

## Appeals -- Preamble

### Adverse Action Appeal Process

This portion of subpart G sets forth the procedures for appealing adverse actions under the National Organic Program (NOP). These procedures will be used by: (1) producers and handlers appealing denial of certification and proposed suspension or revocation of certification decisions; and (2) certifying agents appealing denial of accreditation and proposed suspension or revocation of accreditation decisions. The Act and the Administrative Procedure Act (APA) (5 U.S.C. 553-559) provides affected persons with the right to appeal any adverse actions taken against their application for certification or accreditation or their certification or accreditation.

The Administrator will handle certification appeals from operations in States that do not have an approved State organic program (SOP). The Administrator will also handle appeals of accreditation decisions of the NOP Program Manager. The Administrator will issue decisions to sustain or deny appeals. If an appeal is denied, the Administrator will initiate a formal adjudicatory proceeding to deny, suspend, or revoke certification or accreditation. Such proceedings will be conducted pursuant to USDA's Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes, 7 CFR 1.130 through 1.151. Under these rules of practice, if the Administrative Law Judge denies the appeal, the appellant may appeal the Administrative Law Judge's decision to the Judicial Officer. If the Judicial Officer denies the appeal, the appellant may appeal the Judicial Officer's decision to the United States District Court for the district in which the appellant is located.

In States with approved SOP's, the SOP will oversee certification compliance proceedings and handle appeals from certified operations in the State. An SOP's appeal procedures and rules of procedure must be approved by the Secretary and must be equivalent to those of the NOP and USDA. The final decision on an appeal under the SOP may be appealed by the appellant to United States District Court for the district in which the appellant is located.

### Description of Regulations

These appeal procedures provide that: (1) persons, subject to the Act, who believe they are adversely affected by a noncompliance decision of the NOP's Program Manager may appeal such decision to the Administrator; (2) persons, subject to the Act, who believe they are adversely affected by a noncompliance decision of an SOP may appeal such decision to the SOP's governing State official who will initiate handling of the appeal in accordance with the appeal procedures approved by the Secretary; and (3) persons, subject to the Act, who believe they are adversely affected by a noncompliance decision of a certifying agent may appeal such decision to the Administrator unless the person is subject to an approved SOP, in which case the appeal must be made to the SOP.

All written communications between parties involved in appeal proceedings must be sent to the recipient's place of business by a delivery service which provides dated return receipts. All appeals filed under these procedures will be reviewed, heard, and decided by persons not involved with the decision being appealed.

### Certification Appeals

Applicants for certification may appeal a certifying agent's notice of denial of certification. Certified operations may appeal a notification of proposed suspension or revocation of their certification issued by their certifying agent. Such appeals will be made to the Administrator unless the person is subject to an approved SOP, in which case the appeal must be made to the SOP.

If the Administrator or SOP sustains an appeal, the applicant or certified operation will be granted certification or continued certification, as applicable to the operation's status. The act of sustaining the appeal will not be considered an adverse action and may not be appealed by the certifying agent which issued the notice of denial of certification or notification of proposed suspension or revocation of certification.

If the Administrator or SOP denies an appeal, a formal administrative proceeding will be initiated to deny, suspend, or revoke the certification. Such proceeding will be conducted in accordance with USDA's Uniform Rules of Practice or the SOP's rules of procedure.

### **Accreditation Appeals**

Applicants for accreditation may appeal the Program Manager's notification of accreditation denial. Accredited certifying agents may appeal a notification of proposed suspension or revocation of their accreditation issued by the Program Manager. Such appeals will be made to the Administrator. If the Administrator sustains an appeal, the applicant or certifying agent will be granted accreditation or continued accreditation, as applicable to the operation's status. If the Administrator denies an appeal, a formal administrative proceeding will be initiated to deny, suspend, or revoke the accreditation. Such proceeding will be conducted in accordance with USDA's Uniform Rules of Practice.

### **Filing Period**

An appeal of a noncompliance decision must be filed within the time period provided in the letter of notification or within 30 days from the date of receipt of the notification, whichever occurs later. The appeal will be considered "filed" on the date received by the Administrator or, when applicable, the SOP. Unless appealed in a timely manner, a notification to deny, suspend, or revoke a certification or accreditation will become final. The applicant, certified operation, or certifying agent that does not file an appeal in the time period provided waives the right to further appeal of the compliance proceeding.

### **Where and What to File**

Appeals to the Administrator must be filed in writing and sent to: Administrator, USDA-AMS, Room 3071-S, P.O. Box 96456, Washington, DC 20090-6456. Appeals to the SOP must be filed in writing to the address and person identified in the letter of notification. All appeals must include a copy of the adverse decision to be reviewed and a statement of the appellant's reasons for believing that the decision was not proper or made in accordance with applicable program regulations, policies, or procedures.

### **Appeals - Changes Based On Comments**

This portion of subpart G differs from the proposal in several respects as follows:

(1) To Whom an Appeal Is Made. We have amended section 205.680 to clarify to whom an appeal is made when the noncompliance decision is made by the NOP's Program Manager, an SOP, or a certifying agent. Several commenters requested that we amend section 205.680 to make it consistent with the provision providing that appeals to the Administrator are not allowed in the case of an SOP decision, because such appeals have to be made to the SOP's governing State official.

We agree that section 205.680 did not convey sufficient explanation of to whom an appeal is made. Accordingly, we have amended the language in section 205.680 to clarify through

paragraphs (a), (b), and (c) that: (1) persons, subject to the Act, who believe they are adversely affected by a noncompliance decision of the NOP's Program Manager may appeal such decision to the Administrator; (2) persons, subject to the Act, who believe they are adversely affected by a noncompliance decision of an SOP may appeal such decision to the SOP's governing State official who will initiate handling of the appeal pursuant to appeal procedures approved by the Secretary; and (3) persons, subject to the Act, who believe they are adversely affected by a noncompliance decision of a certifying agent may appeal such decision to the Administrator unless the person is subject to an approved SOP, in which case the appeal must be made to the SOP.

(2) Written Communications. We have added a new paragraph (d) to section 205.680, which provides that all written communications between parties involved in appeal proceedings must be sent to the recipient's place of business by a delivery service which provides dated return receipts. We have taken this action to further clarify the appeals process. This addition to section 205.680 implements the same requirements for appeal documents as our addition of new paragraph (d) to section 205.660 stipulates for compliance documents.

(3) Who Shall Handle Appeals. We have added a new paragraph (e) to section 205.680, which provides that all appeals must be reviewed, heard, and decided by persons not involved with the decision being appealed. This provision was added to section 205.680 to allay the fears of commenters that the person making the decision would be the person deciding the appeal. A couple of commenters recommended that an appeal be heard by persons other than those who made the decision being appealed. Specifically, they want the appeal conducted by independent hearing officers who are not responsible for implementation or administration of the NOP. They also want the final decision-making authority in the administrative review process placed in the hands of the Secretary.

Under the NOP, once the compliance procedures are completed at the certifying agent level, the certified operation may appeal the decision of the certifying agent to the Administrator or to the SOP when the certified operation is located within a State with an approved SOP. The Administrator or the SOP will review the case and render an opinion on the appeal. When the appeal is sustained, the certified operation and certifying agent are notified and the case ends. However, if the appeal is denied the certified operation and certifying agent are notified and the certified operation is given an opportunity to appeal the decision of the Administrator or SOP.

Appeals of decisions made by the Administrator will be heard by an Administrative Law Judge. If the Administrative Law Judge rules against the certified operation, the Administrative Law Judge's decision may be appealed by the certified operation to the Judicial Officer. The Judicial Officer is the USDA official delegated authority by the Secretary as the final deciding officer in adjudication proceedings. If the Judicial Officer rules against the certified operation, the Judicial Officer's decision may be appealed by the certified operation to the United States District Court for the district in which the certified operation is located. For additional information see USDA's Uniform Rules of Practice found at 7 CFR Part 1, subpart H.

Appeals of decisions made by an SOP will follow procedures comparable to those just described for an appeal of a decision made by the Administrator. As with a final decision of USDA, a final decision of the State that goes against the certified operation may be appealed to the United States District Court for the district in which the certified operation is located.

(4) Filing Period. We have amended the first sentence of section 205.681(c) by replacing "at least" with "within" and by adding the words, "whichever occurs later," to the end thereof. This amendment has been made to clarify our intent that persons affected by a noncompliance proceeding decision receive not less than 30 days in which to file their appeal of the decision.

(5) Where To File an Appeal. We have amended section 205.681(d) to clarify where appeals are to be filed. First, we have amended what is now paragraph (1) by removing the requirement that the appellant send a copy of the appeal to the certifying agent. This action shifts the responsibility of notifying the certifying agent of the appeal from the appellant to USDA or, when applicable, the SOP. Second, we have added language at paragraph (2) which clarifies that appeals to the SOP must be filed in writing to the address and person identified in the letter of notification. Finally, we have amended what is now paragraph (3) of section 205.681 by replacing "position" with "reasons for believing" to clarify the intended scope and purpose of the appellant's appeal statement. Clarification of section 205.681(d) was prompted by a commenter who stated that it is discriminatory to require clients of private certifying agents to appeal to USDA in Washington, when State program clients can appeal locally.

There are various levels of appeal within the NOP. Clients of certifying agents (State and private) are provided with an opportunity to rebut the noncompliance findings of the certifying agent. Once the certified operation has exhausted its options at the certifying agent level, the certified operation may appeal the decision of the certifying agent to the Administrator or to the SOP when the certified operation is located within a State with an approved SOP.

The Administrator will review the case and render an opinion on the appeal. This level of appeal will not require the certified operation's representative to travel to the Administrator. An appeal of a decision made by the Administrator will be heard by an Administrative Law Judge as near as possible to the certified operation's representative's place of business or residence. An appeal of a decision made by the Administrative Law Judge will be heard by the Judicial Officer. Again the certified operation's representative will not be required to travel outside of the representative's place of business or residence. If the certified operation appeals the decision of the Judicial Officer, the appeal would be heard by the United States District Court for the district in which the certified operation is located.

Appeals of decisions made by an SOP will follow procedures comparable to those just described for an appeal of a decision made by the Administrator. As with a final decision of USDA, a final decision of the State that goes against the certified operation may be appealed to the United States District Court for the district in which the certified operation is located.

(6) Appeal Reports. We will submit an annual report on appeals to the National Organic Standards Board (NOSB), which will include nonconfidential compliance information. A commenter requested that we report quarterly to the NOSB on appeals (number, outcome, kinds, and problems). We agree that it would be appropriate for the NOP to submit an appeals report to the NOSB. We will compile appeal data such as the number, outcome, kinds, and problems encountered. We will maintain this information under the compliance program to be developed within the NOP. We do not believe that it is necessary to put this type of detail or activity into the regulations. Further, we do not believe, at this time, that reporting more frequently than annually will be needed. The NOP, however, will work closely with the NOSB to provide it with the information it may need to recommend program amendments designed to address compliance and appeal issues.

(7) Availability of Appeal Information. We will develop and distribute appeal information. A commenter requested that section 205.680 be amended to require the distribution of an appeal information brochure to any applicant for accreditation or certification. We agree that the development and distribution of such information is a good idea. We do not believe, however, that it is necessary or appropriate to put this type of detail or activity into the regulations. We plan to provide program information, including appeals and related issues, on the NOP website.

## **Appeals - Changes Requested But Not Made**

This portion of subpart G retains from the proposed rule, regulations on which we received comments as follows:

(1) National Appeals Division. Several commenters recommend amending sections 205.680 and 205.681 to provide for appeals to the National Appeals Division under the provisions at 7 CFR Part 11. We disagree with the request that the NOP use the National Appeals Division Rules of Procedure. The Act and its implementing regulations are subject to the APA for rulemaking and adjudication. The provisions of the APA generally applicable to agency adjudication are not applicable to proceedings under 7 CFR Part 11, National Appeals Division Rules of Procedure. USDA uses 7 CFR Part 1, Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes, for adjudicatory proceedings involving the denial, suspension, and revocation of certification and accreditation.

### **Appeals - Clarifications**

Clarification is given on the following issues raised by commenters:

(1) Appeals. A commenter stated that appeals of certification decisions should always be taken first to the certifying agent to provide an opportunity to rectify any possible error. Another commenter requested an appeals process that includes private certifying agents.

Section 205.662(a) requires a written notification of noncompliance with opportunity to rebut or correct. When the noncompliance has been resolved due to rebuttal or correction, a written notification of noncompliance resolution is issued in accordance with section 205.662(b). When rebuttal is unsuccessful or correction of the noncompliance is not completed within the prescribed time period, a written notification of proposed suspension or revocation will be issued in accordance with section 205.662(c). This notification will advise the certified operation of its right to request mediation or file an appeal with the Administrator or, when applicable, an SOP. We believe this process of providing a notification of noncompliance with opportunity to rebut or correct, followed by a notification of proposed suspension or revocation, provides ample opportunity for the certified operation to work with its certifying agent to resolve issues of noncompliance.

(2) Timely Notification. A few commenters requested that we amend section 205.680 to include mandatory procedures for timely written notice of an adverse decision, the reasons for the decision, the person's appeal rights, and the procedures for filing an appeal. We recognize that all compliance activities need to be carried out as quickly and expeditiously as possible within the confines of due process. We believe that the commenters' concerns are addressed through various sections of these regulations. Section 205.402(a) requires review of an application upon acceptance of the application. Section 205.405, on denial of certification, requires a notification of noncompliance, followed, as applicable, by a notice of denial of certification. In accordance with section 205.405(d), the notice of denial of certification will state the reasons for denial and the applicant's right to request mediation or appeal the decision. Section 205.507 on denial of accreditation requires a notification of noncompliance, followed, as applicable, by a denial of accreditation. The notification of accreditation denial will state the reasons for denial and the applicant's right to appeal the decision. Compliance sections 205.662 for certified operations and 205.665 for certifying agents require a notification of noncompliance with an opportunity to correct or rebut the noncompliance(s). Sections 205.662 and 205.665, when applicable, require the issuance of a notification of proposed suspension or revocation. Such notice must describe the noncompliance and the entity's right to an appeal. Section 205.681 provides the procedures for filling an appeal.