section because it inaccurately indicated an intent to make this entire rule retroactive. Instead, the effective date of this rule is appropriately set forth in the **EFFECTIVE DATE** section of this Federal Register document.

Two additional changes have been made to this section. First, wetland or highly erodible land determinations have been added to the list of examples of agency adverse decisions to clarify that these decisions are included.

Second, a new subsection has been added to address confusion, reflected in some comments, that exists over the jurisdiction of NAD over agency programs. NAD Hearing Officers are not administrative law judges. NAD has no jurisdiction over questions of law or the appropriateness of agency regulations. It simply decides the factual matter of whether an agency complied with such laws and regulations in rendering an adverse decision. The limitation added here makes clear that NAD may not be used by program participants for the purpose of challenging the validity of USDA regulations issued pursuant to statutory authority.

§ 11.4 Inapplicability of other laws and regulations.

Section 277 of the Act provides an elaborate appeals scheme for particular programs of USDA, including provisions for hearings, the issuance of subpoenas, and even *ex parte* communications. Section 277(a)(2)(A) of the Act in fact explicitly incorporates the definition of an *ex parte* communication from the Administrative Procedure Act (APA) (5 U.S.C. 551(14)) as if the APA stands outside of, and is not applicable to, NAD proceedings. In view of this statutory language, and in the absence of Congressional intent otherwise, USDA has concluded that the provisions of the APA generally applicable to agency adjudications (5 U.S.C. 554, 555, 556, 557, & 3105) do not apply to NAD proceedings. Furthermore, because NAD proceedings are not required to be conducted under 5 U.S.C. 554, USDA also concludes the Equal Access to Justice Act, 5 U.S.C. 504, does not apply to NAD proceedings. *Ardestani* v. *I.N.S.*, 112 S.Ct. 515, 519 (1991).

Another issue is the applicability of the Federal Rules of Evidence to NAD proceedings. Congress intended that these proceedings be farmer-friendly so that farmers would not be required to hire attorneys to use the NAD appeal process. Therefore, USDA concluded that the Federal Rules of Evidence should not apply to NAD proceedings.

One commenter suggested USDA also should eliminate any ambiguity with respect to the applicability of the Federal Rules of Civil Procedure, which was referred to in one respect in what was § 11.7(a)(2)(vi) of the proposed rule. The situation with respect to the Rules of Evidence, however, is unique in that attempts have been made in NAD hearings to apply the Federal Rules of Evidence as generally accepted rules of evidence, necessitating an explicit statement of policy in the rules. The same problems have not arisen with respect to the Federal Rules of Civil Procedure; therefore, USDA does not feel that it is necessary to state explicitly that those rules do not apply.

§ 11.5 Informal agency hearings and exhaustion.

This section of the proposed rule drew 29 comments, more than any other. Some comments suggested that the exhaustion requirement for FSA county committees was contrary to statute, while others were concerned because the section did not provide for exhaustion to the FSA state committee. A number of commenters were confused by the sequence of events for informal hearings, mediation, and NAD appeals outlined in this section. Providers of mediation services particularly were concerned that all appellants be notified of mediation rights, and that mediation occur at the lowest level of the appeal process. A number of commenters expressed concern about the inconsistent use of the terms ''informal hearings,'' ''informal appeal,'' and ''informal review.''

With respect to the comments regarding agency notice of adverse decisions and appeal rights, USDA has determined to handle such notice outside the parameters of this rule. As a matter of Department policy, agencies will be expected to notify participants of their appeal rights and their right to choose mediation or ADR, where available, when they issue an adverse decision.

In light of the other comments, this section has been revised significantly. Only the term ''informal review'' will be used throughout the section. Given this consistent use, USDA finds it unnecessary to define this term.

Before appealing to NAD, participants may elect to request an informal review of an adverse decision by the agency. However, in the case of adverse decisions made by officials under the authority of FSA county and area committees, participants will be required to undergo informal review before the county or area committee before appealing the adverse decision to NAD. After receiving the mandatory informal review by the county or area committee, the participant then may seek informal review of that decision by the State committee or appeal directly to NAD. For purposes of this section, USDA interprets a decision at each level of agency informal review as a new adverse decision for purposes of calculating the timeliness of a participant's appeal to NAD under § 11.6 of the rules.

When a participant requests such mediation, the 30-day period within which the participant may request a hearing under § 11.6(b)(1) will stop running until such time as the mediation or ADR is concluded. Unlike with informal review, however, the conclusion of mediation is not viewed as a new agency adverse decision. At that point, the participant will have the balance of the 30-day period to appeal to NAD, or to seek informal review as outlined above. The 30-day period will function in effect as a statute of limitations; it will be up to the agency, not NAD, to raise the jurisdictional issue before NAD as to the fact that a participant's appeal is untimely.

Treatment of mediation or ADR in this manner means that the conclusion of mediation or ADR will not be treated as an adverse decision. Conversely, as indicated above, a decision at each level of the informal review process will be treated as an adverse decision for determining when the 30-day period for an appeal to NAD begins to run.

Example

A FSA program participant receives an adverse decision from a county executive director. He cannot appeal to NAD. He must first pursue an informal review with the county committee. The county committee upholds the original adverse decision. Program participant now has three choices: (1) Within 30 days, choose mediation or ADR; (2) Within 30 days, appeal to NAD; or (3) Within the lesser of 30 days, or the time period specified in FSA informal review regulations, request an informal review by the State Committee. Participant chooses mediation after 10 days. Mediation fails. Participant has the balance of 20 days (i.e., 30 days minus 10 days) to appeal to NAD after the conclusion of mediation or he may request review by the State Committee in accordance with FSA regulations. If he appeals to NAD, the agency bears the burden of proving untimeliness of the appeal to NAD, i.e., if the participant took 25 days, 5 days in excess of his remaining 20, to appeal to NAD, the agency must demonstrate this to NAD. If he requests an informal review by the State Committee, the participant will have 30 days to appeal any adverse decision made by the State Committee to NAD.