FSA
HANDBOOK

Program Appeals, Mediation, and Litigation

To access the transmittal page click on the short reference

For All FSA Employees

SHORT REFERENCE

1-APP
(Revision 2)

UNITED STATES DEPARTMENT OF AGRICULTURE
Farm Service Agency
Washington, DC 20250

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Farm Service Agency
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Program Appeals, Mediation, and Litigation 1-APP (Revision 2)	Amendment 5

Approved by: Acting Administrator

Amendment Transmittal

A Reasons for Amendment

Without changing the substance of previous instructions, the term "technical determinations", in many instances, has no significance or meaning to the administrative appeals process. Accordingly, references to the term are being eliminated where it is deemed appropriate.

2-INFO individual paragraph references have been removed.

Paragraph 71 has been amended to update the FAX information for NAD headquarters.

Paragraph 151 has been amended and Exhibit 58 has been added to incorporate mandatory language for adverse FOIA decision letters.

Page Control Chart		
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Part 1 Basic Information

1 Overview

A Purpose

This handbook provides:

- guidelines to FSA offices on matters about appeals and litigation, requests for documents, witnesses, etc.

- uniform procedure and policy about FSA's informal appeal process that includes:

  - *** * *** mediation
  - appealability reviews
  - appeals
  - reconsiderations.

B Goal of Informal Appeals Process

The goal of the informal appeals process is to maximize opportunity for resolution of factual disputes between participants and FSA at the lowest possible level within FSA.

The informal appeals process provides opportunity for review by persons or committees with detailed knowledge of FSA programs, knowledge of farming and ranching operations, and expertise in farm and ranch management. This is in contrast to appeals administered by NAD under rules at 7 CFR Part 11.

While participants may have the option to seek review at NAD, it is FSA's experience that, generally, only the most difficult unresolved disputes proceed to further appeals before NAD.

1 Overview (Continued)

C Sources of Authority

Sources of authority for this handbook include the following:

- 5 U.S.C. 574
- 7 U.S.C. 6995
- 15 U.S.C. 714b and 714c
- 16 U.S.C. 590h
- 7 CFR Part 1, Subpart K, Subpart G, Subpart A
- 7 CFR Part 11
- 7 CFR Part 780
- individual program regulations and internal operating guidelines.

This table provides steps to access CFR's online.

Step	Action
1	Go to **http://www.gpoaccess.gov/cfr/index.html**.
2	On Code of Federal Regulations (CFR) Main Page, under 1996 Through Current Year Based On CFR Update Schedule, CLICK "**Browse and/or Search the CFR**".
3	On Available CFR Titles on GPO Access Page, scroll down to "7", "Agriculture", and CLICK "**Jan. 1**".
4	On Code of Federal Regulations Home Page, scroll down and under "Browse Parts" column, click the range of parts for the part user wants to view.
5	On the page displayed, scroll down and click on the part user wants to view.
6	Click either the TXT or PDF icon to view the subparts.

Example: Starting with step 4, if user wants to view **7 CFR Part 780**, user would:

- scroll down and CLICK "**700-799**", "Farm Service Agency"
- scroll down and CLICK "**780**", "Appeal regulations"
- click either the TXT or PDF icon, depending on preference.

D Related Handbooks

Related handbooks include, but are **not** limited to the following:

- 9-AO for contact with OIG and using OIG documents to support an adverse decision
- 18-AO for Civil Rights compliance
- ***--**1-AS for State supplements**--***
- 27-AS for mediation services contracting
- 61-FI for Prompt Payment Act
- 58-FI for establishing claims and making offsets
- 98-FI for mediation expense accounting codes
- 2-INFO and 3-INFO for FOIA and Privacy Act requests.

2 FSA, Office of the Administrator, OBPI, ALS Organization

A ALS Organizational Structure and Duties

ALS is part of the Office of the Administrator. ALS:

- monitors and coordinates administrative appeal activities
- develops administrative appeal policy
- prepares National directives
- assists OGC and the Department of Justice with administrative appeals and litigation involving FSA and CCC

  Note: ALS is FSA's point of contact for obtaining concurrence on behalf of the Executive Vice President, CCC, or Administrator, on any compromise or offer of settlement stemming from or potentially about administrative appeal or litigation.

- conducts hearings, as necessary, about suspension and debarment appeals
- assembles and prepares for signature by the Administrator, requests for NAD Director review or reconsideration
- provides guidance to FSA offices and officials on mediation cases and on appeals and litigation matters
- reviews and processes FOIA and Privacy Act appeals
- reviews and processes AFIDA appeals.

2 FSA, Office of the Administrator, OBPI, ALS Organization (Continued)

B ALS Addresses

The addresses for ALS are as follows.

For FedEx, UPS, or other Approved Overnight Mail Delivery	For USPS Delivery
USDA, FSA, ALS SOUTH BUILDING ROOM 6722-S 1400 INDEPENDENCE AVE SW WASHINGTON DC 20250-6722 Telephone: 202-690-3297.	USDA, FSA, ALS STOP 0570 APPEALS AND LITIGATION STAFF 1400 INDEPENDENCE AVE SW WASHINGTON DC 20250-0570

Notes: Use FedEx, UPS, or other approved overnight service when time is of the essence or when sending any electronic disks, photographs, or other sensitive or damageable material.

--**USPS regular or priority mail shall **not** be used to send case files or packages to ALS, or when time is a factor. USPS regular mail should be used **only** for routine letter**--correspondence.

C ALS Contact Information

ALS contacts are as follows.

Appeals and Litigation Staff Main Telephone Number: 202-690-3297 FAX Number: 202-690-3003.		
Name	**Title**	**Phone Number**
John W. Welch	Director	202-690-3297
Gwen Sellman	Staff Assistant	202-690-3297
Charles Berge	Management Analyst	202-720-7757
***--**Shelley Davis	Management Analyst	202-690-8034
H. Talmage Day	Legal Analyst	202-720-0358
G. Sean O'Neill	Management Analyst	202-720-9003
Carol Wagner	Legal Analyst**--***	202-720-4966
Robin Wieland	Paralegal Specialist	202-690-2814

3 Reserving Authority

A Regulation

[7 CFR 780.3] (a) Representatives of FSA and CCC may correct all errors in data entered on program contracts, loan agreements, and other program documents and the results of the computations or calculations made pursuant to the contract or agreement. FSA and CCC will furnish appropriate notice of such corrections when corrections are deemed necessary.

(b) Nothing contained in this part shall preclude the Secretary, or the Administrator of FSA, Executive Vice President of CCC, the Chief of NRCS, if applicable, or a designee, from determining at any time any question arising under the programs within their respective authority or from reversing or modifying any decision made by a subordinate employee of FSA or its county and State committees, or CCC.

B Determinations Binding on FSA Reviewing Authorities

Except for special determinations reserved for the Secretary; Administrator, FSA; Executive Vice President, CCC; or designees thereof, the following determinations *** * *** are binding on FSA reviewing authorities:

- any Federal agency, other than FSA and NRCS
- NRCS Title XII.

Note: Process appeals about NRCS Title XII determinations according to Part 4.

C Special Handling During Appeals

Although an FSA reviewing authority **must** accept written findings of fact *** * *** as binding, the reviewing authority may, at its own option, request clarification from the determining official or agency.

Unusual situations or circumstances should be discussed with ALS as necessary.

4 Coordinating Appeals in State Offices

A SAC Duties

Each State Office shall designate at least 1 employee as SAC who will be responsible for:

- ensuring that FSA's interests are properly and adequately represented
- protecting the integrity of FSA's programs in all administrative appeal and mediation proceedings
- assigning appeal cases to an FSA employee for handling
- appointing or designating an FSA employee as FSA representative for an appeal (subparagraph B)

  Note: SED's have discretion to make each program specialist responsible for a particular program area responsible as SAC. Regardless whether a State Office has 1 or more SAC's, each appeal case shall be assigned to a particular FSA employee for handling as the FSA's representative.

- assisting, to the extent necessary, the employee assigned the case in assembling and preparing the case file
- reviewing all NAD determinations where FSA error has been found *** * *** and submit to ALS an analysis of NAD's determination and recommendation for the case to ALS according to paragraph 113
- ensuring that the employee assigned the responsibility for handling a case will be available and will attend scheduled NAD proceedings
- assuring that NAD determinations are properly and timely implemented

  Note: When there are questions about proper implementation, contact ALS and/or the respective National Office program division responsible for the subject, as necessary.

- ***--**monitoring receipt and implementation of final NAD determinations
- preparing report required in subparagraph 136 C**--***
- reviewing and distributing, as appropriate, copies of the NAD appeal summary that is generated by ALS (paragraph 5 and 7 CFR Part 780 (subparagraph 1 C)).

4 Coordinating Appeals in State Offices (Continued)

B Appeal Representative Duties

Employees designated or appointed as FSA representative for an appeal are responsible for:

- ensuring that FSA's interests are properly represented and that the integrity of FSA's and CCC's programs are protected

- managing FSA's administrative record by making sure that all relevant and pertinent documents, program operating guidelines, and applicable regulations are included

  Note: See paragraph 88 for instructions on records to be submitted to NAD.

- participating in the pre-hearing conference before a NAD appeal hearing

- submitting documents for inclusion in a NAD hearing record to NAD, appellant, and third parties

- preparing for the hearing

- appearing at the NAD hearing as FSA's authorized representative

- reviewing the NAD determinations according to paragraphs 111 through 114

- coordinating appeal activities with SAC

- working with SAC in consulting with the National Office on program issues relating to a specific case, including guidance on national policy and procedure, and, as appropriate, authority to resolve a case

- ensuring that NAD determinations are properly and promptly implemented within 30 calendar days of the effective date of the notice of the final NAD determination (paragraph 5).

5 NAD Case Activity Summary

A ALS Generated Report

ALS generates a report for internal FSA use showing active NAD cases and the status as of the dates shown on the report. Generally, the report is issued to State Offices weekly. SAC's and other interested FSA offices and employees are expected to use the report that includes information about:

- the due date for the Administrator to request a NAD Director review

- outcome or action required in response to individual NAD hearing officer determinations received by FSA

5 NAD Case Activity Summary (Continued)

A ALS Generated Report (Continued)

- active cases for which FSA has requested NAD Director review and comments about action that may be taken while FSA is waiting for the NAD determination

- active cases that were **not** submitted for NAD Director review and that may require additional FSA action and implementation

- active cases for which FSA or an appellant sought NAD Director reconsideration and outcome or action required

- a list of notices of appellant-filed requests for NAD Director review or reconsideration received by ALS and outcome or action required

- cases for which appealability determinations were made by NAD, received by ALS, and the outcome of the appealability determinations

*** * ***

- remaining cases due by a certain date pending disposition at NAD.

Notes: The NAD Case Activity Summary may **not** contain complete information on all appellant-filed requests for NAD Director review or on NAD appealability determinations, because copies of those documents are **not** always sent to ALS.
*** * ***

See Exhibit 4 for an example of a NAD Case Activity Summary.

*--6 State Supplements and Temporary Directives About Appeals and Litigation Matters

A SED Responsibilities

SED's shall issue State supplements and temporary directives about appeals and litigation matters according to 1-AS, Part 8.

B State Supplement and Temporary Directive Approval

Prior approval of all State supplements and temporary directives will be obtained from the--* Director, ALS, using the State Directives Management System outlined in 1-AS, Exhibit 8.

7 (Reserved)

Part 2 General Provisions

8 Decisions for Which 7 CFR Part 780 and This Handbook Apply

A Applicability

[7 CFR 780.4(a)(1)] Except as provided in other regulations, this part applies to decisions made under programs and by agencies, as set forth herein:

(i) Decisions in programs administered by FSA to make, guarantee or service farm loans set forth in chapter VII and XVIII of this title relating to farm loan programs;

(ii) Decisions in those domestic programs administered by FSA on behalf of CCC through State and county committees, or itself, which are generally set forth in chapter XIV of this title, or in part VII relating to conservation or commodities;

(iii) Appeals from adverse decisions, including * * * determinations made by NRCS under title XII of the Food Security Act of 1985, as amended;

(iv) Penalties assessed by FSA under the Agricultural Foreign Investment Disclosure Act of 1978, 5 U.S.C. 501 *et seq.*;

(v) Decisions on equitable relief made by a State Executive Director or State Conservationist pursuant to Section 1613 of the Farm Security and Rural Investment Act of 2002, Pub. L. 107-171;

(vi) Other programs to which this part is made applicable by specific program regulations or notices in the Federal Register.

For FOIA and Privacy Act appeals, follow Part 7.

8 Decisions for Which 7 CFR Part 780 and This Handbook Apply (Continued)

B Prohibited Reviews

[7 CFR 780.4(a)(2)] The procedures contained in this part may not be used to seek review of statutes or regulations issued under Federal law or review of FSA's generally applicable interpretations of such laws and regulations.

Note: An explanation of policy or requirements does **not** constitute a program decision or eligibility determination. Likewise, a notice sent communicating what options may be selected by a participant do **not** communicate a decision that can be challenged. Consequently, communications of this sort, whether in writing or verbal, should **not** convey an opportunity to seek appealability, reconsideration, mediation, or appeal.

C Decision-Makers Subject to FSA's Informal Appeals Process

[7 CFR 780.4(a)(3)] For covered programs, this part is applicable to any decision made by an employee of FSA or of its State and county committees, CCC, the personnel of FSA, or CCC, and by the officials of NRCS to the extent otherwise provided in this part, and as otherwise may be provided in individual program requirements or by the Secretary.

Notes: Decisions of the Administrator and Deputy Administrators are considered final decisions **not** subject to mediation, reconsideration, or further appeal within FSA. They are, therefore, outside the scope of the FSA informal appeals process.

Although decisions of the Administrator or Deputy Administrator are final for NAD appeal purposes, in exceptional cases the Administrator or a Deputy Administrator may exercise discretion to reconsider a decision or to refer a matter to mediation. Any decision on reconsideration or appeal within FSA will constitute a new decision for time limitation purposes for any subsequent appeal within FSA or to NAD.

9 Appealable Issues

A Issues for Which Appeals Are Applicable

[7 CFR 780.4(b)] With respect to the matters identified in 780.4(a) (quoted in subparagraph 8 A)**, participants may request appealability review, reconsideration, mediation, or appeal under the provisions of this part of decisions made with respect to:**

(1) Denial of participation in a program;

(2) Compliance with program requirements;

(3) Issuance of payments or other program benefits to a participant in a program; and

(4) Determinations under title XII of the Food Security Act of 1985, as amended, made by NRCS.

Participants may seek appealability review, reconsideration, mediation, or appeal of decisions made along with a program application, form, agreement, or contract. The decision may be any of the following:

- a denial of benefits or payment under an application or contract

- compliance with program requirements

  Example: Livestock are discovered grazing on a participant's CRP crop acreage. The participant is notified that the participant is violating CRP provisions because the participant has failed to comply with the requirement **not** to permit or allow livestock to graze CRP crop acreage. Although the participant **cannot** appeal the program provision that prohibits grazing, the participant could attempt to show on appeal that FSA's findings are inaccurate.

- NRCS *** * *** determinations according to Part 4

- errors in documentation and calculations necessary to determine program eligibility

- errors in calculations and documentation to determine ability to repay FLP assistance, either in connection with loan servicing or a request for a new loan

- all matters relating to correctly applying regulations pertinent to an issue of fact

9 Appealable Issues (Continued)

A Issues for Which Appeals Are Applicable (Continued)

- appraising security except negotiated appraisals related to primary loan servicing

- whether a participant is farming in a farmer-like manner.

B Who May Seek Review of FSA Program Decisions

[7 CFR 780.4(c)] Only a participant directly affected by a decision may seek administrative review under 7 CFR 780.5(c).

***--**Participants include third parties who are directly affected by a determination. Determinations only result after an application, form, or contract is signed by a participant.

10 Matters Outside the Jurisdiction of 7 CFR Part 780 and the Informal Appeals Process

A Matters Outside the Scope

Generally, only program determinations, including eligibility decisions and extent of eligibility decisions **issued in response to particular applications, contracts, loan agreements, or similar instruments**, are subject to appeal, mediation, or appealability. Other matters (see examples in this subparagraph), are **not** decisions issued to participants or matters subject to appeal, mediation, or appealability. Accordingly, verbal or written communications about the following issues or examples shall **not** be construed to be an adverse decision that gives rise to any appeal, mediation, or appealability review right.

The following are examples of matters or issues outside the scope of 7 CFR Part 780 and the informal appeals process:

- written or verbal responses to inquiries about eligibility, extent of eligibility, or status that are **not** the result of a specific application, contract, or other similar document under which a participant is seeking an administrative determination.

  Note: A response to an inquiry, even if about an earlier determination or decision or appeal, shall **not** be construed to be a reopening of a case or a new determination giving rise to any sort of appeal, review, or appealability rights (paragraph 25).

- matters decided by FSA or someone else, but **not** in response to an individual applicant or participant

- issues that do **not** result in individual determinations, but which may or may **not** impact individual applications; such as definitions of eligible crops, prices, average yields, factors, signup dates or deadlines, or other generally applicable matters **not** decided in response to any specific application, applicant, or participant**--***

*--10 Matters Outside the Jurisdiction of 7 CFR Part 780 and the Informal Appeals Process (Continued)

A Matters Outside the Scope (Continued)

- decisions resulting from matters administered with funding furnished by non-Federal providers

- matters administered by FSA for or on behalf of others under Memorandums of Understanding with USDA agencies

  Example: TAA programs are **not** CCC or FSA programs and are **not** subject to FSA or CCC regulations, including relief regulations. Accordingly, adverse decisions under TAA are **not** reviewable administratively by FSA or NAD.

- decisions or communications about nonprogram loans

- anything about FSA's handling or priority of assignments of payments

- denying access to records or other information under FOIA or Privacy Act and implementing regulations, directives, and notices that are appealable under FOIA or the Privacy Act (Part 7)

- an FSA reviewing authority's refusal to consider equitable relief

  Note: Relief determinations are subject to appeal; however, FSA's electing **not** to consider relief is **not** an adverse decision giving rise to any appeal, mediation, or appealability right. Relief is entirely discretionary; participants are **not** entitled to relief or consideration of relief.

- administrative matters, such as where FSA locates Service Centers or provides structures for conducting FSA business

- a lack of program funding

- U.S. grain standard determinations made under CCC loan and purchase programs

- interest rates established by either FSA or CCC

- refusal by SED or any other FSA official or committee to consider, request, or further a request for administrative waiver, variance, or relief

- requirements that participants furnish information such as cash flow statements, farm operating plans, applications, etc.

- withholding payments according to 7 CFR Part 1403 and 58-FI.--*

***--10 Matters Outside the Jurisdiction of 7 CFR Part 780 and the Informal Appeals Process (Continued)**

B Handling Decisions Outside the Scope

If FSA issues a verbal or written communication or statement for any of the matters or issues identified in subparagraph A, the communication or statement shall **not** do either of the following:

- include a determination of eligibility or extent of eligibility
- provide any appeal, mediation, or appealability review rights.**--***

11 Nonappealable Decisions

A Decisions That Are Not Appealable

--[7 CFR 780.5(a)] Decisions that are not appealable under this part shall include those based on the following:--

(1) Any general program provision or program policy or any statutory or regulatory requirement that is applicable to similarly situated participants;

(2) Mathematical formulas established under a statute or program regulation and decisions based solely on the application of those formulas;

(3) Decisions made pursuant to statutory provisions that expressly make agency decisions final or their implementing regulations;

(4) Decisions on equitable relief made by a State Executive Director or State Conservationist pursuant to Section 1613 of the Farm Security and Rural Investment Act of 2002, Pub. L. 107-171;

(5) Decisions of other Federal or State agencies;

(6) Requirements and conditions designated by law to be developed by agencies other than FSA;

(7) Disapprovals or denials because of a lack of funding;

(8) Decisions made by the Administrator or a Deputy Administrator that may otherwise be appealable under this part.

--**Only decisions are subject to appeal, mediation, or appealability provisions. For examples of matters or issues that are **not** decisions, see paragraph 10.**--

11 Nonappealable Decisions (Continued)

B Examples of Decisions That Are Not Appealable

The following are examples of some things that are **not** appealable:

- ***--**decisions based on program or administrative provisions, policies, or statutory or regulatory requirements that are generally applicable to all similarly situated participants and there is no dispute of fact**--***

- determinations that are solely the result of mathematical calculations made according to a prescribed formula

- ***--**determinations based on U.S. grain standard determinations made under the CCC loan and purchase programs

- decisions based on interest rates established by either FSA or CCC**--***

- denying assistance or payment because of a lack of program funding

*** * ***

- ***--**determinations based on program provisions precluding any particular type of**--*** organization, individual, or entity from being considered an eligible participant

*** * ***

- negotiated appraisals relating to primary loan servicing programs

*** * ***

- ***--**decisions based on requirements and conditions designated by law to be developed by agencies other than FSA; such as flood plain designations, archaeological and historical area preservation requirements, areas designated as inhabited by endangered species, etc.

  Note: In these examples, the program determination or decision would be considered a nonappealable decision if there were no other facts in dispute. Follow paragraph 15.**--***

12 Required Elements of an Adverse Decision Letter

A FSA Policy About Required Elements of an Adverse Decision Letter

Generally, to minimize confusion on the part of participants, FSA does **not** issue letters notifying participants of the opportunity to challenge, seek reconsideration, or appeal, favorable decisions. However, FSA is required by law and regulation to notify participants of adverse decisions. Those notification letters **must** contain the following common elements:

- background; a brief narrative explaining the reason for the letter
- general program provisions; a statement about the program for which the participant filed an application, executed a contract, sought a determination, or the provision that brought about the need for an administrative determination
- FSA's findings; a general discussion of the pertinent facts based on specific references to either the application, contract, information submitted by the participant, or other relevant information or evidence that can be and is specifically cited and referenced in the decision letter
- discussion; a narrative explaining the findings together with the general program provisions
- determination; FSA's decision based on the general program provisions, findings, and discussion
- mandatory language for adverse decision letters, as applicable (paragraph 14).

12 Required Elements of an Adverse Decision Letter (Continued)

B Letter Content

Use plain and simple language and terminology, with a minimum of acronyms and abbreviations that participants and others can easily understand.

Decision letters should contain as much information as possible summarizing all pertinent information and program provisions that could be relevant to the determination. A good decision letter:

- is a letter that adequately summarizes and explains everything that matters about a case
- should require little additional information to explain what is really at issue in a case.

The decision letter is the starting point for the next administrative review authority.

See Exhibits 8 and 15 for examples of adverse decision letters.

13 Appeal and Review Options in FSA's Informal Appeals Process

A Options to Give Participants in Appealable Adverse Decisions

When notifying a participant of an adverse decision, use the applicable language in
*--paragraph 14 to provide the right to request reconsideration, appeal, or mediation according to the following table.

Note: This does **not** apply to:

- matters that do **not** fall within the scope or jurisdiction of 7 CFR Parts 11 and 780 (paragraph 10)

- decisions that are **not** appealable (paragraph 15).--*

IF the adverse decision is made by…	THEN provide the right to…
COC employee	appeal to COC.
*--COC	reconsideration, appeal to STC, mediation, and appeal to NAD.
STO employee (not FLO, FLM, or SED)	
FLO	reconsideration, mediation, and appeal to--* NAD.
FLM	
SED **Exception:** SED relief determinations have **no** review or appeal rights.	
STC	
National Office official	appeal to NAD.

Exhibit 8 provides examples of some decisions made by various FSA officials or committees.

13 Appeal and Review Options in FSA's Informal Appeals Process (Continued)

B Options to Give Participants in Reconsideration Decisions

When notifying a participant of an adverse reconsideration, use the applicable language in *--paragraph 14 to provide the right to appeal and request decision according to the following--* table.

IF the reconsideration decision is made by…	THEN provide the right to…
*--COC	appeal to STC, mediation, and appeal to NAD.
STO employee (not FLO, FLM, or SED)	
FLO	mediation and appeal to NAD.--*
FLM	
SED **Exception:** SED relief determinations have **no** review or appeal rights.	
STC	

C Options to Give Participants in Appeal Decisions

When notifying a participant of an adverse appeal decision, use the applicable language in *--paragraph 14 to provide the right to appeal and request mediation according to the--* following table.

IF the adverse appeal decision is made by…	THEN provide the right to…
COC	*--appeal to STC, mediation, and appeal to NAD.
STC	mediation and appeal to NAD.

Exceptions: Do **not** provide the right to mediation if FSA and the participant have--* previously mediated the issue or otherwise completed mediation.

For NRCS Title XII determinations, follow Part 4.

14 Mandatory Language to Insert in Adverse Decision Letters

A Language Requirements

The applicable **mandatory** language in subparagraphs B through F shall be used, as applicable pursuant to paragraph 13, in **all** adverse decision letters.

Exceptions: For farm loan servicing actions, the forms and exhibits provided in pertinent FLP directives or regulations **must** be used when notifying participants of adverse decisions.

For NRCS *** * *** determinations, follow Part 4.

Exhibit 8 provides examples of some decisions made by various FSA officials or committees.

B Appeal to COC

The following language shall be used, as applicable pursuant to paragraph 13:

> "You may appeal this determination to the County Committee by filing a written request no later than 30 calendar days after you receive this notice in accordance with the FSA appeal procedures found at 7 CFR Part 780. If you appeal to the County Committee, you have the right to an informal hearing which you or your representative may attend either personally or by telephone. If you appeal this determination to the County Committee, you may later appeal an adverse determination of the County Committee to the FSA State Committee or the National Appeals Division. To appeal, write to the County Committee at the following address and explain why you believe this determination is erroneous. (*Insert COC address*.)"

14 Mandatory Language to Insert in Adverse Decision Letters (Continued)

C Reconsideration

--**The following language shall be used, as applicable pursuant to paragraph 13:**--

> "You may request that the (*insert COC, FLO, FLM, SED, or STC, as applicable*) reconsider this determination by filing a written request no later than 30 calendar days after you receive this notice according to FSA's appeal procedures found at 7 CFR Part 780. If you request reconsideration, you have the right to an informal hearing with (*insert COC, FLO, FLM, SED, or STC, as applicable*) that you or your representative may attend personally or by telephone. If you choose to seek reconsideration, you may later appeal the determination to (*insert STC or NAD, as applicable*). To request reconsideration, write to (*insert COC, FLO, FLM, SED, or STC, as applicable*) at the following address and explain why you believe this determination is erroneous. (*Insert applicable address*.)"

D Appeal to STC

--**The following language shall be used, as applicable pursuant to paragraph 13:**--

> "You may appeal the County Committee's determination to the State Committee by filing a written request no later than 30 calendar days after you receive this notice in accordance with the FSA appeal procedures found at 7 CFR Part 780. If you appeal to the State Committee, you have the right to an informal hearing that you or your representative may attend either personally or by telephone. If you choose to appeal to the State Committee, you may later appeal the determination of the State Committee to the National Appeals Division. If you appeal an initial decision of a County Committee to the State Committee, you waive your right to reconsideration by the County Committee of that decision. To appeal, write to the State Committee at the following address and explain why you believe this determination is wrong. (*Insert STC address*.)"

14 Mandatory Language to Insert in Adverse Decision Letters (Continued)

--E Mediation--

States **without** a USDA Certified State Mediation Program shall use the following:

> "Mediation is available as part of FSA's informal appeal process. Mediation may enable us to narrow the issues and resolve the matter by mutual agreement. You may have to pay all or part of the cost of mediation. If you request mediation, the running of the timeframe in which you may file an appeal stops. When mediation closes, the clock restarts and you will have the balance of the days remaining in that period to file an appeal. To request mediation, you must submit your written request no later than 30 calendar days after you receive this notice. To request mediation, write to the FSA State Executive Director at the following address. (*Insert SED address*.)" *** * ***

States **with** a USDA Certified State Mediation Program shall use the following:

> "Mediation is available as part of FSA's informal appeal process. Mediation may enable us to narrow the issues and resolve the matter by mutual agreement. You may have to pay all or part of the cost of mediation. If you request mediation, the running of the timeframe in which you may file an appeal stops. When mediation closes, the clock restarts and you will have the balance of the days remaining in that period to file an appeal. To request mediation, you must submit your written request no later than 30 calendar days after you receive this notice. To request mediation, write to the (*insert State name*) State mediation program at the following address and provide a copy of your request for mediation to FSA. (*Insert mediation program address or other address as agreed on by the State certified mediation program and FSA State Office*.)" *** * ***

14 Mandatory Language to Insert in Adverse Decision Letters (Continued)

F Appeal to NAD

The following is the **mandatory** language to insert in adverse decision letters:

> "You may appeal this determination to the National Appeals Division (NAD) by filing a written request no later than 30 calendar days after you receive this notice according to the NAD appeal procedures found at 7 CFR Part 11. If you appeal to NAD, you have the right to a hearing that you or your representative may attend. Once a hearing with NAD begins, you waive any rights you might have to reconsideration, appeal to FSA, and mediation. To appeal, you must write to NAD at the following address, explain why you believe this determination is erroneous, and provide a copy to FSA. You must personally sign your written appeal to NAD and include a copy of this letter. (*Insert NAD address*.)
>
> If you do not timely exercise one of the preceding options, this shall be the final administrative determination with respect to this matter according to the regulations at 7 CFR Part 780 and 7 CFR Part 11."

*--15 Decisions Based on Issues That Are Nonappealable

A Nonappealable Adverse Determinations

Paragraph 11 describes some decisions based on issues that are not appealable. Decisions--* involving cases that do not have any disputes of fact are not appealable. Participants have the right to appeal when there is a question of fact or when there is some dispute as to the correct application of a rule, regulation, or generally applicable provision. However, participants **cannot** appeal the rules, regulations, or generally applicable provisions themselves. Letters notifying participants that a decision is not appealable **must** clearly explain to the participant the reasons that the decision is not appealable. Avoid using general and vague statements that do not sufficiently demonstrate the reasons that the decision is not appealable.

--15 Decisions Based on Issues That Are Nonappealable (Continued)--

B Mandatory Language to Insert in a Nonappealable Adverse Determination Letter About the Right of Appealability Review

Participants may request that SED or NAD Director review the FSA determination that an adverse decision is **not** appealable. After fully explaining the adverse decision according to paragraph 5, and the reasons why the facts in the case are **not** in dispute, include the following mandatory language in the adverse decision:

> "(*Insert, as applicable, "I have", The COC has" or The STC has"*) determined that the issue is not appealable. You may seek a review of this determination by filing with either the FSA State Executive Director or the National Appeals Division (NAD) Director a written request no later than 30 calendar days after the date you receive this notice according to the FSA appeal procedures found at 7 CFR Part 780 or the NAD appeal procedures found at 7 CFR Part 11. If you believe that this issue is appealable, you must write to either the FSA State Executive Director or the NAD Director at the applicable address shown and explain why you believe this determination is appealable. If you choose to seek an appealability review of this determination with the FSA State Executive Director, you need not send the NAD Director any information. If you seek an appealability review with the NAD Director, provide FSA a copy of your request. If you request an appealability review by the State Executive Director and the State Executive Director determines that the issue is not appealable, you will be afforded the right to request an appealability review by the NAD Director. (*Insert SED and NAD addresses*.)"

Exception: If a COC employee determines that a decision is **not** appealable, replace the mandatory language in this subparagraph with the following:

> "I have determined that the issue is not appealable. You may seek a review of this determination by filing with the FSA State Executive Director a written request no later than 30 calendar days after the date you receive this notice according to the FSA appeal procedures found at 7 CFR Part 780. If you believe that this issue is appealable, you must write to the FSA State Executive Director at the address shown and explain why you believe this determination is appealable. If the FSA State Executive Director determines that the issue is not appealable, you will be afforded the right to request an appealability review by the National Appeals Division Director. (*Insert SED address*.)"

*--15 Decisions Based on Issues That Are Nonappealable (Continued)

C Actions Required Following SED Appealability Determination

The following table describes the action required for the various SED appealability determinations.--*

IF SED's appealability determination is that the adverse decision is…	THEN provide the right to…
appealable	*--reconsideration, appeal, mediation, or--* appeal to NAD, as applicable, according to paragraph 13.
not appealable	seek an appealability review from NAD according to subparagraph 15 D.

D Mandatory Language to Insert in Notification of SED Non-Appealability Determination

If, after performing a review of appealability SED finds or determines that the matter or issue being contested is a matter or issue that is **not** appealable, the participant may request that the NAD Director review the FSA adverse determination and SED appealability determination. After fully explaining the adverse determination and basis upon which the SED determined it was not appealable, include the following **mandatory** language in SED's non-appealability determination:

> "(*Insert, as applicable, "I have", The SED has,"*) determined that the issue is not appealable. You may seek a review of this determination by filing, with the National Appeals Division (NAD) Director, a written request no later than 30 calendar days after the date you receive this notice according to the NAD appeal procedures found at 7 CFR Part 11. If you believe that this issue is appealable, you must write to the NAD Director at the address shown and explain why you believe this determination is appealable. If you choose to seek an appealability review with the NAD Director, provide FSA a copy of your request. (*Insert NAD address*.)"

16 Time Limits for Issuing Adverse Determinations and Filing Requests for Appealability, Reconsideration, Mediation, or Appeal

A Time Limitation For Issuing an Adverse Decision

[7 CFR 780.15(a)] To the extent practicable, no later than 10 business days after an agency decision maker renders an adverse decision that affects a participant, FSA will provide the participant written notice of the adverse decision and available appeal rights.

1994 Act, Section 274 **[7 U.S.C. 6994]** requires that FSA provide written notice of an adverse decision and notice of appeal rights no later than 10 workdays after the decision is made. Accordingly, written notice of **any** FSA decision that may be considered adverse **must** be mailed or personally delivered to a participant no later than 10 workdays after FSA renders the decision.

B Time Limitation For Requesting Appealability Review, Reconsideration, Mediation, or Appeal

[7 CFR 780.15(b)] A participant requesting an appealability review by the State Executive Director of an agency decision made at the county, area, district, or State level that is otherwise determined by FSA not to be appealable must submit a written request for an appealability review to the State Executive Director that is received no later than 30 calendar days from the date a participant receives written notice of the decision.

[7 CFR 780.15(c)] A participant requesting reconsideration, mediation, or appeal must submit a written request as instructed in the notice of decision that is received no later than 30 calendar days from the date a participant receives written notice of the decision.

16 Time Limits for Issuing Adverse Determinations and Filing Requests for Appealability, Reconsideration, Mediation, or Appeal (Continued)

C When a Request is Considered Filed

[7 CFR 780.15(e)(2)] The date when an adverse decision or other notice pursuant to these rules is deemed received is the earlier of physical delivery by hand, by facsimile with electronic confirmation of receipt, actual stamped record of receipt on a transmitted document, or 7 calendar days following deposit for delivery by regular mail.

A request for appealability, reconsideration, mediation, or appeal shall be considered "filed" on the date:

- the request was personally delivered, in writing, to the appropriate reviewing authority
- of postmark, if the request is mailed and properly addressed with adequate postage paid

  Note: If a request is received by mail and does **not** have a postmark, was **not** properly addressed, or had postage due, the request shall be considered filed on the date the request was received by the appropriate reviewing authority.

- a complete FAX copy is received by the reviewing authority.

16 Time Limits for Issuing Adverse Determinations and Filing Requests for Appealability, Reconsideration, Mediation, or Appeal (Continued)

D Requests Not Timely Filed

[7 CFR 780.15(d)] Notwithstanding the time limits in paragraphs (b) and (c) of this section, a request for an appealability review, reconsideration, mediation, or appeal may be accepted if, in the judgment of the reviewing authority with whom such request is filed, exceptional circumstances warrant such action. A participant does not have the right to seek an exception under this paragraph. FSA's refusal to accept an untimely request is not appealable.

SED, FLM, FLO, COC, or STC as reviewing authority, may consider a request for appealability, appeal, mediation, or reconsideration that is **not** filed timely if the circumstances warrant such action. The reviewing authority **must** document, in writing, the reasons for accepting a late-filed request.

Note: Even though requests for mediation may be made by participants directly to the State mediation program according to paragraph 13, it remains FSA's responsibility to determine if the request for mediation was timely filed. FSA's authority to render a decision about the timeliness of any request for mediation is **not** delegated to any State mediation program. FSA reserves the right to refuse to accept any untimely request for mediation.

16 Time Limits for Issuing Adverse Determinations and Filing Requests for Appealability, Reconsideration, Mediation, or Appeal (Continued)

E Misdirected Requests

If a request for appealability, reconsideration, mediation, or appeal is filed with an improper reviewing authority:

- acknowledge the request
- advise the appellant that the request is being referred to the proper authority for consideration.

Unless there is documentary evidence to show that the misdirected request for appealability, reconsideration, mediation, or appeal was itself **not** timely, do **not** deny appealability ***--**requests or requests for reconsideration, mediation, or appeal because of misdirection.**--*** Appealability decisions, reconsideration, mediation, or appeal should **not** be denied merely because the misdirection delayed receipt by the proper reviewing authority.

F Processing Late-Filed Requests for Appealability, Reconsideration, or Mediation or Appeal

Subparagraph D specifies that a participant does **not** have a right to an exception to the time limit set for filing requests for appealability, reconsideration, mediation, or appeal within FSA. FSA's authority and discretion, under subparagraph D and 7 CFR 780.15(d), to accept late filed requests, is **not** and should **not** be considered to be a relief determination giving rise to further appeals. An FSA decision **not** to accept a late-filed FSA appeal is final and **not** subject to further review or appealability review.

If written requests for appealability, reconsideration, mediation, or appeal are received beyond the time period specified in subparagraph B and 7 CFR 780.15, the FSA reviewing authority shall notify the participant that the request (for appealability, reconsideration, mediation, or appeal) was 1 of the following:

- **not** filed timely with FSA and; therefore, will **not** be further processed (Exhibit 10)
- considered **not** timely filed, but that the participant has 7 workdays to provide FSA a written explanation of why the late-filed request (for appealability, reconsideration, mediation, or appeal) should be accepted for further processing (Exhibit 11)
- accompanied by a satisfactory written explanation for such late-filing will be processed (paragraph 17).

16 Time Limits for Issuing Adverse Determinations and Filing Requests for Appealability, Reconsideration, Mediation, or Appeal (Continued)

F Processing Late-Filed Requests for Appealability, Reconsideration, or Mediation or Appeal (Continued)

IF…	THEN the FSA reviewing authority with whom the late-filed request was submitted shall do either of the following:
FSA receives both of the following: • a written request for appealability, reconsideration, mediation, or appeal, as applicable • a timely filed written explanation for such late-filing	accept the late-filed request for appealability, reconsideration, mediation, or appeal, as applicable. **Note:** Proceed according to paragraph 17 the same as if the late-filed request had been timely filed.
	decline to accept the late-filed request for appealability, reconsideration, mediation, or appeal, as applicable. The participant shall be notified that FSA's decision **not** to further process the late-filed request for appealability, reconsideration, mediation, or appeal is administratively final and **not** subject to further review or appeal. **Note:** The participant **cannot** challenge or seek appealability from NAD on this FSA determination. See Exhibit 12 for an example letter.

17 Acknowledging Requests and Preparing for Informal Hearings, Meetings, and Appeals

A Acknowledgement Letter

Handle requests for appealability, reconsideration, or mediation according to the following table.

IF the participant is seeking…	THEN…
an appealability review by the SED	a separate acknowledgement is **not** required. The SED shall issue an appealability decision according to subparagraph 15 C.
reconsideration or appeal	issue an acknowledgement letter (Exhibit 13) informing the appellant: • of the right to an informal hearing or meeting with the reviewing authority • that a copy of FSA's administrative record will be sent to the appellant's address of record in advance of the hearing • of the scheduled date, time, and location of the hearing or meeting **Note:** Allow at least 10 calendar days notice, unless waived by the appellant. • that the hearing may be a personal hearing or may be by telephone, if sufficient telephone equipment is available • that if the appellant or representative **cannot**, or chooses **not** to, attend the hearing or meeting, the appellant may submit written comments **before** the scheduled review • that the Government does **not** reimburse appellants for expenses incurred with an informal hearing or meeting • that the appellant has the right to request a verbatim transcript of the hearing at appellant's expense through FSA's contract service, if such request is received by FSA at least 7 calendar days before the hearing.

17 Acknowledging Requests and Preparing for Informal Hearings, Meetings, and Appeals (Continued)

A Acknowledgement Letter (Continued)

IF the participant is seeking…	THEN in a…
mediation	**certified State,** the USDA Certified State Mediation Program should make all arrangements for the mediation process. **noncertified State**, SED shall determine whether resources are available for mediation, locate and select a mediator, and issue a letter providing the participant notice of the mediation.

B Reviewing Authority Action

Before each reconsideration or appeal hearing, meeting, or appeal, the reviewing authority shall take the following actions.

Step	Action
1	Review the letter from the participant seeking the reconsideration or appeal and obtain a copy of the adverse decision that gave rise to the participant's (appellant's) letter.
2	Obtain a copy of the administrative record that was the basis for the adverse ***--**decision. Provide a copy to appellant (paragraph 19). Ensure that all relevant**--*** documents referenced by the appellant and those mentioned or referenced in the decision letter are contained in the administrative record (paragraph 22).
3	Using the format in Exhibit 9, prepare a written summary of the case that contains: • **all** important issues pertinent to the matter being considered, about all regulations and FSA operating procedure applicable to the decision under review • a clear, concise statement of appellant's position to the extent known, **before** the hearing • a list of **all** the known individuals that will be present. **Note:** The summary should be relatively easy to prepare if the FSA reviewing authority that made the decision issued a decision letter containing all the required elements mentioned in paragraph 12.

17 Acknowledging Requests and Preparing for Informal Hearings, Meetings, and Appeals (Continued)

B Reviewing Authority Action (Continued)

Step	Action
4	Send an acknowledgement letter according to paragraph 17 to the appellant and all persons affected by the matter notifying them of their right to be present or to submit information for consideration. **Note:** Persons affected could include all owners on a farm or participants listed on a contract or application, signatories to loan documents, etc.
5	Arrange for preparation of a verbatim transcript, if applicable (paragraph 18).
6	Review the summary prepared, in step 3, and have a thorough understanding of the issues and matter.
7	Obtain any additional information needed to ensure that sufficient facts are available to adequately address all the pertinent issues in the matter, whether or not the pertinent issues in the matter are brought up by the appellant. **Note:** See Part 4 about appeals of NRCS *** * *** determinations.

18 Verbatim Transcripts

A Prohibition on Unauthorized Recordings

[7 CFR 780.13(a)] Appellants and their representatives are precluded from making any electronic recording of any position of a hearing or other proceeding conducted in accordance with this part.

B Requesting Verbatim Transcripts

[7 CFR 780.13(b)] Any party to an appeal or request for reconsideration under this part may request that a verbatim transcript be made of the hearing proceedings and that such transcript be made the official record of the hearing. The party requesting a verbatim transcript shall pay for the transcription service, provide a copy of the transcript to FSA free of charge, and allow any other party in the proceeding desiring to purchase a copy of the transcript to order it from the transcription service.

IF the request for verbatim transcript is by…	THEN arrangements for a court reporter shall be made by FSA provided that…
or from the appellant or a party to the appeal other than FSA	• the request for transcript is received by FSA at least 7 calendar days before the hearing so that FSA can arrange for the transcript • the requester has agreed to pay the expense of preparing the transcript. **Note:** FSA may reschedule the hearing to obtain a court reporter in cases where FSA receives the request less than 7 calendar days before the hearing. In cases where a default determination may otherwise apply, notify the appellant, in writing, that FSA deems such request to be a waiver of the time line for a default determination.
FSA	the reviewing authority or other responsible FSA official has deemed that a transcript is necessary.

Whether requested by the appellant, a party other than the appellant, or FSA, an official transcript will be made **only** of the evidentiary phase of the hearing or meeting and **not** the deliberative phase of the hearing or meeting.

If requested by the appellant or a party to the appeal other than FSA, a transcript shall **only** be made if the appellant or party to the appeal is present (personally or by telephone) during the meeting or hearing.

18 Verbatim Transcripts (Continued)

B Requesting Verbatim Transcripts (Continued)

If a transcript is prepared for a meeting or hearing according to these instructions, FSA shall **not** make an administrative decision until they receive and review the transcript.

Exception: A statute, regulation, court order, or other compelling document or interest might cause FSA to need to issue a decision before receiving a verbatim transcript. If such need arises, contact ALS for guidance.

C Going Off the Record

Where verbatim transcripts are being made, **only** the reviewing authority shall instruct the reporter to go off the record. The reviewing authority should instruct the reporter to go off the record:

- whenever requested by the chairperson or individual designated by FSA as in-charge of the hearing or meeting
- when addressing matters **not** pertinent or relevant to the hearing record
- when discussing general questions or logistical matters
- **before** deliberating on the case.

19 Due Process and Appellant Document Access

A Due Process

FSA's policy is to allow participants due process in administrative appeals. Accordingly, the reconsideration or appeal proceedings will be conducted according to established rules and principles for the protection and enforcement of participants' rights, including notice and the right to a fair hearing before a reviewing authority with the power to decide the case.

In all cases, the FSA reviewing authority **must** provide an appellant:

•***--**a copy of FSA's record for the decision in advance of the hearing (subparagraph B)**--***

- an opportunity to participate in an informal hearing *** * ***

- a written summary in advance of the hearing *** * *** (paragraph 17 and Exhibit 9) stating the issues to be considered

- the right to retain and be represented by counsel

- the right to present verbal and written evidence about the stated issues

  Note: An appellant may ask FSA *** * *** questions in the course of the reconsideration or appeal hearing to obtain a better understanding of the administrative review process or of the case file circumstances. However, the reconsideration or appeal hearing or meeting is **not** a forum for subjecting FSA reviewing authorities, employees, or COC members to examination. Rather, the hearing is a means by which an appellant can furnish facts and evidence to show FSA's decision is in error or contrary to rules. FSA employees and COC members are under no obligation to subject themselves to examination by either the appellant or the appellant's authorized representative.

•***--**the impartial decision based solely on the facts and arguments presented and in the**--***
case record

19 Due Process and Appellant Document Access (Continued)

A Due Process (Continued)

- a concise written statement of the decision reached (see Exhibit 15 for the suggested format); the determination **must**:

  - address **all** of appellant's arguments

  - state the factual basis for the determination of each issue under review

  - for each issue, cite and, where appropriate, quote from the authority for the determination, such as regulations, program procedure, contract provisions, security agreement, etc.

  - include the remaining available appeal or review rights.

B Providing Documents to Appellant

All records in the administrative file considered in making the determination under appeal, *****--including information obtained from OIG, **must** be in FSA's record and be available to the--***** appellant *** * ***, unless the information in a record is protected by any of the following:

- attorney-client privilege
- deliberative process privilege
- FOIA or the Privacy Act, according to 2-INFO and 3-INFO
- other legally enforceable restrictions.

Any record that exists but **cannot** be made available, such as certain investigation reports, **cannot** be considered by the reviewing authority. Records or information that may reflect on the protected privacy interests of an individual or entity not a party to the appeal, **must** be *****--redacted from copies released and before consideration (subparagraph C).--*****

Requests by a participant for information not in a participant's administrative file should be handled pursuant to the procedures applicable to FOIA and Privacy Act requests, including notice of appeal rights under FOIA and the Privacy Act with respect to any denials of requests for information.

Note: Records that can be disclosed to an appellant in redacted form, or by extracting relevant pages only, should be used and placed in the record **only** as made available in redacted form.

19 Due Process and Appellant Document Access (Continued)

C OIG Reports and Audit and Investigative Records

Direct any questions about reports or documents about OIG audits or investigations to ORAS. See 9-AO for additional guidance. Direct questions about whether to include documents or information in the record to ALS.

D NRCS Records

When handling appeals of NRCS Title XII decisions, documents obtained from NRCS will be included in the administrative record. The appellant is entitled to a copy of the documents on which the decision was based. Therefore, if a document is obtained from NRCS and is part of the administrative record on which the decision was made, the appellant is entitled to receive a copy of that document.

Forward to NRCS any requests for NRCS documents that do **not** appear or are **not** included in the administrative record.

E Using 2-INFO and 3-INFO

Follow 2-INFO and 3-INFO if:

- an appellant requests copies of information upon which a determination was made
- providing an appellant with information in an audit or investigation report.

20 Conducting Meetings and Informal Hearings

A Required Actions

The reviewing authority **must** take the following actions.

Step	Action
1	Conduct the hearing or meeting as necessary to establish a record of material facts of the case. The chairperson, presiding official, or reviewing authority shall be in charge of conducting the hearing or meeting.
2	Ensure that an accurate and concise written record of the hearing or meeting is maintained. The administrative record **must** include: • statements of the appellant's position • names of all persons present at any time during the hearing • proper identification of all documents presented as evidence • all other information developed during the hearing or meeting.
3	Make every effort to ensure that the appellant understands the specific issues under consideration.
4	Give the appellant or the appellant's authorized representative an opportunity to present, either in writing or verbally, any facts and information about the matter being considered. During the course of the written or verbal presentation: • ask sufficient questions to ensure that the appellant has an opportunity to address all issues of fact that could affect the determination • confine presentation to facts and evidence pertinent to the determination • exclude irrelevant material or repetitious evidence, information, or questions; be lenient in favor of the appellant if there is any possibility the information is material • require appellants to provide documentation to support the presentation, as necessary, to verify appellant's oral testimony and substantiate appellant's claims • provide the appellant the right to question witnesses if present in the hearing.
5	Close the hearing if the appellant or representative does **not** appear within a reasonable period after the actual scheduled time. Proceed with review of adverse determination, considering all information available.

20 Conducting Meetings and Informal Hearings (Continued)

B Discretion to Call Others

The reviewing authority may request or permit other persons, in addition those appearing on behalf of the appellant, to give information or evidence.

C Prohibited Actions

The reviewing authority must **not**:

- during the hearing:
  - permit the presence of a representative of the lower reviewing authority
  - contradict or pass judgment on the appellant's statement of position
  - indicate or imply whether the review decision will be favorable or unfavorable

    Note: Even though the argument may be in error, allow the position to be stated for the record. If in error, it may be addressed as being irrelevant or in error.

- allow the appellant to be present during deliberation or have the deliberations recorded by verbatim transcript.

20 Conducting Meetings and Informal Hearings (Continued)

D Post-Hearing Action

After the hearing concludes, the reviewing authority may hold the record open to:

- permit, if necessary, the appellant or representative to submit additional information or documentation needed as a result of questions that arose during the hearing

  Note: Agree on a reasonable and definite deadline for submission.

- obtain further field review for additional information, if necessary and if time limitations are **not** a factor; if additional information or evidence is made part of the record, provide the appellant a reasonable opportunity to review and address or respond to the additional information

  Note: The reviewing authority could elect to reopen a hearing to consider the additional information and give appellant an opportunity to respond at that time.

- if applicable, allow time for receipt and review of the verbatim transcript (subparagraph 17 B).

  Note: For determining time constraints that may apply, a hearing record is considered open while waiting for a verbatim transcript.

21 Appeal or Reconsideration Determinations

A Concluding a Hearing or Appeal

A conclusion and determination should be reached only after:

- the appellant has been excused and the hearing record is closed
- findings are reviewed
- applicable program provisions are analyzed together with the findings to arrive at a supportable conclusion and determination.

If the reviewing authority is a STC or COC, a conclusion should only be reached and a determination made **after** members have had an opportunity to review and discuss findings and applicable program provisions.

B Minutes

Minutes of a meeting where a decision is made do **not** constitute the decision that may be appealed. Committees shall meet in Executive Session to conduct reconsiderations or appeals or to make any determinations about participants or groups of participants. Use Regular Session to make general policy decisions.

Note: Regular sessions are open to the public and would; therefore, **not** be redacted **before** being released.

In all cases, FSA reviewing authorities shall refrain from deliberation, discussion, and decision-making with the appellant present. Deliberations are protected by the deliberative process privilege and; therefore, are **not** the decision itself. Accordingly, deliberations are **not** part of the FSA record or subject to release.

21 Appeal or Reconsideration Determinations (Continued)

C Making Determination

After all evidence is obtained and the hearing is closed, the reviewing authority **must** take the following actions in making its determination:

- promptly review all documentation and testimony, including the verbatim transcript if a verbatim transcript was prepared, available for the matter being considered

- consider all of the appellant's arguments and address each pertinent assertion in the minutes and letter of determination

- make a fair and impartial decision

  Note: The decision must be based solely on facts, evidence contained in the administrative record, and applicable program provisions. Personal feelings or personalities **cannot** be considered when making a determination.

- fully document all information material to the determination

  Note: For STC and COC, minutes are the official record and **must** be used to document the hearing, including STC's or COC's findings, analysis, and the determination. Everything that was considered **must** be included in the minutes, including the STC's or COC's judgment of an issue or personal knowledge of facts in a case. In general, if something is cited as a basis for the determination, it **must** be included in the minutes.

- ensure that the determination is correct and based on specific rules such as program procedure, contractual provision, security agreement, or pertinent and applicable regulations.

21 Appeal or Reconsideration Determinations (Continued)

D Decision Letter Guidelines

The appellant and other affected participants **must** be advised of the determination by way of a letter and may also include a revised notice, where applicable. See Exhibit 15 for notification letter requirements. The determination letter **must** include **all** of the following:

- statement of issues being addressed, including program, program year, appellant's name, farm number, etc.
- background or history of the matter being considered, including a brief history of appellant's participation in the program and dispute that has generated request for review or appeal
- appellant's argument organized by issue, to the extent the issue is addressed
- findings of fact
- analysis (conclusions drawn by the reviewing authority based on findings of fact) organized by issue with citation of applicable regulations and program procedure
- determination
- further review rights, as applicable (subparagraphs 13 B and C).

Notes: If the appeal involves an issue about an NRCS Title XII determination, ensure that a copy of the determination is provided to NRCS **and** the appellant.

If a decision is adverse to the participant, to the extent possible, include all pertinent issues in the decision notification. Include **all** reasons for an adverse decision, **not** just a determination on a threshold question or the primary reason for the adverse determination, in the notice to the appellant.

21 Appeal or Reconsideration Determinations (Continued)

E Referring a Matter for Relief

During FSA's informal appeal process, if the reviewing authority determines that a case merits the consideration of relief by a higher reviewing authority, advise the appellant:

- that a determination will be delayed

  Note: Be aware of time constraints and default determination provisions that may apply.

- of the reason for the delay; do **not** discuss with or give the appellant details of the recommendation or misleading hope that relief may be granted

- that notification will be mailed after the higher reviewing authority has acted on the case.

  Note: Follow 4-CP for issues involving farm programs.

If the adverse decision is affirmed on appeal or reconsideration and relief is either **not** considered or full relief is **not** granted, notify the appellant, in writing, of both the program and relief determination according to subparagraph 13 A.

Note: As explanation, by acting on a relief request, the higher reviewing authority adopts and ratifies the underlying program decision leading to the relief requests. Therefore, appeal rights on the program decision are identical to the relief decision.

22 Administrative Record

A Contents

If a request for review or appeal is filed with the next FSA level, the lower authority shall, upon request, submit copies of the complete administrative record including, but **not** limited to:

- statement of issues being addressed, including program, program year, appellant's name, farm number, etc.
- background or history of the matter being considered, including a brief history of appellant's participation in the program and the dispute that has generated the request for review or appeal
- the verbatim transcript of the hearing, if applicable

22 Administrative Record (Continued)

A Contents (Continued)

- all related program documents (contracts, applications, certifications, etc.) about the issues under review ensuring that the copies:

  - are completely legible

  - are 1-sided (8½ inches x 11 inches, whenever possible)

    Note: If the originals are 2-sided, be sure to copy each side regardless of the nature of the information contained on the reverse side, which includes contracts, appendices, etc.

  - include the following:

    - all signatures, dates, and pages
    - all documents and material provided by the appellant
    - the summary prepared according to paragraph 17 and Exhibit 9
    - records of all FSA reviews and actions taken pertinent to the case
    - any FSA employee statements, whether or not authorized
    - committee minutes.

    Notes: Include all minutes of all meetings of each FSA reviewing authority involved in which any action about the issues under review was recorded. This includes, but is **not** limited to, the minutes of a meeting where the issue was merely considered and tabled.

    --**Follow paragraph 19 for confidential and privileged records.**--

    See Part 6 for procedure about transmitting records to NAD.

22 Administrative Record (Continued)

B Organizing the Record

Assemble the documents in the administrative record in descending, chronological order, with the most recent records on top (oldest documents on bottom).

Paginate the record after making sure that **all** documents have been included.

Create an index of the administrative record that references contents and pages.

C Transmitting the Record

Transmit a copy of the administrative record to the higher FSA reviewing authority under cover of a transmittal memorandum with a short narrative statement of the nature of the case and the issues under review.

23 Avoiding Default Determinations in Payment Limitation Appeals

A Regulation

[7 CFR 1400.9(a)] Any person may obtain reconsideration and review of determinations made under this part in accordance with the appeal regulations set forth at part 780 of this title. With respect to such appeals, the applicable reviewing authority shall:

(1) Schedule a hearing with respect to the appeal within 45 days following receipt of the written appeal; and

(2) Issue a determination within 60 days following the hearing.

Note: A hearing is considered open while FSA is waiting to receive a verbatim transcript (subparagraph 20 D).

B Regulation Exceptions

[7 CFR 1400.9(b)] The time limitations provided in paragraph (a) shall not apply if:

(1) The appellant or the appellant's representative, requests a postponement of the scheduled hearing;

(2) The appellant, or the appellant's representative, requests additional time following the hearing to present additional information or a written closing statement;

(3) The appellant has not timely presented information to the reviewing authority; or

(4) An investigation by the Office of Inspector General is ongoing or a court proceeding is involved that affects the amount of payments a person may receive.

23 Avoiding Default Determinations in Payment Limitation Appeals (Continued)

C Deadlines Not Met

[7 CFR 1400.9(c)] If the deadlines provided in paragraphs (a) and (b) of this section are not met, the relief sought by the producer's appeal will be granted for the applicable crop year unless the Deputy Administrator determines that the producer did not follow the farm operating plan initially presented to the county committee for the year that is the subject of the appeal.

D Waiver

[7 CFR 1400.9(d)] An appellant may waive the provisions of paragraphs (a) and (b) of this section.

If an appellant waives the default determination provisions, obtain the default determination provision waiver in writing or somehow record the waiver in the administrative record. If the appellant requests postponement of a hearing, whether to facilitate obtaining a court reporter at the appellant's request or for any other reason, FSA will deem the postponement request to be a waiver of the deadline to hold a hearing for default determination purposes.

24 Withdrawing FSA Adverse Decisions

A Guidelines for Withdrawing an FSA Adverse Decision

Generally, FSA should withdraw adverse decisions only when some error is detected or when it is determined to be in FSA's best interest, and possibly the participant's best interest, to withdraw the incorrect or misleading determination.

The withdrawal of an adverse decision immediately pulls the decision out of the administrative appeals process. This is true regardless of where in the process the appeal of the decision under consideration lies.

At any time an appeal is pending before NAD, FSA may withdraw the adverse decision if FSA determines that withdrawal is warranted. Although FSA **must** notify an appellant and NAD if a decision has been withdrawn, FSA need **not** explain why it has chosen to withdraw its decision.

Although there are some exceptions, an adverse FSA decision generally **cannot** be withdrawn **after** NAD has ruled on an appeal of the decision. If a NAD determination has been issued and FSA believes withdrawal is warranted, contact ALS for guidance.

Notes: Caution should be exercised before withdrawing **any** adverse decision. FSA offices and officials should consider the impact withdrawal may have on other provisions (default determinations, finality, etc.). Authorized FSA appeal representatives can withdraw FSA adverse decisions; however, those representatives are responsible to FSA reviewing authorities for exercising proper discretion in withdrawing decisions.

--**In the event that NAD asserts jurisdiction to conduct an appeal proceeding despite FSA's having withdrawn the adverse decision, contact ALS for guidance. See paragraph 87.**--

24 Withdrawing FSA Adverse Decisions (Continued)

B Examples of Withdrawing Decisions

The following table describes some instances when FSA adverse decisions may be withdrawn. The table is **not** intended to include all situations.

IF an adverse decision was rendered by…	THEN the decision may be withdrawn by…	IF…
COC employee	COC employee (same person who issued adverse decision), COC, STC, or National Office official	• information becomes available to show that the adverse decision is seriously flawed or was based on incorrect information • the decision clearly does **not** conform with program procedure or regulations • it would be in FSA's best interest to withdraw the decision and reissue a decision that is factually correct and that is according to prescribed procedure or regulations.
COC	COC, authorized FSA appeal representative, STC, or National Office official	
FLO	FLO, FLM, authorized FSA appeal representative, or National Office official	
FLM	FLM, authorized FSA appeal representative, or National Office official	
SED	SED or National Office official **Exception:** SED equitable relief determinations may be withdrawn only by SED.	
STC	STC, authorized FSA appeal representative, or National Office official	
National Office official	National Office official or authorized FSA appeal representative	

25 Finality of Administrative Decisions and Reopening FSA Appeals Cases

A Finality of Administrative Decisions

[7 CFR 780.15] To the extent practicable, no later than 10 business days after an agency decision maker renders an adverse decision that affects a participant, FSA will provide the participant written notice of the adverse decision and available appeal rights.

Notwithstanding the time limits of 780.15(b) and (c), a participant's request for appealability review, reconsideration, or appeal by FSA may be accepted if, in the judgment of the reviewing authority with whom such request is filed, exceptional circumstances warrant such action. A participant does not have the right to seek an exception under 780.15(d). FSA's refusal to accept an untimely request is not appealable or subject to appealability review.

[7 CFR 780.16] To the extent practicable, no later than 30 calendar days after an agency decision becomes a final administrative decision of USDA, FSA will implement the decision.

[7 CFR 11.13] A final determination of the National Appeals Division shall be reviewable and enforceable by any United States District Court of competent jurisdiction in accordance with chapter 7 of title 5, United States Code.

An applicant may not seek judicial review of any agency adverse decision appealable under 7 CFR part 11 without receiving a final determination from the Division pursuant to the procedures of 7 CFR part 11.

FSA's appeal regulations provide for the finality of FSA decisions. NAD Rules of Procedure provide for finality of NAD determinations.

Various rules and regulations require FSA to act and issue decisions within prescribed timeframes. Generally, upon receiving a decision, a participant has 30 calendar days in which to exercise review, appeal, and mediation options that may be available. If a participant chooses, for whatever reason, to not exercise an available option of review or appeal, the FSA decision becomes administratively final.

If a participant elects **not** to appeal an FSA decision to either FSA or NAD, the participant **cannot** later seek judicial review of the matter.

25 Finality of Administrative Decisions and Reopening FSA Appeals Cases (Continued)

B Reopening Cases or Revisiting Decisions

***--**A reviewing authority may reopen a case based on its own motion provided that authority is satisfied **all** of the following apply or are true:

- the matter has **not** been further appealed or is **not** under consideration in another administrative appeal or mediation forum (subparagraph C)

- the case is **not** being reopened merely to provide participants with additional time in**--***
  which to appeal or further appeal

  Note: The following are insufficient basis or justification for reopening a case; a participant's or appellant's:

  - **not** having filed an appeal
  - **not** having timely filed an appeal
  - having been unsuccessful with earlier appeals
  - remaining dissatisfied with an FSA decision or outcome.

  FSA officials shall **not** reopen cases merely to provide participants with additional time in which to further appeal.

- ***--**the case is **not** being reopened to merely consider decisions in other cases, even if those cases appear to be similar

- the decision is **not** administratively final under either FSA's or NAD's appeal regulations.

  Notes: Cases and decisions become administratively final because of either the passage of time or conclusion of appeals. Reopening cases that are already administratively final puts FSA and USDA at risk. Reviewing authorities shall **not** reopen cases or decisions that are administratively final without express written ALS concurrence.**--***

  If there is **any** question whether a case may be administratively final or if there is reason to believe a case is already administratively final, the case shall **not** be reopened; follow subparagraph D.

C Cases Under Consideration by Higher Authority

If a case was either acted on or is under consideration by a higher authority within FSA, the higher authority **must** agree, in writing, **before** the case can be reopened at the lower level.

Do **not** take any action on an issue if the issue is pending before NAD. This includes, but is **not** limited to, submitting requests to a higher review authority for relief.

25 Finality of Administrative Decisions and Reopening FSA Appeals Cases (Continued)

D Reopening Cases That May Be Administratively Final

If a reviewing authority has reason to believe a case may be administratively final or if the authority knows a case is administratively final, the reviewing authority shall **not** reopen the case. Any action to reopen a case that is already administratively final **must** be requested, in writing, by SED to the Director, ALS (see subparagraph 2 B for the address).

Requests to reopen cases that are administratively final **must** be, in writing, and contain **all** of the following information:

- a short narrative background of the case, matters reviewed, and outcome of the case
- a detailed explanation and information about facts that are now available that were **not** available at the time of the administrative decision; the explanation should detail how these facts justify reopening the case
- an explanation stating how the final administrative decision, if **not** reopened, is problematic for FSA
- how the final administrative decision, if left to stand, is contrary to either regulations or law.

Note: A reviewing authority's disagreement with another or higher reviewing authority's decision is **not** justification for showing that a decision is contrary to regulation or law.

No action whatsoever, including advising a participant that a request for reopening of a case that may be administratively final may or will be made, shall be taken without written concurrence of ALS.

A decision by the Director, ALS, to decline authorizing reopening a case shall **not** be construed to be a new administrative decision giving rise to any sort of appeal or right of review. If a request is disallowed, **no** further action shall be taken on the case whatsoever.

26 Employee Assistance to Program Participants

A Limitations on Employee and COC Assistance in Appeals

Employees and COC members shall **not**:

- prepare appeal requests for participants
- furnish personal verbal or written statements without first obtaining written authorization from FSA
- advise participants on a proper course of action in an appeal
- function or act as appellant advocates in appeals to any FSA reviewing authority, NAD, or any other tribunal where their advocacy would be adverse to the Government.

B Employee and COC Member Authority

Employees and COC members shall always assume they do **not** have authorization to testify or issue statements in support of an appellant absent any written authorization to the contrary.

Follow paragraphs 78 and 98 about employees and COC members appearing as witnesses in appeal proceedings.

C Subpoenas

If an employee or committee member is served with a subpoena or subpoena duces tecum, contact ALS through the State Office **immediately**.

27 Discrimination or Misconduct Allegations

A Discrimination Allegations

If a participant or appellant alleges discrimination, the employee or FSA reviewing authority should explain that complaints of discrimination can be pursued through the USDA, Office of Adjudication and Compliance. Provide the participant or appellant with the following:

- web site (**http://www.ascr.usda.gov/**) with information on discrimination complaints
- address for filing complaints or allegations of discrimination:

  U.S. DEPARTMENT OF AGRICULTURE
  DIRECTOR, OFFICE OF ADJUDICATION AND COMPLIANCE
  1400 INDEPENDENCE AVENUE SW
  WASHINGTON DC 20240-9410.

Note: Employees or reviewing authorities who receive written or verbal discrimination complaints shall advise the participant where to file discrimination complaints. Additionally, discrimination allegations shall **not** have **any** impact on the conduct or progress of the appeal.

B Misconduct Allegations

If a participant alleges misconduct, waste, fraud, or abuse, the employee or FSA reviewing authority should explain that complaints of misconduct, fraud, or abuse can be pursued separately by filing a complaint with the employee's supervisor, DAFO, or OIG.

*--28 Suspensions, Debarments, Disqualifications, and Exclusions

A FSA Policy About Receipt of Notices

Employees and offices receiving any notification or communication of suspension, debarment, exclusion, or disqualification from anyone other than ALS shall **immediately** forward such notification or communication to ALS through the State Office.

B ALS Communications

ALS reviews **all** notices and communications mentioned in subparagraph A. Based on 7 CFR Part 3017, ALS issues notifications to DAFP and DAFLP about the specific implications of a suspension, debarment, exclusion, or disqualification notice. DAFP and DAFLP notify the appropriate State and County Offices accordingly.

C Questions

Refer any questions about an ALS notice about a suspension, debarment, or disqualification to ALS.

Send questions about whether an ALS notice impacts participation in benefits under a particular program through the State Office to the Regional Attorney, with copy to ALS.

29 EAJA Applications, Notices, or Claims

A FSA Policy About Receiving Requests

FSA employees and offices receiving any sort of document about claims, applications, petitions, or requests for reimbursement for attorneys fees incurred in either administrative appeal proceedings before NAD or litigation or both shall make **no comment** and shall **not** provide any sort of response. The employee or office shall **immediately** forward a legible copy of the documents to ALS and the Regional Attorney, through the State Office.

B "No Comment"

Employees and offices **must** refrain from commenting at **all** about the merits of any EAJA claim, application, petition, or request for reimbursement for attorney fees. If OGC contacts a State Office about the merits of an application or petition, the State Office **must** contact ALS **immediately** for advice on how to proceed.**--***

30 (Reserved)

Part 3 Field Office Actions

31 Handling Requests for Reconsideration

A Submitting Requests for Reconsideration

[7 CFR 780.7(a)] A request for reconsideration under this part must be submitted in writing by a participant or by a participant's authorized representative and addressed to the FSA decision maker as may be instructed in the adverse decision notification.

B Waiving Reconsideration

[7 CFR 780.7(b)] A participant's right to request reconsideration is waived if, before requesting reconsideration, a participant has:

(1) requested and begun mediation of the adverse decision;

(2) appealed the adverse decision to a higher reviewing authority in FSA; or

(3) appealed to NAD.

[7 CFR 780.7(c)] Provided a participant has not waived the right to request reconsideration, FSA will consider a request for reconsideration of an adverse decision under these rules except when a request concerns a determination of NRCS appealable under the procedures in 780.11, the decision has been mediated, the decision has been previously reconsidered, or the decision maker is the Administrator, Deputy Administrator, or other FSA official outside FSA's informal appeals process.

Reconsideration is available to a participant only once, for any COC, FLM, FLO, SED, or STC decision. FSA may either on its own volition or in response to an agreement made in mediation, agree to allow a reviewing authority to further consider additional or new information generated in mediation. Participants have **no** right to reconsideration, mediation, or appeal to NAD of a COC employee's determination.

31 Handling Requests for Reconsideration (Continued)

C Withdrawn Reconsiderations

[7 CFR 780.7(d)] A request for reconsideration will be deemed withdrawn if a participant requests mediation or appeals to a higher reviewing authority within FSA or requests an appeal by NAD before a request for reconsideration has been acted upon.

D Federal Rules of Evidence

[7 CFR 780.7(e)] The Federal Rules of Evidence do not apply to reconsiderations. Proceedings may be confined to presentations of evidence to material facts, and evidence or questions that are irrelevant, unduly repetitious or otherwise inappropriate may be excluded.

E Reconsideration Decisions

[7 CFR 780.7(f)] The official decision on reconsideration will be the decision letter that is issued following disposition of the reconsideration request.

[7 CFR 780.7(g)] A decision on reconsideration is a new decision that restarts the applicable time limitation periods under 7 CFR 780.15 and part 11 of this title.

Follow subparagraph 13 B for adverse reconsideration decisions.

32 COC Appeals

A Submitting COC Appeal Requests

[7 CFR 780.8(a)] A request for appeal to a county committee concerning a decision of a subordinate of the county committee must be submitted by a participant or a participant's authorized representative in writing and must be addressed to the office in which the subordinate is employed.

The request for an appeal of a county FSA employee decision can **only** be processed by COC responsible for the office or programs where the adverse decision was issued.

Example: CED determines that a participant did **not** meet requirements to be eligible for a particular program. The only right of appeal the participant has is to COC that administers the program for that particular county.

B Federal Rules of Evidence

[7 CFR 780.8(b)] Federal Rules of Evidence do not apply to appeals to a county committee. However, a county committee may confine presentations of evidence to material facts and may exclude evidence or questions that are irrelevant, unduly repetitious, or otherwise inappropriate.

C Deliberations

[7 CFR 780.8(d)] Deliberations shall be in confidence except to the extent that a county committee may request the assistance of county committee or FSA employees during deliberations.

Participants shall **not** be present during and verbatim transcripts shall **not** be made of deliberations.

D Appeal Decision

[7 CFR 780.8(c)] The official county committee decision on an appeal will be the decision letter that is issued following disposition of the appeal.

Follow subparagraph 13 C for adverse COC appeal decisions.

33 STC Appeals

A Submitting STC Appeal Requests

[7 CFR 780.10(a)] A request for appeal to the State committee from a decision of a county committee must be submitted by a participant or by a participant's authorized representative in writing (subparagraph 14 D).

B Waiving STC Appeal

[7 CFR 780.10(b)] A participant's right to appeal a decision to a State committee is waived if a participant has appealed the adverse decision to NAD before requesting an appeal to the State committee.

Provided a participant filed a timely appeal with NAD, at STC's discretion, STC may allow a participant to appeal to STC contingent upon the participant simultaneously withdrawing the NAD appeal.

C Effect of Requesting Mediation or Appeal to NAD Before Requesting Appeal to STC

[7 CFR 780.10(c)] If a participant requests mediation or requests an appeal to NAD before a request for an appeal to the State committee has been acted upon, the appeal to the State committee will be deemed withdrawn.

33 STC Appeals (Continued)

D Federal Rules of Evidence

[7 CFR 780.10(d)] The Federal Rules of Evidence do not apply in appeals to a State committee. Notwithstanding, a State committee may confine presentations of evidence to material facts and exclude evidence or questions as irrelevant, unduly repetitious, or otherwise inappropriate.

E Deliberations

[7 CFR 780.10(f)] Deliberations shall be in confidence except to the extent that a State committee may request the assistance of FSA employees during deliberations.

Participants shall **not** be present during and verbatim transcripts shall **not** be made of deliberations.

F Appeal Decision

[7 CFR 780.10(e)] The official record of a State committee decision will be the decision letter that is issued following disposition of the appeal.

Follow subparagraph 13 C for adverse STC appeal decisions.

34-40 Reserved

Part 4 NRCS Appeals

41 NRCS Appeals

A Statutory Authority for FSA Review

Pub. L. 103-354 226(d)(1) provides in part that, until an adverse decision is appealed to NAD, FSA has jurisdiction over appeals of adverse decisions made under Title XII. *** * ***

FSA and NRCS at the National level have discussed Title XII determinations and mutually agree that handling Title XII determination appeals to FSA and NAD require a partnership effort. FSA and NRCS at the National level strongly emphasize the necessity and benefit of cooperation and coordination between FSA and NRCS at both the State and county levels.

B Referrals to FSA for Appeal Review Under Agreement

*** * *** As authorized by 7 CFR 1466.2, Title XII determinations *** * *** may be appealed to COC's.

Example: EQIP.

Procedures for Title XII determination reviews, set forth in 7 CFR 780.11, apply to EQIP determinations by NRCS reviews.

42 Procedures for Reviewing NRCS * * * Determinations

A NRCS Determination Appeals

[7 CFR 780.11] (a) Notwithstanding any other provision of this part, a determination of NRCS issued to a participant pursuant to Title XII of the Food Security Act of 1985, as amended, including a wetland determination, may be appealed to the county committee in accordance with the procedures in this part.

(b) If the county committee hears the appeal and believes that the challenge to the NRCS determination is not frivolous, the county committee shall refer the case with its findings on other issues to the NRCS State Conservationist to review the determination, or may make such a referral in advance of resolving other issues.

(c) A decision of the county committee not to refer the case with its findings to the NRCS State Conservationist may be appealed to the State committee.

(d) The county or State committee decision must incorporate, and be based upon, the results of the NRCS State Conservationist's review and subsequent determination.

Under each of the procedures in 7 CFR 780.11, the final administrative decision of FSA on the appealed NRCS Title XII determination **must** incorporate and be based on the State Conservationist’s determination following review.

42 Procedures for Reviewing NRCS * * * Determinations (Continued)

B Summary of NRCS Procedure for Appeals of Title XII Determinations

Landowners and program participants may dispute NRCS Title XII determinations *** * *** made by NRCS under NRCS's informal appeals procedures in 7 CFR Part 614. The following are some examples of Title XII programs:

- CRP
- EQIP
- GRP
- HELC and WC, including wetland *** * *** determinations made by NRCS officials even when **not** about a request for USDA program benefits
- WRP.

Note: GRP, WRP, and other easement program appeals are limited to decisions about landowner and land eligibility. Any decision made by NRCS following acquisition and payment of those real property rights acquired under the easement is **not** subject to appeal under USDA administrative appeals procedures according to 7 CFR 614.4(d).

42 Procedures for Reviewing NRCS * * * Determinations (Continued)

C * * * Title XII Determinations

***--**If there is any question about an NRCS decision, FSA **must** consult with NRCS.

If NRCS determines that an initial determination is **not** adverse to the participant, NRCS may issue the initial determination as a final decision and FSA may rely on it.**--***

Regulations at 7 CFR 614.6 require NRCS to notify the landowner and/or program participant of a preliminary determination, in writing, by mail or hand delivery. The preliminary determination will become final after 30 calendar days if the landowner or program participant does **not** arrange with the designated conservationist for either or both of the following options:

- a field visit to the site to gather additional information and to discuss the facts about the preliminary determination together with, at the option of the conservation district, a district representative

- mediation.

--**Once an adverse Title XII determination is final, either because the initial determination was final or because the preliminary determination became final, the landowner or program participant may appeal to the NRCS State Conservationist, FSA, or NAD.**--

42 Procedures for Reviewing NRCS * * * Determinations (Continued)

D Appeal to COC

If the landowner or program participant appeals to COC:

- coordinate with NRCS officials to ensure that the NRCS District Conservationist or other NRCS official has an opportunity to:
  - participate in the appeal hearing
  - submit a copy of the NRCS administrative record to COC
- allow the local conservation district to participate in the hearing
- after coordinating with NRCS, send an acknowledgement letter, with a copy to NRCS. See Exhibit 26 for an example of a letter that **must** be provided to participants with copy to NRCS.

Reminder: Exhibit 26 contains **required** language about the participant's right to a hearing. Offices shall use Exhibit 26 as a guideline in preparing acknowledgements that satisfy the requirements of due process.

E Mediation

If the landowner or program participant requests mediation following a COC decision about an NRCS Title XII determination, mediation will be made available if it has **not** already been used, through either of the following:

- a State's USDA Certified State Mediation Program, if a mediation program has been certified in the State
- by contacting SED's in States without a USDA Certified State Mediation Program.

Note: FSA will **always** be notified of participant requests for mediation following a decision on a Title XII determination or program decision. FSA **must** notify NRCS, and both an FSA and NRCS representative:

- will be available to participate in the mediation process
- **must** sign any resulting mediation agreement.

42 Procedures for Reviewing NRCS * * * Determinations (Continued)

F Participation of FSA's Representative in Mediation

During the mediation, FSA's and NRCS's representatives will explain to the participant the potential ramifications of NRCS's determination, such as:

- eligibility for FSA- and NRCS-administered programs
- types of relief that may be granted.

Any agreement reached during, or as a result of, the mediation process shall conform to the statutory and regulatory provisions and generally applicable interpretations governing the program.

Note: If a preliminary determination has been mediated **before** the final NRCS determination, mediation of the *** * *** determination will **not** be offered again.

G Final NRCS Title XII Determination

An adverse preliminary determination will become final in **any** of the following events:

- 30 calendar days after receipt by the landowner or program participant of the notice of a preliminary determination, unless a field visit or mediation is requested

- after the earlier of 30 calendar days after a field visit to the site or receipt by the landowner or program participant of a final determination from the designated conservationist

- 30 calendar days after the beginning of a mediation session, if a mutual agreement has **not** been reached by the parties **[7 CFR 614.8(a)(2))]**.

42 Procedures for Reviewing NRCS * * * Determinations (Continued)

H Notice of Final Determination

The final determination **must**:

- furnish notice to the landowner or program participant of the following:
  - decision and its basis, including all factors *** * *** and facts relied on in making the decision
  - procedures for requesting and pursuing further reviews of the final technical determination
- provide applicable appeal rights
- be furnished, as a copy, to FSA by NRCS.

I FSA's County Office Action

After NRCS has notified FSA of the final determination, the County Office shall:

- determine the effect of NRCS's determination on participation or requested participation in any FSA-administered program
- if applicable, issue a notification letter to the participant, within 10 calendar days of the date the County Office received the final NRCS determination that will inform the participant of any FSA decision that results from the final NRCS determination.

  Note: The 10 calendar days will allow the participant to file an appeal on both the NRCS determination and any related adverse FSA decision so the hearing can be held on both issues concurrently.

J Participant Appeal Options

Participants may appeal a final determination to either FSA or NAD.

Note: NRCS *** * *** determinations are subject to administrative review by NAD.

43 FSA's Consideration of NRCS Determination Appeals

A COC/STC Consideration of NRCS Appeals

Handle COC/STC considerations of NRCS appeals according to this table.

IF COC and/or STC determine that a participant's appeal of the NRCS determination has...	THEN COC and/or STC shall...
merit or is **not** frivolous	refer the case, through SED, to State Conservationist to review the *** * *** determination before issuing a decision. The referral **must** include, in writing, the reasons COC or STC determined the case had merit or was not frivolous. **Note:** If other FSA issues have been made a part of the appeal and depend on NRCS's determination, COC or STC shall **not** make a decision about FSA issues until State Conservationist's determination is received.
no merit or is frivolous	issue the decision and provide appropriate appeal rights according to subparagraph 13 B. Document reasons why COC or STC considered the appeal to have no merit or is frivolous.

Note: Review by State Conservationist is pursuant statute and to NRCS appeal regulations.

B Action Following State Conservationist Review

[7 CFR 780.11(d)] The county or State committee decision must incorporate, and be based upon, the results of the NRCS State Conservationist's review and subsequent determination.

43 FSA's Consideration of NRCS Determination Appeals (Continued)

C Appeal Rights Following State Conservationist Review

If State Conservationist upholds the final NRCS Title XII determination and the appeal raises no other issues reviewable within FSA, the participant shall be given notice of the right to appeal the decision only to NAD.

The following is **mandatory** language to be included in the adverse decision letter:

> "You may appeal this determination to the National Appeals Division (NAD) by filing a written request no later than 30 calendar days after you receive this notice in accordance with the NAD appeal procedures found at 7 CFR Part 11. If you appeal to NAD, you have the right to a hearing which you or your representative may attend. Once a hearing with NAD begins, you waive any rights you might have to reconsideration, appeal to FSA, and mediation. To appeal, you must write to NAD at the following address, explain why you believe this determination is erroneous, and provide a copy to FSA. You must personally sign your written appeal to NAD and include a copy of this letter. (*Insert NAD address*.)"

If the participant subsequently requests a NAD appeal, FSA is responsible for submitting the FSA record to NAD. However, since this is an appeal of an NRCS final decision, an official from NRCS **must** continue to be involved in the appeal process to furnish information for FSA about the determination and/or decision under appeal to NAD. This may include information about the determination and/or decision, field visits, handbook guidance, and other documentation relevant in the matter to ensure that the record, as well as hearing exhibits and testimony submitted to NAD, is complete and contains all documentation and authorities relevant to the *** * *** determination appealed to NAD.

Note: FSA **must** contact NRCS and provide the NRCS State Office appeals contact (Exhibit 27) a copy of the request for NAD appeal and all information provided by NAD about the appeal proceedings, including the request for FSA record, the pre-hearing teleconference, and all hearing and post-hearing notifications.

NRCS staff **must** attend, be available as witnesses, and assist FSA's representative in any appeal to NAD involving FSA's ratification of an NRCS final Title XII *** * *** determination. FSA and NRCS may agree to have an NRCS employee function as FSA's representative on a case by case basis. In that case, FSA's representative **must** maintain a presence in the appeal proceedings and both agencies **must** attend the NAD hearing and participate in any further requests resulting from NAD's appeal decision.

43 FSA's Consideration of NRCS Determination Appeals (Continued)

D NRCS Appeal Contacts

Exhibit 27 provides a list of current NRCS appeal contacts. FSA offices shall consult with NRCS State Offices, if a contact is unavailable.

44-50 (Reserved)

Part 5 Mediation

Section 1 General Provisions

51 Mediation Features and Objectives

A Part of FSA's Informal Appeals Process

According to 1994 Act, Section 275, mediation is offered as part of FSA's informal appeals process. Any issue that may be appealed under FSA's informal appeals process may be mediated. See paragraph 9 for appealable issues.

Notes: Decisions of the Administrator, Deputy Administrators, and other headquarters officials are considered final FSA decisions not subject to mediation, reconsideration, or further appeal within FSA (subparagraph 8 C). Those decisions are; therefore, outside the scope of the informal FSA appeals process. Accordingly, participants do **not** have a right to mediation on those decisions.

Although decisions of the Administrator or Deputy Administrator are final for NAD appeal purposes, in exceptional cases the Administrator or a Deputy Administrator may exercise discretion and have FSA participate in mediation of a decision or refer a matter to mediation.

B Goal of Mediation

The goal of mediation is to provide a means for parties in a dispute to exchange information and to explore options in a nonbinding setting that assists in resolution of the dispute.

Through mediation, parties may discover options for dispute resolution and avoid some or all of the cost and time that may accompany resolution through administrative appeals and litigation.

C Potential Program Benefits of Mediation

Even if mediation does not resolve a dispute, the mediation process may contribute to improved program management and more positive agency relationships with participants. In particular, mediation may improve communications and narrow issues in a dispute so that, if an appeal is subsequently requested, issues in dispute are more clearly defined and more readily determined.

51 Mediation Features and Objectives (Continued)

D Mediation Availability After a Request for NAD Hearing

Although mediation is not offered by NAD, if mediation is available to a participant in FSA's informal appeals process, the participant may request mediation before a NAD hearing.

If a participant requests mediation following the filing of a NAD appeal, FSA will participate in the mediation in good faith provided all the following apply:

- the participant's appeal to NAD was timely filed (as determined by FSA to be within 30 calendar days of the participant's receiving FSA's adverse decision letter)

- the participant had the right to participate in mediation on the adverse decision but has not yet participated in mediation about the matter

- the adverse decision being appealed is **not** a decision by an official in FSA's National Office and the matter has not been previously mediated.

  Exception: Although participants do **not** have a right to seek mediation on a decision by FSA's National Office, FSA may, at its own discretion, offer the participant the opportunity. FSA's decision **not** to offer or refusal to offer mediation is **not** a decision subject to further review or appeal.

Under NAD Rules of Procedure, a participant who requests mediation after filing an appeal to NAD, but before the hearing, "will be deemed to have waived his right to have a hearing within 45 days after conclusion of mediation or [other Alternative Dispute Resolution]." **[7 CFR 11.5(c)(2)]**.

51 Mediation Features and Objectives (Continued)

E ADR Alternatives to Mediation

If a participant makes a request for some other form of ADR, the request should be referred to ALS. FSA policy is to consider any such request in good faith.

52 Mediation Availability

A One-Time Opportunity for Mediation

[7 CFR 780.9(b)] An adverse decision and any particular issues of fact material to an adverse decision may be mediated only once.

A participant may exercise the option to mediate a particular issue only once during the FSA's informal appeals process (paragraphs 13 and 14).

Note: Certain States may have requirements mandating mediation before foreclosures. Follow appropriate FLP directives in these instances.

B Mediation Duplication

If mediation has occurred before an adverse decision is issued, mediation of that issue will **not** again be offered to a participant as an option in the informal appeals process.
In cases where a participant's circumstances have clearly changed during or after mediation, the change in circumstances should be brought to the attention of the decision-maker for reconsideration. Any decision on reconsideration following mediation is a new decision, the participant should be given notice of all appeal rights that may then be available, **excluding** mediation. Mediation would **no** longer be available.

53 Conforming With Program Requirements

A Mediation Agreements Must Comply with Statute and Regulation

[7 CFR 780.9(c)] Any agreement reached during, or as a result of, the mediation process shall conform to the statutory and regulatory provisions governing the program and FSA's generally applicable interpretation of those statutes and regulatory provisions.

Mediation emphasizes assistance to parties in developing alternatives. The alternatives developed in mediation of an FSA program dispute **must** be both feasible and consistent with statutory and regulatory requirements and FSA's generally applicable interpretations of them.

Note: Nothing in mediation shall preclude FSA from settlement of disputes in other authorized means.

B Examples

Examples of activities that may productively occur during FSA program mediation include the following:

- identifying alternative means for a participant to comply with regulatory requirements
- exploring alternative mitigation strategies when a wetland has been converted
- considering possible changes in a farming operation
- exploring additional resources that may be made available to meet the farming operation's financial requirements.

When other private parties are involved, such as other creditors, the mediation may assist in identifying potential flexibility in the positions of these private parties as in a purely private mediation. In other cases, the mediation may simply clarify the basis for a decision.

54 Processing Requests for Mediation

A Requirement for an Adverse Decision for States With a USDA Certified State Mediation Program and Noncertified States

[7 CFR 780.9(a)] Any request for mediation must be submitted after issuance of an adverse decision but before any hearing in an appeal of the adverse decision to NAD.

FSA's general policy is that mediation is most likely to be productive when an adverse decision has been issued that presents clear issues to challenge and resolve. However, mediation may be productive if there has been no adverse decision, in certain limited cases, as follows:

- where it is clear that only 1 issue will be in dispute and some resolution seems clearly feasible

  Example: There is potential flexibility in positions of third parties.

- to expedite progress toward a favorable resolution of the initial administrative request.

  Example: Request for servicing by a financially distressed borrower.

Ensure that mediation is available in the FSA informal appeals process at a very early stage, when an issue may be defined for mediation.

In farm commodity, marketing assistance, and conservation programs, mediation in advance of any adverse decision is not likely to be productive.

Examples: In CRP, the regulatory requirements that will determine eligibility for a future signup **cannot** be anticipated until guidelines are published.

Similarly, in commodity assistance programs, while general criteria of eligibility tend to persist in successively authorized assistance programs, the exact conditions under which assistance will be made available frequently depend on details of enacted legislation that **cannot** be accurately projected before legislation is signed.

54 Processing Requests for Mediation (Continued)

B States With a USDA Certified State Mediation Program

[7 CFR 780.9(f)(1)] If the participant desires mediation, the participant must request mediation in writing by contacting the certified mediation program or such other contact as may be designated by FSA in an adverse decision letter. The request for mediation must include a copy of the adverse decision to be mediated.

[7 CFR 780.9(f)(2)] Participants in mediation may be required to pay fees established by the mediation program.

[7 CFR 780.9(f)(3)] A listing of certified State mediation programs and means for *--contact may be found on the FSA Web site at http://www.usda.gov/fsa/dispute-mediation.htm.--*

If the State has a USDA Certified State Mediation Program, FSA **must** use the services of the USDA Certified State Mediation Program unless the USDA Certified State Mediation Program does **not** offer mediation for the specific FSA issue in question.
5 U.S.C. 5103(a)(1)(A).

If the USDA Certified State Mediation Program does **not** offer mediation for the specific FSA issue in question, the request to mediate the issue should be processed by SED's under the procedures for processing mediation requests in noncertified States according to subparagraph C.

The participant is responsible for contacting the USDA Certified State Mediation Program that mediates FSA issues. The USDA Certified State Mediation Program should make all arrangements for the mediation process.

54 Processing Requests for Mediation (Continued)

C Noncertified States

[7 CFR 780.9(g)(1)] It is the duty of the participant to contact the State Executive Director in writing to request mediation. The request for mediation must include a copy of the adverse decision to be mediated.

[7 CFR 780.9(g)(2)] If resources are available for mediation, the State Executive Director will select a qualified mediator and provide written notice to the participant that mediation is available and the fees that the participant will incur for mediation.

[7 CFR 780.9(g)(3)] If the participant accepts such mediation, FSA may give notice of the mediation to interested parties and third parties whose interests are known to FSA.

SED's shall:

- determine whether resources are available for mediation

  Note: Although an SED determines available resources, an SED **cannot** unilaterally decide **not** to mediate because of resources.

- locate and select a qualified mediator

- provide the participant written notice of the mediation

- provide written notice of the mediation to third parties and interested parties.

If the participant objects to the selected mediator, the participant may request that another mediator be selected.

55 Participating in Mediation

A Good Faith

[7 CFR 780.9(d)] FSA will participate in mediation in good faith by taking steps including the following:

(1) Designating a representative in the mediation;

(2) Instructing the representative that any agreement reached during, or as a result of, the mediation process must conform to the statutes, regulations, and FSA's generally applicable interpretations of statutes and regulations governing the program;

(3) Assisting as necessary in making pertinent records available for review and discussion during the mediation; and

(4) Directing the representative to forward any written agreement proposed in mediation to the appropriate FSA official for approval.

55 Participating in Mediation (Continued)

A Good Faith (Continued)

FSA **must** participate in the mediation process in good faith. This obligation includes:

- furnishing information related to the mediated adverse decision **in advance** of the mediation session to the mediator and to other participants in the mediation process as the mediator may deem necessary or appropriate

  Example: The mediator may or may not want to see the FSA record in support of the adverse decision. As a matter of general procedure, the FSA representative in mediation should be prepared to furnish a copy of the FSA record and applicable regulations to the mediator upon request as soon as practicable following a request.

- demonstrating consideration for and understanding of participants who choose mediations

- setting a positive, constructive tone in mediation sessions

- cooperating with requests for information or analysis of information made in the course of a mediation

- encouraging a positive, constructive approach by other participants in the mediation

- making a conscientious effort to identify and explore additional options that may resolve the dispute including, if applicable, presenting and exploring debt restructuring proposals advanced during a mediation

- timely presenting dispute resolution proposals to appropriate FSA officials for review and action.

55 Participating in Mediation (Continued)

B Confidentiality

[7 CFR 780.9(e)] Mediations will be treated in a confidential manner consistent with the purposes of the mediation.

See Exhibit 2 for the definition of confidential mediation.

Pursuant to the Administrative Dispute Resolution Act at 5 U.S.C. 574, and FSA's Informal Appeals Regulations, mediations occurring in the informal appeal process are confidential.

During the course of mediation, it is anticipated that FSA's representative may need to communicate with other agency officials. Communications with other agency officials are **not** inconsistent with the requirement that mediations be confidential.

How the restrictions on confidentiality in the Administrative Dispute Resolution Act may apply to disclosures by other participants in mediation will vary with the circumstances in a particular mediation. As a general matter, participants will **not** require other parties' consents to disclose information in mediation to agents furnishing confidential services to a participant, such as, attorneys, accountants, or other agents bound to furnish services under a duty of confidentiality.

Under 5 U.S.C. 574(b)(2), a participant may, in any event, obtain other parties' consent to contemplated disclosures. FSA's duty of good faith in mediation requires that other parties' consent, when requested, will **not** be unreasonably withheld.

55 Participating in Mediation (Continued)

C Mediator Impartiality

[7 CFR 780.9(i)] To provide for mediator impartiality:

(1) No person shall be designated as mediator in an adverse program dispute who has previously served as an advocate or representative for any party in the mediation.

(2) As a condition of retention to mediate in an adverse program dispute under this part, the mediator shall agree not to serve thereafter as an advocate or representative for a participant or party in any other proceeding arising from or related to the mediated dispute, including, without limitation, representation of a mediation participant before an administrative appeals entity of USDA, or any other Federal Government department.

Cases where a mediator appears to be in breach of these restrictions shall be referred to ALS for review and referral for further action.

D Role of the Mediator

The mediator should be expected to assist the parties to reach agreement by:

- providing a forum for the parties to exchange information
- establishing a structure for the mediation that will maximize the opportunity for reaching agreement
- creating a positive atmosphere

  Note: In mediation, a mediator may consider some expression of emotion by participants to be helpful in creating a positive atmosphere. A qualified mediator can be expected to manage the mediation in a way that:

  - does **not** result in abusing any party
  - safeguards the process to ensure that **no** party in the mediation is unfairly pressured.
- helping the participant and FSA representative work together with other interested parties that may be participating.

55 Participating in Mediation (Continued)

E FSA Representative's Role

FSA's representative will be a person selected by SED to represent FSA during the specific mediation. SED's **must**:

- select the person to represent FSA during specific mediation sessions
- define the representative's authority to bind FSA to agreements reached in mediation

  Note: As a general matter, FSA's representative in mediation may **not** be a person with final authority to bind FSA. As a matter of sound management, SED's **must** ensure that the designated FSA representative in **any** mediation is a person with appropriate knowledge of the legal parameters implicated in the program dispute.

- ensure that any agreement reached during, or as a result of, the mediation process is:
  - consistent with the statutory, regulatory, and handbook provisions governing the program
  - detailed and mutually agreed to, in writing, by **all** affected parties.

56 Documenting Mediation Agreements

A No Adverse Decision Modification

Parties in mediation will **not** be expected to execute an agreement if the mediation does **not** result in either of the following:

- any narrowing of issues in dispute
- other steps to resolve a program dispute.

At the close of the mediation, a participant may exercise any remaining appeal rights in the FSA informal appeals process or may appeal to NAD.

B Adverse Decision Modification

The mediator should assist the parties as necessary in drafting an agreement if the result of the mediation is to be an adverse decision modification or an agreement to consider modifying 1 or more terms of the decision mediated. The participant, an FSA official with properly delegated authority, and any other affected parties will execute the agreement. Any agreement **must** include at least the following terms:

- a statement of the terms of the parties' agreement on each mediated issue in the adverse decision

- for each mediated issue, a statement of the actions that the parties have agreed to take to implement their agreement on the issue and the schedule for the actions, including **all** contingencies, conditions, terms, obligations, timeframes, and dates, including the date on which the mediation will conclude

- a statement that the terms set out in the agreement have been reviewed by the participant, FSA, and other affected parties and reflect their respective understandings of the terms for resolution of the mediated issue

- a statement that breach of the mediation agreement may result in reinstatement of the adverse determination that was the subject of the mediation.

  Note: Reinstatement because of a breach of the mediation agreement is **not** a new program decision and would **not** have any appeal rights unless the breach occurred **before** the 30-calendar-day time limit to appeal had expired.

56 Documenting Mediation Agreements (Continued)

C Participant's Failure to Perform

A participant's failure to perform under a mediation agreement, or failure of other conditions agreed to by the parties, will cause reinstatement of the mediated adverse decision. When it appears that a participant has failed to perform under a mediation agreement, or that other conditions agreed to by the parties have **not** been met, the matter shall be brought to the SED's attention. Following review and concurrence by SED, the decision-maker should give written notification to the appellant and other parties to the mediation setting forth the following:

- the factual bases for FSA's determination that participant has failed to perform under the mediation agreement or that other conditions agreed to by the parties have **not** been met
- notice that the adverse decision mediated is reinstated
- notice of the participant's right to appeal to:
  - NAD, if any
  - remaining FSA appeal rights, if any.

Note: In advising the participant of the right to pursue remaining appeal options, do **not** advise the participant of any particular number of days that may remain to appeal. Advise **only** that that the participant has the balance of any time remaining to further appeals. Remember that by the time a breach occurs, the deadlines to appeal will likely have expired.

57 Closing Out Mediation

A When Mediation is Considered Closed

[7 CFR 780.9(h)] Mediation will be considered to be at an end on that date set out in writing by the mediator or mediation program, as applicable, or when the participant receives written notice from the State Executive Director that the State Executive Director believes the mediation is at an impasse, whichever is earlier.

B Mediator Terminates Mediation

The mediator has the right to terminate mediation when either of the following applies:

- a necessary party in the mediation is **not** participating in good faith
- the mediator determines that the mediation is at impasse.

As applicable, the mediator will provide a notice of impasse to SED and the USDA Certified State Mediation Program. At the time of termination of the mediation, the mediator will provide written notice to the parties that the:

- mediation is closed
- parties may pursue other administrative and legal remedies if any are available.

57 Closing Out Mediation (Continued)

C Agreed Impasse

[7 CFR 780.9(b)(1)] If resolution of an adverse decision is not achieved in mediation, a participant may exercise any remaining appeal rights under this part or appeal to NAD in accordance with part 11 of this title and NAD procedures.

Participants may agree to discontinue mediation. The mediator will document the parties' discontinuing the mediation with a report indicating a statement:

- of the terms of any agreement reached by the parties on a mediated issue
- that the parties reached an impasse
- notifying the parties that the participant may or may **not** have time remaining to appeal.

Notes: Mediators do **not** keep track or advise of time that may remain.

Mediation does **not** provide a new 30-calendar-day period from which remaining appeal options can be exercised. When a participant elects to participate in mediation, the time for exercising appeal options is suspended. When mediation is terminated the time resumes from the point it stopped.

FSA officials shall **not** compute a participant's remaining time to appeal to NAD. In instances where a participant wants to exercise an option of a further FSA appeal, if an option exists, FSA **must** determine if the FSA appeal following termination of mediation is timely.

IF the parties…	THEN the…
reached agreement on certain issues mediated	mediator will make every reasonable effort to obtain the parties' acknowledgment of the substance of the report.
did **not** reach an agreement	mediation process is closed and the parties may continue to pursue resolution through the appeal process or other legal remedies.

Note: If the mediation reaches an impasse, consistent with the goals of mediation, notes made by FSA representative at the mediation will **not** be made part of the record submitted to a higher authority for review.

57 Closing Out Mediation (Continued)

D Modified Adverse Decision

[7 CFR 780.9(b)(2)] If an adverse decision is modified as a result of mediation, a participant may exercise any remaining appeal rights as to the modified decision under this part or appeal to NAD, unless such appeal rights have been waived pursuant to agreement in the mediation.

If mediation results in a resolution requiring FSA to agree to modify 1 or more terms of the decision mediated, the mediator will draft an agreement for execution by the participant, FSA, and any other affected parties that includes at least the following terms:

- a statement of the terms of the parties' agreement on each mediated issue
- for each mediated issue, a statement of the actions that the parties have agreed to take to implement their agreement on the issue and the schedule for such actions
- a statement that the positions set out in the agreement have been reviewed by the participant, FSA, and other affected parties and reflect their respective understandings of the terms for resolution of the mediated issues
- if applicable and requested by the parties, a waiver by the participant of any further rights of administrative appeal.

The mediator will ensure that **all** parties receive a fully executed copy of any agreement reached through the mediation. After execution by the participant and the other affected parties, the settlement agreement is binding on the participants. This will conclude the administrative appeal process with respect to those issues.

57 Closing Out Mediation (Continued)

E FSA Terminates Mediation

SED's have the right to terminate mediation when either of the following applies:

- a necessary party in the mediation is **not** participating in good faith
- SED determines that the mediation is at impasse.

At termination of the mediation, SED's will provide written notice to the parties and to the mediator or USDA Certified State Mediation Program, as applicable, that the:

- mediation is closed
- parties are free to pursue other administrative and legal remedies that may be available.

58 Reopening Mediation

A Restrictions

Parties may attempt to reopen a mediation that was at an impasse **only** when **all** the following apply:

- the participant requests that the mediation be reopened
- additional information is requested by the FSA decision-maker
- the FSA decision-maker makes a counter-proposal and agrees, with written SED concurrence, that the mediation may be reopened.

59-70 (Reserved)

Part 6 NAD

Section 1 General Provisions

71 Overview

A Purpose

This part provides general information about NAD and guidelines to assist offices and employees working with and handling appeals filed with NAD.

B Independence of NAD

NAD is an office within USDA but NAD is independent of **all** other agencies and offices in the Department. NAD is subject to general supervision and policy direction from the Secretary.

C NAD Appeal Procedures

The regulations governing NAD appeals are at 7 CFR Part 11 (subparagraph 1 C). In making appeal determinations, NAD hearing officers and the NAD Director **must** ensure that the determinations are consistent with the laws and regulations of FSA and with the generally applicable interpretations of those laws and regulations. The appeal process is informal in the sense that the technical Rules of Evidence do **not** apply in NAD proceedings. To the extent that an agency is authorized to grant equitable relief, the NAD Director likewise has the same authority to grant relief. With the exception of denials of equitable relief by SED's under special relief authority in 7 CFR 718.307, denials of equitable relief are appealable to NAD.

An appellant bears the burden in an appeal to prove by a preponderance of the evidence that an adverse agency decision was erroneous. **[7 CFR 11.8(e)]**

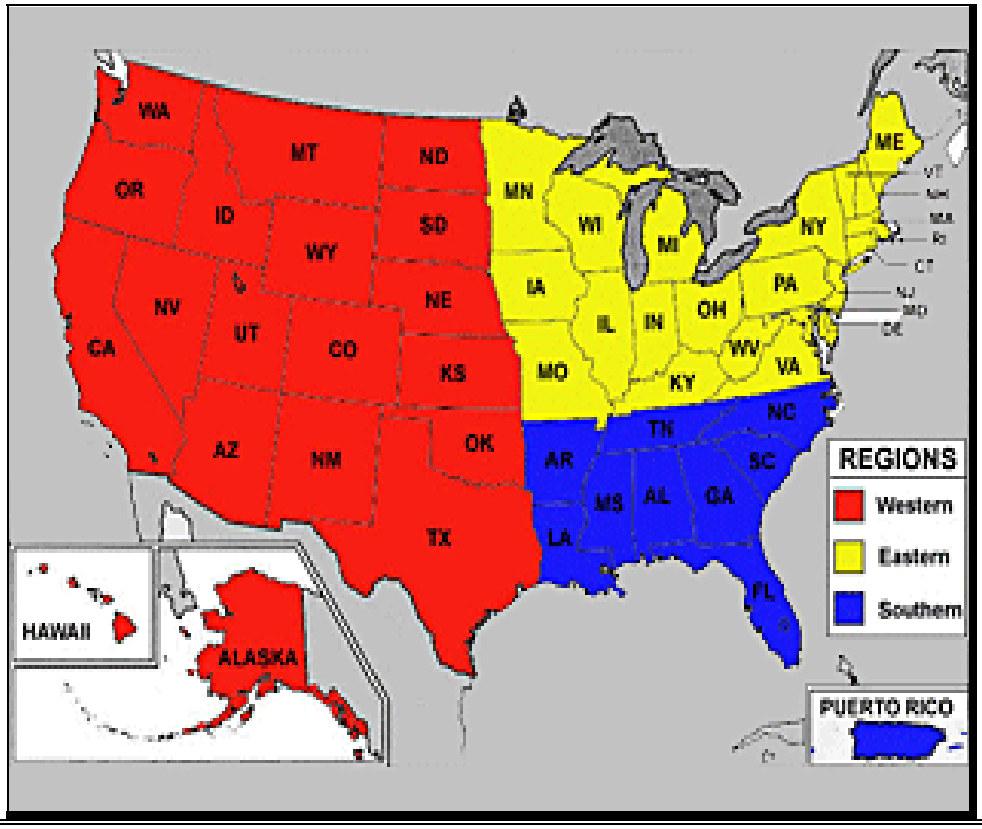
71 Overview (Continued)

D NAD Offices

NAD has 1 headquarter office and 3 regional offices. The following table provides contact information and location coverage.

NAD HEADQUARTERS 3101 PARK CENTER DR STE 1100 ALEXANDRIA VA 22302-1500 Telephone: 703-305-1166 TTY: 703-305-2007 *--FAX: 703-305-2108.--*	**NAD SOUTHERN REGIONAL OFFICE** PO BOX 1508 CORDOVA TN 38088-1508 Telephone: 800-552-5377 or 901-544-0359 TTY: 800-627-8332 FAX: 901-544-0363.
NAD EASTERN REGIONAL OFFICE PO BOX 68806 INDIANAPOLIS IN 46268-0806 Telephone: 800-541-0457 or 317-875-9648 TTY: 800-791-3222 FAX: 317-875-9674.	**NAD WESTERN REGIONAL OFFICE** 755 PARFET ST STE 494 LAKEWOOD CO 80215-5599 Telephone: 800-541-0483 or 303-236-2862 TTY: 800-497-0253 FAX: 303-236-2820.

Each regional office handles a portion of the U.S. as follows.



72 Establishment of NAD

A Organization

NAD was established on October 13, 1994, by Pub. L. 103-354. NAD is an organization within USDA subject to the general supervision of and policy direction by the Secretary, and is independent from all other agencies and offices of USDA. The regulations governing hearing officers and the NAD Director is at 7 CFR Part 11 (subparagraph 1 C).

B NAD Functions and Limits

NAD issues determinations on appeals of adverse program decisions of certain USDA agencies, including FSA. NAD has **no** jurisdiction over questions of law or the appropriateness of agency regulations and agency instructions or handbook procedure. In its determinations, NAD decides whether an agency complied with applicable laws and regulations in rendering the adverse decision under appeal. NAD has **no** enforcement authority. Final appeal determination implementation is the responsibility of the head of the agency involved in the appeal. NAD final determinations are reviewable and enforceable in U.S. District Courts. NAD does **not** process or issue determinations about discrimination complaints, equal employment disputes, FOIA requests, or Privacy Act requests.

73 NAD Jurisdiction and Hearing Guide

A Subject Matter Jurisdiction

Adverse decisions made by a covered agency, including FSA, affecting participants in covered programs are appealable to NAD.

[7 CFR 11.1, *Adverse decision*] Adverse decision means an administrative decision made by an officer, employee, or committee of [a covered agency, including FSA,] 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.

73 NAD Jurisdiction and Hearing Guide (Continued)

A Subject Matter Jurisdiction (Continued)

[7 CFR 11.1, Participant] *Participant* means 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.

The term "participant" does **not** include persons whose claims arise under any of the following:

- proceedings provided for under 7 CFR Part 11
- programs governed by Federal contracting laws and regulations
- FOIA
- suspension and debarment disputes
- export programs administered by CCC
- personnel, EEO, and other similar disputes
- discrimination complaints
- AFIDA appeals.

Note: AFIDA decisions are **not** appealable to NAD because they do **not** involve claims made by persons affected, but involve claims made by FSA against persons obligated to file under AFIDA. Final administrative determinations in AFIDA appeals are final USDA administrative decisions.

73 NAD Jurisdiction and Hearing Guide (Continued)

B NAD Hearing Guide

For informational purposes **only**, NAD's Hearing Guide is available at ***--http://www.nad.usda.gov/Forms/NAD%20Guide%20(October%202008).pdf**.**--***

NAD's Hearing Guide for NAD hearing officers:

- outlines NAD's policies and procedures
- sets forth NAD's stated policy for NAD activities ranging from appealability reviews through hearings and reconsiderations to EAJA reviews
- outlines policies and procedures for NAD employee conduct, managing the hearing process, preparing determinations, and ensuring the quality and consistency of correspondence and determinations.

Note: The guidelines and instructions contained in NAD's Hearing Guide are **not** to be considered FSA's instructions. FSA employees and offices are required to adhere to FSA's instructions contained in appropriate FSA directives.

74 Appealing to NAD

A Requirements for Filing an Appeal with NAD

[7 CFR 11.6(b)] To obtain a hearing under 11.8, a participant personally must request such hearing not later than 30 days after the date on which the participant first received notice of the adverse decision or after the date on which the participant receives notice of the Director's determination that a decision is appealable. 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.

A participant's request for a NAD hearing **must**:

- be in writing
- be personally signed by the participant
- include a copy of the adverse decision to be reviewed, if available
- be timely, that is, be submitted **not** later than 30 calendar days after the date on which the participant first received notice of the adverse decision or after the date on which the participant receives notice of the Director's determination that a decision is appealable
- include a brief statement of the participant's reasons for believing the decision, or FSA's failure to act, was wrong.

Notes: A participant may request a record review of an adverse decision instead of an in-person hearing.

If a participant is assisted in the appeal by a representative, the representative **must** satisfy requirements established by NAD in 7 CFR 11.6(c).

74 Appealing to NAD (Continued)

B NAD Director Review of FSA Decisions of Nonappealability

In addition to performing administrative appeal reviews, NAD performs appealability reviews. The following table describes the action required for the various possibilities stemming from a NAD appealability review. Participants may request a review by NAD of any agency determination that a decision is **not** appealable.

[7 CFR 11.6(a)(2)] The Director shall determine whether the decision is adverse to the individual participant and thus appealable or is a matter of general applicability and thus not subject to appeal, and will issue a final determination notice that upholds or reverses the determination of the agency. This final determination is not appealable. If the Director reverses the determination of the agency, the Director will notify the participant and the agency of that decision and inform the participant of his or her right to proceed with an appeal.

A determination by NAD that an agency decision is appealable is **not** subject to further review before the appeal proceeds, either in FSA's informal appeals process or before a NAD appeal is docketed.

74 Appealing to NAD (Continued)

B NAD Director Review of FSA Decisions of Nonappealability (Continued)

After determining appealability, NAD dockets an appeal and assigns a hearing officer to the appeal.

Note: It is FSA's position that a determination of appealability by the NAD Director does ***--not** eliminate or reduce any of a participant's appeal options. The time limit for--***** exercising appeal options a participant may have in FSA's informal appeals process begins when the participant receives notice of NAD's determination that an agency's decision is appealable.

IF NAD appealability determination is that the adverse FSA decision is…	**THEN, with respect to the agency's adverse decision that gave rise to the appealability review...**
appealable	immediately provide the participant with a written notice *****--advising of the right to reconsideration, appeal, mediation, or appeal to NAD, as applicable, the same as would have been done had FSA decided the matter was--***** appealable, according to paragraph 13. **Notes:** If NAD has already scheduled a NAD hearing for the participant and the participant should have had other appeal options, such as reconsideration or *****--appeal to FSA and/or mediation, advise the participant of the other appeal options. If, after FSA gives the participant this advice, the--***** participant chooses to proceed with the scheduled NAD appeal, the participant will be considered to have **waived** the right to those other appeal or mediation options. It is FSA's policy that it is the participant's choice of what available option to elect following an appealability decision. If a NAD appeal proceeds and FSA continues to believe the matter is outside NAD's jurisdiction, follow subparagraph C.
not appealable	*****--consider the matter closed. No further action by FSA or notification to appellant is required.--*****

74 Appealing to NAD (Continued)

C Preserving Objections to NAD Jurisdiction Following an Appealability Decision

Because a NAD appealability determination may be based on limited information, the issue of whether an issue properly falls within NAD's jurisdiction may still exist even though the NAD Director had ruled that the FSA decision is appealable. Under NAD procedure, a hearing officer may consider FSA's position that NAD does **not** have jurisdiction to conduct an appeal. A hearing officer's determination on an issue of NAD jurisdiction is reviewable by the NAD Director.

Raising the issue of jurisdiction is appropriate when a participant's appeal challenges the substance of regulations or their generally applicable interpretation rather than application of the regulations to a participant's individual circumstances or when it appears that an appellant is trying to challenge a determination under an area that is outside NAD's jurisdiction; for example, a NASS decision on which FSA has relied.

75 Procedural Rights Under NAD Rules

A Participant's Rights

A participant has the right to:

- a NAD hearing within 45 calendar days of the appeal request

- an in-person hearing in the participant's State of residence, as determined by the hearing officer, or a location convenient to the appellant, FSA, and NAD

  Note: If all parties agree, participants may choose to have a telephone hearing or a record review rather than an in-person hearing (see subparagraph 88 B for an explanation of the 3 types of hearings).

- have an individual represent them in the NAD appeal process

  Note: Representatives may or may **not** be lawyers, friends, associates, or family members. NAD requires **all** representatives to file a declaration, sworn to under penalty of perjury, stating that their client have authorized them, in writing, to represent them in their particular appeals. The declaration does **not** preclude the need for on appellant to personally sign a request for a NAD appeal or a NAD Director review.

- file a request that NAD determine the appealability of **any** FSA decision that FSA determines is **not** appealable.

75 Procedural Rights Under NAD Rules (Continued)

B FSA's Rights

FSA has the right to:

- participate in a pre-hearing conference with the NAD hearing officer and appellant **before** the hearing according to paragraph 71
- receive notification of the appeal hearing at least 14 calendar days **before** the scheduled hearing
- participate in the NAD hearing and present FSA's case to support the decision under review
- select the individual who will represent FSA at the appeal hearing
- withdraw FSA's adverse decision.

  Note: This does **not** mean the appeal will be dismissed. If withdrawal of FSA's adverse determination disposes of all issues in the appeal, NAD will dismiss the appeal if **no** appeal decision has been issued.

75 Procedural Rights Under NAD Rules (Continued)

C Third Parties and Interested Parties

[7 CFR 11.15(a)] ***Third parties.*** **When an appeal is filed, the Division shall notify any potential third party whose rights may be adjudicated of its right to participate as an appellant in the appeal. This includes the right to seek Director review of the Hearing Officer determination. Such third parties may be identified by the Division itself, by an agency, or by the original appellant. The Division shall issue one notice to the third party of its right to participate, and if such party declines to participate, the Division determination will be binding as to that third party as if it had participated. For purposes of this part, a third party includes any party for which a determination of the Division could lead to an agency action on implementation that would be adverse to the party thus giving such party a right to a Division appeal.**

Third parties are parties whose rights may be determined as a result of a decision in an appeal. Examples include, but are **not** limited to, cases:

- involving 1 of several parties with a shared interest in a payment, such as tenant and landlord

- by 1 of several heirs to an estate.

If at any time FSA determines that third parties may be affected by the outcome of an appeal, FSA's representative should **promptly** notify the hearing officer to request that NAD notify the third parties, providing names and addresses of third parties, if known to FSA.

75 Procedural Rights Under NAD Rules (Continued)

C Third Parties and Interested Parties (Continued)

[7 CFR 11.15(b)] ***Interested Parties.*** **With respect to a participant who is a borrower under a guaranteed loan or an insured under a crop insurance program, the respective guaranteed lender or reinsurance company having an interest in a participant's appeal under this part may participate in the appeal as an interested party, but such participation does not confer the status of an appellant upon the guaranteed lender or reinsurance company such that it may request Director review of a final determination of the Division.**

Interested parties are parties whose rights may be indirectly or derivatively affected by the outcome of an appeal. If, for any reason, an interested party is **not** given notice of an appeal to NAD, FSA's representative should bring the omission to NAD's attention without delay, providing names and addresses of interested parties, if known to FSA.

Note: Because an adverse decision of a liquidation plan, interest assistance claim, or loss claim will directly affect the guaranteed lender, the lender will be provide with appeal rights when making an adverse decision in these situations.

76 NAD Appeal Record

A Agency Record

[7 CFR 11.1] ***Agency record*** **means all the materials maintained by an agency related to an adverse decision which are submitted to the Division by an agency for consideration in connection with an appeal under this part, including all materials prepared or reviewed by the agency during its consideration and decisionmaking process, but shall not include records or information not related to the adverse decision at issue. All materials contained in the agency record submitted to the Division shall be deemed admitted as evidence for purposes of a hearing or a record review under 11.8.**

The NAD Director, hearing officers, and the appellant shall have access to FSA's record of any adverse decision appealed to NAD for a hearing. FSA's record, with respect to a NAD appeal, consists of documents contained in the administrative record that are about the adverse decision on appeal. In **all** cases, include in FSA's record a copy of the relevant regulations, contract, appendix, complete loan documents, and other FSA operating procedure relied on by FSA to reach the adverse decision.

Note: The NAD Director or hearing officer will notify FSA to submit FSA's record.

FSA **must** promptly submit FSA's record within 10 calendar days of receiving the NAD request.

Note: The NAD policy guideline, for labeling FSA's record, directs that pages in FSA's record be numbered sequentially in the lower right. The following are considered part of FSA's record and **must** be numbered (subparagraph 73 B):

- transmittal memorandum
- any index or list of documents in the record.

If guidelines are unclear, request clarification from NAD **before** submitting the record.

Upon request by the appellant, FSA, within 10 calendar days of receiving the request, **must** provide the appellant a copy of FSA's record.

76 NAD Appeal Record (Continued)

B Hearing Record

[7 CFR 11.1] *Hearing record* means all documents, evidence, and other materials generated in relation to a hearing under 11.8.

Exhibits are distinguishable from FSA's record because they are additional documents and other things submitted as evidence during the hearing. Normally, the hearing officer will ask each party to submit exhibits **before** the hearing. The exchange of exhibits between the parties should be discussed during the pre-hearing conference. Using exhibits can be an effective means to summarize multiple documents in FSA's record and focus attention on the issues that should be decisive in the appeal. Generally, all documents contained in FSA's administrative record will **not** be duplicated in the case record as exhibits, but will be submitted to the hearing officer **only** as part of FSA's record.

It is very important that documentary evidence presented during the hearing be kept organized and as easy as possible to find, follow, and use, both during the hearing and later. In a case with a number of exhibits, it may be appropriate to assemble the exhibits in loose-leaf notebooks with copies for the hearing officer, appellant, witnesses, and FSA to use during the hearing. At minimum, FSA representative should label, in advance, each document to be submitted as an exhibit during the hearing. NAD policy guideline for labeling exhibits states the following:

- FSA documents that are **not** submitted as part of FSA's record are to be numbered
- appellant exhibits are to be labeled alphabetically.

Examples: "FSA Exhibit 1, page 3 of 24."
"Appellant Exhibit A, page 4 of 10"

Note: NAD procedure requires that FSA's Statement of Position provided for under 7 CFR 11.8(c)(2)(ii)(B) be labeled as an exhibit if to be considered as evidence in the hearing rather than as a pre-hearing communication. FSA's representative should confirm during the hearing that the hearing officer is making FSA's written Statement of Position part of the record.

FSA's representative **must** ensure that the hearing officer and the appellant each receive a copy of FSA's exhibits.

76 NAD Appeal Record (Continued)

C Case Record

[7 CFR 11.1, Case Record] ***Case record*** **means all the materials maintained by the Secretary related to an adverse decision: The case record includes both the agency record and the hearing record.**

The case record will include post-hearing exhibits and any submissions in connection with a request for review of a hearing officer's determination by the NAD Director.

77 Ex Parte Communications

A Definition of Ex Parte Communication

[7 CFR 11.1] *Ex parte communication* means an oral or written communication to any officer or employee of the Division with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports, or inquiries on Division procedure, in reference to any matter or proceeding connected with the appeal involved.

B Ex Parte Communication Prohibition

[7 CFR 11.7(a)(1)] At no time between the filing of an appeal and the issuance of a final determination under this part shall any officer or employee of the Division engage in *ex parte* communications regarding the merits of the appeal with any person having any interest in the appeal pending before the Division, including any person in an advocacy or investigative capacity. This prohibition does not apply to:

(i) Discussions of procedural matters related to an appeal; or

(ii) Discussions of the merits of the appeal where all parties to the appeal have been given notice and an opportunity to participate.

The rule in 7 CFR 11.7(a)(1) prohibits NAD from engaging in ex parte communications about the merits of a case.

[7 CFR 11.7(b)] No interested person shall make or knowingly cause to be made to any officer or employee of the Division an *ex parte* communication relevant to the merits of the appeal.

The rule in 7 CFR 11.7(b) prohibits interested persons from initiating or engaging in ex parte communications about the merits of an appeal.

77 Ex Parte Communications (Continued)

C NAD Ex Parte Communication Prevention

NAD officials and hearing officers will document both legitimate discussions of the merits of an appeal and ex parte communications. NAD rules require that any discussions of the merits of an appeal in compliance with 7 CFR 11.7(a)(1)(ii) **must** be documented by the hearing officer in a memorandum of the discussion to be included in the hearing record. If an ex parte communication is initiated by an interested person, the NAD employee receiving the prohibited ex parte communication **must** place the following in the NAD hearing record:

- all written ex parte communications
- memoranda stating the substance of all oral ex parte communications
- all written responses to ex parte communications
- memoranda stating the substance of any oral responses to ex parte communications.

D Ex Parte Communication Consequences

[7 CFR 11.7(d)] Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this section the Hearing Officer or Director may, to the extent consistent with the interests of justice and the policy of the underlying program, require the party to show cause why such party's claim or interest in the appeal should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

77 Ex Parte Communications (Continued)

E Communications With NAD About the Merits of an Appeal

The requirements for communication with NAD about appeals are as follows:

- for written communications, FSA employees **must** provide the appellant a copy of **all** written correspondence about the appeal provided to a NAD hearing officer, including any attachments; written correspondence with the NAD hearing officer should show the appellant and any other parties in the appeal as recipients of copies

  Note: If multiple appellants or other parties are represented by a single representative, service of copies of correspondence with the NAD hearing officer on those parties may be effected by copying the parties' representative on the correspondence.

- for oral communications, FSA employees that want to contact a NAD officer or employee verbally about the merits of an appeal **must** notify the appellant or the appellant's authorized representative, and third parties and interested parties, in **advance** of the intended contact and provide them an opportunity to participate in the communication.

F Documenting Known or Possible Ex Parte Communications

If an FSA employee believes there has been an ex parte communication that is **not** otherwise documented according to subparagraph C, the employee **must**:

- prepare a memorandum to be placed in the FSA administrative record setting forth the basis for believing that ex parte communication has or may have occurred including the evidence supporting the belief and the possible, apparent, or known content of the suspected communication

- sign and date the memorandum

- contact ALS about further steps to be taken.

78 Subpoenas in NAD Proceedings

A Authority to Issue Subpoenas

[7 CFR 11.8(a)(2)] The NAD Director and hearing officers have authority to require, by subpoena, the attendance of witnesses and production of evidence. A subpoena requiring the production of evidence may be requested and issued at any time while the case is pending before the Division.

NAD procedure and regulations at 7 CFR 11.8(a)(2) require that NAD hearing officers obtain NAD Director concurrence **before** issuing subpoenas. Requests for subpoenas **must** state the specific expected testimony of a witness or contents of a document. Subpoenas issued by NAD are enforceable by the NAD Director through OGC and the Department of Justice. If the NAD Director determines that a subpoena for agency evidence or witnesses should issue, FSA's policy is that it will comply with the request for agency evidence or appearance **without** requiring NAD to issue the subpoena.

B Requesting Subpoenas

[7 CFR 11.8(a)(ii)] An appellant or an agency, acting through any appropriate official, may request the issuance of a subpoena requiring the attendance of a witness by submitting such a request in writing at least 14 days before the scheduled date of a hearing. The Director or Hearing Officer shall issue a subpoena at least 7 days prior to the scheduled date of a hearing.

78 Subpoenas in NAD Proceedings (Continued)

C Standard for Issuance of a Subpoena by NAD

Requests for documents or witness appearances shall be handled as follows.

IF the request is for…	THEN according to….
documents	**[7 CFR 11.8(a)(2)(iii)(A)] [The Director or a hearing officer must conclude that] the appellant or the agency has established that production of documentary evidence is necessary and is reasonably calculated to lead to information which would affect the final determination or is necessary to fully present the case before the Division.**
witness appearances	**[7 CFR 11.8(a)(2)(iii)(B)] [The Director or a hearing officer must conclude that] the appellant or the agency has established that either a representative of the Department or a private individual possesses information that is pertinent and necessary for disclosure of all relevant facts which could impact the final determination, that the information cannot be obtained except through testimony of the person, and that the testimony cannot be obtained absent issuance of a subpoena.**

D FSA's Representatives Evaluation of Whether to Request or Object to a Subpoena Request

FSA representatives shall consider **all** of the following in formulating or objecting to a subpoena request:

- the information sought is relevant to the issue in dispute
- the request is specific enough to determine relevance
- the information sought is **not** burdensome to the party
- the subpoena is for a legitimate purpose and **not** harassment
- voluntary production of evidence was sought
- other means of production of the evidence, such as stipulations, were considered
- the evidence is **not** available in another form, such as reliable hearsay testimony
- the information is required to provide a fair hearing.

78 Subpoenas in NAD Proceedings (Continued)

E Untimely Issuing Subpoenas

If a subpoena is issued less than 7 calendar days before a scheduled appeal hearing, FSA's representative may need to contact the NAD hearing officer to request that the hearing be rescheduled.

F Serving Subpoenas

[7 CFR 11.8(a)(2)(iv)] The party requesting issuance of a subpoena shall arrange for service. Service of a subpoena upon a person named therein may be made by registered or certified mail, or in person. Personal service shall be made 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.

G Responsibility for Witness Costs Associated With Subpoenas

[7 CFR 11.8(a)(2)(v)] A party who requests that a subpoena be issued shall be responsible for the payment of any reasonable travel and subsistence costs incurred by the witness in connection with his or her appearance and any fees of a person who serves the subpoena in person. The Department shall pay the costs associated with the appearance of a Department employee whose role as a witness arises out of his or her performance of official duties, regardless of which party requested the subpoena. The failure to make payment of such charges on demand may be deemed by the Hearing Officer or Director as sufficient ground for striking the testimony of the witness and the evidence the witness has produced.

The sanction provided for in the NAD Rules provides for ensuring payment to subpoenaed witnesses who are **not** USDA employees and clarifies that such payments are an issue that is solely between the recipient of the subpoena and the party requesting the subpoena.

78 Subpoenas in NAD Proceedings (Continued)

H FSA Action When Subpoena is Received

Any COC or STC member or other FSA employee or agent receiving a subpoena must **not** take any action about the subpoena **before** receiving guidance from SAC or ALS. An FSA employee, committee member, or agent receiving a subpoena about a NAD hearing shall **immediately** notify SAC. CED's shall immediately notify SAC if a COC member receives a subpoena for a NAD hearing. As soon as practicable after determining the details of the subpoena request and obtaining pertinent documents, SAC will inform ALS and DAFO that an employee or COC member has received a subpoena. ALS and SAC will consult about the appropriate response, and either or both will contact the individual who received the subpoena to provide instructions for response.

78 Subpoenas in NAD Proceedings (Continued)

I Enforcing Subpoenas

[7 CFR 11.8(a)(2)(vi)] If a person refuses to obey a subpoena, the Director, acting through the Office of the General Counsel of the Department and the Department of Justice, may apply to the United States District Court in the jurisdiction where that person resides to have the subpoena enforced as provided in the Federal Rules of Civil Procedure.

If a person refuses to obey a subpoena, the NAD Director through OGC and the Department of Justice, may apply to the U.S. District Court to have the subpoena enforced.

J Giving Required Testimony

[7 CFR 11.8(a)(3)] Testimony required by subpoena pursuant to paragraph (a)(2) of this section may, at the discretion of the Director or a Hearing Officer, be presented at the hearing either in person or telephonically.

In most circumstances, when the NAD hearing officer has determined, and FSA has agreed, that an employee needs to testify at a NAD hearing, testimony should be given telephonically to reduce the amount of time the employee will be absent from work and travel costs.

79, 80 (Reserved)

Section 2 Conduct in NAD Appeal

81 Pre-Hearing Conferences

A Purpose

A pre-hearing conference allows parties to:

- clarify issues and define the dispute

  Note: FSA representatives shall exercise caution **not** to agree to improper stipulations in pre-hearing conferences (paragraph 83).

- determine if there is another pending matter

- raise objections to the appeal going forward for whatever reason (jurisdiction, bankruptcy, litigation, etc.)

  Note: Any and all FSA objections about NAD's jurisdiction to hear an appeal should be raised and made part of the pre-hearing conference record (subparagraph 74 C and paragraph 82).

- identify third parties

- schedule witnesses

- ensure that all relevant information will be available

- determine the need for accommodations for persons with disabilities

- discuss hearing options (personal, telephone, or record review)

- stipulate to facts or expected testimony (paragraph 83).

Note: Generally, FSA representatives should **not** feel pressured into discussing the merits of a case. Facts or expected testimony often go directly to the merits of a case. Pre-hearing conferences, in FSA's view, are more a logistical forum.

Although the pre-hearing conference can be used to obtain stipulations or statements about expected testimony, FSA representatives should refrain from saying anything that could possibly be interpreted to "box" FSA in or preclude FSA from raising whatever it chooses to raise in response to the appellant appeal (subparagraph 83 D).

81 Pre-Hearing Conferences (Continued)

B Discretion to Conduct Pre-Hearing Conferences

[7 CFR 11.8(c)(4), Pre-Hearing Conference] Whenever appropriate, the Hearing Officer shall hold a pre-hearing conference in order to attempt to resolve the dispute or to narrow the issues involved. Such pre-hearing conference shall be held by telephone unless the Hearing Officer and all parties agree to hold such conference in person.

NAD anticipates holding pre-hearing conferences for **all** its appeals. Pre-hearing conferences are usually by telephone, unless NAD determines another form of pre-hearing conference is necessary. NAD sends a notice of pre-hearing conference to all parties. NAD attempts to schedule pre-hearing conferences early enough to permit a hearing within 45 calendar days of receiving a request for NAD appeal review while still allowing the required 14-calendar-day notice of hearing.

C Effect of Requesting Mediation or ADR on NAD Hearing

[7 CFR 11.5(c)(2)] [If a participant] requests mediation or ADR after having filed an appeal to NAD under 11.6(b), but before the hearing, the participant will be deemed to have waived his right to have a hearing within 45 days under 11.8(c)(1) but shall have a right to have a hearing within 45 days after conclusion of mediation or ADR.

Mediation is available as part of FSA's informal appeals process. If the issues in dispute have previously been mediated, a participant's request for mediation of the same issues after filing of an appeal with NAD will **not** be granted (Part 5).

81 Pre-Hearing Conferences (Continued)

D Pre-Hearing Conference Report

The hearing officer will issue a pre-hearing conference report following the conclusion of a pre-hearing conference. The pre-hearing conference report will do all of the following:

- summarize results of the pre-hearing conference
- provide the schedule for the appeal
- include some of the following information:
    - statement of the issues in the appeal as understood by the hearing officer
    - date for the appeal hearing at least 14 calendar days after the date of the pre-hearing conference
    - location where the hearing will convene
    - date for the parties to submit lists of witnesses and descriptions of their testimony
    - date for the parties to submit exhibits
    - deadline for submitting any stipulations to which the parties may agree
    - deadline for parties to submit written statements of position.

Note: If the appeals will be heard jointly or will be consolidated, the pre-hearing conference report will indicate how the appeals will be captioned and whether a single decision or multiple decisions will be issued in the appeal.

82 Objections to NAD Jurisdiction to Conduct an Appeal Proceeding

A Objection at Pre-Hearing Conference

FSA's representative should object to NAD jurisdiction to hear an appeal at the **beginning** of the pre-hearing conference whenever the appeal docketed by NAD is either of the following:

- from a decision based entirely on undisputed or indisputable facts and rules of general applicability as set out either in program regulations or their generally applicable interpretations in FSA handbooks, notices, or pertinent legal opinions

  Note: These decisions are **not** appealable because the appellant is attempting to challenge the rules themselves rather than FSA's application of the rules to the appellant.

- a matter that NAD has considered in a prior appeal and material facts have **not** changed.

B Request for Determination that NAD Lacks Jurisdiction

NAD has clarified that a determination by the NAD Director that a decision is appealable signifies **only** the following:

- the determination is **not** subject to further review before an appeal is docketed and assigned to a hearing officer

- a NAD hearing officer can thereafter dismiss the appeal if the hearing officer determines that NAD is without jurisdiction.

The clarification reflects NAD policy to weigh any uncertain issues of appealability in favor of a determination of appealability to ensure that an appellant is **not** improperly deprived of the right to review of an adverse decision by an independent decision-maker **before** a decision becomes the final administrative decision of USDA. FSA's representative should; therefore, request dismissal of the appeal **without** a further hearing **only** when FSA's record submitted to NAD clearly establishes that there is nothing for NAD to determine that is within the scope of its jurisdiction.

82 Objections to NAD Jurisdiction to Conduct an Appeal Proceeding (Continued)

C Hearing Officer Determination on Jurisdiction

If the hearing officer determines during the pre-hearing conference that NAD does **not** have jurisdiction, the hearing officer will issue a determination of lack of jurisdiction and will provide review rights to the NAD Director. NAD procedure authorizes hearing officers to request additional information during a pre-hearing conference or convene a hearing on the issue of jurisdiction **before** issuing a determination on jurisdiction.

IF the…	THEN…
jurisdiction determination is deferred	the hearing officer will issue a determination jurisdiction no later than 30 calendar days after the pre-hearing conference or receiving additional information from the parties.
hearing officer concludes that NAD has jurisdiction and the appeal proceeds	FSA's representative **must** renew the objection for the record at the **beginning** of the hearing (subparagraph 74 C).

83 Stipulations

A Functional Stipulation Uses

Generally, a stipulation is an agreement by a party or parties to an appeal about an issue or matter that would, without the stipulation or agreement, require producing evidence or hearing officer or NAD Director analysis. In this sense, a stipulation operates as evidence, instead of evidence that otherwise might be offered as a conclusive determination of the stipulated issue. FSA officials shall **not** enter into stipulations without first carefully considering whether the stipulation is in FSA's best interest. While stipulations can be helpful in limiting issues, reducing the need for exhaustive reviews of evidence not in dispute, they can also inappropriately be used to limit FSA's ability to respond effectively in the NAD appeal proceeding (subparagraph D). FSA representatives who are aware that a participant does **not** object or contest various foundational aspects of an FSA decision should inquire whether the appellant is willing to agree to stipulations.

Example: An appellant filed a NAD appeal about an FSA decision denying an application that was **not** filed by a deadline. FSA's representative could ask if the appellant is willing to stipulate that the appellant did **not** file the required application by the deadline. If the appellant agreed to that stipulation, there would be no need to conduct fact finding to determine if the application was filed beyond the deadline.

83 Stipulations (Continued)

B Written Stipulations

NAD will accept and possibly even encourage verbal stipulations of the parties. However, FSA's policy about stipulations by FSA representatives is that the stipulations be in writing and signed. FSA representatives shall refrain from stipulating to anything in the course of a pre-hearing conference, appeal hearing, or post-hearing **without** first reviewing the proposed stipulation with FSA officials who may have authority to modify or reverse the FSA decision that was appealed. The proposed stipulation may also be reviewed by the regional OGC to ensure consistency with the adverse decision, applicable regulations, and proper defense of the appeal (subparagraph D).

C Agreed Issues

If an adverse decision is properly drafted, issues of fact arising in application of the pertinent regulations should be clear and should **not** require further refinement in pre-hearing conference. It may be appropriate; however, to agree or propose that issues accurately stated in an adverse decision should be broken into smaller units for hearing purposes to ensure that there is an orderly and focused presentation of evidence.

83 Stipulations (Continued)

D Avoiding Inappropriate Stipulations

Generally, FSA representatives shall avoid stipulations.

Exception: When FSA determines that a stipulation is to FSA's advantage, such as when FSA is asking if an appellant would stipulate that an overpayment was correctly calculated, a stipulation would be agreeable.

FSA representatives shall **not** agree to statements merely to avoid disagreement or appear contrary. FSA representatives shall avoid being "led" into agreeing to things. Some examples of inappropriate stipulations and suggested responses are as follows.

IF the NAD hearing officer or appellant say…	**THEN FSA's representative should say any of the following, as applicable...**
would you or FSA agree that the only issue in this appeal is whether…	• FSA is concerned with all of the issues identified in the case record and administrative decision that gave rise to the NAD appeal • FSA believes that the issues for this appeal are as follows… • FSA does **not** agree to that statement.
does FSA agree that appellant's crop suffered from disaster? **Note:** Often this type of question is asked when the issue may be something other than whether an eligible cause of loss occurred. In other words, the stipulation may "appear" harmless because the issue of whether a disaster occurred is not at issue in the appeal, such as in a late-filed application scenario or case.	• FSA's position is as stated in the case file record and as contained in the administrative decision; FSA is **not** prepared to agree today to any such statement • FSA's administrative decision speaks for itself and it is appellant's burden to show how FSA erred in making that decision • FSA **cannot** agree with that statement' FSA respectfully requests that NAD review the entire case record and FSA's written position before rendering a decision • FSA does **not** agree with that statement.

83 Stipulations (Continued)

D Avoiding Inappropriate Stipulations (Continued)

IF the NAD hearing officer or appellant say…	THEN FSA's representative should say any of the following, as applicable...
do you or FSA have any objection to... **Note:** Although this may seem harmless, stating that FSA has no objection can have the same effect as agreeing with the statement or admitting it is true.	• FSA reserves the right to make any objection it may deem necessary and appropriate so long as the appeal case file record remains open • FSA **cannot** agree with that statement and FSA reserves the right to comment further about the statement • FSA reserves the right to contest and object so long as the appeal record is open.
does FSA have any evidence to show that appellant's loss computation is in error or wrong? **Note:** This may be an attempt at shifting the burden in the appeal to FSA. Appellants have the burden of showing how FSA got its decision wrong. FSA does **not** have to prove the appellant ineligible at the NAD proceeding.	• FSA's position about appellant's eligibility is as stated in FSA's record and administrative decision; FSA is **not** prepared to agree that appellant's loss computations are correct or without error; FSA's position is that FSA's decision is factually correct and according to rules governing the program • FSA does **not** have a burden of showing error in this proceeding • appellant's loss computation is **not** relevant; rather, the issue is whether FSA's decision is factually correct and according to rules governing the program • FSA **cannot** agree to that statement.

83 Stipulations (Continued)

D Avoiding Inappropriate Stipulations (Continued)

IF the NAD hearing officer or appellant say…	THEN FSA's representative should say any of the following, as applicable…
does FSA admit that it provided misaction or misinformation?	• FSA's position about why equitable relief is **not** appropriate in this case is included in FSA's record and administrative decision • FSA's position on that matter is already on record; appellant is challenging FSA's position • FSA's administrative decision speaks for itself and it is appellant's burden to show how FSA erred in making that decision • FSA does **not** agree with that statement.
in a case involving a disaster application and an FSA decision to assign production for ineligible causes, FSA is asked whether it would at least agree or acknowledge that there was a disaster event that somewhat impacted appellant's crop acreage?	• FSA can answer questions about its decision and the administrative record; however, FSA does **not** agree with that statement; FSA's position is as stated in the official determination letter and in FSA's record • no • FSA **cannot** agree with that statement; the record reflects FSA's official position.
would you or FSA agree that, if appellant can show that he is credit worthy, FSA's denial of the loan is in error?	• no • FSA's position about appellant's ineligibility for the loan is contained in the administrative decision; it is appellant's burden to show how FSA erred in making that decision • FSA does **not** agree with that statement • FSA will **not** agree with or comment on hypothetical situations.

84 Joint Proceedings and Consolidating Appeals

A Joint Proceedings

When appeals are heard jointly, a hearing officer will hear evidence on common issues in a single hearing, but will issue separately captioned decisions in the respective appeals. Joint proceedings should be favored in circumstances where appellants have received separate adverse decisions all sharing certain common underlying facts so that common evidence may be incorporated into a single record that is supplemented only as necessary to address distinguishing issues of fact in the appeals.

B Consolidating Appeals

When appeals are consolidated, separately filed appeals will be combined under a single NAD case number and the hearing officer will issue a single NAD determination in the consolidated appeals. Consolidation of appeals is appropriate when **all** material facts in separately requested appeals are the same, such as payment limitations appeal from a redesignation of persons, as the result of a determination by FSA, resulting in separate appeals by both a landowner and tenant. Because consolidation will have implications for any further review of an appeal determination by the U.S. District Court, consolidations of appeals and designation of records in joint proceedings **must** be approached with caution. In cases involving large records or complicated entity relationships, FSA's representative should consult with SAC, ALS, and regional OGC before the pre-hearing conference to obtain advice about the merits of joint proceedings or consolidation of appeals.

85 Discovery

A No Discovery in NAD Proceedings

See Exhibit 2 for the definition of discovery. NAD rules do **not** provide for pre-hearing discovery. NAD hearing officers do **not** have the authority to compel FSA to engage in discovery.

B Discovery Situations Outside NAD

In dispute resolution procedures providing for discovery, the pertinent rules will specify means for parties to obtain evidence and information that may lead to discovery of evidence from each other in advance of a hearing. Discovery:

- encompasses, among other procedures, the following:
  - depositions; testimony given outside the hearing under oath
  - interrogatories; written questions and answers
  - document requests
  - physical inspections of property
- is generally allowed in court cases, in some formal types of FSA hearings, and in arbitrations
- is **not** a feature of the NAD appeals process that is intended to be technically informal with a focus on review of an FSA record.

86 Official Recordings and Requests for Verbatim Transcripts of NAD Proceedings

A Official Recording

[7 CFR 11.8(c)(5)(iii)] An official record shall be made of the proceedings of every hearing. This record will be made by an official tape recording by the Division.

NAD will make an official tape recording of the proceedings of **every** pre-hearing conference and hearing. Any party may request a copy of the official pre-hearing conference and/or hearing tape recording from NAD.

Notes: If, for whatever reason, FSA's representative believes that FSA could benefit by having a copy of the pre-hearing conference tape, FSA's representative shall request copies. Parties may request copies of recordings at any time, there is no requirement to wait until after a NAD hearing or after receiving a NAD determination to request copies of tape recordings.

In complex or controversial cases or in instances where time may be of essence, FSA should request the tape recordings so that FSA has the benefit of the tape recordings during the entire time FSA is considering whether to request NAD Director review or in anticipation to responding to an appellant-filed request for NAD Director review.

Parties to a NAD appeal will **not** be given additional time to exercise available options while waiting for copies of tape recordings of NAD proceedings.

86 Official Recordings and Requests for Verbatim Transcripts of NAD Proceedings (Continued)

B Requesting NAD Proceeding Verbatim Transcripts

[7 CFR 11.8(c)(5)(iii)] Either party may request that a verbatim transcript be made of the hearing proceedings and that such transcript shall be made the official record of the hearing. The party requesting a verbatim transcript shall pay for the transcription service, shall provide a certified copy of the transcript to the Hearing Officer free of charge, and shall allow any other party desiring to purchase a copy of the transcript to order it from the transcription service.

NAD policy provides that when a transcript is provided it is to be placed in the case record along with the tape recording made by NAD.

FSA should consider requesting a verbatim transcript of NAD proceedings only when 1 or more of the following is a factor:

- extremely sensitive issues
- high profile cases
- complex cases involving many issues or appellants.

Any request for a verbatim transcript of NAD proceedings **must** be approved by SAC. ALS may also determine that a transcript should be prepared.

If a request for a verbatim transcript is made by either FSA or another party to the NAD appeal:

- FSA should request time to submit closing statements or remarks to the appeal record following transcript receipt (paragraph 92)

- FSA **must** purchase its verbatim transcript copy, if NAD proceedings are transcribed at the request of another party to the appeal

- the transcript should be reviewed **immediately** to determine if there are any errors in transcription.

87 Withdrawals

A Withdrawing Adverse Decisions by FSA

FSA may withdraw an adverse decision at any time during the NAD appeals process **before** a NAD hearing officer or NAD Director issues an appeal determination. The official withdrawing the FSA decision **must** be either the FSA decision-maker or higher FSA reviewing authority, authorized FSA appeal representative, or ALS. If FSA determines it necessary to withdraw an adverse FSA decision **after** NAD has issued an appeal determination, written concurrence of ALS **must** be obtained (paragraphs 24 and 25). FSA officials and reviewing authorities shall **not** withdraw any adverse decision that has had a NAD appeal decision rendered **without** ALS concurrence.

--Note:** In the event that NAD asserts jurisdiction to conduct an appeal proceeding despite FSA's having withdrawn the adverse decision, contact ALS for guidance.**--

B Withdrawing Appeals

Only an appellant may withdraw a NAD appeal. Withdrawing an appeal:

- should be in writing
- **must** be signed by all parties that are appellants
- by appellants terminates the NAD appeal and concludes **all** appeal rights relating to the adverse decision.

Third parties do **not** have a right to continue an appeal when appellants have withdrawn.

88 Appellant's Right to NAD Hearing and Types of NAD Hearings

A Appellant's Right to NAD Hearing Within 45 Calendar Days

[7 CFR 11.8(c)] Upon a timely request for a hearing under 11.6(b), an appellant has the right to have a hearing by the Division on any adverse decision within 45 days after the date of receipt of the request for the hearing by the Division.

An appellant may waive the right to have a hearing held within 45 calendar days of timely receiving the appellant's request for a hearing. Reasons for a waiver may include, for example, the complexity of the facts or issues in an appeal, scheduling conflicts of an appellant or appellant's representative, or any other reason in the appellant's sole discretion. An appellant's waiver of the right to a hearing within 45 calendar days of NAD's receiving the appeal request **must** be in writing. If the appellant does **not** request a waiver, NAD will schedule hearing proceedings to comply with the 45-calendar-day provision.

88 Appellant's Right to NAD Hearing and Types of NAD Hearings (Continued)

B Types of Hearings

Appellants have the right to have a hearing held. There are 3 types of hearings, as follows:

- in person in the participant's State of residence, as determined by the hearing officer; referred to as a "personal hearing"

  Note: Personal hearings (subparagraph 89 B) are the most common form of hearing.

- by telephone, telephone hearings may be held by telephone conference call if the appellant agrees

  Note: In telephone hearings, the process is essentially the same as if it were in person. For the hearing record, parties should identify all individuals present and identify themselves while speaking.

- on the written record, referred to as "record review"; record reviews are appeals considered by a hearing officer in which the hearing officer's determination is based on FSA's record and other written information submitted by the appellant and FSA, if the appellant requests a record review:

  - both parties have the opportunity to submit information in documentary form to the hearing officer

    Note: Both parties will also have the opportunity to respond to the documents submitted to the hearing officer.

  - the hearing officer will notify FSA and the appellant of the right to submit additional evidence, the established deadlines, and other requirements as applicable.

89 NAD Hearings

A NAD Appeal Hearing Features

NAD hearings:

- are technically informal in nature and Federal Rules of Evidence do **not** apply
- usually involve placing witnesses under oath and may involve subpoenas
- are controlled by the NAD hearing officer
- presume that FSA's decision being appealed is correct and that it is an appellant burden to show how that decision is wrong
- provide an appellant with the opportunity to submit evidence and other arguments demonstrating how or why FSA's decision is wrong or erroneous
- allow FSA an opportunity to respond to whatever evidence or argument an appellant may submit
- unless waived by appellant, are scheduled within 45 calendar days after NAD receives the appellant's appeal.

89 NAD Hearings (Continued)

B Appellant's Right to Personal Hearings in State of Residence

[7 CFR 11.8(c)(2)(D)(3)] The hearing will be held in the State of residence of the appellant, as determined by the Hearing Officer, or at a location that is otherwise convenient to the appellant, the agency, and the Division.

Regardless of the geographical location for which the FSA adverse decision is issued, NAD rules provide an appellant with the right to have a personal hearing in the appellant's State of residence. Though unintended, this sometimes causes NAD personal hearings to be scheduled in a different State than where the participant/appellant's decision happens to be geographically relevant.

Example: Farmer seeks an LDP in Grant County, Minnesota, and receives an adverse FSA decision. The farmer's residence is actually in Arizona. If the farmer wants to appeal FSA's decision to NAD, the farmer will be offered the opportunity to choose to have a personal hearing about the Minnesota FSA decision on LDP in Arizona.

The State of residence for an appellant is a NAD hearing officer determination. It is up to the hearing officer to decide the State of residence for an appellant joint operation that may have members who reside in different locations.

89 NAD Hearings (Continued)

C Coordinating FSA Representation for NAD Hearings

Generally, FSA is best served by having itself represented at the NAD hearing by an employee who is thoroughly familiar with the case circumstances.

If an appellant is issued an FSA adverse decision relevant to a geographical location other than the appellant's State of residence and the appellant demands a personal hearing in appellant's State of residence that which is different than the geographical location of the FSA decision, SED or SAC for the State responsible for geographical location of the adverse FSA decision shall exercise 1 or more of the following options:

- decide whether it would be in FSA's best interest to travel to and participate in the NAD personal hearing as if it were being held in the State where the decision arose

  Note: Offices shall obtain proper authorizations through normal administrative channels for travel outside their States.

- request assistance, through DAFO and SED of the appellant's State of residence, to have someone from FSA in the State of appellant's residence attend the personal NAD hearing

  Note: Generally, the FSA employee assisting by attending the NAD proceedings should be someone who is familiar with the subject matter/program issue of the appeal and familiar with NAD proceedings in general. Contact ALS as necessary if assistance or advice is required.

- coordinate representation by having someone from FSA in the appellant's State of residence attend the NAD hearing while FSA officials from the State where the decision arose attend by telephone

  Note: FSA's designated appeal representative in such a case could be either the employee in attendance or the employee participating by telephone. Contact ALS as necessary if assistance or advice is required.

- advise NAD that it is impracticable for FSA to attend the hearing in person and request that FSA be allowed to participate in the hearing by telephone

  Note: This option should **only** be used if there is no practicable way for FSA to coordinate or attend the personal NAD hearing or if, in the judgment of FSA officials, it is either imprudent or **not** cost effective for FSA to attend the personal NAD hearing.

- contact ALS for advice or assistance as required.

89 NAD Hearings (Continued)

D Minimum Required Notice of Hearing Date

[7 CFR 11.8(c)(3)] Not less than 14 days prior to the hearing, the Division must provide the appellant, the authorized representative, and the agency a notice of hearing specifying the date, time, and place of the hearing.

If notice of a hearing date is provided less than 14 calendar days before the date noticed, FSA's representative should:

- inform SAC immediately, providing a copy of the notice received showing the receipt date

- upon receiving concurrence from SAC, contact the hearing officer to request rescheduling of the hearing.

Note: Rescheduling should **only** be requested if the notice of NAD hearing does **not** provide FSA with adequate time to prepare and participate in the NAD hearing effectively.

90 NAD Review Standards

A Laws and Regulations

[7 CFR 11.10(b)] In making a determination on the appeal, Hearing Officers and the Director shall ensure that the decision is consistent with the laws and regulations of the agency, and with the generally applicable interpretations of such laws and regulations.

NAD rules at 7 CFR 11.3(b) preclude NAD from reviewing the validity or propriety of FSA's regulations. NAD has **no** authority to formulate generally applicable interpretations of FSA regulations. The authority of the Secretary to determine USDA's generally applicable interpretations of laws and program regulations is delegated to FSA.

[7 CFR 11.10(c)] All determinations of the Hearing Officers and the Director must be based on information from the case record, laws applicable to the matter at issue, and applicable regulations published in the Federal Register and 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 date is appropriate under the applicable agency program laws and regulations.

The appropriate date is **not** necessarily the date on which an adverse decision is issued.

Example: In a compliance case arising under the sodbuster and swampbuster regulations, 7 CFR Part 12, FSA's representative **must** indicate whether the date of the adverse decision under appeal or the date of a prior NRCS *** * *** determination is the date for review of the participant's actions under the applicable regulations.

90 NAD Review Standards (Continued)

B FSA Regulations General Applicability Interpretation Sources

The following table discusses sources of generally applicable interpretations of FSA regulations.

Source	Description or Discussion
FSA Handbooks and Notices	Handbooks and notices are: • sometimes referred to as "procedure" or "internal operating guidelines" • instructions to offices and officials on how to carry out FSA programs and services • interpretations of authorizing legislation and pertinent regulations. It would be inappropriate to interpret a particular section of an FSA handbook or notice as contrary to any particular regulation or statute because the handbook or notice procedure could be based on several regulatory references and OGC advice. In other words, FSA handbooks and notices and other internal operating guidelines often concisely describe, for program administration purposes, how to implement a program or function.
OGC Memorandum	In general, no memorandum prepared by OGC to FSA should be made part of an FSA record **without** OGC consent. If an OGC memorandum previously furnished to FSA deals with a specific issue in an appeal, FSA's representative should review with the State's appeals coordinator whether to request OGC to: • include the memorandum as part of a case file record • issue a written opinion that could be given to NAD.
Unwritten Policy	Written directives often fail to specifically address every eventuality or contingency. Evidence should be submitted in the appeal to support a conclusion that any similar set of facts would generate the same administrative decision as the decision that has been appealed to NAD.

91 Burden of Proof

A Appellant's Burden to Show Error

[7 CFR 11.8(e), Burden of Proof] The appellant has the burden of proving that the adverse decision of the agency was erroneous by a preponderance of the evidence.

Burden of proof means that the appellant **must** show that it is more likely than **not** that FSA's decision was wrong.

Note: The regulation requires proof that FSA's decision **was** erroneous.

Example: Evidence that a borrower's financial condition or costs of operations have subsequently changed is **not** relevant to prove FSA error in denial of a farm loan request. The borrower may, **without** prejudice, submit a new loan application including the new information. Or, if the new information is determined material by FSA, the adverse decision under appeal may be withdrawn.

In general, the appellant as the party with the burden of proof, has the burden of going forward, which simply means that the appellant presents evidence first. However, if the hearing officer believes that it is more logical for FSA to present evidence first, the hearing officer may request FSA to present evidence first.

B Presenting Evidence

In most cases, it should be unnecessary for FSA to present evidence first if FSA's opening statement adequately reviews the content in FSA's record relied on in making the decision under appeal (paragraph 93).

92 Findings of Fact

A Appellant's Burden to Show Error

[7 CFR 11.10(a)] In making a determination, the Hearing Officers and the Director are not bound by previous findings of fact on which the agency's adverse decision was based.

The rule, providing for a de novo hearing before NAD, affords both the appellant and FSA the opportunity to submit additional/new information.

B Recommending Adopting FSA Findings

Although NAD is **not** bound by previous FSA findings of fact, FSA should propose that FSA's findings be adopted as NAD's finding, if there is no clear error made in FSA's finding. In other words, unless the finding is in fact wrong or in error, there is no good reason why it should not be adopted by NAD.

Note: FSA representatives may want to ask if appellant will stipulate to all or part of FSA's findings of fact.

93 Hearing Conduct

A Overview

[7 CFR 11.8(c)(5)] The hearing will be conducted by the Hearing Officer in the manner determined by the Division (NAD) most likely to obtain the facts relevant to the matter or matters at issue.

The hearing officer should confine presentation of facts and evidence to pertinent matters and should exclude irrelevant or unduly repetitious evidence, information, or questions.

Parties to an appeal shall have the opportunity to:

- present oral and documentary evidence
- present oral testimony of witnesses
- present arguments in support of the party's position
- challenge evidence relied on by any party
- question all witness.

All proceedings are to be on the record.

93 Hearing Conduct (Continued)

B Normal Order of Hearing

The order normally anticipated for a NAD hearing is as follows.

Step	Action
1	Appellant's opening statement (subparagraph 95 B).
2	FSA's opening statement (subparagraph 95 C).
3	Presentation of appellant's case and FSA's cross-examination of appellant's witnesses (paragraph 99).
4	Presentation of FSA's rebuttal case and appellant's cross-examination of FSA's witnesses (paragraphs 99 and 100).
5	Appellant's closing statement (paragraph 101).
6	FSA's closing statement (paragraph 101).
7	Instructions about post-hearing submissions and closing of the hearing record (paragraph 102).

In general, the appellant as the party with the burden to show error, has the burden of going forward. This simply means that the appellant should ordinarily give evidence first. However, if the hearing officer believes that it is more appropriate in circumstances for FSA to go first, the hearing officer may request FSA to present its case first. If an appellant is assisted by a representative, it is normally appropriate for the appellant to present the appellant's case first.

Exception: If FSA's adverse decision, organization of the case record, and opening statement are interpreted as deficient by the hearing officer, the hearing officer may determine that FSA **must** present evidence first to allow appellant a fair opportunity for rebuttal.

93 Hearing Conduct (Continued)

C Going Off the Record

Generally, everything that happens during a NAD pre-hearing conference and hearing is "on the record" and is recorded on the official tape. In some circumstances, it may be necessary to go "off the record" for a short period of time.

Example: It may be necessary to go off the record to change the hearing tape or disk or to correct equipment malfunctions.

The hearing officer will decide whether or **not** it is appropriate to go off the record.

D Discussion While Off the Record

The merits of an appeal shall **not** be discussed with NAD by either or both of the parties while off the record. If discussion of merits or procedure occurs while off the record, the hearing officer will summarize, for the record, the events and substance of discussions that took place off the record. If no discussions of the proceedings and merits occur while off the record, the hearing officer may ask parties to confirm once on the record that no such discussions occurred while off the record.

94 NAD Hearing Recordings and Verbatim Transcripts

A Official Record of NAD Hearing

[7 CFR 11.8(c)(5)(iii)] An official record shall be made of every hearing. This record will be made by an official tape recording by the Division.

Under NAD procedure, the pre-hearing conference and hearing will be recorded.

In complex cases, FSA shall request a copy of the pre-hearing conference and hearing recordings immediately after the pre-hearing conference ends and the hearing ends.

Note: There is **no** requirement or provision that FSA **must** wait for the hearing officer decision **before** requesting copies of any recordings of NAD proceedings.

B Verbatim Transcripts of NAD Hearings

[7 CFR 11.8(c)(5)(iii)] Either party may request that a verbatim transcript be made of the hearing proceedings and that such record of transcript shall be made the official record of the hearing.

The party requesting a verbatim transcript shall arrange for and pay for the transcription service, shall provide a certified copy of the transcript to the hearing officer free of charge, and shall allow any other party desiring to purchase a copy of the transcript or to order it from the transcription service. If appellant requests transcription of a NAD proceeding, FSA shall arrange to purchase a copy of the transcript from the transcription service (paragraph 18).

95 Opening Statements

A Purpose

Each party will have an opportunity to make an opening statement. An opening statement gives the parties the opportunity to briefly summarize their positions and arguments and gives the hearing officer an overview of the evidence relating to the issue on appeal. Opening statements are **not** the time for the parties to offer evidence. Parties should **not** interrupt each other for questions, except in limited circumstances, such as for clarification. Although opening statements are **not** an evidentiary phase of the NAD proceeding, the statements are on the record. Accordingly, FSA representatives should exercise caution in making the statement or in being asked to agree with statements the appellant or hearing officer make.

B Appellant's Opening Statement

As the party with the burden of showing error in the adverse decision, appellant's opening statement should be the first opening statement. The appellant's opening statement should discuss the evidence that will be presented on appeal to show FSA's decision was in error. If the appellant fails to indicate what, if any, evidence will be presented, FSA's representative should request the hearing officer to have the appellant clarify appellant's intentions for the appeal. The hearing officer may determine that FSA give its opening statement first.

C FSA's Opening Statement

FSA's representative should summarize the evidence in FSA's record that supports FSA's decision. FSA's opening statement is usually in response to the assertions an appellant makes in either the opening statement or in appellant's appeal. However, as determined necessary by the hearing officer, FSA may be required by NAD to give its opening statement first. As appropriate, FSA's representative should use the opening statement to raise or reiterate FSA's position about NAD's jurisdiction to hear the appeal (paragraphs 73 and 82).

96 Evidence

A Federal Rules of Evidence Inapplicability

Any evidence may be received by the hearing officer **without** regard to whether that evidence could be admitted in judicial proceedings. Although the technical Rules of Evidence that regulate evidence submissions in judicial proceedings do **not** apply, the general objective of fairness and soundly reasoned determinations of fact do apply and are relevant to NAD appeal proceedings.

B Relevant Evidence

Relevant evidence means evidence that has any bearing on any fact that is of consequence to the case or decision.

Evidence that is **not** relevant should **not** have a bearing on the issues in an appeal.

C Objections to Evidence

Although the technical Rules of Evidence do **not** apply to NAD proceedings, objections in NAD hearings on the grounds of relevance, repetitiveness, or unfair prejudice are appropriate and should be made on the record when irrelevant or duplicative evidence is presented.

Example: An appellant references or cites other NAD determinations in other cases. In response, FSA's representative should make a written or verbal objection to such attempt by the appellant. It is important that this objection be on the record. See Exhibit 41 for language for objections to parties referencing NAD cases in other decisions.

If the hearing officer accepts evidence into the record despite objections raised by FSA, the hearing officer will generally state for the record why the evidence is being accepted. If a hearing officer decides **not** to accept evidence into the record, the hearing officer will usually state why the evidence was rejected. The acceptance of evidence into the record is **not** indicative of the weight the evidence will have in the appeal. FSA representatives should ask the hearing officer to give little or no weight to unsupported statements or other questionable evidence. FSA should object to evidence **not** pertinent or relevant to an appeal. The fact that evidence is damaging to a party's position or case is **not** a valid reason for stating an objection unless it can also be argued that such evidence is prejudicial.

96 Evidence (Continued)

D Presenting Evidence

[7 CFR 11.8(c)(5)(ii)] Any party shall have the opportunity to present oral and documentary evidence, oral testimony of witnesses, and arguments in support of the party's position; controvert evidence relied on by any other party; and question all witnesses. When appropriate, agency witnesses requested by the appellant will be made available at the hearing.

Evidence can be presented in 3 forms:

- testimony by the parties
- testimony by other witnesses
- through documents.

Note: The hearing officer should require that documents **not** submitted as part of FSA's record are authenticated, such as require evidence that the documents are what they are claimed to be (subparagraph 97 E). It may be necessary for FSA's representative to request authentication.

96 Evidence (Continued)

E Evidence Not Limited To Evidence Known To Decision-Maker

[7 CFR 11.8(c)(5)(ii)] The Hearing Officer will allow the presentation of evidence at the hearing by any party without regard to whether the evidence was known to the officer, employee, or committee of the agency making the adverse decision at the time the adverse decision was made.

NAD hearing officers may allow presentation of evidence at the hearing by any party **without** regard to whether the evidence was known to FSA at the time the adverse decision was made. To be relevant; however, the evidence **must** ordinarily relate to the facts as the facts were before or as of the date the decision was made (paragraph 91).

F Rebuttal

Each party to an appeal shall have the opportunity to respond to evidence presented and arguments made. This includes an opportunity to challenge evidence presented.

97 Documentary Evidence for NAD Appeals

A Types of Documentary Evidence

The following are examples of documentary evidence:

- FSA record (FSA)
- exhibits (appellant or FSA)
- demonstrative and illustrative evidence (appellant and FSA).

B Definition of Agency Record Under NAD Rules

[7 CFR 11.1] Agency record means all the materials maintained by an agency related to an adverse decision which are submitted to the Division by an agency for consideration in connection with an appeal under this part, including all materials prepared or reviewed by the agency during its consideration and decision-making process, but shall not include records or information not related to the adverse decision at issue. All materials contained in the agency record submitted to the Division shall be deemed admitted as evidence for the purposes of a hearing or a record review under 11.8.

Notwithstanding any objections an appellant may have about its contents, under NAD's rules, an FSA record is deemed accepted by NAD upon receipt. Hearing officers should **not** remove any documents from an FSA record (paragraph 76).

97 Documentary Evidence for NAD Appeals (Continued)

C Exhibits

In addition to FSA's record, FSA may want to submit exhibits with an appeal. Appellants and other parties may also want to submit exhibits. The hearing officer's pre-hearing conference report may instruct parties about exchanging exhibits before a hearing. However, there may still be instances when documentary evidence must be submitted at hearing that was not previously exchanged. When this occurs, the party receiving the newly offered exhibit may ask for time to review the documents. Depending on the nature of the document, the hearing officer may provide for review by calling a short recess, hold the record open for written comment on the newly submitted exhibit, continue, or postpone, in rare cases, the hearing to a later date. Although unusual, hearing officers have the authority to introduce documents into the record. If this happens, parties will generally have an opportunity to respond accordingly.

D Formatting Documents Submitted

In general, as is true for FSA's records, large documents such as maps, photographs, etc., should be reduced or mounted to fit an 8 ½" X 11" page. All pages **must** be on 1-sided *****--paper (see paragraph 22).--*****

E Authenticating Records and Other Documentary Evidence

FSA's appeal representative shall ensure that evidence is presented to support that documents and copies of documents are in fact what they are represented to be. This is usually accomplished by asking pertinent questions. In appropriate cases, FSA's appeal representative should request time to obtain copies of originals from the file to confirm dates and other information if information on documents is illegible or unintelligible.

97 Documentary Evidence for NAD Appeals (Continued)

F Physical Materials Submitted as Evidence

For practical reasons, NAD does **not** accept evidence that is **not** susceptible to long term storage in NAD record-keeping systems. Instead of submitting physical materials as exhibits, FSA's representative should arrange for FSA physical evidence to be photographed, illustrated, or attested to by some available or appropriate means.

G Illustrative Evidence

FSA's appeal representative shall consider means to summarize FSA's record, position, exhibits, or other information to make the information easier to understand.

Example: In a joint appeal proceeding involving several LDP requests on different dates or multiple dates, summarizing the requests on a single exhibit may be an effective means of showing how all the requests were submitted beyond a deadline or after beneficial interest had been transferred. A graph or spreadsheet could be used for this purpose.

H Post-Hearing Exhibits and Submissions

Evidence that the hearing officer or party believes necessary to decide the appeal may not be available at the hearing, either through omission, delay beyond a party's control, or because of developments in the hearing. This evidence may be submitted by the parties as a post-hearing exhibit. When determined necessary, the hearing officer will leave the hearing record open for a defined period of time or number or days, to allow parties to submit information. The hearing officer will also, at the hearing officer's discretion in such cases, allow time for each party to respond to any submissions.

98 Witnesses

A Testimony

Testimony is evidence given verbally by the parties or by witnesses the parties have giving evidence on the party's behalf. Witnesses should limit their testimony to factual information within their personal experience. As a general rule, testimony should **not** include arguments.

Note: Although formal Rules of Evidence do **not** apply to NAD proceedings, FSA appeal representatives should object to witnesses that are merely making arguments or who are discussing matters that are outside their expertise or first-hand experience. These objections should only be raised if the testimony clouds facts that are otherwise **not** controverted or successfully rebutted by other evidence in the record.

Example: A witness testifies that a participant filed an application with FSA although FSA's record contains no copy of the application and no copy of an application has been produced. In such an instance, the FSA appeal representative should tactfully object that the witness is **not** attesting to actually seeing the instrument or knowing that such application was indeed filed. Without an objection in this example, the witness' testimony could cloud the issue of whether there ever was an application.

B FSA Representative as Witness

See subparagraph 4 B about FSA appeal representative duties.

See paragraph 19 about due process.

FSA appeal representatives are generally sworn in NAD proceedings because FSA's designated representative provides both evidence and argument. However, FSA's appeal representative, and those the representative brings to the NAD hearing on behalf of FSA are **not** witnesses for the appellant. While the FSA appeal representative should respond to questions about any evidence FSA puts forward, there is a line between questions about the evidence and interrogating FSA. The appeal forum is **not** a trial of FSA or FSA's appeal representative. FSA appeal representatives, that are uncomfortable with the tenor of questions put forth by an appellant, should ask for a short recess to discuss with FSA the matters FSA's representative finds objectionable or inappropriate.

98 Witnesses (Continued)

C Appellant Requests for FSA Witness Appearances

NAD rules provide that FSA employees and committee members, requested by an appellant, will be made available at the hearing. When appropriate, FSA employee and committee member witnesses requested to appear by appellant will be made available. However, FSA employees, committee members, and contract loss adjusters shall only testify if authorized to do so by FSA. A request for appearance of an FSA employee or committee member shall immediately be forwarded to FSA's designated appeal representative for review. In **no** case shall an FSA employee or committee member testify or give any statement or evidence to an appellant or party **without** express permission to testify or give any statement or evidence. Only ALS, SAC, SED, or FSA's designated appeal representative may authorize FSA employees or committee member appearances as witnesses for an appellant. The authorization **must** be in writing. Without written authorization, the employee or committee member shall assume they are **not** authorized to testify or give statements on behalf of appellants.

D Standard of Review of Requests for FSA Employee or Committee Member as Witness

[7 CFR 11.8(c)(5)(ii)] When appropriate, agency witnesses requested by the appellant will be made available at the hearing.

An FSA employee's or committee member's testimony will be deemed appropriate by FSA when the FSA authorizing official determines that the standard for issuing a subpoena has been met (paragraphs 26 and 78). Employees or committee members receiving a request for statement or to testify shall immediately notify FSA's appeal representative before making any statement or responding. Employees and committee members are **not** permitted to provide any statement to the hearing officer, the appellant, or the appellant's representative without having prior written approval to testify or give any statement or evidence from FSA according to subparagraph C.

98 Witnesses (Continued)

E Witness Declarations Instead of Appearances

When it is **not** practicable for a witness to appear personally, a party to an appeal may offer a sworn written statement, otherwise known as an affidavit, of the witnesses' testimony. When appellants use affidavits instead of witness personal appearances, FSA representatives should point out to the NAD hearing officer that:

- FSA will be unable to cross-examine the witness providing the affidavit
- NAD will be unable to judge the credibility of the witness the same as NAD would in a personal hearing.

If an appellant witness who has provided an affidavit is present at the NAD hearing, the appellant witness can be questioned by FSA at the hearing. FSA should **not** be precluded from examining any appellant witnesses who have given evidence in a case regardless of whether that evidence was given orally in testimony or in an affidavit (paragraph 104).

F General Expectation for Witness Testimony

Witnesses should limit testimony to factual information within their personal experience, should focus on the facts at issue, and as necessary, on the rules or policies applicable to an adverse decision. During a NAD hearing, neither an FSA representative nor an appellant should present a case by arguing with witnesses.

98 Witnesses (Continued)

G Objections

Appellant and agency witnesses are entitled to be treated with courtesy and respect during questioning. Objections raised by FSA's representative should be directed to the NAD hearing officer instead of the appellant or witness. Objections should be:

- raised in a quiet and professional manner; directing the objection to the hearing officer encourages hearing officer control over the hearing proceeding

- thought out and have a point.

  Example: A party has a right to object to questioning that does **not** seem to address relevant matters.

In addition to objections about relevance, objections to the form of questions being posed may be made to the following.

Form of Question	Objection
Compound	A multi-part question that is confusing. In cases where an appellant does not have a representative, FSA's representative may request that the hearing officer assist the appellant in rephrasing the objectionable question.
Argumentative	An objectionable form of leading questioning. Leading questions that call for a yes or no answer are only appropriate in questioning an adverse party, such as FSA questioning the appellant or the appellant questioning FSA.
Repetitive	"Asked and answered." FSA's representative should ask the hearing officer to direct the party to move on to another line of questioning.

98 Witnesses (Continued)

H Hearsay

Hearsay, generally, is second-hand knowledge. It is usually testimony given by a witness based **not** what she or he knows personally, but what others have said. Hearsay testimony:

- is permitted in FSA and NAD proceedings

  Note: Hearsay statements or testimony is dependent on the credibility of someone other than the witness. It is up to the reviewing authority to decide how much weight or credibility to give to the hearsay testimony.

- can be either verbal or written.

If hearsay evidence is a document, such as an invoice, bank statement, or ledger sheet, FSA's representative may object if no foundation is laid that the document is what it is claimed to be.

Note: Hearsay evidence credibility should be address by FSA's appeal representative by introducing exhibits, by noting inconsistencies through examination or cross-examination, or by referring to FSA's record in a closing argument.

I Testimony Under Oath

All persons who testify in a NAD hearing are required to be sworn in before providing testimony. Persons who testify are required to affirm that the testimony they give is the truth and any and all documents they submit are true, correct, and complete to the best of their knowledge.

98 Witnesses (Continued)

J Fifth Amendment Privilege

A witness may assert the constitutional Fifth Amendment privilege **not** to provide testimony so as to **not** incriminate him or herself. However, there are limitations on this privilege. The privilege only protects someone from having to say things that would make them criminally liable for something. Thus, if there is no potential criminal liability in any circumstances, in any other forum, the witness **cannot** refuse to testify. This means that if the witness has been granted immunity from prosecution or has already been criminally prosecuted, the witness may **not** claim the Fifth Amendment as protection from testifying.

Although a witness' choice to invoke the Fifth Amendment privilege **cannot** be used against them in a criminal case, the same is **not** true for a civil case. If a witness in a NAD proceeding asserts the Fifth Amendment privilege, the hearing officer may take that assertion into consideration in deciding the case. Only individuals possess a Fifth Amendment privilege. A corporation or other business entity has **no** Fifth Amendment privilege or right. If an appellant is a business entity, a witness may **not** assert the privilege for the entity. The privilege **cannot** be cited to protect documents from being disclosed.

98 Witnesses (Continued)

K Expert Witnesses

NAD policy provides that witnesses may qualify as experts in NAD proceedings. Experts are individuals, who by their training and experience, are qualified to testify as to their opinion about a situation or a hypothetical situation. Hearing officers should qualify witnesses as expert or not. This is done by reviewing the witnesses' credentials at the hearing and subjecting him or her to cross-examination about those credentials. In many cases the parties may choose to stipulate to the qualifications of the expert. In general there is no need for expert witnesses to give opinion on the proper interpretation of regulations. FSA representatives need **not** agree or stipulate as to a witness' expertise as a condition of allowing the witness to testify. In fact, FSA representatives should **not** agree that a witness is an expert merely to accommodate the appellant or hearing officer or to relieve the hearing officer from deducing that the witness is a qualified expert.

Often professional standards within an expert's particular field will ordinarily impose its own limits on what the expert must do to form a qualified opinion. Examples of this include an appraiser's opinion of value needing to comport with standards for developing and reporting appraised values as set forth in USPAP. In some instances, the hearing officer's authority to review the technical aspects of the expert's testimony may be limited by statute, regulation, or by the applicable professional or State licensing standard.

Examples: A hearing officer may conduct an appeal review of decision that is based on a real estate appraisal; however, the hearing officer may **not** undertake a technical review of the appraisal that may only be performed by a qualified appraiser and according to USPAP rules.

In appeals of NRCS *** * *** determinations, a hearing officer may make a ***--**determination of agency error; however, the hearing officer may **not** disregard NRCS's technical findings.**--***

98 Witnesses (Continued)

L Questioning Witness Expertise

FSA representatives should sufficiently question witnesses to confirm the witness's expertise on the subject about which the witness has been called to testify. Notwithstanding FSA's questioning the expertise of any witness, FSA representatives should refrain, as a general matter, from stipulating to the expertise of a witness. Stipulation is **not** required. If it is learned that the witness received compensation from the appellant or the appellant's representative for past or present services rendered in any capacity, FSA's representative should point this out to the hearing officer.

M Sequestering Witnesses

Sequestering a witness generally involves isolating the witness from the appeal hearing proceeding until the witness is called to testify. NAD policy provides that hearing officers shall sequester witnesses until they are called to testify. If an appellant is a corporation, its representative, officers, and stockholders or owners are entitled to be present in the hearing at all times. FSA's appeal representative may always remain present in the hearing, even if the FSA appeal representative will testify.

99 Witness Examinations and Cross-Examinations

A Overview of Examination of Witnesses

This table provides examination types and their purpose.

Type of Examination	Action
Direct (subparagraph 99 B)	Usually the first testimony of the witnesses. Direct examination sets the stage for cross-examination, re-direct examination, and re-cross examination. Generally, the witnesses should **not** be asked leading questions in direct examination.
Cross (subparagraph 99 C)	Usually follows direct examination. Sometimes, the party wanting to perform cross-examination can request a short break to look over notes of the direct examination.
Re-Direct (subparagraph 99 D)	Usually performed by the same person who performed direct examination and in response to new matters or to rehabilitate testimony given under cross-examination.
Re-Cross (subparagraph 99 D)	Although re-cross examination is seldom used, the person who performed cross-examination may have follow up questions following re-direct examination. Using re-cross examination should be limited to situations that warrant further clarification.

99 Witness Examinations and Cross-Examinations (Continued)

B Direct Examination

Direct examination is a party's opportunity to present its side of the story through testimony of the party or witnesses. Normally it is improper to ask leading questions in direct examination.

Example: "Would you say that…" or "Are you saying that…"

If an appellant or appellant's representative repeatedly asks leading questions of witnesses, FSA's appeal representative may object to the practice or point out that the appellant or representative is leading the witness.

Caution: Objections have their place and should be made after careful thought. They do **not** need to be made each time something objectionable occurs. However, there is nothing inappropriate with objecting to questioning that is clearly inappropriate or is leading.

Consider using an appropriate preface in direct examination that directs the witness to a particular document or matter. In such cases, the witness may be directed to respond to the question.

Example: "Turning to appellant's farm business plan…" or "During the end-of-year review that you performed, you examined the books and records of the appellant relating to payments of land rent. Please describe for the hearing officer your analysis and conclusions that you reached."

99 Witness Examinations and Cross-Examinations (Continued)

C Cross-Examination

Cross-examination is each party's opportunity to ask questions of the opposing party's witnesses. The hearing officer is permitted to ask questions of any witness, representative, or the appellant at any time. Cross-examination generally follows direct examination and questioning. Parties are generally discouraged from interrupting because parties have the opportunity to ask what they deem appropriate in direct examination, cross-examination, or re-direct examination. Parties are allowed to cross-examine, but they are **not** entitled to harass or intimidate witnesses. Hearing officers have the authority to limit cross-examination if it becomes excessive or improper. Cross-examination generally should be limited to the topics that were discussed in direct examination. However, this general guideline should **not** be used to preclude parties from eliciting relevant evidence.

When questioning witnesses, FSA appeal representatives should refrain from asking compound questions. Questions should be single questions. If a witness refuses to answer questions on cross-examination, FSA's appeal representative should point out the witness's refusal and request that the hearing officer strike the witness's direct testimony on the matter in the interest of due process.

99 Witness Examinations and Cross-Examinations (Continued)

D Re-Direct Examination

In the interests of fairness and efficiency, a party is normally expected to present all of a witness's testimony during direct examination. Re-direct examination is a procedural means for a party to bring out additional information or facts to new matters raised during cross-examination or in light of cross-examination. It is sometimes a tactic used to rehabilitate the witness's direct testimony by addition qualifications to answers during the cross-examination. It is useful because it reduces the need for objecting or interrupting either the direct or cross-examination. The hearing officer should restrict; however, re-direct examination to new matters brought out on cross-examination. Similarly, re-cross after re-direct examinations should be limited to new matters brought out on re-direct examination (see the table in subparagraph 104 B).

100 FSA Rebuttal Case Presentation

A Overview

It is suggested that FSA representatives begin presenting the rebuttal case that usually follows appellant's presentation and questioning of witnesses, by:

- reiterating what is at issue in the appeal; pay particular attention to just what FSA determined were facts present in the case, what rules applied, and how appellant's burden is to show just how FSA got its facts wrong or how FSA wrongfully applied its rules to arrive at an incorrect decision

- briefly stating that FSA's decision is FSA's official position on the matter before NAD

  Note: If it is determined that FSA's decision should be modified or amended, FSA's appeal representative should point out exactly how the decision is modified or amended.

- calling witnesses as determined necessary to bolster or reinforce matters in FSA's record

- referencing documents or pages of FSA's record or pertinent regulations that support FSA's official record in the case.

B Witnesses for FSA

Often FSA does **not** bring witnesses to a NAD hearing because the NAD hearing is a forum primarily dedicated providing appellants an opportunity to show just how FSA got it wrong. Much of FSA's case should be referenced as FSA's record that was provided to appellant and NAD in advance of the NAD hearing. It is important to note that just because FSA does **not** read every page of FSA's record into the hearing record, FSA nonetheless expects NAD to consider **all** of FSA's record when rendering a determination. Particular emphasis should be put on pages or documents that strongly support FSA's position.

101 Closing Statements

A Verbal Closing Statements

Unless the hearing officer or a party to the appeal requests written closing statements after the hearing, each party will be given an opportunity to make a closing statement **before** the close of the hearing after each party's case has been presented. A closing statement:

- summarizes the evidence in support of a party's case
- can be used to comment on deficiencies or errors presented by the adverse party.

Example: "FSA's decision should be upheld by the hearing officer because appellant has **not** shown, with credible evidence, that any of FSA's facts are in error or that FSA wrongfully applied its rules."

Generally, because the appellant has the burden of showing error, the appellant should give its closing statement first. FSA's closing statement should ordinarily follow. While it is permissible to address some of appellant's closing statement in FSA's closing statement, generally FSA should attempt to stick to a summary of why FSA's decision is factually correct and conforms to the rules.

101 Closing Statements (Continued)

B Written Closing Statements

In cases involving complex facts, complex regulations, or numerous documents, a written closing statement is more likely to be helpful to the hearing officer for clarifying issues and proposing findings of fact. FSA's policy is to request the opportunity and time to submit a written closing statement whenever:

- the NAD hearing was transcribed; FSA should request time to be able to review the transcript before submitting its closing statement (paragraph 86)

- new information or the basis for an appeal has been entered into the record without giving FSA sufficient time to analyze or comprehend the information or argument

  Note: Appellants and their representatives often do **not** divulge, in advance of the scheduled hearing, the crux of their case or argument. In these instances, FSA is asked to respond, in short order, even though the appellant had FSA's stated position and adverse decision record well in advance of the hearing. Asking for time to submit a written closing statement will level the playing field by giving FSA an opportunity to analyze the appellant's argument to provide an appropriate and detailed response.

- issues are complex, the case is unusually contentious, or if in the judgment of the FSA appeal representative, FSA merely wants time to summarize its position following conclusion of the hearing.

102 Closing NAD Hearing Records

A Post-Hearing Procedure

[7 CFR 11.8(c)(7)] The Hearing Officer will leave the hearing record open after the hearing for 10 days, or for such other period of time as the Hearing Officer shall establish, to allow submission of information by the appellant or the agency, to the extent necessary to respond to new facts, information, arguments, or evidence presented or raised at the hearing. Any new such information will be added by the Hearing Officer to the hearing record and sent to the other party or parties by the submitter of the information. The Hearing Officer, in his or her discretion, may permit the other party or parties to respond to this post-hearing submission.

Additional evidence submitted becomes part of the hearing record and **must** be made available to the opposing party. See paragraph 77 about prohibited ex parte communications.

B Evidence Submitted After the Hearing

FSA's policy is to request the opportunity to respond to any additional evidence submitted after the hearing.

103 Failures to Appear

A Absence of Parties

[7 CFR 11.8(c)(6)] If at the time scheduled for the hearing either the appellant or the agency representative is absent, and no appearance is made on behalf of such absent party, or no arrangements have been made for rescheduling the hearing, the Hearing Officer has the option to cancel the hearing unless the absent party has good cause for the failure to appear. If the Hearing Officer elects to cancel the hearing, the Hearing Officer may: (A) Treat the appeal as a record review and issue a determination based on the agency record as submitted by the agency and the hearing record developed prior to the hearing date; (B) Accept evidence into the hearing record submitted by any party present at the hearing (subject to paragraph (c)(6)(ii) of this section), and then issue a determination; or (C) Dismiss the appeal.

[7 CFR 11.8(c)(6)(ii)] When a hearing is cancelled due to the absence of a party, the Hearing Officer will add to the hearing record any additional evidence submitted by any party present, provide a copy of such evidence to the absent party or parties, and allow the absent party or parties 10 days to provide a response to such additional evidence for inclusion in the hearing record.

B Rescheduling a Hearing for a Failure to Appear

[7 CFR 11.8(c)(6)(iii)] Where an absent party has demonstrated good cause for the failure to appear, the Hearing Officer shall reschedule the hearing unless all parties agree to proceed without a hearing.

104 NAD Appeal Hearing Do's and Don'ts

A General Guidelines

Always following the guidelines in subparagraph B for NAD appeal hearings.

B Do's and Don'ts of NAD Appeal Hearings

The following table provides guidelines for NAD appeal hearings.

DO…	DO NOT…
remember that FSA representatives attend NAD proceedings on behalf of FSA and **not** themselves; be courteous, business-like, and professional.	• give personal views or opinions • interrupt or appear to be rude • appear to have a personal grudge or animosity toward the hearing officer, appellant, or any of appellant's witnesses.
clearly state FSA's position by reading from prepared notes using language that can easily be understood. **Example:** "The Farm Loan Chief has reviewed a USDA OIG referral about the appellant's Crop Disaster Program and emergency loan for FY 2004. Based on the review, OIG audit, OGC opinion, and FSA's record, the request for an operating loan was approved, contingent on the appellant submitting a Farm Business Plan by close of business February 17, 2005."	use acronyms or terms that **cannot** be well understood without further explanation. **Example:** "The FLC has reviewed a USDA OIG referral about appellant's CDP and EM for FY04. Based on the review, the OIG audit, an OGC opinion, and the AR, the request for OL was approved, contingent upon the submission of the FBP by COB 2/17."
question appellant and any appellant witness or expert witness present at the NAD hearing regardless of whether or not the witness gave verbal or written testimony; if the hearing officer rules that FSA may **not** question the individual at the hearing, FSA shall note its objection to that decision on the record.	fail to question appellant or appellant's witness at the NAD hearing merely because the appellant objects to allowing appellant's witness to be examined.

104 NAD Appeal Hearing Do's and Don'ts (Continued)

B Do's and Don'ts of NAD Appeal Hearings (Continued)

DO…	DO NOT…
attempt to get appellant to stipulate to uncontested facts. **Example:** "Will appellant stipulate that appellant did not submit a timely application?"	agree or subject FSA to inappropriate stipulations (subparagraph 83 D).
clearly and tactfully state FSA's position by reading from prepared notes, using language that can easily be understood; stay on subject and discuss FSA's official position based on facts and rules.	make what could be perceived as weak or sympathetic statements. **Example:** "Although I personally agree with appellant's position and understand appellant's view, FSA has no authority to approve appellant's application."
acknowledge background history of a case **without** compromising FSA's official position. **Example:** "FSA's COC reviewed the matter and forwarded a recommendation for consideration. Based on a review of that recommendation and all available information, FSA denied the application (or relief)."	unwittingly pit lower reviewing authority actions against FSA's current official position or allow lower reviewing authority recommendations to be perceived as FSA's official position by inartfully describing the background history of a case. **Examples:** Do not say either of the following: • "Well, that may be the Deputy Administrator's decision; however, the COC believed appellant's application should be approved" • "The COC agreed with appellant and sent a recommendation of approval to DAFP. For some reason, the Deputy Administrator disapproved the COC's request."

104 NAD Appeal Hearing Do's and Don'ts (Continued)

B Do's and Don'ts of NAD Appeal Hearings (Continued)

DO…	DO NOT…
emphasize facts that FSA used to arrive at its decision.	discuss matters that are **not** relevant to the issue at hand or tend to steer the hearing officer away from the very facts that FSA used as a basis for its decision.
be professional in responding to appellant's position. **Example:** "Notwithstanding appellant's assertion that appellant's trees were 6 years old, receipts from the nursery, appellant's application, and the statement of appellant's pest control advisor demonstrate that the trees were only 4 years old."	be personal or unprofessional in responding to appellant's position. **Example:** "Although appellant and appellant's alleged fertilizer salesman stated appellant's trees were 6 years old, FSA knows they were **not** telling the truth or were lying because FSA's investigation clearly indicated the trees were actually 4 years old."
tactfully make objections to documents, form, or procedure.	overdo objections or be disrespectful.
cite applicable rules in support of FSA's decision.	try to overwhelm the appellant or hearing officer with repetitious references to procedure.
remain calm.	raise your voice or lose your temper or composure, even if appellant or hearing officer lose their temper.
ask appellant to cite specific documentation or evidence in support of appellant's assertion or position.	imply that appellant is dishonest.
explain that, in cases such as appellant's, FSA has consistently held that…; object to citations to other NAD cases.	cite other NAD cases from either FSA representative's own personal knowledge or from looking up cases on the Internet; cite case law or respond to citations of case law **without** advice of OGC.
provide FSA's official position.	give a personal opinion about the case, even if asked.
offer to check into something further and get back to appellant and the hearing officer later, take your time and think twice **before** speaking once.	guess and reply without benefit of all available information; in other words, do **not** rush.

105-110 Reserved

Section 3 NAD Hearing Officer Determinations

111 Hearing Officer Determinations

A Overview

The NAD hearing officer appeal determination generally will:

- state whether or **not** FSA's decision is erroneous
- includes findings of fact and conclusions that discuss those findings in support of the appeal determination
- not usually quote regulations at length, most will either reference or cite applicable regulations as part of the determination.

NAD hearing officers:

- are instructed by NAD to avoid citations to court decisions; if a citation to a particular court case is deemed necessary, the hearing officer is instructed by NAD to consult with the hearing officer's supervisor or Regional Office
- will issue their decisions to appellants, appellant representatives, and other parties
- decisions are posted to the Internet by NAD; the Internet copy is **not** deemed an official copy for receipt by FSA.

  Note: FSA receives official copies of hearing decisions at ALS. ALS then distributes FSA's official copy (paragraph 113).

B Status and Copies From ALS

If an FSA employee wants to check on the status of a NAD appeal determination or obtain a copy of the NAD appeal determination, the FSA employee shall contact ALS. FSA offices shall **not** contact NAD for copies of NAD determinations.

112 Hearing Officer Appeal Determination Format

A Content

NAD hearing officer determinations follow a similar format prescribed by NAD. Generally the determination contains the following:

- a statement of the issues under appeal or matters in dispute
- a summary of FSA's adverse decision
- NAD appeal case number
- names and identification of parties
- name of the hearing officer
- date of the determination
- date of the hearing
- place of the in-person hearing, whether the hearing was by telephone, or whether the determination is based on a record review
- name of the agency that issued the adverse decision giving rise to the appeal
- a statement of appellant's position
- findings of fact
- conclusions based on findings of fact and rules governing the program, appellant's position, FSA's position, and any other relevant matter
- a determination of whether FSA erred in its decision
- a statement of the parties' right to seek review and, if raised during the appeal proceedings, time limits for filing NAD Director review requests
- a statement of the rights for allegations of discrimination, misconduct, waste, fraud, or abuse.

112 Hearing Officer Appeal Determination Format (Continued)

B Findings of Fact and Conclusions

NAD views the Findings of Fact and Conclusion Sections of its determinations as the centerpiece of the appeal determination. Accordingly, when reviewing whether NAD has erred in an appeal determination, FSA officials should focus on these sections. In general, findings of fact should be limited to the issues under appeal. Sometimes, hearing officer determinations will contain an Analysis Section where either matters such as witness credibility are discussed or to reflect the hearing officer's deliberative process. Conclusions are the results of the findings and FSA's rule application. In the Conclusion Section, the hearing officer usually applies FSA's rules to conclude whether the FSA erred in its decision.

C Determination

NAD appeal determinations are limited to whether or not FSA erred in its administrative decision. Hearing officers and NAD do **not** have the authority to review the legality of statutes, regulations, or internal operating guidelines (FSA handbooks and notices).

Example: A hearing officer determination indicates that a real estate appraisal was **not** performed in a manner consistent with regulations and; therefore, FSA's decision that was based on the appraisal is in error.

The hearing officer's determination in this instance would **not** direct FSA on how to perform a new appraisal.

D Right to Review

The NAD appeal determination will include a clear statement of the parties' review rights.

113 Receiving and Distributing NAD Appeal Determinations

A Receiving and Distributing NAD Determinations

FSA is a party to NAD appeals involving FSA adverse decisions. Under law, FSA has only 15 workdays from the date of receiving a NAD appeal determination to seek NAD Director review. Accordingly, a system was developed with NAD to coordinate serving determinations on FSA. FSA's official copies of NAD appeal determinations **must** be received by ALS. Copies provided to or obtained by FSA officials from sources other than NAD are considered unofficial and shall **not** be used by FSA for any purpose.

B NAD Appeal Determination Distribution

The following table describes generally how NAD appeal determinations are received by the National Office FSA, OBPI, ALS and how ALS distributes determinations.

Step	Action
1	NAD appeal determination from either the NAD Regional or Headquarter Office is received by the National Office FSA, OBPI, ALS; appeal determinations are usually submitted to ALS electronically.
2	ALS opens the e-mail message containing the appeal determination and immediately documents receiving the appeal determination.
3	ALS examines the appeal determination and attempts to determine the State from which the appeal determination came. **Note:** ALS sometimes is unable to properly identify the correct State Office because the only information that may be available to ALS is the addresses of the parties, if provided. Sometimes the parties to appeals do **not** reside in the State from which the appeal arose.
4	ALS FAXes a copy of the date-stamped appeal determination to the State Office. **Note:** State Offices **promptly** provide copies of the appeal determination to other appropriate FSA offices and employees, and other agencies, such as NRCS, that may be involved.
5	ALS enters the determination in its database.
6	ALS makes an initial determination as to whether the appeal determination finds error on the part of FSA and whether further action is required.

114 Misdirected NAD Appeal Determinations

A Unofficially Received NAD Appeal Determinations

For the reasons discussed in paragraph 113, FSA offices and employees are prohibited from relying on or using any copy of a NAD appeal determination that was **not** received from NAD by FSA according to paragraph 113.

If an FSA employee or office receives a copy of what appears to be a NAD appeal determination that did **not** come from ALS, the employee or office shall:

- immediately contact the State Office and confirm whether the copy is an officially received copy
- disregard the document if it is determined **not** to have been officially received by FSA according to paragraph 113
- not further distribute unofficial copies of the unofficial document.

B Questionable Documentation

FSA has an agreement with NAD about receiving NAD appeal determinations. If an FSA employee or office receives what appears to be a NAD appeal determination, retain **all** envelopes and any other material for further review by ALS. Contact ALS, by phone at 202-690-3297, immediately.

115 Receiving, Disseminating, Analyzing, and Processing Hearing Officer Determinations

A Receiving NAD Hearing Officer Determinations and Actions Required

The following table summarizes actions State Offices shall take when official copies of NAD hearing officer determinations are received from ALS according to paragraph 113.

IF the NAD determination or appeal summary received in a State Office from ALS shows…	**THEN the State Office receiving the determination shall…**
an incorrect State name	immediately contact ALS by telephone at 202-690-3297 and advise that an incorrect State name was entered. If the State Office knows or has a guess of the correct State name for the appeal case, advise ALS accordingly.
an incorrect Deputy Administrator designation	• pen and ink the correct Deputy Administrator designation (such as DAFP, DAFLP, or DACO). Advise ALS by telephone at 202-690-3297 of the correct Deputy Administrator designation **Note:** When contacting ALS about any NAD appeal determination, always provide the NAD case number. • distribute copies of the NAD determination to field offices, employees, and other agencies who should receive a copy of the determination, such as County Office, FLM, DD, State Office FLC's and program specialists, and NRCS, if the appeal was of an NRCS decision appealed to FSA • be alert and advise recipients of copies of the hearing officer determination to be alert to potential appellant-filed requests for NAD Director review so that an appropriate FSA response can be timely filed by FSA.
the correct State name and Deputy Administrator designation and an indication from ALS that FSA's decision was either "upheld" or "not in error"	• distribute copies of the NAD determination to field offices and employees, and other agencies, such as County Office, FLM, DD, State Office FLC's and program specialists, and when appropriate, NRCS • be alert and advise recipients of copies of the hearing officer determination to be alert to potential appellant-filed requests for NAD Director review so that an appropriate FSA response can be timely filed by FSA.

115 Receiving, Disseminating, Analyzing, and Processing Hearing Officer Determinations (Continued)

A Receiving NAD Hearing Officer Determinations and Actions Required (Continued)

IF the NAD determination or appeal summary received in a State Office from ALS shows…	THEN the State Office receiving the determination shall…
the correct State name and Deputy Administrator designation and an indication from ALS that FSA's decision was "reversed," or was "in error"	• distribute copies of the NAD determination to field offices and employees, and other agencies who should receive a copy, such as County Office, FLM, DD, State Office FLC's and program specialists, and NRCS • be alert and advise recipients of copies of the hearing officer determination to be alert to potential appellant-filed requests for NAD Director review so that an appropriate FSA response can be timely filed by FSA **Note:** In cases where FSA's decision was reversed or found to be in error, either in part or entirely by a NAD hearing officer, FSA officials **must** coordinate any response to appellant-filed requests for NAD Director review according to paragraph 117. • within 5 workdays, prepare an analysis according to paragraph 116 in anticipation of being contacted by ALS about whether FSA should seek NAD Director review of the hearing officer determination. **Note:** Offices shall **not** wait until they are contacted by ALS to begin work on the analysis. Additionally, ALS may require a complete copy of the administrative record including documents submitted by appellant to NAD in connection with the appeal. Offices shall be prepared to send, by overnight mail or FAX, requested documents to ALS immediately upon hearing from ALS (paragraph 116).

B NAD Director Review Requests

It is imperative that requests for NAD Director review are handled promptly according to paragraph 117 and Section 4.

116 Hearing Officer Determinations Finding Error or Reversing FSA

A Required Analysis of NAD Hearing Officer Determinations Reversing FSA or Finding Agency Error

In most cases, the only information on a case that is available to ALS or the Administrator is information that is contained in the NAD hearing officer determination. In view of this, and because FSA has a limited amount of time (15 workdays from date of receiving the hearing officer determination) to seek NAD Director review, FSA offices and employees **must** be prepared to assist ALS and the Administrator in meeting the NAD Director review request deadline (paragraph 112).

Within 5 workdays of receiving a NAD hearing officer determination reversing FSA's determination or finding agency error, the State Office shall perform a written analysis of the hearing officer determination. The analysis shall include, but is **not** limited to:

- the NAD case number
- the case background, including important and relevant facts
- a detailed discussion and input about each of the hearing officer's findings, analysis, and conclusions, by number, pointing out accuracies and inaccuracies
- an estimate of the total dollar amount of program benefits at issue
- a summary recommendation of whether or not a request for NAD Director review should be made by the Administrator; the recommendation **must** be accompanied by an explanation.

B Copies to ALS

Do **not** submit a copy of the complete appeal case file to ALS unless ALS requests the file. However, have a copy ready to send to ALS immediately, if ALS requests a copy.

Note: The provisions of this paragraph and the need for an analysis of NAD hearing officer determinations, that reverse FSA or find FSA error, apply to all FSA decisions, including National Office decisions. While State Offices should advise ALS if the FSA decision appealed was the result of a National Office decision, such as Deputy Administrator, the State Office remains responsible for providing the required analysis of the case to ALS, unless other arrangements have been approved.

The analysis and recommendation shall be considered **confidential** internal FSA communications, **not** subject to release outside FSA, without express written ALS concurrence.

117 Appellant Requests for NAD Director Review of Hearing Officer Determinations

A Responding to Appellant-Filed Requests for NAD Director Review

[7 CFR 11.9(c)] Other parties to an appeal may submit written responses to a request for NAD Director review within 5 business days from the date of receipt of a copy of the request for review.

FSA has 5 workdays from first receiving a copy of an appellant request for NAD Director review in which to file its response.

Notes: In some instances, it may be appropriate for FSA to submit a timely response to an appellant-filed request for NAD Director review even though FSA may later or subsequently submit its own NAD Director review request. For example, a response to an appellant-filed request for NAD Director review may help keep NAD focused clearly on what is at issue or why FSA's overall position should be upheld or affirmed.

FSA sometimes may receive a copy of an appellant-filed request for NAD Director review before FSA has received an official copy of the NAD hearing officer determination. In such cases, FSA shall indicate in its response that FSA has not yet received a copy of the hearing officer determination.

117 Appellant Requests for NAD Director Review of Hearing Officer Determinations (Continued)

B SED Action

Because of the limited time in which FSA has to submit responses to appellant-filed requests for NAD Director review, SED's are responsible and authorized to do all of the following:

- prepare and sign FSA responses to appellant-filed requests for NAD Director review
- send FSA responses directly by FAX to the applicable NAD Regional Office
- copy appellant, appellant representatives, and all appeal parties involved (that is, as shown on the hearing officer determination).

  Note: If the hearing officer determination reversed FSA or found FSA error, coordinate the response with ALS to ensure that submissions do **not** conflict with an FSA request for NAD Director review.

In general, FSA shall attempt to submit a timely response to **any** appellant-filed request for NAD Director review, even if the appellant-filed request contains no new information or information showing substantial error on the part of the hearing officer. In these instances, FSA should point that out, as part of its response and reaffirm, why FSA believes its adverse decision that was upheld by the hearing officer is correct.

See Exhibit 51 for an example of a response to an appellant-filed request for NAD Director review.

118 Hearing Officer Determinations Involving Equitable Relief

A NAD's Authority to Consider and Grant Equitable Relief

[7 CFR 11.9(e)] In reaching a decision on an appeal, the Director shall have the authority to grant equitable relief under this part in the same manner and to the same extent as such authority is provided an agency under applicable laws and regulations.

FSA's position is that participants are **not** entitled to either equitable relief or even the consideration of equitable relief. Equitable relief is discretionary. In FSA's view, FSA's refusal to consider equitable relief is **not** appealable to NAD and is outside NAD's jurisdiction. The NAD Director has **not** delegated hearing officers with authority to grant equitable relief.

Exception: Except for SED equitable relief determinations made according to 7 CFR 718.307, FSA equitable relief determinations are appealable and fall under NAD's jurisdiction.

118 Hearing Officer Determinations Involving Equitable Relief (Continued)

B NAD's Hearing Guide

NAD's Hearing Guide (subparagraph 73 B) mentions that equitable relief may arise from either of the following:

- an appeal of an FSA denial of equitable relief

  Note: Hearing officers make findings of fact and draw conclusions as to whether FSA erred in denying equitable relief. A determination that FSA erred in denying relief is **not** itself a grant of relief by the hearing officer. For example, it may find that FSA did **not** consider certain facts or circumstances and implementation would mean that FSA would need to make a new decision.

- a claim for equitable relief in the course of an appeal.

  Notes: The hearing officer will accept evidence and make factual findings on the issue so the Director will have a record on which to determine whether to grant equitable relief, but the hearing officer **cannot**, under NAD rules, grant equitable relief.

  In some instances, NAD has been finding matters appealable only to consider claims for equitable relief even when there are no disputes of fact or when the appellant has no dispute about the participant's failure to meet requirements. It is FSA's view that such is a misuse of appealability provisions. If a participant does **not** have a dispute of fact or otherwise appealable issue, and the case does **not** involve denied equitable relief, FSA believes it is inappropriate for NAD to docket the matter as an appeal merely to allow NAD to entertain the consideration of equitable relief, especially in view of the fact that equitable relief is **not** a program entitlement or benefit.

119 Hearing Officer Determination Finalization

A Finality

[7 CFR 11.8(f)] If the [hearing officer's] determination is not appealed to the Director for review under 11.9, the notice provided by the hearing officer shall be considered to be a notice of final determination under this part.

B Final Determination and Final Administrative Decision

--**If neither the appellant, any third party (but **not** interested party), or FSA submits a timely**--
request for NAD Director review, the hearing officer determination becomes the final determination of NAD and is the final administrative decision.

--Note:** See paragraph 135 about implementing the final determination.**--

120-124 (Reserved)

Section 4 NAD Director Reviews

125 Requesting Director Review of Hearing Officer Determinations

A Who May Request NAD Director Review

The statute and regulations governing NAD appeals of FSA decisions authorize the following to request a NAD Director review of a hearing officer determination:

- appellants (7 CFR 11.9(a)), within 30 calendar days of receiving the hearing officer determination

- named third parties (7 CFR 11.15), within 30 calendar days of receiving the hearing officer determination

- FSA's Administrator or Acting Administrator (7 CFR 11.9(a)), within 15 workdays of receiving the hearing officer determination received according to paragraph 113.

125 Requesting Director Review of Hearing Officer Determinations (Continued)

B Limitations and Standard of Review

Under a request for NAD Director review, the NAD Director considers:

- the appeal determination
- the appeal case record, including the FSA record and documents submitted to NAD by appellant and the parties
- the request for review
- information and arguments of the parties and any responses to requests for NAD Director review

  Note: FSA offices shall submit timely responses to appellant-filed requests for NAD Director review in all cases (paragraph 117).

- any other information that may be accepted by the NAD Director.

The standard for a NAD Director review is whether substantial evidence supports the findings of fact in the hearing officer's determination. Findings of fact will **not** be disturbed unless contradicted by evidence or the case file record. In other words, the NAD Director review analyzes whether the hearing officer's

- findings of fact are accurate or in error
- conclusions and determination are reasonable based on the original or corrected findings.

125 Requesting Director Review of Hearing Officer Determinations (Continued)

C Statutory Deadlines for Requesting NAD Director Review

An appellant, third party, and the Administrator each have a limited amount of time in which to seek a NAD Director review of a NAD hearing officer determination. For FSA, time begins the day a NAD hearing officer determination is received from NAD by FSA in ALS.

Under NAD Rules of Procedure (7 CFR 11.9(a)(2)), **only** the Administrator, or an FSA official who is Acting Administrator, can request a NAD Director review on behalf of FSA. NAD regulation prohibits delegation of this authority to other FSA officials.

The deadlines for requesting a NAD Director review are statutory. The statute provides **no** authority to accept requests for NAD Director review that are filed beyond the statutory deadlines.

125 Requesting Director Review of Hearing Officer Determinations (Continued)

C Statutory Deadlines for Requesting NAD Director Review (Continued)

The following summarizes who may seek NAD Director review of a hearing officer appeal determination and conditions for NAD Director review requests.

IF requests for NAD Director review are from…	THEN requests must include all the following to be entitled to review by NAD Director…
appellants	• be submitted no later than 30 calendar days after the date on which the appellant receives the hearing officer determination under 7 CFR 11.8 • be in writing, signed personally by the named appellant, and addressed to the NAD Director to review the determination • include specific reasons why the appellant believes the determination is wrong • have copies simultaneously sent to **all** parties to the appeal and FSA.
FSA	• be signed by the Administrator or Acting Administrator • be submitted no later than 15 workdays after the date on which ALS received the hearing officer determination on FSA's behalf • include specific reasons why FSA believes the NAD hearing officer determination is wrong, including citations to statutes or regulations that FSA believes the determination violates • show that copies were simultaneously sent to appellant, appellant representatives, and all parties to the appeal.

126 Director Review Requests

A Whether to Request Review

On behalf of the Administrator, ALS reviews and considers some of the following factors, as well as any other pertinent information deemed appropriate, in deciding to recommend that the Administrator submit a NAD Director review request:

- recommendations of FSA offices, employees, and committees
- the extent to which NAD hearing officer's determination is adverse to FSA
- whether the underlying FSA determination, that was appealed to NAD, was substantially and factually correct and properly documented according to rules governing the program
- whether the NAD hearing officer determination contains factual errors that resulted in an incorrect appeal determination
- whether either the FSA decision or NAD hearing officer's determination incorrectly interpret or apply rules governing the program or if the NAD hearing officer's determination is contrary to regulations or law
- whether the NAD hearing officer exceeded his or her authority in:
    - rendering a determination outside the scope of the appeal
    - granting equitable relief inappropriately
- whether the NAD hearing officer's determination is contrary to FSA or NAD regulations or law
- whether the dollar amount of benefits at issue in the appeal case is significant enough to warrant FSA's seeking NAD Director review
- whether the NAD hearing officer's determination is wrong.

126 Director Review Requests Continued)

B Providing Recommendations to ALS

FSA offices shall follow paragraph 116 for providing recommendations that FSA seek NAD Director review of a hearing officer determination.

FSA offices shall not wait to be contacted by ALS before providing recommendations.

Recommendations on whether or not to seek NAD Director review are considered confidential and privileged internal agency discussions. No specific program eligibility decision or extent of eligibility decision is rendered in the recommendations. Accordingly, the recommendations shall not be sent to or copied to participants, NAD, or made public in any forum. The recommendations and information contained therein are not subject to release outside FSA without express written concurrence of ALS.

C Reviewing Recommendations and Processing FSA Review Requests

ALS shall review the NAD hearing officer determination and recommendations and do 1 or more of the following as appropriate:

- assemble a NAD Director review request for signature by the Administrator and prepare that request for clearance
- determine not to seek NAD Director review and recommend other appropriate action
- send requests for NAD Director review that have been signed by the Administrator to NAD
- provide appellants, appellant representatives, State offices, and others with copies of NAD Director review requests that the Administrator has signed
- notify FSA offices of other appropriate action necessary as applicable.

127 Formatting Director Review Requests and Distributing Determinations

A Elements of FSA Requests for NAD Director Review

FSA's requests for NAD Director review are in a memorandum type of informal format that includes, but is **not** limited to, the following:

- notification to the NAD Director from the Administrator
- identification of the named appellant, NAD Case Number, and State or other location where the appeal case arose
- a short narrative introduction explaining the purpose of the memorandum and subject case
- a narrative background of the appeal case
- results of the NAD hearing officer's determination
- identification of issues for the appeal
- discussion or analysis
- conclusion
- indication that copies were sent to appellant, appellant's representatives, and parties to the appeal.

127 Formatting Director Review Requests and Distributing Determinations (Continued)

B Format of NAD Director Review Determinations

NAD Director review determinations follow a format that is very similar in appearance to NAD hearing officer determinations (paragraph 112). Generally, review determinations contain the following:

- a statement of the issues under appeal and matters in dispute
- a summary of the hearing officer's determination and brief statement of requests for NAD Director review
- the NAD appeal case number
- the names and identification of parties
- whether the case was heard or whether the case was a record review
- a statement as to whether or not other parties filed responses or review requests
- a statement of why the appeal party objects to the hearing officer determination
- an analysis of whether the hearing officer determination's findings are accurate and whether the determination is supported by substantial evidence in the record
- additional findings of fact as necessary
- a final conclusion and appeal determination, or remand of the case for further appeal proceedings
- determination about questions of equitable relief, if raised by the parties
- notification that is the final administrative appeal determination of USDA.

127 Formatting Director Review Requests and Distributing Determinations (Continued)

C Receiving and Distributing NAD Director Review Determinations

FSA's official copies of NAD Director review determinations are received by ALS. Copies provided to or obtained by FSA officials from sources other than NAD are considered unofficial and shall **not** be used by FSA for any purpose.

The following table describes how a NAD Director determination is received by FSA and how FSA distributes that determination.

Exception: NAD appealability determinations are **not** considered appeal determinations. NAD distributes appealability determinations to FSA field offices and appellants (paragraph 74).

Step	Action
1	NAD Director review appeal determinations are received electronically by the National Office FSA, OBPI, ALS.
2	ALS opens the e-mail messages containing NAD Director appeal determinations and immediately document receiving the appeal determination.
3	ALS examines the NAD Director appeal determination and determines the State from which the appeal came based on a review of FSA records. **Note:** FSA should have already identified the State from which the appeal arose when FSA received the NAD hearing officer determination (paragraph 112).
4	ALS FAXes a copy of the date-stamped NAD Director appeal determination to the State Office. State Offices **promptly** provide copies of the appeal determination to other appropriate FSA offices and employees, and other agencies such as NRCS, that may be involved
5	ALS enters the determination in its database.
6	ALS makes an initial determination as to whether the NAD Director appeal determination finds error on the part of FSA, if equitable relief has been granted, and whether further action is required.

128 (Withdrawn--Amend. 2)

129 Requests for Reconsideration of Director Review Determinations

A Justification for Seeking Reconsideration

***--[7 CFR 11.11] Reconsideration of a determination of the Director may be requested by the appellant or the agency within 10 days of receipt of the determination. The Director will not consider any request for reconsideration that does not contain a detailed statement of material error of fact made in the determination, or a detailed explanation of how the determination is contrary to statute or regulation, which would justify the--* reversal or modification of the determination.**

Requests for reconsideration by FSA **must** be signed by the Administrator. Upon receiving a request for reconsideration, the Director, NAD, shall issue a notice to all parties as to whether a request meets the standard mentioned above. If the Director rules that the request meets the standard for reconsideration requests, the nonrequesting parties will have 5 calendar days from receiving the Director's notice to file an appropriate response.

Note: Whenever the final date for any requirement or document falls on a Saturday, Sunday, Federal holiday, or other day on which NAD is **not** open for the transaction of business during normal working hours, the time for filing will be extended to COB on the next workday.

B Timing of Reconsideration Determinations

[7 CFR 11.11(c)] The Director shall issue a decision on the request for reconsideration within 5 days of receipt of responses from the non-requesting parties. If the Director's decision upon reconsideration reverses or modifies the final determination of the Director rendered under 11.9(d), the Director's decision on reconsideration will become the final determination of the Director under 11.9(d) for the purposes of this part.

130-134 (Reserved)

Section 5 Implementing Final Administrative Decisions

135 Implementing Final NAD Director Review Determinations

A Overview

[7 CFR 11.12(a)] On the return of a case to an agency pursuant to the final determination of the Division, the head of the agency shall implement the final determination not later than 30 days after the effective date of the notice of the final determination.

Barring a pending request for reconsideration (paragraph 129), FSA **must** implement NAD Director review determinations within 30 calendar days of the effective date *** * *** of the final determination.

B When an Appeal Determination is Administratively Final

A hearing officer's appeal determination is administratively final unless an appellant, the agency, or a third party, but not an interested party, files a timely request for Director review, as follows:

- if a timely Director review is requested, the appeal determination is **not** final
- if no Director review is requested, the appeal determination becomes final 30 calendar days after it is received by the appellant from NAD; that is when the period for an appellant to request a Director review has passed.

--Notes:** Under NAD's internal procedure, a hearing officer determination is treated as final 45 calendar days after the decision date unless a request for review by the NAD Director is filed by the appellant, third party to the appeal, or FSA.**--

See paragraph 119.

A Director's review determination that:

- upholds, reverses, or modifies an appeal determination is final when issued, **except** when the agency, appellant, or third party requests reconsideration by the NAD Director
- remands a case to a hearing officer is **not** final, because subsequent action will occur in the matter.

A reconsideration determination that reverses or modifies a Director's review determination is final when issued.

***--135 Implementing Final NAD Director Review Determinations (Continued)**

C Appeal Determination Effective Date

[7 CFR 11.12(b)] A final determination will be effective as of 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 under the applicable agency program statutes or regulations.

The clarity and precision of the appealed adverse decision is critical both to justification of a decision on appeal and to correction of any error that NAD may determine. The limited grounds for requesting reconsideration of a review determination by the NAD Director that are set forth in the NAD Rules of Procedure, do **not** afford **any** means for an agency to request clarification of a final NAD determination. The adverse decision **must**; therefore, be clear and sufficient to guide agency action if an error is determined by NAD.**--***

*--135 Implementing Final NAD Director Review Determinations (Continued)

D Final Determination Implementation

[7 CFR 11.1] *Implement* means the taking of action by an agency of the Department in order fully and promptly to effectuate a final determination of the Division.

NAD determines agency error, but does **not** determine what must be done to implement an agency decision, except by implication. NAD has **no** role in enforcing its final determinations. Enforcement or reversal of appeal determinations is through the U.S. District Courts.

The requirement for full and prompt implementation of a final NAD determination is a matter for FSA to determine in the circumstances of particular programs and particular appeals, as follows:

- agencies, according to their regulations, may consider changes in the condition of the participant in implementing any NAD final determination

- the 30-calendar-day requirement for NAD decision implementation in 7 CFR 11.12(a) requires that an agency initiate the steps necessary to correct the error in agency consideration of a benefit or application identified by NAD.

Example 1: After a final NAD decision has determined agency error in a decision on farm loan repayment ability, FSA requests updated financial and production information to make a new determination on repayment ability. The request is proper because an appellant's circumstances may have changed during the pendency of the appeal.

Example 2: FSA determines that a new appraisal is necessary to determine the sum due under a Shared Appreciation Agreement. Procurement is initiated within 30 calendar days of the final NAD determination, but the new appraisal report is delivered more than 30 calendar days **after** the final NAD determination. The agency has taken action within 30 calendar days "in order fully and promptly to effectuate [the] final determination of the Division."

Example 3: After a final NAD decision has reversed an agency determination that a participant has received an overpayment of a farm program payment, FSA must reverse agency financial records to cancel the overpayment claim.

Example 4: After a final NAD decision has determined agency error in a denial of a disaster program payment, FSA **must** process payment of the denied benefit if the sum due is ascertainable, or take the next steps to determine what sum should be paid as a result of the determination of agency error.**--***

*--135 Implementing Final NAD Director Review Determinations (Continued)

E Implementation Resulting in New Appeal Rights

If implementation of a NAD determination requires an agency to make a new determination of fact, then a participant **must** be given notice of appeal rights.

Example: The agency corrects flaws in an appraisal used to determine shared appreciation due under a Shared Appreciation Agreement, the corrected appraisal results in a different valuation of the security property and, as a result, a different determination of shared appreciation due. The participant **must** be given new rights of appeal.

F Administrative Offset Appeals

Once a participant's appeal from receipt of notice of intent to collect delinquent debt through administrative offsets has concluded in favor of the agency, the participant does **not** have rights to appeal the actual offsets to collect against the delinquency that was the subject of the appeal.

Example 1: **New Appeal Rights:** A participant's delinquency on loan installment payments is extinguished through administrative offsets, and the participant later becomes delinquent on the same loan. The new delinquency gives rise to new rights of appeal.

Example 2: **No New Appeal Rights:** The participant's delinquency is **not** cured by offsets during a crop year and later program payments to the participant become payable. The additional offsets against the delinquency do **not** give rise to new appeal rights because the participant has no new notice and all calculations of the remaining delinquency are purely mathematical.**--***

*--135 Implementing Final NAD Director Review Determinations (Continued)

G Prompt Payment Act

When calculating program benefits because of an appeal decision, see 61-FI to determine whether interest is due the appellant under the Prompt Payment Act.

H Questions

Direct questions about properly implementing NAD determinations as follows.

IF…	THEN contact…
a County Office	State Office.
a State Office	National Office program division with responsibility for the matter appealed.
any other FSA office	ALS, with the NAD Case Number, at 202-690-3297.

--*

136 Reporting Implementation Status

A Overview

The 2008 Farm Bill (Pub. L. 110-246), Section 14009(b) requires that the head of the agency ***--**report periodically to committees in Congress about the status of implementation and NAD final determinations. The reported information is also to be published to the Department's**--*** web site.

The report by the head of the agency shall include **all** the following:

- a description of all cases returned pursuant to a final determination by NAD

  Note: "Returned", according to 7 CFR 11.12, is when FSA receives the final NAD determination.

- the status of implementation of final determinations

- for any final determination that has **not** been implemented, the reason the final determination has **not** been implemented and the projected implementation date.

B ALS Responsibility

ALS will:

- compile the information required for reporting implementation of returned NAD appeals pursuant to the 2008 Farm Bill

- ***--**maintain a staff point of contact for reporting by States on implementation of NAD determinations returned to FSA

- track when NAD determinations become final and request monthly updates from SAC's about final appeal determinations pending implementation.**--***

136 Reporting Implementation Status (Continued)

C State Office Actions

--**To facilitate FSA reporting, ALS will contact SAC's monthly in States with final appeal determinations that are pending implementation, to obtain a report on implementation status, as follows.**--

- For reporting purposes, implementation occurs when the next step required to correct the error identified by NAD in its final determination has been initiated. The following table has examples of implementation.

Error Identified	Implementation
Payment Error	Determine sum to be paid.
Error in Claim	Reverse claim.
Error in Servicing Notice	Issue corrected notice.
Error in Appraisal	Initiate procurement of a new or corrected appraisal.

- Final determinations where the decision was **not** based on merits will **not** be included in the report. Examples include the following:

  - dismissal by NAD for failure to appear
  - dismissal following withdrawal of decision by FSA
  - dismissal on a determination of no jurisdiction by NAD.

- ***--**For reporting on implementation status:

  - if no further steps are required for implementation after the final NAD determination, SAC will report, "no steps required" and "implemented"

  - if all steps required to process a payment to a prevailing appellant or to process a recovered overpayment have occurred as of the reporting date, SAC will report that implementation of the determination is "pending"

  Note: If steps necessary to begin processing payment have been taken or if demand for an overpayment has been sent, SAC will report, "implemented", but will furnish additional information about status and timing for payment or steps in process to recover any overpayment.

  - in cases where implementation **cannot be initiated** with 30 calendar days after the appeal becomes final, SAC will briefly state the reason for any delay and the expected time for implementation

  - in all other cases, SAC will report the final determination "implemented", if the first steps to implement the final determination have been taken.**--***

137-150 (Reserved)

Part 7 FOIA and Privacy Act

Section 1 FOIA

151 Administrative Appeal Rights

A Regulations

[7 CFR 1.14(a)] Requesters seeking administrative appeal of a denial of a request for records or denial of a fee wavier must ensure that the appeal is received by the agency within 45 days of the date of the denial letter.

The sole level of appeal for denials of requests filed under FOIA and the Privacy Act is to the Administrator. The address to file a FOIA or Privacy Act appeal is shown in subparagraph 162 B.

[7 CFR 1.13] The date of a request or appeal shall be the date it is received in the agency and office responsible for the administrative processing of FOIA requests or appeals.

151 Administrative Appeal Rights (Continued)

B Record Holding Office's Initial Denial

A requester has the right to administratively appeal any adverse determination, which includes:

- denying the release of records, in full or in part, based on at least 1 of the 9 FOIA exemptions

--Note:** See 2-INFO for the legal basis for denying requests.**--

- "no records" response

  Note: The issue on appeal is the adequacy of FSA's search for records.

- denying a request for a fee waiver

- requester's status for determining fee level

  Note: See 2-INFO *** * *** for categories of requesters.

- denying a request for expedited processing

- "agency records" determination

  Note: "Agency records" are records that are either created or obtained by FSA and under FSA control at the time of the FOIA request.

151 Administrative Appeal Rights (Continued)

*--C Mandatory Language to Insert in Adverse FOIA Decision Letters

Any FSA office issuing an adverse FOIA decision shall use the language in Exhibit 58. Language is provided for 5 types of adverse FOIA decisions, as follows:

- denial of release of information based on applicable FOIA exemptions
- no records response
- denial of expedited processing
- denial of fee waiver
- Glomar response.**--***

D Requester Action

FOIA appeals shall be submitted to FSA's Administrator within 45 calendar days from the date of the adverse determination. If the requester mails the appeal, "**STOP 0570**" **must** be included in the address. To facilitate the processing of an appeal, the requester should place ***--**"**FOIA APPEAL**" in capital letters on the front of the envelope. See Exhibit 58 for the complete mailing address for submitting FOIA appeals to the Administrator.**--***

152 State FOIA Coordinators

A Designation

Each State Office shall designate at least 1 employee to act as FOIA coordinator who, in addition to assisting the record holding office in processing FOIA requests, will be responsible for providing all necessary assistance to enable ALS to review and process FOIA appeals within the administrative deadline or any extension of the administrative deadline.

152 State FOIA Coordinators (Continued)

B Responsibilities Relating to Appeals

When ALS receives an appeal of a decision made by a State or County Office to deny the release of FSA records, ALS will notify the State FOIA coordinator. FOIA coordinators will provide assistance in:

- forwarding the FOIA request file compiled by the record holding office to ALS

  Notes: If the volume of the requested records is so large as to make sending all records impractical, ALS may request a representative sample.

  Copies shall be 1-sided and the best copies available. The record holding office shall notate on the FOIA request file that all copies are the best available. Copies of records that were withheld in full shall **not** have information blacked out or added. Copies of records that were partially released, according to 2-INFO, shall include the brackets showing the information that was withheld but the information shall **not** be blacked out.

- obtaining background information pertinent to the FOIA request, as determined by ALS or OGC

- obtaining declarations, if applicable, from the FSA employee who performed, supervised, or coordinated the record search efforts, as determined by ALS or OGC.

State and County Offices **must** use FedEx, United Parcel Service, or other shipping companies with overnight delivery, to ship the FOIA request file and any other information required by ALS.

Note: Mail sent to the National Office using standard USPS creates delays because of package inspections and irradiation technology usage to decontaminate bacteria. Because irradiation “over exposes” images on paper, reviewing the records and providing the requester the best copy available, as required by FOIA, will be difficult, if not impossible.

153 FOIA Request File

A Material To Be Included

A complete copy of the FOIA request file, maintained by the record holding office according to 25-AS, may be required to be forwarded to ALS. The material in the file shall include:

- the original written request
- a copy of the record holding office's response.

Depending on the individual request, the FOIA request file may also include, but **not** be limited to:

- originals or best copies available of the requested records

  Note: Requested records will include pages released to the requester **and** pages withheld.

- supporting documentation or correspondence compiled in the course of processing the request relating to:

  - fees, including fee waiver determinations
  - the search for records
  - expedited processing determinations
  - consultations and referrals
  - contact with the requester about the request
  - any unusual circumstances that may justify a delay in responding to a request.

    Note: See 2-INFO *** * *** for examples of unusual circumstances that could justify a delay.

154 Processing Appeals

A Regulations

[7 CFR 1.14(b)] Each agency shall provide for review of appeals by an official different from the official or officials designated to make initial denials.

B Separating Duties

If an appeal is received by the record holding office, the head of the office shall forward the appeal to the Administrator, according to paragraph 151, and notify the requester that the appeal is being referred to the Administrator for a determination.

C ALS Responsibility

ALS is responsible for processing administrative appeals under FOIA and preparing materials used by the U.S. Justice Department and OGC to defend FOIA in litigation.

D ALS Initial Denial Review

The administrative appeals process is to be made available to a requester **after** FSA has given all consideration to the FOIA request according to FSA procedure. Processing the initial request may include performing a search for records and determining applicable fees. If responsive records exist, a review of the records shall be completed to determine what information is exempt from disclosure.

On a case-by-case basis, if the initial review by ALS reveals that the request was **not** processed according to 2-INFO, ALS may remand the FOIA request to the record holding office, through the State Office, for additional processing and a complete response. ALS will close its files on the appeal and notify the requester that the request is being referred to the record holding office for further processing and response. If the request is partially denied under FOIA, the requester will again be provided appeal rights to the Administrator.

State Offices shall contact PAS for guidance about the processing FOIA requests received.

155 Final Administrative Determination

A Regulation

[7 CFR 1.14(c) (first sentence)] 5 U.S.C. 552(a)(6)(A)(ii) provides that each agency in the Department to which an appeal of a denial is submitted shall inform the requester of its determination concerning that appeal within 20 working days (excepting Saturdays, Sundays, and legal public holidays), plus any extension authorized by 1.16, of its date of receipt.

B Appeal is Granted in Full

If FSA determines to grant the appeal in full, the written response to the requester shall include any conditions surrounding the decision to grant the request, such as the payment of fees. If the responsive records are released to the requester by ALS on appeal, the response shall also include the name, mailing address, and telephone number of the FSA employee to contact to make arrangements for inspection or record release.

C Appeal is Denied

If FSA determines to deny the appeal, either in part or in whole, FSA **must** receive concurrence from OGC with respect to legal sufficiency.

ALS shall send a copy of the records requested and all correspondence relating to the request to OGC. When the volume of records is so large as to make sending a complete copy impractical, ALS shall include a representative sample of the requested records and an informative summary of the records to OGC.

OGC shall review, as promptly as practicable, the request and appeal and provide FSA all necessary assistance to respond to the appeal within the administrative deadline or any extension of the administrative deadline.

The requester shall be informed of the final determination, the reasons for denial, if denied, the name, title or position of each employee responsible for denial, and the right to judicial review of the denial by an appropriate U.S. District Court.

Note: The Administrator, or designee, is authorized to receive FOIA appeals and make determinations to deny FOIA appeals.

156 Judicial Review

A Appellant's Rights

Any requester has the right to seek judicial review in an appropriate U.S. District Court, if the Administrator denies an appeal either in whole or in part.

If FSA fails to meet an administrative deadline in either the initial review or administrative appeal process, the requester has been deemed to have fully, or "constructively", exhausted his or her administrative remedies and can seek immediate judicial review.

Note: On complaint, the U.S. District Courts with jurisdiction over FOIA cases can be the district in which the complainant resides or has his or her principal place of business, where the FSA records are located, or in the District of Columbia.

B Court Action

FOIA includes a provision permitting the U.S. District Court to award reasonable attorney fees and litigation costs if an appellant substantially prevails in litigation. FOIA does **not** authorize a requester to seek monetary damages against FSA or its employees. However, in certain circumstances, FOIA provides that FSA employees who arbitrarily withhold information may be subject to disciplinary action.

157–160 (Reserved)

161 Right to Appeal Decision to Deny Access to Records

A USDA Regulations

[7 CFR 1.112(a) (first sentence)] Any individual who wishes to be notified if a system of records maintained by an agency contains any record pertaining to him or her, or to request access to such records, shall submit a written request in accordance with the instructions set forth in the system notice for that system of records.

[7 CFR 1.112(b)] Any individual whose request under paragraph (a) of this section is denied may appeal that denial to the head of the agency which maintains the system of records to which the request relates.

Note: The complete FSA Privacy Act System of Records was published in FR, Volume 62, No. 25, page 5568, on February 6, 1997. FSA's Privacy Act System of Records is included in 3-INFO, Exhibit 4.

B FSA Policy

Unlike FOIA, the Privacy Act does **not** speak of a requester's right to administratively appeal any adverse determination that FSA makes on his or her request.

FSA permits individuals to request an administrative review of initial denials of access comparable to that under FOIA to avoid, where possible, the need for unnecessary judicial action.

162 Refusal to Grant Access Notification

A Regulation

[7 CFR 1.114(d) (second sentence)] If the system manager determines to deny the request, the system manager shall inform the requester of that determination, the reason for the determination, and the title and address of the agency head to whom the denial can be appealed.

B Record Holding Office's Initial Denial

If FSA determines to deny an individual access to his or her own records, the requester shall be notified of the determination in writing.

The head of the record holding office **must** cite both the applicable Privacy Act and FOIA exemption to withhold information from the individual to whom the records pertain.

Note: In the interest of full disclosure, the Privacy Act requires that requests for access to, or copies of, records subject to the Privacy Act **must** be analyzed under both FOIA and the Privacy Act.

See 3-INFO, paragraph 20, for the descriptions of the 2 Privacy Act exemptions that apply to FSA records subject to the Privacy Act, and 2-INFO *** * *** for the descriptions of the 9 FOIA exemptions.

The requester shall be provided the opportunity to submit a written appeal of the denial to the Administrator within 45 calendar days from the date of the denial letter. The appeal shall be submitted to the following address:

ADMINISTRATOR, FARM SERVICE AGENCY
ATTENTION: APPEALS AND LITIGATION STAFF
1400 INDEPENDENCE AVE SW RM 6722-S
STOP 0570
WASHINGTON DC 20250-0570
Telephone: 202-690-3297.

Note: To facilitate the processing of the appeal, the requester shall be instructed to place "PRIVACY ACT APPEAL" in capital letters on the front of the envelope *** * ***.

C State Office Action

The designated State FOIA coordinator shall send a copy of the denial letter to the Director, PAS.

163 Processing Appeals

A Proper Referral

If an appeal is received by the recording holding office, the head of the office shall immediately transmit the appeal to the Administrator and notify the requester that the appeal is being sent to the Administrator for a final determination. The record holding office shall include with the transmittal:

- a copy of the initial request for access to, or a copy of, the records
- specific identification of the records or information sought by the requester, including the name of the applicable system of records
- the reason for the denial and any relevant circumstances that support the decision.

B ALS Responsibility

ALS is responsible for processing appeals of FSA's refusal to grant access and preparing materials used by the U.S. Department of Justice and OGC to defend Privacy Act access lawsuits.

163 Processing Appeals (Continued)

C ALS Initial Denial Review and Processing

When FSA receives an appeal of a decision by a State or County Office to deny access, FSA shall acknowledge receiving the appeal within 10 workdays, excluding Saturdays, Sundays, and legal public holidays and, whenever practicable, indicate whether or **not** to grant the appeal.

ALS shall immediately notify the designated State FOIA coordinator that a Privacy Act appeal has been received. State FOIA coordinators will provide assistance in forwarding to ALS:

- a copy of the initial request for access to, or copies of, records
- a copy of the record holding office's response that provides the reason for the denial
- supporting documentation that specifically identifies the requested records or information, including the name of the applicable system of records
- a record of any contact with the requester about the request
- any unusual circumstances that may justify a delay in responding to the request, if applicable.

On a case-by-case basis, ALS may determine that the requested records **must** be reviewed by ALS or OGC **before** FSA can make its final determination. The State FOIA coordinator will assist the record holding office in forwarding to ALS the best copies available of the requested records. See paragraph 152 for guidance on shipping records to the National Office.

Note: The record holding office shall maintain individual Privacy Act files, according to 25-AS, created in response to requests for access to, or copies of, records received from the subject of the records. See paragraph 153 for descriptions of the type of material included in individual Privacy Act request files.

164 Final Determination

A Regulation

[7 CFR 1.114(e)] If the head of an agency determines that an appeal pursuant to 1.112(b) is to be denied, the head of the agency shall inform the requester of that determination, the reason for the determination, and the requester's right under 5 U.S.C. 552a(g) to seek judicial review of the denial in Federal district court.

B Appeal is Granted

If FSA determines to grant the appeal, the requester will be notified of the determination in writing within 10 workdays and any requested records forwarded to ALS by the record holding office will be provided to the requester with the written determination.

If the requested records are **not** released by ALS on appeal, the requester will be notified of when and where to access the requester's own records. ALS shall notify the record holding office to provide access for personal inspection, or copies of the requested records, within 30 workdays of the final decision letter, unless for good cause shown, the record holding office is unable to provide access for personal inspection, or copies of the requested records, within 30 workdays of the final decision letter.

C Appeal is Denied

If FSA determines to deny access to, or the release of, the requested records, FSA **must** receive OGC's concurrence for legal sufficiency. ALS shall send a copy of the requested records and the reasons for FSA's proposed determination to OGC. Once OGC has completed its review, FSA shall notify the requester of FSA's decision, with the reasons for denying the request if denied, including the following:

- applicable Privacy Act and FOIA exemptions
- name and title of the person responsible for the final decision
- right to seek judicial review of the denial in an appropriate U.S. District Court.

Note: The Administrator, or designee, is authorized to receive Privacy Act appeals of denial to access and make determinations to deny such appeals.

165-170 (Reserved)

Section 3 Privacy Act – Amending FSA Records

171 Right to Appeal Decision to Refuse to Amend and Notification

A Right to Appeal Decision to Refuse to Amend Regulations

[7 CFR 1.116(a)] Any individual who wishes to request correction or amendment to any record pertaining to him or her contained in a system of records maintained by an agency shall submit that request in writing in accordance with the instructions set forth in the system notice for that system of records.

[7 CFR 1.118(a)] Any individual whose request for correction or amendment under 1.116 is denied, and who wishes to appeal that denial, shall address such appeal to the head of the agency which maintains the system of records to which the request relates, in accordance with the procedures set forth in the agency's initial denial of the request.

Note: The complete FSA Privacy Act System of Records was published in FR, Volume 62, No. 25, page 5568, on February 6, 1997. FSA's Privacy Act System of Records is included in 3-INFO, Exhibit 4.

B Refusal to Amend Notification

[7 CFR 1.117(a)(2) (first sentence)] [The agency shall … promptly} inform the requester of its refusal to amend the record in accordance with the request; the reason for the refusal; the procedures whereby the requester can appeal the refusal to the head of the agency; and the title and business address of that official.

171 Right to Appeal Decision to Refuse to Amend and Notification (Continued)

C Record Holding Office's Review and Initial Denial

If FSA, after reviewing the record that the requester believes is not accurate, relevant, timely, or complete, determines **not** to grant all or any portion of the request to amend, the requester shall be notified of the determination, in writing, along with the reasons for the determination. The requester shall be provided the opportunity to submit a written appeal of the refusal to amend to the Administrator within 45 calendar days from the date of the denial letter. The appeal shall be submitted to the following address:

ADMINISTRATOR
ATTENTION: APPEALS AND LITIGATION STAFF
FARM SERVICE AGENCY
STOP 0570
1400 INDEPENDENCE AVE SW RM 6722-S
WASHINGTON DC 20250-0570
Telephone: 202-690-3297.

Note: To facilitate processing the appeal, the requester shall be instructed to place "PRIVACY ACT APPEAL" in capital letters on the front of the envelope or on the cover sheet of the FAX transmittal.

D State Office Action

The designated State FOIA coordinator shall send a copy of the denial letter to the Director, PAS.

172 Processing Appeals

A Proper Referral

If an appeal is received by the record holding office, the head of the office shall immediately transmit the appeal to the Administrator and notify the requester that the appeal is being sent to the Administrator for a final determination. The record holding office shall include the following with the transmittal:

- a copy of the initial request to amend records
- all information required to be submitted by the requester in support of the request.

Note: The request shall include the name of the system of records, as published in the system notice to which the request relates, a description of the nature (that is, modification, addition, or deletion) and substance of the correction or amendment requested, and any other information specified in the system notice. FSA's current System of Records is detailed in 3-INFO, Exhibit 4.

B ALS Responsibility

ALS is responsible for processing FSA's refusal to amend record appeals and preparing materials used by the U.S. Justice Department and OGC to defend Privacy Act amendment lawsuits.

172 Processing Appeals

C ALS Initial Denial Review and Processing

When ALS receives an appeal of a decision by a State or County Office to refuse to amend records, ALS will notify the designated State FOIA coordinator. State FOIA coordinators will provide assistance in forwarding to ALS:

- a copy of the initial request to amend records and required information in support of the request
- a copy of the record holding office's response that provides the reason for the denial
- a copy of the FSA record subject to the appeal, if required by ALS or OGC
- a record of any contact with the requester about the request
- any unusual circumstances that may justify a delay in responding to the request, if applicable.

On a case-by-case basis, ALS may determine that the records subject to the appeal **must** be reviewed by ALS or OGC **before** FSA can make its final determination. The State FOIA coordinator will assist the record holding office in forwarding to ALS the best copies available of the subject records. See paragraph 152 for guidance on shipping records to the National Office.

Note: The record holding office shall maintain individual Privacy Act files, according to 25-AS, created in response to requests to amend records. See paragraph 153 for descriptions of the type of material included in individual Privacy Act request files.

173 Review by Administrator and Final Determination

A Regulation

[7 CFR 1.118(b) (first sentence] The head of each agency shall make a final determination with regard to an appeal submitted under paragraph (a) of this section not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests a review, unless, for good cause shown, the heard of the agency extends this 30-day period and so notifies the requester, together with an estimate of the date on which a final determination will be made.

B Agree to Amend Record

If the Administrator determines to grant all or any portion of an appeal of the refusal to amend records, the requester shall be notified of the determination in writing. The record holding office shall be notified to make the requested correction or amendment. The record holding office shall inform all previous recipients of the subject record, including any person or agency outside USDA as maintained in the accounting of disclosures, of the exact nature of the correction or amendment.

Note: See 3-INFO, paragraph 22 for instructions for accounting for certain disclosures of Privacy Act records.

173 Review by Administrator and Final Determination (Continued)

C Refusing to Amend Record

If FSA determines on appeal to refuse to amend records, FSA **must** receive OGC's concurrence.

ALS shall send a copy of the request to amend records, all documentation submitted by the requester in support of the request, and FSA's proposed determination to OGC.

Once OGC has completed its review, the Administrator shall notify the requester of the decision and the reasons for denying the request, if denied. The denial letter shall also inform the requester of the following:

- his or her right to file a concise statement of the reasons for disagreeing with FSA's decision

- that the statement of disagreement shall be submitted to the following address:

  ADMINISTRATOR, FARM SERVICE AGENCY
  ATTENTION: APPEALS AND LITIGATION STAFF
  STOP 0570
  1400 INDEPENDENCE AVE SW RM 6722-S
  WASHINGTON DC 20250-0570
  Telephone: 202-690-3297

- that the statement of disagreement will be made available to anyone to whom the record is subsequently disclosed along with the following:

  - the record, if determined appropriate
  - a brief statement by FSA summarizing its reasons for refusing to amend the record

- that, where FSA has made prior disclosures of the record and an accounting of those disclosures was made, prior recipients of the record will be provided a copy of any statement of disagreement and a brief statement of FSA's reasons for refusing to amend the record

- the right to seek judicial review of FSA's determination to refuse to amend the record in the appropriate U.S. District Court.

  Note: The delegation of authority to the Administrator may be **not** redelegated.

173 Review by Administrator and Final Determination (Continued)

D Statement of Dispute

When the record holding office receives a Statement of Dispute from the Administrator, the office shall annotate the record so the dispute is apparent and a permanent part of the record so that subsequent disclosures of the record will include the annotation. The Statement of Dispute and, if necessary, a copy of the Administrator's summary of the reasons for **not** making the requested correction shall be provided to prior recipients of the record.

174-175 (Reserved)

Section 4 Privacy Act - Penalties

176 Statute of Limitations

A Time Restrictions

An action to enforce any liability under the Privacy Act may be brought in the U.S. District Court within 2 years from either of the following:

- date on which the cause of action arises
- date of discovery, if FSA has willfully misrepresented any information required to be disclosed to an individual.

B Jurisdiction

On complaint, the U.S. District Courts with jurisdiction over FOIA cases can be the district in which the complainant resides or has his or her principal place of business, where the FSA records are located, or in the District of Columbia.

177 Civil Remedies

A Grounds for Court Action

An individual may seek judicial relief if FSA violates any provision of the Privacy Act. Grounds for court action include the following:

- refusal to amend a record
- denial of access to a record
- failure to maintain a record accurately

  Note: Court action may be taken **only** if the individual can show that the deficiency in the record caused an adverse action or determination to be made against the individual.

  Example: FSA fails to maintain any record about an individual with accuracy, relevance, timeliness, and completeness. The failure to maintain records with accuracy, relevance, timeliness, and completeness endangers the fairness of any determination relating to the qualifications, character, rights, or opportunities of or benefits to the individual.

- failure to comply with the Privacy Act.

  Note: An individual may bring a court action for any other alleged failure of FSA to fully comply with the Privacy Act when the action was intentional or willful or had an adverse effect on the individual, or the adverse effect was about FSA's actions.

177 Civil Remedies (Continued)

B Refusing to Amend a Record

The court may order FSA to amend the individual's record according to the request for amendment, or as the court directs, and assess reasonable attorney fees and other litigation costs against the U.S.

C Denying Access to Records

The court may order FSA to produce any record improperly withheld and assess reasonable attorney fees and other litigation costs against the U.S.

Note: In this case, the court may examine the contents of any FSA records in camera, a judge's private consideration, to determine whether the records or any portion of the records may be withheld under proper examination of the Privacy Act.

D Adverse Determinations and Other Failures to Comply

If the court determines that FSA acted in a manner that was willful or intentional in subparagraph A, the U.S. will be liable to the individual in an amount equal to the sum of actual damages sustained by the individual as a result of the adverse determination or $1,000, whichever is greater, as well as court costs and attorney fees.

E Rights of Legal Guardians

The parent of any minor, or the legal guardian of an individual who has been declared incompetent because of physical or mental incapacity or age by a court, may act on behalf of the individual.

178 Criminal Penalties

A USDA Regulation

[7 CFR 1.121] The criminal penalties which have been established for violations of the Privacy Act of 1974 are set forth in 5 U.S.C. 552a(i). These penalties are applicable to any officer or employee of an agency who commits any of the acts enumerated in 5 U.S.C. 552a(i). These penalties also apply to contractors and employees of such contractors who enter into contracts with an agency of USDA and who are considered to be employees of the agency within the meaning of 5 U.S.C. 552a(m)(1).

B Unauthorized Disclosures

Any FSA employee may be convicted of a misdemeanor and fined not more than $5,000, if the employee has possession or access to records and knowingly and willfully discloses any individual protected data or information that is included in a system of records to any person or agency.

C Failure to Publish a Public Notice

Any employee who willfully maintains a system of records without meeting the public notice requirement, according to 3-INFO, shall be guilty of a misdemeanor and fined not more than $5,000.

D Obtaining Records Under False Pretenses

Any person who knowingly and willfully requests or obtains any record about an individual under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

179-190 (Reserved)

*--Part 8 Litigation

191 Settlements

A Authority to Settle for the Government

The Department of Justice is vested with authority to settle in its sole discretion all litigation in which Government is a party. As a matter of Department of Justice policy, the concurrence of the affected agency will be sought before a settlement is agreed to. The FSA Administrator or Executive Vice President, CCC, will accordingly be afforded an opportunity to concur or **not** concur with terms contemplated for settlement of litigation.

B ALS Role

ALS assists the Administrator and Executive Vice President, CCC, in exploration and review of settlement terms and coordination and clearance of settlements through the affected program offices.

To allow for an orderly consideration of settlement proposals by the National Office, terms that may be considered or proposed for settlement of litigation should be brought to ALS's attention at the very earliest practicable opportunity.

Notes: STC's and State Offices do **not** have authority to concur with settlements for FSA.

This paragraph does **not** apply to servicing and resolving debts under authorities provided in specific regulations; such as 7 CFR Part 766 and other regulations.**--***

***--191 Settlements (Continued)**

C Processing Approved Settlements

ALS will coordinate with FMD to furnish information required to effect payment of litigation settlements.

No payment will be processed by FSA or CCC until a settlement agreement has been executed by **all** parties and has been approved by the court, the litigation has been dismissed, and all claims arising from the matter have been released either under terms of the settlement agreement or under a separately executed release.

Before a claim is processed for payment or to establish a claim for payments to be received under the settlement terms, ALS **must** receive a copy of the settlement agreement, and any separately executed release, showing its execution by all parties.**--***

***--191 Settlements (Continued)**

D Information Required From Parties for Payment Under Terms of a Settlement or Court Order

Generally, FMD processes payments under settlement agreements through EFT's. The following information is often required from the parties to effect payment:

- names of parties and mailing addresses of parties to receive payments
- Social Security or tax ID numbers of parties
- sums to be paid, total or respective payments depending on settlement terms
- name of financial institution, mailing address, tax ID number, and bank routing number of the financial institution to receive EFT
- name of the bank account and account number of the account to which the financial institution is to credit the transferred funds.

See Exhibit 61 for an example letter for EFT's that may be sent to parties seeking payment.**--***

*--192 Employees Appearing as Witnesses in Judicial or Administrative Proceedings

A Authorization

[7 CFR 1.212] No USDA employee may provide testimony or produce documents in a judicial or administrative proceeding unless authorized in accordance with regulations.

FSA employees **must** obtain authorization **before** appearing in any judicial or administrative proceeding arising out of the employee's official duties with USDA or related to his or her employment with USDA. Appearance means testimony or production of documents and includes an affidavit, deposition, interrogatory, or other required written submission.

Notes: For the purposes of this Part, COC and STC members are treated the same as FSA employees.

Judicial proceeding means any case or controversy pending before any federal, state, or local court. Administrative proceeding means any proceeding pending before any federal, state, or local agency and undertaken for the purpose of the issuance of any regulations, orders, licenses, permits, or other rulings, or the adjudication of any matter, dispute, or controversy.

This Part does **not** apply to:

- proceedings that are purely personal or do **not** arise out of or relate to employment with USDA
- Congressional requests or Congressional subpoenas for testimony or documents.

Follow paragraph 98 for NAD proceedings.

B Appearance on Behalf of the U.S.

[7 CFR 1.213] An employee of USDA may appear as a witness on behalf of the United States in any judicial or administrative proceeding without the issuance of a summons, subpoena, or other compulsory process.

Employees in State or County Offices shall obtain written permission to appear as a witness on behalf of the U.S. from their SED. SED's and National Office employees shall obtain permission from their immediate supervisor.

Follow paragraph 98 for NAD proceedings.**--***

***--192 Employees Appearing as Witnesses in Judicial or Administrative Proceedings (Continued)**

C Appearing as a Witness on Behalf of a Party Other Than the U.S. Where the U.S. is Not a Party, With a Subpoena

[7 CFR 1.214 (b)(1)] An employee of USDA served with a valid summons, subpoena, or other compulsory process, or requested to appear as a witness on behalf of a party other than the United States in a judicial or administrative proceeding in which the United States is not a party, may appear only if such appearance has been authorized by the head of his or her USDA agency, with the concurrence of the General Counsel, based upon a determination that such an appearance is in the interest of USDA.

When an FSA employee is served with a valid summons, subpoena, or other compulsory process demanding his or her appearance, or is otherwise requested to appear on behalf of a party other than the U.S. in a judicial or administrative proceeding in which the U.S. is not a party, the employee shall promptly notify his or her supervisor of the existence and nature of the order compelling his or her appearance, and of the document requesting his or her attendance. He or she shall also specify, if known, the nature of the judicial or administrative proceeding and the nature of the testimony or documents requested.

The State Office shall forward the submitted information, along with a recommendation as to whether or not the testimony should be authorized, to ALS. ALS will coordinate the Administrator's authorization and OGC's concurrence.

Valid summons, subpoena, or other compulsory process means an order that is served properly and within the legal authority and the jurisdictional boundaries of the court or administrative agency or official that has issued it. If there is any question about the validity of a summons, subpoena, or other compulsory process, an employee shall contact the Regional Attorney for advice.**--***

***--192 Employees Appearing as Witnesses in Judicial or Administrative Proceedings (Continued)**

D Appearing as a Witness on Behalf of a Party Other Than the U.S. Where the U.S. is Not a Party, Without a Subpoena

[7 CFR 1.214 (b)(2)] An employee of USDA requested to appear as a witness on behalf of a party other than the United States in a judicial or administrative proceeding in which the United States is not a party, without the service of a valid summons, subpoena, or other compulsory process, may appear only if such appearance has been authorized by the head of his or her USDA agency and approved by the appropriate Assistant Secretary, Under Secretary or other general officer, and by the General Counsel, based upon a determination that such an appearance is in the interest of USDA.

[7 CFR 1.219(d)] The responsibilities assigned to heads of agencies and to Assistant and Under Secretaries in 1.214(b)(2) of this part may not be redelegated.

When an FSA employee is requested to appear on behalf of a party other than the U.S. in a judicial or administrative proceeding in which the U.S. is not a party, the employee shall promptly notify his or her supervisor of the existence and nature of the request, and of the document requesting his or her attendance. He or she shall also specify, if known, the nature of the judicial or administrative proceeding and the nature of the testimony or documents requested.

Forward the submitted information, along with a recommendation as to whether or not the testimony should be authorized, to ALS who will coordinate the authorization of the Administrator, the approval of the Under Secretary, and the approval of OGC.

Note: Crop insurance companies are considered parties other than the U.S.**--***

*--192 Employees Appearing as Witnesses in Judicial or Administrative Proceedings (Continued)

E Appearing on Behalf of a Party Other Than the U.S. Where the U.S. is a Party

When an FSA employee is served with a valid summons, subpoena, or other compulsory process demanding his or her appearance, or otherwise requested to appear or produce documents on behalf of a party other than the U.S. in a judicial or administrative proceeding in which the U.S. is a party, the employee shall promptly notify his or her supervisor and OGC of the existence and nature of the order compelling his or her appearance, and of the document requesting his or her appearance. He or she shall also specify, if known, the nature of the judicial or administrative proceeding and the nature of the testimony or documents requested.

The State Office shall forward a summary of the information to ALS who will coordinate the approval or disapproval to appear.

An employee requested to appear as a witness or produce records on behalf of a party other than the U.S. in a judicial or administrative proceeding in which the U.S. is a party, without being served a valid summons, subpoena, or other compulsory process, may appear or produce records only if such appearance or production has been authorized by a representative of the Department of Justice, the U.S. Attorney, or other counsel who is representing the U.S. in the case of a judicial proceeding; or by the official or attorney representing the U.S., in the case of an administrative proceeding.

An employee may appear as a witness or produce records on behalf of a party other than the U.S. in a judicial or administrative proceeding in which the U.S. is a party if such appearance or production has been ordered by the service on the employee of a valid summons, subpoena, or other compulsory process issued by a court, administrative agency, or other official authorized to compel his or her appearance.

ALS will consult with OGC as to whether there are grounds to oppose the employee's attendance or production of documents and, if so, whether to seek to quash the summons, subpoena, compulsory process, or to deny authorization to testify.

Follow paragraph 98 for NAD proceedings.--*

***--192 Employees Appearing as Witnesses in Judicial or Administrative Proceedings (Continued)**

F Subpoenas Duces Tecum

A subpoena duces tecum is a compulsory judicial process that directs a person served to appear producing documents as directed by the subpoena. These actions are handled as FOIA requests.

[7 CFR 1.215 (a)] Subpoenas duces tecum for USDA records in judicial or administrative proceedings in which the United States is not a party shall be deemed to be requests for records under the Freedom of Information Act and shall be handled pursuant to the rules governing public disclosure.

Whenever a subpoena duces tecum compelling the production of records is served on an FSA employee in a judicial or administrative proceeding in which the U.S. is not a party, the employee shall consult with OGC. The production of the records involved will be handled according to 2-INFO and 3-INFO.

[7 CFR 215(b)] Whenever a subpoena duces tecum compelling the production of records is served on a USDA employee in a judicial or administrative proceeding in which the United States is not a party, the employee, after consultation with the General Counsel or his or her designee, shall appear in response thereto, respectfully decline to produce the records on the grounds that it is prohibited by this section and state that the production of the records involved will be handled in accordance with subpart A of this part.

If OGC determines that service of process on the FSA employee is defective, the employee simply need **not** appear.

When the appearance of an FSA employee has **not** been authorized, but service of the subpoena duces tecum on the FSA employee is valid, SED will determine the need for any assistance by counsel and will request assistance of counsel by directing the request to the Regional Attorney serving the State.**--***

*--193 Administrative Tort Claims

A Overview

Under FTCA provisions, as amended, 28 U.S.C. 2671–2680, and the regulations issued by the Department of Justice contained in 28 CFR Part 14, USDA may, subject to FTCA provisions and Department of Justice regulations, consider, ascertain, adjust, determine, compromise, and settle claims for money damages against the U.S. for personal injury, death, or property loss or damage caused by the negligent or wrongful act or omission of any employee of USDA while acting within the scope of his or her office or employment, under circumstances where the U.S., if it were a private person, would be liable, according to the law of the place where the act or omission occurred.

The procedures for determination and disallowance of claims are set forth in 7 CFR 1.51. Pursuant to 7 CFR 1.51(c)(1), determination and disallowance of claims under FTCA provisions, and Department of Justice and USDA regulations, is delegated to OGC and employees in OGC designated by OGC to determine claims pursuant to the applicable Department of Justice regulations.

B Procedure for Filing Tort Claims

See 58-FI, paragraphs 480 through 484 for FSA procedure on filing tort claims.--*

*--194 Awards Under EAJA

A Overview

USDA regulations implementing EAJA are found at 7 CFR Part 1, subpart J. NAD Hearing Officers and the NAD Director are Adjudicative Officers within the scheme of EAJA regulations.

Pursuant to the EAJA regulations, NAD hearing officers and the NAD Director make determinations on EAJA fee applications submitted by appellants prevailing in appeals to NAD.

See paragraph 29 for additional information and instructions regarding EAJA.--*

***--194 Awards Under EAJA (Continued)**

B Payment of EAJA Fee Awards

No EAJA fee award payment will be processed by FSA or CCC until either of the following take place:

- a decision on a fee application by a NAD adjudicative officer (the USDA Juridical Officer or a reviewing court) has been issued and OGC has recommended, in writing, that the fee award should be paid, the amount of the award, and that the prevailing applicant has stated in writing that the fee award will not be appealed to a higher reviewing authority; or

- a fee settlement has been executed by all parties, including OGC on behalf of FSA, that has been approved by NAD or the court, the fee litigation has been dismissed, and all other claims arising from the matter have been released either under terms of the settlement agreement or under a separately executed release.

Before an EAJA claim is processed for payment, ALS **must** receive a copy of the fee award and supporting documentation or of any settlement agreement and any separately executed release showing its execution by all parties.

Generally, at ALS's request, FMD processes payments to be made under EAJA fee awards or fee settlement agreements through EFT's. The following information **must** be obtained from the parties:

- names of parties and mailing addresses of parties to receive payments

- Social Security or tax ID numbers of parties

- sums to be paid, total or respective payments depending on settlement terms

- name of financial institution, mailing address, tax ID number, and bank routing number of the financial institution to receive EFT's

- name of the bank account and account number of the account to which the financial institution is to credit the transferred funds; such as (*Law Firm Name*) Client Account number (*nn-nnnn-n*).

See Exhibit 61 for an example letter that may be sent to parties seeking payment.**--***

Reports, Forms, Abbreviations, and Redelegations of Authority

Reports

None.

Forms

None.

Abbreviations Not Listed in 1-CM

The following abbreviations are not listed in 1-CM.

Approved Abbreviation	Term	Reference
2008 Farm Bill	Food, Conservation, and Energy Act of 2008	136
ADR	alternative dispute resolution	51, 81
ALS	Appeals And Litigation Staff	Text, Ex. 4
EAJA	Equal Access to Justice Act	29, 73, 182
FTCA	Federal Tort Claims Act	193
SAC	State appeals coordinator	4, 5, 78, 84, 86, 89, 98, 136
Title XII	Food Security Act of 1985, Title XII	3, 9, 13, 19, 21, 41-43

Redelegations of Authority

None.

Definitions of Terms Used in This Handbook

Adverse Decision

[7 CFR 780.2] An adverse decision means a program decision by an employee, officer, or committee of FSA that is adverse to the participant. The term includes any denial of program participation, benefits, written agreements, eligibility, etc., that results in a participant receiving less funds than the participant believes should have been paid or not receiving a program benefit to which the participant believes the participant was entitled.

Agency

[7 CFR 780.2] Agency means FSA and its county and State committees and their personnel, CCC, NRCS, and any other office of the Department which the Secretary may designate, or any successor agency.

Agency Record

[7 CFR 780.2] The agency record is all documents and materials maintained by FSA that are related to the adverse decision under review that are compiled and reviewed by the decision-maker or that are compiled in the record provided to the next level reviewing authority.

Definitions of Terms Used in This Handbook (Continued)

Appeal

[7 CFR 780.2] An appeal is a written request by a participant asking the next level reviewing authority within FSA or NAD to review a decision.

Appealability Review

[7 CFR 780.2] ***An*** **appealability review is a review of the decision-maker's determination that a decision is not appealable** (paragraphs 9, 11, 15, and 74).

Appellant

[7 CFR 780.2] An appellant is any participant who appeals or requests reconsideration or mediation of an adverse decision in accordance with 7 CFR Part 780 or 7 CFR Part 11.

Authorized Representative

[7 CFR 780.2] Authorized representative means a person who has obtained a Privacy Act waiver and is authorized in writing by a participant to act for the participant in a reconsideration, mediation, or appeal.

Burden of Proof

Burden of proof means that the appellant **must** show that it is more likely than **not** that FSA's decision was wrong.

Definitions of Terms Used in This Handbook (Continued)

***--Civil Judgment**

[7 CFR 3017.920] Civil judgment means the disposition of a civil action by any court of competent jurisdiction, whether by verdict, decision, settlement, stipulation, other disposition which creates a civil liability for the complained of wrongful acts, or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801–3812).--*

Confidential Mediation

[7 CFR 780.2] Confidential mediation means a mediation process in which neither the mediator nor parties participating in mediation will disclose to any person oral or written communications provided to the mediator in confidence, except as allowed by 5 U.S.C. 574 [Administrative Disputes Resolution Act] or 7 CFR part 785 [regulations governing the Certified Agricultural Mediation Program].

Constructive Knowledge

Constructive knowledge is knowledge that a person using reasonable care or diligence should have, and; therefore, is attributed by law to a given person.

***--Conviction**

[7 CFR 3017.925] Conviction means — (a) A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of nolo contendere; or (b) Any other resolution that is the functional equivalent of a judgment, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.--*

De Novo Review

A de novo review means reviewing the issue as if there had been no earlier ruling.

***--Debarment**

[7 CFR 3017.930] Debarment means an action taken by a debarring official under subpart H of this part to exclude a person from participating in covered transactions and transactions covered under the Federal Acquisition Regulation (48 CFR Chapter 1). A person so excluded is debarred.--*

Discovery

Discovery is the legal act or process of finding or learning something that was previously unknown. In general, discovery does **not** apply to NAD proceedings.

Definitions of Terms Used in This Handbook (Continued)

***--Disqualified**

[7 CFR 3017.940] Disqualified means that a person is prohibited from participating in specified Federal procurement or nonprocurement transactions as required under a statute, Executive order (other than Executive Orders 12549 and 12689) or other authority. Examples of disqualifications include persons prohibited under— (a) The Davis-Bacon Act (40 U.S.C. 276(a)); (b) The equal employment opportunity acts and Executive orders; or (c) The Clean Air Act (42 U.S.C. 7606), Clean Water Act (33 U.S.C. 1368) and Executive Order 11738 (3 CFR, 1973 Comp., p. 799).

Excluded or Exclusion

Excluded or exclusion means that, either by court order, agreement, settlement, or administrative process, a participant is prohibited from participating in or receiving benefits under some or all agency programs or may participate or receive benefits only under certain conditions. The time period of an exclusion may be limited or lifetime.**--***

Handbooks, Notices, and Other Directives

Handbooks, notices, and directives are internal operating guidelines issued to field offices and employees to facilitate the implementation of a program or delivery of services as prescribed in enabling legislation (statute), regulation, or Federal Register notice. Generally, FSA handbooks, notices, and directives should be considered FSA's official generally applicable interpretation of enabling legislation or statute, regulation, or Federal Register notice.

Hearing

[7 CFR 780.2] A hearing is an informal proceeding on an appeal to afford a participant opportunity to present testimony, documentary evidence, or both to show why an adverse decision should be reversed or modified.

Hearsay

Hearsay, generally, is:

- second-hand knowledge
- testimony given by a witness based not what she or he knows personally, but what others have said.

Definitions of Terms Used in This Handbook (Continued)

Leading Question

A leading question is a question that:

- suggests an answer to the person being asked or interrogated
- requires either a yes or no answer or an answer on whether the person being questioned agrees or disagrees.

Mediation

[7 CFR 780.2] Mediation means a technique for resolution of disputes in which a mediator assists disputing parties in voluntarily reaching mutually agreeable settlement of issues within the laws, regulations, and the agency's generally applicable program policies and procedures, but in which the mediator has no authoritative decision making power.

Mediation is a dispute resolution process in which a neutral person, who has received special training as a mediator, helps 2 or more parties:

- look at the issues
- attempt to identify and consider additional available options for resolution of a dispute
- determine whether they can agree on a solution to the dispute that complies with statutory, regulatory, and Agency procedural requirements.

Mediator

[7 CFR 780.2] Mediator means a neutral individual who functions specifically to aid the parties in a dispute during a mediation process.

A mediator who meets and agrees to the requirements for impartiality will be considered neutral.

Note: A uniform minimum standard of training for qualified mediators is in 7 CFR Parts 780 and 785.

Definitions of Terms Used in This Handbook (Continued)

Personal Hearing

A personal hearing is an in-person hearing conducted either under FSA's informal appeals procedures or under NAD's procedures where the participant/appellant personally appears before the appeal reviewing authority to present evidence in the hearing proceeding.

***--Preponderance of the Evidence**

Preponderance of the evidence means proof by information that, compared with information opposing it, leads to the conclusion that the fact at issue is more probably true than not.**--***

Qualified Mediator

[7 CFR 780.2] Qualified mediator means a mediator who meets the training requirements established by State law in the State in which mediation services will be provided or, where a State has no law prescribing mediator qualifications, an individual who has attended a minimum of 40 hours of core mediator knowledge and skills training and, to remain in a qualified mediator status, completes a minimum of 20 hours of additional training or education during each 2-year period. Such training or education must be approved by USDA, by an accredited college or university, or by one of the following organizations: State Bar of a qualifying State, a State mediation association, a State approved mediation program, or a society of dispute resolution professionals.

In States without a USDA Certified State Mediation Program, FSA will not participate in mediation if a qualified mediator is not available. If a qualified mediator is available and accepted by the participant, FSA will notify third parties and interested parties of the mediation (paragraph 14).

Note: In loan servicing actions, FSA will not participate in mediation if a qualified mediator is not available, but will attend any meeting of creditors requested by a participant to the extent that it may be required under any applicable regulation or other regulation.

Definitions of Terms Used in This Handbook (Continued)

Reconsideration

[7 CFR 780.2] Reconsideration means a subsequent consideration of a program decision by the same level of decision-maker or reviewing authority.

Record Review

A record review is an appeal considered by a NAD hearing officer without any hearing in which the hearing officer's determination is based on FSA's record and other written information submitted by the appellant and FSA.

Relevant Evidence

Relevant evidence means evidence that has any bearing on any fact that is of consequence to the case or decision.

Res Judicata

Res judicata means something that was already decided or settled and **cannot** now be brought up for review or decision.

Definitions of Terms Used in This Handbook (Continued)

Stipulation

A stipulation is a voluntary agreement between opposing parties in an administrative appeal proceeding.

Subpoena

A subpoena is an order compelling someone to appear and give testimony or produce documents.

***--Suspension**

[7 CFR 3017.1015] Suspension is an action taken by a suspending official under subpart G of this part that immediately prohibits a person from participating in covered transactions and transactions covered under the Federal Acquisition Regulation (48 CFR chapter 1) for a temporary period, pending completion of an agency investigation and any judicial or administrative proceedings that may ensue. A person so excluded is suspended.--*

Telephone Hearing

A telephone hearing is a hearing that is:

- held on the telephone
- essentially the same as if the hearing were in person.

Verbatim Transcript

[7 CFR 780.2] A verbatim transcript means an official written record of proceedings in an appeal hearing or reconsideration of an adverse decision appealable under 7 CFR Part 780.

ALS Generated NAD Case Activity Summary Report

ALS generates a report for internal FSA use showing active NAD cases and the status as of the dates shown on the report. The following is an example of a NAD appeal activity summary.

Note: The names and case numbers shown in this example are fictitious.

Hearing Officer Decisions Received Finding Agency Error	State	Deputy Administrator	Due Date for Administrator to Request NAD Director's Review
Jefferson, Thomas (2006E000000)	VA	DAFP	02/15/07
Clark, William (2006W000000)	ND	DAFLP	02/20/07
Roosevelt Farms (2006S000000)	GA	DACO	02/21/07

Hearing Officer Decisions Received Upholding Agency Action	State	Deputy Administrator	Outcome/Action Required
Hickcock, W. Bill (2006W000000) Patton, George S. (2006E000000)	SD MS	DAFLP DAFLP	Appellant has 30 calendar days from date of receiving the decision to request a NAD Director review. If the State Office receives notice of an appellant's request for a Director review, the State Office may prepare a response directly to NAD. A copy of the response must be provided to the appellant, and noted as such on the original sent to NAD to avoid a prohibited exparte communication.
Fudd, Elmer (2006S000000)	MO	DAFP	Hearing officer determination received. NAD has no jurisdiction.
Lamb, Mary H. (2006W000000)	UT	DACO	Hearing officer determination received for Dismissal of Appeal.

Cases Submitted by the Agency for Director's Review/Reconsideration	State	Deputy Administrator	Comments
Kansas Settlement Gin Company (2006W000000)	AZ	DACO	No action may be taken to implement the hearing officer's decision while the review is pending.

FSA Prepared NAD Appeal Activity Summary (Continued)

Cases Not Submitted for Director's Review/Reconsideration by the Agency	State	Deputy Administrator	Comments
Wonka, Willie (2007W000000) Wayne, John (2006W000000) Soprano, Tenor (2006S000000)	NE MT NJ	DAFP DAFLP DAFP	State Office should ensure the hearing officer's decision is timely implemented. Deputy Administrator/State Office may wish to discuss implementation with the applicable program office and the Appeals and Litigation Staff (ALS).

Agency Requested NAD Director Review/ Reconsideration Determinations Received	State	Deputy Administrator	Outcome/Action Required
Noted, Dooley (2007E000000)	GA	DAFP	Hearing officer determination in favor of appellant reversed by NAD Director.
Morrow, T.O. (2006S000000)	FL	DAFLP	Hearing officer determination in favor of FSA is modified by NAD Director.

Appellant Requested NAD Director Review/ Reconsideration Determinations Received	State	Deputy Administrator	Outcome/Action Required
Kidd, Billy T. (2007E000000)	MD	DAFLP	Hearing officer determination in favor of FSA is upheld by NAD Director (cases marked with an asterisk (*) are those in which the NAD Director also denied equitable relief). The State Office should ensure NAD Director's decision is implemented timely in consultation with applicable program staff, as needed.
Betterdays, Abner (2006W000000)	WA	DAFP	Hearing officer determination in favor of FSA is upheld and denied equitable relief by NAD Director.
Sweetwater Farms (2007W000000)	ID	DAFLP	Hearing officer determination in favor FSA is partially reversed by NAD Director.

FSA Prepared NAD Appeal Activity Summary (Continued)

*--

Notice of Appellant's Request for Director Review/Reconsideration Received	State	Deputy Administrator	Outcome/Action Required
Doublemint, June (2006W000000)	TX	DAFLP	Appellant request accepted by NAD.
Cassidy, H. Long (2005W000000)	WY	DAFP	Appellant request for reconsideration denied by NAD Director.

Appealability/Timeliness Determinations Received	State	Deputy Administrator	Outcome/Action Required
Times, Hard (2007E000000)	NY	DAFLP	Agency decision is appealable.
Better, Get N. (2006W000000)	CA	DAFP	Agency decision not appealable/NAD has no jurisdiction.

Remaining Cases Due on or Before February 23, 2007, Pending Disposition	State	Deputy Administrator	Comments
Grand Farms (2007W000000) Dilbert, C. (2005E000000)	AZ OH	DAFP DAFLP	No action may be taken to implement the hearing officer's decision while the review is pending.

--*

Note: If there are questions about the implementation of a final decision, contact ALS or the appropriate program area of guidance. State Offices should ensure all final decisions are implemented timely.

Example Initial Determination Letters

The following example letters are for illustration purposes **only** and are **not** intended to be accurate descriptions of program or eligibility provisions.

Example 1 (COC Determination)

Date

Ms. Helga Moe
12 Farmville Rd
Taneyburg VA 12345-9876

Dear Ms. Moe:

This letter is in reference to the two applications you filed seeking benefits under the Crop Disaster Program for 2005 sweet pea losses on unit numbers 4 and 5. We have processed those applications.

Under the rules governing the program, payment eligibility occurs if the eligible loss of quantity of an eligible crop is in excess of 35 percent of expected production. As shown on the attached computation worksheets, and based on the information you certified to concerning unit crop acreage and 2005 crop year net production of sweet peas, the Somewhere County FSA Committee determined that units 4 and 5 did not suffer a loss great enough to trigger payment eligibility. Consequently, quantity loss payments are not computed for these units.

If you believe that the county committee has not properly considered the individual facts of your applications for unit numbers 4 and 5, you have the following options:

Reconsideration

You may request that the county committee reconsider this determination by filing a written request no later than 30 calendar days after you receive this notice in accordance with FSA appeal procedures found at 7 CFR Part 780. If you request reconsideration, you have the right to an informal hearing which you or your representative may attend either personally or by telephone. If you choose to seek reconsideration, you may later appeal the determination to the National Appeals Division. To request reconsideration, write to me at the following address and explain why you believe this determination is erroneous. The address of the county committee is:

(Insert applicable address.)

--**Mediation**--

Mediation is available as part of FSA's informal appeal process. Mediation may enable us to narrow the issues and resolve the matter by mutual agreement. You may have to pay all or part of the cost of mediation. If you request mediation, the running of the time frame in which you may file an appeal stops. When mediation closes, the clock restarts and you will have the balance of the days remaining in that period to file an appeal. To request mediation, you must submit your written request no later than 30 calendar days after you receive this notice. To request mediation, write to the State FSA State Executive Director at the following address:

(Insert applicable address.)

*** * ***

Example Initial Determination Letters (Continued)

Example 1 (COC Determination) (Continued)

Appeal to STC

You may appeal the County Committee's determination to the State Committee by filing a written request no later than 30 calendar days after you receive this notice in accordance with the FSA appeal procedures found at 7 CFR Part 780. If you appeal to the State Committee, you have the right to an informal hearing which you or your representative may attend either personally or by telephone. If you choose to appeal to the State Committee, you may later appeal the determination of the State Committee to NAD. If you appeal an initial decision of a County Committee to the State Committee, you waive your right to reconsideration by the County Committee of that decision. To appeal, write to the State Committee at the following address and explain why you believe this determination is wrong.

(Insert applicable STC address.)

Appeal to the Department of Agriculture National Appeal Division (NAD)

You may appeal this determination to NAD by filing a written request no later than 30 calendar days after you receive this notice in accordance with the NAD Appeal procedures found at 7 CFR Part 11. If you appeal to NAD, you have the right to a hearing which you or your representative may attend. Once a hearing with NAD begins, you waive any rights you might have to reconsideration, appeal to FSA, and mediation. To appeal, you must write to NAD at the following address, explain why you believe this determination is erroneous, and provide a copy to FSA. You must personally sign your written appeal to NAD and include a copy of this letter.

(Insert applicable NAD address.)

If you do not timely exercise one of the preceding options, this shall be the final administrative determination with respect to this matter in accordance with the regulations at 7 CFR Part 780 and 7 CFR Part 11.

Sincerely,

Jon Rodriguez
County Executive Director

Attachment

Example Initial Determination Letters (Continued)

Example 2 (COC Employee Determination)

Date

Mr. Arch Stanton
3 Littleton Rd
Somewhere OH 12345-9876

Dear Mr. Stanton:

This letter is in response to your application for cost share assistance under the Emergency Conservation Program (ECP).

You submitted an ECP application under the prescribed enrollment period. You subsequently furnished evidence of your expenses for completion of practices. Cost-share assistance under ECP may be authorized for all reasonable costs and within maximum limitations.

Our review shows that your claim for expenses exceeds practice specifications for cost-share calculations. In addition, documentation you submitted showed that you were reimbursed by a third party for the expenses. Accordingly, we must disapprove your application for ECP cost-share assistance in accordance with 7 CFR §701.23 which precludes payment when claims exceed practice specifications and when participants have been reimbursed by third parties.

If you believe we have not properly reviewed your application, you may appeal this determination to the county committee by filing a written request no later than 30 days after you receive this notice in accordance with the FSA appeal procedures found at 7 CFR Part 780. If you appeal to the county committee, you have the right to an informal hearing which you or your representative may attend either personally or by telephone. If you appeal this determination to the county committee, you may later appeal any adverse determination of the county committee to the FSA State committee or the National Appeals Division. To appeal, write to the county committee at the following address and explain why you believe this determination is erroneous.

Somewhere County FSA Committee
55 Main St
Somewhereville OH 12346-6543

If you do not timely file an appeal of this determination, this shall be the final administrative determination with respect to this matter in accordance with regulations at 7 CFR Part 780.

Sincerely,

Sharina Farmer
County Executive Director

Example Initial Determination Letters (Continued)

Example 3 (FLM Determination)

Dear *(insert participant's name)*:

This responds to your request for *(insert applicable program benefit – e.g. "a direct operating loan in the amount of $60,000").*

(Insert and fully explain adverse decision as discussed in paragraph 14)

If you believe that this decision is erroneous, you have the following options.

Reconsideration

You may request that I reconsider this determination by filing a written request no later than 30 calendar days after you receive this notice in accordance with FSA appeal procedures found at 7 CFR Part 780. If you request reconsideration, you have the right to an informal hearing which you or your representative may attend either personally or by telephone. If you choose to seek reconsideration, you may later appeal the determination to the National Appeals Division. To request reconsideration, write to me at the following address and explain why you believe this determination is erroneous.

(Insert applicable address.)

--**Mediation**--

Mediation is available as part of FSA's informal appeal process. Mediation may enable us to narrow the issues and resolve the matter by mutual agreement. You may have to pay all or part of the cost of mediation. If you request mediation, the running of the time frame in which you may file an appeal stops. When mediation closes, the clock restarts and you will have the balance of the days remaining in that period to file an appeal. To request mediation, you must submit your written request no later than 30 calendar days after you receive this notice. To request mediation, write to the FSA State Executive Director at the following address:

(Insert SED address or Mediation Program address, as applicable.)

*** * ***

Example Initial Determination Letters (Continued)

Example 3 (FLM Determination) (Continued)

Appeal to the Department of Agriculture National Appeal Division (NAD)

You may appeal this determination to NAD by filing a written request no later than 30 calendar days after you receive this notice in accordance with the NAD Appeal procedures found at 7 CFR Part 11. If you appeal to NAD, you have the right to a hearing which you or your representative may attend. Once a hearing with NAD begins, you waive any rights you might have to reconsideration, appeal to FSA, and mediation. To appeal, you must write to NAD at the following address, explain why you believe this determination is erroneous, and provide a copy to FSA. You must personally sign your written appeal to NAD and include a copy of this letter.

(Insert applicable NAD address.)

If you do not timely exercise one of the preceding options, this shall be the final administrative determination with respect to this matter in accordance with the regulations at 7 CFR Part 780 and 7 CFR Part 11.

(Insert applicable nondiscrimination statement as instructed in 1-FLP, subparagraph 41C).

Sincerely,

(Insert name)
Farm Loan Manager

Summary Outline for Informal Hearing or Meeting

The reviewing authority is required to provide the appellant with a written summary that contains a clear, concise statement of material facts pertinent to the determination, including the program provisions applicable to the determination. The names of interested individuals who will appear at the hearing shall be included, to the extent known. A summary prepared according to the following outline containing the proper information must be used to meet this requirement. An example appears on page 2.

Note: The following example letter is for illustration purposes **only** and is **not** intended to be an accurate description of program or eligibility provisions.

Appellant's Name: *(Insert name of appellant.)*

Represented By: *(Insert name of appellant's representative, if applicable.)*

Farm, Loan and/or Contract or Unit Nos.: *(Insert applicable farm, contract, or unit number.)*

Date of Review: *(Enter date of informal hearing or meeting)*

Matter Under Review: *(Include a brief statement of what is at issue or what is being contested. This can come from the background section of the adverse decision letter; however, the matter under review need only mention the subject(s) being considered.)*

Background: *(This can come from both the background and discussion sections of the adverse decision prepared according to paragraph 16)*

Issue: *(Identify issues before the reviewing authority in relation to the matter under review. For example, if the matter under review is whether a participant filed a required form by a deadline, the issue could be: (1) Did appellant file form XXX by February 1, 2006, as required?)*

General Program Provisions: *(A statement about the applicable regulations and program provisions for the matter under review. Copies of excerpts of the regulations and program guidelines can be attached to the summary).*

Discussion of Pertinent Facts: *(From the adverse decision letter prepared according to paragraph 16, this should be a general narrative discussion of facts based on specific references to either the application, contract, information submitted by the participant, or other relevant information.)*

Appellant's Position: *(From the application, contract, or correspondence submitted by the participant (because appeals and/or requests for reconsideration must be in writing, appellant's position may be obtained from the letter of appeal. FSA should take care to summarize appellant's position without partiality. Be sure to include all of appellant's known arguments (to the extent the arguments are relevant to the matter being reviewed).*

Summary Outline for Informal Hearing or Meeting (Continued)

Example Outline For Informal Hearing Or Meeting

Appellant's Name: Farmland Partnership (Farmland)
Represented By: John Farm and Bill Land
Farm and/or Contract or Unit Nos.: Farm Nos. 14 and 55
Date of Review: July 5, 2004

Matter Under Review: Late filed application for coverage for 2003 sweet corn under the Noninsured Crop Disaster Assistance Program (NAP).

Background: On March 14, 2004, Farmland signed an application for NAP coverage for two plantings of 2003 crop sweet corn on farm numbers 14 and 55. The application closing date for 2003 sweet corn was March 15, 2003. Because appellant's application for coverage was submitted more than a year after the application closing date, NAP coverage was denied.

Issues: Did FSA correctly determine that Farmland failed to timely file an application for coverage prior to the application closing date of March 15, 2003? In the event that Farmland failed to submit an application for NAP coverage prior to the application closing date, is Farmland ineligible for coverage? Is there a basis for considering equitable relief for Farmland?

General Program Provisions: Regulations at 7 CFR Part 1437 and FSA Handbook 1-NAP apply to this case. Relief provisions appear at FSA Handbook 7-CP and 7 CFR Part 718.

7 CFR 1437.6 requires participants to file an application for coverage no later than the application closing date. The application closing date is defined by 1437.3 as the last date participants can submit an application for NAP coverage for noninsured crops for the specified crop year.

The application closing date is a statutory requirement. Provisions of 7-CP and regulations at 7 CFR 718.303 provide discretion to consider equitable relief where a participant acted (or failed to act) in good faith reliance based upon erroneous action or advice of an authorized FSA representative. The relief provisions do not extend to cases where a participant knew or had reason to know that action or advice of the authorized FSA representative was in error or where the participant acted in reliance upon the participant's own interpretation of program provisions, notices, or information.

Discussion of Pertinent Facts: The State committee established March 15, 2003, as the application closing date for NAP coverage on 2003 crop sweet corn. Appellant filed its application for coverage on March 14, 2004 (more than a year after the application closing date).

Appellant's Position: Farmland does not dispute that it did not file the application for coverage by the deadline. Rather, appellant asserts relief should be granted to permit appellant to now obtain 2003 NAP coverage in 2004. Appellant asserts that appellant telephoned the county FSA office in January 2003 about wanting to purchase insurance for corn. Appellant claims the FSA office advised it of three agents who sold corn crop insurance. Appellant contacted two of the three agents about obtaining crop insurance on sweet corn. Appellant contends the agents advised that appellant needed 3 years of production records to obtain insurance. Appellant explains that because it did not have 3 years of records, appellant elected to plant the sweet corn without the benefit of insurance. In early 2004, appellant contacted the county FSA office asking about NAP coverage for sweet corn. Appellant insists that in response to appellant's 2004 inquiry, the FSA employee knew very little about NAP. Appellant subsequently decided to visit the office and attempt to file a 2003 NAP coverage application for sweet corn.

Example Letter Denying a Late-Filed Request for Appealability, Reconsideration, Mediation, or Appeal

The following example letter is for illustration purposes **only** and is **not** intended to be an accurate description of program or eligibility provisions.

Mr. Dale Towns
7477 Kansas Settlement Rd Date
Roundup AZ 85613-7477

Dear Mr. Towns:

This letter acknowledges your request for appeal *(could also be appealability, reconsideration, or mediation, as applicable)* of the Anywhere County FSA Committee determination about your eligibility for a farm-stored loan.

Regulations governing FSA's informal appeals process at 7 CFR 780.15 specify that participants have 30 days from the date of receiving FSA's decision to file an appeal *(or seek appealability, reconsideration, or mediation, as applicable)* with FSA. Your written appeal was received 107 days following the issuance of FSA's determination. Accordingly, FSA has determined that your request for appeal is not considered timely filed and cannot be further processed.

FSA considers this matter closed under 7 CFR Part 780.

Sincerely,

(Insert name)
County Executive Director

Example Letter Allowing a Participant Time to Provide Written Explanation for a Late-Filed Request for Appealability, Reconsideration, Mediation, or Appeal

The following example letter is for illustration purposes **only** and is **not** intended to be an accurate description of program or eligibility provisions.

Mr. Yukon Jones
HCR 3 Box X Date
Anywhere AZ 85613-0003

Dear Mr. Jones:

This letter acknowledges your request for appeal *(could also be appealability, reconsideration, or mediation, as applicable)* of the Anywhere County FSA Committee determination about your eligibility for a loan deficiency payment.

Regulations governing FSA's informal appeals process at 7 CFR 780.15 specify that participants have 30 calendar days from the date of receiving FSA's decision to file an appeal *(or seek appealability, reconsideration, or mediation, as applicable)* with FSA. Your written appeal was received 67 calendar days following the issuance of FSA's determination. Accordingly, FSA has determined that your request for appeal is not considered timely filed. Therefore, your appeal request cannot be further processed.

However, you have 7 business days from the date of this letter to provide FSA with a written explanation for the late-filed appeal request *(for appealability, reconsideration, mediation, or appeal, as applicable)*. Failure to provide the required explanation for potential consideration by FSA will result in our considering this matter closed. Please submit the written explanation to:

(Insert Anywhere COC address.)

Upon timely receiving a written explanation for your late-filed appeal, FSA will notify you of its decision whether to grant you an exception.

If you do not submit a written explanation within 7 business days of the date of this letter, FSA shall consider this matter closed according to 7 CFR Part 780.

Sincerely,

(Insert name)
County Executive Director

Example Letter Denying a Late-Filed Request for Appealability, Reconsideration, Mediation, or Appeal That is Accompanied by Explanation of Late-Filing

The following example letter is for illustration purposes **only** and is **not** intended to be an accurate description of program or eligibility provisions.

Mr. Barry Bar
77 Safford Hwy Date
Uteop VA 22408-0077

Dear Mr. Bar:

This letter acknowledges your request for a late-filed appeal *(could also be appealability, reconsideration, or mediation, as applicable)* of the Anywhere County FSA Committee determination about a maintenance default on a Conservation Reserve Program contract.

Regulations governing FSA's informal appeals process at 7 CFR 780.15 specify that participants have 30 calendar days from the date of receiving FSA's decision to file an appeal *(or seek appealability, reconsideration, or mediation, as applicable)* with FSA. Your written appeal was received 180 days following the issuance of FSA's determination. Your written explanation indicated that you were not aware that you had only 30 days in which to file an appeal of the adverse FSA decision. You requested that an exception be made to allow your late-filed appeal.

FSA has determined not to grant you an exception to the filing requirement. Accordingly, your request for appeal *(or seek appealability, reconsideration, or mediation, as applicable)* will not be further processed.

FSA considers this matter closed under 7 CFR Part 780.

Sincerely,

(Insert name)
County Executive Director

Example Letter of Acknowledgement of Request for Review

Reviewing authorities are required to send written letters acknowledging requests for review. Offices shall modify the following sample example letter to fit each case circumstance. However, the letter issued must include all the required elements. If sufficient telephone equipment is available to the reviewing authority, the reviewing authority may include that option in the letter. Retain a copy of the notification letter.

Note: The following example letter is for illustration purposes **only** and is **not** intended to be an accurate description of program or eligibility provisions.

Date _____

Dear _____ :

This letter acknowledges your request for (*reconsideration or appeal*) of the (*specify determination to be reviewed*) determination about (*identify the issue as to farm number, program, loan number, program year, etc*).

By separate communication, as soon as practicable in advance of the hearing, a copy of FSA's administrative record will be sent to your attention at your address of record.

(Identify reviewing authority) will review your request on (date) at (time). The hearing will be in the (*enter name of the office*). You, your authorized representative, or both, are invited to attend this meeting and submit any additional information in support of your request for review.

The hearings are informal and verbatim transcripts are not ordinarily made. However, if you want a transcript to be made at your expense, please let us know at least 7 calendar days before the meeting and hearing, and we will make the arrangements. Neither FSA nor the Department will reimburse you for any costs you may incur in connection with your request for (*reconsideration or appeal*).

Should you prefer to attend the scheduled hearing by telephone, in advance of the scheduled hearing please provide us telephone numbers of where you and your authorized representative can be reached on the day and time of the scheduled hearing.

If you choose not to attend the hearing, you may submit before the scheduled review, any further facts or evidence you wish to have considered. The (*enter name of reviewing authority*) will consider your request and arrive at a decision based on the records and other information. The review will include all of the information submitted by you, in addition to the complete file pertaining to your case. You may be assured that the decision will be fair and equitable and made according to program procedure.

The (*Insert name of reviewing authority*) review determination will be issued to you in writing and sent to you and your representative as soon as possible after conclusion of the scheduled meeting or hearing. If you have any questions about this matter, you may contact (*name of contact*) at (*telephone number*).

Sincerely,

NAME
TITLE

Example Determination Letter for a COC Appeal Hearing

The following example letter is for illustration purposes **only** and is **not** intended to be an accurate description of program or eligibility provisions.

Mr. John Farm and Mr. Bill Land
Farmland Partnership
HCR 3 Box X
Anywhere KS 44865-0003

Farm Serial Numbers 14 & 55

Date

Dear Mr. Farm and Mr. Land:

This letter is in response to the appeal filed on behalf of Farmland Partnership (Farmland) with the Anywhere County FSA Committee, about a late filed application for 2003 sweet corn coverage under the Noninsured Crop Disaster Assistance Program (NAP).

BACKGROUND

On March 14, 2004, Farmland signed an application for NAP coverage for two plantings of 2003 crop sweet corn on farm numbers 14 and 55. The application closing date for 2003 sweet corn was March 15, 2003. Because Farmland's application for coverage was submitted more than a year after the application closing date, the county committee denied NAP coverage. Farmland subsequently wrote the Anywhere County FSA Committee appealing that decision. Farmland then attended an informal appeal hearing with the county committee.

ISSUES

1. Did FSA correctly determine that Farmland failed to timely file an application for coverage prior to the application closing date of March 15, 2003?

2. In the event that Farmland failed to submit an application for NAP coverage prior to the application closing date, is Farmland ineligible for coverage?

3. Is there a basis for considering equitable relief for Farmland?

GENERAL PROGRAM PROVISIONS

Regulations at 7 CFR Part 1437 and FSA Handbook 1-NAP apply to this case. Relief provisions appear at FSA Handbook 7-CP and 7 CFR Part 718.

7 CFR 1437.6 requires participants to file an application for coverage no later than the application closing date. The application closing date is defined by 1437.3 as the last date participants can submit an application for NAP coverage for noninsured crops for the specified crop year.

The application closing date is a statutory requirement. Provisions of 7-CP and regulations at 7 CFR 718.303 provide discretion to consider equitable relief where a participant acted (or failed to act) in good faith reliance based upon erroneous action or advice of an authorized FSA representative. The relief provisions do not extent to cases where a participant knew or had reason to know that action or advice of the authorized FSA representative was in error or where the participant acted in reliance upon the participant's own interpretation of program provisions, notices, or information.

Example Determination Letter for a COC Appeal Hearing (Continued)

Mr. John Farm and Mr. Bill Land
Page 2

FARMLAND'S POSITION

Farmland does not dispute that it did not file the application for coverage by the deadline. Rather, Farmland asserts relief should be granted to permit it to now obtain 2003 NAP coverage in 2004. Farmland claimed that it telephoned the county FSA office in January 2003 about wanting to purchase insurance for corn. Farmland contended that the FSA office advised Farmland of three agents who sold corn crop insurance. Farmland contacted two of the three agents about obtaining crop insurance on sweet corn. Farmland stated that the agents advised that Farmland needed 3 years of production records to obtain insurance. Farmland explained that because it did not have 3 years of records, Farmland elected to plant the sweet corn without the benefit of insurance. In early 2004, Farmland contacted the county FSA office asking about NAP coverage for sweet corn. Farmland insists that in response to Farmland's 2004 inquiry, the FSA employee knew very little about NAP. Farmland subsequently decided to visit the office and attempt to file a 2003 NAP coverage application for sweet corn.

FINDINGS OF FACT

The State committee established March 15, 2003, as the application closing date for NAP coverage on 2003 crop sweet corn. Farmland filed its application for coverage on March 14, 2004 (more than a year after the application closing date).

Notwithstanding contacts Farmland made during the 2003 application for coverage period, Farmland did not attempt to obtain 2003 NAP coverage during the 2003 application period. Additionally, there is no evidence that Farmland was given incorrect program information or advice about 2003 NAP coverage or the deadline for obtaining coverage.

The requirement for an application for coverage to be filed during the application period is a statutory and regulatory requirement. (7 CFR 1437.6, 1-NAP, paragraph 23)

Farmland's failure to obtain 2003 NAP coverage for sweet corn was not the result of misinformation or misaction of an FSA employee.

ANALYSIS

Farmland applied for 2003 NAP coverage more than a year after the application period ended. Although Farmland had contacted the county FSA office during the 2003 application period, Farmland did not attempt to obtain NAP coverage during the application period nor was Farmland given any erroneous program information or advice that would have adversely impacted Farmland's being able to obtain 2003 NAP coverage during the application period.

Farmland does not dispute that it failed to meet program requirements to obtain 2003 NAP coverage for sweet corn. Rather, Farmland seeks equitable relief to be allowed to obtain 2003 NAP coverage more than a year after the application period closed.

The relief provisions at 7 CFR 718.303 do not apply to cases where a participant's failure was the result of the participant's own misunderstanding of program provisions or where there is no erroneous program information or advice.

Example Determination Letter for a COC Appeal Hearing (Continued)

Mr. John Farm and Mr. Bill Land
Page 3

DETERMINATION

In view of the facts of this case and Farmland's position, the denial of 2003 NAP coverage for sweet corn was factually correct and according to rules governing the program. The record does not contain any evidence supporting a conclusion that Farmland's inability to submit a timely application for 2003 NAP coverage was the result of erroneous information or advice of an authorized FSA representative. Accordingly, the county committee denies Farmland's appeal and has declined to consider equitable relief provisions under 7 CFR 718.303.

If you believe that the county committee's decision is erroneous, you have the following options:

Appeal to State Committee

You may appeal the county committee's determination to the State Committee by filing a written request no later than 30 calendar days after you receive this notice in accordance with the FSA appeal procedures found at 7 CFR Part 780. If you appeal to the State committee, you have the right to an informal hearing which you or your representative may attend either personally or by telephone. If you choose to appeal to the State committee, you may later appeal the determination of the State Committee to NAD. To appeal, write to the State Committee at the following address and explain why you believe this determination is wrong. (Insert STC address.)

Alternative Dispute Resolution (ADR)

Mediation is available as part of FSA's informal appeal process. Mediation may enable us to narrow the issues and resolve the matter by mutual agreement. You may have to pay all or part of the cost of mediation. If you request mediation, the running of the time frame in which you may file an appeal stops. When mediation closes, the clock restarts and you will have the balance of the days remaining in that period to file an appeal. To request mediation, you must submit your written request no later than 30 calendar days after you receive this notice. To request mediation, write to the FSA State Executive Director at the following address: *(Insert SED address or Mediation Program address, as applicable.)*

In the alternative, you may seek another form of ADR.

Appeal to the Department of Agriculture National Appeal Division (NAD)

You may appeal this determination to NAD by filing a written request no later than 30 calendar days after you receive this notice in accordance with the NAD Appeal procedures found at 7 CFR Part 11. If you appeal to NAD, you have the right to a hearing which you or your representative may attend. Once a hearing with NAD begins, you waive any rights you might have to reconsideration, appeal to FSA, and mediation. To appeal, you must write to NAD at the following address, explain why you believe this determination is erroneous, and provide a copy to FSA. You must personally sign your written appeal to NAD and include a copy of this letter. *(Insert applicable NAD address.)*

If you do not timely exercise one of the preceding options, this shall be the final administrative determination with respect to this matter in accordance with the regulations at 7 CFR Part 780 and 7 CFR Part 11.

Sincerely,

(Insert name)
County Executive Director

Example Letter of Acknowledgement of Request for Reconsideration or Appeal

This is an example of the letter of acknowledgement of request for reconsideration or appeal of a NRCS Title XII determination.

Dear *(insert participant's name)*:

This letter acknowledges your appeal of the *(specify date and decision maker)* determination about *(insert issue under review – e.g. your eligibility under an Environmental Quality Incentives Program application)*.

By separate communication, as soon as practicable in advance of the hearing, a copy of the administrative record will be sent to your attention at your address of record.

(Identify reviewing authority) will review your appeal on *(insert date and time)*. The hearing will be held in *(insert name and address of office)*. You, your authorized representative, or both, are invited to attend this hearing and submit any additional information in support of your appeal.

The hearing is informal and a verbatim transcript is not ordinarily made. However, if you want a transcript to be made at your expense, please notify me at least 7 days prior to the hearing and I will make the necessary arrangements. Regulations at 7 CFR 780.13 prohibit appellants and their representatives from making any electronic recording of hearings with FSA. FSA will not reimburse you for any costs you may incur in connection with your appeal.

If you chose not to attend the hearing, you may submit, before the scheduled hearing date, information and evidence you wish to be considered. *(Insert name of reviewing authority)* will consider your appeal and make a decision based upon the information submitted by you, in addition to the documents and evidence contained in the administrative record.

The *(insert name of reviewing authority)* will provide the determination in writing to your or your representative as soon as possible after the scheduled hearing. If you have any questions about this matter, you may contact *(insert name and telephone number of contact)*.

Sincerely,

(Insert name)
(Insert title)

cc: *(Insert appropriate NRCS Contact)*

NRCS State Appeal Contacts

FSA **must** provide the applicable NRCS State Office a copy of the request for NAD appeal and all information provided by NAD about the appeal proceedings. The following are NRCS contacts as of April 9, 2008.

State	Last Name	First Name	Position	Office Address	Business Phone	FAX	E-mail Address
AL	Hughes	William	SRC	PO Box 311 Auburn AL 36830	334-887-4520	334-887-4551	bill.hughes@al.usda.gov
AK	Hedt	Thomas	ASTC-P	800 W Evergreen Ave Ste 100 Palmer AK 99645	907-761-7700	907-761-7790	thomas.hedt@ak.usda.gov
AZ	Stein	Kevin	Farm Bill Specialist-Resource Conservationist/ National Appeals Cadre Member	230 N 1st Ave Ste 509 Phoenix AZ 85003-1733	602-280-8800 Cell: 602-680-0947	602-280-8809	kevin.stein@az.usda.gov
AR	Mobley	Dennis	Soil Conservationist	Federal Bldg Rm 3416 700 W Capitol Ave Little Rock AR 72201	501-301-3164	501-301-3189	dennis.mobley@ar.usda.gov
CA	Forkey	Alan	ASTC-P	430 G St #4164 Davis CA 95616-4164	530-792-5653	530-792-5790	alan.forkey@ca.usda.gov
CO	Carney	Tim	ASTC-P	655 Parfet St Rm E200c Lakewood CO 80215-5517	720-544-2805	720-544-2962	tim.carney@co.usda.gov
CT	Dybdahl	Jan	SRC	344 Merrow Rd, Ste A Tolland CT 06084-3917	860-871-4018	860-871-4054	jan.dybdahl@ct.usda.gov
DE	Petrichenko	Paul	ASTC-P	1221 College Park Dr Ste 100 Dover DE 19904	302-678-4180	302-678-0843	paul.petrichenko@de.usda.gov
FL	Stewart	Teresa	EQIP Manager/National Appeals Cadre Member	2614 NW 43rd St Gainesville FL 32606-6611	352 338-9510	352-338-9574	teresa.stewart@fl.usda.gov
GA	Lamm	David	ASTC-P	355 Hancock Ave Mail Stop 200 Athens GA 30601	706-546-2083	706-546-2120	david.lamm@ga.usda.gov

NRCS State Appeal Contacts (Continued)

State	Last Name	First Name	Position	Office Address	Business Phone	FAX	E-mail Address
HI/ Pac Basin	Kimberlin	Dennis	Resource Conservationist	Pacific Islands Area State Office PO Box 50004 Honolulu HI 96850-0050	808-541-2600 ext 106	808-541-1335	dennis.kimberlin@hi.usda.gov
ID	Bartholomew	Bob	ASTC-P	9173 W Barnes Dr Ste C Boise ID 83709-1574	208-378-5703	208-378-5735	bob.bartholomew@id.usda.gov
IL	Dozier	Ivan	ASTC-P	2118 W Park Ct Champaign IL 61821	217-353-6602	217-353-6676	ivan.dozier@il.usda.gov
IN	Thompson	Harold	ASTC-P	6013 Lakeside Blvd Indianapolis IN 46278	317-290-3200 ext 320	317-290-3225	harold.thompson@in.usda.gov
IA	Carrington	Donald	Resource Conservationist/ National Appeals Cadre Member	210 Walnut St Rm 693 Des Moines IA 50309-2180	515-323-2615	515-284-4394	donald.carrington@ia.usda.gov
KS	Ungerer	Jon	Resource Conservationist	760 S Broadway Blvd Salina KS 67401-4604	785-296-3600	785-823-4540	jon.ungerer@ks.usda.gov
KY	Wheby	Deena	ASTC-P	771 Corporate Dr Ste 210 Lexington KY 40503	859-224-7403	859-224-7399	deena.wheby@ky.usda.gov
LA	Marcantel	Ronald	ASTC-O	3737 Government St Alexandria LA 71302	318-473-7802	318-473-7626	ron.marcantel@la.usda.gov
ME	Yamartino	Bill	ASTC-P	967 Illinois Ave Ste 3 Bangor ME 04401	207-990-9553	207-990-9599	bill.yamartino@me.usda.gov
MD	Rose	Mark	ASTC-P	John Hanson Business Center 339 Busch's Frontage Rd Ste 301 Annapolis MD 21409-5543	443-482-2910	410-757-0687	mark.rose@md.usda.gov
MA	Johnson	Deb	ASTC-P	451 West St Amherst MA 01002	413 253 4366	413-253-4375	deb.johnson@ma.usda.gov
MI	Rinkenberger	Gary	Resource Conservationist/ National Appeals Cadre Member	3001 Coolidge Rd Ste 250 East Lansing MI 48823	517-324-5266	517-324-5171	gary.rinkenberger@mi.usda.gov

NRCS State Appeal Contacts (Continued)

State	Last Name	First Name	Position	Office Address	Business Phone	FAX	E-mail Address
ND	Schwagler	Todd	SRC	220 East Rosser Ave PO Box 1458 Bismarck ND 58502-1458	701-530-2084	701-530-2110	todd.schwagler@nd.usda.gov
OH	Perrin	Tom	ASTC-P	200 North High St Rm 522 Columbus OH 43215	614-255-2474	614-255-2548	tom.perrin@oh.usda.gov
OK	vacant	vacant	ASTC-P	100 USDA Ste 206 Stillwater OK 74074-2655	405-742-1236	405-742-1126	
OR	Dishman	Dave	SCE	1201 NE Lloyd Blvd Ste 900 Portland OR 97232	503-414-3252	503-414-3103	dave.dishman@or.usda.gov
PA	Soto	Noel	Farm Bill Specialist/Resource Conservationist	One Credit Union Place Ste 340 Harrisburg PA 17110-2993	717-237-2233	717-237-2238	noel.soto@pa.usda.gov
PR	Arroyo	Fernando	Program Specialist	Santa Maria Shopping Center Ste 203 471 Ferrocaril St Ponce PR 00731	787-841-3136 ext 101	787-841-3217	fernando.arroyo@pr.usda.gov
RI	Bachand	Joseph	Program Manager	60 Quaker Lane Ste 46 Warwick RI 02886-0111	401-822-8818	401-828-0433	joseph.bachand@ri.usda.gov
SC	Ellis	Craig	ASTC-P	1835 Assembly St Rm 950 Columbia SC 29201	803-253-3930	803-253-3670	craig.ellis@sc.usda.gov
SD	Vickers	Shaun	SRC	Federal Bldg Rm 203 200 4th St SW Huron SD 57350-2475	605-352-1234	605-352-1288	shaun.vickers@sd.usda.gov
TN	Zeman	Mike	Biologist	US Courthouse Rm 675 801 Broadway Nashville TN 37203	615-277-2571	615-277-2578	mike.zeman@tn.usda.gov
TX	Sharer	Doug	EQIP/WHIP Program Manager/National Appeals Cadre Member	101 S Main St Temple TX 76501-7602	254 742-9825	254-742-9819	doug.sharer@tx.usda.gov

NRCS State Appeal Contacts (Continued)

State	Last Name	First Name	Position	Office Address	Business Phone	FAX	E-mail Address
UT	Hamilton	Barry	ASTC-FO/National Appeals Cadre Member	Price Service Center 540 W Price River Dr Price UT 84501-2813	435-637-0041	435-637-3146	barry.hamilton@ut.usda.gov
VT	Drew	Vicky	ASTC-P	356 Mountain View Dr Ste 105 Colchester VT 05446	802-951-6796 ext 242	802-951-6327	vicky.drew@vt.usda.gov
VA	Harris	Barry	Resource Conservationist Programs	Culpepper Bldg Ste 209 1606 Santa Rosa Rd Richmond VA 23229-5014	804-287-1658	804-287-1737	barry.harris@va.usda.gov
WA	Bromiley	Sharon	Area Program Liaison	316 W Boone Ave Ste 450 Spokane WA 99201-2348	509-343-2265	509-929-2909	sharon.bromiley@wa.usda.gov
WV	ODonnell	Bill	ASTC-O	75 High St Rm 301 Morgantown WV 26505	304-284-7543	304-284-4839	bill.odonnell@wv.usda.gov
WI	Weihrouch	Robert	Biologist	8030 Excelsior Dr. Ste 200 Madison WI 53717	608 662-4422 ext 267	608-662-4430	robert.weihrouch@wi.usda.gov
WY	Mar	Jay	ASTC-P	Federal Bldg. Rm 3124 100 East B St Casper WY 82601-1911	307-233-6757	307-233-6753	jay.mar@wy.usda.gov

Language for Objection to Parties Referencing NAD Cases in Other Decisions

The following language shall be used when making written or verbal objections on the record.

The NAD appeals process provides participants in covered agency programs an opportunity to obtain review of an adverse agency decision by an independent decision-maker before the decision becomes a final determination of USDA.

All determinations of NAD **must** be based on information from the case record laws applicable to the matter at issue, and applicable regulations in effect on the date of the adverse decision.
(7 CFR 11.10)

NAD **must** make any determination of agency error on the basis of the agency record and other evidence submitted during the proceedings in the instant appeal and **must**, independently, determine whether FSA committed material factual error in rendering its administrative decision or erred in applying its rules to a correct set of facts reaching an incorrect conclusion.

Even if cited appeals purport to deal with matters similar to those present in an appellant's appeal, the appeals, though publicized by NAD on its Web site, do **not** reflect the full case record in those appeals (which **must** remain closed to inspection under the Privacy Act, 5 U.S.C. 552a).

Citing other appeal decisions that may have been decided by NAD in response to a different set of facts and an administrative record that will never be made part of the case record in this appeal confuses the NAD appeal process and complicates any further review.

Example Summary Outline for Responses to Appellant-Filed Requests for NAD Director Review

FSA must submit its written response to any appellant-filed request for NAD Director review within 5 workdays of receiving a copy of the appellant-filed request. The following is an outline of what FSA should provide. An example appears on page 2 of this Exhibit.

Note: The following examples are for illustration purposes **only** and are **not** intended to be accurate descriptions of program or eligibility provisions.

Appellant's Name: (*Insert name of appellant.*)

Represented By: (*Insert name of appellant's representative, if applicable.*)

Subject: (*Insert name of the appellant and NAD Case Number assigned by NAD.*)

Statement of FSA Position in Reponse: (*State that the memorandum is in response to appellant's request for NAD Director review. Mention the date FSA first received a copy of the request for NAD Director review.*)

(*Include a statement saying what FSA determined and why FSA believes its decision [and possibly the hearing officer decision] is [are] factually correct and in accordance with rules governing the program.*

To the extent the appellant-filed request identifies error in the hearing officer decision, insert a response with explanation as to how such error. You may mention whether FSA agrees or disagrees with the assertion of error; however, you may also want to mention why the error does not impact or is not particularly relevant to FSA's and the hearing officer's decision.

In general, respond tactfully or mention how FSA has already responded to the claims or contentions of appellant).

cc: (*Insert addresses for appellant and all parties to the appeal where copies of FSA's response were simultaneously sent.*)

Example Summary Outline for Responses to Appellant-Filed Requests for NAD Director Review (Continued)

TO: Director
National Appeals Division

By FAX to NAD Director
Date

FROM: SED, FSA's Designated Representative, or State Appeals Coordinator

SUBJECT: FSA Response to Appellant's Request for NAD Director Review – Tinseltown Farms – NAD Appeal Case Number 2007W000XXX

The following is the Farm Service Agency's (FSA's) response to the request for NAD Director review filed on behalf of Tinseltown Farms (appellant), NAD Appeal Case Number 2007W000XXX. FSA received a copy of appellant's request on March 10, 2007.

FSA determined appellant violated the terms of its Conservation Reserve Program (CRP) contract by allowing livestock to access and graze the CRP crop acreage. Appellant admitted to violating the terms and conditions of the CRP contract; however, appellant claimed the violation was unintentional and inadvertent. FSA determined appellant did not intend for the livestock to graze the CRP acreage and that appellant acted in good faith by removing the livestock from the CRP acreage once they were discovered. In view of this, FSA chose not to terminate either appellant's CRP contract or the acreage in violation. Instead, FSA assessed a payment reduction for the unauthorized grazing of the CRP acreage. Appellant appealed that determination to NAD.

FSA believes its decision is factually correct and in accordance with rules governing the CRP. Additionally, FSA does not believe appellant has shown any factual errors in either FSA's or the hearing officer's determination. Rather, appellant merely does not want a payment reduction assessed.

Appellant has not explained how FSA's and hearing officer's decision are contrary to rules governing the program. Accordingly, FSA believes the hearing officer's (and FSA's) decision should be affirmed.

A copy of this response is being provided to appellant.

cc: Tinseltown Farms
4 Anywhere Rd
Place KS 66123-0004

***--Mandatory Language to Insert in Adverse FOIA Decision Letters**

A Required Language

Any FSA office issuing an adverse FOIA decision shall use the language in subparagraphs B through E. Language is provided for 4 types of adverse FOIA decisions.

B Denial of Release of Information Based on Applicable FOIA Exemptions

The following language shall be used when denying the release of information based on applicable FOIA exemptions.

"If you believe this determination to withhold information is incorrect, you may appeal to the FSA Administrator. The Appeals and Litigation Staff must receive your written appeal within forty-five (45) calendar days of the date of this letter. Please include in the appeal a brief explanation of why you believe this decision is in error. Be sure to include a copy of your initial request letter in your appeal package, and clearly mark both your letter and its envelope with the words "Freedom of Information Act Appeal." Mail your appeal package to the following address.

ADMINISTRATOR
ATTN: APPEALS AND LITIGATION STAFF
USDA FSA
1400 INDEPENDENCE AVE SW RM 6722-S
STOP CODE 0570
WASHINGTON DC 20250-0570."

C No Records Response

The following language shall be used when there is a no records response.

"If you believe that there are, in fact, records responsive to your request in files maintained by FSA, you may appeal to the FSA Administrator. The Appeals and Litigation Staff must receive your written appeal within forty-five (45) calendar days of the date of this letter. Please include in the appeal the location of the responsive records, if it is known to you, and the reason why you believe that there are records responsive to your request in FSA files. Be sure to include a copy of your initial request letter in your appeal package, and clearly mark both your letter and its envelope with the words "Freedom of Information Act Appeal." Mail your appeal package to the following address.

ADMINISTRATOR
ATTN: APPEALS AND LITIGATION STAFF
USDA FSA
1400 INDEPENDENCE AVE SW RM 6722-S
STOP CODE 0570
WASHINGTON DC 20250-0570."**--***

***--Mandatory Language to Insert in Adverse FOIA Decision Letters (Continued)**

D Denial of Expedited Processing

The following language shall be used when denying expedited processing.

"If you believe the determination to deny your request for expedited processing is incorrect, you may appeal to the FSA Administrator. The Appeals and Litigation Staff must receive your written appeal within forty-five (45) calendar days of the date of this letter. Please include in the appeal a brief explanation of the particular circumstances which constitute exceptional need or urgency for the specific records you requested. Be sure to include a copy of your initial request letter in your appeal package, and clearly mark both your letter and its envelope with the words "Freedom of Information Act Appeal." Mail your appeal package to the following address.

ADMINISTRATOR
ATTN: APPEALS AND LITIGATION STAFF
USDA FSA
1400 INDEPENDENCE AVE SW RM 6722-S
STOP CODE 0570
WASHINGTON DC 20250-0570."

E Denial of a Fee Waiver

The following language shall be used when denying a fee waiver.

"If you believe the determination to deny your request for a fee waiver is incorrect, you may appeal to the FSA Administrator. The Appeals and Litigation Staff must receive your written appeal within forty-five (45) calendar days of the date of this letter. Please include in the appeal a brief explanation of how disclosure of the information to you is likely to contribute significantly to public understanding of the operations or activities of the government and the reasons disclosure would not be primarily in your commercial interest. Be sure to include a copy of your initial request letter in your appeal package, and clearly mark both your letter and its envelope with the words "Freedom of Information Act Appeal." Mail your appeal package to the following address.

ADMINISTRATOR
ATTN: APPEALS AND LITIGATION STAFF
USDA FSA
1400 INDEPENDENCE AVE SW RM 6722-S
STOP CODE 0570
WASHINGTON DC 20250-0570."**--***

***--Mandatory Language to Insert in Adverse FOIA Decision Letters (Continued)**

F Glomar Response

The following language shall be used when FSA can neither confirm nor deny the existence of records.

"You have the right to challenge FSA's response to your request for records. The Appeals and Litigation Staff must receive your written appeal within forty-five (45) calendar days of the date of this letter. Please include in the appeal a brief explanation of why you believe FSA's response is not appropriate. Be sure to include a copy of your initial request letter in your appeal package, and clearly mark both your letter and its envelope with the words "Freedom of Information Act Appeal." Mail your appeal package to the following address.

ADMINISTRATOR
ATTN: APPEALS AND LITIGATION STAFF
USDA FSA
1400 INDEPENDENCE AVE SW RM 6722-S
STOP CODE 0570
WASHINGTON DC 20250-0570."**--***

Example Letter to Participants or Payees for EFT's

USDA

United States Department of Agriculture

Farm and Foreign Agricultural Services

Farm Service Agency

1400 Independence Ave, SW
Stop 0570
Washington, DC 20250-0570

TO: (*Enter name of participant or payee; such as, "I. Am Farms"*)

THROUGH: (*Enter name and address of the participant's attorney or representative; such as, "Lawyers are Us, P.O. Box 1, Fargo, ND 58103"*)

FROM: Farm Service Agency
Appeals and Litigation Staff, Room 6722-S
1400 Independence Ave., SW
Washington, D.C. 20250

PHONE: 202-690-3297 FAX: 202-690-3003

SUBJECT: Data Required for Electronic Funds Transfer

In connection with an agreement or order directing that payment be issued, the Farm Service Agency requests the following information.

Participant's Name:	*I. Am Farms*
Last 4 of Participant's Tax ID:	*1234*
Participant's Mailing Address:	*P.O. Box A, Fargo, ND 58103*
Participant's Phone:	*701-555-1515*
Do you want payment to go to you as participant or someone else?	If participant wants payment to be issued directly to the participant, **leave this block blank**. If participant wants payment issued to another designated account; such as the attorney or a law firm, enter name and address where the participant wants the payment issued: *Lawyers are Us* *P.O. Box 1* *Fargo, ND 58103*
Please complete the following for the account where you want funds deposited.	
Name and address of bank or financial institution where you want payment to go:	*Dakota Financial* *Financial Street* *Fargo, ND 58103*
Bank Routing Number:	*123456789*
Account Number:	*987654*
Name of Owner on Account:	*Lawyers are Us, Escrow and Trust Account*
Tax ID of owner of account (only to assist in identification of owner with bank):	If this is the same as the participant, **leave this block blank**. *12-3456789*
PLEASE SUBMIT THIS FORM TOGETHER WITH A COPY OF A VOIDED CHECK AND BLANK DEPOSIT SLIP OF THE ACCOUNT WHERE YOU WANT FUNDS DEPOSITED.	

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