



11TH ANNUAL MID-SOUTH AGRICULTURAL AND ENVIRONMENTAL LAW CONFERENCE CLE

COURSE MATERIALS:

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“Navigating the NAD Appeals Process: What You Need to Know”

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I. What/Who is OHA-NAD?

The Office of Hearings and Appeals (OHA) is an independent office within USDA's Office of the Secretary. It has three units: the National Appeals Division (NAD); the Office of Administrative Law Judges (OALJ); and the Office of the Judicial Officer (OJO). This training focuses solely on the NAD unit, which adjudicates appeals of adverse decisions from agencies over which Congress conferred it jurisdiction.

NAD is an administrative appeal branch of the U.S. Department of Agriculture with jurisdiction to hear certain appeals of decisions made by the Farm Service Agency (FSA); Natural Resources Conservation Service (NRCS), Federal Crop Insurance Corporation (FCIC), Risk Management Agency (RMA), Rural Business-Cooperative Service (RBS), and Rural Housing Service (RHS)/Rural Development (RD). Because Congress has mandated that all administrative remedies be exhausted prior to bringing an action against the Secretary of Agriculture, the U.S.D.A., or any agency, office, officer, or employee of the Department; in many circumstances, you must pursue an appeal with NAD to "exhaust" your administrative remedies prior to pursuing legal action against any of those agencies mentioned above.



II. NAD's Formation: Background and Framework

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

In that same Act, Congress mandated the exhaustion of remedies. *7 U.S.C. § 6912(e)*. *But see Dawson Farms LLC v. Farm Service Agency*, 504 F.3d 592, 602-606 (5th Cir. 2007) (The Fifth Circuit joins with the Eighth and Ninth Circuits holding that *7 U.S.C. § 6912(e)* is not jurisdictional but a codification of judicial doctrine of exhaustion of remedies (i.e. jurisprudential)). In 1996, Congress created the Risk Management Agency (RMA) whose tasks include supervising the FCIC and administering all aspects of all programs under the Federal Crop Insurance Act. *7 U.S.C. § 6933*. RMA is included in the regulatory list of agencies subject to appeal review by NAD. *7 C.F.R. § 11.1 (defining "Agency")*.

Determinations of the NAD Director, both on the merits and regarding whether an issue is appealable, are administratively final. *7 U.S.C. §§ 6992(d), 6998(b)*. Further, if Director review of a NAD Administrative Judge's¹ determination is not requested within thirty calendar days of the issue date, that determination becomes administratively final. *7 U.S.C. §§ 6997(d), 6998(a)(1)*; *see also Bartlett v. U.S. Dept. of Agriculture*, 716 F.3d 464, 473 (8th Cir. 2013).

III. NAD's Jurisdiction, A Quick Primer

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

A participant is defined by regulation as an "individual or entity whose right to participate in or receive a payment, loan, loan guarantee, or other benefit in accordance with any program of an agency to which the regulations in this part

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



apply is affected by a decision of such agency.” 7 U.S.C. § 6992; 7 C.F.R. 11.1 (defining “Participant”). Thus, a participant would most often be a producer, borrower, or, in the instance of crop insurance, an insured.

An adverse decision is defined as “an administrative decision made by an officer, employee, or committee of an agency that is adverse to a participant.” *Id.*; 7 C.F.R. 11.1 (defining “Adverse Decision”). The definition also includes the agency’s denial of equitable relief or failure to issue a decision or otherwise act on a request within prescribed timeframes or a reasonable time.

Reading the definitions together, NAD has jurisdiction to hear appeals from individuals or entities adversely affected by one of the enumerated agencies when that individual’s right to participate in a program or receive a payment, loan, loan guarantee, or other benefit in connection with any program is stymied. Thus, if a producer is denied the right to participate in a USDA program or receive a payment or benefit (within the confines of those USDA agencies listed in the previous section), NAD most likely has jurisdiction to hear that appeal.

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

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



IV. Crop Insurance: Limitation on NAD's Jurisdiction

Crop insurance cases represent one of the more expansive limits on NAD jurisdiction. A review of the basis for our jurisdiction and how crop insurance matters are handled illustrate the reason for this. NAD is authorized to hear appeals of adverse decisions issued to a participant **by** one of the enumerated agencies. With crop insurance, while FCIC and RMA (NAD jurisdiction agencies) are the government agencies over the program, they are not the primary point of contact for insureds. That role is reserved to the Approved Insurance Provider, defined at 7 U.S.C. § 1502 as a private insurance company *approved by FCIC* "to provide insurance coverage to producers participating in the Federal crop insurance program..." Thus, many of the decisions are made and issued by the AIP, not an agency such as FCIC or RMA under NAD's jurisdiction, and those decisions are therefore not appealable. Further, as is noted below, Congress also specifically limited NAD's jurisdiction with regard to crop insurance denials involving a failure to follow good farming practices.

- **Insurance Company Decisions**

Generally, decisions issued by an Approved Insurance Provider are not appealable to NAD. FCIC nor RMA are involved in these determinations, and insurance companies are not agencies within the definition set forth in 7 C.F.R. § 11.1 (Agency). A review of the premium collection process illustrates the reasoning. The Approved Insurance Provider, per the Standard Reinsurance Agreement, is responsible for sending billing notices and statements directly to insureds. It is only when the insured fails to pay the amount due by the termination date that the Approved Insurance Provider must notify FCIC of the existence of the delinquent debt. 7 C.F.R. § 400.682(b). After notification, FCIC sends notice of the ineligible status to the producer. 7 C.F.R. § 400.682(c). In this process, only the notice of ineligible status would be appealable to the National Appeals Division because it is the only action taken by FCIC. *See* 7 U.S.C. § 6992 (Adverse decision).

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



jurisdiction of crop insurance cases based on an Approved Insurance Provider letter issued to the producer.

- ***Claim Denials***

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

- ***Good Farming Practices***

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

V. Appealability Review

Sometimes, agencies inform participants that a decision is not appealable because it is not adverse to them individually but generally applicable to all similarly situated participants. The term "general applicability" is used throughout the regulations to describe a type of decision that is not appealable. In 7 C.F.R. § 400.91(e), the prohibition on appeal of generally applicable determinations is explained in this



manner, “[n]otwithstanding any other provision, this [subpart J] does not apply to any decision made by [RMA] that is generally applicable to all similarly situated program participants. Such decisions are also not appealable to NAD.” In 7 C.F.R. § 780.5(a)(1), the regulations for Farm Service Agency state, “[d]ecisions that are not appealable under this part shall include the following: (1) Any general program provision or program policy or any statutory or regulatory requirement that is applicable to similarly situated participants....”

Congress specifically prescribed determinations of appealability to the Director of NAD. 7 U.S.C. § 6992(d). Because of this, after explaining that decisions regarding generally applicable matters are not appealable, the varied agency regulations usually contain a somewhat confusing additional sentence or section stating that the NAD Director determines appealability. This is exemplified in the remainder of the regulation at 7 C.F.R. § 400.91(e) cited above, which states, “[i]f the Agency determines that a decision is not appealable because it is a matter of general applicability, the participant must obtain a review by the Director of NAD ... that the decision is not appealable before the participant may file suit against the Agency.” 7 C.F.R. § 400.91(e); *see also* 7 C.F.R. § 780.5(c); 7 C.F.R. § 400.768(g) (regarding Final Agency Determinations). Only the NAD Director’s determination of non-appealability, not that of the enumerated agencies under NAD jurisdiction, can constitute an exhaustion of remedies on this basis.

Thus, in certain instances participants are regulatorily required to obtain a determination from NAD regarding the appealability of an agency decision, but, in all instances, a participant may request an appealability determination. However, when NAD receives an appeal request of an agency decision that is not appealable, NAD will typically issue, of its own accord, an appealability determination. Redacted versions of appealability determinations are published on NAD’s searchable website: go to <https://www.usda.gov/oha/nad> and click “Search NAD Determinations” on left side (see picture reference below).



Office of Hearings and Appeals

- Leadership
- Services
- Rules and Procedures
- NAD Guidance, Regulations, and Statutes**
- OALJ/OJO Rules of Practice and Procedure
- OALJ/OJO Statutes Administered

National Appeals Division

- NAD Appeals
- Search NAD Determinations^o
- Outreach
- Frequently Asked Appeal Questions (FAQs)
- Contact NAD
- Office of Administrative Law Judges
- Office of the Judicial Officer

NAD Guidance

These guides outline the policies and procedures of the National Appeals Division (NAD). Actions of NAD are governed by regulations codified at Part 11 of Title 7 of the Code of Federal Regulations (7 C.F.R.). They set forth policy for NAD activities from appealability reviews through hearings and reconsiderations to Equal Access to Justice Act (EAJA) reviews. They also outline policies and procedures for employee conduct, managing the hearing process, preparing determinations, and ensuring the quality and consistency of correspondence and determinations.

Select one of the NAD documents below for more information.

- [NAD Style Guide](#) (PDF, 319 KB)
- [NAD Hearing Guide](#) (PDF, 232 KB)
- [NAD Correspondence Manual](#) (PDF, 527 KB)

Regulations

- Applicability of Equal Access to Justice Act - [Federal Register 74 FR 57401, November 6, 2009](#)
- NAD Rules of Procedure, Final Rule - [Federal Register 64 FR 33367, June 23, 1999](#)
- NAD Freedom of Information Act, Final Rule - [Federal Register 63 FR 44773, August 21, 1998](#)
- NAD Rules of Procedure, Interim Final Rule - [Federal Register 60 FR 67298, December 29, 1995](#)
- [Code of Federal Regulations](#) (C.F.R.)
- [United States Code](#) (U.S.C.)
- [www.govinfo.gov](#)

V. Commonly Appealed Decisions

It would be impossible to list all the different types of NAD appealable decisions here. However, I can describe some of the more common types of decisions for each agency. For FSA, some of the common adverse determinations NAD receives involve payment limitation and eligibility (7 C.F.R. §§ 795, 1400); loan denial (7 C.F.R. §§ 761.6, 780); and denial of indemnity and disaster program eligibility or payment *See generally* 7 C.F.R. § 760. Common NRCS adverse decisions often deal with the Environmental Quality Incentives Program (EQIP) (7 C.F.R. §§ 1466.30, 614, 780); wetland determinations (7 C.F.R. §§ 12.12, 614, 780); and enrollment program denials such as denials of enrollment in the Conservation Reserve Program (CRP) (7 C.F.R. §§ 1410.59, 614, 780). For RMA and FCIC, a few of the most common types of appealable crop insurance decisions, include the “Notice of Ineligibility” (7 C.F.R. § 400.682(e)); a denial of written agreement (7 C.F.R. § 457.8, para. 18(o)); and large claim denial (7 C.F.R. § 457.8, para. 20). NAD also hears appeals of Final Agency Determinations and Interpretation of Procedures if they meet jurisdictional requirements. (7 C.F.R. § 457.8, para. 20 [FCIC Policies] (a)(1); 7 C.F.R. § 2457.8 para.



20 [Reinsured Policies] (a)(1)(iv); 7 C.F.R. § 400.768(g); NAD Case No. 2011S000634). Finally, the most common Rural Development adverse decisions involve the Single-Family Housing Program (7 C.F.R., Part 3550) and denials of grant program funds like the Value-Added Producer Grant (VAPG) (7 C.F.R. § 4284).

VI. After Requesting an Appeal

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

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

- Determining whether there is mediation pending between the agency and the appellant, or if the appellant is in bankruptcy;
- Determining whether any third or interested parties should be identified;
- Verifying that a complete copy of the agency record has been provided to the appellant and to the administrative judge;
- Identifying and framing the matter(s) in dispute and the issue(s) to be resolved;
- Advising the parties concerning the nature of the evidence that may be presented at the hearing;
- Explaining the hearing process;
- Explaining how exhibits will be handled during the hearing;
- Requesting that the agency identify the regulations and statutes it believes to be applicable to the adverse decision;
- Encouraging stipulations to undisputed facts to expedite the hearing;



- Obtaining agreement among the parties as to the date, time, and location of the hearing; and
- Determining the need for translators, accommodations for those with disabilities, and other administrative matters.

An appellant has a right to a hearing within 45 days of NAD's receipt of a perfected appeal request, which means the 45-day period starts after the appeal request is deemed complete, i.e., perfected, by the regional office. Additionally, an appellant has the right to a hearing in his state of residence or at a location otherwise convenient to him, the agency, and NAD. 7 C.F.R. § 11.8(c). The appellant also has the right to choose the form of the hearing: in-person, by telephone, or a record review. 7 C.F.R. § 11.8(c)(5)(i); 7 C.F.R. § 11.6(b)(2).

The NAD Administrative Judge presides over the hearing and controls the proceeding in the manner most likely to obtain facts relevant to the matters at issue while maintaining order. There are generally four main parts to a NAD hearing:

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

VII. Post-Appeal Hearing

The Administrative Judge has 30 days from the date the record closes to issue a determination in cases where the hearing was by telephone or in-person. In a record review, the Administrative Judge has 45 days from the date Appellant requests the record review to issue a determination. 7 C.F.R. § 11.8(f). The Agency head has 15 business days after the date it receives an appeal determination to request a Director review, but Appellant has 30 calendar days to request review. 7



C.F.R. § 11.9. Either party has 5 business days to respond to a Request for Director Review. *Id.*

- ***Director Review***

Requests for Director Review from Appellant or Third Party must be filed within 30 calendar days *after receipt* of the appeal determination. However, because the determinations are now uploaded to Box—NAD’s electronic filing system the same day of issuance, with extremely limited exceptions, the thirty-day filing window starts immediately. The Director Review request may be mailed, faxed, or emailed to the regional office in your area **or** eFiled at <http://usda-nad.entellitrak.com/efile>. Individuals listed as Interested Parties who do not become Third Parties may not request Director Review. See <https://www.usda.gov/oha/rules-and-procedures/guidance> for a more thorough review of the applicable rules and procedures. If you have additional information you’d like considered on Director Review, it is best practice to file that information simultaneously with your request for Director Review.

Still have questions?? See our main page <https://www.usda.gov/oha> for more information as well as contact information for NAD’s Ombudsmen, Jennifer Guerrieri; NAD Headquarters in DC; and the respective Regional Offices.