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Introduction to the National Appeals Division Land Loss Prevention Project

EDITOR'S NOTE: the following is based on a review of the Code of Federal Regulations and publications of the National Appeals Division in effect as of October 7, 2011. The recipient of this information should be careful to be aware of any legislative or agency changes that may occur in the future.

Function of the National Appeals Division

The National Appeals Division, also referred to as "NAD" and the "Division", was established in 1994 and is an organization within the United States Department of Agriculture (USDA), subject to the general supervision of and policy direction of the Secretary of Agriculture.¹ Its mission is to conduct evidentiary administrative appeal hearings and reviews arising from program operations of specified agencies within the USDA.² It is independent from all other agencies and offices of the USDA, including Department officials at the state and local level.³ The Director of NAD reports directly to the Secretary of Agriculture.⁴ The Director is appointed by the Secretary of Agriculture for a six year term and is eligible for reappointment, but is not subject to removal during a term except for cause established in accordance with law.⁵ The Director of the National Appeals Division is responsible for appointing the hearing officers and other employees as are necessary for the administration of the Division.⁶

Starting the Appeal Process

The appeals process before NAD begins when a participant receives an adverse decision from an agency. A *participant* is an 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 from an agency subject to appeal to the National

¹ 7 C.F.R. § 11.2(a) (2011).

² United States Department of Agriculture, *The National Appeals Division Guide*, National Appeals Division, 2 (October 2008), *available at* [http://www.nad.usda.gov/Forms/NAD%20Guide%20\(October%202008\).pdf](http://www.nad.usda.gov/Forms/NAD%20Guide%20(October%202008).pdf).

³ 7 C.F.R. § 11.2; *see* Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, § 272(a), 108 Stat. 3178 (1994).

⁴ 7 CFR § 11.2(a).

⁵ § 272(b)(1), 108 Stat. 3178; § 272(b)(2), 108 Stat. 3178.

⁶ § 272(e), 108 Stat. 3178.

Appeals Division, is affected by a decision of such agency.⁷ Once a participant or authorized representative files an appeal to an adverse decision, they become an *appellant*.⁸ The agencies that are subject to this process are as follows:

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

Examples of adverse decisions that are subject to NAD jurisdiction are: denial of participation in, or receipt of benefits under any programs of an agency; compliance with program requirements; the making or amount of payments or other program benefits to a participant in any program of an agency; and a determination that a parcel of land is a wetland or highly erodible land.¹⁰ The National Appeals Division is not authorized to review federal statutes or USDA regulations and the Federal Rules of Evidence are not used during NAD hearings.¹¹

For National Appeals Division purposes, an “adverse decision means an administrative decision made by an officer, employee, or committee of an agency that is adverse to a participant. The term includes a denial of equitable relief by an agency or the failure of an agency to issue a decision or otherwise act on the request or right of the participant within the 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.”¹²

Informal Review Requirement

⁷ 7 C.F.R. § 11.1.

⁸ *Id.*

⁹ *Id.*

¹⁰ 7 C.F.R. § 11.3(a).

¹¹ 7 C.F.R. § 11.3(b); 7 C.F.R. § 11.4(b).

¹² 7 C.F.R. § 11.1.

Prior to seeking a NAD hearing, a participant (except for farm credit programs) must seek an informal review of an adverse decision issued at the field service office level by an officer or employee of the Farm Service Agency, or by any employee of a county or area committee established by the Soil Conservation and Domestic Allotment Act before NAD will accept an appeal of a Farm Service Agency.¹³ Optional informal review is available with respect to adverse decisions issued at the state office level of the Farm Service Agency and adverse decisions of all other agencies.¹⁴

Mediation or Alternate Dispute Resolution

Before filing a NAD appeal, a participant has the option to use any available alternative dispute resolution (ADR) or mediation program in an attempt to resolve an adverse decision prior to a NAD hearing.¹⁵ Currently in North Carolina, mediation is conducted through the North Carolina Agricultural Mediation Program, which conducts statewide mediation sessions free of charge for all mediations involving agencies of the United States Department of Agriculture. Should the participant request mediation or ADR prior to filing a NAD appeal, the participant stops the running of the 30-day period that the participant would otherwise have to file a written request for a hearing under 7 CFR § 11.6(b)(1).¹⁶ Another option available to the appellant is to file a timely NAD appeal, but prior to the hearing, request mediation or ADR. By utilizing this tactic, the appellant waives the right to have a hearing within 45 days under 7 CFR § 11.8(c)(1), but has a right to have a NAD hearing within 45 days of the conclusion of the mediation or ADR.¹⁷

Director Review of Agency Determination of Appealability

Within 30 days of receiving a determination from an agency that agency decision is not appealable, the participant must submit a personally signed written request to the NAD Director, requesting a review of that determination, should the participant want such a review.¹⁸ The NAD Director will determine whether the decision is adverse to the participant and therefore appealable or is a matter of general applicability as described in 7 CFR § 11.3(b), being an attempt to seed a review of statutes or USDA regulations and therefore not subject to appeal.¹⁹ A decision by the Director that the decision of the agency is non-appealable is final.²⁰ If the NAD Director decides that the agency decision is subject to appeal, the Director will notify the participant and the agency of that decision and inform the participant of the right to appeal.²¹ Requesting a NAD Hearing

¹³ 7 C.F.R. § 11.5(a).

¹⁴ 7 C.F.R. § 11.5(b).

¹⁵ 7 C.F.R. § 11.5(c).

¹⁶ 7 C.F.R. § 11.5(c)(1).

¹⁷ 7 C.F.R. § 11.5(c)(2).

¹⁸ 7 C.F.R. § 11.6(a)(1).

¹⁹ 7 C.F.R. § 11.6(a)(2); *see* 7 C.F.R. § 11.3(b).

²⁰ 7 C.F.R. § 11.6(a)(2).

²¹ *Id.*

Once the participant receives notice of an adverse decision or notice from the Director that the decision is appealable, the participant can then request a NAD appeal. Such a request must be in writing, personally signed by the participant with an attached copy of the adverse decision (if available), and a brief statement as to why the participant believes the agency's decision is incorrect.²²

The request for a NAD hearing must be filed within 30 days of the participant first receiving notice of the adverse decision or within 30 days of the date that the participant first received notice that of the Director's determination that the adverse decision is appealable.²³ If the participant is requesting a hearing based on the agency failing to act on the request of a participant, the participant has 30 days from the time he knew or reasonably should have known that the agency had not acted within the timelines specified by the agency program regulations, or where no such timelines are specified, within 30 days after the participant should have reasonably known of the agency's failure to act.²⁴ As an alternative to requesting a hearing, a participant has the option to request a record review following these same procedures.²⁵ If the participant is represented by an authorized representative, the authorized representative must file a declaration with NAD, stating that the participant has duly authorized the declarant in writing to represent the participant and attach a copy of the written authorization to the declaration.²⁶

The Hearing Process

An appellant has the right to have a National Appeals Division hearing within 45 days of receipt of the request for a hearing by the Division.²⁷ The National Appeals Division will assign a Hearing Officer to the appeal and send a "Notice of Appeal And Request For Agency Record After Appealability Determination" to the appellant (formerly the participant) and the agency regarding the identity and contact information of the Hearing Officer, time deadlines for both the agency and the appellant to submit specified documents and various other instructions.²⁸

Accompanying the notice will be an attachment designated as the "NAD Information Sheet" that covers various items including but not limited to the procedure for submitting evidence; the method of labeling submitted evidence; information about pre-hearing teleconferences; accommodations for persons with disabilities, the availability of language interpreters and the options for choosing an in-person hearing, a telephone hearing, or a record review instead of a hearing.²⁹

Third parties and interested parties may participate in an appeal.³⁰ A third party is any individual or entity for which a NAD determination could lead to any agency action

²² 7 C.F.R. § 11.6(b)(2).

²³ 7 C.F.R. § 11.6(b)(1).

²⁴ *Id.*

²⁵ 7 C.F.R. § 11.6(b)(2).

²⁶ 7 C.F.R. § 11.6(c).

²⁷ 7 C.F.R. § 11.8(c)(1).

²⁸ United States Department of Agriculture, *The National Appeals Division Correspondence Manual*, National Appeals Division, 45-47 (October 2007), available at [http://www.nad.usda.gov/Forms/NAD%20Correspondence%20Manual%20\(October%202007\).pdf](http://www.nad.usda.gov/Forms/NAD%20Correspondence%20Manual%20(October%202007).pdf).

²⁹ *Id.* at 48-51.

³⁰ 7 C.F.R. § 11.15.

that would be adverse to the third party.³¹ A third party cannot be forced to participate in a hearing, however the third party who has been notified of the right to participate and who does not participate, is bound by the determination of the Hearing Officer and may not request an appeal.³² An interested party, one whose rights are not being adjudicated but who may be affected by the outcome of an agency determination, may participate in a hearing but are not classified as appellants.³³ Interested parties are commonly guaranteed lenders and reinsured companies in a crop insurance program.

Hearing Officers are authorized to schedule and conduct a pre-hearing conference whenever they deem it appropriate for the purpose of resolving the dispute or narrowing the issues that will make up the appeal.³⁴ These pre-hearing conferences are held by telephone and the Hearing Officer will send a notice of such conference to all parties with information as to the date and time for the pre-hearing conference, the procedure for calling in and the issues that will be discussed.³⁵ This notice also notifies the participants that the hearing officer will: ask about any mediation or bankruptcy that might be pending; identify any potential third parties; narrow the issues in dispute; ask the Agency to explain the regulatory basis for the adverse decision; ask the Appellant to explain the basis of the appeal; discuss information and document exchange; explain the hearing process; address procedural matters; explain the options for processing the appeal and ask the appellant to select either an in-person hearing, telephone hearing, or record review; and schedule a time and place for the hearing if the Appellant wants to proceed with one.³⁶

An appellant or the agency may request the issuance of a subpoena requiring the attendance of a witness by submitting a written request at least 14 days prior to the scheduled hearing date.³⁷ It is for the determination of the Director or the Hearing Officer as to whether the subpoena will issue.³⁸ For a subpoena of documents to issue, the Director or Hearing Officer must be satisfied that the appellant or the agency has established that production of documentary evidence is necessary and reasonably calculated to lead to information that would affect the final determination or is necessary to fully present the case.³⁹ The standard for which a subpoena of a witness will be authorized is that the appellant or the agency establish that either a representative of the USDA or a private individual possesses information that is pertinent and necessary for disclosure of all relevant facts that could impact the final determination, that the information is unavailable except through the testimony of the person and that the testimony cannot be obtained absent issuance of a subpoena.⁴⁰

³¹ United States Department of Agriculture, *The National Appeals Division Guide*, National Appeals Division, 19 (October 2008), available at [http://www.nad.usda.gov/Forms/NAD%20Guide%20\(October%202008\).pdf](http://www.nad.usda.gov/Forms/NAD%20Guide%20(October%202008).pdf).

³² *Id.*

³³ *Id.* at 20.

³⁴ 7 C.F.R. § 11.8(c)(4).

³⁵ United States Department of Agriculture, *The National Appeals Division Correspondence Manual*, National Appeals Division, 55-56 (October 2007), available at [http://www.nad.usda.gov/Forms/NAD%20Correspondence%20Manual%20\(October%202007\).pdf](http://www.nad.usda.gov/Forms/NAD%20Correspondence%20Manual%20(October%202007).pdf).

³⁶ *Id.*

³⁷ 7 C.F.R. § 11.8(a)(2)(ii).

³⁸ 7 C.F.R. § 11.8(a)(2)(iii).

³⁹ 7 C.F.R. § 11.8(a)(2)(iii)(A).

⁴⁰ 7 C.F.R. § 11.8(a)(2)(iii)(B).

The party requesting issuance of a subpoena is responsible for arranging for service and is responsible for the payment of any reasonable travel and subsistence costs incurred by the witness unless the witness is a USDA employee whose role as a witness arises out of his or her performance of official duties, regardless of which party requested the subpoena.⁴¹ It is within the discretion of the Director or the Hearing Officer to allow testimony at a hearing, given pursuant to a subpoena, to be in person or telephonically.⁴²

The Hearing Officer must provide the appellant, the authorized representative, and the agency a notice of hearing specifying the date, time, and place of the hearing no less than 14 days prior to the hearing.⁴³ 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 National Appeals Division.⁴⁴

The Federal Rules of Evidence are not applicable to NAD proceeding.⁴⁵ The Hearing Officer will allow the presentation of evidence at the hearing whether or not 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.⁴⁶ The Hearing Officer can confine the presentation of evidence to pertinent matters and exclude irrelevant, immaterial, or unduly repetitious evidence, information or questions.⁴⁷

An official tape recording is made of all hearings by the National Appeals Division although a party to the proceeding may request a verbatim transcript to be made the official record at the expense of the requesting party.⁴⁸ Should this method be used, the requesting party must provide a certified copy of the transcript to the Hearing Officer, free of charge, and allow any other party to purchase a copy.⁴⁹

After the hearing, the Hearing Officer will leave the record open for 10 days, or such other time as deemed appropriate, for the purpose of allowing the agency or the appellant to submit additional information to the extent necessary to respond to any new facts, information, arguments, or evidence presented or raised at the hearing.⁵⁰ All new information will be made part of the hearing record and sent to the other party by the submitter of the information and the Hearing Officer has the discretion to allow the other party or parties to respond to any post-hearing submission.⁵¹

Determination by Hearing Officer.

The Hearing Officer must issue a notice of determination on the appeal to the named appellant, the authorized representative, and the agency within 30 days after the hearing or the closing date of the hearing record.⁵² Should the appellant opt for a record

⁴¹ 7 C.F.R. § 11.8(a)(2)(iv); 7 C.F.R. § 11.8(a)(2)(v).

⁴² 7 C.F.R. § 11.8(a)(3).

⁴³ 7 C.F.R. § 11.8(c)(3).

⁴⁴ *Id.*

⁴⁵ 7 C.F.R. § 11.4(b).

⁴⁶ 7 C.F.R. § 11.8(c)(5)(ii).

⁴⁷ *Id.*

⁴⁸ 7 C.F.R. § 11.8(c)(5)(iii).

⁴⁹ *Id.*

⁵⁰ 7 C.F.R. § 11.8(c)(7).

⁵¹ *Id.*

⁵² 7 C.F.R. § 11.8(f).

review in lieu of an in-person or telephonic hearing, the Hearing Officer is required to issue a notice of determination within 45 days of receipt of the appellant's request for a record review.⁵³ The Hearing Officer can present a request to the Director to establish an earlier or later deadline to issue a determination.⁵⁴

Along with issuing a notice of determination, the Hearing Officer will include a copy of the procedures for filing a request for Director review under the provisions established in 7 CFR § 11.9.⁵⁵

Director Review of Hearing Officer Determination

Within 30 days of an appellant receiving the determination of a Hearing Officer pursuant to 7 CFR § 11.8, the appellant is required to submit to the Director, a personally signed written request, with specific reasons as to why the appellant is entitled to review.⁵⁶ Failure to comply with this provision will result in the notice of determination issued by the Hearing Officer to be classified as a final determination.⁵⁷

The timeline for the agency to request a Director review is more restrictive as the agency is required to make such request within 15 business days (*30 days versus 15 business days*) of receipt of the determination.⁵⁸ A copy of the request for Director review shall be made simultaneously to all parties.⁵⁹ Additionally, a request for Director review by the agency must be made by the head of an agency only, or by a person acting in such capacity, not by a subordinate officer of the agency.⁶⁰ The Director is required to provide prompt notification to all parties of receipt of a request for review.⁶¹ The other parties to an appeal have the option to submit written responses to a request for Director review within 5 business days from receiving a copy of the request for review.⁶²

Director Determination Upon Review.

In conducting a review of the Hearing Officer's determination, the Director will use the agency's record, the hearing record, the request for review, responses submitted by other parties to the review, and any arguments or information as may be accepted by the Director in order to determine whether the Hearing Officer's decision is supported by substantial evidence.⁶³ Based on such review, the Director will issue a final determination that will either uphold, reverse, or modify the previous determination of the Hearing Officer.⁶⁴ The Director's determination will be considered a final determination unless the Director determines that the hearing record is inadequate or that new evidence has

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 7 C.F.R. § 11.9(a)(1).

⁵⁷ 7 C.F.R. § 11.8(f).

⁵⁸ 7 C.F.R. § 11.9(a)(2).

⁵⁹ 7 C.F.R. § 11.9(a)(3).

⁶⁰ 7 C.F.R. § 11.9(a)(2).

⁶¹ 7 C.F.R. § 11.9(b).

⁶² 7 C.F.R. § 11.9(c).

⁶³ 7 C.F.R. § 11.9(d)(1).

⁶⁴ *Id.*

been submitted, then the Director can remand all or a portion of the determination to the Hearing Officer for further proceedings to complete the hearing, or order a new hearing.⁶⁵

If the request for review is made by the head of an agency, the Director has 10 business days from the receipt of the request to issue a final determination or remand the matter to the Hearing Officer.⁶⁶ If the request for review is made by the appellant, the Director has 30 business days after receipt of the request to either issue a final determination or remand the matter to the Hearing Officer.⁶⁷ On appeal, the Director also has the authority to grant equitable relief to the same extent as such authority is provided to an agency under applicable laws and regulations.⁶⁸

Basis for Determinations.

Hearing Officers and the Director are not bound by previous findings of facts on which the agency's adverse decision was based.⁶⁹ At the appeal level, the Hearing Officers and 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.⁷⁰ Furthermore, all determinations of the Hearing Officer and Director must be based on information from the case record, laws applicable to the matter at issue, and the applicable regulations 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.⁷¹

Reconsideration of Director Determination.

The appellant and the agency have the right to request a reconsideration of a determination of the Director within 10 days from receipt of the determination.⁷² Such request must include a detailed statement of a material error of fact made in the determination, or a detailed explanation of how the determination is contrary to statute or regulation, justifying reversal or modification of the determination.⁷³ The Director is required to issue a notice to all parties as to whether a request for reconsideration meets this criteria and if it does, the Director shall include a copy of the request for reconsideration in the notice to the non-requesting party, who will have 5 days from its receipt to file a response to the request for reconsideration with the Director.⁷⁴ Within 5 days of receiving responses from the non-requesting party, the Director is required to issue a decision on the request for reconsideration.⁷⁵ Should the Director's decision on

⁶⁵ *Id.*

⁶⁶ 7 C.F.R. § 11.9(d)(2)(i).

⁶⁷ 7 C.F.R. § 11.9(d)(2)(ii).

⁶⁸ 7 C.F.R. § 11.9(e).

⁶⁹ 7 C.F.R. § 11.10(a).

⁷⁰ 7 C.F.R. § 11.10(b).

⁷¹ 7 C.F.R. § 11.10(c).

⁷² 7 C.F.R. § 11.11(a).

⁷³ *Id.*

⁷⁴ 7 C.F.R. § 11.11(b).

⁷⁵ 7 C.F.R. § 11.11(c).

the request for reconsideration reverse or modify the final determination previously issued by the Director under 7 C.F.R. § 11.9(d), this will become the final determination of the Director under 7 C.F.R. § 11.9(d).⁷⁶ Upon the return of a case to an agency pursuant to a final determination, the head of an agency has 30 days from the date of the notice of the determination to implement the final determination.⁷⁷

Judicial Review.

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 the provisions of chapter 7 of title 5 of the United States Code.⁷⁸

⁷⁶ *Id.*

⁷⁷ 7 C.F.R. § 11.12(a).

⁷⁸ 7 C.F.R. § 11.13(a).