

Date: October 5, 2020

Docket: AMS-NOP-17-0065

Re: Strengthening Organic Enforcement Proposed Rule – Continuation of Certification

Thank you for this opportunity to provide comment on the United States Department of Agriculture (USDA) Agricultural Marketing Service (AMS) National Organic Program (NOP) Proposed Rule on Strengthening Organic Enforcement. The Organic Trade Association is submitting individual comments on each topic in the proposed rule to help NOP in its process of finding and navigating our positions and recommendations. We have also submitted all of our comments bundled into a single PDF including a cover letter.

This comment addresses Section #6: Continuation of Certification

Summary of Organic Trade Association’s Positions and Recommendations

- OTA supports revisions to the rule that will eliminate unnecessary paperwork without compromising oversight of organic operations.
- OTA supports the clarification that operations are only required to submit sections of the Organic System Plan that have changed during the annual certification year rather than submitting a full plan every year.
- OTA supports a rule that provides certifying agents with the flexibility needed to adjust the timing of an inspection in circumstances when it is impossible to conduct an on-site inspection.
- OTA supports a requirement to conduct an on-site inspection at least once per year, but some flexibility is needed outside a strict 12-month time period. We recommend specifying that inspections must occur on an annual basis with reduced flexibility from 18 months to 15 months.
- OTA recommends a revision to the organic regulations that will provide an impossibility clause or temporary variance for conducting on-site inspections in the case of a natural disaster or natural emergency as declared by the Secretary or President. Given the unprecedented experience and the lessons learned during COVID-19, it is critical that the regulations include flexibility that allow for certifying agencies to utilize emergency remote inspections when on-site inspections are not possible.
- OTA supports the proposal that all requirements in this section be implemented within one year after the publication of the final rule.

OTA's Positions and Recommendations

- **§ 205.406(a): OTA supports revisions to the rule that will eliminate unnecessary paperwork without compromising oversight of organic operations.** We also support consistent practices between certifying agents. The proposed change to § 205.406(a) to clarify that operations are only required to submit sections of the OSP that have changed during the annual certification process should accomplish just this. Furthermore, the proposed change is consistent with published NOP instructions (NOP 2615 and NOP 2601) and it is also largely consistent with the practice of many certifying agents. While we support this change, we also acknowledge that certifiers need the flexibility to request an OSP in its entirety as it is deemed appropriate or necessary. For example, many certifiers will request that a complete OSP be submitted every five years. The proposed change to § 205.406, however, should not create a conflict since flexibility is provided under § 205.201(a)(6) (Organic Production and Handling System Plan), and may be utilized accordingly when and if certifiers decide that submission of a complete OSP is needed. Further, as noted in the preamble and in § 205.403(c)(2), the on-site inspection must verify that the entire OSP is implemented as described.
- **§ 205.406(b): OTA does not support the proposed revisions to § 205.406(b). It is critical that certifying agents have flexibility to certify clients on an “annual basis” and to adjust the timing of an inspection in circumstances when it is impossible to conduct an on-site inspection.** The proposed rule requires certifying agents to arrange and conduct an on-site inspection of the certified operation at least once per calendar year. The intent is to remove language that could be interpreted to mean that an operation may be inspected every 18 months on an ongoing basis. However, the proposed language “once per calendar year” will be challenging since many certifying agents certify clients on an “annual” but *seasonal* basis, and the Winter season spans the calendar years. The proposal also removes critical language that *allows for flexibility* when it is *impossible* for the certifying agent to conduct the annual on-site inspection as scheduled.

OTA believes that certifying agents interpret the rule to mean that operations must be inspected every 12-months. We agree with this requirement and recognize it as a strict goal. However, certifying agents need flexibility to conduct on-site inspections on an annual basis (either seasonal or by the calendar year) and to make schedule adjustments that are sound, sensible and do not increase the fraud opportunity. The proposed revision to § 205.406(b) will unfortunately eliminate the flexibility needed for certifying agents to respond to real-life situations and make practical adjustments. OTA believes clarification that inspections are to be conducted on an annual 12-month basis (vs. once every 18 months) can be accomplished without taking away this important flexibility.

Given the unprecedented experience and the lessons learned during COVID-19, it is critical that the regulations provide scheduling flexibility as well as an impossibility clause or a temporary variance for conducting on-site inspections in the case of a natural disaster or emergency as declared by the Secretary or President. Certifying agents need the flexibility to adjust the timing of an inspection as well as to be able to conduct an emergency remote inspection (with a follow-up on-site inspection) when an on-site inspection is not possible.

➔ **Recommendation:** Revise § 205.406(b) to reference “annual basis” and retain the exception for up to 15 months, instead of 18 months. *See OTA’s requested revision in Table 6*

➔ **Recommendation:** Add § 205.403 to § 205.290(a) to allow for a temporary variance for inspections during a natural disaster or national emergency. *See OTA’s requested revisions in Table 6*

Table 6: OTA’s Requested Revisions to the Proposed Rule and Recommendations for Guidance

Action & Section	Proposed Rule Text	Revisions and/or Guidance needed to implement OTA Positions and improve the quality, clarity and utility of the Proposed Rule.
Revise 205.406(a)	<p>To continue certification, a certified operation must annually pay the certification fees and submit the following information, as applicable, to the certifying agent:</p> <p>An updated organic production or handling system plan which includes:</p> <p>1) A summary statement, supported by documentation, detailing any deviations from, changes to, modifications to, or other amendments made to the organic system plan submitted during the previous year; and</p> <p>Any additions or deletions to the previous year’s organic system plan, intended to be undertaken in the coming year, detailed pursuant to §205.200 §205.201;</p> <p>Any additions to or deletions from the information required pursuant to §205.401(b); and</p> <p>An update on the correction of minor noncompliances previously identified by the certifying agent as requiring correction for continued certification; and</p> <p>Other information as deemed necessary by the certifying agent to determine compliance with the Act and the regulations in this part.</p>	<p>OTA supports the revision as written. No changes needed</p> <ul style="list-style-type: none"> • OTA supports revisions to the rule that will eliminate unnecessary paperwork without compromising oversight of organic operations. We also support consistent practices between certifying agents. The proposed change to clarify that operations are only required to submit sections of the OSP that have changed during the annual certification process should accomplish just this.
OTA Requested Revision: None		

<p>Revise 205.406(b)</p>	<p>Following the receipt of the information specified in paragraph (a) of this section, The certifying agent shall <u>must</u> within a reasonable time arrange and conduct an on-site inspection, pursuant to §205.403, of the certified operation pursuant to §205.403 at least once per calendar year. Except, That, when it is impossible for the certifying agent to conduct the annual on-site inspection following receipt of the certified operation's annual update of information, the certifying agent may allow continuation of certification and issue an updated certificate of organic operation on the basis of the information submitted and the most recent on-site inspection conducted during the previous 12 months: Provided, That, the annual on-site inspection, required pursuant to §205.403, is conducted within the first 6 months following the certified operation's scheduled date of annual update.</p>	<p>Revision needed: Certifying agents must have the flexibility to adjust the timing of an inspection in circumstances when it is impossible to conduct an on-site inspection. OTA supports a requirement to conduct an on-site inspection at least once per year, but some flexibility is needed outside a strict 12-month time period. We recommend specifying that inspections must occur on an annual basis and we recommend retaining the existing impossibility clause, but reducing the flexibility time from 18 months to 15 months.</p> <p>Revision needed: Given the unprecedented experience and the lessons learned during COVID-19, it is critical that the regulations also include a temporary variance for conducting on-site inspections in the case of a natural disaster or natural emergency as declared by the Secretary or President. Specifically, certifying agents need to the flexibility to adjust the timing of an inspection as well as to be able to conduct an emergency remote (vs. on-site) inspection until the on-site can be rescheduled. This could be accomplished by adding §205.403 to §205.290(a) to allow for a temporary variance.</p>
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OTA Requested Revision: § 205.406(b)- The certifying agent must arrange and conduct an on-site inspection, pursuant to §205.403, of the certified operation on an annual basis, at least once per calendar year. Except, That, when it is impossible for the certifying agent to conduct the annual on-site inspection following receipt of the certified operation's annual update of information, the certifying agent may allow continuation of certification and issue an updated certificate of organic operation on the basis of the information submitted and the most recent on-site inspection conducted during the previous 12 months: Provided, That, the annual on- site inspection, required pursuant to §205.403, is conducted within the first-6 3 months following the certified operation's scheduled date of annual update.

OTA Requested Revision:
 §205.290 Temporary variances.
 (a) Temporary variances from the requirements in §§205.203 through 205.207, 205.236 through 205.240 and 205.270 through 205.272, and 205.403 may be established by the Administrator for the following reasons:
 (1) Natural disasters declared by the Secretary or a national emergency declared by the President;
 (2) Damage caused by drought, wind, flood, excessive moisture, hail, tornado, earthquake, fire, or other business interruption; and
 (3) Practices used for the purpose of conducting research or trials of techniques, varieties, or ingredients used in organic production or handling.



On behalf of our members across the supply chain and the country, the Organic Trade Association thanks the National Organic Program for your commitment to protecting organic integrity.

Respectfully submitted,

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