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April 2, 2012

Toni Strother
Agricultural Marketing Specialist
USDA National Organic Program
1400 Independence Ave. SW.,
Room 2646–So., Ag Stop 0268,
Washington, DC 20250–0268

Re: AMS–NOP–11–0073; NOP–11–14
Draft Guidance Handling Bulk, Unpackaged Organic Products

Dear Ms. Strother:

Thank you for the opportunity to provide comments to the National Organic Program regarding the Draft Guidance for Handling Bulk, Unpackaged Organic Products.

The Accredited Certifiers Association (ACA) represents 43 foreign and domestic USDA Accredited Certifying Agents.

The members of the ACA appreciate the efforts of the National Organic Program in putting forth this Draft Guidance. We support the clarification provided by the Draft Guidance and believe it will further enhance the accountability of the organic market.

In our review of the Draft Guidance document we did identify several issues, which would benefit from further clarification and these are noted below. Our specific suggestions for language revisions are included in Appendix A beginning on page 5.

- a) There is a lack of a definition for “broker”. While we understand that the common definition is considered to mean someone who does not physically handle the product and the transaction is paper based, there are instances where brokers do take physical possession. Please include a clear definition of broker.
- b) The ACA has identified two issues of concern regarding handling operations that are excluded:
 - distributors that might repack without detection, and
 - contamination of organic products due to activities in storage or transit.

We believe that these issues could be addressed with the use of proper containers and suggest that the exclusion for wholesale handlers who do not repackage could be tied to the type of containers being used. Wholesale handlers receiving packages or containers that are enclosed in a manner that the product could not be exposed to substances that could contaminate the organic contents (i.e. impermeable containers) and are enclosed in a manner so that any opening would be evident to subsequent handlers would be excluded from the certification requirement. Protections such as use of a tamper-proof seal would assure all parties that the container had not been opened.

- c) The ACA also suggests that additional clarity will be gained by the separation of the examples of handling operations that are NOT excluded under §205.101(b)(1) into two distinct groups: Transportation companies and Brokers, Traders and Distributors. The definition of “handle” does not include transport of organic products. Therefore, transportation companies may obtain certification, but should not be required to be certified.

Transportation companies would include:

- trucking, rail, or other transportation companies that move bulk certified organic grain from elevators to milling facilities;
- livestock hauling companies (other than the certified producer) that move certified organic livestock from production operations to auctions or slaughter facilities;
- milk tankers that are picking up from organic farms and delivering bulk milk to an organic processing plant

The ACA believes that transportation companies should not necessarily be required to be independently certified, as they are generally under contract with a certified operation on one end of the transaction or the other. The activities of the transportation company, including clean – out activities, are monitored through the Organic System Plan and the Organic System Plan Updates of the certified entity. Under the existing system, transporters of dry bulk organic products (grains, hay, beans, etc.) are required to utilize “clean truck/trailer affidavits”, which the selling producer and the purchaser maintain as part of their respective record keeping systems. Transporters of liquids, such as milk, maintain records of clean-out including the materials used, and also utilize tamper evident seals on the tankers. In the majority of these cases, clean – out procedures/protocol is maintained by the certified party receiving the shipment.

The ACA does not believe that it is necessary to include by direct reference in the Organic System Plan transporters of organic agricultural products. This information may not be available at the time the Organic System Plan is submitted, and it changes based upon timing and availability of the transporter. Certified operators are required, as part of the Organic System Plan, to have a well documented system for monitoring the organic integrity of the organic product from the time it leaves the certified seller until it arrives at

the next certified entity. Transportation records are reviewed at the time of the annual inspection of the certified operation.

We also believe that the requirement for transportation companies to be independently certified could result in a lack of availability of transporters, especially in areas where there is not a large organic production sector.

Brokers, Traders and Distributors would include:

- hay and/or straw brokers that receive, sell, transport or deliver certified organic baled hay or straw (wrapped or unwrapped)
- fruit & vegetable terminal market vendors that receive and reconstitute containers of certified organic produce for resale as organic
- livestock auctions
- brokers, traders or distributors that manage or direct the movement of organic products in anything other than sealed retail or wholesale containers that are labeled in compliance with the NOP regulations.

Based on the requirement that livestock bedding must be organic if it is consumable, brokers also sell and transport straw. Both straw and hay should be included in the description of types of brokers.

The ACA does support the requirement that brokers, traders and distributors must be certified. There are many instances where brokers receive payment for the products, utilizing the certificate of the seller. There are also instances where brokers are breaking down various shipments for sale to multiple parties. There are also instances where brokers will conceal the supplier of the product to the purchaser. In all of these instances, there is not an adequate audit trail to determine the authenticity of the organic product.

In our discussions it was noted that it may be possible for a broker who is moving product from one certified operation to another (without breaking down shipment or taking financial ownership) to be certified under the OSP of one of the operations if all the documentation was traceable.

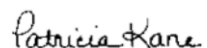
- d) We support the Policy as stated in # 5 of the Draft Guidance. We believe that regardless of which system (1 or 2) is utilized, *traceability of the organic product must be ensured*. The final two paragraphs of the Policy appear to close the gap between certified operations and an uncertified entity and the part of the organic audit trail that was not being audited by a certifier. The completely documented audit trail will provide added assurances to the purchasers of the organic products.

ACAs will immediately begin the work to bring brokers, traders and distributors into the certification fold, and review the transportation procedures of existing certified operations

to verify complete audit trail documentation, and expect to complete these tasks 18 months from the time this Guidance is finalized.

Again, we would like to thank the National Organic Program for the effort to provide clarification on this topic and encourage improvements in the system of handling of bulk organic products.

Sincerely,

A handwritten signature in cursive script that reads "Patricia Kane".

Patricia Kane
Coordinator

Appendix A

Draft Guidance Handling Bulk, Unpackaged Organic Products

1. Purpose

This guidance document clarifies the requirements and limitations of 7 CFR § 205.101 of the National Organic Program (NOP) regulations regarding the organic certification of handlers and the handling of bulk, unpackaged organic products.

2. Scope

This policy applies to all accredited certifying agents, certified operations, and non-certified handlers of certified organic products.

3. Background

The NOP regulations require handlers of organic products to be certified, unless specifically exempt or excluded as described in § 205.101(b) of the NOP regulations. In an October 2010 recommendation, the National Organic Standards Board (NOSB) expressed concerns regarding the potential for fraud in the organic market place due to the movement of organic products through unregulated segments of the marketing chain.

The NOSB requested that the NOP clarify the limits of § 205.101(b), which excludes handlers of packaged organic products from the certification requirement if they receive in and ship out products in the same container without opening, relabeling or otherwise handling the products. The NOSB noted that uncertified brokers, distributors, and traders lack the regular oversight of accredited certifying agents and the NOP.

While the regulations at § 205.101(b)(1) exclude handlers of finished packaged products from certification, they do not exclude handlers of unpackaged organic products such as bulk grain, soybeans, hay, milk, and livestock. In response to the NOSB, the NOP is issuing guidance to clarify the requirements of § 205.101 regarding the organic certification of handlers and the handling of bulk, unpackaged organic products.

4. Discussion

Section 205.101 of the NOP regulations describes the exemptions and exclusions from the requirements for certification. Section 205.101(b)(1) provides two conditions which must be met in order for persons other than retailers who handle organic products to be excluded from the requirements for organic certification. These conditions exclude operations or portions of operations that sell organic agricultural products labeled as “100 percent organic,” “organic,” or “made with organic [specified ingredients]” from certification only (emphasis added) if:

1. The products are packaged or otherwise enclosed in a container that prohibits contact with

substances that could contaminate the organic contents (i.e. impermeable containers) and are enclosed in a manner, such as use of tamper-proof seal, so that any opening would be evident to subsequent handlers prior to being received or acquired by the operation; and (emphasis added)

2. The products remain in the same package or container and are not otherwise processed while in the control of the handling operation.

Examples of handling operations that are excluded under this provision include, but are not limited to:

1. Wholesale distribution houses that receive certified organic products in wholesale or retail containers and ship them out in the same container without opening, reconstituting, altering, repackaging, relabeling or otherwise handling the products;
2. Trucking or other transportation companies that transport certified organic products in retail or wholesale containers that have been labeled in accordance with NOP regulations; and
3. Produce brokers who do not open boxes, repack, trim, relabel, or otherwise handle the product.

Examples of handling operations that are NOT excluded under § 205.101(b)(1) include, but are not limited to:

Brokers, Traders and Distributors

- hay and/or straw brokers that receive, sell, transport or deliver certified organic baled hay or straw (wrapped or unwrapped)
- fruit & vegetable terminal market vendors that receive and reconstitute containers of certified organic produce for resale as organic
- livestock auctions
- brokers, traders or distributors that manage or direct the movement of organic products in anything other than sealed retail or wholesale containers that are labeled in compliance with the NOP regulations.

Brokers are generally considered any person who buys and sells agricultural products for others and who may or may not physically handle the product. Brokers, traders and distributors are required to obtain organic certification.

NOP regulations do not require transportation companies to obtain organic certification however, the Organic System Plan of the certified operation must clearly specify the procedures and methods used for monitoring of organic integrity throughout the transportation process. Transportation records are to be reviewed at the time of annual inspection of the certified operation. Transportation companies include but are not limited to:

- trucking, rail, or other transportation companies that move bulk certified organic grain from elevators to milling facilities;
- livestock hauling companies (other than the certified producer) that move certified organic livestock from production operations to auctions or slaughter facilities;

• milk tankers that are picking up from organic farms and delivering bulk milk to an organic processing plant

- ~~1. Hay brokers that receive, sell, transport or deliver certified organic baled hay;~~
- ~~2. Trucking, rail, or other transportation companies that move bulk certified organic grain from elevators to milling facilities;~~
- ~~3. Fruit and vegetable terminal market vendors that receive and reconstitute containers of certified organic produce for resale as organic;~~
- ~~4. Livestock hauling companies (other than the certified producer) that move certified organic livestock from production operations to auctions or slaughter facilities;~~
- ~~5. Livestock auctions;~~
- ~~6. Milk tankers that are picking up from organic farms and delivering bulk milk to an organic processing plant; and~~
- ~~7. Brokers, traders, or distributors that manage or direct the movement of organic products in anything other than sealed retail or wholesale containers that are labeled in compliance with the NOP regulations.~~

5. Policy

NOP regulations require brokers, traders or distributors of bulk, unpackaged organic commodities or livestock to be certified organic operations, maintaining product segregation and records sufficient to verify compliance with NOP regulations. Uncertified brokers, traders or distributors of bulk, unpackaged organic commodities or livestock must either:

1. Seek and obtain organic certification, or
2. Be specifically included by direct reference in the Organic System Plan (OSP) of the certified seller or buyer of the organic products, subject to approval and inspection by the certifying agent of the certified operation.

Unpackaged certified organic commodities that are handled by an uncertified, non-retail operation that is not specified in the OSP of a certified organic operation lose their certified organic status and may no longer be sold, labeled or represented as organic. Handlers currently engaged in brokering, trading or distributing organic products beyond the exclusions provided in § 205.101(b) are not in compliance with the NOP regulations and may be subject to civil penalties of up to \$11,000 pursuant to § 205.100(c)(1).

Certified organic operations that receive bulk products from uncertified handlers and subsequently label the products as organic are in violation of NOP regulations, and are also subject to proposed suspension or revocation of certification and possible civil penalties. Certifying agents are required to review OSPs to ensure producers and handlers receive hay, grain, milk, livestock, or other non-packaged organic products via a certified organic handler.

6. References

6.1 NOP Regulations

§ 205.2 Terms defined.

Commingling. Physical contact between unpackaged organically produced and nonorganically produced agricultural products during production, processing, transportation, storage or handling, other than during the manufacture of a multi-ingredient product containing both types of ingredients.

Handle. To sell, process, or package agricultural products, except such term shall not include the sale, transportation, or delivery of crops or livestock by the producer thereof to a handler.

Handler. Any person engaged in the business of handling agricultural products, including producers who handle crops or livestock of their own production, except such term shall not include final retailers of agricultural products that do not process agricultural products.

Handling operation. Any operation or portion of an operation (except final retailers of agricultural products that do not process agricultural products) that receives or otherwise acquires agricultural products and processes, packages, or stores such products.

Organic system plan. A plan of management of an organic production or handling operation that has been agreed to by the producer or handler and the certifying agent and that includes written plans concerning all aspects of agricultural production or handling described in the Act and the regulations in subpart C of this part.

§ 205.101 Exemptions and exclusions from certification.

(b) *Exclusions.* (1) A handling operation or portion of a handling operation is excluded from the requirements of this part, except for the requirements for the prevention of commingling and contact with prohibited substances as set forth in § 205.272 with respect to any organically produced products, if such operation or portion of the operation only sells organic agricultural products labeled as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s))” that:

(i) Are packaged or otherwise enclosed in a container prior to being received or acquired by the operation; and

(ii) Remain in the same package or container and are not otherwise processed while in the control of the handling operation.

6.2 NOSB Recommendations

October 2010 NOSB Meeting - Clarifying the Limitations of § 205.101(b)