§ 2422.33 Relief obtainable under Part 2423.

Remedial relief that was or could have been obtained as a result of a motion, objection, or challenge filed or raised under this subpart, may not be the basis for similar relief if filed or raised as an unfair labor practice under Part 2423 of this Chapter: *Provided, however,* that related matters may be consolidated for hearing as noted in § 2422.27(d) of this subpart.

§ 2422.34 Rights and obligations during the pendency of representation proceedings.

(a) *Existing recognitions, agreements, and obligations under the Statute.* During the pendency of any representation proceeding, parties are obligated to maintain existing recognitions, adhere to the terms and conditions of existing collective bargaining agreements, and fulfill all other representational and bargaining responsibilities under the Statute.

(b) *Unit status of individual employees.* Notwithstanding paragraph (a) of this section and except as otherwise prohibited by law, a party may take action based on its position regarding the bargaining unit status of individual employees, pursuant to 5 U.S.C. 7103(a)(2), 7112 (b) and (c): *Provided, however,* that its actions may be challenged, reviewed, and remedied where appropriate.

PART 2429—MISCELLANEOUS AND GENERAL REQUIREMENTS

5. The authority citation for Part 2429 continues to read as follows:

Authority: 5 U.S.C. 7134; § 2429.18 also issued under 28 U.S.C. 2112(a).

6. Section 2429.21 is amended by revising paragraphs (a) and (b) to read as follows:

§ 2429.21 Computation of time for filing papers.

(a) In computing any period of time prescribed by or allowed by this subchapter, except in agreement bar situations described in § 2422.12 (c), (d), (e), and (f) of this subchapter, and except as to the filing of exceptions to an arbitrator's award under § 2425.1 of this subchapter, the day of the act, event, or default from or after which the designated period of time begins to run shall not be included. The last day of the period so computed is to be included unless it is a Saturday, Sunday, or a Federal legal holiday in which event the period shall run until the end of the next day which is neither a Saturday, Sunday, or a Federal legal holiday. *Provided, however,* in agreement bar situations described in § 2422.12 (c), (d), (e), and (f), if the 60th day prior to the expiration date of an agreement falls on Saturday, Sunday, or a Federal legal holiday, a petition, to be timely, must be filed by the close of business on the last official workday preceding the 60th day. When the period of time prescribed or allowed is 7 days or less, intermediate Saturdays, Sundays, and Federal legal holidays shall be excluded from the computations.

(b) Except when filing an unfair labor practice charge pursuant to § 2423.6 of this subchapter, a representation petition pursuant to Part 2422 of this subchapter, and a request for an extension of time pursuant to § 2429.23(a) of this part, when this subchapter requires the filing of any paper with the Authority, the General Counsel, a Regional Director, or an Administrative Law Judge, the date of filing shall be determined by the date of mailing indicated by the postmark date. If no postmark date is evident on the mailing, it shall be presumed to have been mailed 5 days prior to receipt. If the filing is by personal delivery, it shall be considered filed on the date it is received by the Authority or the officer or agent designated to receive such matter.

7. Section 2429.22 is revised to read as follows:

§ 2429.22 Additional time after service by mail.

Except as to the filing of an application for review to a Regional Director's Decision and Order under § 2422.31 of this subchapter, whenever a party has the right or is required to do some act pursuant to this subchapter within a prescribed period after service of a notice or other paper upon such party, and the notice or paper is served on such party by mail, five (5) days shall be added to the prescribed period: *Provided, however,* That five (5) days shall not be added in any instance where an extension of time has been granted.

Dated: December 22, 1995.

Solly Thomas,

Executive Director, Federal Labor Relations Authority.

[FR Doc. 95–31413 Filed 12–28–95; 8:45 am]

BILLING CODE 6727–01–P

DEPARTMENT OF AGRICULTURE

Office of the Secretary

Farm Service Agency

Natural Resources Conservation Service

Rural Business-Cooperative Service

Rural Housing Service

Rural Utilities Service

7 CFR Parts 1, 11, 12, 400, 614, 620, 623, 631, 632, 634, 663, 701, 702, 752, 780, 781, and 1900

National Appeals Division Rules of Procedure

AGENCY: Office of the Secretary, National Appeals Division, USDA.

ACTION: Interim final rule.

SUMMARY: On May 22, 1995 (60 FR 27044), the National Appeals Division (NAD) in the Office of the Secretary published a proposed rule to implement Title II, Subtitle H, of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. 103–354, 7 U.S.C. 6991 *et seq.*, by setting forth procedures for program participant appeals of adverse decisions by United States Department of Agriculture (USDA) agency officials to NAD. The deadline for receipt of comments was June 21, 1995. On June 28, 1995 (60 FR 32922) the Office of the Secretary published an extension of the deadline for receipt of comments until July 6, 1995. From the period May 22 to July 6, 1995, forty-six timely public comments were received in response to the proposed rulemaking. Based on these comments, including concerns regarding the need for an additional comment period on the proposed rules and the need for a comment period on USDA agency conforming rules, but mindful of the immediate need for published rules, the Secretary now issues these rules on an interim final basis. These rules also include conforming changes to the former appeal rules of USDA agencies whose adverse decisions are now subject to NAD review.

DATES: Part 11 of this interim rule is effective January 16, 1996. With the exception of § 11.9, part 11 of this rule is applicable as to agency adverse decisions and NAD appeals for which hearings have not been held. Section 11.9 of this interim rule is applicable immediately as to all pending requests for Director review and is applicable retroactively to all requests for Director

review made on or after October 20, 1994.

Amendments made by this interim rule to all other parts of title 7 of the *Code of Federal Regulations* are effective January 16, 1996 and are applicable on January 16, 1996 as to any adverse technical determinations or decisions made by an applicable agency.

Written comments via letter, facsimile, or Internet are invited from interested individuals and organizations, and must be received on or before March 28, 1996.

ADDRESSES: Comments should be sent to L. Benjamin Young, Jr., Office of the General Counsel, Research and Operations Division, AgBox 1415, United States Department of Agriculture, Washington, DC 20250–1415; fax number: 202/720–5837; Internet: hqdoma-in.lawpo.young@sies.wsc.ag.gov.

FOR FURTHER INFORMATION CONTACT: L. Benjamin Young, Jr. at the above address or 202/720–4076.

SUPPLEMENTARY INFORMATION:

Classification

This rule has been reviewed under E.O. 12866, and it has been determined that it is not a ''significant regulatory action'' rule because it will not have an annual effect on the economy of $100 million or more or adversely and materially affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. This rule will not create any serious inconsistencies or otherwise interfere with actions taken or planned by another agency. It will not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof, and does not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or principles set forth in E.O. 12866.

Regulatory Flexibility Act

USDA certifies that this rule will not have a significant impact on a substantial number of small entities as defined in the Regulatory Flexibility Act, Pub. L. 96–534, as amended (5 U.S.C. 601 *et seq.*).

Paperwork Reduction Act

USDA has determined that the provisions of the Paperwork Reduction Act, as amended, 44 U.S.C., chapter 35, do not apply to any collections of information contained in this rule because any such collections of information are made during the conduct of administrative action taken by an agency against specific individuals or entities. 5 CFR 1320.4(a)(2).

Background and Purpose

On December 27, 1994 (*see* 59 FR 66,517), the Secretary of Agriculture noticed that the NAD was established pursuant to Title II, Subtitle H of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Public Law No. 103–354, 7 U.S.C. 6991 *et seq.* (''the Act''). NAD was assigned responsibility for all administrative appeals formerly handled by the National Appeals Division of the former Agricultural Stabilization and Conservation Service (ASCS) and by the National Appeals Staff of the former Farmers Home Administration (FmHA), appeals arising from decisions of the former Rural Development Administration (RDA) and the former Soil Conservation Service (SCS), appeals arising from decisions of the successor agencies to the foregoing agencies established by the Secretary, appeals arising from decisions of the Commodity Credit Corporation (CCC) and the Federal Crop Insurance Corporation (FCIC), and such other administrative appeals arising from decisions of agencies and offices of USDA as may in the future be assigned by the Secretary.

This rule sets forth the jurisdiction of the NAD, and the procedures appellants and agencies must follow upon appeal of adverse decisions by covered USDA program ''participants'' as defined in detail in the new 7 CFR part 11. In addition, since the Act changes existing formal administrative appeals procedures for some agencies while allowing participants a choice of pursuing informal appeals with an agency first or appealing directly to NAD, this rule also makes conforming amendments to the existing appeal procedures of the USDA agencies whose adverse decisions will be appealable to NAD under the new 7 CFR part 11.

For the purposes of convenience, this preamble and the changes to USDA regulations are divided as follows:

Item	Subject	Contact
I	Authentication of Records	B. Young 202/720–4076.
II	NAD Rules of Procedure	B. Young 202/720–4076.
III	Natural Resources Conservation Service (NRCS) Appeal Rules	S. Penn 202/720–6521.
IV	Commodity Credit Corporation (CCC), Federal Crop Insurance Corporation (FCIC), and Farm Service Agency (FSA) Appeal Rules.	A. Grundeman 202/720–4591.
V	Rural Business-Cooperative Service (RBS), Rural Housing Service (RHS), and Rural Utilities Service (RUS) Appeal Rules.	A. Grundeman 202/720–4591.

I. Authentication of Records

This rule amends the provisions of USDA regulations regarding authentication of official records to provide that the Director of NAD may authenticate documents in NAD records for USDA.

II. NAD Rules of Procedure

Forty-six timely comments were received by July 6, 1995 in response to the requests for comment on the proposed NAD rule. In response to these comments, a number of changes have been made to the rules; however, USDA has opted not to publish the revised rules for an additional comment period. USDA does recognize the need for further public comment on these rules. USDA therefore is issuing this rule on an interim final basis for three specific reasons.

First, a tension exists between the desire of Congress and the USDA to make this a farmer-friendly appeals process and the necessity of establishing an appeals procedure that comports with due process and results in determinations that will withstand scrutiny in the Federal courts. At the same time, it is important that the appeals procedure allow for ease of administration by NAD in a time of scarce and decreasing Federal resources. These problems are reflected in disagreements among the commenters as to how some of the most detailed procedures should be implemented. These tensions should not be resolved presumptively in a final rule. Therefore, promulgation of an interim rule will allow USDA to receive more feedback

and make adjustments with the aid of experience.

Second, several commenters expressed concern over the fact that conforming amendments to individual agency appeal rules were not published with the proposed rule. Additionally, these conforming amendments will result in more substantive changes to agency rules than originally were anticipated by USDA at the time the proposed rules were published. For example, FSA now has decided to combine appeal procedures for the former ASCS, the former FmHA, and FCIC programs that it now administers under the Act. These new agency appeal procedures will set forth how participants may use the ''informal hearings'' option provided in section 275 of the Act.

Third, legislative changes may occur during consideration of the Farm Bill in 1996 that will necessitate changes to the NAD rules of procedure. By publishing this as an interim rule, the USDA establishes a process for current operations while leaving the rulemaking door open for timely adoption of rules necessary to implement possible legislative changes.

The following explanation is given for those sections of the proposed rule that were heavily commented on or appeared to be misunderstood:

§ 11.1 Definitions.

Adverse decision. Two commenters noted problems with the proposed definition of ''adverse decision'' with respect to such decisions resulting from a failure of the agency to act. The proposed rule had by definition provided that an adverse decision results when an agency failed to act or make a decision within timeframes prescribed by agency program regulations. The two commenters noted that in some cases statutes prescribed timeframes and that in others the regulations prescribed no timeframes. In the latter case, one of the commenters suggested that USDA use a ''reasonable'' time in the absence of a prescribed timeframe. The amended definition provides that an adverse decision results when an agency fails to act within prescribed statutory or regulatory timeframes, or, in the case where there are no such timeframes specified, within a reasonable time.

Agency. All former and current agencies of the USDA whose adverse decisions are covered by this part have been added in response to a comment noting the lack of parallel treatment between inclusion of old and new agency names and the need to assist individuals unfamiliar with the new names.

USDA also has added language to cover certain programs administered by RUS because, as one commenter correctly noted, they are former programs of RDA that by definition in the Act are covered by NAD. This is accomplished by excluding from NAD purview all RUS programs authorized under the Rural Electrification Act and the Rural Telephone Bank Act.

Agency record, case record, and hearing record. Seven commenters had questions regarding the definitions of ''agency record,'' ''case record,'' and ''hearing record.'' These definitions were carefully nested within one another in order to construe the language of the Act in a logical manner.

Section 278(c) of the Act requires that NAD determinations be made ''based on information from the case record, laws applicable to the matter at issue, and applicable regulations published in the Federal Register.'' Section 277(a) of the Act, however, also makes reference to the fact that the Director and the Hearing Officer are to have access to the ''case record'' of an adverse decision upon initial filing of an appeal. Section 278(b) also makes reference to the ''case record'' that the Director must review as well as the record from the hearing. Clearly, the ''case record'' in the latter two provisions cannot be the same ''case record'' referred to in section 278(c), or else NAD determinations would have to be made without reference to the record developed in the hearing itself.

USDA faced the task of construing these seemingly contradictory statutory provisions in a complementary manner. This was done by creating a definitional framework based upon section 271(4) of the Act that defines ''case record'' to include ''all the materials maintained by the Secretary related to an adverse decision.'' As in most cases where the Secretary is named in a statute, ''Secretary'' here is interpreted to mean not the person of the Secretary but rather the Secretary and all subordinate officials of USDA to whom the Secretary has delegated statutory authority. Construed in this manner, ''case record'' includes any and all materials held by USDA that relate to an adverse decision at any given moment during the administrative appeal process. What the term ''case record'' includes when used in the statute thus changes based upon the level of the appeal process in which it is used.

For purposes of clarity in the rule, a new term needed to be created to distinguish the ''case record'' presented by the agency to the Hearing Officer, the record developed by the Hearing Officer in the hearing (sec. 278(b)) and eventually forwarded to the Director, and the ''case record'' upon which the determination is based. This is accomplished in the rule by defining documents furnished by the agency to the Hearing Officer upon the initial filing of the appeal as the ''agency record'' that by rule is deemed admitted as evidence in the hearing, by defining evidence presented at the hearing, the transcript of the hearing itself, and post-hearing submissions as the ''hearing record,'' and finally by explicitly incorporating both the ''agency record'' and the ''hearing record'' into the definition of ''case record'' upon which NAD determinations are made. ''Case record'' construed in this fashion also includes ''the request for review, and such other arguments or information as may be accepted by the Director'' (sec. 278(b)) in the Director review phase of NAD appeals because they would be included as materials maintained by the Secretary.

Director. Three commenters objected to the proposed rule definition and other provisions that would allow the Director to delegate the authority of the Director to subordinate individuals within NAD. The primary rationale for the objections was that this would mean that someone without the credentials and qualifications required by the statute for the Director would be exercising the statutory authority of the Director.

USDA rejected changing this provision for two reasons. First, even though the authority for certain actions may be delegated, such actions are still taken in the name of the Director. The Director, in other words, still exercises the final authority. Second, given the anticipated volume of appeals to be filed with NAD, it is not practical or efficient to require that the Director personally perform all actions specified for the Director by name in the Act.

Division. One commenter suggested that the proposed rule was in error in specifying that the Division was established by this part instead of the Act itself. Section 272(a) of the Act provides that ''[t]he Secretary shall establish'' NAD, not that the NAD ''is established.'' Therefore, action by the Secretary was required to establish NAD.

Equitable relief. Two commenters suggested that the proposed rule definition of equitable relief needed to be better defined. USDA chose not to define equitable relief further because the meaning of such relief varies from program to program covered under these rules, depending on the language of the program statutes. The guiding intent

behind the drafting of these rules was to ensure that they were written as broadly and flexibly as possible so that they do not need to be amended each time an agency amends its substantive program regulations.

Ex parte communication. One commenter suggested this definition needed to include post-hearing requests for Director review and requests regarding the appealability of adverse decisions. The definition here was changed to include an oral or written communication ''to any officer or employee of the Division.'' As explained below, further changes were made regarding *ex parte* communications to ensure that the prohibition on such communications covered all NAD proceedings and employees.

Implement. Three comments were received suggesting changes to this definition. In combination with § 11.11 of the rule, USDA feels that this language reflects the statutory definition and need not be changed.

Participant. One commenter suggested that, rather than defining ''participant'' by listing programs and statutes under which an individual may not bring an appeal before NAD, a separate list of non-appealable decisions should be added to the regulation. This approach was considered, as was listing the programs from which adverse decisions could be appealed to NAD, but the statutory language did not support these approaches. ''Adverse decision'' is defined too broadly in the statute to limit by regulation. Further, nonappealability of decisions is limited only to matters of general applicability under section 272(d) of the Act. Conversely, Congress explicitly gave the Secretary authority to define ''participant'' (sec. 271(9)) and therefore the approach reflected in the rule was chosen.

Seven substantive comments were made regarding the definition of ''participant'' in the proposed rule. Two commenters suggested that the definition should be expanded to include the requirement that, for certain guaranteed loan programs of the former Farmers Home Administration (FmHA), both the applicant/borrower and the lender should be required to appeal jointly. Since any decision to deny a guaranteed loan would affect both the applicant/borrower and the lender, USDA agrees that both parties must appeal any such adverse decision and the rule has been revised to reflect this requirement. However, only the lender will be able to appeal the denial or reduction of a final loss payment to that lender.

One commenter expressed concern that the language ''right to participate in'' did not clearly include an applicant. Therefore, USDA has added ''who has applied for'' to the definition.

One commenter suggested that the wording of the definition technically could exclude someone from appealing to NAD if, for example, they had filed a tort claim against USDA. As a ''participant'' in a tort claim, they would not be included as a ''participant'' for purposes of a NAD appeal. To clarify that this is not the case, USDA has amended the introductory phrase before the list of programs to read: ''The term does not include persons whose claim(s) arise under:''.

Finally, three comments were received from representatives of reinsured companies, that is, crop insurance companies whose insurance contracts with producers are reinsured by the FCIC. The reinsured companies objected to the language including participants affected by decisions of reinsured companies in the definition of ''participants.'' As originally proposed, the language would have allowed participants to appeal reinsured company decisions to NAD.

The reinsured companies objected to this language on several grounds. First, they noted that while FCIC was included in the definition of ''agency'' in section 271(1) of the Act, reinsured companies were not. Thus, the proposed rule attempted to include private companies as government agencies contrary to the language of the Act. Second, the reinsured companies argued that promulgation of this language by USDA in the final rule would breach the terms of the Standard Reinsurance Agreements between USDA and the reinsured companies, as well as alter the legal terms of reinsured company policies with thousands of insureds. Third, the number of policy decisions made by reinsured companies that would be open to appeal to NAD under the proposed language would overwhelm NAD with thousands of appeals. Finally, the reinsured companies argued that the intent of the Act in including FCIC in the definition of ''agency'' was to provide appeal rights for participants in crop insurance programs for a narrow range of decisions still committed to FCIC after crop insurance reform, i.e., decisions regarding yield and coverage that are based on FCIC actuarial data or decisions where an individual is found ineligible to participate in the Federal crop insurance program.

In response to these comments, USDA has dropped decisions of reinsured companies as decisions that participants may appeal under this part. The exclusion of disputes between reinsured companies and FCIC from the definition of participant in the final rule also means that all disputes between reinsured companies and FCIC likewise are excluded from the jurisdiction of NAD. Contract disputes between reinsured companies and FCIC will be appealable to the USDA Board of Contract Appeals as provided in its rules. Non-contract related decisions of FCIC that are adverse to reinsured companies may be settled with the agency or by resort to legal action in a court of competent jurisdiction.

Additional definitions. Two commenters suggested that a definition for ''mediation'' be added. The use of mediation or other forms of alternative dispute resolution (ADR) by program participants is a matter of choice for the participants themselves. Since the type of mediation or ADR used by a participant and the agency is not a jurisdictional issue for purposes of determining whether an appeal is properly before NAD, NAD has no control over whatever means the participant and agency employ. Accordingly, USDA has declined to attempt to define mediation or ADR for purposes of this part.

§ 11.2 General statement.

No comments were received in response to this section. USDA has made two changes to this section upon further review. First, language has been added to reflect the statutory provision that NAD, although independent, is subject to the general supervision and policy direction of the Secretary. Second, a statement has been added to make clear that exhaustion of the procedures for Hearing Officer review of an adverse decision under this part is required before a program participant may seek judicial review of an adverse decision. This additional language does not deprive participants of their right to seek review under any judicial exceptions to required exhaustion of administrative procedures.

§ 11.3 Applicability.

Six commenters generally contended that the NAD appeal procedures should apply to appeals arising after October 13, 1994, and not October 20, 1994 as specified in the proposed rule. The commenters' rationale for the October 13 date is that the Act was effective as of that date. One commenter also discussed the legal ability of the Department to make the rule effective retroactively.

USDA has decided to delete the effective date subsection from this

section because it inaccurately indicated an intent to make this entire rule retroactive. Instead, the effective date of this rule is appropriately set forth in the **EFFECTIVE DATE** section of this Federal Register document.

Two additional changes have been made to this section. First, wetland or highly erodible land determinations have been added to the list of examples of agency adverse decisions to clarify that these decisions are included.

Second, a new subsection has been added to address confusion, reflected in some comments, that exists over the jurisdiction of NAD over agency programs. NAD Hearing Officers are not administrative law judges. NAD has no jurisdiction over questions of law or the appropriateness of agency regulations. It simply decides the factual matter of whether an agency complied with such laws and regulations in rendering an adverse decision. The limitation added here makes clear that NAD may not be used by program participants for the purpose of challenging the validity of USDA regulations issued pursuant to statutory authority.

§ 11.4 Inapplicability of other laws and regulations.

Section 277 of the Act provides an elaborate appeals scheme for particular programs of USDA, including provisions for hearings, the issuance of subpoenas, and even *ex parte* communications. Section 277(a)(2)(A) of the Act in fact explicitly incorporates the definition of an *ex parte* communication from the Administrative Procedure Act (APA) (5 U.S.C. 551(14)) as if the APA stands outside of, and is not applicable to, NAD proceedings. In view of this statutory language, and in the absence of Congressional intent otherwise, USDA has concluded that the provisions of the APA generally applicable to agency adjudications (5 U.S.C. 554, 555, 556, 557, & 3105) do not apply to NAD proceedings. Furthermore, because NAD proceedings are not required to be conducted under 5 U.S.C. 554, USDA also concludes the Equal Access to Justice Act, 5 U.S.C. 504, does not apply to NAD proceedings. *Ardestani* v. *I.N.S.*, 112 S.Ct. 515, 519 (1991).

Another issue is the applicability of the Federal Rules of Evidence to NAD proceedings. Congress intended that these proceedings be farmer-friendly so that farmers would not be required to hire attorneys to use the NAD appeal process. Therefore, USDA concluded that the Federal Rules of Evidence should not apply to NAD proceedings.

One commenter suggested USDA also should eliminate any ambiguity with respect to the applicability of the Federal Rules of Civil Procedure, which was referred to in one respect in what was § 11.7(a)(2)(vi) of the proposed rule. The situation with respect to the Rules of Evidence, however, is unique in that attempts have been made in NAD hearings to apply the Federal Rules of Evidence as generally accepted rules of evidence, necessitating an explicit statement of policy in the rules. The same problems have not arisen with respect to the Federal Rules of Civil Procedure; therefore, USDA does not feel that it is necessary to state explicitly that those rules do not apply.

§ 11.5 Informal agency hearings and exhaustion.

This section of the proposed rule drew 29 comments, more than any other. Some comments suggested that the exhaustion requirement for FSA county committees was contrary to statute, while others were concerned because the section did not provide for exhaustion to the FSA state committee. A number of commenters were confused by the sequence of events for informal hearings, mediation, and NAD appeals outlined in this section. Providers of mediation services particularly were concerned that all appellants be notified of mediation rights, and that mediation occur at the lowest level of the appeal process. A number of commenters expressed concern about the inconsistent use of the terms ''informal hearings,'' ''informal appeal,'' and ''informal review.''

With respect to the comments regarding agency notice of adverse decisions and appeal rights, USDA has determined to handle such notice outside the parameters of this rule. As a matter of Department policy, agencies will be expected to notify participants of their appeal rights and their right to choose mediation or ADR, where available, when they issue an adverse decision.

In light of the other comments, this section has been revised significantly. Only the term ''informal review'' will be used throughout the section. Given this consistent use, USDA finds it unnecessary to define this term.

Before appealing to NAD, participants may elect to request an informal review of an adverse decision by the agency. However, in the case of adverse decisions made by officials under the authority of FSA county and area committees, participants will be required to undergo informal review before the county or area committee before appealing the adverse decision to NAD. After receiving the mandatory informal review by the county or area committee, the participant then may seek informal review of that decision by the State committee or appeal directly to NAD. For purposes of this section, USDA interprets a decision at each level of agency informal review as a new adverse decision for purposes of calculating the timeliness of a participant's appeal to NAD under § 11.6 of the rules.

When a participant requests such mediation, the 30-day period within which the participant may request a hearing under § 11.6(b)(1) will stop running until such time as the mediation or ADR is concluded. Unlike with informal review, however, the conclusion of mediation is not viewed as a new agency adverse decision. At that point, the participant will have the balance of the 30-day period to appeal to NAD, or to seek informal review as outlined above. The 30-day period will function in effect as a statute of limitations; it will be up to the agency, not NAD, to raise the jurisdictional issue before NAD as to the fact that a participant's appeal is untimely.

Treatment of mediation or ADR in this manner means that the conclusion of mediation or ADR will not be treated as an adverse decision. Conversely, as indicated above, a decision at each level of the informal review process will be treated as an adverse decision for determining when the 30-day period for an appeal to NAD begins to run.

Example

A FSA program participant receives an adverse decision from a county executive director. He cannot appeal to NAD. He must first pursue an informal review with the county committee. The county committee upholds the original adverse decision. Program participant now has three choices: (1) Within 30 days, choose mediation or ADR; (2) Within 30 days, appeal to NAD; or (3) Within the lesser of 30 days, or the time period specified in FSA informal review regulations, request an informal review by the State Committee. Participant chooses mediation after 10 days. Mediation fails. Participant has the balance of 20 days (i.e., 30 days minus 10 days) to appeal to NAD after the conclusion of mediation or he may request review by the State Committee in accordance with FSA regulations. If he appeals to NAD, the agency bears the burden of proving untimeliness of the appeal to NAD, i.e., if the participant took 25 days, 5 days in excess of his remaining 20, to appeal to NAD, the agency must demonstrate this to NAD. If he requests an informal review by the State Committee, the participant will have 30 days to appeal any adverse decision made by the State Committee to NAD.

§ 11.6 Director review of agency determination of appealability and right of participants to Division hearing.

USDA has revised the format of this section so that it follows the logical progression from a Director determination of appealability, where made necessary because of an agency determination that an adverse decision is not appealable, to the appeal itself.

Section 11.6(a) (§ 11.6(b) in the proposed rule) provides the rules for requesting Director review of the determination of appealability. Two commenters suggested that the proposed language that the Director use ''any information he determines necessary'' in making a determination was too broad. These commenters felt the information to be considered should be defined, and that the allowance of any information the Director deemed necessary made the process appear secretive if the *ex parte* prohibition did not apply to this stage of the appeal process.

USDA has revised this subsection to reflect the language of the statute and not specify anything regarding what information the Director may or may not use.

Two commenters desired changes in the references to Deputy and Associate Directors to reflect titles currently used in the NAD internal structure. USDA has substituted ''subordinate official other than a Hearing Officer'' in the place of Deputy and Associate Directors to preserve the flexibility of the Director to organize NAD internally without reference to regulatorily defined titles. This change also responds to a comment that requests that the Director be allowed to delegate this responsibility as far down as possible to accomplish such a mission efficiently. Hearing Officers were excluded from such delegation because the delegation of such authority down to Hearing Officers facially contradicted the statute and could represent a potential conflict of interest for Hearing Officers who must justify resource requirements based on the burden of their caseload.

USDA rejected comments suggesting that this delegation is improper under the statute, or that participants should be given the right to challenge the credentials of the subordinate reviewing official. Nothing in the statute requires that the Director personally must review every request for a determination of appealability that may be filed. The Director, as in the case of any agency official, remains ultimately responsible for any decision undertaken by a subordinate. Therefore, USDA sees no reason why this statute should be read any differently than any other statute where, absent a specific statutory prohibition, USDA and other executive branch agencies have allowed for delegation of decision-making authority by officials whose qualifications have been set by statute.

With respect to this subsection as proposed, two commenters also expressed concern that it did not specify the timing for filing an appeal once the Director reversed an agency determination that an adverse decision was not appealable. USDA added language in what is now subsection (b) to specify that the 30 days for appeal of adverse decisions shall run from the date the participant receives notice of the adverse decision or receives notice of the Director's determination that an adverse decision is appealable.

Subsection (b) (§ 11.6(c) in the proposed rule) provides rules for appealing adverse decisions to NAD. In addition to the change noted above, two additional changes were made to this section. First, seven commenters suggested that it is inappropriate in any circumstances to apply a ''should have known'' standard as a deadline for appeals in cases of agency inaction. They argued that this shifted the burden from the agency to the participant for policing the agency's failure to follow its own regulations; one commenter argued that the agency remained in continuing violation for failure to act within its own deadlines.

USDA disagrees with these commenters. A failure to act by the agency at some point becomes ripe for appeal and the statute clearly also provides that at a point past 30 days from an adverse decision an appellant loses the right of appeal. USDA finds no intention on the part of Congress to extend a participant's right of appeal indefinitely, particularly when agency regulations define a specified period in which a decision is to be made. However, to add flexibility to the ''should have known'' standard in the latter situation, USDA has changed the regulation to require that a participant must request a hearing within 30 days after the participant ''reasonably'' should have known that the agency had not acted within the timeframes specified by program regulations.

The second change made to the proposed rule regarding the request for a hearing is to require a participant to send a copy of the request for a hearing to the agency, and allow a participant the option to send a copy of the adverse decision being appealed to the agency as well. In either case, failure of the participant to send such copies to the agency is not jurisdictional and therefore will not be grounds for dismissal of an appeal.

Agency officials often make many decisions a year with respect to some individual participants. In such cases, it is not always immediately apparent which decision a participant has appealed at a given time. USDA adds this provision to promote efficiency in the appeals process by encouraging full airings of appeals before the Hearing Officer. Sending the agency a copy of the decision will discourage agency requests for Director review because the agency did not have adequate notice of the appeal or the decision that was being appealed.

With respect to the language in the proposed § 11.9(c), several other comments were rejected. Two commenters suggested that, since the ''should have known'' standard is being used, participants should not be required to exhaust administrative remedies prior to judicial review when appeals are taken from cases where agencies have failed to act. The statement added to § 11.2 and discussed above makes clear that USDA considers exhaustion of an appeal to the Hearing Officer mandatory prior to seeking judicial review, regardless of the basis for the appeal.

One commenter suggested that the regulation should state clearly that a decision becomes final after the 30-day time period for requesting a hearing is missed and that this timeframe may not be waived. USDA believes such a provision unnecessary; if a participant does not request the hearing within 30 days, the participant will not be allowed to have a hearing. USDA considers the 30-day requirement for filing an appeal to be jurisdictional in nature; thus, NAD has no authority under the Act to hear an appeal unless filed within the 30-day time period as required.

On the other hand, USDA does not view the requirements of section 274 of the Act to be jurisdictional for NAD. That section requires an agency to provide participants with written notice of the adverse decision and appeal rights within 10 working days of the adverse decision. One commenter suggested that the proposed rule be revised to state that the 30-day timeframe for requesting a hearing does not begin to run until the participant receives complete appeal rights, presumably as provided for in section 274. While section 274 of the Act places a requirement on agencies, it has no bearing on the authority of NAD to hear an appeal by a participant. To read section 274 literally as suggested also would mean conversely that a participant achieves no standing to

appeal an adverse decision to NAD until the participant receives a notice of appeal rights. USDA therefore rejects this comment and instead determines that the time period for requesting an appeal begins to run on ''the date on which the participant first received notice of the adverse decision'' as provided in section 276(b) of the Act.

New subsection (c) retains language from the proposed subsection (a) regarding the requirement for participants to authorize representation by others in writing to USDA. Eight commenters addressed both this specific requirement and the requirement in other parts of this subsection that a participant must ''personally'' request a Director determination of appealability and an appeal to a Hearing Officer.

The intention behind this requirement is to ensure that participants are fully aware of the implications of actions being taken on their behalf in the appeals process. By requiring that they personally sign requests for Director review of appealability, requests for hearing, and requests for Director review of Hearing Officer determinations (§ 11.9(a)), participants will be taking personal responsibility for such actions when represented by another. Authorized representatives also will be required to keep participants informed in order to get their signature authorizing proceeding to each new phase of a NAD appeal. USDA's concern is to ensure that participants are giving informed consent to the decisions undertaken in their behalf by their representatives, and, by requiring execution of a declaration of representation, that NAD is assured that purported representatives are who they actually claim to be. While USDA could curb potential abuses by licensed attorneys by complaints to state bars, USDA has no check on the actions of representatives who are not attorneys other than through provisions such as those promulgated here. The burdens imposed on participants and representatives are light—the language for the declaration can be obtained from NAD and signed documents can be submitted by mail or by facsimile transmission.

Finally, four commenters felt that it was inappropriate for an appellant to state why the adverse decision is wrong because it was too early in the process to state a position or it may lead some participants to think that they need an attorney to bring an appeal. USDA disagrees. The word ''wrong'' was used here precisely to avoid any requirement that a participant state why a decision was ''erroneous'' or ''did not conform to published law or regulation'' or similar language. Those latter variations could be interpreted as legalistic, but USDA believes that at this initial stage the participant at least can tell NAD what is wrong with the decision that causes one to appeal it. This initial position is not binding, but rather provides NAD with a little bit more information that will allow for efficient administration of appeals. For example, if a participant feels discriminated against in the administration of a program, a statement to this effect at this stage may allow NAD to direct that person to the appropriate forum of USDA for consideration of civil rights complaints.

§ 11.7 Ex parte communications.

The proposed rule included a paragraph on *ex parte* communications in § 11.7(a) under the section regarding Division hearings. Two commenters expressed concerns in response to this proposed paragraph, the proposed definition of *ex parte* communication, and the proposed subsection on Director review of agency determinations of nonappealability, suggesting that the *ex parte* prohibition should apply to more than just the hearing phase of the NAD appeal process. One of these commenters also noted that the *ex parte* prohibition also should apply to all employees of the Division.

Initially, USDA drafted the proposed regulation in parallel to the statute that stated the *ex parte* prohibition in the section of the Act on hearings. After reviewing the comments and the statutory language, and in order to foster a perception of fairness and equal treatment in the NAD appeals process, USDA has determined to apply the *ex parte* prohibition from the point at which the appeal is filed under section § 11.6(b) through the issuance of a final determination by the Director under § 11.9.

To do this, a new § 11.7 was created to make clear that the *ex parte* prohibition applies to more than just the hearing phase of the NAD process, and that it applies to any officer or employee of the Division. However, USDA rejected the comment that suggested that the *ex parte* prohibition apply to requests for Director review of appealability. The Director should be entitled to greater flexibility in contacting the agency and the USDA Office of the General Counsel to obtain information useful in making determinations as to whether particular adverse decisions are matters of general applicability. Additionally, the *ex parte* prohibition does not apply to Director reconsideration under § 11.11 unless the Director decides to grant the request for reconsideration.

§ 11.8 Division hearings.

Proposed § 11.7 has been renumbered § 11.8. The majority of comments on this section involved the perceived onerous burden on appellants of virtually requiring verbatim transcripts of hearings, the allegedly unreasonable time deadlines that could be set more flexibly by the Hearing Officer, the requirements for sending various notices to the appellant, the need for allowing good cause exceptions for absences, the need for actual documents to be submitted to Hearing Officers to make the hearing more efficient, the need to stress telephone hearings, the wisdom of continuing current NAD practice of telephonic pre-hearing conferences, the need to give additional parties the right to participate in the appeal, the need to reduce or waive the perceived unreasonable requirement that the requesting party pay for costs of witness travel and subsistence fees, and the ambiguity of the use of the word ''personally.''

A number of changes have been made in response to comments and upon further reflection by USDA. The changes, or rejection of comments, are described below:

—Proposed § 11.7(a)(1) (now § 11.8(a)(1)) is revised to require the agency to provide the appellant a copy of the agency record upon request of the appellant; this requirement is a restatement of that requirement already included in the proposed rule at § 11.7(b)(1) that also has been amended as § 11.8(b)(1) in the final rule to require that such record be furnished to the appellant within 10 days of agency receipt of request for the record rather than ''promptly'' as proposed;

—A Hearing Officer will be required to obtain the concurrence of the Director prior to issuing a subpoena;

—Comments suggesting that an appellant have access to his or her entire file under this part were rejected, but the definition of ''agency record'' was expanded above;

—The requirement that a request for subpoena be submitted 14 days ahead of the hearing was retained but a requirement that such a subpoena must be issued 7 days prior to the hearing was added;

—Parties requesting a subpoena will have to pay only the ''reasonable'' travel and subsistence costs of a witness; USDA rejected all comments suggesting that the requirement that a party pay for all witnesses subpoenaed be deleted or that USDA should pay for such witnesses where the appellant was unable to pay;

USDA also limited its payment for the costs associated with the appearance of a USDA employee to such situations where an employee's role as a witness arises out of his or her performance of official duties;

—The requirement for submission of certain documents to the Hearing Officer 28 days prior to the hearing is deleted; instead, the Hearing Officer may set a ''reasonable'' deadline for submission of such documents;

—The required pre-hearing submission of documents is limited to those documents not contained in the agency record that the appellant plans on introducing at the hearing;

—The amount of time for the Hearing Officer's notice of the date, time, and place of the hearing is reduced from 21 days to 14 days prior to the hearing, and the Hearing Officer also may take into account the convenience of the agency in picking a hearing site;

—A pre-hearing conference will be required and will be conducted by telephone unless otherwise agreed to by all parties and the Hearing Officer;

—The notice of the right to obtain the official record shall go to all parties, and all parties shall have the same participation rights in the actual hearing;

—The text of the proposed paragraph § 11.7(c)(4)(iii) is deleted and replaced with new text in § 11.8(c)(5)(iii) that makes a tape recording by the Division the official record of the proceeding unless a party requests a verbatim transcript, in which case that party must furnish a certified copy of the transcript to the Hearing Officer for the purpose of constituting the official record and must allow other parties to purchase that transcript from the transcription service;

—The authority of the Hearing Officer to cancel a hearing in the absence of a party is limited to such cases where the absent party fails to appear without good cause;

—The ability of the Hearing Officer to add additional evidence to the record in the absence of a party at a hearing is clarified;

—The section clarifies that a notice of determination must be sent by the Hearing Officer to the individual participant appealing the adverse decision, i.e. the ''named'' appellant, as well as the authorized representative of that person; and

—The Hearing Officer shall send, with the notice of determination, a copy of the procedures for a request for filing for Director review under § 11.9.

§ 11.9 Director review of determinations of Hearing Officers.

Fifteen commenters submitted comments on this section, which appeared as § 11.8 in the proposed rule. Some of these comments, such as those objecting to the use of the word ''personally,'' the request for the procedures of this section to be sent to the appellant with the Hearing Officer notice of determination, and the extension of the *ex parte* prohibition to Director review, have been handled as described above.

One comment suggesting that the agency head be allowed to delegate his or her authority to request Director review was rejected. On this point, USDA's position is that an agency request for Director review should only be exercised where the Hearing Officer has issued a determination that clearly is not supported by a preponderance of the evidence or is contrary to law. To avoid flooding NAD with agency requests for review, retaining the agency head, or the person acting in such capacity, as the only person allowed to request review assures that only the most meritorious and serious NAD decisions will be forwarded by an agency for Director review.

A number of comments concerned the perceptions that all parties are not able to respond to requests for Director review, that the Director is not addressing all arguments in the rush to meet the statutory deadlines for issuing determinations, and that no provision is made for how new evidence introduced at this stage is to be handled. In response to these concerns, a number of changes were made.

First, a request for Director review shall include specific reasons why the appellant believes the Hearing Officer's determination is wrong. Given the limited time period for agency response and the limited time period for Director review, the appellant should be required to do something more than simply submit a copy of the Hearing Officer's determination with a note saying that they appeal. As explained above, the term ''wrong'' is used specifically to avoid legalistic connotations. USDA simply asks that appellants express in their own terms what they find wrong with determinations. However, agencies here are held to a higher standard in order to assure efficient use of NAD resources. Agencies in their requests must state specific reasons why the determination of the Hearing Officer is erroneous, including citation of statutes or regulations that the agency believes the determination violates.

Second, USDA has added language requiring that a party seeking Director review of the Hearing Officer's determination submit a copy of the request for review simultaneously to all other parties to the appeal. A new subsection also provides those non-submitting parties 5 days from receipt of the request for Director review to submit written responses to the request. Added language makes clear that the Director may consider such responses in reaching a determination. However, if new evidence is submitted in such a request, new language authorizes the Director to remand all or a portion of the determination to the Hearing Officer for consideration of that new evidence. USDA rejected the comment that such a remanded determination should go back to a new Hearing Officer. The Hearing Officer making the original determination has the best knowledge of the case to make an efficient consideration of new evidence in the absence of some credible evidence of personal bias.

Third, the deadlines set by the Act for the Director to issue a final determination or to remand to the Hearing Officer may be unrealistic at any given time because of caseload or the complexities of a particular appeal. Although USDA believes the failure to meet these deadlines does not deprive the Director of jurisdiction to reach a determination or issue a remand order, it fully intends to follow such deadlines to the extent possible in order to deliver fairly considered determinations of the Director that will withstand judicial review. Hastily rendered determinations that fail to develop an adequate decision for judicial review do not benefit either USDA or appellants. Therefore, while USDA has added no provision affirmatively authorizing the Director to extend the period for issuance of determinations, USDA recognizes that it may be necessary for the Director to do so in individual cases in order to facilitate a fair and equitable resolution of the appeal. Equitable, in this sense, refers to equal participation in and consideration of parties' submissions in the Director review process.

Finally, the Director will review the determination of the Hearing Officer to determine whether the Hearing Officer's determination is supported by substantial evidence. If any additional information submitted in the Director review process is used as a basis for the Director's final determination, the Director shall note the reasons for use of such new information in the final determination.

With respect to this section, one commenter also suggested that if a Hearing Officer does not have the power to reverse a denial of equitable relief (in

effect, to award equitable relief) then this part should provide a shortcut past the Hearing Officer to the Director. The position of USDA is that the statute provides the Director with authority in appropriate cases to award equitable relief, and that no different procedural steps are required to implement that authority. However, a record developed by a Hearing Officer is necessary for the Director to determine whether such relief is appropriate.

§ 11.10 Basis for determinations.

One commenter cited this section (proposed § 11.9) as the appropriate place for stating that NAD is bound by prior findings of fact by an agency or NAD with respect to a particular appellant in another matter. While it is not the intention of USDA to implement NAD as part of a formal legal system based on large bodies of caselaw, USDA agrees that a Hearing Officer should not issue a contrary factual determination regarding the same appellant in a different matter where that factual determination was directly addressed in the other matter.

Two commenters suggested in essence that the basis of determinations should be limited to issues raised by the decision of the agency and that the Hearing Officer or Director may not decide adversely to the appellant on issues not decided adversely to the appellant by the agency. USDA finds nothing in the statute to support anything other than a *de novo* review of agency decisions by NAD. The parties or NAD may raise any new issue as long as it conforms to the facts and law and regulations.

Four commenters expressed concern that the language ''generally applicable interpretations'' in what is now § 11.10(b) of the rule would make agency handbooks, manuals, and directives binding in a way that permits wholesale violations of the Act. These commenters point to section 278(c) of the Act that the commenters assert was enacted specifically to prevent agencies from using such materials by reference only to statutes and ''regulations published in the Federal Register'' as the basis for NAD determinations.

USDA uses this language here to make clear again that NAD is not a forum for appellants to challenge agency statutes, regulations, or the generally applicable interpretations of those statutes and regulations. Some generally applicable interpretations actually may have been published once as a notice in the Federal Register, others may be based on caselaw interpreting a particular program provision in a particular Federal court jurisdiction or state court jurisdiction for programs in which state law is the applicable law. Still other generally applicable statements may be based on the previous advice of the Office of the General Counsel regarding a statute or regulation that constitutes the official legal position of USDA. In any of these described cases, for example, NAD could not ignore the generally applicable statements and base its determinations on legal interpretations that it is not authorized by the Act to make.

§ 11.11 Reconsideration of Hearing Officer or Director determinations.

Upon further review, USDA has determined that the Director has limited inherent authority to reconsider final determinations of the Director even though provisions for such authority have not been specifically stated in the Act. Therefore, this new section sets forth standards for reconsideration of a Director's final determination.

§ 11.12 Effective date and implementation of final determinations of the Division.

Several commenters suggested that this section needed more clarification as to the applicable dates, or, alternatively, that the Hearing Officer or Director should state what those dates are in the final determination. USDA finds further amendment of this section unnecessary at this time, given the variety of programs appealable to NAD and the responsibility of agencies for implementation of NAD and program decisions.

It is the position of USDA with respect to implementation, however, that: (1) Implementation of a NAD decision only requires an agency to move to the next step of agency consideration of a benefit or application; (2) in keeping with the language of the Act, the applicable date of the decision is the date of the decision of the body from which the NAD appeal is brought; and (3) agencies, in accord with their regulations, may consider changes in the condition of the participant in the implementation of any NAD final determination.

§ 11.13 Judicial review.

Two commenters suggested that appeals arising from an agency's failure to act should be excluded from this exhaustion requirement. USDA finds no support in the Act for such an exception. One commenter also suggested an amendment to include judicially recognized exceptions to the administrative exhaustion requirement. Since those exceptions are part of common law, and are thus changeable and subject to conflicting judicial interpretation, USDA finds inappropriate the addition of such exceptions to the regulation.

§ 11.14 Filing of appeals and computation of time.

Two commenters expressed concerns that individuals residing in different time zones would have less time to appeal if Eastern time was used as a defining time for submission of filings required by this rule. In response, USDA has changed the deadline to 5:00 p.m. local time at the office of the Division to which the filing is submitted. Common practice now is for NAD or the agency, in its notice of appeal rights, to specify regional NAD offices where documents are to be submitted. USDA's change in this provision is acknowledgement of that practice and permits flexibility. However, USDA does not think that this permits participants on the East Coast to evade the purposes of this rule by filing documents with West Coast NAD offices in order to meet the 5:00 p.m. deadline.

III. Natural Resources Conservation Service (NRCS) Appeal Rules

This portion of the interim-final rule sets forth the regulations for the handling of program participant requests for mediation or informal hearings of adverse technical determinations and decisions made by NRCS officials. Specifically, this rule amends part 614 to implement section 275 of the Act which requires NRCS to afford participants the opportunity for an informal hearing or mediation (where available), when requested, before they file an appeal of adverse decisions with NAD.

These procedures are applicable to requests for mediation or informal hearings within the following program areas:

(1) Highly erodible land conservation.
(2) Wetland Conservation.
(3) Wetland Technical determinations, including wetland technical determinations made by NRCS officials not related to a request for USDA program benefits.
(4) Conservation Reserve Program.
(5) Wetlands Reserve Program.
(6) Great Plains Conservation Program.
(7) Rural Abandoned Mine Program.
(8) Colorado River Basin Salinity Control Program.
(9) Resource Conservation and Development Program.
(10) Emergency Wetland Reserve Program.
(11) Agricultural Water Quality Incentives Program.
(12) Environmental Easement Program.

(13) Forestry Incentives Program.
(14) Water Bank Program.
(15) Long term cost-sharing agreements under Public Law 83–566 and Public Law 78–534 watershed projects.
(16) Any other program which subsequently incorporates these procedures through reference to this part within its program regulations.

Part 614 as revised establishes two major categories of decisions made by NRCS officials for which landowners and participants may seek reconsideration or appeal: 1) those technical determinations of NRCS officials that may be appealed to NAD after appeal to the FSA county or area committees established under section 8(b)(5) of the Soil Conservation and Domestic Allotment Act (16 U.S.C 590h(b)(5)); and 2) other decisions made by NRCS.

The current regulations in 7 CFR part 614 were published as a final rule on July 24, 1986, pursuant to Title XII of the Food Security Act of 1985, P.L. 99–198, 16 U.S.C. 3801 *et seq.* (Title XII). Those regulations set forth the procedures under which an owner or operator could seek reconsideration of, or appeal from, certain decisions made by NRCS officials regarding eligibility for participation in the Conservation Reserve Program, as authorized by Subtitle D of Title XII, or regarding the applicability of the compliance requirements of the highly erodible land and wetland conservation provisions of subtitles B and C of title XII, respectively.

The Reorganization Act specified that, until such time as an adverse decision is referred to the NAD for consideration, FSA county or area committees established under section 8(b)(5) of the Soil Conservation and Domestic Allotment Act (16 U.S.C 590h(b)(5)) would have jurisdiction over any appeal resulting from adverse technical determinations made under Title XII, including an adverse decision involving technical determinations made by NRCS. Thus the subject matter of the current part 614 has been incorporated into subpart B of the revised part 614 which sets forth the informal appeal process for appeals of title XII technical determinations made by NRCS to FSA county committees as required by the Reorganization Act.

Subpart C of the revised part 614 consolidates appeal procedures for all other existing NRCS programs in part 614. Appeals for the following additional programs are now also covered by part 614: 7 CFR Part 623, Emergency Wetland Reserve Program; 7 CFR Part 631, Great Plains Conservation Program; 7 CFR Part 632, Rural Abandoned Mine Program; 7 CFR Part 634, Rural Clean Water Program; 7 CFR Part 663, Wellton-Mohawk Irrigation Improvement Program, and 7 CFR Part 702, Colorado River Basin Salinity Control Program; 7 CFR Part 701 subpart-Forestry Incentives Program; and 7 CFR Part 752, Water Bank program.

Subpart A of part 614 includes general provisions applicable to informal appeals under both subparts B and C.

Appeal provisions for 7 CFR parts 12, 620, 623, 631, 632, 634, 663, 701, 702, and 752 are revised to make reference to part 614 for NRCS appeal procedures.

IV. Commodity Credit Corporation (CCC), Federal Crop Insurance Corporation (FCIC), and Farm Service Agency (FSA) Appeal Rules

The interim final rule makes amendments to 7 CFR parts 400 and 780 to maintain and revise the informal appeals process for adverse decisions of the FSA regarding Federal crop insurance, CCC, and FSA programs. The procedures for appeals under both parts will be consolidated in part 780. The revised part 780 sets forth regulations for requesting informal hearings or mediation in accordance with section 275 of the Act.

Part 780 includes procedures for the handling of appeals of NRCS technical determinations to FSA county and area committees.

Part 780 also includes procedures for the mandatory appeal of certain FSA adverse decisions to such committees as required by 7 CFR 11.5(a) of the NAD rules of procedure.

This rule also amends part 781 to conform the hearing procedures to that of part 780.

V. Rural Housing Service (RHS), Rural Business-Cooperative Service (RBS), and Rural Utilities Service (RUS) Appeal Rules

7 CFR part 1900, subpart B currently contains rules for appeals of decisions of the former Farmers Home Administration (FmHA). Either by the Act or by delegation of the Secretary, the FmHA programs covered by part 1900, subpart B were divided among RHS, RBS, and RUS. This rule amends part 1900, subpart B to set forth rules for requesting informal appeals or mediation of adverse decisions concerning direct loans, loan guarantees, and grants under the following programs: RUS Water and Waste Disposal Facility Loans and Grants Program, RHS Housing and Community Facilities Loan Programs, and RBS Loan, Grant, and Guarantee Programs and the Intermediary Relending Program.

List of Subjects

7 CFR Part 1

Administrative practice and procedure, Agriculture, Reporting and recordkeeping requirements.

7 CFR Part 11

Administrative practice and procedure, Agriculture, Agricultural commodities, Crop insurance, Ex parte communications, Farmers, Federal aid programs, Guaranteed loans, Insured loans, Loan programs, Price support programs, Soil conservation.

7 CFR Part 12

Administrative practice and procedure, Agriculture, Soil conservation, Wetlands.

7 CFR Part 400

Administrative practice and procedure, Agriculture, Agricultural commodities, Crop insurance.

7 CFR Part 614

Administrative practice and procedure, Agriculture, Soil conservation, Wetlands.

7 CFR Part 620

Administrative practice and procedure, Agriculture, Soil conservation, Wetlands.

7 CFR Part 623

Administrative practice and procedure, Agriculture, Soil conservation, Wetlands.

7 CFR Part 631

Administrative practice and procedure, Agriculture, Soil conservation.

7 CFR Part 632

Administrative practice and procedure, Mines, Rural areas, Soil conservation.

7 CFR Part 634

Administrative practice and procedure, Agriculture, Soil conservation, Water resources, Water pollution control.

7 CFR Part 663

Administrative practice and procedure, Irrigation, Soil conservation, Water resources.

7 CFR Part 701

Administrative practice and procedure, Agriculture, Environmental protection, Forests and forest products, Soil conservation, Wetlands.

7 CFR Part 702

Administrative practice and procedure, Agriculture, Soil conservation, Water resources.

7 CFR Part 752

Administrative practice and procedure, Agriculture, Soil Conservation, Water bank program, Water resources.

7 CFR Part 780

Administrative practice and procedure, Agriculture, Agricultural commodities, Crop insurance, Ex parte communications, Farmers, Federal aid programs, Loan programs, Price support programs, Soil conservation, Wetlands.

7 CFR Part 781

Administrative practice and procedure, Agriculture, Farmers.

7 CFR Part 1900

Administrative practice and procedure, Agriculture, Business, Community development, Farmers, Federal aid programs, Guaranteed loans, Housing, Insured loans, Loan programs, Rural areas, Utilities.

For the reasons set out in the preamble, Title 7 of the Code of Federal Regulations is amended as set forth below:

PART 1—ADMINISTRATIVE REGULATIONS

1. The authority citation for part 1 continues to read as follows:

Authority: 5 U.S.C. 301 and 552. Appendix A also issued under 7 U.S.C. 2244; 31 U.S.C. 9701, and 7 CFR 2.75(a)(6)(xiii).

2. Section 1.20 is revised to read as follows:

§ 1.20 Authentication.

When a request is received for an authenticated copy of a document which the agency determines to make available to the requesting party, the agency shall cause a correct copy to be prepared and sent to the Office of the General Counsel which shall certify the same and cause the seal of the Department to be affixed, except that the Hearing Clerk in the Office of Administrative Law Judges may authenticate copies of documents in the records of the Hearing Clerk and that the Director of the National Appeals Division may authenticate copies of documents in the records of the National Appeals Division.

PART 11—NATIONAL APPEALS DIVISION RULES OF PROCEDURE

Part 11 is added to read as follows:

PART 11—NATIONAL APPEALS DIVISION RULES OF PROCEDURE

Sec.

Authority: 5 U.S.C. 301; Title II, Subtitle H, Pub. L. 103–354, 108 Stat. 3228 (7 U.S.C. 6991 *et seq.*); Reorganization Plan No. 2 of 1953 (5 U.S.C. App.).

§ 11.1 Definitions.

For purposes of this part:

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 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.

Agency means:

(1) The Agricultural Stabilization and Conservation Service (ASCS);

(2) The Commodity Credit Corporation (CCC);

(3) The Farm Service Agency (FSA);

(4) The Farmers Home Administration (FmHA);

(5) The Federal Crop Insurance Corporation (FCIC);

(6) The Natural Resources Conservation Service (NRCS);

(7) The Rural Business-Cooperative Service (RBS);

(8) The Rural Development Administration (RDA);

(9) The Rural Housing Service (RHS);

(10) The Rural Utilities Service (RUS) (but not for programs authorized by the Rural Electrification Act of 1936 and the Rural Telephone Bank Act, 7 U.S.C. 901 *et seq.*);

(11) The Soil Conservation Service (SCS);

(12) 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

(13) Any successor agency to the above-named agencies, and any other agency or office of the Department which the Secretary may designate.

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

Agency representative means any person, whether or not an attorney, who is authorized to represent the agency in an administrative appeal under this part.

Appeal means a written request by a participant asking for review by the National Appeals Division of an adverse decision under this part.

Appellant means any participant who appeals an adverse decision in accordance with this part. Unless separately set forth in this part, the term ''appellant'' includes an authorized representative.

Authorized representative means any person, whether or not an attorney, who is authorized in writing by a participant, consistent with § 11.6(c), to act for the participant in an administrative appeal under this part. The authorized representative may act on behalf of the participant except when the provisions of this part require action by the participant or appellant personally.

Case record means all the materials maintained by the Secretary related to an adverse decision. The case record includes both the agency record and the hearing record.

Days means calendar days unless otherwise specified.

Department means the United States Department of Agriculture (USDA).

Director means the Director of the Division or a designee of the Director.

Division means the National Appeals Division established by this part.

Equitable relief means relief which is authorized under section 326 of the Food and Agriculture Act of 1962 (7 U.S.C. 1339a) and other laws administered by the agency.

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

Hearing, except with respect to § 11.5, means a proceeding before the Division to afford a participant the opportunity to present testimony or documentary evidence or both in order to have a previous determination reversed and to show why an adverse determination was in error.

Hearing Officer means an individual employed by the Division who conducts the hearing and determines appeals of adverse decisions by any agency.

Hearing record means all documents, evidence, and other materials generated in relation to a hearing under § 11.8.

Implement means the taking of action by an agency of the Department in order fully and promptly to effectuate a final determination of the Division.

Participant means any individual or entity who has applied for, or whose right to participate in or receive, a payment, loan, loan guarantee, or other benefit in accordance with any program of an agency to which the regulations in this part apply is affected by a decision of such agency. With respect to guaranteed loans made by FSA, both the borrower and the lender jointly must appeal an adverse decision except that the denial or reduction of a final loss payment to a lender shall be appealed by the lender only. The term does not include persons whose claim(s) arise under:

(1) Programs subject to various proceedings provided for in 7 CFR part 1;

(2) Programs governed by Federal contracting laws and regulations (appealable under other rules and to other forums, including to the Department's Board of Contract Appeals under 7 CFR part 24);

(3) The Freedom of Information Act (appealable under 7 CFR part 1, subpart A);

(4) Suspension and debarment disputes, including, but not limited to, those falling within the scope of 7 CFR parts 1407 and 3017;

(5) Export programs administered by the Commodity Credit Corporation;

(6) Disputes between reinsured companies and the Federal Crop Insurance Corporation;

(7) Tenant grievances or appeals prosecutable under the provisions of 7 CFR part 1944, subpart L, under the multi-family housing program carried out by RHS;

(8) Personnel, equal employment opportunity, and other similar disputes with any agency or office of the Department which arise out of the employment relationship;

(9) The Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, or the Military Personnel and Civilian Employees Claims Act of 1964, 31 U.S.C. 3721; or

(10) Discrimination complaints prosecutable under the nondiscrimination regulations at 7 CFR parts 15, 15a, 15b, and 15e.

Record review means an appeal considered by the Hearing Officer in which the Hearing Officer's determination is based on the agency record and other information submitted by the appellant and the agency, including information submitted by affidavit or declaration.

Secretary means the Secretary of Agriculture.

§ 11.2 General statement.

(a) This part sets forth procedures for proceedings before the National Appeals Division within the Department. The Division is an organization within the Department, subject to the general supervision of and policy direction by the Secretary, which is independent from all other agencies and offices of the Department, including Department officials at the state and local level. The Director of the Division reports directly to the Secretary of Agriculture. The authority of the Hearing Officers and the Director of the Division, and the administrative appeal procedures which must be followed by program participants who desire to appeal an adverse decision and by the agency which issued the adverse decision, are included in this part.

(b) Pursuant to section 212(e) of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Public Law 103–354 (the Act), 7 U.S.C. 6912(e), program participants shall seek review of an adverse decision before a Hearing Officer of the Division, and may seek further review by the Director, under the provisions of this part prior to seeking judicial review.

§ 11.3 Applicability.

(a) *Subject matter.* The regulations contained in this part are applicable to adverse decisions made by an agency, including, for example, those with respect to:

(1) Denial of participation in, or receipt of benefits under, any program of an agency;

(2) Compliance with program requirements;

(3) The making or amount of payments or other program benefits to a participant in any program of an agency; and

(4) A determination that a parcel of land is a wetland or highly erodible land.

(b) *Limitation.* The procedures contained in this part may not be used to seek review of statutes or USDA regulations issued under Federal law.

§ 11.4 Inapplicability of other laws and regulations.

The provisions of the Administrative Procedure Act generally applicable to agency adjudications (5 U.S.C. 554, 555, 556, 557, & 3105) are not applicable to proceedings under this part. The Equal Access to Justice Act, as amended, 5 U.S.C. 504, does not apply to these proceedings. The Federal Rules of Evidence, 28 U.S.C. App., shall not apply to these proceedings.

§ 11.5 Informal review of adverse decisions.

(a) *Required informal review of FSA adverse decisions.* A participant must seek an informal review of an adverse decision issued at the field service office level by an officer or employee of FSA, or by any employee of a 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), before NAD will accept an appeal of an FSA adverse decision. Such informal review shall be done by the county or area committee with responsibility for the adverse decision at issue. The procedures for requesting such an informal review before FSA are found in 7 CFR part 780. After receiving a decision upon review by a county or area committee, a participant may seek further informal review by the State FSA committee or may appeal directly to NAD under § 11.6(b).

(b) *Optional informal review.* With respect to adverse decisions issued at the State office level of FSA and adverse decisions of all other agencies, a participant may request an agency informal review of an adverse decision of that agency prior to appealing to NAD. Procedures for requesting such an informal review are found at 7 CFR part 780 (FSA), 7 CFR part 614 (NRCS), 7 CFR part 1900, subpart B (RUS), 7 CFR part 1900, subpart B (RBS), and 7 CFR part 1900, subpart B (RHS).

(c) *Mediation.* A participant also shall have the right to utilize any available alternative dispute resolution (ADR) or mediation program, including any mediation program available under title

V of the Agriculture Credit Act of 1987, 7 U.S.C. 5101 *et seq.*, in order to attempt to seek resolution of an adverse decision of an agency prior to a NAD hearing. If a participant:

(1) Requests mediation or ADR prior to filing an appeal with NAD, the participant stops the running of the 30-day period during which a participant may appeal to NAD under § 11.6(b)(1), and will have the balance of days remaining in that period to appeal to NAD once mediation or ADR has concluded.

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

§ 11.6 Director review of agency determination of appealability and right of participants to Division hearing.

(a) *Director review of agency determination of appealability.* (1) Not later than 30 days after the date on which a participant receives a determination from an agency that an agency decision is not appealable, the participant must submit a written request to the Director to review the determination in order to obtain such review by the Director.

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

(3) The Director may delegate his or her authority to conduct a review under this subsection to any subordinate official of the Division other than a Hearing Officer. In any case in which such review is conducted by such a subordinate official, the subordinate official's determination shall be considered to be the determination of the Director and shall be final and not appealable.

(b) *Appeals of adverse decisions.* (1) To obtain a hearing under § 11.8, a participant personally must request such hearing not later than 30 days after the date on which the participant first received notice of the adverse decision or after the date on which the participant receives notice of the Director's determination that a decision is appealable. In the case of the failure of an agency to act on the request or right of a recipient, a participant personally must request such hearing not later than 30 days after the participant knew or reasonably should have known that the agency had not acted within the timeframes specified by agency program regulations, or, where such regulations specify no timeframes, not later than 30 days after the participant reasonably should have known of the agency's failure to act.

(2) A request for a hearing shall be in writing and personally signed by the participant, and shall include a copy of the adverse decision to be reviewed, if available, along with a brief statement of the participant's reasons for believing that the decision, or the agency's failure to act, was wrong. The participant also shall send a copy of the request for a hearing to the agency, and may send a copy of the adverse decision to be reviewed to the agency, but failure to do either will not constitute grounds for dismissal of the appeal. Instead of a hearing, the participant may request a record review.

(c) If a participant is represented by an authorized representative, the authorized representative must file a declaration with NAD, executed in accordance with 28 U.S.C. 1746, stating that the participant has duly authorized the declarant in writing to represent the participant for purposes of a specified adverse decision or decisions, and attach a copy of the written authorization to the declaration.

§ 11.7 Ex parte communications.

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

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

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

(2) In the case of a communication described in paragraph (a)(1)(ii) of this section, a memorandum of any such discussion shall be included in the hearing record.

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

(c) If any officer or employee of the Division receives an *ex parte* communication in violation of this section, the one who receives the communication shall place in the hearing record:

(1) All such written communications;

(2) Memoranda stating the substance of all such oral communications; and

(3) All written responses to such communications, and memoranda stating the substance of any oral responses thereto.

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

§ 11.8 Division hearings.

(a) *General rules.* (1) The Director, the Hearing Officer, and the appellant shall have access to the agency record of any adverse decision appealed to the Division for a hearing. Upon request by the appellant, the agency shall provide the appellant a copy of the agency record.

(2) The Director and Hearing Officer shall have the authority to administer oaths and affirmations, and to require, by subpoena, the attendance of witnesses and the production of evidence. A Hearing Officer shall obtain the concurrence of the Director prior to issuing a subpoena.

(i) A subpoena requiring the production of evidence may be requested and issued at any time while the case is pending before the Division.

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

(iii) A subpoena shall be issued only if the Director or a Hearing Officer determines that:

(A) For a subpoena of documents, the appellant or the agency has established that production of documentary evidence is necessary and is reasonably calculated to lead to information which would affect the final determination or

is necessary to fully present the case before the Division; or

(B) For a subpoena of a witness, the appellant or the agency has established that either a representative of the Department or a private individual possesses information that is pertinent and necessary for disclosure of all relevant facts which could impact the final determination, that the information cannot be obtained except through testimony of the person, and that the testimony cannot be obtained absent issuance of a subpoena.

(iv) The party requesting issuance of a subpoena shall arrange for service. Service of a subpoena upon a person named therein may be made by registered or certified mail, or in person. Personal service shall be made by personal delivery of a copy of the subpoena to the person named therein by any person who is not a party and who is not less than 18 years of age. Proof of service shall be made by filing with the Hearing Officer or Director who issued the subpoena a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service in person or by return receipts for certified or registered mail.

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

(vi) If a person refuses to obey a subpoena, the Director, acting through the Office of the General Counsel of the Department and the Department of Justice, may apply to the United States District Court in the jurisdiction where that person resides to have the subpoena enforced as provided in the Federal Rules of Civil Procedure (28 U.S.C. App.).

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

(b) *Hearing procedures applicable to both record review and hearings.* (1) Upon the filing of an appeal under this part of an adverse decision by any agency, the agency promptly shall provide the Division with a copy of the agency record. If requested by the appellant prior to the hearing, a copy of such agency record shall be provided to the appellant by the agency within 10 days of receipt of the request by the agency.

(2) The Director shall assign the appeal to a Hearing Officer and shall notify the appellant and agency of such assignment. The notice also shall advise the appellant and the agency of the documents required to be submitted under paragraph (c)(2) of this section, and notify the appellant of the option of having a hearing by telephone.

(3) The Hearing Officer will receive evidence into the hearing record without regard to whether the evidence was known to the agency officer, employee, or committee making the adverse decision at the time the adverse decision was made.

(c) *Procedures applicable only to hearings.* (1) Upon a timely request for a hearing under § 11.6(b), an appellant has the right to have a hearing by the Division on any adverse decision within 45 days after the date of receipt of the request for the hearing by the Division.

(2) The Hearing Officer shall set a reasonable deadline for submission of the following documents:

(i) By the appellant:

(A) A short statement of why the decision is wrong;

(B) A copy of any document not in the agency record that the appellant anticipates introducing at the hearing; and

(C) A list of anticipated witnesses and brief descriptions of the evidence such witnesses will offer.

(ii) By the agency:

(A) A copy of the adverse decision challenged by the appellant;

(B) A written explanation of the agency's position, including the regulatory or statutory basis therefor;

(C) A copy of any document not in the agency record that the agency anticipates introducing at the hearing; and

(D) A list of anticipated witnesses and brief descriptions of the evidence such witnesses will offer.

(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. The hearing will be held in the State of residence of the appellant, as determined by the Hearing Officer, or at a location that is otherwise convenient to the appellant, the agency, and the Division. The notice also shall notify all parties of the right to obtain an official record of the hearing.

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

(5) Conduct of the hearing. (i) A hearing before a Hearing Officer will be in person unless the appellant agrees to a hearing by telephone.

(ii) The hearing will be conducted by the Hearing Officer in the manner determined by the Division most likely to obtain the facts relevant to the matter or matters at issue. The Hearing Officer will allow the presentation of evidence at the hearing by any party without regard to whether the evidence was known to the officer, employee, or committee of the agency making the adverse decision at the time the adverse decision was made. The Hearing Officer may confine the presentation of facts and evidence to pertinent matters and exclude irrelevant, immaterial, or unduly repetitious evidence, information, or questions. Any party shall have the opportunity to present oral and documentary evidence, oral testimony of witnesses, and arguments in support of the party's position; controvert evidence relied on by any other party; and question all witnesses. When appropriate, agency witnesses requested by the appellant will be made available at the hearing. Any evidence may be received by the Hearing Officer without regard to whether that evidence could be admitted in judicial proceedings.

(iii) An official record shall be made of the proceedings of every hearing. This record will be made by an official tape recording by the Division. In addition, either party may request that a verbatim transcript be made of the hearing proceedings and that such transcript shall be made the official record of the hearing. The party requesting a verbatim transcript shall pay for the transcription service, shall provide a certified copy of the transcript to the Hearing Officer free of charge, and shall allow any other party desiring to purchase a copy of the transcript to order it from the transcription service.

(6) Absence of parties. (i) If at the time scheduled for the hearing either the appellant or the agency representative is absent, and no appearance is made on behalf of such absent party, or no arrangements have been made for rescheduling the hearing, the Hearing

Officer has the option to cancel the hearing unless the absent party has good cause for the failure to appear. If the Hearing Officer elects to cancel the hearing, the Hearing Officer may:

(A) Treat the appeal as a record review and issue a determination based on the agency record as submitted by the agency and the hearing record developed prior to the hearing date;

(B) Accept evidence into the hearing record submitted by any party present at the hearing, and then issue a determination; or

(C) Dismiss the appeal.

(ii) When a hearing is cancelled due to the absence of a party, the Hearing Officer will add to the hearing record any additional evidence submitted by any party present, provide a copy of such evidence to the absent party or parties, and allow the absent party or parties 10 days to provide a response to such additional evidence for inclusion in the hearing record.

(iii) Where an absent party has demonstrated good cause for the failure to appear, the Hearing Officer shall reschedule the hearing unless all parties agree to proceed without a hearing.

(7) Post-hearing procedure. The Hearing Officer will leave the hearing record open after the hearing for 10 days, or for such other period of time as the Hearing Officer shall establish, to allow the submission of information by the appellant or the agency, to the extent necessary to respond to new facts, information, arguments, or evidence presented or raised at the hearing. Any such new information will be added by the Hearing Officer to the hearing record and sent to the other party or parties by the submitter of the information. The Hearing Officer, in his or her discretion, may permit the other party or parties to respond to this post-hearing submission.

(d) *Interlocutory review.* Interlocutory review by the Director of rulings of a Hearing Officer are not permitted under the procedures of this part.

(e) *Burden of proof.* The appellant has the burden of proving that the adverse decision of the agency was erroneous by a preponderance of the evidence.

(f) *Timing of issuance of determination.* The Hearing Officer will issue a notice of the determination on the appeal to the named appellant, the authorized representative, and the agency not later than 30 days after a hearing or the closing date of the hearing record in cases in which the Hearing Officer receives additional evidence from the agency or appellant after a hearing. In the case of a record review, the Hearing Officer will issue a notice of determination within 45 days of receipt of the appellant's request for a record review. Upon the Hearing Officer's request, the Director may establish an earlier or later deadline. A notice of determination shall be accompanied by a copy of the procedures for filing a request for Director review under § 11.9. If the determination is not appealed to the Director for review under § 11.9, the notice provided by the Hearing Officer shall be considered to be a notice of a final determination under this part.

§ 11.9 Director review of determinations of Hearing Officers.

(a) *Requests for Director review.* (1) Not later than 30 days after the date on which an appellant receives the determination of a Hearing Officer under § 11.8, the appellant must submit a written request, signed personally by the named appellant, to the Director to review the determination in order to be entitled to such review by the Director. Such request shall include specific reasons why the appellant believes the determination is wrong.

(2) Not later than 15 business days after the date on which an agency receives the determination of a Hearing Officer under § 11.8, the head of the agency may make a written request that the Director review the determination. Such request shall include specific reasons why the agency believes the determination is wrong, including citations of statutes or regulations that the agency believes the determination violates. Any such request may be made by the head of an agency only, or by a person acting in such capacity, but not by any subordinate officer of such agency.

(3) A copy of a request for Director review submitted under this paragraph (a) shall be provided simultaneously by the submitter to each party to the appeal.

(b) *Notification of parties.* The Director promptly shall notify all parties of receipt of a request for review.

(c) *Responses to request for Director review.* Other parties to an appeal may submit written responses to a request for Director review within 5 business days from the date of receipt of a copy of the request for review.

(d) *Determination of Director.* (1) The Director will conduct a review of the determination of the Hearing Officer using the agency record, the hearing record, the request for review, any responses submitted under paragraph (c) of this section, and such other arguments or information as may be accepted by the Director, in order to determine whether the decision of the Hearing Officer is supported by substantial evidence. Based on such review, the Director will issue a final determination notice that upholds, reverses, or modifies the determination of the Hearing Officer. The Director's determination upon review of a Hearing Officer's decision shall be considered to be the final determination under this part and shall not be appealable. However, if the Director determines that the hearing record is inadequate or that new evidence has been submitted, the Director may remand all or a portion of the determination to the Hearing Officer for further proceedings to complete the hearing record or, at the option of the Director, to hold a new hearing.

(2) The Director will complete the review and either issue a final determination or remand the determination not later than—

(i) 10 business days after receipt of the request for review, in the case of a request by the head of an agency; or

(ii) 30 business days after receipt of the request for review, in the case of a request by an appellant.

(3) In any case or any category of cases, the Director may delegate his or her authority to conduct a review under this section to any Deputy or Associate Directors of the Division. In any case in which such review is conducted by a Deputy or Associate Director under authority delegated by the Director, the Deputy or Associate Director's determination shall be considered to be the determination of the Director under this part and shall be final and not appealable.

(e) *Equitable relief.* In reaching a decision on an appeal, the Director shall have the authority to grant equitable relief under this part in the same manner and to the same extent as such authority is provided an agency under applicable laws and regulations.

§ 11.10 Basis for determinations.

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

(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.

(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.

§ 11.11 Reconsideration of Director determinations.

(a) Reconsideration of a determination of the Director may be requested by the appellant or the agency within 10 days of receipt of the determination. The Director will not consider any request for reconsideration that does not contain a detailed statement of a material error of fact made in the determination, or a detailed explanation of how the determination is contrary to statute or regulation, which would justify reversal or modification of the determination.

(b) The Director shall issue a notice to all parties as to whether a request for reconsideration meets the criteria in paragraph (a) of this section. If the request for reconsideration meets such criteria, the Director shall include a copy of the request for reconsideration in the notice to the non-requesting parties to the appeal. The non-requesting parties shall have 5 days from receipt of such notice from the Director to file a response to the request for reconsideration with the Director.

(c) The Director shall issue a decision on the request for reconsideration within 5 days of receipt of responses from the non-requesting parties. If the Director's decision upon reconsideration reverses or modifies the final determination of the Director rendered under § 11.9(d), the Director's decision on reconsideration will become the final determination of the Director under § 11.9(d) for purposes of this part.

§ 11.12 Effective date and implementation of final determinations of the Division.

(a) On the return of a case to an agency pursuant to the final determination of the Division, the head of the agency shall implement the final determination not later than 30 days after the effective date of the notice of the final determination.

(b) A final determination will be effective as of the date of filing of an application, the date of the transaction or event in question, or the date of the original adverse decision, whichever is applicable under the applicable agency program statutes or regulations.

§ 11.13 Judicial review.

(a) A final determination of the Division shall be reviewable and enforceable by any United States District Court of competent jurisdiction in accordance with chapter 7 of title 5, United States Code.

(b) An appellant may not seek judicial review of any agency adverse decision appealable under this part without receiving a final determination from the Division pursuant to the procedures of this part.

§ 11.14 Filing of appeals and computation of time.

(a) An appeal, a request for Director review, or any other document will be considered ''filed'' when delivered in writing to the Division, when postmarked, or when a complete facsimile copy is received by the Division.

(b) Whenever the final date for any requirement of this part falls on a Saturday, Sunday, Federal holiday, or other day on which the Division is not open for the transaction of business during normal working hours, the time for filing will be extended to the close of business on the next working day.

(c) The time for filing an appeal, a request for Director review, or any other document expires at 5:00 p.m. local time at the office of the Division to which the filing is submitted on the last day on which such filing may be made.

PART 12—HIGHLY ERODIBLE LAND AND WETLAND CONSERVATION

1. The authority citation for part 12 continues to read as follows:

Authority: 16 U.S.C. 3801 *et seq.*

2. Section 12.12 is revised to read as follows:

§ 12.12 Appeals.

Any person who has been or who would be denied program benefits in accordance with § 12.4 as the result of any determination made in accordance with the provisions of this part may obtain a review of such determination in accordance with the administrative appeals procedures of the agency which rendered such determination. Agency appeal procedures are contained in the Code of Federal Regulations as follows: FSA, 7 CFR part 780; NRCS, 7 CFR part 614; RHS, RBS, and RUS, 7 CFR part 1900, subpart B.

PART 400—GENERAL ADMINISTRATIVE REGULATIONS

1–2. Subpart J is revised to read as follows:

Subpart J—Appeal Procedure—Regulations

Authority: 7 U.S.C. 1506(p).

§ 400.90 Applicability.

Persons who are insured or believe they are insured under contracts of insurance issued under the Federal Crop Insurance Act must obtain appeal and reconsideration of decisions made under the provisions of this chapter in accordance with part 780 of this title.

PART 614—APPEAL PROCEDURES

1. Part 614 is revised to read as follows:

PART 614—APPEAL PROCEDURES

Subpart A—General Provisions

Subpart B—Appeals of Technical Determinations Related to the Conservation Title (Title XII) of the Food Security Act of 1985, as Amended

Subpart C—Appeals of Decision Related to Conservation Programs (non-Title XII)

Authority: 5 U.S.C. 301, sections 226 and 275 of Pub. L. 103–354 (7 U.S.C. 6932 and 6995); 16 U.S.C. 3843(a).

Subpart A—General Provisions

§ 614.1 Purpose and scope.

This part sets forth the informal procedures under which a landowner or program participant may appeal adverse technical determinations or decisions made by officials of the Natural Resources Conservation Service (NRCS) or its successor agency.

§ 614.2 Definitions.

Adverse technical determination or decision includes, in addition to the definition of adverse decision in 7 CFR part 11, an NRCS technical determination or decision that affects the legal substantive status of the land, though it may not necessarily be adverse.

Chief means the Chief of NRCS. For the purposes of this part, the term ''Chief'' includes an official of NRCS national headquarters designated by the Chief to act for the Chief in making decisions under this part.

Conservation district means any district or unit of State or local government formed under State law or territorial law for the express purpose of developing and carrying out a local soil and water conservation program. Such

district or unit of government may be referred to as a conservation district, soil conservation district, soil and water conservation district, natural resource district, land conservation committee, or a similar name.

County committee means a Farm Service Agency (FSA) county or area committee established in accordance with section 8(b) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)).

Decision means a conclusion reached by an NRCS official based on applicable regulations and program instructions which relates to eligibility for program benefits, including a technical determination used as a basis for the decision.

Designated conservationist means the NRCS official, usually the district conservationist, whom the State Conservationist designates to be responsible for the program or compliance requirement to which this part is applicable.

Mediation means a process in which a neutral third party, the mediator, meets with the disputing parties (e.g., the landowner or program participant and the agency), facilitates discussions, and works with the parties to resolve their disputes, narrow areas of disagreement, and improve communications and relationships. A mediator has no authority to render a decision or determination.

Preliminary technical determination means the initial written technical determination provided to a client which will become final after 30 days unless the client takes action in accordance with § 614.101 to stay the preliminary technical determination from becoming final.

State Conservationist means the NRCS official in charge of NRCS operations within a State, as set forth in part 600 of this chapter.

Technical determination means a conclusion concerning the status and condition of the natural resources and cultural practices based on science and best professional judgment of natural resource professionals concerning the soils, water, air, plants, and animals.

Refer to 7 CFR 11.1 for other definitions applicable to appeals of adverse technical determinations and decisions covered by this part.

§ 614.3 Applicability.

(a) Appeals of adverse technical determinations and adverse decisions covered by this part are also governed by National Appeals Division (NAD) regulations at 7 CFR part 11.

(b) Decisions which are subject to this part include any decision under one or more NRCS programs; and technical determinations or decisions that affect the status of the land even though they may not affect the landowner's or program participant's eligibility for USDA program benefits.

(c) The failure of an official of NRCS to issue a technical determination or decision is subject to this part.

(d) Complaints involving discrimination in program delivery will be handled under the existing USDA civil rights rules and regulations.

(e) Appeals on contractual issues that are subject to the jurisdiction of the Agriculture Board of Contract Appeals are not appealable under the procedures within this part.

§ 614.4 Reservation of authority.

Nothing contained in the regulations of this part shall preclude the Secretary of Agriculture or the Chief from determining at any time any question arising under the programs to which the regulations of this part apply, or from reversing or modifying in writing, with sufficient reason given therefore, any technical determination or decision made by an NRCS official.

§ 614.5 Decisions not subject to appeal.

The following are examples of decisions which are not appealable:

(a) General program requirements that apply to all participants;

(b) Science-based formulas and criteria;

(c) Procedural decisions relating to administration of the programs; and

(d) Denials of assistance due to lack of funds or authority.

Subpart B—Appeals of Technical Determinations Related to the Conservation Title (Title XII) of the Food Security Act of 1985, as Amended

§ 614.100 Applicability.

The provisions of this subpart set forth the procedures under which a landowner or program participant may seek mediation of a preliminary technical determination or appeal from technical determinations made by NRCS officials on or after January 16, 1996 regarding technical determinations within the following programs:

(1) Highly Erodible Land Conservation;

(2) Wetland Conservation, including wetland technical determinations made by NRCS officials not related to a request for USDA program benefits;

(3) Conservation Reserve Program;

(4) Wetlands Reserve Program;

(5) Agricultural Water Quality Incentives Program; and

(6) Environmental Easement Program.

§ 614.101 Notice of preliminary technical determinations.

(a) All preliminary technical determinations related to programs provided for in § 614.100 shall be in writing and shall inform the landowner or program participant of the following:

(1) The preliminary technical determination will become final after 30 days if the landowner or program participant does not arrange with the designated conservationist for either or both of the following options:

(i) A field visit to the site to gather additional information and to discuss the facts concerning the preliminary technical determination, together with, at the option of the conservation district, a district representative; and

(ii) Mediation.

(2) Once the technical determination is final, the landowner or program participant may appeal the technical determination to the FSA county or area committee pursuant to 7 CFR part 780. Landowners or program participants wishing to appeal must exhaust any available appeal procedures through the FSA county committee prior to appealing to NAD. Judicial review is available only as specified in 7 CFR part 11.

(b) The document containing the preliminary technical determination shall be mailed or hand delivered to the landowner or program participant.

§ 614.102 Mediation of preliminary technical determinations.

(a)(1) Any dispute with respect to a preliminary technical determination related to the programs provided in § 614.100 shall, at the request of the landowner or program participant, be mediated:

(i) Through certified individuals in those States where a State mediation program certified by the United States Department of Agriculture (USDA) has been established. Conservation district officials in certified State Mediation Program States may become certified by the State and utilized for mediation, if they choose to participate.

(ii) In States with no certified mediation program in effect, through mediation by a qualified representative of a local conservation district, if a local conservation district chooses to participate. Upon mutual agreement of the parties, other individuals may serve as mediators.

(2) Upon receiving a request for mediation, NRCS shall notify other USDA and Federal agencies, as appropriate.

(b) The parties shall have not more than 30 days to reach an agreement following a mediation session. The

mediator shall notify the designated conservationist in writing at the end of this period whether the parties reached an agreement. Any agreement reached during, or as a result of, the mediation process shall conform to the statutory, regulatory, and manual provisions governing the program.

§ 614.103 Final determinations.

(a) Preliminary technical determinations shall become final:

(1) 30 days after receipt by the landowner or program participant of the notice of a preliminary technical determination issued pursuant to § 614.101, unless a field visit or mediation is requested;

(2) After the earlier of 30 days after the field visit provided for under § 614.101(a) or receipt by the landowner or program participant of a final determination from the designated conservationist; or

(3) 30 days after a mediation session if a mutual agreement has not been reached by the parties.

(b) The final technical determination shall set forth the decision, the basis for the decision, including all factors, technical criteria, and facts relied upon in making the decision, and shall inform the landowner or program participant of the procedure for requesting and pursuing further review.

§ 614.104 Appeals of technical determinations.

(a) Technical determinations related to the programs in § 614.100 may only be appealed, pursuant to the provisions of 7 CFR part 780, to the FSA county committee with jurisdiction.

(b) In cases where a field visit has not already been completed in accordance with § 614.101(a), a field visit shall be completed by the designated conservationist before the FSA county committee considers the appeal.

(c) If the FSA county committee hearing the appeal requests review of the technical determination by the applicable State Conservationist prior to issuing their decision, the State Conservationist may:

(1) Designate an appropriate NRCS official to gather any additional information necessary for review of the technical determination;

(2) Obtain additional oral and documentary evidence from any party with personal or expert knowledge about the facts under review; and

(3) Conduct a field visit to review and obtain additional information and to discuss the facts concerning the technical determination. The State Conservationist shall provide the applicable FSA county committee with a written technical determination, including all factors, technical criteria, and facts relied upon in making the technical determination.

(d) Any landowner or program participant who is adversely affected by a decision of the FSA county committee may appeal to NAD in accordance with 7 CFR part 11.

Subpart C—Appeals of Decisions Related to Conservation Programs (non-Title XII)

§ 614.200 Applicability.

The provisions of this subpart set forth the procedures under which a landowner or program participant may seek an informal hearing on adverse decisions made by NRCS officials (exclusive of those decisions that are appealable to the USDA Board of Contract Appeals) after January 16, 1996 in the following program areas:

(1) Great Plains Conservation Program;

(2) Rural Abandoned Mine Program;

(3) Emergency Watershed Projects;

(4) Rural Clean Water Program;

(5) Colorado River Basin Salinity Control Program;

(6) Forestry Incentive Program;

(7) Water Bank Program;

(8) Flood Prevention and Watershed Protection Programs;

(9) Any other program which subsequently incorporates these procedures through reference to this subpart within the program regulations.

§ 614.201 Notice of final decisions.

(a) All final decisions related to programs provided for in § 614.200 that are made by the designated conservationist shall be in writing and shall inform the landowner or program participant of their right to request any or all of the following:

(1) An informal hearing before NRCS;

(2) Mediation; or

(3) A hearing before NAD in accordance with 7 CFR part 11.

(b) The document containing the decision shall be mailed or hand delivered to the landowner or program participant.

§ 614.202 Time frames for filing requests for informal hearings.

(a) A request for an informal hearing before NRCS shall be filed within 30 days after written notice of the final decision, which is the subject of the request, is mailed or otherwise made available to the landowner or program participant. A request for an informal hearing shall be considered ''filed'' when personally delivered in writing to the appropriate reviewing authority or when the properly addressed request, postage paid, is postmarked.

(b) A request for appeal may be accepted and acted upon even though it is not filed within the time prescribed in paragraph (a) of this section if, in the judgment of the reviewing authority with whom such request is filed, the circumstances warrant such action.

§ 614.203 Mediation of adverse final decisions.

(a) Any dispute with respect to an adverse final decision related to the programs provided in § 614.200 shall, at the request of the landowner or program, be mediated:

(1) Through certified individual in those States where a State Mediation Program has been established. Conservation district officials in certified State Mediation Program States may become certified by the State and utilized for mediation, if they choose to participate.

(2) In States where no certified mediation program is in effect, through mediation by a qualified representative of a local conservation district, if a local conservation district chooses to participate. Upon mutual agreement of the parties, other individuals may serve as mediators.

(b)(1) The parties shall have not more than 30 days to reach an agreement following a mediation session. The mediator shall notify the designated conservationist in writing at the end of this period whether the parties reached an agreement.

(2) Any agreement reached during, or as a result of, the mediation process shall conform to the statutory, regulatory, and manual provisions governing the program.

(3) If the parties fail to reach an agreement within the specified period, the designated conservationist shall have up to 30 days after the conclusion of mediation to issue a final decision.

§ 614.204 Appeals of adverse final decisions.

(a) Any landowner or program participant, who is adversely affected by a decision made by a designated conservationist related to the programs in § 614.200, may appeal the decision to the State Conservationist in the applicable State for an informal hearing or to NAD in accordance with 7 CFR part 11.

(b) The State Conservationist may designate a NRCS official to gather information and conduct the informal hearing before making a decision.

(c) Any landowner or program participant who is adversely affected by a decision of the State Conservationist may appeal to NAD in accordance with 7 CFR part 11.

PART 620—WETLANDS RESERVE PROGRAM

1. The authority citation for part 620 continues to read as follows:

Authority: 16 U.S.C. 590a et seq., 3837 et seq.

2. Section 620.17(a) is revised to read as follows:

§ 620.17 Appeals.

(a) A person participating in the WRP may obtain review of any administrative determination concerning eligibility for participation utilizing the administrative appeal procedures in 7 CFR part 614, 7 CFR part 780, and 7 CFR part 11, as appropriate.

* * * * *

PART 623—EMERGENCY WETLANDS RESERVE PROGRAM

1. The authority citation for part 623 continues to read as follows:

Authority: 16 U.S.C. 3837–3837f; Pub. L. 103–75, Chapter 1, 107 Stat. 739, 742.

2. Section 623.20 is revised to read as follows;

§ 623.20 Appeals.

A participant in the EWRP may obtain a review of any administrative determination concerning land eligibility, development of a WRPO, or any adverse determination under this part in accordance with the administrative appeal regulations provided in part 614 of this title.

PART 631—GREAT PLAINS CONSERVATION PROGRAM

1. The authority citation for part 631 continues to read as follows:

Authority: 16 U.S.C. 590p(b).

2. Section 631.13 is revised to read as follows:

§ 631.13 Disputes and appeals for matters other than contract violations.

Applicants or participants may appeal decisions regarding matters other than contract disputes under this part in accordance with part 614 of this title.

PART 632—RURAL ABANDONED MINE PROGRAM

1. The authority citation for part 632 continues to read as follows:

Authority: Sec. 406, Pub. L. 95–87; 91 Stat. 460 (30 U.S.C. 1236).

2. Section 632.40 is revised to read as follows:

§ 632.40 Appeals.

Land users may appeal decisions under this part in accordance with part 614 of this title.

PART 634—RURAL CLEAN WATER PROGRAM

1. The authority citation for part 634 continues to read as follows:

Authority: Sec. 35, Pub. L. 95–217, 91 Stat. 1579 (33 U.S.C. 1288).

2. Section 634.30 is revised to read as follows:

§ 634.30 Appeals in USDA administered projects.

The participant in a USDA-administered RCWP project may appeal decisions of the administering agency in accordance with part 614 of this title.

PART 663—WELLTON-MOHAWK IRRIGATION IMPROVEMENT PROGRAM

1. The authority citation for part 663 continues to read as follows:

Authority: Pub. L. 93–320, 88 Stat. 266 (43 U.S.C. 1571 et seq.); sec. 601, Pub. L. 72–212, 47 Stat. 417 (31 U.S.C. 686).

2. Section 663.17 is revised to read as follows:

§ 663.17 Appeals.

A decision under this part may be appealed by a cooperator in accordance part 614 of this title.

PART 701—CONSERVATION AND ENVIRONMENTAL PROGRAMS

1. The authority citation for part 701 continues to read as follows:

Authority: 16 U.S.C. 590d, 590g-590o, 590p(a), 590q, 1501–1510, 1606, 2101–2111, 2201–2205; 48 U.S.C. 1469d(c).

2. Section 701.76 is revised to read as follows:

§ 701.76 Appeals.

Any person may obtain review of determinations affecting participation in:

(a) The Forestry Incentive Program, in accordance with part 614 of this title; and

(b) All other programs within this part, in accordance with part 780 of this title.

PART 702—COLORADO RIVER BASIN SALINITY (CRSC) CONTROL PROGRAM

1. The authority citation for part 702 continues to read as follows:

Authority: Sec. 201, Pub. L. 93–320, 88 Stat. 271; Sec. 2, Pub. L. 98–569, 98 Stat. 2933 (43 U.S.C. 1592(c)).

2. Section 702.20 is revised to read as follows:

§ 702.20 Appeals.

The participant may obtain a review, in accordance with the provisions of 7 CFR part 614 and 7 CFR part 11, of any administrative decision made under the provisions of this part.

PART 752—WATER BANK PROGRAM

1. The authority citation for part 752 continues to read as follows:

Authority: Secs. 2–12, 84 Stat. 1468–1471, as amended (16 U.S.C. 1301–1311).

2. Section 752.28 is revised to read as follows:

§ 752.28 Appeals.

Any person may obtain review of determinations affecting participation in this program in accordance with part 614 of this title.

PART 780—APPEAL REGULATIONS

1. Part 780 is revised to read as follows:

PART 780—APPEAL REGULATIONS

Sec.

Authority: 5 U.S.C. 301; 15 U.S.C. 714b and 714c; 16 U.S.C. 590h.

§ 780.1 Definitions.

For purposes of this part:

1994 Act means the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (Public Law 103–354).

Agency means FSA and its county and State committees and their personnel, CCC, NRCS, FCIC, and any other agency or office of the Department which the Secretary may designate, or any successor agency.

Appeal means a written request by a participant asking the next level reviewing authority to review a decision.

CCC means the Commodity Credit Corporation, a wholly owned Government corporation within the U.S. Department of Agriculture.

County committee means an FSA county or area committee established in accordance with section 8(b) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)).

FCIC means the Federal Crop Insurance Corporation, a wholly owned Government corporation within the U.S. Department of Agriculture.

Final decision means the program decision rendered by the county or State committee or the FCIC Regional Service Office upon written request of the participant. A decision that is otherwise final shall remain final unless the decision is timely appealed to the State committee or NAD. A decision of FSA or FCIC made by personnel subordinate to the county committee is considered ''final'' for the purpose of appeal to NAD only after that decision has been appealed to the county committee under the provisions of this part.

FSA means the Farm Service Agency.

NAD means the National Appeals Division, established pursuant to the 1994 Act.

NAD regulations means the National Appeals Division (NAD) rules of procedure published by the Secretary at 7 CFR part 11 implementing title II, subtitle H of the 1994 Act.

NRCS means the Natural Resource Conservation Service of the United States Department of Agriculture, formerly the Soil Conservation Service.

Reconsideration is a subsequent consideration of a prior decision by the same reviewing authority.

Regional Service Office means the regional offices established by FSA and FCIC for the purpose of making determinations for private insurance companies reinsured by FCIC under the Federal Crop Insurance Act and for FSA for insurance contracts delivered through county FSA offices (including underwriting decisions), the applicability of provisions under chapter IV of 7 CFR, and decisions as to insurability and rating of acreage.

Reviewing authority means a person or committee assigned the responsibility of making a decision on the appeal filed by the participant in accordance with this part.

State committee means an FSA State committee established in accordance with section 8(b) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)) including, where appropriate, the Director of the Caribbean Area FSA office for Puerto Rico and the Virgin Islands.

Technical determination of NRCS means a decision by NRCS concerning the status and condition of the natural resources based on science and on the best professional judgment of natural resource professionals within NRCS.

§ 780.2 Applicability.

(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 those domestic programs administered by the Farm Service Agency (FSA), and programs administered by FSA on behalf of the Commodity Credit Corporation (CCC) through State and county committees, which are generally set forth in chapters VII and XIV of this title;

(ii) Technical decisions made by the Natural Resources Conservation Service (NRCS) under title XII of the Food Security Act of 1985, as amended;

(iii) Decisions made by personnel of the Federal Crop Insurance Corporation (''FCIC'') or FSA with respect to contracts of insurance insured by FCIC and the noninsured crop disaster assistance program;

(iv) Decisions made by personnel of FCIC or FSA with respect to contracts of insurance provided by private insurance carriers and reinsured by FCIC under the provisions of the Federal Crop Insurance Act; and

(v) Other programs to which this part is made applicable by individual program regulations.

(2) For covered programs, this part is applicable to any decision made by FSA and its State and county committees, CCC, FCIC, the personnel and agents of FSA, FCIC, or CCC, and by the officials of NRCS (to the extent provided in § 780.9), except as otherwise may be provided in individual program requirements or by the Secretary.

(3) This part is not applicable to any decision:

(i) Made by FSA or FCIC with respect to any matter arising under the terms of the Standard Reinsurance Agreement between FCIC and any private insurance company reinsured by FCIC under the provisions of the Federal Crop Insurance Act, as amended; or

(ii) Made by any private insurance company with respect to any contract of insurance issued to any producer by the private insurance company and reinsured by FCIC under the provisions of the Federal Crop Insurance Act, as amended. Those insurance contracts are subject to dispute resolution through arbitration or mediation in accordance with the contract terms.

(b) With respect to matters identified in paragraph (a) of this section, participants may request reconsideration or appeal, under the provisions of this part, of decisions by an agency 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;

(4) Making payments or other benefits to an individual or entity who is not a participant in a program; or

(5) Technical determinations by NRCS.

(c) No reconsideration or appeal may be sought under this part of any general program provision or program policy, or any statutory or regulatory requirement that is applicable to all similarly situated participants.

(d) Mathematical formulas established under a statute or program regulations, and decisions based solely on the application of those formulas, are not appealable under this part.

(e) Only a participant may seek reconsideration or appeal under this part.

§§ 780.3–780.5 [Reserved]

§ 780.6 Mediation.

Participants have the right to seek mediation involving any decision appealed under this part in accordance with the provisions of section 282 of the 1994 Act, if the mediation program of the State where the participant's farming operation giving rise to the decision is located has been certified by the Secretary for the program involved in the agency decision. Any time limitation for review contained in this part will be stayed pending timely pursuit and completion of the mediation process.

§ 780.7 Reconsideration and appeals with the county and State committees and reconsideration with the regional service offices.

(a) A participant may appeal a decision of personnel subordinate to the county committee by filing with the county committee a written request for appeal that states the basis upon which the participant relies to show that:

(1) The decision was not proper and not made in accordance with applicable program policies; or

(2) All material facts were not properly considered in such decision.

(b) A participant may seek reconsideration of a final decision by a county committee or the Regional Service Office by filing a written request for reconsideration with the county committee or the Regional Service Office that states the basis upon which the participant relies to show that:

(1) The decision was not proper and not made in accordance with applicable program regulations; or

(2) All material facts were not properly considered in such decision.

(c) A participant may appeal a final decision by a county committee or the Regional Service Office to the State committee and request an informal hearing in connection therewith, by filing a written appeal with the State committee.

(d) A participant may seek reconsideration of a decision by a State committee, and request an informal hearing in connection therewith, by filing a written request for reconsideration with the State committee that states the basis upon which the participant relies to show that:

(1) The decision was not proper and not made in accordance with applicable program regulations; or

(2) All material facts were not properly considered in such decision.

(e) Nothing in this part prohibits a participant from filing an appeal of a final decision of the county committee or the Regional Service Office with NAD in accordance with the NAD regulations.

(f) This section does not apply to a technical determination by NRCS. Procedures regarding the appeal of a technical determination by NRCS are contained in § 780.9.

§ 780.8 Time limitations for filing requests for reconsideration or appeal.

(a) A request for reconsideration or an appeal of a decision shall be filed within 30 days after written notice of the decision which is the subject of the request is mailed or otherwise made available to the participant. A request for reconsideration or appeal shall be considered to have been ''filed'' when personally delivered in writing to the appropriate reviewing authority or when the properly addressed request, postage paid, is postmarked. A decision shall become final and non-reviewable unless reconsideration is timely sought or the decision is timely appealed.

(b) A request for reconsideration or appeal may be accepted and acted upon even though it is not filed within the time prescribed in paragraph (a) of this section if, in the judgment of the reviewing authority with whom such request is filed, the circumstances warrant such action.

§ 780.9 Appeals of NRCS technical determinations.

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

(b) If the county committee hears the appeal and agrees with the participant's appeal, the county committee shall refer the case with its findings to the NRCS State Conservationist to review the matter and review the technical determination. The County or State committee decision shall incorporate, and be based upon, the NRCS State Conservationist's technical determination.

§ 780.10 Other finality provisions.

The finality provisions contained in section 281 of the 1994 Act shall be applied to appeals under this part to the extent provided for in that section of the 1994 Act.

§ 780.11 Reservations of authority.

(a) Representatives of FSA, FCIC, and CCC may correct all errors in entering data on program contracts, loan agreements, and other program documents and the results of the computations or calculations made pursuant to the contract or agreement.

(b) Nothing contained in this part shall preclude the Secretary, or the Administrator of FSA, Executive Vice President of CCC, the Manager of FCIC, 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 FSA or its county and State committees, FCIC, or CCC.

PART 781—DISCLOSURE OF FOREIGN INVESTMENT IN AGRICULTURAL LAND

1. The authority citation for part 781 continues to read as follows:

Authority: Sec. 1–10, 92 Stat. 1266 (7 U.S.C. 3501 *et seq.*).

2. In § 781.5 paragraphs (c), (d) and (e) are removed, paragraphs (f) through (h) are redesignated as paragraphs (d) through (f) respectively, and paragraph (b)(3) is revised and a new paragraph (c) is added to read as follows:

§ 781.5 Penalty review procedure.

* * * * *

(b) * * *

(3) A request for a hearing on the proposed penalty may be filed in accordance with part 780 of this title.

(c) After a final decision is issued pursuant to an appeal under part 780 of this title, the Administrator or Administrator's designee shall mail the foreign person a notice of the determination on appeal, stating whether a report must be filed or amended in compliance with § 781.3, the amount of the penalty (if any), and the date by which it must be paid. The foreign person shall file or amend the report as required by the Administrator. The penalty in the amount stated shall be paid by check or money order drawn to the Treasurer of the United States and shall be mailed to the United States Department of Agriculture, P.O. Box 2415, Washington, DC 20013. The Department is not responsible for the loss of currency sent through the mails.

* * * * *

PART 1900—GENERAL

1. The authority for part 1900 is revised to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 1989; 7 U.S.C. 6991, *et. seq.;* 42 U.S.C. 1480; Reorganization Plan No. 2 of 1953 (5 U.S.C. App.).

2–3. Subpart B is revised to read as follows:

Subpart B—Adverse Decisions and Administrative Appeals

* * * * *

§ 1900.51 Definitions.

Act means the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Public Law No. 103–354 (7 U.S.C. 6991 *et seq.*).

Agency means the Rural Utilities Service (RUS), the Rural Housing Service (RHS), and the Rural Business-Cooperative Development Service (RBS), or their successor agencies.

Refer to 7 CFR 11.1 for other definitions applicable to appeals of adverse decisions covered by this subpart.

§ 1900.52 General.

This subpart specifies procedures for use by USDA personnel and program participants to ensure that full and complete consideration is given to program participants who are affected by an agency adverse decision.

§ 1900.53 Applicability.

(a) Appeals of adverse decisions covered by this subpart will be governed by 7 CFR part 11.

(b) The provisions of this subpart apply to adverse decisions concerning direct loans, loan guarantees, and grants under the following programs: RUS Water and Waste Disposal Facility Loans and Grants Program; RHS Housing and Community Facilities Loan

Programs; RBS Loan, Grant, and Guarantee Programs and the Intermediary Relending Program; and determinations of the Rural Housing Trust 1987–1 Master Servicer.

(c) This subpart does not apply to decisions made by parties outside an agency even when those decisions are used as a basis for decisions falling within paragraph (b) of this section, for example: decisions by state governmental construction standards-setting agencies (which may determine whether RHS will finance certain houses); Davis-Bacon wage rates; flood plain determinations; archaeological and historical areas preservation requirements; and designations of areas inhabited by endangered species.

§ 1900.54 Effect on assistance pending appeal.

(a) Assistance will not be discontinued pending the outcome of an appeal of a complete or partial adverse decision.

(b) Notwithstanding the provisions of paragraph (a) of this section, administrative offsets initiated under subpart C of part 1951 will not be stayed pending the outcome of an appeal and any further review of the decision to initiate the offset.

§ 1900.55 Adverse action procedures.

(a) If an applicant, guaranteed lender, a holder, borrower or grantee is adversely affected by a decision covered by this subpart, the decision maker will inform the participant of the adverse decision and whether the adverse decision is appealable. A participant has the right to request the Director of NAD to review the agency's finding of nonappealability in accordance with 7 CFR 11.6(a). In cases where the adverse decision is based on both appealable and nonappealable actions, the adverse action is not appealable.

(b) A participant affected by an adverse decision of an agency is entitled under section 275 of the Act to an opportunity for a separate informal meeting with the agency before commencing an appeal to NAD under 7 CFR part 11.

(c) Participants also have the right under section 275 of the Act to seek mediation involving any adverse decision appealable under this subpart if the mediation program of the State in which the participant's farming operation giving rise to the decision is located has been certified by the Secretary for the program involved in the decision. An agency shall cooperate in such mediation. Any time limitation for appeal will be stayed pending completion of the mediation process (7 CFR 11.5(c)).

§ 1900.56 Non-appealable decisions.

The following are examples of decisions which are not appealable:

(a) Decisions which do not fall within the scope of this subpart as set out in § 1900.53.

(b) Decisions that do not meet the definition of an ''adverse decision'' under 7 CFR part 11.

(c) Decisions involving parties who do not meet the definition of ''participant'' under 7 CFR part 11.

(d) Decisions with subject matters not covered by 7 CFR part 11.

(e) Interest rates as set forth in agency procedures, except for appeals alleging application of an incorrect interest rate.

(f) The State RECD Director's refusal to request an administrative waiver provided for in agency program regulations.

(g) Denials of assistance due to lack of funds or authority to guarantee.

§ 1900.57 [Reserved]

Done at Washington, D.C., this 21st day of December, 1995.

Dan Glickman,

Secretary of Agriculture.

[FR Doc. 95–31397 Filed 12–28–95; 8:45 am]

BILLING CODE 3410–01–P

Agricultural Marketing Service

7 CFR Part 51

[Docket No. FV–95–303C]

Removal of U.S. Grade Standards and Other Selected Regulations

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Correction to interim final rule.

SUMMARY: This document contains a correction to the interim final rule published on December 4, 1995, (60 FR 62172–62181). The document concerned removal of U.S. grade standards and other selected regulations from the Code of Federal Regulations (CFR).

EFFECTIVE DATE: December 4, 1995.

FOR FURTHER INFORMATION CONTACT: Eric Forman, Deputy Director, Fruit and Vegetable Division, USDA, AMS, Room 2085–S, P.O. Box 96456, Washington, DC 20090–6456, telephone (202) 690–0262.

SUPPLEMENTARY INFORMATION:

Background

As published, the interim final rule removed most of the voluntary U.S. grade standards and other selected regulations covering a number of agricultural commodities (dairy products, tobacco, wool, mohair, fresh and processed fruits and vegetables, livestock, meats and meat products, eggs, and poultry and rabbit products). This includes all the standards except those which are currently in the rulemaking process, incorporated by reference in marketing orders/agreements appearing at 7 CFR Parts 900 through 999, or those used to implement government price support. Those grade standard regulations will continue to appear in the CFR. Standards for Applies (7 CFR 51.300–51.339), Applies for Processing (7 CFR 51.340–51.354), and Pears for Canning (7 CFR 51.1345–51.1374) should not have been removed because of requirements under the Export Apple and Pear Act (7 U.S.C. 581, et seq.).

Correction of Publication

1. Accordingly, in the December 4, 1995, publication, on page 62174 of the **SUPPLEMENTARY INFORMATION**, in the table titled ''Administered by the Fresh Products Branch, Fruit and Vegetable Division, 51.300–339, Subpart—United States Standards for Grades of Apples, 51.340–354, Subpart—United States Standards for Grades of Apples for Processing, and 51.1354–1374, Subpart—United States Standards for Pears for Canning, should not have been included. These three entities should have appeared in the table on page 62176 as standards that are being retained.

PART 51—[CORRECTED]

2. On page 62180, in the first column, under part 51, the first 5 lines in amendatory instruction 6 are corrected to read as follows:

6. In part 51, § 51.100, §§ 51.355 through 51.464, §§ 51.495 through 51.556, §§ 51.810 through 51.869, §§ 51.925 through 51.986, §§ 51.1030 through 51.1109, §§ 51.1375 through 51.1387, * * *

Dated: December 26, 1995.

Kenneth C. Clayton,

Acting Administrator.

[FR Doc. 95–31515 Filed 12–28–95; 8:45 am]

BILLING CODE 3410–02–M