

## **Compliance Guideline for Appealing Inspection Decisions**

The North Dakota Meat and Poultry Inspection Program (NDMPIP) developed this guideline in accordance with USDA-FSIS 'equal to' obligations and to help ND state meat processing and slaughter establishments understand the appeals process and learn how to make an appeal in accordance with title 9 Code Fed. Regulations 306.5 and 9 CFR 381.35 (incorporated by N.D.C.C. § 4.1-31-01.1). 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**

NDMPIP 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 NDMPIP 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. NDMPIP 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 NDMPIP program personnel are reviewed.

The appeal process follows the ND Department of Agriculture (NDDA) chain of command. The goal for handling appeals is to start with program employees that are most familiar with the appeal facts. If the appeal is denied and the plant wants to continue to appeal, it will move it to the highest level within the NDDA to minimize overall response time. The NDDA chain of command is:

1. NDMPIP Senior Inspector / IIC Supervisor
2. NDDA Commissioner

### **NR Appeal**

The most common NDMPIP 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 does not agree that an NR should have been issued because the NDMPIP program employee does not have the correct facts, that the NDMPIP program employee incorrectly applied a regulation or statute, or that there are facts that were not considered by the NDMPIP program employee when the finding was made. The plant should first discuss the disagreement with the

NDMPIP employee. The NDMPIP employee will either rescind the NR or confirm that the NR will remain as is. If after discussion the plant continues to believe the NR should not have been issued, they should make an appeal to the NDMPIP employee's supervisor.

- As soon as possible, plant management prepares and submits a written appeal. The appeal can be submitted to the NDMPIP program employee who made the finding or to that employee's supervisor.
- In situations involving retained fresh product, the appeal can be made orally. An oral appeal can ensure that the NDMPIP 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 NDMPIP program employee would need to evaluate the appeal.
- The NDMPIP program employee documents the appeal in PHIS and submits the appeal to their supervisor who will evaluate the plant's reason for the appeal, the initial inspection findings, and the pertinent regulatory provisions.
- The NDMPIP supervisor issues a written response to the plant's appeal, typically within 2 weeks. The NDMPIP supervisor should address all the disputed findings in the appeal. The NDMPIP supervisor 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 NDMPIP program employee or their supervisor makes appropriate modifications or completely deletes the NR and documents the changes in PHIS. If the appeal is denied, plant management has the option to accept the decision or to appeal to the next level of the NDDA 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**

NDMPIP recommends that plants appeal in writing whenever possible, although written appeals are not required by regulation. There are several advantages to written appeals. A written appeal allows the establishment to fully explain why it believes the NDMPIP program employee's decision is wrong. A written document is also a record of the appeal. A written appeal gives the NDMPIP supervisor 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 NDDA chain of command. The NDDA supervisor 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**

NDMPIP recognizes that plants want a response to an appeal 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 NDMPIP 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 NDDA 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 response times are typical.

- Within 2 weeks for the Senior Inspector / IIC Supervisor
- Within 30 days for the NDDA Commissioner

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 NDMPIP program employee for an explanation. The plant should contact the next level in the NDDA chain of command if unsatisfied with the explanation.

### **NOIE Challenge**

There is a slightly different appeal procedure when the NDMPIP Director issues an NOIE. First, a plant challenges the NOIE to the NDMPIP Director. The appeal should provide an explanation of why the establishment disagrees with the findings and any supporting documentation (e.g., technical information, scientific data, or factual information) that the Director 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 extensive to be communicated orally. The establishment must respond to the NOIE within 3 business days. In challenging the NOIE, the establishment provides an argument with supporting documentation. The NDDA may enforce the NOIE or rescind it in whole or part.

The NDDA chain of command for NOIE appeals is:

1. NDMPIP Director
2. NDDA Commissioner

### **Custom Exempt Establishment Appeals**

A custom exempt establishment may appeal a regulatory enforcement action, such as the tagging of equipment, rooms or facilities, or the risk rating assigned by the NDMPIP inspector. Appeals should be made to the NDMPIP Director by phone, email or regular mail within one week of the finding.

## **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. NDMPIP 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 NDMPIP 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 NDMPIP 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 NDMPIP program employee do?**

The program employee will document the appeal in PHIS 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 PHIS, 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 NDDA 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 NDMPIP program employees who receive appeals?**

The NDMPIP program employee who made the finding should provide contact information to the plant for his/her direct supervisor. The senior inspector or director can provide the establishment with contact information for the NDDA Commissioner. Contact information can also be found on the NDDA website at:

<https://www.nd.gov/ndda/about-us/staff-directory>

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

After providing a reasonable time for the NDMPIP 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 NDMPIP 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 NDDA 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 NDDA 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 NDDA 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 NDMPIP 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. NDMPIP does not tolerate retaliation or intimidation by employees. Plants should immediately report any NDMPIP program employee retaliation or intimidation to the NDDA 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 NDMPIP 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.