

**UNITED STATES DEPARTMENT OF AGRICULTURE**

Farm Service Agency  
Washington, DC 20250

**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.

<b>Page Control Chart</b>		
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### 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)).

**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--\*

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.

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

**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.

<b>IF the adverse appeal decision is made by...</b>	<b>THEN provide the right to...</b>
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.*)”

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

A Acknowledgement Letter (Continued)

<b>IF the participant is seeking...</b>	<b>THEN in a...</b>
mediation	<p><b>certified State</b>, the USDA Certified State Mediation Program should make all arrangements for the mediation process.</p> <p><b>noncertified State</b>, 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.</p>

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	<p>Using the format in Exhibit 9, prepare a written summary of the case that contains:</p> <ul style="list-style-type: none"> <li>• <b>all</b> important issues pertinent to the matter being considered, about all regulations and FSA operating procedure applicable to the decision under review</li> <li>• a clear, concise statement of appellant’s position to the extent known, <b>before</b> the hearing</li> <li>• a list of <b>all</b> the known individuals that will be present.</li> </ul> <p><b>Note:</b> 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.</p>

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

B Reviewing Authority Action (Continued)

Step	Action
4	<p>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.</p> <p><b>Note:</b> Persons affected could include all owners on a farm or participants listed on a contract or application, signatories to loan documents, etc.</p>
5	<p>Arrange for preparation of a verbatim transcript, if applicable (paragraph 18).</p>
6	<p>Review the summary prepared, in step 3, and have a thorough understanding of the issues and matter.</p>
7	<p>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.</p> <p><b>Note:</b> See Part 4 about appeals of NRCS * * * determinations.</p>

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.

<b>IF COC and/or STC determine that a participant’s appeal of the NRCS determination has...</b>	<b>THEN COC and/or STC shall...</b>
merit or is <b>not</b> frivolous	refer the case, through SED, to State Conservationist to review the * * * determination before issuing a decision. The referral <b>must</b> include, in writing, the reasons COC or STC determined the case had merit or was not frivolous.  <b>Note:</b> If other FSA issues have been made a part of the appeal and depend on NRCS’s determination, COC or STC shall <b>not</b> make a decision about FSA issues until State Conservationist’s determination is received.
<b>no</b> 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 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)]

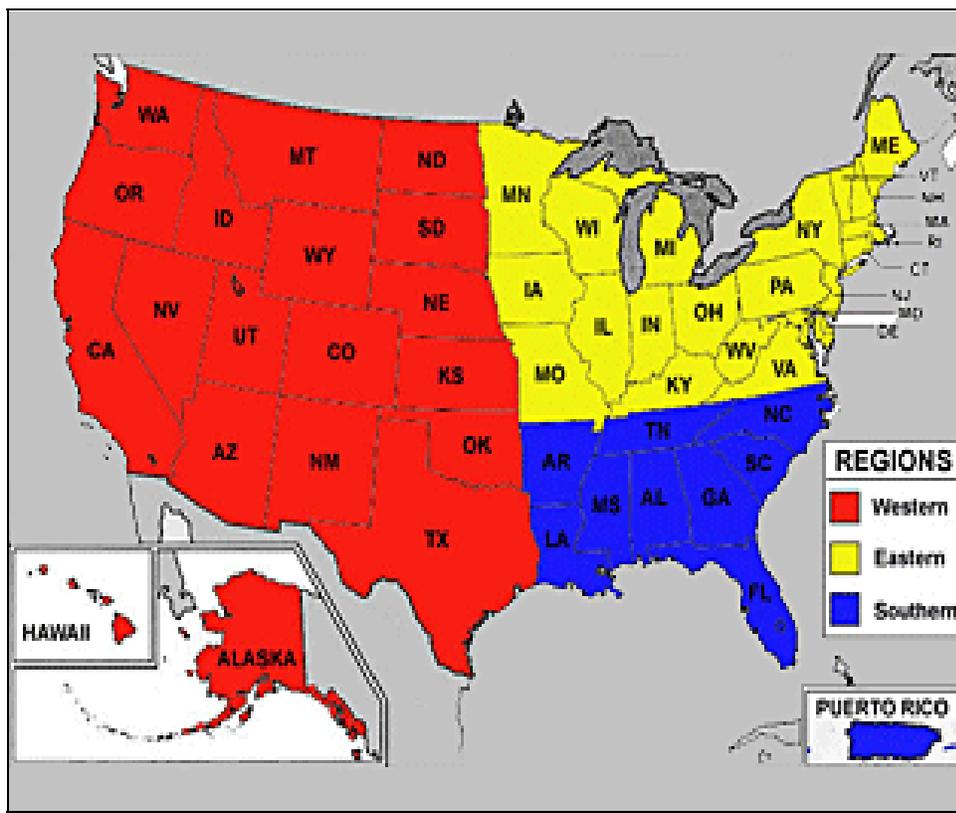
71 Overview (Continued)

D NAD Offices

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

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

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



## 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.

## 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.

**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.

## Section 2 Privacy Act – Access to Records

**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.

**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.

<b>Approved Abbreviation</b>	<b>Term</b>	<b>Reference</b>
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

**Re delegations of Authority**

None.



**\*--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.”--\*

