

FLAG



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**Via Electronic Mail (Sent to: [beth.schuler@wdc.usda.gov](mailto:beth.schuler@wdc.usda.gov))**

Ms. Beth Schuler  
Natural Resources Conservation Service  
United States Department of Agriculture  
1400 Independence Avenue, SW., 103  
Washington, DC 20250

Dear Ms. Schuler:

Re: Comments on Interim Final Rule for Natural Resources Conservation  
Service Appeal Procedures, 71 Fed. Reg. 28,239 (May 16, 2006)

Farmers' Legal Action Group, Inc. (FLAG) submits these comments on behalf of the National Family Farm Coalition (NFFC) concerning the interim final rule published at 71 Fed. Reg. 28,239-28,248 (May 16, 2006).

NFFC represents 30 grassroots farm and rural advocacy organizations serving more than 30 states. The coalition was formed in 1986 to coordinate the efforts of a growing network of grassroots organizations concerned with maintaining a family farm system of food production. NFFC's work includes education, outreach, and advocacy for stable rural communities, safe food, and the preservation of natural resources through family farming. NFFC has long been interested in USDA's implementation of farm credit, disaster assistance, and conservation programs and the administrative review procedures available to participants in those programs.

FLAG is a nonprofit, public interest law center dedicated to the preservation of family farms. For two decades, FLAG has provided legal services to thousands of small and mid-sized family farmers throughout the nation in class action lawsuits,

administrative proceedings, public education initiatives, and legislative technical assistance involving agricultural credit and farm program issues and the administrative review processes for these programs.

### **In General, the Rule Includes Helpful Clarification of the Available Processes**

NFFC commends NRCS for the way the interim rule elaborates upon and clarifies the Agency's prior appeal regulations. This will help Agency personnel and program participants have a clearer understanding of the available processes and their requirements. This is especially true concerning the Agency's understanding of its good faith obligations in mediation and the relationship between the NRCS processes and participants' right to seek review by the FSA county committee. The organization of the rule is also clearer.

Despite these improvements, however, the rule does present some concerns. These comments discuss areas where the interim rule provisions appear to violate the Agency's statutory mandates or will needlessly confuse and/or discourage program participants.

### **Calculation of "Filing" Date Is Unreasonable, Inconsistent With NAD Rules of Procedure**

The definition of "appeal" at § 614.2(c) states that "[a]n appeal is considered filed when it is received by the appropriate NRCS official..." This determination of filing solely based on receipt by the Agency is inconsistent with the NAD Rules of Procedure<sup>1</sup> and the Agency's immediately policy under § 614.202,<sup>2</sup> both of which determine filing according to receipt by the Agency or postmark. The Agency has provided no rationale for the abandonment of this policy, and failed to even acknowledge that the interim rule reflects both a change in Agency policy and a departure from the NAD standard.

Moreover, the use of receipt to determine the end of the 30-day period for a participant to request review or mediation is inappropriate and highly susceptible to abuse. Participants have no ability to even learn when a request is "received" by the Agency, let alone prove or disprove it. The postmark-date requirement is clear and readily verifiable. Participants can reasonably be expected to know and demonstrate (if needed) when a request was mailed. For participants' review and/or mediation rights to be determined by when a federal agency (which is likely to be in an adversarial position) sorts its mail is completely arbitrary and cannot be said to provide due process. One modification that would be warranted would be to allow for filing a request by facsimile or electronic mail as those mechanisms become available for these procedures. In the interests of consistency, fairness to participants who have no control over when something is "received" (as opposed to when it is sent), and good government, the prior policy must be retained, and the same rule should also apply to mediation requests.

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<sup>1</sup> 7 C.F.R. § 11.14(a) (a document "will be considered 'filed' when delivered in writing to [NAD], when postmarked, or when a complete facsimile copy is received by [NAD]").

<sup>2</sup> 7 C.F.R. § 614.202(a) ("A request for an informal hearing shall be considered 'filed' when personally delivered in writing to the appropriate reviewing authority or when the properly addressed request, postage paid, is postmarked.").

### **No Statutory Authority to Require Participants to Choose Between an Informal Hearing or Mediation**

As the prefatory remarks to the interim rule discuss, the governing statute states that agencies “shall hold, at the request of the participant, an informal hearing” on an adverse decision.<sup>3</sup> That is, the participant must be offered an informal hearing administered by a deciding agency to review its own decision. The same statutory section states that, if there is an available USDA-certified mediation program in the state, “as part of the informal hearing process, the participant shall be offered the right to choose such mediation.”<sup>4</sup> That is, a participant’s right to mediate an agency’s adverse decision must be “part” of the informal hearing process offered by the agency. A deciding agency must always offer an informal hearing that is “held” by the agency itself. Mediation is not “held” by an agency and, thus, cannot satisfy the requirement of the first sentence of 7 U.S.C. § 6995.

Moreover, independent of the requirements at 7 U.S.C. § 6995, agencies within USDA are required by federal statute to participate in good faith in mediations conducted by USDA-certified mediation programs.<sup>5</sup> NRCS cannot claim to satisfy the mandate of good faith participation in mediation when it adopts rule language that purports to require participants to waive their statutory mediation rights if they want to ask the Agency to review its own decisions.

Thus, the governing statutes require deciding agencies to establish an informal hearing process available to all participants, at the participants’ request, and to offer mediation to all participants where a USDA-certified mediation program is available. The rule language at § 614.9 purporting to make participants choose between an informal hearing and mediation is contrary to these statutory mandates and must be amended. The Agency’s interest in “efficient resolution of disputes” as stated in the prefatory remarks, cannot override participants’ statutory rights to request an informal hearing and, where available, mediation by a USDA-certified program.

### **Confusing or Misleading Statements of Participants’ NAD Appeal Rights**

In prefatory remarks accompanying the interim rule, the Agency states that “this rule does not include the right of appeal to NAD which was included at § 614.204(c) in the current regulation since the participant will likely forgo that option by appealing to the State Conservationist.”<sup>6</sup> As the Agency surely knows, it has no authority to omit participants’ statutory NAD appeal rights simply because it believes that participants would be “likely” to forgo them. Participants’ NAD appeal rights must be clearly and fully set out in the rule and in all communications with participants regarding adverse decisions and any process under the rule.

The use of “or” to connect the participants’ options in §§ 614.8(b) and 614.9(a) confusingly suggests that exercising one process in the list precludes the use of others if the first is unsuccessful. The error of this structure is discussed above with respect to the statutory requirements for informal hearings and mediation. However, this structure also wrongly suggests that if a participant pursues

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<sup>3</sup> 7 U.S.C. § 6995 (emphasis added).

<sup>4</sup> 7 U.S.C. § 6995 (emphasis added).

<sup>5</sup> 7 U.S.C. § 5103(a).

<sup>6</sup> 71 Fed. Reg. 28,242 (2006).

FSA committee review (under § 614.8(b)) or an informal hearing or mediation (under § 614.9(a)), then the participant has waived NAD review. Since this is clearly contrary to participants' express statutory rights, this cannot be what the Agency intends. However, this is what a plain reading of the rule suggests. Presumably, the Agency intended to indicate that in lieu of pursuing any of these informal review steps, a participant can simply appeal directly to NAD. This must be stated much more clearly to eliminate any confusion on the part of Agency personnel or participants about the right of participants to appeal to NAD whether or not they pursue informal processes.

In § 614.6(b)(3) regarding appeal rights information to be included in each decision notice, the language "if applicable" at the end of the paragraph is inappropriate. NAD appeal rights are always applicable.

### **Mediation Requests Should Go Directly to the Mediation Program**

Under § 614.11(a), the Agency requires participants to submit requests for mediation to an Agency official, rather than have participants contact the mediation programs directly. NFFC questions the efficiency of adding another step in the process and funneling requests for a neutral mediation service through the Agency with whom the participants seek to mediate. In addition to adding complications and risk of error, this seems certain to have a chilling effect on participants who are too intimidated by or frustrated with Agency personnel to submit any kind of request to the Agency. Opportunities to resolve disputes are certain to be lost, and there has been no suggestion of what is to be gained, other than more paperwork. NFFC urges the Agency to continue the practice of directing participants to contact mediation programs directly to request mediation services. Of course, NFFC expects that state-specific adverse decision letters will continue to include the direct contact information for the state mediation program, if available.

### **Effect of Final Agency Consideration of Mediation Agreement Is Unclear**

NFFC is concerned that § 614.11(e)(3) of the interim rule provides no guidance regarding the timeframe for final approval by the appropriate Agency official of a mediation agreement, nor does it state what the next step will be if final approval of a mediation agreement is denied. Will the mediation resume, with direction from the final decision-maker about what the impediments were to approval? Or will the Agency consider the mediation "unsuccessful," despite the fact that those actually participating reached an agreement? Given the requirement that an issue may only be mediated once, due process would require that the mediation resume. The best use of resources and most respectful use of everyone's time would have the decision-maker present or available to be contacted during the mediation session(s).

### **Prohibition on Recordings Is Unreasonable**

Section 614.12(a) prohibits program participants from making recordings of a program decision hearing. Section 614.12(b) provides that any party to a program decision hearing may request that a verbatim transcript be made the official record of a proceeding – with the requester paying for the cost of the service and providing a free copy to NRCS. The Agency's prefatory remarks suggest that the intent of this provision is to state that "only verbatim transcripts may serve as official transcripts

of an NRCS hearing.”<sup>7</sup> But by prohibiting all recordings, the rule goes much farther than the Agency’s stated intent would reasonably require. Given that there can be no question that a participant’s personal recording could be considered the “official transcript” of a proceeding, NFFC cannot identify any purpose that might be served by the interim rule’s prohibition on personal recordings. What is the threat if a participant wishes to have a personal record of the hearing that doesn’t rely on memory or the ability to take detailed notes while also trying to be an active participant?

Although the prefatory remarks state that “this policy parallels NAD’s policy,”<sup>8</sup> this is plainly false. NAD hearings are always recorded.<sup>9</sup> In contrast, the interim rule prohibits all recordings.<sup>10</sup> If a party requests a copy of a NAD hearing tape, it is provided at no charge, so parties rarely, if ever, need bear the expense of obtaining a verbatim transcript.<sup>11</sup> Until the Agency is prepared to provide this low-cost alternative, there is no reasonable basis for prohibiting participants from making their own recordings for their own use.

#### **Notice to Participants of Appealability Review Is Required**

The Agency’s prefatory remarks state that “[§] 614.13 also informs the participant of the right to seek an appealability review from NAD.”<sup>12</sup> NFFC asks the Agency to confirm that it does not in fact intend to rely on the language of § 614.13 to “inform” participants but that it will directly inform a participant of the right to appeal to NAD a non-appealability decision when it notifies the participant of the decision itself.

#### **Resistance to Full and Prompt Implementation of Final NAD Decisions Is Contrary to Statutory Mandate**

As the Agency is aware, the NAD statute requires that

[o]n the return of a case to an agency pursuant to the final determination of [NAD], 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.<sup>13</sup>

This is reflected in the interim rule at § 614.15, which states that “[n]o later than 30 days after an agency decision becomes a final administrative decision of USDA, NRCS will implement the decision.” However, the prefatory remarks accompanying the interim rule state that

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<sup>7</sup> 71 Fed. Reg. 28,242 (2006).

<sup>8</sup> 71 Fed. Reg. 28,242 (2006).

<sup>9</sup> 7 C.F.R. § 11.8(c)(5)(iii) (2006).

<sup>10</sup> 7 C.F.R. § 614.12(a) (“No recordings shall be made of any hearing conducted under § 614.9.”)

<sup>11</sup> NAD Guide (Rev. 01/2004) at 33 (“The Hearing Officer, as presiding officer, begins the hearing with an opening statement that includes ... an announcement that the hearing is being recorded and that parties may request copies of the tape free of charge....”).

<sup>12</sup> 71 Fed. Reg. 28,242 (2006).

<sup>13</sup> 7 U.S.C. § 7000.

“[i]mplementation...must be initiated by the agency within the required period, but does not necessarily have to be completed within the 30 day period.”<sup>14</sup>

This statement is directly contrary to the definition of “implement” in the NAD statute as being

those actions necessary to effectuate fully and promptly a final determination of [NAD] not later than 30 calendar days after the effective date of the final determination.<sup>15</sup>

It is a “settled principle of statutory construction that [one] must give effect, if possible, to every word of [a] statute.”<sup>16</sup> And Congress is presumed to “intend[] the words in its enactments to carry ‘their ordinary, contemporary, common meaning.’”<sup>17</sup> It is nonsensical and disingenuous for the Agency to take a statutory definition of “implement” which uses the words “fully and promptly” and conclude that this means the action need not be completed. “Fully” can mean nothing else. The prefatory remarks must be repudiated as contrary to the explicit requirements of the NAD statute.

Certainly program funds can be limited, and, in such cases, NFFC expects that the Agency will do what it would have done had funds been unavailable at the time of an original, favorable decision: put the participant’s name next on the list of those who will receive the benefit when funds become available. There is nothing in that truism to justify the Agency giving itself a blanket waiver of the statutory mandate.

#### **Notice to Participants of Appealability to NAD of Denial of Equitable Relief Is Required**

The Agency’s prefatory remarks note that participants do not have the right to seek appeal within NRCS or judicial review of Agency decisions on equitable relief requests.<sup>18</sup> However, participants have an explicit statutory right to appeal to NAD the denial of equitable relief.<sup>19</sup> The rule, along with the Agency’s directives to its personnel and communications with participants, must clearly set out this right.

#### **Clear, Complete, and Accurate Notices to Participants Are of Paramount Importance**

The effectiveness of the Agency’s informal appeals process depends on a participant’s understanding of how to access that process and the participant’s belief that the process will be fair. NFFC cannot state strongly enough how important it is that notices to participants regarding informal appeal, mediation, and NAD appeal rights be clear, complete, and absolutely accurate. Notices must be written so that a participant can understand all of the review opportunities

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<sup>14</sup> 71 Fed. Reg. 28,244 (2006).

<sup>15</sup> 7 U.S.C. § 6991(8) (emphasis added).

<sup>16</sup> Bowsher v. Merck & Co., 460 U.S. 824, 833 (1983).

<sup>17</sup> Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 388 (1993) (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)).

<sup>18</sup> 71 Fed. Reg. 28,242 (2006).

<sup>19</sup> 7 U.S.C. § 6991(a) (“The term [‘adverse decision’] includes a denial of equitable relief by an agency....”); 7 U.S.C. § 6998(d) (the NAD Director “...shall have the authority to grant equitable relief ... in the same manner and to the same extent as such authority is provided to the Secretary under [7 USCS § 7996] and other laws....”)

available, the requirements for pursuing each, and the effect of pursuing one opportunity on another/others (i.e., waiver, delay, tolling, starting over).

One piece of information that is not spelled out in the interim rule is how pursuing mediation will affect a participant's rights to seek further informal review. The stay of the period to request a NAD appeal while mediation is open is codified in the NAD Rules of Procedure,<sup>20</sup> but the effect on a participant's right to seek review by the FSA county committee, for example, is unclear.

NFFC does not suggest that composing the necessary notices is an easy undertaking, but it is absolutely necessary. If adverse decision notices give participants an incomplete or erroneous understanding of their appeal rights, many are going to be blindsided by unanticipated time limits, waivers of rights, and missed opportunities. Not only would this be a denial of participants' due process rights, the resulting resentments, suspicions, and pessimism will raise serious concerns about the entire process.

Thank you for your consideration of these comments.

Sincerely,

FARMERS' LEGAL ACTION GROUP, INC.

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cc: Kathy Ozer, NFFC

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<sup>20</sup> 7 C.F.R. § 11.5(c).