

Date: October 5, 2020

Docket: AMS-NOP-17-0065

Re: Strengthening Organic Enforcement Proposed Rule – Noncompliance, Mediation and Appeals

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 Sections #11-15:

Section #11: Compliance—General

Section #12: Noncompliance Procedure for Certified Operations

Section #13: Mediation.

Section #14: Adverse Action Appeal Process—General

Section #15: Adverse Action Appeal Process—Appeals

Summary of the Organic Trade Association’s (OTA) Positions and Recommendations

- OTA supports the authority of NOP to investigate and enforce against violators of OFPA including uncertified operations.
- OTA supports consistent clarification that enforcement actions extend to all accountable parties per the existing definition of “responsibly connected.” OTA recommends guidance be developed to clarify procedures for certifier to report responsibly connected parties for operations that they certify, and for responsibly connected persons to submit a request for eligibility to be certified per §205.662(f)(1).
- OTA supports timely updates in the NOP Organic Integrity Database regarding the certification status of surrendered, suspended or revoked operations.
- OTA supports clear explanations of the mediation process and procedures as proposed in §205.663. OTA recommends guidance be developed to clarify the criteria that should be included in a certifier’s internal policies and procedures for acceptance or denial of mediation requests, and to clarify that a third-party mediator is not required per §205.663(c).

- OTA does not support the revision as proposed in §205.681 regarding administrative proceedings, and recommends revisions to clarify and maintain the appellant’s right to an administrative hearing when requested and/or when not settled through other means, and to include a timeframe within which the appellant can request the hearing.
- OTA supports the clarifications proposed for the general appeals section of the regulations at §205.680 and recommends that NOP staff itself appropriately so that it can respond to appeals in a timely manner.
- OTA supports the implementation of the proposals in this section (with OTA requested revisions and recommended guidance) within one year after publication of the final rule.

Background

The Organic Foods Production Act (OFPA) part 6505(a)(1) states: (A) a person may sell or label an agricultural product as organically produced only if such product is produced and handled in accordance with this chapter; and (B) no person may affix a label to, or provide other market information concerning, an agricultural product if such label or information implies, directly or indirectly, that such product is produced and handled using organic methods, except in accordance with this chapter.

The NOP Regulation (§205.2) defines “Responsibly connected” as “Any person who is a partner, officer, director, holder, manager, or owner of 10 percent or more of the voting stock of an applicant or a recipient of certification or accreditation.”

The NOP Handbook includes the guidance document¹ NOP 4001: AMS Office of the Administrator Adverse Action Appeal Process for the National Organic Program.

OTA’s Positions and Recommendations

- **OTA supports the authority of NOP to investigate and enforce against violators of OFPA including uncertified operations.**
- **OTA supports consistent clarification that enforcement actions extend to all accountable parties per the existing definition of “responsibly connected.”**

¹ <https://www.ams.usda.gov/sites/default/files/media/4011.pdf>

In order to ensure transparent and consistent implementation of enforcement across all responsibly connected persons to an operation, **we recommend that NOP provides guidance to certifiers on the procedures for reporting responsibly connected parties for operations that they certify.** Should responsibly connected persons be listed in the NOP Organic Integrity Database? Such information needs to be readily accessible so that certifiers can verify whether an applicant for certification is responsibly connected with an operation whose certification has been suspended.

→ **Recommendation:** Develop guidance to clarify the procedures for reporting and verifying responsibly connected parties.

Section 205.662(f)(1) includes a proposed revision that requires persons who are responsibly connected to an operation whose certification has been suspended to submit a request for eligibility to be certified. The procedures for such request are unclear. Should the person follow the same procedures as reinstatement? Such procedures should specify which entity should receive the request (NOP or the certifier), and if there are any special considerations that must be made for responsibly connected parties that are applying as a new operation. *See also OTA Comments on Certificates & Data Reporting.* **We recommend NOP that NOP provides guidance to clarify and explain the procedure for responsibly connected persons to submit a request for eligibility to be certified per §205.662(f)(1).**

→ **Recommendation:** Develop guidance to clarify and explain the procedure for responsibly connected persons to submit a request for eligibility to be certified per §205.662(f)(1).

- **OTA supports timely updates in the NOP Organic Integrity Database regarding the certification status of operations that have surrendered, suspended or revoked.** OTA supports the proposed rule that requires certifiers to update the NOP Organic Integrity Database within 3 business days when an operation surrenders its certification, or its certification is suspended or revoked. Timely communication regarding operations that have received such adverse actions is critical for effective enforcement and oversight activities by all parties. Timely updates to the NOP Organic Integrity Database are also critical for transparency about an operation's certification status. OTA's pre-rule comments² in 2018 supported this requirement (72 hours) and we maintain support for this provision.

² https://ota.com/sites/default/files/indexed_files/NOP_EnforcementRulemaking_Final.pdf

- **OTA supports clear explanation of the mediation process and procedures as proposed in §205.663.** We support the clarifications and reorganization proposed for this section of the regulations. We have no concerns with the new 30-day deadline identified in §205.663(b)(1).

We support the requirement for certifiers to have documented criteria for accepting or denying mediation. This will prevent certifiers from being able to deny mediation arbitrarily without giving a reason, and may even lead to broader use of mediation to settle enforcement cases. In order to ensure fair implementation of mediation criteria across certified operations, **we recommend that NOP provides guidance to certifiers that identifies critical aspects of mediation criteria that should be included in certifier’s internal policies and procedures.** Such guidance should reflect key excerpts from the preamble, such as not including any preconditions and explaining the types of noncompliances that can be resolved with mediation, e.g. when the corrective action(s) is clear and the noncompliance(s) is not recurrent; when the noncompliance(s) is correctable, and not willful or recurrent.

→ **Recommendation:** Develop guidance to clarify the criteria that should be included in a certifier’s internal policies and procedures for acceptance or denial of mediation requests.

We support the requirement for both parties to agree on the person conducting the mediation. The Preamble provides helpful information to explain that a third-party mediator isn’t required. In order to ensure fair implementation of mediation criteria across certified operations, **we recommend that NOP provides guidance to certifiers that clarifies the multiple types of “persons conducting the mediation.”** Such guidance should reflect key excerpts from the preamble, such as that a third-party mediator is not required and that mediation can be between only the two parties.

→ **Recommendation:** Develop guidance to clarify that a third-party mediator is not required per §205.663(c).

- **OTA supports the clarifications proposed for the general appeals section of the regulations at §205.680, and recommends that NOP staff itself appropriately so that NOP can respond to appeals in a timely manner.** OTA sees a need for the process to be expedited such that appeals are reviewed and responded to in a timelier manner. As currently administered, the appeals process takes too long. It can take up to a year for NOP to evaluate and respond to an appeal. When an appeal is denied and the appellant requests a hearing, it can take an additional year or more to reach a final outcome. This multi-year process is unacceptable, especially considering that the operator is still certified and able to sell products as organic throughout the entire appeals process. It is essential that NOP strike a balance between due process and efficiency to minimize the amount of time that operations are able to sell product as organic while under an adverse action. To do so, OTA recommends NOP to staff itself appropriately so that NOP can respond to appeals in a timely manner (ideally, within 6 months).

- **OTA does not support the revision as proposed in §205.681 regarding administrative proceedings.** The proposed change from “will” to “may” is implying that what should be a guaranteed right of the appellant is now at the discretion of AMS. We are concerned that the proposed text implies an erosion of due-process for certified operations. We recognize that it is likely not NOP’s intent to remove the right of the appellant, but rather to have the regulation acknowledge that the appellant may not need or want to exercise their right to an administrative hearing. As the NOP describes in the preamble, *“AMS proposes changing “will” to “may” to reflect actual practice and to recognize that AMS may pursue the resolution of appeals through expedited, alternative means, such as settlement agreements, before initiating a formal administrative proceeding. In current practice, an appellant whose appeal is denied by the Administrator has the option to request or waive a hearing. If the appellant does not request a hearing, AMS does not initiate a formal administrative proceeding and the Administrator’s appeal decision is final and takes effect. When an appellant requests a hearing, AMS and the appellant may enter into a settlement agreement prior to the hearing. This proposed revision provides flexibility to resolve appeals outside of the formal administrative process.”*

OTA recommends revisions to clarify and maintain the appellant’s right to an administrative hearing when requested and/or when not settled through other means, and to include a timeframe within which the appellant can request the hearing. The regulations must be revised to assure that the regulatory text aligns with NOP’s intent, and that the final rule language can be clearly understood. Although there are situations when an administrative proceeding may not be warranted, there are other situations when an administrative proceeding must occur to fulfill the appellant’s right to an administrative hearing. The regulation should maintain the appellant’s right to an administrative hearing when requested and/or when not settled through other means, and to include a timeframe within which the appellant can request the hearing. Furthermore, to maintain timely procedures, we also recommend that the regulations include a timeframe within which the appellant can request the hearing

➔ **Recommendation:** Revise §205.681(a)(2) and (b)(2) clarify and maintain the appellant’s right to an administrative hearing when requested and/or when not settled through other means, and to include a timeframe within which the appellant can request the hearing. *See OTA’s requested revisions in Table 10 below.*

- OTA supports the implementation of the proposals in this section (with OTA requested revisions and recommended guidance) within one year after publication of the final rule.

Table 10: OTA’s Requested Revisions to the Proposed Rule and Recommendations for Guidance

Action & Section	Proposed Rule Text compared with Current Rule Text (strikethrough removed text; underlined new text)	Revisions and/or Guidance needed to implement OTA’s Positions and improve the quality, clarity or utility of the proposed rule
205.660 (c)–(d) Redesignate	Redesignate paragraphs (c)–(d) as paragraphs (d)–(e)	
205.660(c) Add	<u>The Program Manager may initiate enforcement action against any person who sells, labels, or provides other market information concerning an agricultural product if such label or information implies, directly or indirectly, that such product is produced or handled using organic methods, if the product was produced or handled in violation of the Organic Foods Production Act or the regulations in this part.</u>	Revision needed to clarify who is the Program Manager. The Program Manager is not defined in the USDA organic regulations or OFPA, and it is not a defined position at the NOP. <ul style="list-style-type: none"> • Add definition of Program Manager to §205.2.
OTA Requested Revision: Add to 205.2: <u>Program Manager. The representative to whom authority has been delegated to represent the National Organic Program.</u>		
205.661 Revise title	Investigation of certified operations.	

205.100(c)(1) Revise	<p>205.100 What has to be certified.</p> <p>(c) Any operation <u>person or responsibly connected person</u> that:</p> <p>(1) Knowingly sells or labels a product as organic, except in accordance with the Act, shall be subject to a civil penalty of not more than the amount specified in §3.91(b)(1) of this title per violation.</p> <p>(2) Makes a false statement under the Act to the Secretary, a governing State official, or an accredited certifying agent shall be subject to the provisions of section 1001 of title 18, United States Code.</p>	<p>Revision needed in §205.100(c)(1) to align with the NOP's proposed edit in §205.662(g)(1).</p>
<p>OTA Requested Revision:</p> <p>(1) Knowingly sells or labels a product as organic, except in accordance with the Act, shall be subject to a civil penalty of not more than the amount specified in §3.91(b)(1)(xxxvii) of this title per violation</p>		
205.662(e)(3) Add	<p><u>(3) Within 3 business days of issuing a notification of suspension or revocation, or the effective date of an operation's surrender, the certifying agent must update the operation's status in INTEGRITY.</u></p>	
<p>OTA Requested Revision:</p> <p>(3) Within 3 business days of issuing a notification of suspension or revocation, or the effective date of an operation's surrender, the certifying agent must update the operation's status in INTEGRITY.</p>		

<p>205.662(f)(1) Revise</p>	<p>(1) A certified operation <u>or a person responsibly connected with an operation</u> whose certification has been suspended under this section may at any time, unless otherwise stated in the notification of suspension, submit a request to the Secretary for reinstatement of its certification, <u>or submit a request for eligibility to be certified</u>. The request must be accompanied by evidence demonstrating correction of each noncompliance and corrective actions taken to comply with and remain in compliance with the Act and the regulations in this part.</p> <p>(2) A certified operation or a person responsibly connected with an operation whose certification has been revoked will be ineligible to receive certification for a period of 5 years following the date of such revocation, Except, That, the Secretary may, when in the best interest of the certification program, reduce or eliminate the period of ineligibility.</p>	<p>Guidance needed to clarify the procedures for reporting and verifying responsibly connected parties. See OTA’s Position on <u>responsibly connected</u>.</p> <p>Guidance needed to clarify and explain the procedure for responsibly connected persons to submit a request for eligibility to be certified per §205.662(f)(1). See OTA’s Position on <u>responsibly connected</u>.</p>
<p>205.662(g)(1) Revise</p>	<p>§205.662 Noncompliance procedure for certified operations.</p> <p>(g) Violations of Act. In addition to suspension or revocation, any certified operation that:</p> <p>(1) Knowingly sells or labels a product as organic, except in accordance with the Act, shall be subject to a civil penalty of not more than the amount specified in §3.91(b)(1)(xxxvii) of this title per violation.</p> <p>(2) Makes a false statement under the Act to the Secretary, a State organic program's governing State official, or a certifying agent shall be subject to the provisions of section 1001 of title 18, United States Code.</p>	

<p>205.663 Revise</p>	<p>§205.663 Mediation. (a) A certifying agent must submit with its administrative policies and procedures provided in §205.504(b): decision criteria for acceptance of mediation, and a process for identifying personnel conducting mediation and setting up mediation sessions.</p>	<p>Revision needed to clarify and consistently communicate accreditation requirements.</p> <ul style="list-style-type: none"> • Move the text at §205.663(a) to §205.504(b) so that it appears with accreditation requirements. <p>Revision needed to clarify what is Mediation.</p> <ul style="list-style-type: none"> • Add a new definition of Mediation to §205.2. <p>Guidance needed to clarify the criteria that should be included in a certifier’s internal policies and procedures for acceptance or denial of mediation requests. See OTA’s Position on <u>mediation</u>.</p>
<p>OTA Requested Revision: Add to §205.504(b): <u>Decision criteria for acceptance of mediation, and a process for identifying personnel conducting mediation and setting up mediation sessions</u> Add to §205.2: <u>Mediation. Mediation under the USDA organic regulations is an alternative dispute resolution mechanism, conducted between a certified operation or applicant for certification and a certifying agent or State organic program, that brings an operation into compliance with the USDA organic regulations.</u></p>		
<p>205.663 Revise</p>	<p>(b) A certified operation or applicant for certification may request mediation to resolve a denial of certification or proposed suspension or proposed revocation of certification issued by a certifying agent or State organic program. (1) A certified operation or applicant for certification must submit any request for mediation in writing to the applicable certifying agent or State organic program within 30 calendar</p>	<p>Guidance needed to clarify that a third-party mediator is not required per §205.663(c). See OTA’s Position on <u>mediation</u>.</p>

days of receipt of the notice of proposed suspension or proposed revocation of certification or denial of certification.

(2) A certifying agent or State organic program may accept or reject a request for mediation based on its own decision criteria.

(i) If a certifying agent rejects a mediation request, it must provide this rejection in writing to the applicant for certification or certified operation. The rejection must include the right to request an appeal, pursuant to §205.681, within 30 calendar days of the date of the written notification of rejection of the request for mediation.

(c) Both parties must agree on the person conducting the mediation.

(d) If a State organic program is in effect, the parties must follow the mediation procedures established in the State organic program and approved by the Secretary.

(e) The parties to the mediation have a maximum of 30 calendar days to reach an agreement following a mediation session. Successful mediation results in a settlement agreement agreed to in writing by both the certifying agent and the certified operation. If mediation is unsuccessful, the applicant for certification or certified operation has 30 calendar days from termination of mediation to appeal the denial of certification or proposed suspension or revocation pursuant to §205.681.

(f) Any settlement agreement reached through mediation must comply with the Act and the regulations in this part. The Secretary may review any mediated settlement agreement for conformity to the Act and the regulations in this part and may reject any

	<p>agreement or provision not in conformance with the Act or the regulations in this part.</p> <p>(g) The Program Manager may propose mediation and enter into a settlement agreement at any time to resolve any adverse action notice that it has issued.</p>	
<p>205.2 Add new term</p>	<p><u>Adverse action. A noncompliance decision that adversely affects certification, accreditation, or a person subject to the Act, including a proposed suspension or revocation; a denial of certification, accreditation, or reinstatement; a cease and desist notice; or a civil penalty</u></p>	
<p>205.680 Revise</p>	<p>(a) Persons subject to the Act who believe they are adversely affected by a noncompliance decision <u>an adverse action</u> of the National Organic Program's Program Manager may appeal such decision to the Administrator.</p> <p>(b) Persons subject to the Act who believe that they are adversely affected by a noncompliance decision <u>an adverse action</u> of a State organic program may appeal such decision to the State organic program's governing State official who will initiate handling of the appeal pursuant to appeal procedures approved by the Secretary.</p> <p>(c) Persons subject to the Act who believe that they are adversely affected by a noncompliance decision <u>an adverse action</u> of a certifying agent may appeal such decision to the Administrator, Except, That, when the person is subject to an approved State organic program, the appeal must be made to the State organic program.</p>	<p>Revision needed at §205.680(e), change “USDA organic regulations” to “regulations of this part” to be consistent with existing regulatory language.</p>

	<p>(d) Persons subject to the Act who believe they are adversely affected by an adverse action of a certifying agent or a State organic program may request mediation as provided in §205.663.</p> <p>(e) All appeals must comply with the procedural requirements in §205.681(c) and (d) of the USDA organic regulations.</p> <p>(f)-(d) All written communications between parties involved in appeal proceedings must be sent to the recipient's place of business by a delivery service which provides dated return receipts.</p> <p>(g)-(e) All appeals shall <u>must</u> be reviewed, heard, and decided by persons not involved with the decision <u>adverse action</u> being appealed.</p>	
<p>OTA Requested Revision: (e) All appeals must comply with the procedural requirements in §205.681(c) and (d) of the USDA organic regulations <u>of this part</u>.</p>		
<p>205.681(a) Revise</p>	<p>(a) Certification appeals <i>Adverse actions by certifying agents</i>. An applicant for certification may appeal a certifying agent's notice of denial of certification, and a certified operation may appeal a certifying agent's notification of proposed suspension or <u>proposed</u> revocation of certification to the Administrator, Except, That, when the applicant or certified operation is subject to an approved State organic program the appeal must be made to the State organic program which will carry out the appeal pursuant to the State organic program's appeal procedures approved by the Secretary.</p> <p>(1) If the Administrator or State organic program sustains a certification applicant's or certified operation's appeal of a certifying agent's decision, the applicant will be issued organic certification, or a certified operation will continue its certification, as applicable to the operation. The act of</p>	<p>Revision needed to clarify and maintain the appellant's right to an administrative hearing when requested and/or when not settled through other means, and to include a timeframe within which the appellant can request the hearing. See OTA's Position on <u>administrative proceedings</u>.</p>

	<p>sustaining the appeal shall not be an adverse action subject to appeal by the affected certifying agent.</p> <p>(2) If the Administrator or State organic program denies an appeal, a formal administrative proceeding will <u>may</u> be initiated to deny, suspend, or revoke the certification. Such proceeding shall <u>must</u> be conducted pursuant to the U.S. Department of Agriculture's Uniform Rules of Practice, 7 CFR part 1, subpart H, or the State organic program's rules of procedure.</p>	
<p>OTA Requested Revision:</p> <p>(2) If the Administrator or State organic program denies an appeal, a formal administrative proceeding <u>will</u> be initiated to deny, suspend, or revoke the certification <u>if requested within 30 days of denial, unless prior to the initiation of such proceeding the Administrator and the appellant enter into a settlement agreement.</u> Such proceeding must be conducted pursuant to the U.S. Department of Agriculture's Uniform Rules of Practice, 7 CFR part 1, subpart H, or the State organic program's rules of procedure.</p>		
<p>205.681(b) Revise</p>	<p>(b) Accreditation appeals <u>Adverse actions by the NOP Program Manager.</u> An applicant for accreditation and an accredited certifying agent <u>A person affected by an adverse action, as defined by 205.2, issued by the NOP Program Manager may appeal the Program Manager's denial of accreditation or proposed suspension or revocation of accreditation to the Administrator.</u></p> <p>(1) If the Administrator sustains an appeal, an applicant will be issued accreditation, or a certifying agent will continue its accreditation, <u>or an operation will continues its certification, a civil penalty will be waived and a cease-and-desist notice will be withdrawn, as applicable to the operation.</u></p> <p>(2) If the Administrator denies an appeal, a formal administrative proceeding will <u>may</u> be initiated to deny, suspend, or revoke the accreditation <u>or certification and/or levy civil penalties.</u> Such proceeding shall be conducted pursuant to</p>	<p>Revision needed to clarify and maintain the appellant's right to an administrative hearing when requested and/or when not settled through other means, and to include a timeframe within which the appellant can request the hearing. See OTA's Position on <u>administrative proceedings.</u></p>

	<p>the U.S. Department of Agriculture's Uniform Rules of Practice, 7 CFR part 1, Subpart H.</p>	
<p>OTA Requested Revision: If the Administrator or State organic program denies an appeal, a formal administrative proceeding <u>will</u> be initiated to deny, suspend or revoke the accreditation or certification and/or levy civil penalties <u>if requested within 30 days of denial, unless prior to the initiation of such proceeding the Administrator and the appellant enter into a settlement agreement.</u> Such proceeding shall be conducted pursuant to the U.S. Department of Agriculture's Uniform Rules of Practice, 7 CFR part 1, Subpart H.</p>		
	<p>(c) Filing period. An appeal of a noncompliance decision must be filed <u>in writing</u> within the time period provided in the letter of notification or within 30 days from receipt of the notification, whichever occurs later. The appeal will be considered “filed” on the date received by the Administrator or by the State organic program. <u>An adverse action decision to deny, suspend, or revoke certification or accreditation will become final and nonappealable unless an appeal is timely filed the decision is appealed in a timely manner.</u></p>	
	<p>(d) Where and what to file. (1) Appeals to the Administrator <u>and Requests for Hearing</u> must be filed in writing and addressed to: Administrator, USDA, AMS, e/o NOP Appeals Team, 1400 Independence Avenue SW., Room 26422648-So., Stop 0268, Washington, DC 20250-0268 or <u>electronic transmission, NOPAppeals@ams.usda.gov.</u> (2) Appeals to the State organic program must be filed in writing to the address and person identified in the letter of notification. (3) All appeals must include a copy of the adverse decision <u>action</u> and a statement of the appellant's reasons for believing that the</p>	

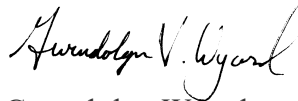
	<u>decision action</u> was not proper or made in accordance with applicable program regulations, policies, or procedures.	

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,



Johanna Miranda
Farm Policy Director



Gwendolyn Wyard
Vice President, Regulatory and Technical Affairs

cc: Laura Batcha
Executive Director/CEO