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April 19, 2010

Miles McEvoy,
Deputy Administrator
National Organic Program
U.S. Department of Agriculture
Room 2646-So. (Stop 0268)
1400 Independence Avenue, S.W.
Washington, DC 20250-0268

Dear Miles:

ACA members are requesting a reconsideration of the recent statement, made by the NOP at the Training in Savannah that **certifiers identify all instances of deviation from the Rule as a “noncompliance.”** The definition of “noncompliance” in the Rule requires (a) communicating with the client by a delivery service which provides dated receipts and (b) submission of copies of all noncompliance notices to NOP.

We believe this would be a burden, both in time and funds, on the certifiers, certified operations and the NOP. Our members have indicated that the majority of requests that might be called a “noncompliance” based on the NOP guidance in Savannah relate to the submission of annual updates and to the payment of certification fees, as well as minor inconsistencies between the OSP and reality (input material spellings, inaccurate maps of parcels, an incomplete explanation of their lot numbering system). **These most likely have no bearing on the integrity of the organic crops or products,** and their potential for affecting organic integrity cannot be determined by the certifier without more information from the client. We do not believe that these deviations are sufficiently severe to warrant NOP notification. It will be very costly for both ACA staff and the NOP staff to address the increase in paperwork.

ACA suggests that NOP issue a Guidance Document describing when a noncompliance would be required. The document should be circulated to all accredited certifying agents. We believe that this guidance document should incorporate the recommendations contained in the **NOSB Recommendation of Compliance Procedures for Minor Noncompliances, April 29, 2004 (enclosed).**

In particular, the ACA believes that the incorporation of common quality system terminology in use by ARC, ISO, NIST and included in the NOSB recommendation would assist in making this system consistent for all involved. The definitions which need to be incorporated include:

Major Noncompliance - a finding that affects the integrity of the organic system or the organic product and precludes the certification or continued certification of a producer or handler.

*USDA-accredited certifying agents working together to ensure the integrity of
organic certification in the United States*

*Minor Noncompliance*¹ - a finding of noncompliance that is correctable, does not affect the integrity of the organic system or the organic product, and does not preclude the certification or continued certification of an otherwise qualified organic producer or handler. Isolated incidences of noncompliance are considered to be a minor noncompliance. A minor noncompliance not corrected or addressed in a timely manner may be upgraded to a major noncompliance.

Continuous improvement point (CIP): Observations or areas identified as opportunities for improvement. Although not identified as noncompliances, CIPs have the potential to become noncompliances if not corrected or addressed.

The NOSB recommendation provides examples of noncompliances which address crop production. ACA is also submitting examples of noncompliance issues relating to livestock and handling. (This is a series of hypothetical examples. All certification decisions are made within the context of specific situations. It is not meant to provide definite answers for certifiers making specific certification decisions.) Including these examples in an NOP document will help the organic community understand what actions are required by the certifier (i.e. certified mail, copying NOP) when an issue threatens organic integrity.

One of our members provided the following anecdote regarding the monetary and time costs that will be associated with this new requirement:

“In 2009, we sent 403 noncompliance, suspension, revocation, and related letters to Washington. The vast majority of those had to do with tracking the annual organic plan update process and reeling in those that neglected to return their update materials. But the 403 did not include the more routine “minor noncompliance” or “conditions for continued certification” letters received by many of [our] certified operations as their annual review was concluded.

We estimated that a “conditional” certification outcome occurs for perhaps ½ of our clients. [If these were considered noncompliances] ... that would mean we would need to send 700 more certified/return receipt noncompliance letters to clients each year. Each of those would require a resolution, also to be sent with verified receipt. Many of these would not be confirmed as received, so they would need to be sent again. We could be [sending] 1500 certified letters...Each of these must also be sent to NOP. Each letter, if sent certified, could now take \$4.34 in postage, rather than \$0.44. Each certified letter also takes another 3 to 4 minutes to mail...Each of these letters then need follow-up to see if they’ve been received. We now do this electronically via USPS.com. And then there’s the reality that many of our rural clients do not make it to the post office to get their letter. So we send copies of the letters again by regular mail. The NOP training handout noted that email is an option, if an acknowledgement of receipt is used...However, only about half of our clients have provided an email address... Many who have provided an email address may not use it regularly. We send a lot of client communications by email, with mixed results. Most of the time, asking for confirmation of receipt results in an automated message along the lines of “the message has been relayed for delivery; this system does not support delivery confirmation...” ”

¹ This category of issues has gone under other monikers, such as “Requests for Further information”, “Pre-Decision Requests” and “Additional Information Required” by different certifiers.

ACA members have also expressed concern over the impact certified mail copied to the NOP has on their relationship with certified operations. **It is important that certified operations are receptive to communications from their certifier.** It arose anecdotally that there are certified operations wary of Federal government communications. One farmer stated that he categorically refuses to pick up certified letters (because they never contain good news, he said). Our members do not believe we need to send a farmer a certified “notice of noncompliance” letter because his field map is inaccurate or his OSP is missing a facility pest control product MSDS.

ACA believes a noncompliance system based upon the severity of the issue is more appropriate for consistency in dealing with clients and for reporting the issue to the NOP. The OIG report also emphasized developing guidance on consistency based upon severity, *AMS Oversight of Certification Agents, Noncompliance Procedures*, page 22 & 23. We believe that certifiers should be required to submit all notification of major noncompliance, notification of denial, notification of proposed suspension or proposed revocation, and notification of suspension or revocation to the NOP. We believe that forwarding notices of minor noncompliances to the NOP would not strengthen the program, but divert energy away from more critical issues.

We support the increased enforcement by NOP, and we urge NOP to provide clarification to all certifiers regarding noncompliances. If we can provide additional information, please do not hesitate to contact us.

Sincerely,

Patricia Kane
Coordinator

Enclosures:

- ACA examples of hypothetical examples of minor noncompliances addressing livestock and handling issues.
- NOSB Recommendation: *Compliance Procedures for Minor Noncompliances, Adopted April 29, 2004*

Hypothetical Examples of Minor Noncompliances in Livestock and Handling Production

EXAMPLES OF MINOR NONCOMPLIANCES		EXAMPLES (MAJOR) NONCOMPLIANCES	
Issues	Minor Noncompliances	Major Violations	Criminal Violations
Improper transitioning of young stock §205.236(a)(2)(iii)	An isolated incident of bringing in conventional replacements after having converted an entire, distinct herd.	Continuation of bringing in conventional replacements after herd conversion, or refusal to follow requirements for sourcing replacements.	Falsification of records regarding origin of livestock
Prohibited feed supplements §205.237(a)	Prohibited minor ingredients in a supplement (ex: nonorganic oil as a dust suppressant, yellow prussiate of soda in salt, synthetic silicon dioxide in feed)	Refusal to discontinue use of inputs with prohibited minor ingredients	Falsification of records related to feed inputs
Use of nonorganic feed in organic livestock §205.237(a)	Isolated incident of nonorganic feed consumption (ex: cows get out and graze neighboring property)	Feeding nonorganic feed	Falsification of records related to feed inputs
Physical alterations not in accordance with §205.238(a)(5)	Isolated dehorning of older animals	Continued physical alteration practices that do not minimize pain and stress	Animal cruelty
Prohibited health inputs §205.238(c)	Prohibited minor ingredients in a health treatment, health treatments with synthetics not on the National List, or wrong form of an otherwise allowed input (ex: teat dips, isolated use of propylene glycol for ketosis)	Undisclosed use of antibiotic, parasiticide, growth hormone; Refusal to discontinue use of health treatments with prohibited minor ingredients.	Falsification of information regarding health treatments
Unsanitary living conditions §205.239(a)	Bedding is not clean and dry	Ongoing issue with bedding, continued reports of high SCC's	Blatant animal neglect
Confinement of animals §205.239(a)	Nonroutine confinement of animals which is not in accordance with temporary confinement allowances under .239(b)	Refusing to provide outdoor access	Falsification of information related to outdoor access/confinement practices.
Poor manure management §205.239(c)	Cow yard runoff threatens, but has not contaminated, a waterway	Manure management practices violate NRCS requirements	Willful disposal of manure into a waterway.

EXAMPLES OF MINOR NONCOMPLIANCES		EXAMPLES OF (MAJOR) NONCOMPLIANCES	
Issues	Minor Noncompliances	Major Violations	Criminal Violations
Improper pest management protocols §205.271	Isolated incidents of food source access, preventable facility access, providing harborage; Or use of pest control substances in a manner which does not threaten organic integrity, but without following all provisions in .271.	Refusal to follow procedures in .271; Use of pest control substances in a manner which threatens organic integrity	Falsifying pest management documentation
Prohibited sanitizer residues on processing equipment §205.272(a)	Failure to document that prohibited sanitizer residues are adequately removed from equipment prior to organic processing; Or use of a sanitizer, <i>with</i> proper protocols to protect organic integrity, but <i>without</i> including this in organic system plan information.	Refusal to document that sanitizer residues are not an organic integrity threat; Or, prohibited sanitizer residues threaten organic integrity	Falsification of equipment cleaning information or documentation
Commingling issues §205.272(a)	Organic product is not clearly segregated from nonorganic product in storage, but no commingling is evident.	Refusal to implement preventive measures, or commingling of organic and nonorganic product is evident.	Falsification of records regarding separation of organic from nonorganic, or willful use of nonorganic ingredients in an organic product.
Unapproved product composition §205.301	Change in ingredient suppliers without prior approval (same ingredient, different source, allowed for use); Or, change in percentage of ingredients that would not affect labeling without prior approval.	Unacceptable change in product composition; Marketing products as organic which have not been certified.	Marketing of products as organic which are uncertifiable. Falsification of product composition information.
Labeling errors (Note: all label formats are required to be approved before use. Any label use prior to certifier approval is a noncompliance) §205.303- .311	(Limited time frame for correction may be enabled for the following) Improper ingredient order of predominance; wrong font size for percentage statement; use of organic ingredients but failure to identify them as organic; improper placement for certifier identification statement; incorrect color scheme for USDA Organic Seal	Misleading claims regarding certification category (100%, organic, MWO) for a product; Failure to list all ingredients; improperly listing ingredients that are not present; Overstating organic percentage; Identifying nonorganic ingredients as organic; No certifier identification statement; Use of USDA Organic Seal on a product which is not certified as “100% organic” or “organic”.	Marketing of products as organic which are uncertifiable. Willfully misleading labels.