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DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Parts 1 and 11

National Appeals Division Rules of Procedure

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

ACTION: Final rule.

SUMMARY: On December 29, 1995, the National Appeals Division (NAD) in the Office of the Secretary published an interim final rule to implement Title II, Subtitle H, of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, 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 March 28, 1996. Nineteen timely public comments were received in response to the interim final rulemaking.

The Secretary now issues a final rule for the rules of procedure of NAD and for the technical change regarding authentication of NAD records by the NAD Director. The interim final rulemaking document also included conforming changes to the former appeal rules of USDA agencies whose adverse decisions are now subject to NAD review. This final rulemaking document does not contain final rules for the conforming changes. Those final rules will be issued by the respective agencies at a later date.

DATES: *Effective Date:* This final rule is effective July 23, 1999.

Applicability Date: This rule applies to all agency adverse decisions issued after July 23, 1999, all agency adverse decisions on which timely NAD appeals have not yet been taken, and pending NAD appeals.

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SUPPLEMENTARY INFORMATION:

Classification

This final 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, of State, local, or tribal governments or communities. This final 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 66517), 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, Pub. L. No. 103–354, 7 U.S.C. 6991 *et seq.* (''the Reorganization Act''). NAD was assigned responsibility for all administrative appeals formerly handled by the National Appeals Division of the former Agriculture 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 final rule sets for 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 7 CFR part 11.

Response to Comments and Changes to Interim Final Rule

Nineteen comments were received by March 28, 1996 in response to the request for comments on the interim final NAD rule. In response to these comments, minor changes have been made to the interim final rule. Additionally, a few other changes to the interim final rule have been made to reflect subsequent Congressional and USDA action established in the Risk Management Agency and to clarify some aspects of the rule as a result of the application of the interim final rule since it was promulgated.

The following explanation is given for those sections of the interim final rule that have been changed. Responses to comments not addressed in the explanation of changes follow.

Effective Date

The provisions of the interim final rule applicable to NAD Director review (7 CFR 11.9) were made effective retroactively to October 20, 1994, the date on which the Secretary established NAD. The purpose of the retroactive application of that section was to provide an administrative mechanism

for reconsideration of Director reviews during the transition from the old to the new appeals system where appellants had not received notice or copies or agency requests for review of hearing officer decisions. At this point, USDA has determined that any difficulties with prior decisions should have been resolved. In order to remove any ambiguity regarding the finality of Director review decisions, USDA accordingly is not making § 11.9 of this final rule retroactive.

Section 11.1 Definitions

Agency. Section 194 of the Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104–127, amended the Reorganization Act by adding a new section 226A (7 U.S.C. 6933) authorizing the Secretary to establish an Office of Risk Management to supervise the Federal Crop Insurance Corporation (FCIC) and other crop insurance-related programs. The Secretary implemented this provision with Secretary's Memorandum 1010–2 issued on May 3, 1996, which established the Risk Management Agency (RMA). Since the RMA has taken over FCIC supervisory functions formerly assigned to the Farm Service Agency (FSA), USDA has added RMA to the definition of ''agency'' in this final rule.

Given that the Reorganization Act was enacted more than four years ago, USDA has deleted obsolete references to the former Agricultural Stabilization and Conservation Service (ASCS), Farmers Home Administration (FmHA), and Soil Conservation Service (SCS) from the definition of ''agency.'' However, to ensure any matters that may arise from those former agencies remain within the jurisdiction of NAD, appropriate reference has been made to include a ''predecessor'' of a named agency within the definition of ''agency.''

USDA has deleted the Rural Development Agency (RDA) from the definition of ''agency'' as that agency no longer exists.

In many States and at the national office level, decisions relating to programs of the Rural Housing Service (RHS), Rural Business-Cooperative Service (RBS), and Rural Utilities Service (RUS) may be issued under the auspices of ''Rural Development.'' Accordingly, USDA adds Rural Development (RD) to the definition of ''agency'' to avoid any confusion as to whether such decisions are subject to appeal to NAD.

Participant. For USDA response to comments and amendments regarding the participation of parties in NAD proceedings other than the agency and the appellant, see the preamble text below addressing new § 11.15 of the rule.

USDA also amends this section to clarify that participants in proceedings before State Tobacco Marketing Quota Review Committees (''Tobacco Committees) under section 361, *et seq.*, of the Agricultural Adjustment Act of 1938, as amended (7 U.S.C. 1361, *et seq.*) are excluded from the definition of ''participant'' in § 11.1. In creating the NAD, Congress repealed several statutory appeal processes in section 273 of the Reorganization Act, but did not repeal these statutory appeal and judicial review provisions for decisions of the Tobacco Committees. Accordingly, in order to construe the statutes harmoniously, USDA concludes Congress did not intend for NAD review to supersede the specific statutory review process for decisions of the Tobacco Committees, and amends the NAD rule to give effect to this interpretation.

Section 11.4 Inapplicability of Other Laws and Regulations

Three comments were received from the same commenter concerning the applicability of the provisions of the Administrative Procedure Act (APA) regarding formal adjudicative proceedings (5 U.S.C. 554–57, 3105) and the Equal Access to Justice Act (EAJA) (5 U.S.C. 504) to NAD proceedings. The commenter suggests that 5 U.S.C. 559 requires that the formal adjudication provisions of the APA apply to NAD proceedings, and therefore, by its terms, EAJA also applies to NAD proceedings.

For the reasons set forth in the preamble to the interim final rule, it is the position of USDA that Congress did not intend for either the APA or the EAJA to apply to NAD proceedings. This is the same position that USDA took with respect to the applicability of the APA and EAJA when it was addressed in the regulations applicable to appeals before the former Farmers Home Administration National Appeals Staff. *See* 53 FR 26401 (July 12, 1988).

In *Lane* v. *U.S. Dept. of Agriculture,* 120 F.3d 106 (8th Cir. 1997), the court disagreed with the USDA position regarding the applicability of the APA and EAJA, holding that 5 U.S.C. 559 required application of both Acts to NAD proceedings. Consequently, USDA will apply the holding in *Lane* to NAD appeals which arise within the 8th Circuit. For adverse decisions arising outside of the 8th Circuit, USDA will continue to assert the inapplicability of NAD and EAJA, and NAD will not process EAJA applications filed in such appeals.

By definition, USDA EAJA regulations at 7 CFR part 1, subpart J, apply to any adjudication that USDA is required to conduct under the formal adjudication provisions of the APA. 7 CFR 1.183(a)(1)(i). Accordingly, EAJA applications on 8th Circuit NAD appeals have been processed by USDA in accordance with the USDA EAJA regulations at 7 CFR part 1, subpart J, and will continue to be processed in accordance with those regulations with one change.

Under EAJA, it is the agency, not the adjudicative officer, that is the final agency decisionmaker on an administrative EAJA application. 5 U.S.C. 504(a)(3). A NAD Hearing Officer clearly falls within the definition of ''adjudicative officer'' under the USDA EAJA regulations (7 CFR 1.180(b)); however, the Secretary has delegated to the Judicial Officer (with the exception of covered proceedings arising before the Board of Contract Appeals) his authority to review decisions of adjudicative officers as the final agency decisionmaker under EAJA (7 CFR 1.189). Concurrently with the promulgation of this final rule, the Secretary by separate memorandum will reassign, from the Judicial Officer to the NAD Director, his authority to make final agency determinations under EAJA for initial EAJA determinations rendered by NAD Hearing Officers. This delegation will apply prospectively to initial EAJA determinations issued by NAD Hearing Officers after the date the memorandum is signed.

As the holding of the 8th Circuit in *Lane* makes apparent, the right of a NAD appellant under EAJA to recover attorneys fees incurred in NAD proceedings will not rise or fall on the basis of whether or not USDA promulgates a regulation accepting or denying the applicability of the APA and EAJA. Further, as a result of *Lane,* the statement in the interim final rule regarding the inapplicability of the APA and EAJA no longer has universal application.

Accordingly, USDA has determined to remove any references to the APA or EAJA from the final rule in order to eliminate the issue of rulemaking from what is a pure matter of statutory construction involving the relationship of the Reorganization Act, the APA, and EAJA. The removal of references to the APA and EAJA, however, does not mean that USDA now finds the APA and EAJA applicable to NAD proceedings. As indicated above, USDA will continue to assert that the APA and EAJA do *not* apply to NAD appeals except where required by judicial ruling.

Section 11.5 Informal Review of Adverse Decisions

Section 11.5(a) of the interim final rule provides that a participant first must seek county or area committee review of any adverse decision issued at the field service office level by an officer or employee of FSA, or any employee of such county or area committee. In the context of the USDA reorganization with the combination of the former Farmers Home Administration and the Agricultural Stabilization and Conservation Service into FSA, confusion has surrounded this provision with respect to its applicability to the former FmHA farm credit programs. As a result of reorganization, very few farm credit decisions would come within the scope of this requirement in any case. Accordingly, to clarify the scope of the provision, language has been added excepting farm credit programs from its coverage. Any inconsistency with the interim final rule at 7 CFR part 780 will be corrected when that rule is finalized but in the meantime NAD will apply these rules in determining the acceptability of an appeal to NAD of a farm credit decision by FSA.

Section 11.6 Director Review of Agency Determinations of Appealability and Right of Participants to Division Hearing

Paragraph (a)(1) of § 11.6 is amended to correct an omission in the interim final rule that led to a discrepancy between the statement in the preamble to that rule and the text of that rule. The preamble of the interim final rule provided that a request for Director review of an agency determination that a decision is not appealable must be personally signed by the participant, just as the case with a participant request for a hearing and request for Director review of a Hearing Officer determination. However, the language of section 11.6(a)(1) did not expressly state that such requests must be personally signed. Section 11.6(a)(1) now makes clear that the participant must personally sign the request for Director review of an agency determination of non-appealability.

Further, with respect to the need for personal signature for certain actions, USDA clarifies that the reasonable interpretation of this requirement is vested in the NAD Hearing Officers or Director in individual cases. While it is not a statutory jurisdictional prerequisite for perfecting a timely appeal, it is reasonable to expect that authorized representatives seeking to file appeals before NAD would check the rules of the forum for filing requirements. Even though the requirement is expressed using the term ''personally,'' it also is reasonable to interpret that term as applying to a responsible officer or employee of an entity where the definition of ''participant'' in § 11.1 encompasses an ''entity'' as well as an ''individual.''

Section 11.8 Division Hearings

Section 11.8(b)(6) is ambiguous with respect to the options of a NAD hearing officer when a party fails to show up at a hearing. Section 11.8(b)(6)(i)(B) states that if the hearing officer elects to cancel the hearing, he can accept evidence into the record from any party present and then issue a determination, whereas § 11.8(b)(6)(ii) suggests that the hearing officer must allow the absent party an opportunity to respond to any such evidence admitted prior to rendering a determination. USDA has modified the language of § 11.8(b)(6)(i)(B) to make the acceptance of evidence clearly subject to § 11.8(b)(6)(ii) prior to issuing a determination.

Section 11.9 Director Review of Determinations of Hearing Officers

The word ''Associate'' in § 11.9(d)(3) is changed to ''Assistant'' to reflect the curent organization of NAD.

Section 11.15 Participation of Third Parties and Interested Parties in Division Proceedings

Several commenters, either reinsurance companies or organizations commenting on behalf of reinsurance companies, requested that reinsurance companies be notified of and allowed to participate in NAD proceedings on participant appeals of FCIC decisions where the outcome of the NAD proceeding would affect policies held by reinsurance companies. For example, if FCIC declares an insured ineligible for crop insurance, a reinsurance company may cancel a previously existing policy as a result of that decision; however, if the insured then successfully appeals to NAD and the FCIC decision is overturned, the reinsurance company now will have a policy on its books that it had thought removed and it may not have received any notice of the NAD appeal or decision.

One commenter also objected to the change from the proposed rule in the interim final rule that required a bank holding a guaranteed loan to jointly appeal with the borrower any adverse decision. The commenter argued that the borrower was the individual directly affected and thus should be able to appeal an adverse decision related to a guaranteed loan independently from the lender.

In addition to the concerns raised by these commenters, NAD also has experienced difficulties in the appeal process where the interests of parties other than the appellant and the agency are involved.

Accordingly, a new § 11.15 has been added to the rule to provide procedures for handling these types of situations involving the interests of other parties in a NAD appeal.

The new § 11.15 recognizes that there are two types of situations where parties other than the appellant or the agency may be interested in participating in NAD proceedings. In the first situation, a NAD proceeding may in fact result in the adjudication of the rights of a third party, e.g., an appeal of a tenant involving a payment shared with a landlord, an appeal by one recipient of a share of a payment shared by multiple parties, or an appeal by one heir of an estate. In the second situation, there may be an interested party that desires to receive notice of and perhaps participate in an appeal because of the derivative impact the appeal determination will have on that party, e.g., guaranteed lenders and reinsurance companies.

These two different types of situations require separate procedures. Thus, in the first type where the actual rights of a third party are being adjudicated, USDA has termed such a party a ''third party'' and provided a new § 11.15(a) to provide for the participation of a ''third party.'' After an appellant files an appeal, if the agency, appellant, of NAD itself identifies a third party whose rights will be adjudicated in an appeal, NAD will issue a notice of the appeal to the third party and provide such party with an opportunity to participate fully as a party in the NAD proceeding. Participation will include the right to seek Director review of the determination of the Hearing Officer. USDA believes the participation of a third party under § 11.15 also gives the third party the right to seek judicial review of the final NAD determination. If the third party receiving notice declines to participate, he will be bound by the final NAD determination as if he had participated. The intent of this provision is to include all parties in the initial NAD appeal and prevent a secondary appeal by a third party who did not receive notice of the appeal, but who is adversely affected by the agency implementation of the NAD determination of appeal, and who thus would then be entitled to an appeal of his own that could lead to a contradictory result.

For example, the agency determines a recipient sharing in a payment with two

other parties is entitled to 25% of the payment, and the recipient appeals. NAD determines that the agency decision was erroneous, and the agency implements by according the appellant 50% of the payment. The first NAD determination would not be binding as to the other two recipients, thus giving rise to secondary appeals, unless the other two recipients had notice and opportunity to participate in the first appeal.

In the second type of situation, new § 11.15(b) provides for the participation of guaranteed lenders and crop reinsurers as ''interested parties'' in an appeal where the actual rights of such interested parties under a USDA program are not being adjudicated (i.e., the appeal would not lead to an agency implementation decision that would give rise to NAD appeal rights for them), but such parties would be impacted by the outcome. Interested parties are not entitled under this new provision to request Director review of a hearing officer determination. It also is the position of USDA that such participation of an ''interested party'' does not give rise to a right by such ''interested party'' to judicial review of the final NAD determination.

In light of these changes, USDA is striking the requirement in the definition of ''participant'' in § 11.1 of the interim final rule that guaranteed lenders jointly appeal to NAD with borrowers.

With respect to the comments suggesting that reinsurers should be notified of NAD appeals taken by insureds, that topic should be addressed in agency rules and not the rules pertaining to NAD itself. NAD does not have the resources, capability, or function to carry out that mission.

Other Comments

As indicated above, the other CFR sections amended by the interim final rule and that are not a part of this final rule will be issued as final rules at a later date. Comments received on those rules are not addressed below except to the extent that they are related to a provision of 7 CFR part 11. Comments related to other parts of the interim final rule, or other agency rules (such as those for mediation), will be referred to the appropriate parties for further consideration.

Crop Insurance Issues

One commenter expressed concern that the revision of 7 CFR part 400, subpart J, in the interim final rule eliminated the rights of appeal previously contained in 7 CFR 400.92. The commenter questioned whether the more general language of the interim final rule provided for appeal rights coextensive to those in 7 CFR 400.92.

Except with respect to the provision for notification to the reinsurance company in 7 CFR 400.92(f), USDA believes that the specified rights of appeal outlined in 7 CFR 400.92 are covered by the NAD appeal regulations contained in this final rule. Further, the notification issue has been dealt with partially in this final rule by providing reinsurance companies the right to participate in NAD appeals as detailed above.

One reinsurance commenter also expressed the view that if allowed to participate in a NAD appeal it also should be allowed to request Director review of a hearing officer's decision. The comment reflected a concern that the agency would not timely request Director review of a hearing officer's decision and thus leave the reinsurer at risk. USDA does not adopt this recommendation because only program participants receiving adverse decisions from an agency have a statutory right to appeal under the NAD statute; since a reinsurer is not the recipient of the adverse decision, it may not be a NAD appellant able to request hearings and Director review. However, as interested parties, USDA is allowing reinsurers to participate in the hearing and Director review process.

One commenter on behalf of crop insurers suggested that the interim final rule be revised to allow reinsurance companies to appeal to NAD where a matter would not be subject to appeal to the Agriculture Board of Contract Appeals (AGBCA). The NAD process was established as a forum primarily for producer appeals, not as a forum for contractual and quasi-contractual matters. USDA at this time does not perceive a gap between a reinsurance company's right of appeal to the AGBCA and the availability of participant appeals to NAD by recipients of FCIC or RMA adverse decisions; therefore, a safety provision in this NAD final rule to cover appeals not taken by the AGBCA is neither required nor appropriate.

Mediation

Several commenters addressed issues regarding mediation. The mediation process between participants and agencies is not the subject of this final rule. Mediation is relevant to this rule only with respect to the determination of when a participant's right to appeal to NAD begins to toll. Comments regarding the length of time agencies allow for mediation to be requested and the length of time they permit for mediation to continue therefore are outside the scope of this rule and are not addressed herein.

Section 11.5(c)(1) of the interim final rule provides that a participant request for mediation or alternative dispute resolution (ADR) stops the running of the 30-day period after an adverse decision in which a participant may appeal that decision. Once mediation or ADR has concluded, this provision provides that the participant then has the remaining balance of the 30 days to appeal. Finding this process prone to confusion, four commenters suggested that the termination of mediation without settlement should in some way be construed as a new adverse decision with a full 30 days to seek NAD review of the decision. This suggestion does not comport with the concept of mediation. First of all, the mediator is not an agency decisionmaker and the results of the mediator's work is not therefore an agency decision. Second, mediation does not result in decisions; it results either in a mutually acceptable solution to all parties or a termination of the mediation with no resolution of the dispute. The NAD statute does not provide for a new 30-day period for a NAD appeal to begin at the conclusion of the mediation process.

One of the commenters, however, suggested that agencies issue a new adverse decision at the conclusion of mediation, with a notice of appeal rights. This adverse decision would replace the initial adverse determination and start the 30-day clock running anew for a NAD appeal. Such a mandate on USDA program agencies is beyond the scope of this final rule.

Three commenters suggested that § 11.5 of the rule provide that agencies notify participants of the balance of time remaining for appeal at the conclusion of mediation. Two commenters suggested that it would be inappropriate for the mediator to perform this task for reasons of liability and impartiality.

USDA agrees that it would be inappropriate to require the mediator to provide such notice; however, USDA does not adopt the suggestion that agencies should be required to give such notice. Agency notices to participants of appeal rights are beyond the scope of this final rule.

One commenter suggested that participants be billed for their share of the costs of medication. That subject is beyond the scope of this final rule.

Required Informal Agency Review

One commenter suggested that the required informal review by a county or area committee as a prerequisite to a NAD appeal, as set forth in § 11.5(a),

should be dropped because it results in additional costs and delays for participants. USDA declines to remove this provision.

Notification of Appeal Rights for Adverse Decisions Determined Non-Appealable

One commenter suggested that agencies be required to provide participants with notice of appeal rights to NAD under § 11.6(a) of agency determinations that an adverse decision is not appealable. USDA agrees that information on such appeal rights should be given by agencies when a decision is issued with a statement that it is not appealable. As with other notice requirements, however, USDA does not mandate this requirement on agencies in this final rule.

''Reasonably Should Have Known''

One commenter objected to the requirement in § 11.6(b)(1) that a participant must request an appeal within 30 days after ''the participant reasonably should have known that the agency had not acted within the timeframes specified by agency program regulations''. The commenter suggested that the agency should have specified timeframes to respond to participant requests, application, or inquiries; that participants should be notified of agency deadlines so that they can monitor them and know when to appeal; and that, alternatively, that if an agency fails to respond by deadlines, participant requests or applications should be automatically approved.

The purpose of the above-quoted phrase in § 11.6(b)(1) is to bring finality to agency decisions and programs by requiring appellants to appeal within 30 days of an agency missing a deadline specified in published agency regulations. Participants are deemed to have knowledge of published laws and regulations. If a regulation states that the agency will act on a given application in 60 days, a participant may not rest on his or her rights for a year before appealing to NAD because the agency never acted on the applications. Requiring an agency to specify timeframes for all actions in regulations, or to notify participants of such timeframes, is beyond the scope of this rule and the mission of NAD. Finally, USDA by general rule cannot establish automatic award of applications for failure to act on them where contrary to statute or principles of sovereign immunity.

''Adverse Decision''

Two commenters suggested that § 11.8(b) should be revised to allow participants 30 days to appeal upon receiving a *written* decision from the agency including: a clear statement of the adverse decision, a citation of the regulatory basis for the adverse decision, a notification of appeal rights, notification of the proper agency from which to appeal the adverse decision, notification of the proper reviewing officer to whom the appeal must be sent, and notification of mediation rights. One of the commenters further suggested that the definition of ''adverse decision'' be changed to ''adverse final decision'' so that preliminary adverse letters to participants—which a given agency may not regard as starting the 30-day clock—will not start the 30-day clock until the adverse decision is made officially by the agency.

These suggestions by the commenters appear to reflect several concerns. First, one commenter takes issue with our view, stated in the preamble to the interim final rule, that the requirement fro notice of an agency adverse decision in § 274 of the Reorganization Act is not a prerequisite for NAD jurisdiction. Placing the requirement for a written decision in § 11.8(b)(1), as suggested, implicitly would provide that notice and allow the participant a fair amount of time to develop his or her appeal. Second, there is a concern that agencies will seek to trigger the 30-day clock with oral decisions that participants will not understand as triggering their appeal rights. Third, agencies often do not view some actions as the adverse decisions for which appeal rights run and thus participants may prematurely appeal. Fourth, the suggested required content for an adverse decision is needed for the written determinations so that participants understand all their rights and clearly understand what the adverse decision is and the basis therefor.

USDA declines to adopt these suggestions for several reasons. While well-intentioned, these suggestions would be a triumph of form over substance spawning unnecessary litigation over who got what notice when. First and foremost, USDA interprets the statute to provide a clear intent on the part of Congress to afford participants the right to appeal *de facto* decisions rendered by an agency failure to act. The definition of ''adverse decision'' in section 271(1) of the Reorganization Act expressly includes ''the failure of an agency to issue a decision or otherwise act on the request or right of the participant.'' To require a written decision from the agency before a participant may appeal essentially stops a participant's ability to appeal agency inaction, contrary to Congressional intent.

Second, if an administrative decision adversely affects a participant, it is an adverse decision subject to appeal under the statute regardless of whether the agency has sent out the formal letter with formal appeal rights. Each agency subject to NAD jurisdiction handles decisions in various ways and to attempt to specify that only ''final'' adverse decisions will count does not provide for an efficient NAD appeals process. (This, of course, does not mean that an agency may not recall and re-issue an earlier decision, in which case the 30-day clock begins to run anew).

Finally, with respect to the fairness of the appeal by providing the basis therefore, USDA sees no intent on the part of Congress to allow agencies to hold up the processing of appeals by failing to provide the basis for the decision. Section 11.8(c)(ii) in fact is written to require the agency to provide NAD with a copy of the adverse decision and a written explanation, including regulatory and statutory citation, once an appeal is filed in the event the participant was unable to get that information beforehand. If the agency does not furnish the information at that point, it merely runs the danger of losing the appeal for lack of information. At least, however, the participant has gotten his appeal before NAD whereas requiring the agency to provide that information to the participant before he or she may appeal to NAD effectively would prevent the participant from even filing an appeal.

Copies of Agency Record

Two commenters suggested changes to §§ 11.8(a) and 11.8(b)(1) to require agencies to notify an appellant of the appellant's right to an agency record after the appellant has filed an appeal, to require the agency to provide the hearing officer with a copy of the agency file to be placed automatically in the record, to require the agency to provide a copy of the agency record upon request, and to provide specific procedures for how an appellant could obtain the agency record. One commenter also suggested adding language to § 11.8(c)(5)(ii) to require the agency to present similar information, as well as additional information on the basis of the decision, at the hearing itself.

USDA declines to adopt these comments. They are either already covered specifically in the cited sections of the rule or else are covered within the language of the rule in a way that allows flexibility for agency and NAD response. Appellants are placed on notice of their

right to request and receive copies of the agency record by this final rule itself and a further requirement for agencies to provide such notice is beyond the scope of this rule. Further, requiring the agency to present such information at the hearing runs contrary to the statutory requirement that the appellant must prove the agency decision erroneous. This places the burden of going forward in the appeal on the appellant. If the agency fails to provide an adequate response to the appellant by failing to provide informataton, it runs the risk of losing the appeal.

Notice of Director Review

Section 11.9(b) requires the Director to notify all parties of receipt of a request for Director review and section 11.9(c) requires a party to submit responses to a request for Director review within 5 business days of receiving a copy of the request for Director review.

One commenter suggested clarifying how the Director is to provide notification under § 11.9(b), and suggested inserting the word ''their'' in § 11.9(c) presumably to distinguish the running of the 5 business days from the receipt of the Director review itself by the Division from the 5 business days from receipt of a *copy* by the other parties. USDA declines to adopt either of these comments. The method of notification should remain within the discretion of the Director and § 11.9(c) is clear without further amendment.

Basis for Determinations

Three commenters suggested removal or revision of the phrase ''and with the generally applicable interpretations of such laws and regulations'' in § 11.10(b) to reflect that generally applicable interpretations of laws and regulations should not be the sole basis for agency adverse decisions. These commenters were concerned that § 11.10(b) is inconsistent with the principle that adverse decisions must be based on regulations promulgated in accordance with notice-and-comment rulemaking procedures. For the reasons set forth in explanation of § 11.10(b) in the preamble to the interim final rule, USDA finds this language appropriate and declines to remove it as requested in the comments. Further, USDA notes that inclusion of this language does not reflect an intent to bind NAD to arbitrary interpretations of statutes or regulations by agency officials. Any unpublished, generally applicable interpretations of laws and regulations may be relied upon only to the extent permitted by the APA and interpretations thereof by relevant caselaw. NAD is bound to decide appeals in accordance with law; therefore, if an interpretation is not permissible under the APA, then NAD cannot rely upon that interpretation to sustain an agency decision.

Reconsideration

One commenter suggested that appellants be given 15 days, instead of 10 days, to request the Director to reconsider his determination under § 11.11. USDA declines to change this provision.

Section 11.11 was added to the interim final rule to reflect the inherent authority of a decisionmaker under general principles of law to review his or her decisions to correct *errors*. These are errors (such as citation to the wrong dates, wrong amounts, wrong regulations, or wrong statutes), not changes of interpretations or opinions, and as such should be quickly detectable upon reading the determination and reviewing the record. A request for reconsideration under this provision should not require a great deal of time for research, and rarely should require additional time for gathering information and evidence since this is not another step in the appeal process.

Implementation

One commenter suggested that § 11.12(a) was vague about how implementation would occur, thus allowing agencies to obstruct the implementation process. The commenter suggested amending § 11.12(a) to incorporate the implementation language from the old National Appeals Staff rules of procedure (7 CFR 1900.59(d) (1–1–95)) that provided that implementation meant the taking of the next step by the agency that would be required by agency regulations if no adverse action had occurred.

USDA indicated in the preamble to the interim final rule its position that implementation meant taking the next step. However, that interpretation of implementation comes from the farm credit appeals system that is now under the auspices of NAD. NAD also reviews decisions related to farm programs, disaster assistance, soil and water conservation programs, and crop insurance. Given the variety of programs now covered by NAD that were not subject to the ''next step'' rule, USDA declines to adopt any express guidance regarding implementation at this time until experience with a unified appeals process provides a clear picture of what uniform implementation rule would work for all agencies under the jurisdiction of NAD.

Discrimination Complaints

One commenter suggested that NAD develop a process for consolidating program appeals with related civil rights complaints. USDA declines to adopt this suggestion. The rights and remedies available to NAD appellants under USDA statutes and regulations are much different than those available to individuals asserting discrimination claims against USDA under civil rights laws of governmentwide applicability. USDA already has a separate administrative process for review of discrimination complaints. NAD does not have the ability or capacity to undertake consolidated civil rights appeals that exceed the scope of the purpose for which it was established.

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.

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 revised 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 Commodity Credit Corporation (CCC);

(2) The Farm Service Agency (FSA);

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

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

(5) The Risk Management Agency (RMA);

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

(7) Rural Development (RD);

(8) The Rural Housing Service (RHS);

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

(10) A State, county, or area committee established under section 8(b)(5) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h (b)(5)); and

(11) Any predecessor or successor agency to the above-named agencies, and any other agency or office of the Department 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 decisionmaking 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. 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;

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

(11) Section 361, *et seq.*, of the Agricultural Adjustment Act of 1938, as amended (7 U.S.C. 1361, *et seq.*) involving Tobacco Marketing Quota Review Committees.

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, Pub. L. 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.

(a) Reserved.

(b) The Federal Rules of Evidence, 28 U.S.C. App., shall not apply to proceedings under this part.

§ 11.5 Informal review of adverse decisions.

(a) *Required informal review of FSA adverse decisions.* Except with respect to farm credit programs, 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 a 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 Agricultural 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 a 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 personally signed by the participant to the Director to review the determination in order to obtain such review by the Director.

(2) The Director shall determined 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 paragraph 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 determined 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 applicant 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 (subject to paragraph (c)(6)(ii) of this section), 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 Office 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 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 Assistant Directors of the Division. In any case in which such review is conducted by a Deputy or Assistant Director under authority delegated by the Director, the Deputy or Assistant 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.

§ 11.15 Participation of third parties and interested parties in Division proceedings.

In two situations, parties other than the appellant or the agency may be interested in participating in Division proceedings. In the first situation, a Division proceeding may in fact result in the adjudication of the rights of a third party, e.g., an appeal of a tenant involving a payment shared with a landlord, an appeal by one recipient of a portion of a payment shared by multiple parties, an appeal by one heir of an estate. In the second situation, a party may desire to receive notice of and perhaps participate in an appeal because of the derivative impact the appeal determination will have on that party, e.g., guaranteed lenders and reinsurance companies. The provisions in this section set forth rules for the participation of such third and interested parties.

(a) *Third parties.* When an appeal is filed, the Division shall notify any potential third party whose rights may be adjudicated of its right to participate as an appellant in the appeal. This includes the right to seek Director review of the Hearing Officer determination. Such third parties may be identified by the Division itself, by an agency, or by the original appellant. The Division shall issue one notice to the third party of its right to participate, and if such party declines to participate, the Division determination will be binding as to that third party as if it had participated. For purposes of this part, a third party includes any party for which a determination of the Division could lead to an agency action on implementation that would be adverse to the party thus giving such party a right to a Division appeal.

(b) *Interested parties.* With respect to a participant who is a borrower under a guaranteed loan or an insured under a crop insurance program, the respective guaranteed lender or reinsurance company having an interest in a participant's appeal under this part may participate in the appeal as an interested party, but such participation does not confer the status of an appellant upon the guaranteed lender or reinsurance company such that it may request Director review of a final determination of the Division.

Done at Washington, D.C., this 14th day of June 1999.

Dan Glickman,

Secretary of Agriculture.

[FR Doc. 99–15624 Filed 6–22–99; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Part 457

RIN 0563–AA85

Peanut Crop Insurance Regulations; and Common Crop Insurance Regulations, Peanut Crop Insurance Provisions; Correction

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule; Correcting amendment.

SUMMARY: This document is a correction to the final rule which was published Tuesday, June 9, 1998 (63 FR 31331–31337). The regulation pertains to the insurance of peanuts.

EFFECTIVE DATE: June 23, 1999.

FOR FURTHER INFORMATION CONTACT: Gary Johnson, Insurance Management Specialist, Research and Development, Product Development Division, Federal Crop Insurance Corporation, United States Department of Agriculture, 9435 Holmes Road, Kansas City, MO 64131, telephone (816) 926–7730.

SUPPLEMENTARY INFORMATION:

Background

The regulation subject to this correction provided policy changes to better meet the needs of the insured and include the current Peanut Crop Insurance Regulations with the Common Crop Insurance Policy for ease of use and consistency of policy terms and conditions.

Need For Correction

As published, the final regulation contained an error which may prove to be misleading and is in need of clarification. Section 9(a)(3) of the Basic Provisions (§ 457.8) states that acreage which is not replanted in accordance with that subsection is not insurable. Section 9(a) of the crop provisions contained in § 457.134 provides that acreage of the insured crop damaged before the final planting date must be replanted unless FCIC agrees replanting is not practical. Section 14(d) states that total production to count from all insurable acreage on the unit will include all appraised and harvested production. Subsection (e)(1)(v) of that section, in turn, provides that appraised production will include acreage which is not replanted in accordance with the policy. The latter provision may cause confusion because it implies that such acreage is insurable in direct conflict with section 9(a). Furthermore, it is unnecessary because production to count is only calculated based on insurable acreage under section 14(d). This correction is consistent with other crop provisions providing for replanting payments.

List of Subjects in 7 CFR Part 457

Crop insurance, Peanut.

Accordingly, 7 CFR part 457 is corrected by making the following correcting amendment:

PART 457—COMMON CROP INSURANCE REGULATIONS

1. The authority citation for part 457 continues to read as follows:

Authority: 7 U.S.C. 1506(1), 1506(p).

§ 457.134 [Corrected]

2. Amend the crop provisions in § 457.134 to remove section 14(e)(1)(v) and revise section 14(e)(1)(iv) to read as follows:

14. Settlement of Claim.

* * * * *

(e) * * *

(1) * * *

(iv) For which you fail to provide production records that are acceptable to us.

* * * * *

Signed in Washington, DC, on June 16, 1999.

Kenneth D. Ackerman,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 99–15940 Filed 6–22–99; 8:45 am]

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