



APPEALS

February 6, 2018

USDA Agricultural Marketing Service
National Organic Program



Training Objectives



Review

- Recap: Authority, Appellant, & Appeals
- Evidence
- Communicating Noncompliance
- Settlement Agreements

Authority (What) & Appellants (Who)



What are sources of our authority?

- The Organic Foods Production Act calls for an expedited appeals process; Parameters located in §205.680.

Who are appellants of adverse actions?

- Certified organic operations
- Certifiers
- Applicants for organic certification or accreditation
- Uncertified operations
- Suspended operations or certifiers that have been denied reinstatement.

Source of Appeals: Why



Why is an appeal submitted to AMS?

- Proposed suspension or revocation
- Combined notice of noncompliance and proposed suspension or revocation
- Denial of certification
- Denial of accreditation
- Cease and desist notice (to uncertified operations)
- Denial of reinstatement



***Certifiers must provide facts
and evidence to support
any noncompliance***

What is Evidence?



Evidential support of noncompliance

- Pesticide residue testing results
- Documentation gathered during application reviews and inspections: Deviation from OSP, photos, employee and third party statements, documented admissions from operator
- Documented traceability gaps, mass balance calculation, , phytosanitary certificates
- Third-party complaints or allegations
- Record of communication with operation
- Written Statements
- Official investigative findings from other state or federal agencies
- Official records from other government agencies (e.g. Farm Service Agency, Natural Resources Conservation Service)

Strengthening Noncompliance Language



Helpful writing tips

- Identify the evidence and explain what it means
- State how the evidence supports a noncompliance
- Cite specific USDA organic regulation
- Use clarifying language to strengthen the Notice:
Active voice instead of Passive (e.g. “The Inspector Collected Samples” instead of “Samples were collected”)
- Describe how multiple pieces of evidence relate to each other

Importance of thorough assessments



Review and submit all evidence, otherwise

- Fail to meet regulatory criteria §205.665(a)(2)
- Shows an unfair bias against the Appellant
- Weakens your case argument

Incompleteness may

- Jeopardize entire noncompliance proceedings
- Require restart of noncompliance
- Prevent AMS from completing a Decision

Third-Party Information



Allegations from third-party sources

- Sufficient to trigger investigation (e.g. unannounced inspection) but insufficient as basis to take enforcement action.

Helpful Tip

- Documented observations collected during an unannounced inspection may anchor the enforcement action.

Combined Notices of Noncompliance



When correction of a noncompliance is not possible, the notification of noncompliance and the proposed suspension or revocation of certification may be combined in one notification. – §205.662(c)

- Notice of Noncompliance and Proposed Suspension (or Revocation)

Combined Notices



When used, combined notices must

- Identify noncompliance
- State factual evidence linked to noncompliance

If not justified

- It will jeopardize the appeal proceedings

Helpful tips for combined notices

- If in doubt, issue two separate letters
- If combined notice used, state why it's not possible to correct the noncompliance

Mediation and Settlement Agreements



AMS may delegate authority to...

- Certifiers after an appeal is submitted to AMS

Goal of delegating mediation to...

- Address and correct specific noncompliance through Settlement Agreement between the Certifier and Operator

Settlement Agreements represent...

- Successful mediation

Indicators of mediation



AMS may delegate mediation to Certifier when/if...

- New information submitted to AMS by operator
- Mediation not requested by operation prior to appeal submission
- No prior settlement agreement
- No prior history of systemic inability to comply

Delegated Mediation Process



1

- AMS receives & reviews appeal submission
- NOP confirms Certifier willing to consider mediation

2

- Certifier contacts Operator directly to mediate
- AMS holds appeal open during mediation
- AMS & Certifier maintain contact

3

- If successful, AMS closes appeal once certifier sends NOP an executed Settlement Agreement

Key to Strong Settlement Agreements



Solid Settlement Agreements include

- Specific corrective actions with tailored terms targeting noncompliance history
- Deadlines that checkpoint corrective actions

Best Practices Example

- *“The Operator will submit complete and accurate product labels and organic systems plan to Certifier on or before 09/10/18”*

Plan of Action



Key take-homes

- Use unannounced inspections as a mechanism to investigate - following a verbal complaint
- Collect and objectively assessing all evidence
- Assemble data points of evidence to connect the dots
- Write clearly in Noncompliance Notices – active vs passive
- Incorporate specific tailored language and deadlines into Settlement Agreements
- Review certifier process to ensure compliance

Target outcomes

- Strengthened compliance and enforcement
- Bring operator into compliance or facilitate operator exit

Appeal Training Resources



- AMS Organic Training

<https://www.ams.usda.gov/services/organic-certification/training>

- 2015 - Appeals and Settlement Agreement Updates

<https://www.ams.usda.gov/sites/default/files/media/NOP%20Appeals%20and%20Settlement%20Agreement%20Updates%20Training.pdf>

- 2014 - Appeals Update

<https://www.ams.usda.gov/sites/default/files/media/NOP%20Appeals%20Update%20Training%202014.pdf>