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# Agriculture exemption upheld: hog operation not subject to county zoning

In a much anticipated, and potentially important, decision, the Iowa Supreme Court in *Thompson v. Hancock County*, No. 264/94-692, filed Oct. 25, 1995, ruled a hog confinement facility was not subject to the Hancock County zoning ordinance under the exemption to county zoning found in Iowa Code section 335.2 (1995). The ruling is important for what it says about when the agricultural exemption in county zoning might apply to protect many modern hog operations from local regulations. But the ruling is also important for what it says about when the exemption may not apply and counties can zone livestock operations. In addition, the case is significant because several statements made by the court may have unintended, or at least unexpected, consequences for the application of other important laws dealing with Iowa agriculture.

The Thompsons have been farming in Hancock County since 1973. They own a forty-acre "home place" and rent an additional 577 acres of land for grain production. They also operate a farrow-to-finish hog operation on the home place, farrowing 225-250 sows and producing between 4,200-5,000 fat hogs a year. The controversy arose when the Thompsons announced plans to expand their operation by building five 900-head confinement buildings on the homeplace. Their plan was to feed pigs under contract for the Land O'Lakes cooperative. Under the contract, which was to run until June 2003, Land O'Lakes would own the hogs, and the Thompsons would be paid a fee for their services. Under the applicable county zoning ordinances the proposed confinement buildings did not qualify for construction. The county board of supervisors refused to apply the agricultural exemption to the zoning ordinance to the proposed facility. The county's decision was based both on the fact the operation was a contract production facility rather than a traditional production operation and on the Iowa Supreme Court's earlier ruling in *Farmegg Prods., Inc. v. Humboldt County*, 190 N.W.2d 454, 457-58 (Iowa 1971), which limited application of the agricultural exemption when "commercial" agricultural operations are involved.

The Thompsons took the dispute to the district court, which ruled both that the board of adjustment did not have authority to intervene in the supervisor's decisions, but more importantly, that the operation was exempt. On appeal, the Iowa Supreme Court considered three issues: 1) the county's authority to zone agricultural operations, 2) the agricultural exemption in section 335.2, and 3) the effect of section

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# State law claims for defective vaccines preempted by federal law

A federal district court in Kansas has ruled that regulations adopted by the USDA's Animal and Plant Health Inspection Service (APHIS) preempted a cattle feeder's common law claims against a animal vaccine manufacturer for losses allegedly caused by defective vaccines. *Murphy v. Smithkline Beecham Animal Health Group*, 898 F. Supp. 811 (D. Kan. 1995). Specifically, the APHIS regulations, which were adopted pursuant to the Virus-Serum-Toxin Act, 21 U.S.C. §§ 151-159, were held to preempt the cattle feeder's state law claims for breach of implied warranty, false advertising, fraudulent misrepresentation, negligence, and failure to warn of dangers associated with the vaccines.

The cattle feeder had sued the SmithKline Beecham Corporation, alleging that two of its vaccines, BoviShield 4 and BoviShield 4+L5, had "induced or failed to prevent debilitating and mortal infections and diseases" in his cattle. *Murphy*, 898 F. Supp. at 813. Both vaccines had been licensed by the USDA in 1988, and the cattle feeder had administered them to his cattle in late 1993. *Id.*

In response to the lawsuit, SmithKline Beecham moved for summary judgment in

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172D.4(1) (nuisance protection for feedlots) on the agricultural exemption in section 335.2.

The first issue the court addressed concerns whether or not an amendment to Iowa Code Chapter 172D, a right-to-farm nuisance protection for feedlots, provided an independent basis for the county to zone the Thompson's hog confinement operation. The provision, in section 172D.4(1) reads:

> A person who operates a feedlot shall comply with applicable zoning requirements. The applicability of a zoning requirement shall be as provided in subsection 2 of this section. A person complies with this section as a matter of law where no zoning requirement exists.

The section has been a concern for parties who argue livestock feeding operations are exempt from county zoning, but the typical theory has been this subsequent law did not authorize such ordinances if chapter 332 on county zoning was not so amended. Support for such a view arguably had been found in another provision, in section 172D.1(15) defining zoning ordinances, which reads "Nothing in this chapter shall be deemed to empower any agency described in this subsection to make any regulation or ordinance." The theory was that this provision clarified that Chapter 172D did not provide an independent basis for county zoning of agricultural operations. However, when the court confronted this argument in *Thompson*, it ruled "Notwithstanding the hog producers' argument to the contrary, we do not believe that the quoted language in any way restricts the power of counties to enact zoning regulations under the general authority contained in Iowa Code chapter 331." The court went on to say that "ordinances enacted pursuant to this authority, however, may be subject to applicable exemptions found elsewhere in the Code." The court's reference to Chapter 331 of the Code, the chapter on "County Home Rule Implementation," is somewhat puzzling, as the authority for county zoning comes from Chapter 335, an express grant, and not from the general home rule powers of the county. (See section 331.304(6), which notes that "The power to adopt county zoning regulations shall be exercised in accordance with chapter 335.")

The central issue in *Thompson* concerned how the court would apply the language of the agricultural exemption to the modern, large-scale, contract production operation being proposed by the Thompsons. The section provides:

> Except to the extent required to implement section 335.27, no ordinance adopted under this chapter applies to land, farm houses, farm barns, farm buildings or other buildings or structure which are primarily adapted, by reason of nature and area, *for use for agricultural purposes*, while so used. However, the ordinances may apply to any structure, building, dam, obstruction, deposit or excavation in or on the flood plains of any river or stream.

Iowa Code section 335.2 (1995)(emphasis added by the court.)

The court began its analysis on the issue by noting that in determining "what are agricultural purposes within the scope of this exemption, we have concluded that agriculture is the art or science of cultivating the ground, including harvesting of crops and rearing and management of livestock" (citing *Farmegg Prods.*). The court noted this definition has been held to exempt "facilities to be used in connection with agricultural functions" (citing *DeCoster v. Franklin County*, 497 N.W.2d 849, 853 (Iowa 1993)).

The court then reviewed the facts of the Thompson's operations, noting the following features: they have farmed some portion of this land for over twenty years; they have other types of livestock in addition to hogs; they raise crops on the land in part for feeding the hogs; they own machinery for planting and harvesting crops and for spreading manure; they have grain storage for over 16,000 bushels of grain; and the operation is an expansion of the livestock operation they have carried on for a number of years. Based on these features, the court reached the following conclusion:

> We are convinced that the challenged hog confinement facilities are part of the evolving agricultural functions associated with a particular farming operation. As such, these facilities enjoy the exemption from county zoning ordinances provided in section 335.2.

The third issue considered by the court was the interplay between the agricultural exemption of section 335.2 and the apparent requirement for feedlots to comply with county zoning, contained in section 172D.4(1). The court noted the provision of section 172D.4(1) was added to the Iowa Code effective November 1, 1976, while the provision of section 335.2 was first enacted in 1947. The county had argued that as a result of this timing, the more specific and later provision of section 172D.4(1) "supersedes and overrides" the general exemption statute. The court answered this claim in a way that resolved the issue before it but that also raised serious problems for other agricultural feedlots, such as open cattle feedlots, which had until this case believed they were exempt from county zoning. The court stated:

> Although we find that argument to be persuasive, it does not avail the appellants much unless the proposed hog confinement facilities in the present case meet the definition of feedlot used in section 172D.4(1).

The court observed that the definition of feedlot, found in section 172D.1(6), is "a lot, yard, corral or other area in which livestock are confined primarily for purposes of feeding and growth prior to slaughter." The county had argued that the confinement buildings in question fit within the "other area" language of the definition, but the court disagreed. The court looked to the Webster definition of "area" and ruled "This definition only extends to open land areas and does not include enclosed structures." The court opined that the same result would be reached by applying the rule of statutory interpretation that "when specific words of the same nature are used in the statute followed by the use of general ones, the general terms take their meaning from the specific ones and are restricted to the same genus." (citations omitted). The court reasoned that the words "lot, yard, corral"

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all refer to outdoor or open-air facilities, thus the "other area" language must be so limited as well. The court concluded that, "Consequently, nothing contained in section 172D.4(1) abrogates the exempt status of the challenged facilities under section 335.2."

The case is a strong ruling that many livestock operations, especially those in a traditional farming system, are exempt from county zoning. Having said that, it is important to note the case does not say that counties have no power to regulate livestock feeding operations. In fact, in some ways the opinion provides strong support for such zoning efforts, in at least two cases. By refusing to, or at least not accepting the opportunity, to overturn the language of *Farmegg*, the court left in place the judicial basis for counties to determine when an agricultural operation no longer qualifies for the exemption. The lengthy enumeration of facts concerning the Thompson's operation may in fact serve as a check list for which factors support application of the exemption. Conversely to the extent a livestock feeding operation does not fit that definition, the potential for county zoning is increased. This is especially true, given the court's statement that it found the argument that section 172.4(1) "supersedes and overrides" section 335.2 to be "persuasive." In other words, the court appears to have ruled that as long as what is involved is a feedlot, the county can zone it.

First, the converse implication of the court's ruling that confinement operations do not fit within the protection of Chapter 172D because they are not feedlots is to remove any claim of that nuisance defense for such operations. Iowa livestock producers have operated under the belief that Chapter 172D provided them with an absolute defense in a nuisance suit as long as their operation predated the other party's ownership and complied with applicable regulations. The *Thompson* ruling indicates such reliance is misplaced at least for those thousands of producers, primarily raising swine, who have confinement buildings rather than open feedlots. The ruling on the definition of what is a feedlot, while perhaps "accurate" from a legislative interpretation perspective, creates its own set of potential difficulties because of how such a narrow reading of "feedlot" applies to other laws using the same definition. Most notably, consider the language of Chapter 9H, the Iowa law restricting corporate ownership of farmland and prohibiting packer feeding of livestock. The definition of "feedlot" in section 9H.1(12) uses the same "lot, yard, corral, or other area" language interpreted in *Thompson*. But consider how the court's reading of the provision to not include confinement operations for hogs would apply in the context of section 9H.2. This provision, commonly known as the ban on packer and processor feeding of livestock, provides that it is "unlawful for any processor ... to own, control, operate a feedlot in Iowa in which hogs or cattle are fed for slaughter." In other words, the court's ruling now means that large meat processors, such as Iowa Beef Processors (IBP), can own as many hog confinement facilities and the pigs in them as it wants to. The only possible limitation is whether the general restriction on corporate ownership of farmland in section 9H.4 might block such activities by a corporate processor such is IBP. But for other processors, which are not incorporated or otherwise exempt from section 9H.4, they can now apparently own and feed their own pigs — that is at least until the state legislature reconsiders whether to close this newly opened loophole.

In conclusion, the court's opinion no doubt satisfied the task before it in resolving the dispute between the Thompsons and Hancock County. For similarly situated producers, even those constructing large operations as part of an integrated contract production arrangement, the opinion offers some protection from county zoning. But the opinion does not provide the clarity its supporters have claimed concerning the lack of any residual power for counties to zone livestock operations. From the perspective of livestock producers, who generally oppose such local regulation, the court's decision raises troubling implications concerning how county zoning ordinances can now apply to open feedlots. Similarly, for producers who raise livestock in confinement, the opinion has placed in doubt the availability of a nuisance suit defense, which has been on the law books for over twenty years. It is clear the ruling in Thompson, while important, has not written the last chapter in the debate over the power of local governments to zone livestock production.

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*Defective vaccines/Continued from page 1*

its favor on the grounds that the Virus-Serum-Toxin Act gave APHIS preemptive authority to regulate the labeling and the "safety, efficacy, potency, or purity" of domestic animal vaccines. The court granted the motion, relying in part on *Lynnbrook Farms v. Smithkline Beecham Corp.*, 887 F. Supp. 1100 (C.D. Ill. 1995), which also had held that the APHIS regulations preempted state law.

The court also independently examined whether the APHIS regulations preempted state law. It applied a three-step analysis that first examined whether Congress had expressly or implicitly authorized APHIS to preempt state law. After concluding that Congress' broad delegation of authority to APHIS to make regulations implementing the Virus-Serum-Toxin Act implicitly empowered APHIS to preempt state law, the court also concluded that the agency's regulations were expressly intended to have that effect. *Murphy*, 898 F. Supp. at 815-16.

Finally, the court rejected the cattle feeder's arguments that the regulations only preempted "positive enactments" such as state regulatory schemes. It held that enforcement of the state common law claims would effectively impose requirements that were different from, or in addition to, those imposed by the APHIS regulations regarding the "safety, efficacy, potency, or purity of a product" and would thus come within the scope of the regulation's preemptive effect. *Id.* at 818 (quoting 57 Fed. Reg. 38,758, 38,759 (1992)). Accordingly, it ruled that APHIS's authority to preempt state law extended to state common law claims for damages allegedly caused by defective domestic animal vaccines. Although the court expressed its "regrets" that its decision left the cattle feeder without a legal remedy, the court concluded that Congress and APHIS had not given it an alternative. *Id.*

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# Federal Register *in brief*

The following is a selection of items that were published in the *Federal Register* from October 16 to November 21, 1995.

1. Farm Credit Administration; Loans in areas having special flood hazards; proposed rule; comments due 12/18/95. 60 Fed. Reg. 53962.

2. CCC; Extension of maturing 1994 and subsequent crop year wheat and feed grain price support loans; proposed rule; comments due 12/4/95. 60 Fed. Reg. 55807.

3. CCC; Market Promotion Program; fiscal year 1996. 60 Fed. Reg. 56316.

4. FCIC; Hybrid seed crop insurance regulations; final rule; effective date 11/30/95. 60 Fed. Reg. 55781.

5. USDA; Revision of delegations of authority; effective date 11/8/95. 60 Fed. Reg. 56206.

6. Consolidated Farm Service Agency; NAFTA; End-Use Certificate Program; proposed rule; comments due 12/14/95. 60 Fed. Reg. 57198.

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# Persistent implementation problems under USDA NAD

By Christopher R. Kelley and Susan A. Schneider

In October 1994, for the second time in four years, Congress changed the administrative appeal process for federal farm program disputes by repealing the ASCS NAD and creating the USDA National Appeals Division (USDA NAD).[1] Although this Congressional directive came over a year ago, the creation of USDA NAD by the Department of Agriculture has been neither prompt nor without controversy. The Secretary of Agriculture has not yet promulgated final regulations,[2] and only recently was a permanent USDA NAD Director finally appointed.[3] This lack of guidance has been exacerbated by resistance to the system on the part of persons within the subject agencies, most notably the Consolidated Farm Service Agency (CFSA). Nevertheless, USDA NAD has been functioning for much of the last year. Although the NAD regional directors and the hearing officers have performed admirably, the lack of regulatory guidance combined with agency resistance has resulted in numerous systemic problems. This article discusses some of these problems and provides suggestions for their resolution.

**Administrative appeals covered under USDA NAD**

The USDA NAD was created by the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (USDA Reorganization Act).[4] Intended to be an "independent" appeal authority,[5] the USDA NAD now hears final administrative appeals from the following USDA agencies and committees:

- CFSA (the successor to the Agricultural Stabilization and Conservation Service (ASCS), Federal Crop Insurance Corporation (FCIC), and the Farmers Home Administration (FmHA));[6]
- Commodity Credit Corporation (CCC);[7]
- Farmers Home Administration (FmHA);
- Federal Crop Insurance Corporation (FCIC);
- Rural Development Administration (RDA);[8]
- Natural Resources Conservation Service (NRCS) (successor to the Soil Conservation Service (SCS));[9] and
- the state, county, and area committees established under the Soil Conservation and Domestic Allotment Act.[10]

Participants in the programs administered by these agencies and committees are now required to exhaust their administrative remedies by appealing to the USDA NAD before seeking judicial review.[11]

Concerning FCIC appeals, it appears that the USDA NAD has the authority to review only decisions specifically made by FCIC. The definition of "adverse decision" for the purposes of appealability is limited to decisions made by "an officer, employee, or committee of an agency."[12] Thus, the right to an appeal should not extend to decisions made by an approved private insurance provider, even if that insurance provider is re-insured through the FCIC. Rather, appeal rights should extend only to adverse decisions made directly by the FCIC. This will include decisions made by the FCIC under programs such as the Non-insured Disaster Assistance Program.[13] It will not, however, include decisions made by private insurance providers. Disputes with private insurance providers will continue to be contested through the arbitration process set forth in the farmer's crop insurance contract.

The Act contains specific provisions that govern the appealability of technical determinations made by the NRCS. Prior to the Act's enactment, technical determinations made by the SCS could he appealed through the SCS's administrative appeal process. In the meantime, the SCS determinations were binding on the ASCS.[14] The Act deals with the appeal of NRCS technical determinations and the CFSA's reliance on those determinations in the following manner:

> (1) IN GENERAL.— Until such time as an adverse decision described in this paragraph is referred to the National Appeals Division for consideration, the Consolidated Farm Service Agency shall have initial jurisdiction over any administrative appeal resulting from an adverse decision made under title XII of the Food Security Act of 1985 (16 U.S.C. 3801 et seq.), including an adverse decision involving technical determinations made by the Natural Resources Conservation Service.
>
> (2) TREATMENT OF TECHNICAL DETERMINATION.— With respect to administrative appeals involving a technical determination made by the Natural Resources Conservation Service, the Consolidated Farm Service Agency, by rule with the concurrence of the Natural Resources Conservation Service, shall establish procedures for obtaining review by the Natural Resources Conservation Service of the technical determinations involved. Such rules shall ensure that technical criteria established by the Natural Resources Conservation Service shall be used by the Consolidated Farm Service Agency as the basis for any decisions regarding technical determinations. If no review is requested, the technical determination of the Natural Resources Conservation Service shall be the technical basis for any decision rendered by a county or area committee estahlished under section 8(b)(5) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. § 590h(b)(5))....[15]

**The USDA NAD process**

Under the Act, the Secretary is required to notify affected program participants of the decision and their appeal rights within ten working days of an adverse decision.[16] To be entitled to a hearing before the USDA NAD, the aggrieved participant must "request the hearing not later than 30 days after the date on which the participant first received notice of the adverse decision."[17]

The phrase "first received notice" is potentially problematic since it may include oral notice of the decision or some other notice received before the written adverse decision was received. The proposed regulations do not resolve the potential uncertainties. Instead, they make matters worse with the following requirement:

> 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 should have known that the agency had not acted within the time frames specified by agency program regulations, or, where such regulations specify no time frames, not later than 30 days after the participant reasonably should have known of the agency's failure to act.[18]

This proposed regulation is an invitation for confusion and needless disputes, and it is patently unfair to program participants. An agency's failure to take an action as required by a statute or by its own regulations should be a continuing violation, appealable at any point in time prior to agency action.

An adverse decision is broadly defined under the Act to mean:

> 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

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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.[19]

When an appellant requests a hearing, the hearing must be held within forty-five days.[20] The hearing is to be held in the state of the appellant's residence or at another location convenient to the appellant and the USDA NAD.[21] An appellant may waive the right to a personal hearing and conduct the hearing either by telephone or on the basis of the existing case file.[22]

USDA NAD hearings are conducted by hearing officers. The hearing officers are given a right of access to the case record developed in the administrative proceedings leading to the appeal[23] and the authority to issue subpoenas and administer oaths and affirmations.[24] Hearings are *de novo*, at least as to the facts supporting the decision under review.[25] The appellant bears the burden of "proving that the adverse decision of the agency was erroneous."[26]

Hearing officer decisions are appealable to the Director; otherwise, they are administratively final.[27] Program participants have thirty days within which to appeal a hearing officer's decision to the Director.[28] Agency heads may also appeal, but they are subject to a fifteen-business day limit.[29]

When a program participant appeals a hearing officer's decision to the Director, the Director has the authority to uphold, reverse, or modify the decision. Alternatively, if the Director determines that the hearing record is inadequate, all or a portion of the decision can be remanded for a new hearing. In the case of a producer's request for review, the Director is to complete the review within 30 business days.[30] When an agency appeals, that limit is shortened to 10 business days.[31] The Director's review is based on the record developed before the hearing officer, "the request for review, and such other arguments or information as may be accepted by the Director."[32]

The USDA Reorganization Act specifically requires hearing officers and the Director to base their determinations "on information from the case record, laws applicable to the matter at issue, and applicable regulations published in the Federal Register. . . ."[33] While it may seem unremarkable to require that determinations be based on statutory law and duly promulgated regulations, the requirement represents a departure from past ASCS NAD and DASCO practices. Until the last several months of the ASCS NAD's existence, the ASCS NAD, as had DASCO, made determinations based on ad hoc rules or *ASCS Handbook* directives without consistent regard to whether the ad hoc rules or directives were authorized by, or consistent with, the agency's duly promulgated regulations.[34]

Many, if not most, federal farm program administrative appeals involve requests for administrative equitable relief under 7 C.F.R. Parts 790 or 791 or comparable regulations.[35] Through its broad definition of "adverse decision," the USDA Reorganization Act gave USDA NAD hearing officers the authority to address the issue of equitable relief. Moreover, in response to previous debates over the authority of the ASCS NAD Director to grant equitable relief, the Act specifically gives the USDA NAD Director this authority.[36] Significantly, the Act also provides as follows:

> Notwithstanding the administrative finality of a final determination of an appeal by the Division, the Secretary shall have the authority to grant equitable or other types of relief to the appellant after an administratively final determination is issued by the Division.[37]

Under this provision, agencies appear to be free to settle disputes with program participants.

### Implementation Problems

Despite the specificity of the USDA NAD provisions of the USDA Reorganization Act, controversy has surrounded its implementation. Unfortunately, much of this controversy may stem from a basic unwillingness on the part of former ASCS agency personnel to implement the statute as written. The following recurring problems evidence this unwillingness and raise some practical examples of potential difficulties to anticipate in the USDA NAD process.

**· Certain farmers were denied their rights to an evidentiary hearing.**

A number of farmers had appeals that were pendiug as of October 13, 1995, the date the USDA Reorganization Act became effective. Similarly, a number of farmers received adverse decisions from the CFSA shortly thereafter. In both circumstances, farmers with appeals that involved farm program disputes received hearings that were conducted under the previous appeal system. They were neither given the evidentiary hearing required by the Act, nor allowed to have a hearing held in their home state, nor notified of their rights under the new statute.[38] In at least some cases, these farmers requested a hearing under the new NAD and were denied.[39]

The proposed regulations acknowledge that farmers had immediate rights to the new appeal process, although the regulations consider the effective date to be October 20, 1995, the date that the Secretary implemented the reorganization authority and created USDA NAD.[40] The regulations do not, however, provide for any notice to farmers nor do they acknowledge that appeals were conducted after that date under the old system.

**· There is no provision for mediation in current USDA NAD procedures, and CFSA refuses to mediate farm program matters.**

The Act expands the categories of disputes to be mediated under the certified state mediation programs to include farm program compliance matters.[41] If mediation is available, program participants must be offered the right to chose mediation.[42] As of this writing, however, this provision of USDA NAD has yet to be implemented with regard to farm programs.

The proposed regulations provide that participants have the right "to utilize any available alternative dispute resolution or mediation program . . . prior to any appeal . . . to the Division [USDA NAD]. . . ." 60 Fed. Reg. 27,044, 27,046 (1995) (to be codified at 7 C.F.R. § 11.5(b)) (proposed May 22, 1995). A number of agencies have participated in certified mediation programs when requested by the farmer. However, the CFSA has refused to mediate farm program disputes on the grounds that it does not have procedures in place to mediate.[43]

**· There is an attempt to allow consideration of unpublished agency policy.**

As noted previously, the USDA Reorganization Act limits the USDA NAD's decision-making by specifying that USDA NAD determinations are to be based on "laws applicable to the matter at issue, and applicable regulations published in the Federal Register . . . ."[44] The proposed regulations, however, eviscerate that command. Proposed 7 C.F.R. § 11.9(b) purports to add a third rule of decision by requiring USDA NAD determinations to be based on "the generally applicable interpretations of such laws and regulations."[45] Because the primary evidence of such interpretations is contained in those agencies' respective internal operating manuals or "handbooks," proposed section 11.9(h) is a transparent attempt to bind the USDA NAD and the parties before it to directives contained in manuals and handbooks such as the *ASCS Handbook* (presumahly now the *CFSA Handbook*).

Thus, proposed section 11.9(b) gives agency "interpretations" the same status as agency legislative (suhstantive) rules

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without requiring the promulgation and publication of those interpretations under the Administrative Procedure Act (APA). In requiring the USDA NAD to base its decisions on agency "interpretations," proposed section 11.9(b) binds the Secretary to rules that otherwise would not be binding on either the USDA or program participants. For example, the *ASCS Handbook* heretofore has been held not to be binding on the Secretary.[46] In other contexts, courts such as United States Court of Appeals for the District of Columbia Circuit have held, albeit not always consistently, that an agency's interpretive rules and statements of policy are not binding on the agency.[47]

By making agency "interpretations" controlling, proposed section 11.9(b) converts what should be no more than an agency argument on behalf of its decision to the result. In other words, proposed section 11.9(b) places the agency's thumb on the scales and dictates that the agency's "interpretation" of its regulations always wins before the USDA NAD.

In addition to being fundamentally unfair, proposed section 11.9(b) is neither authorized by, nor consistent with, the USDA Reorganization Act. The Act's very specific language was enacted for the purpose of preventing the USDA NAD from basing its decisions on rules found only in the agencies' internal operating manuals or on rules that exist only in the minds of program administrators. The reason for doing this did not emerge from thin air. The CFSA and one of its predecessor agencies, the ASCS, has a notorious and discredited practice of relying on unwritten rules or rules that appear only in the *ASCS Handbook*.[48] As participants in some of the Act's drafting, the authors have personal knowledge that this purpose was openly and frequently discussed during the drafting of, and deliberations on, the Senate and House bills that evolved into the USDA NAD legislation.

**· The director review process as currently conducted undermines the authority and the autonomy of NAD.**

By and large, farmers have reported that NAD evidentiary hearings have been conducted with the utmost concern for fairness. The opposite, however, has been reported regarding the Director review process. The following problems have been observed:

1) When an agency's determination is reversed by a hearing officer, that agency has the right to request a review by the Director. When CFSA has made this request, additional and sometimes erroneous factual information has been submitted to the Director by the CFSA along with the request for a review. Similarly, additional and sometimes insupportable legal arguments are made with this request.

2) As inferred above, the farmer may not be given notice of the appeal itself and may not be given access to the information submitted by the agency. This presents another problem with the review process and the submission of additional information. Arguably, this constitutes ex parte communication in violation of the Act.

3) Inconsistency in decision-making on review has been observed. In several cases where the facts and the evidence presented were essentially identical, the agency decision was reversed by the NAD hearing officer. On review, one case was affirmed, and one was reversed.

**· There is a risk that the appropriate standard of review and burden of proof may not be used in the NAD process.**

The proposed rules correctly state that the farmer will have "the burden of proving that the adverse decision of the agency was erroneous by a preponderance of the evidence."[49] Arguments by the CFSA in individual cases, however, challenge this as the appropriate standard of review. In at least one case, CFSA has alleged that the appropriate standard for review in administrative hearings is "clear and convincing evidence," a standard normally relegated only to the most serious cases involving deprivation of individual liberty, citizenship or parental rights and wholly inappropriate in the review of farm program decisions.[50] At least one recent Director review decision indicated that clear and convincing evidence was the appropriate standard.

**· Agency arguments attempt to undercut the authority of the hearing officers to conduct any meaningful review.**

In addition, the CFSA has argued that its decisions must be given deference by the NAD hearing officers. However, the deference doctrine only applies in judicial review occurring after the administrative appeal process.[51]

**· The phrase "General Applicability" has not been defined and is thus, subject to abuse.**

The Act provides that the Director has the authority to determine whether an issue is a "matter of general applicability and thus not subject to appeal."[52] This category references general departmental decisions such as the target price for a commodity. However, the CFSA has sought to expand this exclusion to cover individual determinations. For example, in one case, the CFSA argued in a letter brief to the acting Director that the interpretation of an entire set of program regulations and the implementing notices constituted matters of general applicability, and thus were beyond the jurisdiction of the hearing officer.

**· The Director's determination may not be treated as final by the CFSA.**

In situations where the CFSA has not been able to prevail at any stage of the NAD process, the Secretary has been asked to reverse the final administrative decision of the Director. This is not authorized by statute. Only the "appellant," defined to be the farmer, has the right to request further relief from the Secretary.[53]

**Conclusion**

The USDA Reorganization Act's promise of a new and independent appeal process for farmers is yet to be fully realized. Structurally, the process is greatly improved. Similarly, the statutory protections address many of the criticisms of the ASCS NAD. However, implementation problems, focused almost exclusively at the national level threaten to undermine the statutory changes.

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[1] *See* Federal Crop Insurance and Department of Agriculture Reorganization Act of 1994 (USDA Reorganization Act), Pub. L. No. 103-354, §§ 271 - 280, 108 Stat 3178, 3228 - 3235 (to be codified at 7 U.S.C. §§ 6991 - 7000).

[2] Proposed regulations have been published. 60 Fed. Reg. 27,044-049 (1995) (to be codified at 7 C.F.R. pt. 11) (proposed May 22, 1995).

[3] On October 10, 1995, Secretary Glickman appointed Norman G. Cooper as Director of the USDA NAD. *Cooper Appointed Director of National Appeals Division*, USDA Press Release No. 0712.95, Oct. 10, 1995. Prior to Mr. Cooper's appointment, Mr. Frederick Young served as Acting Director of USDA NAD.

[4] USDA Reorganization Act, §§ 271 - 280, 108 Stat. 3178, 3228 - 3235 (to be codified at 7 U.S.C. §§ 6991 - 7000). The Act was signed by President Clinton on October 13, 1994. Secretary Espy began implementing the reorganization on October 20, 1994. *See generally* Alan R. Malasky & William E. Penn, *USDA Reorganization—Fact or Fiction?*, 25 U. Memphis L. Rev. 1161 (1995).

[5] *Id.* at § 272(a), 108 Stat. at 3229 (to be codified at 7 U.S.C. § 6992(a)). While the USDA NAD is independent of other USDA agencies, it is not independent of the Secretary. The USDA NAD Director is subject to the Secretary's "direction and control". *Id.* at § 272(c), 108 Stat. at 3229 (to be codified at 7 U.S.C. § 6992(c)).

[6] The CFSA's functions are set forth in the USDA Reorganization Act at § 226, 108 Stat. at 3214-16 (to be codified at 7 U.S.C. § 6932).

[7] Only appeals involving the CCC's do-

mestic programs are within the USDA NAD's jurisdiction. *Id.* at § 271(2), 108 Stat. at 3228 (to be codified at 7 U.S.C. § 6991(2)).

[8] Under the USDA Reorganization Act, rural economic development programs are now administered by the Rural Utilities Service, the Rural Housing and Community Development Service, and the Rural Business and Cooperative Development Service. *Id.* at §§ 232-34, 108 Stat. at 3219-20 (to be codified at 7 U.S.C. §§ 6941 - 6944).

[9] The USDA Reorganization Act's provisions creating the NRCS are set forth at § 246, 108 Stat. at 3223 (to be codified at 7 U.S.C. § 6962).

[10] *Id.* at § 271(2), 108 Stat. at 3228 (to be codified at 7 U.S.C. § 6991(2)); *See also id.* § 227, 108 Stat. at 3216 - 3218 (amending 16 U.S.C. § 590h). These committees used to be known as the state and county ASC committees. The FmHA committees are abolished. *Id.* at 108 Stat. at 3218.

[11] *Id.* at § 212(e), 108 Stat. at 3211 (to be codified at 7 U.S.C. § 6912(e)). Judicial review of agency action is presumptively available under the judicial review provisions of Administrative Procedure Act (APA), 5 U.S.C. § 701 - 706.

[12] *Id.* at § 271 , 108 Stat. at 3228 (to be codified at 7 U.S.C. § 6991).

[13] *See*, 60 Fed. Reg. 26,669, 26,676 (May 18, 1995) (to be codified at 7 C.F.R. § 404.33).

[14] 7 C.F.R. § 780.17(b)(1) (1994).

[15] *Id.* at § 226(d), 108 Stat. at 3215 (to be codified at 7 U.S.C. § 6932(d)).

[16] *Id.* at § 274, 108 Stat. at 3230 (to be codified at 7 U.S.C. § 6994).

[17] *Id.* at § 276(b), 108 Stat. at 3230 (to be codified at 7 U.S.C. § 6996(b)).

[18] 60 Fed. Reg. 27,044, 27,046-47 (1995) (to be codified at 7 C.F.R. § 11.6(c)) (proposed on May 22, 1995).

[19] USDA Reorganization Act, § 271, 108 Stat. 3228 (to be codified at 7 U.S.C. § 6991).

[20] *Id.* at § 277(b), 108 Stat. at 3231 (to be codified at 7 U.S.C. § 6997(b)). The statute does not specify the consequences of the failure to hold a timely hearing. "[T]he courts generally hold that such time limits are directory, not mandatory, and refuse to invalidate agency action merely because the limits have been violated." Bernard Schwartz, Administrative Law 661 (1991) (footnote omitted).

[21] USDA Reorganization Act at § 277(b)(1), 108 Stat. at 3231 (to be codified at 7 U.S.C. § 6997(c)(1)). Under the DASCO and ASCS NAD appeal systems, hearings were held in Washington, D.C., or by telephone.

[22] *Id.* at § 277(b)(2), 108 Stat. at 3231 (to be codified at 7 U.S.C. § 6997(c)(2)).

[23] *Id.* at § 277(a)(1), 108 Stat. at 3230 (to be codified at 7 U.S.C. § 6997(a)(1)).

[24] *Id.* at § 277(a)(2), 108 Stat. at 3231 (to be codified at 7 U.S.C. § 6997(a)(2)). The final regulations implementing the subpoena authority are likely to impose on parties to an appeal a time limit and a showing of need for requesting a subpoena. *See* 60 Fed. Reg. 27,044, 27,047 (1995) (to be codified at 7 C.F.R. § 11.7(a)(2)) (proposed May 22, 1995).

[25] *Id.* at § 277(c)(3), 108 Stat. at 3231 (to be codified at 7 U.S.C. § 6997(c)(3)).

[26] *Id.* § 277(c)(4), 108 Stat. at 3231 (to be codified at 7 U.S.C. § 6997(c)(4)).

[27] *Id.*

[28] *Id.* at § 278(a)(1), 108 Stat. at 3232 (to be codified at 7 U.S.C. § 6998(a)(1)).

[29] *Id.* at § 278(a)(2), 108 Stat. at 3232 (to be codified at 7 U.S.C. § 6998(a)(2)).

[30] *Id.* at § 278(b), 108 Stat. at 3232 (to be codified at 7 U.S.C. § 6998(b)).

[31] *Id.*

[32] *Id.* The authors have received one unconfirmed report that the Acting USDA NAD Director took the position that only the appellant could submit information in connection with an appeal. The USDA Reorganization Act does not support that position.

[33] *Id.* at § 278(c), 108 Stat. at 3232 (to be codified at 7 U.S.C. § 6998(c)).

[34] *See* Christopher R. Kelley, *Recent Developments in Federal Farm Program Litigation*, 25 U. Memphis L. Rev. 1107, 1108-17 (1995).

[35] *See* Christopher R. Kelley & John S. Harbison, *A Guide to the ASCS Administrative Appeal Process and the Judicial Review of ASCS Decisions* (pts. 1 & 2), 36 S.D. L. Rev. 14, 52-53 (1991).

[36] USDA Reorganization Act at § 278(d), 108 Stat. at 3232 (to be codified at 7 U.S.C. § 6998(d)).

[37] *Id.*

[38] Arguably, NAD could have advised these farmers of the new statute, informed them that it would be several months before the new NAD procedures were in place, and given them the option to either wait for the new NAD or to waive their statutory rights and proceed under the old appeal system. Farmers were not so notified. Rather, the old appeal process continued for some time as if the law had not passed.

[39] For a thorough discussion and documentation of this problem, see Letter to Secretary Glickman from Christopher R. Kelley, dated October 4, 1995, available from the authors. It has been reported that a few farmers who requested a USDA NAD evidentiary hearing were given one, however, the decision to do so was not made on a consistent basis. Moreover, it can be presumed that most farmers in this situation were not aware of their rights under the new USDA NAD. No notice was ever provided.

[40] This week delay creates a gap period wherein no effective appeal procedure legally existed. The USDA Reorganization Act abolished the previous appeal system, ASCS NAD as of October 13, 1995. The USDA Reorganization Act at § 281(b), 108 Stat. at 3233 (repealing 7 U.S.C. § 1433e). *See supra* note 4.

[41] The USDA Reorganization Act at § 282, 108 Stat. at 3233-35 (to be codified at 7 U.S.C. § 5101(c)).

[42] *Id.* at § 275, 108 Stat. at 3230 (to be codified at 7 U.S.C. § 6995).

[43] According to a memorandum from Bruce Weber, Associate Administrator for CFSA to Scott Stofferahn, Acting State Executive Director, CFSA, North Dakota, dated Oct. 27, 1995, CFSA cannot participate in state mediation because it does not yet have the appropriate procedures and policies in place. This same memo alleges that USDA NAD does not have the authority to enforce the mediation provisions of the USDA Reorganization Act, i.e., USDA NAD cannot force CFSA to mediate before the appeal is heard by USDA NAD. A copy of this memorandum is available from the authors.

[44] The USDA Reorganization Act at § 278(c), 108 Stat. at 3232 (to be codified at 7 U.S.C. § 6998(c)).

[45] 60 Fed. Reg. 27,044, 27,049 (1995) (to be codified at 7 C.F.R. § 11.9(b) (proposed May 22, 1995).

[46] *See, e.g., Hawkins v. State Agriculture Stabilization and Conservation Committee*, 149 F. Supp. 681, 686 (S.D. Tex. 1957) ("These Handbooks were not published in the Federal Register and were not intended by any officials in the Department of Agriculture to have the force and effect of regulations. They were intended only as general guides for the use of personnel in the administration of the cotton program."), *aff'd*, 252 F.2d 570 (5th Cir. 1958).

[47] *See Vietnam Veterans of Am. v. Secretary of the Navy*, 843 F.2d 528, 536-37 (D.C. Cir. 1988).

[48] *See Golightly v. Yeutter*, 780 F. Supp. 672 (D. Ariz. 1991); *Jones v. Espy*, No. 90-2831-LFO, 1993 WL 102641 (D.D.C. Mar. 17, 1993); U.S. Dep't of Agric., ASCS, *Report of Policy and Regulatory Review Taskforce — Phase I* (1993) (acknowledging that some *ASCS Handbook* directives were not authorized by law).

[49] 60 Fed. Reg. 27,044, 27,048 (1995) (to be codified at 7 C.F.R. § 11.11.7) (proposed on May 22, 1995).

[50] *Bender v. Clark*, 744 F.2d 1424, 1429 (10th Cir. 1984).

[51] *Id.* For briefing on this subject or the issue of the appropriate standard of review, contact the authors.

[52] The USDA Reorganization Act at § 272, 108 Stat. at 3229 (to be codified at 7 U.S.C. § 6992).

[53] The USDA Reorganization Act at § 278, 108 Stat. at 3232 (to be codified at 7 U.S.C. § 6998).

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

# Report to the Members on the 1995 AALA Annual Conference

More than 225 practitioners, educators, government officials, industry representatives, and farmers met in Kansas City MO, November 3 and 4, 1995 at the AALA's 16th Annual Educational Conference and Annual Meeting.

Over forty-five speakers addressed a range of topics on agriculture and the environment, including environmental considerations in agricultural lending; ethical issues arising from environmental audits; the 1995 Farm Bill and the environment; using the tax code to address environmental issues in agriculture; agriculture and clean water issues; and agricultural international trade and environmental issues.

J. Patrick Wheeler gave the presidential address entitled "Call for White House Conference on Rural America to Plan for Entry of the Rural and Municipal Communities into the Twenty-First Century."

The Distinguished Service Award was presented to past president David A. Myers of Valparaiso, Indiana.

The Special Writing Award was presented to Susan A. Schneider of Hastings, Minnesota.

Walter J. Armbruster of Oak Brook, Illinois is the Association's President Elect.

Drew. L. Kershen, Norman, Oklahoma, assumed his duties as President.

Newly elected board members are: John Baldrige of Washington, Iowa and L. Leon Geyer of Blacksburg, Virginia.

Retiring board members are Delmar K. Banner of Champaign, Illinois and Steve C. Babls of Columbus, Ohio. We sincerely thank them for their dedicated service to the American Agricultural Law Association.

Next year's Annual Meeting will be October 3-5, 1996 in Seattle, Washington at the Westin Hotel.