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(2) Operated by cooperating agencies with financial and technical assistance from NRCS: Meeker, CO—White River and Douglas Creek Soil Conservation Districts with partial funding from NRCS.

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PART 614—NRCS APPEAL PROCEDURES

Sec.

614.1 General.

614.2 Definitions.

614.3 Decisions subject to informal appeal procedures.

614.4 Decisions not subject to informal appeal procedures.

614.5 Reservation of authority.

614.6 Agency records and decision notices.

614.7 Preliminary technical determinations.

614.8 Final technical determinations.

614.9 Program decisions.

614.10 Appeals before the Farm Service Agency county committee.

614.11 Mediation.

614.12 Transcripts.

614.13 Appealability review.

614.14 Computation of time.

614.15 Implementation of final NAD decisions.

614.16 Participation of third parties in NRCS proceedings.

614.17 Judicial review.

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§ 614.1 General.

This part sets forth the informal appeal procedures under which a participant may appeal adverse technical determinations or program decisions made by officials of the Natural Resources Conservation Service (NRCS), an agency under the Department of Agriculture (USDA). These regulations reflect NRCS policy to resolve at the agency level, to the greatest extent

possible, disputes arising from adverse technical determinations and program decisions made by NRCS. Once a decision is rendered final by NRCS, participants may appeal to the National Appeals Division (NAD) as provided for under 7 CFR part 11, or to the Farm Service Agency (FSA) county committee pursuant to 7 CFR part 780 for decisions rendered under Title XII of the Food Security Act of 1985, as amended, 16 U.S.C. 3801 *et seq.* (Title XII).

§ 614.2 Definitions.

The following definitions are applicable for the purposes of this part:

Adverse decision means the final technical determination or the program decision issued by NRCS that is adverse to the individual participant and not a matter of general applicability.

Agency means NRCS and its employees.

Agency exhibit means those documents or materials that are used during the hearing to further explain, differentiate, or distinguish a point, concept, or criteria in an appeal but that were not those materials or documents that the agency relied upon in making the adverse decision. Agency exhibits are labeled alphabetically A, B, C, etc., with total pages in each exhibit numbered.

Agency record means all documents and materials, including documents submitted by the participant and those generated by NRCS, which the agency relies upon and bases its program decision or technical determination. The agency record will include all documents relevant to the adverse decision. NRCS maintains the agency record and will, upon request or appeal, make available a copy of the agency record for a specific adverse decision to the participant(s) involved in the dispute. Agency record documents are labeled numerically 1, 2, 3, etc., in the lower right hand of the document.

Appeal means a written request by a participant asking for review (including mediation) of an adverse NRCS technical determination or program decision under this part. An appeal must set out the reason(s) for appeal and include any supporting documentation. An appeal is considered filed when

the participant's request has been received by the accepting official as indicated in the adverse decision notice.

Chief means the Chief of NRCS or his or her designee.

Commodity Credit Corporation means a wholly owned government corporation within USDA.

Conservation district means any district or unit of State or local government developed under State 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 and water conservation district, natural resource district, conservation committee, or similar name.

County committee means a 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)).

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.

Final technical determination means a preliminary technical determination issued under the Highly Erodible Land and Wetland Conservation (HELC/WC) provisions found in 7 CFR part 12 that have become final, and thus, appealable under sections 8 or 10 of this final rule.

Hearing means an informal appeal proceeding, either before the NRCS State Conservationist or the FSA county committee that affords a participant opportunity to present testimony and documentary evidence to show why an adverse program decision is in error and why the adverse decision should be reversed.

Mediation means a process in which a neutral third party, the mediator, meets with the disputing parties, usually the participant and the agency. Through mediation, the parties have the opportunity to work together with the assistance of the mediator to: Improve communications, understand the relevant issues, develop and explore alternatives, and reach a mutually satisfactory resolution.

Mediator means a neutral third party who serves as an impartial facilitator between two or more parties to assist them in resolving a dispute. The mediator does not take sides or render decisions on the merits of the dispute. The mediator assists the parties in identifying areas of agreement and encourages the parties to explore potential options toward resolution.

Participant means any individual or entity who has applied for, or whose right to participate in or receive, a payment or other benefit in accordance with any program administered by NRCS to which the regulations in this part apply and is affected by a decision of NRCS. The term does not include those individuals or entities excluded in the definition of participant published at 7 CFR 11.1.

Preliminary technical determination means the initial written decision by NRCS for a technical matter under HELC/WC which has not become final under this part.

Program decision means a written decision by NRCS concerning eligibility for program benefits, program administration, or program implementation and based upon applicable regulations and program instructions and not a technical determination made solely for the HELC/WC provisions. Program decisions may include technical matters relative to the specific conservation program. These are final decisions upon receipt by the program participant.

Qualified mediator means a mediator who is accredited under State law in those States that have a mediation program certified by USDA pursuant to 7 CFR part 785, or in those States that do not have a mediation program certified by USDA, an individual who has attended a minimum of 40 hours of core mediator knowledge and skills training and, to remain in a qualified mediator status, completes a minimum of 20 hours of additional training or education during each 2-year period. Such training or education must be approved by USDA, an accredited college or university, or one of the following organizations: State Bar, a State mediation association, a State approved mediation program, or a society of dispute resolution professionals.

Reconsideration means a subsequent consideration of a preliminary technical determination by the designated conservationist or the State Conservationist.

Secretary means the Secretary of Agriculture.

State Conservationist means the NRCS official, or his or her designee, in charge of NRCS operations within a State.

Title XII means Title XII of the Food Security Act of 1985, as amended, 16 U.S.C. 3801 *et seq.*

Verbatim transcript means the official, written record of proceedings of a hearing on a decision appealable under this part.

§614.3 Decisions subject to informal appeal procedures.

(a) This part applies to NRCS adverse program decisions and technical determinations made with respect to:

(1) Conservation programs and regulatory requirements authorized under Title XII, including:

- (i) Conservation Security Program;
 - (ii) Conservation Stewardship Program;
 - (iii) Conservation Reserve Program and the Conservation Reserve Enhancement Program;
 - (iv) Environmental Quality Incentives Program, including the following:
 - (A) Agricultural Water Enhancement Program,
 - (B) Conservation Activity Plans,
 - (C) Colorado River Basin Salinity Control,
 - (D) Conservation Innovation Grants,
 - (E) Ground and Surface Water Conservation Program,
 - (F) Klamath Basin Program, and
 - (G) Organic Program Initiative;
 - (v) Farm and Ranch Land Protection Program;
 - (vi) Grassland Reserve Program;
 - (vii) Highly Erodible Land Conservation;
 - (viii) Wetland Conservation;
 - (ix) Wetlands Reserve Program and Wetlands Reserve Enhancement Program; and
 - (x) Wildlife Habitat Incentive Program.
- (2) Non-Title XII conservation programs or provisions, including:

(i) Agriculture Management Assistance Program;

(ii) Emergency Watershed Protection Program including Flood Plain Easements;

(iii) Great Lakes Restoration Initiative;

(iv) Healthy Forest Reserve Program;

(v) Water Bank Program;

(vi) Watershed Protection and Flood Prevention Program; and

(3) Any other program to which this part is made applicable.

(b) With respect to matters identified in paragraph (a) of this section, participants may appeal adverse decisions concerning:

(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) Technical determinations made under Title XII HELC/WC provisions;

(5) Technical determinations or program decisions that affect a participant's eligibility for USDA program benefits;

(6) The failure of an NRCS official issue a technical determination or program decision subject to this part ("failure to act"); and

(7) Incorrect application of general policies, statutory or regulatory requirements.

(c)(1) Only a participant directly affected by a program decision or a technical determination made by NRCS may invoke the informal appeal procedures contained in this part.

(2) In order for the appeal request to be effective, the participant must personally make a written request for appeal that is signed by the participant identified in paragraph (c)(1) no later than 30 days after receipt of the adverse decision.

(d) Appeals of adverse final technical determinations and program decisions subject to this part are also covered by the NAD rules of procedure, set forth at 7 CFR part 11, and by the FSA county committee appeals process, set forth at 7 CFR parts 11 and 780 for informal appeals of Title XII decisions.

§ 614.4 Decisions not subject to informal appeal procedures.

(a) Decisions that are not appealable under this part include:

(1) Any general program provision, program policy, or any statutory or regulatory requirement that is applicable to all similarly situated participants, such as:

(i) Program application ranking criteria;

(ii) Program application screening criteria;

(iii) Published soil surveys; or

(iv) Conservation practice technical standards included in the local field office technical guide or the electronic FOTG (eFOTG).

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

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

(4) Decisions that are based on technical information provided by another Federal or State agency, e.g., lists of endangered and threatened species;

(5) Corrections by NRCS of errors in data entered on program contracts, easement documents, loan agreements, and other program documents; or

(6) Decisions issued by the Office of the General Counsel, in the exercise of authority delegated to it by the Attorney General, concerning the application of real property title standards issued by the Attorney General.

(b) Complaints involving discrimination in program delivery are not appealable under this part and are handled under the existing USDA civil rights rules and regulations.

(c) Appeals related to contractual issues that are subject to the jurisdiction of the Civilian Board of Contract Appeals are not appealable under the procedures within this part.

(d) Where NRCS is unable to fund an application for program participation due to a lack of funds. The agency may not deny appeal of the underlying computations used to rank and prioritize the application.

§ 614.5 Reservation of authority.

The Secretary of Agriculture, Chief of NRCS, if applicable, or designee, reserves the right to make a determination at any time on any question arising under the programs covered under this regulation within their respective authority, including reversing or modifying in writing, with sufficient reason given therefore, any program decision or technical determination made by an NRCS official.

§ 614.6 Agency records and decision notices.

(a) All NRCS decisions under this part are based upon an agency record. NRCS will supplement the agency record, as appropriate, during the informal appeals process.

(b) NRCS notifies participants of the agency's preliminary and final technical determinations and program decisions through decision notices. By certified mail, return receipt requested, NRCS will send to the participant a decision notice within 10 working days of rendering a technical determination or program decision. In lieu of certified mail, NRCS may hand deliver notices to participants with written acknowledgment of delivery by the participant. Each decision notice contains the following:

(1) The factual basis for the technical determination or program;

(2) The regulatory, statutory, or policy basis for the technical determination or program decision; and

(3) Information regarding any informal appeal rights available under this part; the process for requesting such appeal; and the procedure for requesting further review before the FSA county committee pursuant to 7 CFR part 780 or NAD pursuant to 7 CFR part 11.

§ 614.7 Preliminary technical determinations.

(a) A preliminary technical determination is limited to those determinations made pursuant to the HELC/WC provisions (16 U.S.C. 3801, *et seq.*) and becomes final 30 days after the participant receives the decision, unless the participant files an appeal with the appropriate NRCS official as indicated in the decision notice requesting:

§ 614.8

(1) Reconsideration with a field visit, office visit, or other designated location meeting site in accordance with paragraphs (b) and (c) of this section; or

(2) Mediation as set forth in § 614.11.

(b)(1) If the participant requests reconsideration with a field visit, office visit, or other location visit, the designated conservationist, participant, and at the option of the conservation district, a district representative will make a field or office visit for the purpose of gathering additional information and discussing the facts relating to the preliminary technical determination. The participant may also provide any additional documentation to the designated conservationist.

(2) Within 15 days of the field or office visit, the designated conservationist, based upon the agency record as supplemented by the field visit and any participant submissions, will reconsider his or her preliminary technical determination.

(3) If the reconsidered determination is no longer adverse to the participant, the designated conservationist will issue the reconsidered determination as a final technical determination.

(4) If the preliminary technical determination remains adverse, then the designated conservationist will forward the revised decision and agency record to the State Conservationist for a final determination pursuant to paragraph (c) of this section, unless further appeal is waived in writing by the participant in accordance with paragraph (d) of this section.

(c) The State Conservationist will issue a final technical determination to the participant as soon as is practicable after receiving the reconsideration and agency record from the designated conservationist. The technical determination issued by the State Conservationist becomes a final NRCS technical determination upon receipt by the participant. Receipt triggers the running of the 30-day timeframe to appeal to NAD, or if applicable, to the FSA county committee.

(d) In order to address application needs or resource issues on the ground immediately (expedited finality), a participant may waive, in writing to the State Conservationist, the reconsider-

7 CFR Ch. VI (1–1–23 Edition)

ation rights stated in paragraph (a) of this section so that a preliminary technical decision becomes final before the expiration of the 30-day appeal period.

§ 614.8 Final technical determinations.

(a) Preliminary HELC/WC technical determinations become final and appealable:

(1) Thirty days after receipt of the preliminary technical decision by the participant unless the determination is appealed in a timely manner as provided for in this regulation.

(2) Thirty calendar days after the beginning of a mediation session if a mutual agreement has not been reached by the parties; or

(3) Upon receipt by the participant of the final technical determination issued on reconsideration as provided in § 614.7(c).

(b) The participant may appeal the final technical determination issued under the HELC/WC provisions to:

(1) The FSA county committee pursuant to 7 CFR part 780; or

(2) NAD pursuant to 7 CFR part 11.

§ 614.9 Program decisions.

(a) Program decisions are final upon receipt of the program decision notice by the participant. Program decisions include all decisions issued by NRCS for programs that NRCS administers separate from the HELC/WC provisions. The participant has the following options for appeal of the program decision:

(1) An informal hearing before NRCS as provided for in paragraph (b) through paragraph (d) of this section;

(2) Mediation as provided for in § 614.11;

(3) An informal hearing before the FSA county committee pursuant to 7 CFR part 780 if the program decision is made under Title XII; or

(4) A hearing before NAD pursuant to 7 CFR part 11.

(b) A program participant must file an appeal request for a hearing with the appropriate State Conservationist as indicated in the decision notice within 30 calendar days from the date the participant received the program decision.

(c) The State Conservationist may accept a hearing request that is untimely filed under paragraph (b) of this section if the State Conservationist determines that circumstances warrant such an action.

(d) The State Conservationist will hold a hearing no later than 30 days from the date the appeal request was received. The State Conservationist will issue a written final decision no later than 30 days from the close of the hearing.

(e) NRCS will provide notice of the right to appeal to NAD on program decisions when equitable relief is denied by the Chief or the State Conservationist.

§ 614.10 Appeals before the Farm Service Agency county committee.

(a) In accordance with 7 CFR part 780, a participant may appeal a final technical determination or a program decision to the FSA county committee for those decisions made under Title XII.

(b) When the FSA county committee hearing the appeal requests review the technical determination by the applicable State Conservationist prior to issuing their decision, the State Conservationist will:

(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 concerning the technical determination.

(c) After the actions set forth in paragraphs (b)(1) through (3) of this section are completed, provide the FSA county committee with a written technical determination in the form required by § 614.6(b)(1) through (2) as well as a copy of the agency record.

§ 614.11 Mediation.

(a) A participant who wishes to pursue mediation must file a request for mediation under this part with the official designated in the decision notice no later than 30 days after the date on which the decision notice was received.

Participants in mediation are normally required to pay fees established by the mediation program.

(b) A dispute will be mediated by a qualified mediator as defined at § 614.2(n).

(c) The parties will have 30 days from the date of the first mediation session to reach a settlement agreement. This date can be extended upon agreement of the parties. The mediator will notify the State Conservationist whether the parties have reached an agreement.

(d) Settlement agreement reached during, or as a result of, the mediation process must be in writing, signed by all parties to the mediation, and comply with the statutory and regulatory provisions and policies governing the program. In addition, the participant must waive all appeal and judicial rights as to the issues resolved by the settlement agreement.

(e) At the outset of mediation, the parties must agree to mediate in good faith. NRCS demonstrates good faith in the mediation process by, among other things:

(1) Designating an NRCS representative in the mediation;

(2) Making pertinent records available for review and discussion during the mediation; and

(3) To the extent the NRCS representative does not have authority to bind the agency, directing the NRCS representative to forward, in a timely manner, any written agreement proposed in mediation to the appropriate NRCS official for consideration.

(f) *Mediator impartiality.* (1) No person may serve as mediator in an adverse program dispute who has previously served as an advocate or representative for any party in the mediation.

(2) No person serving as mediator in an adverse program dispute may thereafter serve as an advocate for a participant in any other proceeding arising from or related to the mediated dispute including, without limitation, representation of a mediation participant before an administrative appeals entity of USDA or any other Federal agency.

(g) *Confidentiality.* Mediation is a confidential process except for those limited exceptions permitted by the Administrative Dispute Resolution Act

§ 614.12

at 5 U.S.C. 574. As a condition of participation, the participants and any interested parties joining the mediation must agree to the confidentiality of the mediation process. The mediator will not testify in administrative or judicial proceedings concerning the issues discussed in mediation, nor submit any report or record of the mediation discussions, other than the mediation agreement or the mediation report, except as required by law.

§ 614.12 Transcripts.

(a) No recordings will be made of any informal hearing conducted under § 614.9. In order to obtain an official record of a hearing, a participant may obtain a verbatim transcript as provided in paragraph (b) of this section.

(b) Any party to an informal hearing appeal under § 614.9 may request that a verbatim transcript is made of the hearing proceedings and that such transcript is made the official record of the hearing. The party requesting a verbatim transcript must pay for the transcription service and provide a copy of the transcript to NRCS at no charge.

§ 614.13 Appealability review.

If NRCS states that a decision is not adverse to the individual participant, and thus, no right to appeal exists, NRCS will notify the participant that he may seek review of that determination from the NAD Director.

§ 614.14 Computation of time.

(a) The word “days” as used in this final rule means calendar days, unless specifically stated otherwise.

7 CFR Ch. VI (1–1–23 Edition)

(b) Deadlines for any action under this part, including deadlines for filing and decisions which fall on a Saturday, Sunday, Federal holiday, or other day on which the relevant NRCS office is closed during normal business hours, will be extended to close of business the next working day.

§ 614.15 Implementation of final NAD determinations.

(a) No later than 30 days after a NAD determination becomes a final administrative decision of USDA, NRCS will implement the determination.

(b) Biannually, NRCS must file a report on the status of implementation of final administrative determinations in accordance with section 14009 of the 2008 Farm Bill.

§ 614.16 Participation of third parties in NRCS proceedings.

When an appeal is filed under this part, NRCS will notify any third party whose interests may be affected of the right to participate as an appellant in the appeal. If the third party declines to participate, then NRCS’ decision will be binding as to that third party as if the party had participated. If a formal hearing is conducted by NAD, third party issues will be decided by NAD.

§ 614.17 Judicial review.

A participant must receive a final determination from NAD pursuant to 7 CFR part 11 prior to seeking judicial review in any U.S. District Court of competent jurisdiction.