



Appeals to the National Organic Program filed by an National Organic Program Certified Operator or Applicant for Certification

Purpose

This document details National Organic Program (NOP) procedures for determining the final disposition of an appeal filed by a certified operator or applicant for certification which disputes a decision of the certifying agent. It also outlines the factors which are weighed during consideration of an appeal.

Scope

These procedures apply to internal operations of the National Organic Program including the NOP Appeals Staff, comprised of AMS Compliance Office personnel to whom the NOP has delegated responsibilities for the administration of this part of the Rule.

Standards of Reference

§ 205.681 Appeals. (a) Certification appeals. An applicant for certification may appeal a certifying agent's notice of denial of certification, and a certified operation may appeal a certifying agent's notification of proposed suspension or revocation of certification to the Administrator, Except, That, when the applicant or certified operation is subject to an approved State organic program the appeal must be made to the State organic program which will carry out the appeal pursuant to the State organic program's appeal procedures approved by the Secretary.

(1) If the Administrator or State organic program sustains an applicant's or certified operation's appeal of a certifying agent's decision, the applicant will be issued organic certification, or a certified operation will continue its certification, as applicable to the operation. The act of sustaining the appeal shall not be an adverse action subject to appeal by the affected certifying agent.

(2) If the Administrator or State organic program denies an appeal, a formal administrative proceeding will be initiated to deny, suspend, or revoke the certification. Such proceeding shall be conducted pursuant to the U.S. Department of Agriculture's Uniform Rules of Practice or the State organic program's rules of procedure.

Policy

NOP certified operators or applicants for NOP certification may appeal an adverse decision initiated by a certifying agent that is intended to suspend, revoke or deny the certification of their operation. Filing an appeal has the effect of staying the proposed action until a decision has been rendered so that certification status remains unchanged throughout the proceedings. The appeal is reviewed by persons not involved with the decision being appealed.

An appeal goes through an initial procedural review to determine whether the appeal was properly filed, in terms of timeliness and required documentation, and whether noncompliance proceedings initiated by the certifying agent were in adherence to the regulations. An appellant who does not meet filing requirements fails to preserve their appeal rights and may have their case dismissed.



If the appeal is accepted the NOP Appeals Staff will request specific information as needed to assess the content of the appeal in order to determine whether the certifying agent's proposed action is appropriate. In consideration of the proposed adverse action, the record is examined for evidence of willful violations. An appellant may be subject to additional proposed adverse action, separate from the appeal proceeding, if other noncompliances are discovered during the course of appeal review or investigation.

The Administrator independently reviews the appeal and comments from the Agency's Compliance Office and Office of General Council. In rendering a decision, the Administrator has the discretion to change the scope of action, reducing or expanding the terms of a suspension or revocation as applicable to the appellant's operation. In addition, the Administrator may sustain an appeal, but still seek a punitive penalty. The Administrator may not prescribe the specific penalty, but determine whether the allegations warrant a sanction that would be detailed through formal complaint or settlement agreement process.

An appeal that has been denied by the Administrator may be prepared for formal administrative complaint by persons assigned by the AMS Compliance Office in consultation with OGC and NOP. Under appropriate circumstances, prior to issuing an appeal decision, the Agency may offer the appellant an opportunity to enter a compromise agreement in which the appellant waives the right to further hearing and accepts a specified sanction which may include suspension, revocation and/or civil penalty (See NOP 4010 Policies and Procedures for Stipulated Agreements).

Procedure

Procedure to address appeals by certified operators

*Certified operators who reside in a state where there is an approved SOP will file appeals with the SOP.

1. The Appeals Clerk assigns an appeal number and sends an acknowledgement of receipt to the appellant via certified mail. A copy of this letter is also sent to the certifying agent.
2. The NOP Appeals Staff conducts a **Procedural Review**.

Procedural Review Part I – Appeal

- (A) Is the appellant subject to the Act and is the appeal in response to an adverse action proposed by a certifying agent?
- (B) Is the written appeal filed within 30 days of receipt of the notice of noncompliance/proposed adverse action?
- (C) Does the appeal contain a copy of the proposed adverse decision?
- (D) Does the appeal state the appellant's reasons for believing the decision was not proper or made in accordance with applicable program regulations, policies or procedures.
- (E) Was the appeal sent using a delivery service which provides dated return receipts?

The appeal may be **dismissed** at this time if it is not acceptable according to Procedural Review. If an appeal is filed incorrectly and there is time to request additional information, or to dismiss in time to refile, the appellant will be offered an opportunity to cure the appeal. When applicable, a dismissal letter is issued by the NOP Appeals Staff to the appellant stating the reasons for the outcome. The certifying agent is informed of the decision in writing and notified that they may proceed to suspend, revoke or deny certification.



Procedural Review Part II– Notification of Noncompliance and Notification of Proposed Action

(F) Has the certifying agent followed noncompliance procedures according to NOP regulations?

- (i) Does the Notice of Noncompliance or Notice of Noncompliance/Proposed Adverse Action provide a description of each noncompliance, the facts upon which the noncompliance(s) is based and sufficient notice and opportunity to respond?
 - (ii) Does the Notice of Proposed Adverse Action or Notice of Noncompliance/Proposed Adverse Action provide the reasons for the proposed suspension or revocation, the impact on future eligibility for certification and the right to request mediation or file an appeal?
 - (iii) Does the Notice of Denial of Certification or Notice of Noncompliance/Denial of Certification state the reason(s) for the denial and the applicant's right to reapply for certification, request mediation or file an appeal?
3. If the proposed adverse action is flawed the appeal may be **sustained** for this reason. A copy of the decision and transmittal letter is sent to the appellant and certifying agent informing them of their certification status.
 4. If the appeal is acceptable, as determined by the Procedural Review, the NOP Appeals Staff may request specific evidence from the certifying agent in support of their assertions. In addition, a copy of the appeal letter is provided to the certifying agent with the option to respond to the appellant's statements. As applicable, the appellant may also be requested to provide, in writing, further information and answers to specific questions.
 5. Review evidence.

Content Review

(A) Factors for consideration:

- (i) Is the noncompliance(s) substantiated by the preponderance of evidence?
 - (ii) Are all violations listed in the proposed action appealed?
 - (iii) Are there violations which were omitted from the proposed action, but subject to inclusion in appeal decision?
 - (iv) Is there evidence that the violation(s) was committed knowingly or willfully and subject to civil penalty?
6. Evidence is analyzed and organized into findings of fact to account for the presence and extent of noncompliance as verified by records.
 7. The findings of fact substantiate the conclusions which underlie the decision to sustain or deny appeal. The decision is drafted by the NOP Appeals Staff.
 8. The NOP Appeals Staff, in accordance with established criteria, will determine on a case by case basis whether to propose resolution via stipulated agreement in lieu of issuing a decision which denies the appeal and pursuing a formal complaint.

Decision Draft

(A) The following factors are considered in the appeal decision:



- (i) If not all violations are appealed, can agent's action be sustained?
 - (ii) Will all, or selected violations be presented for litigation?
 - (iii) Will additional violations, not cited in the agent's proposed adverse action, be introduced and substantiated for litigation?
 - (iv) Is the proposed sanction, revocation or suspension, suitable given the violation(s)?
- (B) An appeal may be sustained if: the preponderance of evidence does not substantiate the agent's actions or is insufficient for litigation; the agent has incorrectly interpreted or applied the regulations; and/or agent did not follow the proper adverse action procedures;
- (C) An appeal may be denied if the preponderance of evidence demonstrates noncompliance and is sufficient for litigation. In denying the appeal, the Administrator may elect to reduce or extend the scope of the proposed action, and indicate whether there are grounds to pursue civil or criminal penalties. The regulations, 205.100(c)(2) provide that any operation which makes a false statement under the Act to the Secretary, governing State official, or an accredited certifying agent shall be subject to the provisions of section 1001 title 18, United States Code, Crimes and Criminal Procedure, Fraud and False Statement.
- (i) If an appellant appeals some, but not all violations, the appeal may be denied if there is sufficient evidence to support the noncompliances which are not addressed.
 - (ii) If the appellant successfully argues that other portions of an operation were in compliance and the act was not intentional the Administrator may reduce the scope of a suspension.
 - (iii) If the Administrator believes the scope was too limited the Administrator may seek a broader scope when filing the complaint.
 - (iv) If the Administrator determines that the proposed action is too severe the Administrator may reduce the action in the appeal decision by reducing from revocation or reducing the suspension period to seek through complaint.
 - (v) If the Administrator determines the proposed action is not severe enough the Administrator may deny the appeal and seek further sanction through complaint.
9. When an accredited certifying agent is responsible for procedural errors for which an adverse action is effected without consideration of a properly filed appeal, the appeal may be dismissed. As a result of this action the Agency may (1) direct an agent to rescind the adverse action, reinstate the proposed adverse action, and provide the operator with a new opportunity to file an appeal, or (2) reinstate the operation on the basis of procedural error and advise the agent that it may issue a new proposed adverse action notification if appropriate.
10. A Clearance document is prepared for the appeal draft decision noting the precedent which the decision will establish. The appeal draft decision, comprised of the findings of fact, discussion, conclusion and exhibits, is circulated for review, comment and signature to the Associate Deputy Administrator, Compliance, Safety and Security, NOP ADA, Office of General Counsel, and the AMS Administrator.
11. Following the receipt of comments from the NOP and OGC, the Administrator independently reviews the comments and the findings of fact and decides whether to sustain or deny the appeal.



12. When the decision has passed all clearances it is finalized. The Appeals Clerk sends a copy of the decision and transmittal letter to the appellant and certifying agent via certified mail or a service which provides confirmation of date of delivery.
13. An appeal which has been denied is prepared for administrative complaint or settlement agreement, as applicable. A copy of the Clearance document, appeal decision and exhibits are provided to the Chief Compliance Officer, AMS Compliance Office to complete a litigation referral.
14. A denial of certification appeal, when sustained, is transmitted to the certifying agent with directions to issue certification.
15. The records of each appeal, the final decision and follow-up actions taken are maintained by the Compliance Office in accordance with published retention schedules.
16. Appeal decisions which terminate the adverse action proceedings (sustained appeals) are final actions of the Agency and are subject to the FOIA.
17. Appeal files are part of the Agency's Privacy Act system of records and are maintained and released in accordance with these regulations.

Document Control and Retention

All documents related to this process are retained in AMS Compliance for 10 years.

Appeal letters and accompanying documentation

Acknowledgement of receipt of appeal

Procedural review

Transmittal letters

Decision document/exhibits

Clearance document

Related correspondence

Litigation referral packet

Formal complaint