "reasonable method of implementation."<sup>506</sup> Although the court "recogniz[ed] that the practice of considering changed circumstances when implementing an appeal decision is capable of being abused," it found that the facts of the case supported a conclusion that the agency "considered the [farmers'] changed circumstances because of a significant change in the [farmers'] financial position."<sup>507</sup> The court in *First National Bank* reached the opposite conclusion and held that agencies are not allowed to consider changes in a participant's circumstances after the adverse decision when implementing a NAD determination.<sup>508</sup> Specifically, the court held that the NAD implementation requirement "simply removes the reversed adverse decision from the process and 'relates back' to the original procedure."<sup>509</sup> The court found that "even if the agency was entitled to again review the financial basis of the application after the appeal determination, it was required to do so on the basis of the facts existing at the time the application was made or the original adverse decision was issued."<sup>510</sup>

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<sup>504</sup> See 7 U.S.C. § 6992(a), (c); 7 C.F.R. § 11.2 (2003).

<sup>505</sup> 60 Fed. Reg. 67,298, 67,306 (1995) (prefatory comments to interim final rule) ("It is the position of USDA . . . that . . . agencies, in accord with their regulations, may consider changes in the condition of the participant in the implementation of any NAD final determination."). See also 7 C.F.R. § 762.104(c) (2003) (FSA guaranteed loan program regulations) ("The lender or Agency may request updated information from the borrower to implement an appeal decision.").

<sup>506</sup> 50 F. Supp. 2d at 504. This passage in *Cooper* was cited favorably by the court in *Cerniglia v. Glickman*, 118 F. Supp. 2d 27 (D.D.C. 2000), but the issue in *Cerniglia* was whether the agency could consider a loan servicing applicant's changed circumstances before making an *initial* decision on the application, not whether consideration of changed circumstances is permitted when implementing a NAD determination.

<sup>507</sup> 50 F. Supp. 2d at 506. Between the time of the adverse loan servicing decision and the initial NAD hearing, the farmers' poultry houses were destroyed by a hurricane and the farmers received a \$400,000 insurance payment.

<sup>508</sup> 1998 U.S. Dist. LEXIS 22433, at \*32-\*33.

<sup>509</sup> *Id.* at \*32.

<sup>510</sup> *Id.* at \*33.

## B. Attorney Fees

The Equal Access to Justice Act (EAJA) requires federal agencies to reimburse persons for “fees and other expenses” incurred in an administrative “adversary adjudication” if the person prevails in the proceeding and the agency’s position was not “substantially justified.”<sup>511</sup> Reimbursement for the expense of challenging an erroneous agency decision can be seen as an important part of realizing full vindication of the program rights at issue in a NAD appeal. Nonetheless, the availability of EAJA awards for the NAD process remains uncertain in most states. Even where EAJA awards are unquestionably available for the NAD process, successful appellants must meet strict application requirements.

This article only discusses the administrative EAJA process for USDA program participants who are successful in a NAD appeal. If a participant seeks judicial review of an unfavorable NAD determination and prevails in federal court, a separate but similar EAJA process applies.<sup>512</sup> Expenses and fees incurred in the NAD process may also be recoverable as part of a judicial EAJA award.<sup>513</sup>

### 1. Availability of Fees and Costs in NAD Proceedings

USDA has consistently taken the position that NAD proceedings are not formal adjudicative proceedings under the APA and therefore are not subject to awards of fees and costs under EAJA.<sup>514</sup> In 1997, however, the Eighth Circuit Court of Appeals rejected USDA’s position and held in *Lane v. USDA* that NAD proceedings are subject to both the APA and EAJA.<sup>515</sup> Courts outside the Eighth Circuit have been receptive to the analysis in *Lane*,<sup>516</sup> and research for this article uncovered no federal court decision agreeing with USDA’s position that EAJA awards are unavailable for NAD proceedings.

Nonetheless, USDA announced as part of the final NAD rule issued in 1999 that it would “continue to assert that the APA and EAJA do not apply to NAD appeals” and would only process EAJA applications for NAD hearings “where required by judicial ruling.”<sup>517</sup> At the time the final NAD rule was issued, USDA considered itself required to apply the *Lane*

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<sup>511</sup> 5 U.S.C. § 504(a)(1).

<sup>512</sup> 5 U.S.C. § 504(c)(1).

<sup>513</sup> See 28 U.S.C. § 2412(d)(3).

<sup>514</sup> See 60 Fed. Reg. 27,044, 27,046 (1995) (proposed to have been codified at 7 C.F.R. § 11.4); 60 Fed. Reg. 67,298, 67,302 (1995) (prefatory comments to interim final rule); 64 Fed. Reg. 33,367, 33,368 (1999) (prefatory comments to final rule).

<sup>515</sup> 120 F.3d 106 (8th Cir. 1997). The fee applications at issue in *Lane* were the first such applications presented under the NAD statute. *Lane v. USDA*, 929 F. Supp. 1290, 1293 (D.N.D. 1996).

<sup>516</sup> A July 2001 order out of the U.S. District Court for the District of Oregon adopted the reasoning of the *Lane* case and held that EAJA applies in NAD appeals. *Hopper Bros. v. USDA*, Civ. No. 00-265-JE (D. Or. July 27, 2001). A decision out of the U.S. District Court for the Northern District of New York noted *Lane*’s rejection of the USDA position that EAJA does not apply to NAD hearings, but refrained from deciding the issue because the plaintiff’s EAJA claim could be dismissed on other grounds. *Bentley v. Glickman*, 234 B.R. 12, 20 n. 5 (N.D.N.Y. 1999).

<sup>517</sup> 64 Fed. Reg. 33,367, 33,368 (1999) (prefatory comments to final rule).

holding only in the jurisdiction of the Eighth Circuit Court of Appeals; it stated that NAD would “not process” EAJA applications filed in appeals outside that area.<sup>518</sup>

Despite USDA’s position, successful NAD applicants who live outside the Eighth Circuit remain free to submit applications for EAJA awards and pursue judicial review of USDA’s certain rejection. If more courts follow the *Lane* holding, USDA will be “required by judicial ruling” to make EAJA awards available in more states. For example, in 2001, the United States District Court for the District of Oregon issued an order following the *Lane* analysis, holding that EAJA awards are available for the NAD process.<sup>519</sup> It is not certain how broadly USDA will consider itself obligated to apply that ruling.

## **2. Eligibility for Fees and Costs in NAD Proceedings**

Whether a successful NAD appellant lives in a state where USDA has conceded the availability of EAJA awards for NAD proceedings or the appellant is interested in challenging USDA’s position and expanding the reach of the *Lane* holding, it is important to understand the eligibility requirements for a successful EAJA application.

### **a. Prevailing Party**

The appellant must have prevailed in the NAD hearing.<sup>520</sup> USDA regulations setting out the EAJA application process state that the applicant must have prevailed in the proceeding “or in a significant and discrete substantive portion of the proceeding.”<sup>521</sup> This suggests that an appellant need not prevail on every issue in a NAD appeal in order to seek an EAJA award and that it would be possible to obtain a partial award for the issues that were successful.

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<sup>518</sup> *Id.* (“USDA will apply the holding in *Lane* to NAD appeals which arise within the 8th Circuit. For adverse decisions arising outside of the 8th Circuit . . . NAD will not process EAJA applications filed in such appeals.”). The Eighth Circuit encompasses the states of Arkansas, Missouri, Iowa, Minnesota, North Dakota, South Dakota, and Nebraska.

<sup>519</sup> *Hopper Bros. v. USDA*, Civ. No. 00-265-JE (D. Or. July 27, 2001).

<sup>520</sup> 5 U.S.C. § 504(a)(1). See also 7 C.F.R. § 1.184(a)(1) (2003). EAJA awards are also available in cases where an agency has made a demand to enforce compliance with a statutory or regulatory requirement and the amount demanded by the agency is “substantially in excess” of the amount awarded in the adjudication and is found “unreasonable . . . under the facts and circumstances of the case.” 5 U.S.C. § 504(a)(4); 7 C.F.R. § 1.184(a)(2) (2003).

<sup>521</sup> See 7 C.F.R. §§ 1.185(a)(1), 1.193(a) (2003).

### **b. Agency’s Position Was Not “Substantially Justified”**

An EAJA award is only available if the NAD hearing officer finds that the agency’s position was not “substantially justified.”<sup>522</sup> The agency’s “position” includes the position taken during the NAD hearing and the agency adverse decision—whether an action or failure to act—that was the basis of the NAD appeal.<sup>523</sup> It is the agency’s burden to establish that its position was substantially justified.<sup>524</sup> The determination whether the agency’s position was substantially justified must be based on the administrative record “as a whole” for the NAD appeal.<sup>525</sup> The United States Supreme Court has held that an agency position is “substantially justified” under EAJA when it is “justified to a degree that could satisfy a reasonable person”<sup>526</sup> and that “substantial” in this standard can be interpreted as meaning “for the most part.”<sup>527</sup>

### **c. Net Worth Limits Not Exceeded**

To be eligible for an EAJA award, an individual appellant must have had a net worth of no more than \$2 million at the time the NAD appeal request was filed.<sup>528</sup>

Business entities seeking EAJA awards—including sole owners of unincorporated businesses,<sup>529</sup> partnerships, corporations, associations, units of local government, and other organizations—must have had a net worth of no more than \$7 million and no more than 500 employees at the time the NAD appeal request was filed.<sup>530</sup> Agricultural cooperatives and organizations exempt from taxation under § 501(c)(3) of the Internal Revenue Code having no more than 500 employees are eligible for EAJA awards regardless of their net worth.<sup>531</sup> Employees for this purpose will be all persons who “regularly perform services for remuneration” for the appellant, under the appellant’s direction and control.<sup>532</sup>

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<sup>522</sup> 5 U.S.C. § 504(a)(1); 7 C.F.R. § 1.185(a)(1) (2003).

<sup>523</sup> 5 U.S.C. § 504(b)(1)(E); 7 C.F.R. § 1.185(a)(1) (2003).

<sup>524</sup> 7 C.F.R. § 1.185(a)(1) (2003).

<sup>525</sup> 5 U.S.C. § 504(a)(1); 7 C.F.R. § 1.199(a) (2003).

<sup>526</sup> *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

<sup>527</sup> *Id.* at 566 n. 2.

<sup>528</sup> 5 U.S.C. § 504(b)(1)(B)(i); 7 C.F.R. § 1.184(b)(1) (2003).

<sup>529</sup> The net worth calculation for sole owners of unincorporated businesses will include both personal and business assets. 7 C.F.R. § 1.184(b)(2) (2003). If the issues in the NAD appeal relate primarily to personal interests rather than business interests, an appellant who is the sole owner of an unincorporated business will be considered an “individual” EAJA applicant and will be required to meet the \$2 million net worth limit. 7 C.F.R. § 1.184(d)(1) (2003).

<sup>530</sup> 5 U.S.C. § 504(b)(1)(B)(ii); 7 C.F.R. § 1.184(b)(2), (5) (2003). Net worth and employees will be aggregated for a business entity and all of its affiliates when determining eligibility for EAJA awards. 7 C.F.R. § 1.184(d)(3) (2003).

<sup>531</sup> 5 U.S.C. § 504(b)(1)(B)(ii); 7 C.F.R. § 1.184(b)(3), (4) (2003).

<sup>532</sup> 7 C.F.R. § 1.184(d)(2) (2003). Part-time employees are counted on a proportional basis.

#### **d. Other Factors**

EAJA awards are not available if the NAD hearing officer finds that “special circumstances” would make an award “unjust.”<sup>533</sup> An EAJA award may also be reduced or denied if the NAD hearing officer finds that the appellant “unduly or unreasonably” caused the proceedings to be protracted.<sup>534</sup>

#### **3. The EAJA Application Process**

Because USDA continues to maintain that EAJA does not apply to NAD appeals, the NAD rule does not set out a process for applying for an EAJA award. Instead, appellants who prevail in a NAD appeal and wish to seek reimbursement for their attorney fees and expenses are directed to follow USDA’s general EAJA procedures set out in 7 C.F.R. Part 1, Subpart J.<sup>535</sup> These general procedures are altered for EAJA applications arising out of NAD appeals in one respect. The NAD Director is the final decision maker for initial EAJA determinations made by NAD hearing officers.<sup>536</sup> In all other cases, USDA’s Judicial Officer is the final USDA decision maker for EAJA applications.<sup>537</sup>

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<sup>533</sup> 5 U.S.C. § 504(a)(1); 7 C.F.R. § 1.185(a)(2) (2003).

<sup>534</sup> 5 U.S.C. § 504(a)(3), (b)(1)(E); 7 C.F.R. § 1.185(a)(2) (2003).

<sup>535</sup> 64 Fed. Reg. 33,367, 33,368 (1999) (prefatory comments to final rule).

<sup>536</sup> 64 Fed. Reg. 33,367, 33,368 (1999) (prefatory comments to final rule). Prior to the issuance of the final NAD rule on June 23, 1999, USDA’s Judicial Officer also was the final decision maker for NAD EAJA applications.

<sup>537</sup> See 64 Fed. Reg. 33,367, 33,368 (1999) (prefatory comments to final rule); 7 C.F.R. § 1.189 (2003).

### **a. File Within 30 Days of NAD Determination Becoming Final**

An application for an EAJA award based on a favorable NAD determination must be filed by the appellant no later than *30 calendar days* after the NAD determination becomes final.<sup>538</sup> USDA's EAJA regulations state that this time period begins when the NAD determination becomes "final and unappealable, both within the Department and to the courts."<sup>539</sup> For a NAD determination favorable to the appellant, the 30-day countdown would presumably begin when the agency's time to request Director review has expired,<sup>540</sup> but there is no clear statement that NAD does in fact count from that point. Appellants should also note that the EAJA application period apparently begins on the date of final disposition, rather than the date when the applicant receives notice of final disposition,<sup>541</sup> and that an EAJA application is considered "filed" when received by NAD and not when postmarked by the applicant.<sup>542</sup>

### **b. Application Requirements**

An application for an EAJA award must meet several detailed requirements.

#### **(1) Identify Applicant and Case**

An EAJA application must identify the applicant and the proceeding (the NAD appeal) for which an award is sought.<sup>543</sup> An applicant that is not an individual must indicate how many employees it has and must "describe briefly the type and purpose of its organization or business."<sup>544</sup>

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<sup>538</sup> 5 U.S.C. § 504(a)(2); 7 C.F.R. §§ 1.180(e), 1.193(a) (2003).

<sup>539</sup> 7 C.F.R. § 1.193(b) (2003).

<sup>540</sup> Because an agency's 15-calendar day period to request Director review is triggered by the agency's *receipt* of the NAD hearing officer determination, appellants are not in a good position to determine when that period has expired and the 30-calendar day period to submit an EAJA application has begun.

<sup>541</sup> See 7 C.F.R. § 1.193(a) (2003); *Monark Boat Co. v. NLRB*, 708 F.2d 1322, 1328 (8th Cir. 1983).

<sup>542</sup> 7 C.F.R. § 1.194 (2003) (making filing provisions of 7 C.F.R. § 1.147 applicable to EAJA applications); 7 C.F.R. § 1.147(g) (2003); *Monark Boat Co. v. NLRB*, 708 F.2d 1322, 1328-29 (8th Cir. 1983).

<sup>543</sup> 7 C.F.R. § 1.190(a) (2003).

<sup>544</sup> 7 C.F.R. § 1.190(a) (2003).

## **(2) Identify Agency Position(s) Not Substantially Justified**

The EAJA application must “[s]how that the applicant has prevailed.”<sup>545</sup> This can presumably be done by pointing to language in the NAD determination finding that the agency erred. The EAJA application must also allege that the agency’s position “was not substantially justified.”<sup>546</sup> USDA’s EAJA regulations require that the application identify the agency position that the applicant alleges was not substantially justified and that it “briefly state the basis for such allegation.”<sup>547</sup>

## **(3) Establish Eligibility Under EAJA Net Worth Limits**

An EAJA application must include a statement that the applicant’s net worth does not exceed the applicable limits—\$2 million for an individual and \$7 million for any other applicant.<sup>548</sup> This statement may be omitted if the applicant is an agricultural cooperative<sup>549</sup> or tax-exempt organization.<sup>550</sup>

In addition to the statement in the EAJA application that the applicant meets the net worth limits, an EAJA application must also include a detailed “net worth exhibit” setting out the net worth of the applicant and any affiliates at the time the NAD appeal was filed.<sup>551</sup> USDA’s EAJA regulations state that a net worth exhibit may take “any form convenient to the applicant” so long as it provides “full disclosure of the applicant’s and its affiliates’ assets and liabilities” and allows USDA to determine whether the applicant meets the net worth eligibility requirement.<sup>552</sup> An applicant may be required to file additional net worth information to establish eligibility under this standard.<sup>553</sup>

An EAJA application’s net worth exhibit will typically be included in the public record of the NAD appeal.<sup>554</sup> However, USDA’s EAJA regulations provide

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<sup>545</sup> 7 C.F.R. § 1.190(a)(1) (2003). See also 5 U.S.C. § 504(a)(2).

<sup>546</sup> 5 U.S.C. § 504(a)(2).

<sup>547</sup> 7 C.F.R. § 1.190(a)(1) (2003).

<sup>548</sup> 7 C.F.R. § 1.190(b) (2003). See also 5 U.S.C. § 504(a)(2).

<sup>549</sup> 7 C.F.R. § 1.190(b)(2) (2003) (applicable to cooperatives as defined at 12 U.S.C. § 114j(a)). The applicant must include a statement of its status as an agricultural cooperative in the EAJA application.

<sup>550</sup> 7 C.F.R. § 1.190(b)(1) (2003) (the organization must either attach a copy of the IRS ruling qualifying it as a § 501(c)(3) exempt organization or, if no such ruling is required by the IRS, must attach a statement describing the basis for the applicant’s belief that it is exempt under § 501(c)(3)).

<sup>551</sup> 7 C.F.R. § 1.191(a) (2003). Net worth exhibits are not required for agricultural cooperatives and tax-exempt organizations.

<sup>552</sup> 7 C.F.R. § 1.191(a) (2003).

<sup>553</sup> 5 U.S.C. § 504(a)(2); 7 C.F.R. § 1.191(a) (2003).

<sup>554</sup> 7 C.F.R. § 1.191(b) (2003).



detailed direction for applicants who wish to claim that all or a portion of their net worth exhibit should be withheld from public disclosure.<sup>555</sup>

#### **(4) Document Fees and Expenses Sought**

An EAJA application must state the amount of fees and expenses sought in the award.<sup>556</sup> The application must be accompanied by “full documentation” of those fees and expenses.<sup>557</sup> Required documentation includes the cost of “any study, analysis, engineering report, test, project, or similar matter” for which an EAJA award is sought.<sup>558</sup> And, in general, an EAJA application must document “any expenses for which reimbursement is sought” by describing the services provided and stating the amounts paid (or payable) for those services.<sup>559</sup> The NAD hearing officer reviewing the EAJA application may require the applicant to substantiate claimed fees or expenses by providing receipts or other documentation.<sup>560</sup>

Required documentation for an EAJA application also includes an affidavit from any attorney, agency, or expert witness who represented the applicant or appeared at the hearing on behalf of the applicant.<sup>561</sup> The affidavit(s) must state the time expended, the rate at which fees and other expenses were calculated, and the specific services performed.<sup>562</sup> The affidavit must also state the hourly rate that is billed to and paid by the majority of the attorney’s or agent’s clients during the relevant time period.<sup>563</sup>

The amount of an EAJA award will be determined in part by the required documentation submitted by the applicant, in part by certain set standards, and in part by reasonableness determinations made by the NAD hearing officer.<sup>564</sup> For

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<sup>555</sup> 7 C.F.R. § 1.191(b) (2003).

<sup>556</sup> 7 C.F.R. § 1.190(c) (2003).

<sup>557</sup> 7 C.F.R. § 1.192(a) (2003).

<sup>558</sup> 7 C.F.R. § 1.192(a) (2003).

<sup>559</sup> 7 C.F.R. § 1.192(c) (2003). The expenses may be paid by the applicant or “by any other person or entity.” *Id.*

<sup>560</sup> 7 C.F.R. § 1.192(d) (2003).

<sup>561</sup> 7 C.F.R. § 1.192(b) (2003).

<sup>562</sup> 7 C.F.R. § 1.192(b) (2003). *See also* 5 U.S.C. § 504(a)(2).

<sup>563</sup> 7 C.F.R. § 1.192(b)(1) (2003). If the majority of clients are represented on a contingency basis or for any other reason pay no hourly rate, the attorney or agent must provide hourly rate information about two attorneys or agents “with similar experience, who perform similar work.” 7 C.F.R. § 1.192(b)(2) (2003).

<sup>564</sup> *See* 7 C.F.R. § 1.186 (2003). The reasonableness of a fee sought for an attorney, agent, or expert witness will be based on that person’s customary fee for the services, the prevailing rate in the community for the services, the time actually spent on the appeal, the time that should reasonably have been spent on the appeal “in light of the difficulty or complexity of the issues in the proceeding,” and “[s]uch other factors as may bear on the value of the services provided.” 7 C.F.R. § 1.186(c) (2003); *see also* 5 U.S.C. § 504(b)(1)(A). The reasonableness of the cost of a study, analysis, test, engineering report, or “similar matter” prepared for the

example, an EAJA award will be based on hourly rates “customarily” charged by attorneys, agents, and expert witnesses, even if the services in the particular case were provided without charge or at a reduced rate.<sup>565</sup> On the other hand, an award for attorney or agent fees will not exceed \$125 per hour even if the actual and customary fees are higher, and expert witness fees may not exceed the highest rate paid by USDA for expert witnesses.<sup>566</sup>

#### **(5) Include Any Other Matters to Be Considered**

An EAJA application may include “any other matters” that the applicant wants the NAD hearing officer to consider when determining “whether and in what amount” the award should be approved.<sup>567</sup>

#### **(6) Signature and Written Verification of Truth**

An EAJA application must be signed by the applicant or the applicant’s authorized officer or attorney.<sup>568</sup> The application must also include a written statement made under oath or affirmation under penalty of perjury that the contents of the application and all accompanying materials are true and complete to the best of the signer’s information and belief.<sup>569</sup>

#### **(7) Filed in Quadruplicate with NAD Regional Office**

Appellants should submit four copies of an EAJA application.<sup>570</sup> If the appeal involves more than just the appellant and the agency, an additional copy of the application should be submitted for each additional party.<sup>571</sup> The NAD Guide states that EAJA applications are to be filed with the “appropriate” NAD regional office,<sup>572</sup> presumably the regional office with jurisdiction over the state where the appellant resides.

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applicant will be based on the prevailing rate for the service and whether the service was “necessary for preparation of the applicant’s case.” 5 U.S.C. § 504(b)(1)(A); 7 C.F.R. § 1.186(d) (2003).

<sup>565</sup> 7 C.F.R. § 1.186(a) (2003).

<sup>566</sup> 5 U.S.C. § 504(b)(1)(A); 7 C.F.R. § 1.186(b) (2003). The “reasonable expenses” of an attorney, agent, or expert witness may be paid in addition to these maximum hourly rates if the attorney, agent, or expert witness “ordinarily charges clients separately for such expenses.” 7 C.F.R. § 1.186(b) (2003).

<sup>567</sup> 7 C.F.R. § 1.190(d) (2003).

<sup>568</sup> 7 C.F.R. § 1.190(e) (2003).

<sup>569</sup> 7 C.F.R. § 1.190(e) (2003).

<sup>570</sup> 7 C.F.R. § 1.194 (2003) (making filing provisions of 7 C.F.R. § 1.147 applicable to EAJA applications); 7 C.F.R. § 1.147(a) (2003).

<sup>571</sup> 7 C.F.R. § 1.194 (2003) (making filing provisions of 7 C.F.R. § 1.147 applicable to EAJA applications); 7 C.F.R. § 1.147(a) (2003).

<sup>572</sup> NAD Guide at 62 (Sept. 2002).

**EAJA Application Requirements After a  
Successful NAD Appeal**

1. Filed within 30 calendar days of NAD determination becoming final.
2. Identifies the applicant and the underlying case.
3. Shows that applicant is a prevailing party.
4. States that agency's position was not substantially justified and briefly explains why.
5. States that applicant meets net worth limits and provides detailed net worth exhibit establishing eligibility.
6. States the amount of fees and expenses sought and provides detailed documentation for the claimed amounts.
7. Includes any other matters to be considered.
8. Signed by the applicant or an authorized officer or attorney.
9. Includes a written statement under oath or affirmation of truthfulness and completeness.
10. Filed in quadruplicate with the NAD regional office having jurisdiction over the appeal.

**c. Agency May Answer an EAJA Application Within 30 Days**

Counsel for the agency may file an answer to an EAJA application within 30 calendar days of service of the application.<sup>573</sup> If the agency fails to answer, the NAD hearing officer “upon a satisfactory showing of entitlement by the applicant” may make an award.<sup>574</sup> Note that even in the absence of an agency response and where the applicant has made such a showing, the granting of an EAJA award remains discretionary. The agency’s answer must “explain in detail any objections to the award requested and identify the facts relied on” to support the agency’s position.<sup>575</sup> If the agency alleges facts not in the NAD appeal record, the agency must either include supporting affidavits or request further proceedings.<sup>576</sup>

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<sup>573</sup> 7 C.F.R. § 1.195(a) (2003). It appears that this time may be extended if there is “good reason.” See 7 C.F.R. § 1.194 (2003) (making extension provisions of 7 C.F.R. § 1.147 applicable to EAJA application deadlines other than the initial filing deadline); 7 C.F.R. § 1.147(f) (2003) (allowing extensions of time if there is “good reason” but requiring that the other party receive notice and an opportunity to comment on an extension request).

<sup>574</sup> 7 C.F.R. § 1.195(a) (2003).

<sup>575</sup> 7 C.F.R. § 1.195(c) (2003).

<sup>576</sup> 7 C.F.R. § 1.195(c) (2003). Further proceedings in EAJA award determinations are conducted under 7 C.F.R. § 1.199.

#### **d. Applicant May Reply to Agency's Answer Within 15 Days**

Within 15 calendar days after being served with the agency's answer to an EAJA application, the applicant may file a reply.<sup>577</sup> If the applicant's reply is based on any alleged facts not in the NAD appeal record, the applicant must include either supporting affidavits or a request for further proceedings.<sup>578</sup>

#### **e. EAJA Determination**

USDA's EAJA regulations state that the NAD hearing officer must issue a decision on the application "as expeditiously as possible."<sup>579</sup> The decision is supposed to include written findings and conclusions about: (1) the applicant's eligibility and status as a prevailing party, (2) whether the agency's position was substantially justified, (3) whether the applicant unduly protracted the proceedings, and (4) whether special circumstances would make an award unjust.<sup>580</sup> The decision should also include an explanation of any difference between the amount requested and the amount awarded.<sup>581</sup>

#### **f. Further Review Within USDA**

Either the applicant or the agency may seek review by the NAD Director of the initial EAJA determination.<sup>582</sup> If neither side seeks further review, the NAD hearing officer's decision will become final 35 calendar days after it is served on the applicant.<sup>583</sup>

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<sup>577</sup> 7 C.F.R. § 1.196 (2003). It appears that this time may be extended if there is "good reason." See 7 C.F.R. § 1.194 (2003) (making extension provisions of 7 C.F.R. § 1.147 applicable to EAJA application deadlines other than the initial filing deadline); 7 C.F.R. § 1.147(f) (2003) (allowing extensions of time if there is "good reason" but requiring that the other party receive notice and an opportunity to comment on an extension request).

<sup>578</sup> 7 C.F.R. § 1.196 (2003). Further proceedings in EAJA award determinations are conducted under 7 C.F.R. § 1.199.

<sup>579</sup> 7 C.F.R. § 1.200 (2003).

<sup>580</sup> 7 C.F.R. § 1.200 (2003). See also 5 U.S.C. § 504(a)(3).

<sup>581</sup> 7 C.F.R. § 1.200 (2003). If the applicant requested an award from more than one agency, the decision must allocate responsibility among the agencies for payment of any award granted and should explain the reasons for the allocation.

<sup>582</sup> 7 C.F.R. § 1.201(a) (2003); 64 Fed. Reg. 33,367, 33,368 (1999) (prefatory comments to final rule) (delegating to the NAD Director the authority to "make final agency determinations under EAJA for initial EAJA determinations rendered by NAD Hearing Officers").

<sup>583</sup> 7 C.F.R. § 1.201 (2003).

### **g. Judicial Review of EAJA Awards**

Applicants for EAJA awards may seek judicial review of a final USDA EAJA decision by filing an appeal of the decision to a federal district court<sup>584</sup> within 30 calendar<sup>585</sup> days “after the determination is made.”<sup>586</sup> The court’s review of the award decision will be based on the factual record before USDA, and the court may only modify an EAJA award decision if the failure to make an award or the calculation of fees and expenses was “unsupported by substantial evidence.”<sup>587</sup> USDA may not seek judicial review of EAJA awards for administrative appeals.<sup>588</sup>

### **h. Payment of EAJA Awards**

USDA’s EAJA regulations state that an applicant who receives a final award decision within the Department (whether by the NAD hearing officer or the NAD Director) may obtain payment by submitting a copy of the final award decision to “the head of the agency administering the statute involved in the proceeding.”<sup>589</sup> This is presumably the head of the agency that made the initial adverse decision. Along with the final decision, the applicant must submit a statement that the applicant will not seek judicial review of the award.<sup>590</sup> Once these are submitted, USDA’s EAJA regulations state that the agency will pay the award amount within 60 days unless the applicant or any other party to the appeal seeks judicial review of the award amount or the underlying NAD determination.<sup>591</sup>

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<sup>584</sup> EAJA awards may be appealed “to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication.” 5 U.S.C. § 504(c)(2). As discussed earlier in this article, NAD determinations are reviewable by the federal district courts. See *Deaf Smith County Grain Processors, Inc. v. Glickman*, 162 F.3d 1206, 1213 (D.C. Cir. 1998); *Farmers & Merchants Bank of Eaton, Georgia v. United States*, 43 Fed. Cl. 38, 44 (1999).

<sup>585</sup> Although the designation of this period as 30 calendar days rather than 30 business days is not made explicit, this seems to be the assumption made by the courts. See, e.g., *Monark Boat Co. v. NLRB*, 708 F.2d 1322, 1324 (8th Cir. 1983).

<sup>586</sup> 5 U.S.C. § 504(c)(2); 7 C.F.R. § 1.202 (2003).

<sup>587</sup> 5 U.S.C. § 504(c)(2).

<sup>588</sup> 5 U.S.C. § 504(c)(2).

<sup>589</sup> 7 C.F.R. § 1.203 (2003).

<sup>590</sup> 7 C.F.R. § 1.203 (2003).

<sup>591</sup> 7 C.F.R. § 1.203 (2003).

## **IX. Equitable Relief Available in Certain USDA Programs**

The types of challenges to agency decisions discussed in this article will typically involve a USDA program participant arguing that he or she met the requirements for a program benefit—such as a loan or program payment—and that the agency’s decision to deny the benefit was erroneous. In some cases, however, participants may want to argue that although they admittedly did not satisfy all of the requirements they are nonetheless entitled to the program benefit. That is, these participants seek to make a claim for “equitable relief” from the strict application of program requirements.

### **A. USDA’s Equitable Relief Authority Changed in 2002**

Congress has authorized the Secretary of Agriculture to grant “equitable relief” in certain programs. The 2002 Farm Bill repealed two existing statutory provisions that gave the Secretary equitable relief authority and created a new section giving more comprehensive direction to the Secretary about when equitable relief may be offered.<sup>592</sup>

#### **1. When Equitable Relief is Available**

The new equitable relief provision in the 2002 Farm Bill—codified at 7 U.S.C. § 7996—made some notable changes to USDA’s equitable relief authority.<sup>593</sup>

##### **a. Commodity Payment, Disaster Relief, and Conservation Programs Only**

Programs covered by the new statutory equitable relief authority are the USDA conservation programs and programs providing price or income support or production or market loss assistance for farmers.<sup>594</sup> The new statutory equitable relief language specifically excludes agricultural credit and crop insurance programs from the equitable relief authority.<sup>595</sup> The conference committee report accompanying the 2002 Farm Bill gives no explanation for denying equitable relief to farmers in USDA credit or crop insurance programs. Notably, the exclusionary language was added in the committee compromise; it had not been part of the original Farm Bill proposals from either the House of Representatives or the Senate.

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<sup>592</sup> Farm Security and Rural Investment Act of 2002, Pub. L. 107-171, § 1613, 116 Stat. 134, 219 (2002) (codified at 7 U.S.C. § 7996) (amending 7 U.S.C. § 6998(d) and repealing 7 U.S.C. § 1339a, 16 U.S.C. § 3830a).

<sup>593</sup> The statutory change was implemented by rule by FSA on October 31, 2002. 67 Fed. Reg. 66,304 (2002) (codified at 7 C.F.R. pt. 718). It does not appear that NRCS has yet implemented its new authority by rule.

<sup>594</sup> 7 U.S.C. § 7996(a)(2)(A).

<sup>595</sup> 7 U.S.C. § 7996(a)(2)(B). Previously, there had been at least an argument that the broad language in 7 U.S.C. § 1339a authorized equitable relief in *all* USDA programs for farmers.

### **b. Good Faith Reliance on Bad Information or Good Faith Effort to Comply**

For those USDA programs where equitable relief is available, the new statutory language expands the circumstances when such relief may be offered. The two repealed equitable relief provisions were based on the farmer's "good faith reliance" on information or action by an authorized representative of USDA.<sup>596</sup> In this type of claim, the farmer's ability to show that the reliance on misinformation was in good faith is key. If the farmer knew or should have known that the agency's action or advice was wrong, he or she will have difficulty arguing good faith reliance. The new § 7996 continues this basis for granting equitable relief, and adds a new basis: the farmer's good faith effort to comply with the program requirements.<sup>597</sup> This opens up the possibility for equitable relief and continued program eligibility when a farmer attempted to satisfy program requirements but did not fully comply without requiring that a USDA representative have given the farmer wrong information.<sup>598</sup>

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<sup>596</sup> See *repealed* 7 U.S.C. § 1339a (relief available for farmers who have "taken actions in good faith in reliance on the action or advice of an authorized representative of the Secretary"); *repealed* 16 U.S.C. § 3830a (relief available under conservation contracts to owners/operators who "took actions in good faith reliance on the action or advice of an authorized representative of the Secretary").

<sup>597</sup> Section 7996(b) states in full:

The Secretary may provide relief to any participant that is determined to be not in compliance with the requirements of a covered program, and therefore ineligible for a loan, payment, or other benefit under the covered program, if the participant—

- (1) acting in good faith, relied on the action or advice of the Secretary (including any authorized representative of the Secretary) to the detriment of the participant; *or*
- (2) failed to comply fully with the requirements of the covered program, but made a good faith effort to comply with the requirements.

(emphasis added).

<sup>598</sup> The FSA regulations implementing the new statutory authority include the alternative bases for granting equitable relief, but seem to interpret the authority more narrowly than is required by the statutory language. 67 Fed. Reg. 66,304 (2002) (codified at 7 C.F.R. pt. 718). The new FSA rule divides the two bases for equitable relief into two separate regulatory sections. A new § 718.303 addresses relief due to reliance on misinformation or action. This section explicitly states that "[t]his part does not apply to cases . . . where the participant acted in reliance on their own misunderstanding or misinterpretation of program provisions, notices, or information." 67 Fed. Reg. 66,307 (2002) (codified at 7 C.F.R. § 718.303(b)). This statement would be unobjectionable if it limited itself to saying "this *section* does not apply. . . ." Saying that "this part" does not apply in the identified cases, if anything other than a drafting error, would seem to be an attempt to unnecessarily limit the situations under which relief could be granted under the "good faith effort to comply" test.

A new § 718.304 authorizes relief due to "a good faith effort to comply fully with the requirements of the covered program," and provides that relief will only be granted in cases where the participant "made a good faith effort to comply fully with the terms and conditions of the program and rendered substantial performance." 67 Fed. Reg. 66,307 (2002) (codified at 7 C.F.R. § 718.304(a), (b)). It is not clear how FSA will interpret its "substantial performance" requirement, a requirement that is not included in the statutory language.

## 2. What Relief Is Available

The new statutory equitable relief authority specifies forms of relief that are available to program participants, including retaining benefits received, continuing to be eligible for program benefits, and any other “appropriate” relief.<sup>599</sup> Farmers who receive equitable relief may be required to take action necessary to comply with program requirements.<sup>600</sup>

## 3. Who May Grant Equitable Relief

In general, granting or denying equitable relief in FSA programs is the responsibility of the agency head, or a designee.<sup>601</sup> The new statutory provision also gives FSA State Directors and NRCS State Conservationists the authority to grant equitable relief up to a certain dollar amount in programs they oversee.<sup>602</sup> State Directors and State Conservationists are not authorized to grant equitable relief for violations of payment limitations or Swampbuster or Sodbuster requirements,<sup>603</sup> and they must obtain the approval of USDA’s Office of General Counsel before granting any equitable relief.<sup>604</sup>

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<sup>599</sup> The complete list is:

Forms of relief. The Secretary may authorize a participant in a covered program to—

- (1) retain loans, payments, or other benefits received under the covered program;
- (2) continue to receive loans, payments, and other benefits under the covered program;
- (3) continue to participate, in whole or in part, under any contract executed under the covered program;
- (4) in the case of a conservation program, reenroll all or part of the land covered by the program; and
- (5) receive such other equitable relief as the Secretary determines to be appropriate.

7 U.S.C. § 7996(c).

<sup>600</sup> 7 U.S.C. § 7996(d).

<sup>601</sup> The statute grants the authority to the Secretary who has in turn delegated it to subordinate officials. See 67 Fed. Reg. 66,307 (2002) (codified at 7 C.F.R. § 718.301(a)) (granting FSA’s Deputy Administrator for Farm Programs supervision over equitable relief authority); 67 Fed. Reg. 66,307 (2002) (codified at 7 C.F.R. § 718.303(a)) (stating that equitable relief due to misinformation “may be approved by” the FSA Administrator, the CCC Executive Vice President, “or their designee”); 67 Fed. Reg. 66,307-08 (2002) (codified at 7 C.F.R. § 718.305(a)) (stating that the FSA Administrator, CCC Executive Vice President, or a designee may authorize any of the various forms of relief).

<sup>602</sup> 7 U.S.C. § 7996(e) (limiting these officials to approving equitable relief up to \$20,000 per participant (\$25,000 per participant per year) and \$1,000,000 total per year); 67 Fed. Reg. 66308 (2002) (codified at 7 C.F.R. § 718.307(a)). See 67 Fed. Reg. 66,306-07 (2002) (prefatory comments to final rule) (discussing FSA’s decision to make the amount limits yearly limits, though not specifically so designated in the statute).

<sup>603</sup> 7 U.S.C. § 7996(e)(3).

<sup>604</sup> 7 U.S.C. § 7996(e)(2)(B). A decision by one of these officials to grant equitable relief is not subject to any further review within USDA except by the Secretary personally. 7 U.S.C. § 7996(e)(2)(C).



## **B. Seeking Equitable Relief Through the NAD Process**

The NAD statute clearly makes an agency's denial of a request for equitable relief appealable to NAD.<sup>605</sup> USDA has interpreted the NAD statute to authorize only the NAD Director to make equitable relief determinations.<sup>606</sup> This can be somewhat complicated for appellants, because the justification for granting equitable relief must be established in the hearing record developed by the NAD hearing officer, but that hearing officer will have no authority to rule on the appellant's equitable relief claim.<sup>607</sup>

The NAD Director has the authority to grant any equitable relief that could have been granted by the agency head or the Secretary.<sup>608</sup> If the request for equitable relief from the NAD Director is unsuccessful, the program participant may request such relief directly from the Secretary.<sup>609</sup>

## **C. No Judicial Review of Equitable Relief Decisions**

The statutory change made by the 2002 Farm Bill included language making all equitable relief decisions non-reviewable by the federal courts.<sup>610</sup>

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<sup>605</sup> 7 U.S.C. § 6991(1). See also 7 C.F.R. § 11.1, "Adverse decision" (2003).

<sup>606</sup> 60 Fed. Reg. 67,298, 67,306 (1995) (prefatory comments to interim final rule).

<sup>607</sup> 60 Fed. Reg. 67,298, 67,306 (1995) (prefatory comments to interim final rule) ("a record developed by a Hearing Officer is necessary for the Director to determine whether such relief is appropriate").

<sup>608</sup> 7 U.S.C. § 6998(d); 7 C.F.R. § 11.9(e) (2003)

<sup>609</sup> 7 U.S.C. § 6998(d).

<sup>610</sup> 7 U.S.C. § 7996(f).