



## National Organic Program Accreditation Appeals

### Purpose

This document details National Organic Program (NOP) procedures for determining the final disposition of an appeal filed by a USDA accredited Certifying Agent or Applicant for Accreditation in dispute of a decision made by the of the Associate Deputy Administrator (ADA) of the National Organic Program. It also outlines the factors which are weighed during consideration of an appeal.

### Scope

These procedures apply to internal operations of the Agricultural Marketing Service (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. (b) Accreditation appeals. An applicant for accreditation and an accredited certifying agent may appeal the Program Manager's [sic] denial of accreditation or proposed suspension or revocation of accreditation to the Administrator. (1) If the Administrator sustains an appeal, an applicant will be issued accreditation, or a certifying agent will continue its accreditation, as applicable to the operation.

(2) If the Administrator denies an appeal, a formal administrative proceeding to deny, suspend, or revoke the accreditation will be initiated. Such proceeding shall be conducted pursuant to the U.S. Department of Agriculture's Uniform Rules of Practice, 7 CFR Part 1, Subpart H.

### Policy

USDA Accredited Certifying Agents or Applicants for Accreditation for the purposes of certifying operators to the NOP may appeal an adverse decision of the NOP ADA that is intended to suspend, revoke or deny the accreditation of their operation. Filing an appeal has the effect of staying the proposed action until a decision has been rendered so that accreditation 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 appellant has properly filed in terms of timeliness and required documentation and whether noncompliance proceedings initiated by the NOP ADA adhered to the regulations. An appellant who does not meet filing requirements fails to preserve their appeal rights and may have their case dismissed.

The NOP Appeals Staff will request specific information as needed to assess the content of the appeal in order to determine whether the NOP ADA's proposed action is appropriate. In consideration of the proposed adverse action, the record is examined for evidence of willful violations. Any additional noncompliances revealed during appeal proceedings may be introduced as evidence to support the course of action as decided by the Administrator.

The Administrator independently reviews the appeal and comments from Office of Compliance and Analysis and Office of General Council. While views of NOP personnel may be solicited, final clearance is limited to OGC since the regulations specify that the appeal will be reviewed by persons not involved



with the decision being appealed. 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. 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 is prepared for formal administrative complaint by AMS Compliance Office in consultation with OGC.

It is important to clarify that the Administrator's role in granting USDA accreditation does not preclude the Administrator from ruling on accreditation appeals. Denials of accreditation are issued by the NOP ADA since deficiencies are detected during the application review stage. Requests for accreditation are presented to the Administrator for approval after successful completion of the review process. Therefore in deciding accreditation appeals the Administrator maintains independence from involvement in the decision being appealed.

## **Procedure**

### Procedure to address appeals by certifying agents

1. The Appeals Clerk assigns an appeal number and sends an acknowledgement of receipt to the appellant via certified mail.
2. The appeal is subject to Procedural Review by a Compliance Officer(s) designated as the NOP Appeals Staff.

### Procedural Review – Appeal

- (A) Is the appellant subject to the Act and is the appeal in response to a non-compliance decision of the NOP ADA?
  - (B) Is the written appeal filed within 30 days of receipt of the notice of non-compliance/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?
1. 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 re-file, the appellant may be offered an opportunity to cure the appeal.
  2. When applicable, a dismissal letter is issued by the NOP Appeals Staff/Compliance Officer to the appellant stating the reasons for the outcome. The appellant has no further avenues of appeal once dismissed.

### Procedural Review – Notification of Non-compliance and Notification of Proposed Action

- (E) Has the NOP ADA followed non-compliance procedures according to NOP regulations?
  - (i) Does the Notice of Non-compliance or Notice of Noncompliance/Proposed Adverse Action provide a description of each non-compliance, the facts upon which the non-compliance(s) is based and sufficient notice and opportunity to respond?



- (ii) Does the Notice of Proposed Adverse Action or Notice of Non-compliance/Proposed Adverse Action provide the reasons for the proposed suspension or revocation, the impact on future eligibility for accreditation and the right to request mediation or file an appeal?
  - (iii) Does the Notice of Denial of Accreditation state the reason(s) for the denial and the applicant's right to reapply for accreditation, request mediation or file an appeal?
3. If the appeal is not acceptable due to inappropriate procedures by the NOP ADA the appeal may be **sustained** for this reason. A copy of the decision and transmittal letter is sent to the appellant informing them of their accreditation status.
  4. If the appeal is acceptable, as determined by Procedural Review, NOP Appeals Staff sends a written request to the appellant for specific evidence in support of their appeal.
  5. Review evidence.

#### Content Review

- (A) Factors for consideration:
  - (i) Is the non-compliance(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?
  - (v) Has precedent been set in a similar situation?
- 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.

#### Decision Draft

- (A) The following factors are considered in the appeal decision:
  - (i) If violation(s) is not appealed, could the NOP ADA's action be sustained?
  - (ii) Will all, or selected violations be presented for litigation?
  - (iii) Will additional violations, not cited in the proposed adverse action letter, be introduced and substantiated for litigation?
  - (iv) Is the proposed sanction, revocation or suspension or accreditation or denial of accreditation, suitable given the violation(s)?
- (B) An appeal may be sustained if: the preponderance of evidence does not substantiate the NOP ADA's actions or is insufficient for litigation; and/or the NOP ADA did not follow the proper non-compliance procedures;
- (C) An appeal may be denied if the preponderance of evidence demonstrates non-compliance and is sufficient for litigation. In denying the appeal, the Administrator may elect to reduce or extend the scope of the proposed action.



- (i) If an appellant appeals some, but not all violations, the appeal may be denied if there is sufficient evidence to support the non-compliances which are not addressed.
  - (ii) If the appellant successfully argues that other portions of their 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 proposed action is too severe the Administrator may reduce the action in the appeal decision by reducing from revocation or reducing the suspension period.
  - (v) If the Administrator determines the proposed action is not severe enough the Administrator may deny the appeal and seek further sanction through complaint.
8. When the Agency 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) rescind the adverse action, reinstate the proposed adverse action, and provide the agent with a new opportunity to file an appeal, or (2) reinstate the agent on the basis of procedural error issue a new proposed adverse action notification if appropriate.
9. 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 Associate Deputy Administrator, Compliance, Safety and Security, Office of General Counsel, AMS Administrator.
10. Following the receipt of comments from OGC, the Administrator independently reviews the comments and the findings of fact and decides whether to sustain or deny the appeal.
11. When the decision has passed all clearances the decision is finalized. The Appeals Clerk sends a copy of the decision and transmittal letter to the appellant and certifying agent. This correspondence is sent via certified mail or a service which provides confirmation of date of delivery.
12. An appeal which has been denied is prepared for administrative complaint to formally suspend, revoke or deny accreditation. A copy of the Clearance document, appeal decision and exhibits is provided to the Chief Compliance Officer, AMS Compliance Office.
13. A record of each appeal, the final decision and follow-up actions taken is maintained by the Compliance Office.



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### **Document control and Retention**

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

Letters of Appeal and accompanying documents

Receipt of acknowledgement

Procedural Review

Transmittal letters

Decision document and exhibits

Clearance document

Related correspondence

Litigation referral packet

Formal complaint