

74 FR 57401-01, 2009 WL 3667050(F.R.)
RULES and REGULATIONS
DEPARTMENT OF AGRICULTURE
Office of the Secretary
7 CFR Part 11
RIN 0503-AA38

National Appeals Division Rules of Procedure; Applicability of
Equal Access to Justice Act and Administrative Procedure Act

Friday, November 6, 2009

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

***57401 ACTION:** Final rule.

SUMMARY: This document amends the National Appeals Division rules of procedure to reflect recent judicial rulings regarding the applicability of the Equal Access to Justice Act and the Administrative Procedure Act to National Appeals Division administrative proceedings. The rules of procedure are amended to provide that the provisions of the Administrative Procedure Act generally applicable to agency adjudications, and the Equal Access to Justice Act and its implementing regulations, shall apply to National Appeals Division hearings.

DATES: Effective Date: November 6, 2009.

FOR FURTHER INFORMATION CONTACT: Adam J. Hermann, Attorney-Advisor, General Law Division, Office of the General Counsel, United States Department of Agriculture, STOP 1415, 1400 Independence Ave., SW., Washington, DC 20250, (202) 720-5565.

SUPPLEMENTARY INFORMATION: USDA is amending the National Appeals Division (“NAD”) rules of procedure in 7 CFR part 11, subpart A, to reflect judicial rulings in four Circuits regarding the applicability of the Equal Access to Justice Act (“EAJA”), [5 U.S.C. 504](#), and by extension, the Administrative Procedure Act (“APA”), to NAD proceedings.

Prior to publication of this final rule, the position of USDA was that EAJA ([5 U.S.C. 504](#)) and the provisions of the APA applicable to formal adjudicative proceedings ([5 U.S.C. 554-557](#)) did not apply to NAD proceedings except where required by judicial ruling. See [64 FR 33367, 33368 \(June 23, 1999\)](#). At that time, only one U.S. Circuit Court of Appeals—the 8th—had issued a decision holding that EAJA applies to NAD proceedings. See [Lane v. USDA, 120 F.3d 106 \(8th Cir. 1997\)](#).

Since then, the 7th and 9th Circuits also have issued decisions holding that EAJA applies to NAD proceedings. See [Five Points Rd. Joint Venture v. Johanns, 542 F.3d 1121 \(7th Cir. 2008\)](#); [Ageson Grain & Cattle v. USDA, 500 F.3d 1038 \(9th Cir. 2007\)](#). Additionally, on May 1, 2009, a U.S. District Court in the 5th Circuit entered a decision following the 7th, 8th, and 9th Circuits. See [Rosenbaum v. USDA, No. 07-02808 \(S.D. Tex. May 1, 2009\) \(final judgment\)](#).

In light of the decisions in these four Circuits, USDA is no longer maintaining the position that the APA and EAJA do not apply to NAD proceedings except where required by judicial ruling. Effective immediately, EAJA and USDA's implementing regulations at 7 CFR part 1, subpart J, will apply universally to NAD proceedings regardless of the judicial Circuit in which the proceeding arises. While the four decisions cited above addressed only the issue of whether EAJA applies to NAD proceedings, the applicability of EAJA is derivative of the applicability of the APA and thus, by extension, the court rulings apply to the applicability of the APA as well. Therefore, the provisions of the APA generally

applicable to agency adjudications (5 U.S.C. 554-557) also will apply generally to NAD proceedings regardless of the judicial Circuit in which the proceeding arises. However, it is the position of USDA that the applicability of the APA does not require any changes to existing NAD administrative procedures.

This final rule applies to proceedings conducted under 7 CFR part 11, except for proceedings under § 11.5 (USDA agency informal reviews of adverse decisions) and § 11.6(a) (NAD Director reviews of USDA agency determinations of appealability).

Classification

This rule relates to internal agency management. Accordingly, pursuant to 5 U.S.C. 553, notice of proposed rulemaking and opportunity for comment are not required, and this rule may be made effective less than 30 days after publication in the Federal Register. This rule also is exempt from the provisions of Executive Order 12866. This action is not a rule as defined by the Regulatory Flexibility Act, Public Law 96-354, and the Small Business Regulatory Fairness Enforcement Act, 5 U.S.C. 801 et seq., and thus is exempt from the provisions of those Acts. This rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

List of Subjects in 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.

Accordingly, Title 7 of the Code of Federal Regulations is amended as set forth below:

PART 11-NATIONAL APPEALS DIVISION

1. The authority for part 11 continues to read as follows:

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

Subpart A-National Appeals Division Rules of Procedure

7 CFR § 11.4

2. Amend § 11.4 by revising the section heading and adding paragraph (a), to read as follows:

7 CFR § 11.4

§ 11.4 Other laws and regulations.

(a) The provisions of the Administrative Procedure Act generally applicable to agency adjudications (5 U.S.C. 554-557), and the Equal Access to Justice Act (5 U.S.C. 504) and its implementing regulations at 7 CFR part 1, subpart J, shall apply to proceedings under this part except for proceedings under § 11.5 and § 11.6(a).

* * * * *

*57402 Done at Washington, DC, this 2nd day of November 2009.

Thomas J. Vilsack,

Secretary of Agriculture.

[FR Doc. E9-26747 Filed 11-5-09; 8:45 am]

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