



United States
Department of
Agriculture

Agricultural
Marketing
Service

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National Organic Program Appeal Decisions September 2005 – March 2007

The nine National Organic Program (NOP) appeal rulings, issued between September 2005 and March 2007, by the Administrator of the Agricultural Marketing Service are summarized below. Eight of the appeals were denied and one was sustained; seven appeals pertain to certification and two to accreditation. While this summary includes all appeal decisions issued in the indicated timeframe, it is not a comprehensive account of all NOP appeals received.

Appeal proceedings may be dismissed, closed or settled without a ruling on the merits. Incomplete or untimely filed appeals are dismissed. An appeal may be closed if the appellant surrenders certification/accreditation or belatedly resolves noncompliances, and punitive sanction is not warranted. Where there is no precedent to be set via an appeal decision, nor evidence of egregious violation, the agency may propose a settlement agreement.

If the Administrator issues an adverse appeal decision, the Department can file a formal complaint against the appellant which culminates in a hearing before an Administrative Law Judge where both parties may present their arguments. This allows the appellant an opportunity to appeal an adverse decision of the Administrator. However, an appellant may sign a waiver of hearing which in effect halts further proceedings of the Administrator's ruling.

Certification Appeals

1. Federal Phytosanitary Requirements and Treated Seeds

Proposed Adverse Action: Three year suspension of certification applicable to the land areas on which treated seeds were planted; crops from treated seeds cannot be sold, labeled or marketed as organic.

SUMMARY: The appellant, a production operation based in Mexico, argued that the phytosanitary treatment of seeds with a prohibited substance was mandated by the Mexican government and, therefore, allowed in organic crop production per a regulatory exemption that permits treatment if required by Federal or State phytosanitary regulations. The appellant consented to the diversion of crops raised from the treated seed to the conventional market, but disputed the proposed 3 year suspension of the land area.

RULING: September 16, 2005. The appeal was denied. The decision established that any exemption for the use of seeds treated with a prohibited substance is valid

only when such treatment is mandated by United States Federal or State phytosanitary regulations. Exemptions do not extend to the phytosanitary requirements imposed by foreign governments. (Previous appeal decisions established that planting seeds treated with a prohibited substance is equivalent to the application of a prohibited substance and, therefore, a crop intended for certification may not be harvested from effected land areas prior to 36 months from the date on which the treated seed was planted).

ADDENDUM: This case did not proceed to formal complaint as the USDA and the appellant reached a settlement agreement. The appellant acknowledged that use of seed treated with a prohibited substance was not permissible and agreed to cease and desist from using treated seed at the production site in Mexico and refrain from using such seed in the future unless such use is approved in advance by the certifying agent. Given regulatory ambiguity with respect to the scope of the definition of Federal, prior to this ruling, the 3 year suspension as applicable to the land was not enforced.

2. Recordkeeping deficiencies

Proposed Adverse Action: Revocation of certification for willful violations

SUMMARY: A crop production operation was cited for discrepancies in harvest yields and sales volumes, and the duplication, revision and falsification of the documents which verify compliance of the products involved in each sale transaction. The appellant submitted a detailed rebuttal on appeal, claiming that the agent never afforded the opportunity to explain the inspection findings.

RULING: June 8, 2006. The appeal was sustained and the operator retained certification, having satisfactorily demonstrated that document alterations and deficiencies resulted from benign rather than deceptive organizational shortcomings. The appellant accounted for the missing records and explained how documents were adjusted to reflect rejected shipments. The ruling instructed the appellant to promptly fix and maintain a fully auditable recordkeeping system and to retain records of certified crop sales even if sold as conventional. In addition, shortcomings in the agent's processes were identified including: the omission of noncompliances from the exit interview which were later cited in the notice of proposed adverse action; vague descriptions of noncompliances; and insufficient evidence to support a charge of willful violation.

3. Accidental application of prohibited substances

Proposed Adverse Action: Three year suspension of certification applicable to the land areas where prohibited substances were applied.

SUMMARY: A spreader-activator, which contained prohibited synthetic ingredients, was sprayed on a portion of a certified orchard operation. The operator informed the agent and fruit packer/seller of the mistaken application upon discovering the incident during a review of the spray records 4 months later.

The appellant did not contest the exclusion of that season's harvest from certification, but disputed the proposed 3 year suspension on the basis that the application was accidental and that the prohibited substance had been applied at a low concentration prior to fruit formation, would not persist in the orchard environment and acted as an adjuvant rather than a pesticide.

RULING: June 13, 2006. The appeal was denied affirming that neither the degree of toxicity of a prohibited substance, nor whether the application was accidental justified an exemption. The appellant waived the option to have a hearing, and the proposed adverse action went into effect.

4. Product excluded from NOP certification

Proposed Adverse Action: Denial of certification

SUMMARY: An applicant requested organic certification for a spring water collection and bottling operation. The appellant argued that water may be certified organic as the NOP labeling provisions exclude water as a certified organic ingredient, but not as a product, and water is absent from the National List. The appellant further suggested that the land in the catchment area as well as the handling process was certifiable.

RULING: September 7, 2006. The denial of certification was upheld, reinforcing the position that neither pure water, nor the water source, or the handling process may be certified within the parameters of the NOP. The decision noted that organic flavored water products are permissible provided that the word "organic" is clearly used to describe the flavoring and not the water.

5. Failure to update the organic system plan and permit timely inspection

Proposed Adverse Action: Revocation of certification

SUMMARY: An operation did not submit annual updated production and handling system plans, preventing the agent from conducting timely on-site inspections. The appellant accepted responsibility for failing to submit the paperwork, but pleaded that the address on record had changed and thus continuation of certification forms and notices had not been received, and that a lack of time and resources and deliberations over changing certifying agents contributed to the delays.

RULING: July 27, 2006. The appeal was denied. The ruling clarified that an operator remains obligated to fulfill certification requirements for any active certification, even when simultaneously considering or obtaining certification through another certifying agent. Further, the decision emphasized that an organic system plan must be an accurate, fluid portrayal of the workings of a certified operation. The proposed sanction of revocation was deemed too severe as there was no evidence that organic integrity was imperiled, nor intent to deceive in the sale, marketing or labeling of organic products, or an indication of

a systemic flaw requiring major modifications. Suspension of certification, until demonstration of full compliance, was determined to be suitable.

6. Improper inspection procedures

Proposed Adverse Action: Denial of certification

SUMMARY: A denial of certification was issued to community grower group, located in Mexico, for improper personnel structure of the Internal Control System (ICS) and lapses in its administration. Specifically, the ICS failed to detect the application of a prohibited insecticide by one producer and to provide evidence that the use of empty fertilizer bags for crop storage was confined to one producer. The appellant admitted fault, but contested that the severity of the sanction was disproportionate to the frequency and extent of the noncompliances.

RULING: October 27, 2006. The appeal was denied. The findings demonstrated that the operation's oversight mechanisms for maintaining compliance were inadequate. Further, the certifying agent's policies and procedures for the certification of community grower groups were deemed inconsistent with the NOP and had been implemented prematurely prior to evaluation by the NOP. In conflict with the provision §205.403(a)(1), whereby each production unit must be inspected, the agent selected a percentage of the producers within a community grower group for on-site inspection. The internal inspection procedures, whereby each production unit is inspected, was overseen by members of the grower group who were not required to have sufficient expertise, be subject to an annual performance review or to disclose conflicts of interest. The ruling established that use of an internal inspection system as a proxy for mandatory on-site inspections of each production unit by the certifying agent is not permitted. The appellant waived the right to a hearing, and the denial of certification was final.

7. Conversion of dairy livestock

Proposed Adverse Action: Denial of certification

SUMMARY: The applicant requested certification for a closed herd, maintained under continuous organic management following conversion under 80/20, until surrender of certification and incorporation of conventional grain in the feed ration. Following the period of noncertification, the operator subsequently began to transition back to organic management per the 80/20 feed exemption. A denial of certification was issued to a dairy operation on the basis that the 80/20 conversion provision could not be used repeatedly by the same operator to transition separate distinct herds.

RULING: March 5, 2007. The decision to uphold the denial of certification hinged on the account of a disruption in the continuous organic management of an entire closed herd. In accordance with 205.236(a)(2)(iii), this action permanently disqualified from organic certification: (a) the livestock which consumed conventional grain; and (b) their offspring that have not been under continuous

organic management from the last third of gestation; and (c) replacement animals which have not been under organic management from the last third of gestation. The ruling allowed that livestock which have been under continuous organic management from the last third of gestation are eligible for organic certification.

Accreditation Appeals

1. Annual Reporting and Recordkeeping

Proposed Adverse Action: Revocation of accreditation

SUMMARY: The NOP proposed revocation for the failure to submit the following outstanding information: conflict of interest disclosure reports, evidence of completion of annual program review, description of personnel training; a livestock operation inspection report, and annual updates and client lists for 2 consecutive years. The appellant attributed these lapses to a series of unfortunate accidents, provided some of the outstanding material and pledged that omissions would not recur.

RULING: June 19, 2006. The appeal was denied based upon evidence of a pattern of failure to correct and prevent noncompliances, and demonstrate the ability to uphold the requirements of accreditation.

ADDENDUM: The certifying agent surrendered accreditation following the appeal decision according to terms stipulated by the NOP. The agent was required to transfer client files in order that the operations could continue certification with an accredited agent and to agree that the principle managers not apply for accreditation for a period of 3 years.

2. Conflict of interest

Proposed Adverse Action: Denial of accreditation

SUMMARY: The NOP denied accreditation citing conflict of interest based on the applicant's intent to certify fellow members of a production cooperative. The appellant claimed there was no conflict of interest because business transactions did not occur between individual cooperative members, there was a lack of evidence that certification decisions would be biased, the NOP's interpretation of conflict of interest was novel and unprecedented and that such finding would curtail the availability of capable certification personnel to work for the program.

RULING: July 3, 2006. The appeal was denied. The Administrator found that persons responsibly connected to the certifying agent would benefit from an inadvertent influence on certification decisions involving any cooperative member. The ruling declared that there is a shared commercial interest between cooperative members, even when business transactions between

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members are neither direct nor readily segregable, and the magnitude of that commercial interest is immaterial. The appellant's initiative to recuse personnel who are cooperative members from certification decisions involving other cooperative members did not sufficiently diminish the potential for subjective or biased outcomes. The appellant waived the right to a hearing and the denial of accreditation was final.

ADDENDUM: The certifying agent subsequently received accreditation having resolved the conflicts of interest.