

## **Compliance Guideline for Small and Very Small Plants Appealing Inspection Decisions**

At various industry forums, small and very small plants identified a need to FSIS for guidance on how to appeal inspection decisions. As a result, FSIS developed this guideline to help small and very small plants understand the appeals process and learn how to make an appeal, when a plant thinks it's necessary, in accordance with 9 CFR 306.5 and 9 CFR 381.35. This guideline includes the following sections:

- Appeals Process Information
- Noncompliance Record (NR) Appeal
- Written vs. Verbal Appeals
- Appeal Response Timeline
- Notice of Intended Enforcement (NOIE) Challenge
- Questions and Answers

### **Appeal Process**

FSIS regulations, 9 CFR 306.5 and 9 CFR 381.35, provide plants with the opportunity to appeal any inspection decision. An appeal is part of a plant's due process according to the Rules of Practice. If FSIS program personnel issue an NR, the plant can appeal the whole decision or part of the decision. Any enforcement action taken in accordance with the Rules of Practice, 9 CFR 500, may also be appealed.

A plant should file an appeal without fear of retaliation. FSIS encourages plants to appeal decisions they believe are unfair or are not consistent with applicable standards. The appeal process is a mechanism for ensuring that any disagreements between plant managers and FSIS program personnel are reviewed.

The appeal process follows the Office of Field Operations (OFO) chain of command. The chain of command ensures that program employees most familiar with the appeal facts evaluate the appeal first to minimize response time. The chain of command also allows a plant to appeal to the next highest level if unsatisfied with an appeal outcome. The OFO chain of command is:

1. Program employee who made the finding (e.g. Consumer Safety Inspector (CSI), Public Health Veterinarian (PHV), Inspector in Charge (IIC))
2. PHV IIC or Mini-Circuit Supervisor
3. Frontline Supervisor (FLS)
4. District Manager (DM)
5. Executive Associate for Regulatory Operations
6. OFO Assistant Administrator
7. FSIS Administrator

## **NR Appeal**

The most common FSIS program employee decision is the NR; therefore an NR was used as the example on how, step-by-step, a plant should appeal an inspection finding.

- A plant decides to appeal an NR because the plant believes it can demonstrate that the FSIS program employee does not have the correct facts, that the FSIS program employee incorrectly applied a regulation or statute, or that there are facts that were not considered by the FSIS program employee when the finding was made.
- As soon as possible, plant management prepares and submits a written appeal. The appeal can be made to the FSIS program employee who made the finding or to that employee's supervisor. The regulations give the plant the right to appeal directly to the FSIS program employee's supervisor; however, a plant may wish to appeal to the employee who made the finding because that person's familiarity with the facts may expedite the appeal.
- In situations involving retained fresh product, the appeal can be made orally. An oral appeal can ensure that the FSIS program employee evaluates the facts before the fresh product's shelf-life is jeopardized. A written appeal can be made later. In most other cases, the plant should prepare a written appeal, containing a narrative explanation of why the plant disagrees with the finding. The appeal should include the appropriate NR reference number and any supporting documentation (e.g. technical information, scientific data, or factual information) that the FSIS program employee would need to evaluate the appeal.
- The FSIS program employee documents the appeal in PBIS 5.1.3 and evaluates the plant's reason for the appeal, the initial inspection findings, and the pertinent regulatory provisions.
- The FSIS program employee issues a written response to the plant's appeal, typically within 2-5 working days. The FSIS program employee should address all of the disputed findings in the appeal. The FSIS program employee may verbally render a decision prior to the written decision, especially if fresh product is involved.
- If the appeal or any part of the appeal is granted, the FSIS program employee granting the appeal makes appropriate modifications or completely deletes the NR and documents the changes in PBIS 5.1.3. If the appeal is denied, plant management has the option to accept the decision or to appeal to the next level of the OFO chain of command. A further appeal up the chain should be written and include all pertinent appeal documents including any denials.

## **Written vs. Oral Appeals**

FSIS recommends that plants appeal in writing whenever possible, although written appeals are not required by regulation. There are a number of advantages to written appeals. A written appeal allows the establishment to fully explain why it believes the FSIS program employee's decision is wrong. A written document is also a record of the appeal. A written appeal gives the FSIS program employee a document to respond to in

writing, instead of a potentially misunderstood oral appeal. A misinterpreted oral appeal can add time to resolving the appeal.

It is essential that an appeal be written as it moves up the OFO chain of command. The FSIS program employee evaluating the appeal is not located at the plant and was not present at the time the event occurred. If the appeal is not in writing, it will take more time to gather all the necessary facts.

### **Appeal Response Timeline**

FSIS recognizes that plants want a response to appeals as soon as possible, especially when an appeal involves retained product. It is important for plants to make an appeal as soon as possible after a finding is made and to provide the FSIS program employee with all the necessary information to get a timely response.

Time is needed for program employees to become familiar with the facts as an appeal moves up the OFO chain of command. Plants should understand that every inspection decision is based on a different set of facts. There are no specific time frames because each appeal has a unique set of facts that need to be considered, but these times are typical.

- Within 2-5 working days for a level 1, program employee who made the decision, appeal response
- Within 2 weeks for a level 2, PHV IIC or Mini-Circuit Supervisor, level 3, FLS, or level 4, DM, appeal response
- Within 30 days for a level 5, OFO Executive Associate for Regulatory Operations, level 6, OFO Assistant Administrator, or level 7, FSIS Administrator, appeal response\*

These are only typical appeal response times because each case presents a unique set of facts and can cause response times to be much shorter or longer than the timeframes listed. If a plant does not receive a decision within the timeframes given above and is concerned, the plant should contact the FSIS program employee for an explanation. The plant should contact the next level in the OFO chain of command if unsatisfied with the explanation.

### **NOIE Challenge**

There is a slightly different appeal procedure when a DM issues an NOIE. First, a plant challenges the NOIE to the DM. The appeal should provide an explanation of why the establishment disagrees with the findings, including the date the NOIE was issued and any supporting documentation (e.g., technical information, scientific data, or factual information) that the DM would need to evaluate the appeal. A challenge to an NOIE should be in writing, although not required, since the issues are usually too complex or

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\* In situations where product shelf life is in jeopardy, the timeframe may be expedited.

extensive to be communicated orally. The establishment must also respond to the NOIE within 72 hours. In challenging the NOIE, the establishment provides an argument with supporting documentation. The Agency may enforce the NOIE or rescind it in whole or part.

The OFO chain of command for NOIE appeals is:

1. DM
2. OFO Executive Associate for Regulatory Operations
3. OFO Assistant Administrator
4. FSIS Administrator

### **Questions and Answers**

#### **1. Can an NR be appealed if there is a clerical error, documented regulatory reference error, or an incorrect trend indicator cited?**

Yes, plants can appeal particular documentation errors. However, if there is no disagreement that the underlying non-compliance existed, the NR will be corrected by the program employee and reissued. Clerical errors, incorrect trend indicators, incorrect regulatory citations, dates, names, times, etc., are not the basis for removing an NR from the system using the appeal process.

#### **2. If a plant receives an NR and decides not to appeal, can that NR later be linked to another NR?**

Yes.

#### **3. What NRs should a plant appeal?**

The plant decides whether or not to appeal an NR. FSIS recommends that plants appeal a NR based on a legitimate disagreement of the facts listed in the NR or the application of a regulatory provision cited in the NR.

#### **4. When should an appeal be made?**

Since most NRs are issued by the end of a shift, an appeal should be made by a plant as soon as possible after the NR is issued. A prompt appeal helps to assure a timely response from the FSIS program employee and avoids the suggestion that the establishment accepts the inspection finding or decision.

#### **5. Is there a time limit for appealing an NR?**

No, but an appeal should be made as soon as possible because it is easier to remember the facts around the event for both plant employees and FSIS program employees.

**6. Can a plant appeal part of an NR, or must the plant appeal all aspects of an NR?**

Plant management can appeal a part of an NR. The plant's appeal should clearly state the particular finding or findings that the plant is challenging.

**7. In what form should an appeal be made?**

There is no requirement that an appeal be made in writing, but a written appeal is the best way to communicate the basis for the appeal and to create a record of the appeal. The appeal should provide an explanation of why the plant disagrees with the NR, including the NR reference number and any supporting documentation (e.g., technical information, scientific data, factual information, regulatory information) that the program employee needs to evaluate the appeal.

**8. Once a plant submits an appeal of an NR, what does an FSIS program employee do?**

The program employee will document the appeal in PBIS 5.1.3 for an official record. The program employee will evaluate the plant's reason for the appeal, the supporting documentation, the original inspection finding, and the pertinent regulatory provisions. The program employee will prepare and present a written response in a timely manner to the plant.

**9. What happens if the NR appeal is granted?**

If the program employee concludes that the appeal should be granted, he/ she will note the action in PBIS 5.1.3, remove the NR from the file, and remove any tags. When the NR is rescinded officially, the plant should be given a copy of the rescinded NR documents.

**10. What happens if the NR appeal is denied?**

If the program employee denies the appeal, the plant has the right to appeal to the next level in the OFO chain of command. The appeal should be made in the same manner as at the previous level, including a copy of the lower level appeal responses. An appeal to each level in the chain of command follows the same process.

**11. How does the plant determine who and how to contact the FSIS program employees who receive appeals?**

The FSIS program employee who made the finding should provide contact information to the plant for his/her direct supervisor. Depending on the District's hierarchy, the supervisor could be the PHV IIC, Mini-Circuit Supervisor, or FLS. In addition, the particular District Office where the plant is located can provide the establishment with the necessary points of contact. OFO (DM, Executive Associate for Regulatory

Operations, and Assistant Administrator) and FSIS Administrator contact information can be found on the FSIS web page at:

[http://www.fsis.usda.gov/Contact\\_Us/Key\\_Agency\\_Contacts/index.asp](http://www.fsis.usda.gov/Contact_Us/Key_Agency_Contacts/index.asp)

**12. What should plants do if an appeal is not responded to by in-plant FSIS program personnel in a timely manner?**

After providing a reasonable time for the FSIS program employee to respond to the appeal, plants should express their concern about response delays to the individual reviewing the appeal. If the plant does not receive a satisfactory explanation, the plant should contact the next level in the chain of command about the delay, likely resulting in a decision by the next supervisory level of the appeal.

**13. Does a FSIS program employee's response to an appeal need to be in writing?**

Yes, a response should always be in writing and explain the basis for the decision. Plants should expect a written response to an appeal.

**14. What information should a plant forward to the next level in the OFO chain of command if it chooses to appeal further?**

A plant is expected to forward all information supporting the appeal to the next level in the OFO chain of command. To ensure a timely response, it would also be useful if the plant included earlier appeal responses by the lower levels in the OFO chain of command.

**15. What effect would a granted appeal have on a linked NR?**

If an appeal of an NR is granted, and the NR is rescinded, then any linkage between that NR and another NR is also rescinded and will be documented in the program employee's written response. If only a portion of an NR was granted, and that granted portion included the cause used to link the two NRs, then that linkage is rescinded. On the other hand, if the cause used to link the two NRs is upheld, the linkage stands.

**16. Should plants fear retaliation or intimidation by FSIS program personnel as a result of an appeal?**

No, 9 CFR 306.5 and 9 CFR 381.35 provide for an appeals process, giving plants due process. FSIS does not tolerate retaliation or intimidation by employees. Plants should immediately report any FSIS program employee retaliation or intimidation to the District Office.

**17. Can a plant appeal any inspection decision?**

Yes, a plant may appeal any inspection decision. The supporting documentation should explain the disagreement with the inspection decision.

### **18. How can an appeal be a learning process?**

The appeal process can be a learning opportunity for both plant management and FSIS inspection program employees. An appeal can start conversation between the plant and inspection personnel that may lead to further understanding of the plant's food safety system and the pertaining regulations by both parties. As an example, an appeal may uncover a long held misunderstanding of a regulation by the plant that an inspection program employee can further explain.

The appeal process can also be an opportunity for inspection program employees to inform plant management of the numerous resources available such as compliance guides, the Technical Service Center and the expanded small and very small plant outreach program that the Agency has initiated. FSIS has provided IKE scenarios on its website. They are an additional resource in understanding the appeals process. They can be found at:

[http://www.fsis.usda.gov/FSIS\\_Employees/IKE\\_Scenarios/Index.asp](http://www.fsis.usda.gov/FSIS_Employees/IKE_Scenarios/Index.asp)