

UNITED STATES DEPARTMENT OF AGRICULTURE

Farm Service Agency
Washington, DC 20250

Program Appeals, Mediation, and Litigation
1-APP (Revision 2)

Amendment 10

Approved by: Acting Administrator



Amendment Transmittal

A Reasons for Amendment

Subparagraph 2 B has been amended to update contact information.

Subparagraphs 10 A and 11 A have been amended to clarify that failure to act on a participant's right or request, including a participant's relief request, is an adverse determination that is appealable.

Subparagraph 10 A has been amended to add that administratively or judicially final decisions are **not** appealable.

Subparagraph 15 B and Exhibit 8 have been amended to update the paragraph references.

Subparagraph 117 B has been amended to require coordination between the State Office and National Office on responses to appellant's requests for NAD Director review.

Page Control Chart		
TC	Text	Exhibit
	1-3, 1-4 2-5, 2-6 2-17, 2-18 2-27, 2-28 6-129, 6-130	8, pages 3, 4

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	*--202-720-7797--*
Shelley Davis	Management Analyst	202-690-8034
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Robin Wieland	Paralegal Specialist	202-690-2814

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 recommend equitable relief

Note: Relief determinations are subject to appeal; however, FSA's electing **not** to consider relief on its own initiative is **not** an adverse decision giving rise to any appeal, mediation, or granting or denying right or relief, is entirely discretionary; participants are **not** entitled to relief. Failure to act on a participant's request, including a participant's relief request is appealable.--*

- 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
- *--determinations, including determinations on relief, that are administratively or judicially final.--*

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

Note: Denial of relief and failure to act on the request or right of a participant are appealable adverse decisions.--*

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 12, 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.)”

18 Verbatim Transcripts

A Prohibition on Unauthorized Recordings

[7 CFR 780.13(a)] Appellants and their representatives are precluded from making any ~~any~~ electronic recording of any portion 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	<ul style="list-style-type: none"> 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. <p>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.</p>
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.

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 ALS 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.

--If an appellant requests the NAD Director review in a case where a NAD hearing officer upheld FSA's determination and the FSA National Office has been involved, the State Office must consult with the appropriate program division in the National Office to coordinate a response to the appellant's Director's review request. If the State Office believes a response is not appropriate in such cases, the State Office must obtain concurrence from the appropriate program division in the National Office.--

See Exhibit 51 for an example of a response to an appellant-filed request for NAD Director review.

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 12)--

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.)