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## **An Agricultural Law Research Note**

### **The USDA National Appeals Division An Outline of the Rules of Procedure**

by

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### **The USDA National Appeals Division An Outline of the Rules of Procedure**

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The USDA National Appeals Division (USDA NAD) was created by the Secretary of Agriculture in 1994 pursuant to the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994. On December 29, 1995, the USDA NAD Rules of Procedure were published in the Federal Register as interim final rules. 60 Fed. Reg. 67,298, 67,308-318 (1995). These rules remained in interim final form until June 23, 1999, when they were amended and published as final rules. 64 Fed. Reg. 33,367, 33,373-378 (1999). They appear in the Code of Federal Regulations at 7 C.F.R. Part 11. This outline reviews these rules.

By way of an overview, the USDA NAD appeal process has three stages. It begins with the taking of an appeal to the USDA NAD from an “adverse decision” rendered against a participant in a program administered by one of the agencies whose program determinations are appealable to the USDA NAD. For some adverse decisions, the participant has the option of seeking “informal review” by the agency or mediation before appealing to the USDA NAD. The second step is an opportunity for an in-person evidentiary hearing before a USDA NAD hearing officer. The third step is the opportunity for either the program participant or the agency to have the USDA NAD Director review the hearing officer’s decision. Most appeals end at Director review. Final Director review decisions are subject to review in federal district court. A program participant who receives an unfavorable Director review decision can also ask the Secretary of Agriculture to review that decision before seeking judicial review or instead of seeking judicial review. These stages are listed below:

Adverse Decision by Agency

(“Informal review” before Agency)

(Mediation)

Evidentiary Hearing Before Hearing Officer

Director Review

(Review by the Secretary and/or judicial review)

## I. Adverse Decision

### A. Definitions

1) The regulations define an “adverse decision” as

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 within timeframes specified by agency program statutes or regulations or within a reasonable time if timeframes are not specified in such statutes or regulations. The term does not include a decision over which the Board of Contract Appeals has jurisdiction. 7 C.F.R. § 11.1 (Adverse decision).

2) The regulations define “agency” to mean the following agencies and committees:

- (1) The Commodity Credit Corporation (CCC);
- (2) The Farm Service Agency (FSA);
- (3) The Federal Crop Insurance Corporation (FCIC);
- (4) The Natural Resources Conservation Service (NRCS);
- (5) The Risk Management Agency (RMA);
- (6) The Rural Business-Cooperative Service (RBS);
- (7) Rural Development (RD);
- (8) The Rural Housing Service (RHS);
- (9) The Rural Utilities Service (RUS) (but not for programs authorized by the Rural Electrification Act of 1936 and the Rural Telephone Bank Act, 7 U.S.C. 901 et seq.);
- (10) A State, county, or area committee established under section 8(b)(5) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)(5)); and
- (11) Any successor agency to the above-named agencies, and any other agency or office of the Department which the Secretary may designate. 7 C.F.R. § 11.1 (Agency).

### B. Time Limitations

Unless the program participant seeks informal review or mediation, an adverse decision must be appealed to the USDA NAD not later than **30 days** after the date on which the participant first received notice of the adverse decision. 7 C.F.R. § 11.6(b).

In the case of the failure of an agency to act, the participant must appeal to the USDA NAD not later than 30 days after he/she knew or reasonably should have known that the agency had not acted within the time frames specified by agency program regulations, or, where such regulations specify no time frames, not later than 30 days after the participant reasonably should have known of the agency's failure to act. *Id.*

## II. Mediation

### A. The USDA NAD Rules Allow for Mediation

The USDA NAD rules provide that

[a] participant also shall have the right to utilize any available alternative dispute resolution (ADR) or mediation program, including any mediation program available under title V of the Agriculture Credit Act of 1987, 7 U.S.C. 5101 et seq., in order to attempt to seek resolution of an adverse decision of an agency prior to a NAD hearing. 7 C.F.R. § 11.5.

B. Certain Agency Regulations Allow for Mediation

Both the Farm Service Agency (FSA) and the Natural Resources Conservation Service (NRCS) appeal regulations provide for mediation in certain circumstances. For example, the FSA regulations 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. Any time limitation for review contained in this part will be stayed pending timely pursuit and completion of the mediation process. 7 C.F.R. § 780.6.

D. Impact on the Time Limitations

- A. A request mediation or ADR prior to filing an appeal with NAD will stop the running of the 30-day period during which the farmer may appeal to NAD. Once mediation is concluded, the program participant will have the balance of days remaining in that period to appeal to NAD. 7 C.F.R. § 11.5(c).
- B. A request for mediation or ADR that is made after a NAD hearing has been requested, but before the hearing has been held, acts as a waiver of the program participant's right to have a hearing held within 45 days of the request. The hearing should be held within 45 days after conclusion of mediation or ADR, however. 7 C.F.R. § 11.5(c).
- C. Any time limitation required for informal review under the FSA appeal regulations will be stayed pending the completion of mediation. 7 C.F.R. § 780.6.

### III. "Informal Review" of Adverse Decisions

"Informal review" prior to a NAD appeal can either be required or it can be at the farmer's option.

A. Required "informal review."

- 1. Except with respect to farm credit programs, informal review must be sought for decisions made "at the field service office level by an officer or employee of FSA, or by any employee of a county or area committee" before an appeal will be accepted by NAD. 7 C.F.R. § 11.5(a). The procedures for seeking informal review of FSA decisions are found at 7 C.F.R. Part 780.
- 2. A program participant must "exhaust any appeal procedures through the FSA county committee" before appealing NRCS technical determinations to NAD 7 C.F.R. § 614.102.

B. Optional informal review

A program participant may request an agency informal review prior to appealing to NAD. Procedures for requesting such an informal review are found at 7 C.F.R. part 780 (FSA), 7 C.F.R. part 614 (NRCS), 7 C.F.R. part 1900, subpart B (RUS), 7 C.F.R. part 1900, subpart B (RBS), and 7 C.F.R. part 1900, subpart B (RHS).

#### **IV. Appeal to USDA NAD**

A. Steps to Perfect an Appeal

1. The program participant must personally request a USDA NAD hearing (or a record review) in writing;
2. The request must be signed by the participant;
3. If available, a copy of the adverse decision should be included with the request;
4. A brief statement of the reasons for believing that the decision, or the agency's failure to act, was wrong should also be included; and
5. A copy of the request for a hearing to should be sent to the agency (all attachments should also be sent to the agency, although the regulation state that the failure to do so will not constitute grounds for dismissal of the appeal). 7 C.F.R. § 11.6(b).

B. Appellant Representation

Once an appeal is filed, the program participant is deemed the "appellant." If an appellant is represented by someone, this representative must file a declaration with NAD stating that the appellant has duly authorized him/her in writing to represent the appellant. The representative's declaration and a copy of the appellant's written authorization must be filed with NAD. 7 C.F.R. § 11.6(c).

C. Director Review of Agency Determinations of Appealability

If an agency has issued a determination that is asserts is not appealable to NAD, the program participant may request the Director to determine whether the determination is appealable. Such a request must be made within 30 from the date on which the participant receives the agency determination, and the request must be personally signed by the participant. 7 C.F.R. § 11.6(a)(1). The Director has the authority to determine whether the issue presented is one of "general applicability" and thus not appealable. If the Director determines that the determination is appealable, the participant will be notified of his or her right to appeal. 7 C.F.R. § 11.6(a)(2).

#### **V. Pre-Hearing Procedures**

- A. Once the appeal is filed, the agency must "promptly" provide the NAD with a copy of the agency record. 7 C.F.R. § 11.8(b)(1).
- B. If requested by the appellant, a copy of the agency record is to be provided to the appellant within 10 days of the receipt of the request by the agency. 7 C.F.R. § 11.8(b)(1).
- C. The NAD Director will assign a hearing officer to the case, though this authority has been delegated to the Regional Assistant Directors. 7 C.F.R. § 11.8(b)(2).

D. The agency and the appellant will each receive notice of the name of the hearing officer assigned to the case, notice of the right to request a telephone hearing instead of a personal hearing, and notice of certain documents that will be required prior to the hearing. 7 C.F.R. § 11.8(b)(2).

E. The documents that will be required from the appellant are

1. A short statement of why the decision is wrong;
2. A copy of any document not in the agency record that the farmer anticipates introducing at the hearing; and
3. A list of anticipated witnesses and brief descriptions of the evidence each witness will offer.

The documents that will be required from the agency are

1. A copy of the adverse decision challenged by the appellant;
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 brief descriptions of the evidence each witness will offer.  
7 C.F.R. § 11.8(c)(2).

F. The hearing officer will set a reasonable deadline for submission of all of the documents listed above. 7 C.F.R. §11.8(c)(2).

G. At least 14 days before the hearing, the hearing officer will notify the appellant, any authorized representative, and the agency of the date, time, and place of the hearing. The hearing will be held in the state where the appellant lives, or at a location that is otherwise convenient to the appellant, the agency, and the NAD. The notice also will notify all parties of the right to obtain an official record of the hearing. 7 C.F.R. §11.8(c)(3) .

H. Parties can request the issuance of a subpoena requiring the attendance of a witness at the hearing. 7 C.F.R. § 11.8(a). USDA employees are expected to attend the hearing if requested by NAD.

I. The hearing officer will hold a pre-hearing conference to attempt to resolve the dispute or to narrow the issues involved. This pre-hearing conference will be held by telephone unless the hearing officer and the parties agree to hold the conference in person. 7 C.F.R. §11.8(c)(4).

## **VI. The USDA NAD Hearing**

A. The regulations contain the following rules for the conduct of the USDA NAD hearing:

1. The hearing will be in person unless the appellant agrees to a hearing by telephone.
2. The hearing officer will allow the presentation of evidence at the hearing by any party without regard to whether the evidence was known at the time the adverse decision was made.
3. Any evidence may be received by the hearing officer without regard to whether that evidence could be admitted in judicial proceedings.

4. The hearing officer may confine the presentation of facts and evidence to pertinent matters. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence, information, or questions.
5. Each party will have the opportunity to present oral and documentary evidence, oral testimony of witnesses, and arguments in support of the party's position. Each party will have an opportunity controvert evidence relied on by any other party; and question all witnesses.
6. When appropriate, agency witnesses requested by the farmer will be made available at the hearing.
7. An official record shall be made of the proceedings of every hearing. This record will be made by an official tape recording by the NAD.
8. Either party may request that a verbatim transcript be made of the hearing proceedings and that this transcript be made the official record of the hearing. The party requesting the transcript must pay for the transcription service, provide a certified copy of the transcript to the hearing officer free of charge, and allow any other party desiring to purchase a copy of the transcript to order it from the transcription service. 7 C.F.R. § 11.8(c)(5) .

B. The regulations also specify how the Hearing Officer is to make his/her decision.

1. The hearing officer is not bound by previous findings of facts on which the agency's adverse decision was based. 7 C.F.R. § 11.10(a).
2. The appellant has the burden of proving that the adverse decision of the agency was erroneous by a preponderance of the evidence. 7 C.F.R. § 11.8(c)(5).
3. The decision must be based on information from the case record, laws applicable to the matter at issue, and applicable regulations published in the Federal Register. 7 C.F.R. § 11.10.
4. The decision must be consistent with the laws and regulations of the agency and with the generally applicable interpretations of these laws and regulation. 7 C.F.R. § 11.10(b).

C. "Third parties," defined as parties other than the appellant or the agency whose rights may be affected may participate in the hearing, and they have the same rights as an "appellant." 7 C.F.R. § 11.15(a).

D. "Interested parties," defined as those who are the guaranteed lender of a borrower who is an appellant or a reinsured crop insurance company whose insured is an appellant, may participate, but they do not have the rights of an "appellant." 7 C.F.R. § 11.15(b).

## **VII. Post-hearing Procedures**

A. Additional Arguments

The hearing officer will leave the hearing record open for 10 days after the hearing, or for such other period of time as the hearing officer establishes, to allow the appellant or the agency to submit additional information in response to new facts, information, arguments, or evidence presented or raised at the hearing. Any new information that is submitted will be added to the hearing record and should be sent to the other party by the party providing the information. The hearing officer, in his or her discretion, may permit the other party to respond to this post-hearing submission. 7 C.F.R. § 11.8(c)(7).

B. The Determination

The Hearing Officer will make a decision on the appeal and will issue a “notice of determination” to the farmer, any authorized representative, and the agency. This notice should be issued not later than 30 days after the hearing or, if additional information was submitted, 30 days after the closing date of the hearing record. The regulations do provide for flexibility on this time limit if needed, however. 7 C.F.R. § 11.8(f).

C. Availability of Director Review

The notice of determination will be accompanied by a copy of the procedures for filing a request for Director review. If the determination is not appealed to the Director for review, the determination of the hearing officer is the final USDA NAD determination. 7 C.F.R. § 11.8(f).

## VIII. Director Review

Any party to a USDA NAD appeal has the right to seek a review of the hearing officer’s determination. This review will be conducted by either the Director of NAD or his designee. All review requests are filed with the appropriate Regional Office of the NAD.

A. 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 farmer received the determination; and
4. Stating specific reasons why the determination is wrong. 7 C.F.R. § 11.9(a)(1).

B. 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 determination is wrong; and
5. Including citations to the law that the agency believes the determination violates. 7 C.F.R. § 11.9(a)(2).

C. Notice to Opposing Side

A copy of a request for Director review must be provided simultaneously by the party seeking review to each other party to the appeal. 7 C.F.R. § 11.9(a)(3). In addition, the Regional Director will promptly notify all parties of the receipt of a request for review. 7 C.F.R. § 11.9(b).

D. Response

Other parties to an appeal may submit written responses to a request for Director review within 5 business days from the date of receipt of a copy of the request for review. 7 C.F.R. § 11.9(c).

E. Determination

In making a decision, the Director will conduct a review of the determination of the hearing officer and consider the following:

1. The agency record;
2. The hearing record;
3. The request for review;
4. Any responses submitted; and
5. Such other arguments or information as may be accepted by the Director. 7 C.F.R. § 11.9(d).

F. The Director's Authority

The Director has the authority:

1. To issue a final determination notice that upholds, reverses, or modifies the determination of the hearing officer. 7 C.F.R. § 11.9(d).
2. To grant equitable relief in the same manner and to the same extent as such authority is provided to the agency. 7 C.F.R. § 11.9(e).
3. To remand all or a portion of the determination to the hearing officer for further proceedings to complete the hearing record or to hold a new hearing. *Id.*

G. Time Limitation

The regulations provide that the Director will complete the review and either issue a final determination or remand the determination not later than—

- 10 business days after receipt of the request for review, in the case of a request by the head of an agency; or
- 30 business days after receipt of the request for review, in the case of a request by an appellant. 7 C.F.R. § 11.9(d)(2).

## IX. Director Reconsideration

The regulations provide a procedure for requesting reconsideration by the Director. 7 C.F.R. §11.11.

A. Time Requirements

The request must be made within 10 days of receipt of the determination. 7 C.F.R. §11.11.

B. Requirements of the Request for Reconsideration

The request must include:

1. A detailed statement of factual errors in the determination; or
2. A detailed explanation of how the determination is contrary to law. 7 C.F.R. §11.11.

### C. The Reconsideration Process

- Notice as to whether the request meets the requirements;
- Notice to the other party of the request;
- 5-day reply period;
- Final determination within 5 days of the end of the reply period. 7 C.F.R. §11.11.

## X. Effective Date and Implementation of Final Determination of the NAD

Upon the return of a case to an agency pursuant to a final determination of the NAD, the head of the agency shall implement the NAD's determination not later than 30 days after the effective date of the Notice of the Final Determination. 7 C.F.R. § 11.12.

## XI. Attorney Fees

The United States Court of Appeals for the Eighth Circuit has held that the USDA NAD appeal process is formal adjudication for purposes of the Equal Access to Justice Act, 5 U.S.C. § 504. *Lane v. United States Dep't of Agric.*, 120 F.2d 106 (8th Cir. 1997). The USDA, however, will not entertain requests for attorneys' fees in appeals arising outside the Eighth Circuit.

## XII. Judicial Review

Judicial review is available in the federal district courts. 7 U.S.C. § 6999; *Deaf Smith County Grain Processors, Inc. v. Glickman*, 162 F.3d 1206 (D.C. Cir. 1998); *Farmers & Merchants Bank of Eaton, Georgia v. United States*, 43 Fed. Cl. 38 (1999). The judicial review provisions of the Administrative Procedure Act apply.

By statute, the USDA NAD appeal process must be completed before judicial review is available. 7 U.S.C. § 6912(e). This statutory exhaustion of administrative remedies requirement also applies to matters that are subject to a determination by the NAD Director as to whether they are appealable to NAD. In other words, the Director must determine that a matter is not appealable to NAD before such a matter may be presented for judicial review. See *Bastek v. Federal Crop Ins. Corp.*, 145 F.3d 90 (2d Cir. 1998). The Fourth Circuit, however, has permitted a facial challenge to a regulation to proceed in the absence of a Director's determination as to whether the challenge was appealable to NAD. See *Gold Dollar Warehouse, Inc. v. Glickman*, 211 F.3d 93 (4th Cir. 2000). In *McBride Cotton and Cattle Corp. v. Veneman*, 290 F.3d 973, 980-81 (9th Cir. 2002), the court ruled that the statute's exhaustion requirement was not jurisdictional, but courts should require compliance with it unless the suit alleges a constitutional claim which is "(1) collateral to a substantive claim of entitlement, (2) colorable, and (3) 'one whose resolution would not serve the purposes of exhaustion.'" (citations omitted).

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