

THE USDA OFFICE OF HEARINGS AND APPEALS - NATIONAL APPEALS DIVISION (OHA-NAD)



NAVIGATING THE NAD APPEALS PROCESS

WHAT YOU NEED TO KNOW

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NAD's Mission and Enabling Statute

The mission of the National Appeals Division is to conduct impartial administrative appeal hearings and reviews of adverse decisions made by designated agencies of the Department of Agriculture.

The Secretary shall establish and maintain an independent National Appeals Division within the Department. 7 U.S.C. § 6992(a).

GOVERNING LAW & REGULATIONS

- ❑ The Administrative Procedure Act (APA) applies to NAD appeals.
 - 5 U.S.C. §§ 500, et. seq.; 7 C.F.R. § 11.4.

- ❑ Equal Access to Justice Act (EAJA) also applies.
 - 5 U.S.C. § 504; 7 C.F.R. part 1, subpart J.

- ❑ The Federal Rules of Evidence, 28 U.S.C. does not apply.
 - Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. 5 U.S.C. § 556(d).

STANDARD OF REVIEW AND BURDEN OF PROOF

- ❑ The standard of review is “substantial evidence.”
 - *See Epp v. Natural Resources Conservation Service*, 425 F.Supp.3d 1142, 1148 (D.Neb., 2019) (citing *Syverson v. U.S. Dep't of Agric.*, 601 F.3d 793, 800 (8th Cir. 2010)); 5 U.S.C. § 706(2)(E).
 - “Evidence may be substantial even when two inconsistent conclusions might have been drawn from it.” *Syverson*, 601 F.3d at 800.
 - “A reasonable decision is one supported by substantial evidence, which is more than a scintilla but less than a preponderance.” *Epp v. NRCS*, 425 F.Supp.3d at 1148–49 (citing *Hillery v. Metro. Life Ins. Co.*, 453 F.3d 1087, 1090 (8th Cir. 2006)).
- ❑ **Appellant** has the burden of proof. *See 7 U.S.C. § 6997(c)(4); 7 C.F.R. § 11.8(e)*
 - Caveat... Any thoughts on the proposed BoP change?

Why NAD Matters

PROTECT YOUR (CLIENT'S) RIGHTS!

If you've been turned down for a farm loan, had your mortgage accelerated, or have been denied program payments, assistance, or a grant, you have the right to a fair before an impartial NAD judge.

Exhaustion of Remedies Mandate:

Statutory and case law requires exhaustion of all administrative remedies before pursuing an action against the Secretary of Agriculture, the USDA, or any agency, office, officer or employee of the USDA. *See* 7 U.S.C. § 6912(e); *Dawson Farms LLC v. Farm Service Agency*, 504 F.3d 592, 602-606 (5th Cir. 2007)

NAD's Subject-Matter Jurisdiction

7 C.F.R. § 11.3 prescribes the applicability of NAD's jurisdiction as follows:

- (a) **Subject matter.** The regulations contained in this part are applicable to adverse decisions made by an agency, including, for example, those with respect to:
 - (1) Denial of participation in, or receipt of benefits under, any program of an agency;
 - (2) Compliance with program requirements;
 - (3) The making or amount of payments or other program benefits to a participant in any program of an agency; and
 - (4) A determination that a parcel of land is a wetland or highly erodible land.
- (b) **Limitation.** The procedures contained in this part may not be used to seek review of statutes or USDA regulations issued under Federal Law.

Agencies Under NAD's Jurisdiction

*See 7 C.F.R. § 11.1
(defining Agency)*

- (1) Commodity Credit Corporation (CCC);
- (2) Farm Service Agency (FSA);
- (3) Federal Crop Insurance Corporation (FCIC);
- (4) Natural Resources Conservation Service (NRCS);
- (5) Risk Management Agency (RMA);
- (6) Rural Business-Cooperative Service (RBS);
- (7) Rural Development (RD);
- (8) Rural Housing Service (RHS);
- (9) Rural Utilities Service (RUS);

*The regulation also contains a catchall for additional USDA agencies or offices later designated by the Secretary.

So, Who Can Appeal What to NAD?

Participant?

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.

See 7 C.F.R. § 11.1 (defining Participant)

Adverse Decision?

An administrative decision from an agency enumerated in 7 C.F.R. § 11.1 (defining Agency) that is adverse, i.e., opposing/negative, to a participant.

See 7 C.F.R. § 11.1 (defining Adverse Decision)

Examples...

- ✓ Denial of a requested moratorium on mortgage payments
- ✓ Mortgage loan acceleration
- ✓ Farm operating or ownership loan denial of amt. requested
- ✓ Denial of equitable relief at enumerated agency level
- ✓ Failure to act on a request within a reasonable timeframe

What Can (& Not) Be Appealed?

For Now...

Participants **CAN** appeal:

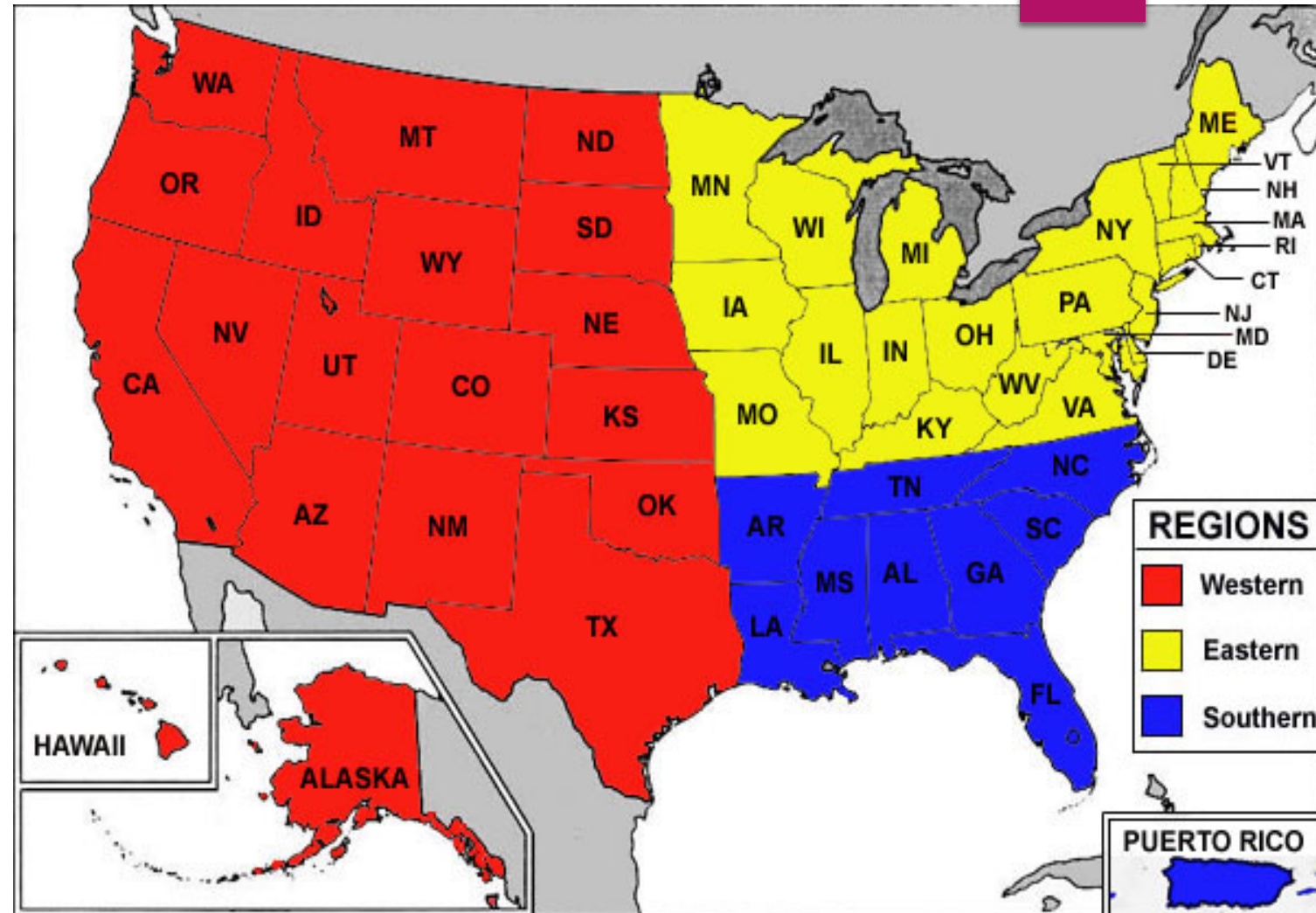
- Denial of right to participate in a USDA program
- Payment of a benefit that is less than requested or anticipated
- The denial of equitable relief by the denying agency
- Failure to Act

NAD does **NOT** adjudicate:

- Applications for program benefits
- Matters of “General Applicability”
- Complaints on the basis of discrimination – (caveat?)
 - Race
 - Gender
 - Gender Identity
 - Religion

NAD FILING RULES

- **Must** be in writing and signed personally by the program participant.
- **Must** be filed within 30 days of receiving the adverse decision **in any format/medium**.
- Should be filed at the appropriate regional office.
- Should include a statement as to why the decision is wrong.



THE APPEAL ROUTING PROCESS

Participant files appeal to respective regional office

- Regional office reviews for timeliness/ jurisdiction
- Creates Case Record

Deputy Regional Director Assigns Case to AJ

- AJ Schedules prehearing to narrow issues
- AJ holds hearing within 45 days

AJ Issues Decision

- Agency erred/did not err
- Appellant/ Agency may request Director Review

The NAD Appeal Process

delving a bit deeper

HOW MANY OF YOU HAVE EVER APPEARED BEFORE NAD, IN ANY CAPACITY?

Please note that I cannot discuss...

- ❑ Ongoing Appeals
- ❑ Appeals on Director Review
- ❑ Why an Administrative Judge made a certain decision
- ❑ How a judge will *always* rule



APPEALABILITY:

Is this decision appealable?

What is an “Appealable” Issue?

General Applicability

- NAD has the authority to adjudicate decisions that are adverse as applied to the **individual** participant.
- If it is a rule, regulation, or policy generally applicable to all participants that directly causes the adverse decision/action, it is NOT APPEALABLE!
- Jurisdictional

Tie always goes to NAD’s Director

- NAD’s Director has the final authority to determine whether an adverse decision is appealable.
- If an agency rules a decision is not appealable, the agency MUST notify the participant of NAD appeal rights. (7 C.F.R §11.6(a)(1 - 2).
- Agency notice is not required to trigger appeal rights.

Challenging the Agency's Non-Appealability Findings at NAD

Be Timely: Due Within 30 Days of Agency Notice of nonAppealability

A participant who has been notified that an agency decision is not appealable may file a request for an appealability review from NAD **no later than** 30 days after receipt of the agency ruling of nonappealability.

7 C.F.R. § 11.6(A)(1).

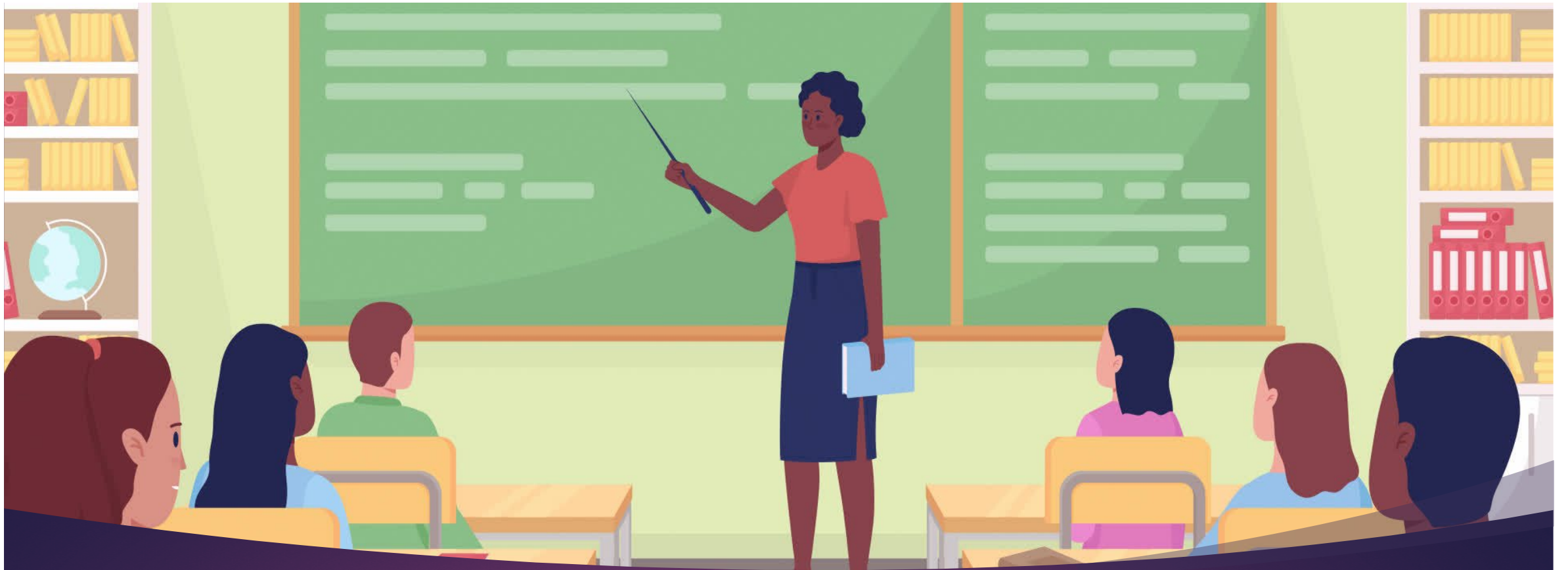
Written Request, with Specificity

The review request must be in writing and focus on facts demonstrating that the adverse decision is adverse to the named participant, specifically (no general applicability).

It must also state why participant believes decision is appealable.

But Remember

An appealability review determines only if an adverse decision may be appealed, not whether an agency erred in the decision.



Got it? Okay, Let's Practice!

Scenario 1

- Mr. John Doe resides in Alligator, MS (population; 205 residents). He and his wife Sally have been married for 32 years and are the parents of three adult children. They are both 59 years old, disabled, and have a combined income of \$14,000 per year. John has applied for a Water and Waste Disposal Grant offered by the Rural Housing Service in 7 C.F.R. Sections 504 and 306C. These grants are intended to help very low-income homeowners who are at least 62 years old in rural areas repair their properties. Grant funds may be used only to pay for repairs that will remove identified health and safety hazards or remodel dwellings to make them accessible for household members with disabilities. John plans to use the money to add a wheelchair ramp to the front of the house so that Sally, who recently suffered a stroke, can enter and exit the house in her wheelchair.
- The Rural Housing Service denied John's application. What is the reason for the denial? Is the denial appealable?

Scenario 2

- In 2013 , Maxine Johnson inherited a 200 acre stretch of land located just outside of Milwaukee, WI, from her grandfather, Leroy Johnson Sr. Leroy purchased 2 acres in 1970 and started an oat farm. As the farm prospered, Leroy purchased additional acreage in the surrounding areas until there was no more land suitable for farming to add to his operation. Leroy's oat crops prospered until his farm was destroyed by the Great Flood of 1993. Leroy relocated his family and farming operation but chose to keep the 200-acre property for future use. Upon his death, he bequeathed the land to his granddaughter, Maxine. Maxine is unsure what to do with it but would like to try farming again. She has noticed that parts of the land are now saturated and covered in hydrophytic vegetation. Several small animals have made their homes in the moist areas. Maxine plans to enroll these areas into the EWRP program. NRCS denies her application, stating that "there is little likelihood of successful restoration of the land." NRCS tells her its determination is a matter of "general applicability" and is therefore not appealable. Is their decision appealable???



Hearing

NAD Pre-Hearings

Pre-Hearings Occur in Every Case

Pre-Hearings are Recorded

Parties may obtain a free copy of the recording upon written request to the appropriate regional office

This is the official hearing transcript.

Transcript Availability

Either party may request a verbatim transcript (or large print) of the pre-hearing or hearing. The requesting party must pay for the service and provide a copy to the judge.

Party must also allow opposing party to purchase a copy.

Critical Hearing Prep

The Pre-Hearing is designed to help both parties prepare for the hearing. During this proceeding, the Administrative Judge will:

- Identify the issues & parties: actual, interested, & third
- Set the date, time, location, and type of hearing
- Important opportunity for parties to discuss and possibly resolve case on their own
- Recission opportunity/notice

Pre-Hearing Issues

The Administrative Judge will inquire about:

- ▶ Interested Parties – Guaranteed lenders or reinsurance companies who are not parties but have an interest in the outcome of the appeal. Their rights are not affected by the appeal determination. (7 C.F.R. § 11.15(b))
- ▶ Third Parties – Spouses, former spouses, children, siblings, co-owners, etc., have the right to participate in a NAD appeal hearing. Third parties' rights are affected by NAD decisions, and they are bound by said decisions whether they participate or not. (7 C.F.R. § 11.15(a))

Pre-Hearing Issues (cont.)

- ▶ Bankruptcies- If an Appellant or Third Party has filed for bankruptcy protection, the NAD appeal must be dismissed unless the Bankruptcy Court Judge authorizes NAD to move forward with the appeal.
- ▶ Mediation – An appellant can request mediation if its available, however, NAD does not require mediation in any case. A mediation request tolls NAD's statutory time frames when a mediation is requested before or after a timely submitted appeal request. (7 C.F.R. § 11.5(c)(1-2))



NAD Hearings

At the Hearing...

- ▶ **Have the Agency Record in front of you and be familiar with it and the regulations on which the decision/your arguments are based.**
- ▶ **Organize the presentation of your evidence.**
- ▶ **Use an opening statement to tell the AJ what you are going to show.**
- ▶ **Use a closing statement to remind the AJ what you showed.**



Document Labeling

- ▶ All exhibits should be labeled prior to the hearing. Labeling instructions are provided to the parties in the Notice of Appeal.
- ▶ Appellant documents not included in the agency record may be submitted as exhibits. These should be marked “Appellant Exhibit 1; Page 1 of __; Appellant Exhibit 2; page 1 of __. Each page of each exhibit must be numbered.
- ▶ Everything submitted after the hearing should be labeled Appellant **Post-Hearing** Exhibit 1 and paginated.



NAD Hearing Best-Practices

At the NAD Hearing:

- Open your presentation by telling the AJ ..
- Close your presentation by telling the AJ...
- True or False: All agency documents should be labeled during the hearing?
- Where should page numbers appear on the agency record?
- Agency documents not included in the agency record should be marked as _____?
- True or False: If an agency exhibit is 3 pages long, it is sufficient to mark that exhibit "page 1 of 3" and proceed to the next exhibit?
- You should know this very well, in addition to these.

NAD, THE WRAP UP

Finality Rule

- An appeal determination is a final administrative action on the issue, unless a Director Review is requested.
- Absent a request for Director Review, the determination is final 30 days after it is issued. If no Director Review, AJ decision becomes the final agency action on the matter. This means subsequent legal action must be filed in US District Court.

Equitable Relief

Rule found at 7 C.F.R. Part 11.9(e)

- When an agency head has authority to grant equitable relief, NAD Director has the same authority. AJs have no authority to grant equitable relief but must prepare the record for Director to consider.
- Appellant may appeal an Agency's denial of equitable relief. In such cases, the AJ will make findings of fact and draw conclusions as to whether the Agency erred in denying relief. Appellant may raise a claim for relief during appeal hearing.

Director Review

- Requests for Director Review from Appellant or Third Party must be filed within 30 days after receipt of appeal determination.
- Agency requests for Director Review must be filed within 15 days after receipt of appeal determination
- Interested Parties may not request Director Review



Q&A