NOFA-NY
NORTHEAST ORGANIC FARMING ASSOCIATION OF NEW YORK

October 5, 2020

Jennifer Tucker, Deputy Administrator,
National Organic Program, USDA-AMS-NOP,
1400 Independence Ave., SW,
Room 2642-So., Ag Stop 0268,
Washington, DC 20250-0268

RE: **AMS-NOP-17-0065**; NOP-17-02; RIN 0581-AD09

The Northeast Organic Farming Association of New York (NOFA-NY) appreciates the opportunity to comment on the USDA/AMS National Organic Program: Strengthening Organic Enforcement Proposed Rule, AMS-NOP-17-0065.

Founded in 1983, the Northeast Organic Farming Association of New York (NOFA-NY) is the premier statewide organization growing a strong organic and sustainable agriculture movement in New York State, and is part of a regional network of seven Northeast Organic Farming Associations. NOFA-NY provides education and assistance to local organic and sustainable farmers; connects consumers with organic and sustainable farmers; advocates policies that support a sustainable and fair food and farm system at both the state and federal levels; and is the largest USDA-accredited organic certifier in New York certifying over 1,000 organic operations in the state.

New York State is a top US producer of organic products, ranking third in number of organic farms nationwide, with over 1800 organic certified entities statewide. With one of the biggest marketplaces in the world in the New York City metropolitan region, New York participates in a large portion of the over $52 billion in organic sales nationwide.

NOFA-NY has been involved in advocating for a strong federal organic program since the late 1980s when our farmers participated in the process to draft the Organic Foods Production Act and continued to be very active in the Rule-making process through implementation.

NOFA-NY applauds the significant work of the Department in developing this proposed Rule. It substantively addresses both major and minor issues concerning enforcement of the

Regulation, as well as adds clarity to the roles of certifers, inspectors, and certified entities. We are very supportive of moving forward to complete this Regulation as soon as possible, with the exception of the Grower Group Section, and with some adjustments to the Implementation Timeline. We believe that Section 16 – Grower Group – is not fully formed, and we request that not be included. We propose that the Department move forward as fast as possible in implementing all other sections, and send the Grower Group section back to the NOSB for significant work and public comment.

While it does not affect our support of moving most of this Rule forward, NOFA-NY does have a general comment regarding the role of USDA in enforcement activities as well as being the main governmental advocate for the Organic Label.

In our general review of the Rule, we note a lack of attention to the role of the USDA/NOP, especially with regards to other agencies and sub-agencies. While this Rule rightly focuses on issues of accreditation and certification for certifiers, and clarity on who should be certified to ensure the supply chain, we would like to see the necessary work of the NOP in supporting enforcement and fraud prevention, accounted for and codified.

Just as we are asking certifiers to take on major new responsibilities and mandates with regards to organic enforcement, so too should we ask the USDA/NOP take on increased tasks and accountability in order for this enforcement to be effective. Simple labels or symbols on containers, etc. will not prevent mistakes and fraud if it has not been preceded by education of those who have the oversight tasks in the myriad of (non-organic) situations where organic product is stored and moved from the farm to an end-user.

We would like to see some specific actions proposed regarding the Department's communications and education of other agencies such as CBP and APHIS as to the requirements of organic that directly relate to their work in overseeing various transportation activities and non-retail containers.

Role & Responsibility of USDA NOP

1. **Using import data to detect fraud:** The NOP should develop a list of criteria available from import data and other sources that would instantly trigger an automatic investigation into the possibility of fraud from imports. Two such criteria include:

    a. Conduct an automatic investigation whenever there is a significant surge in imports for a specific product category, in order to determine if fraudulent activity is contributing to that increase.

    b. Conduct an automatic investigation when there is trade from a certifier or certified entity that is under investigation from another competent authority such as the EU.

2. **Increase education and oversight:** NOP should increase its education and oversight of all entities and agencies that have control over (or are in control of) non-retail containers, including trailers, tanks, railcars, shipping containers, grain elevators/silos,

vessels, cargo holds, freighters, barges, or other method of bulk transport or storage. While a visual indicator on a container—potentially the USDA organic seal—is a great first step, NOP should design simple, clear training modules on the specifics of what that oversight means for the organic products in these containers, including:

a. What is organic?
b. What fumigants can and cannot be used.
c. Prohibited materials.
d. Prohibition on opening certain sealed containers.

3. **Annual reporting.** Acknowledging the breadth of the entities and agencies that have control over (or are in control of) transportation and non-retail containers, NOP should report to the NOSB twice a year information regarding progress in communicating these controls throughout the entire non-retail supply chain.

    a. This report should include the compilation of a more complete list of which agencies, sub-agencies, and other entities have control of (or are in control of), even for limited time, all types of non-retail containers. This information will also aid certifiers in their oversight.

4. **Learning from other sectors:** The NOP should identify other industries/products that have a longer history of dealing with fraud and learn from the measures they took, as well as their outcomes, and should share these findings with the NOSB and the public.

5. **Leverage OIG, FAS, CBP resources**: NOP should continue to work to leverage the resources of other USDA sub-agencies and other federal agencies to include and educate them in the effort to deter fraud in organic supply chains.

Following are Section-by-Section comments with some clarifying suggested changes to the text noted in blue:

Section (1) Applicability and Exemptions from Certification

NOFA-NY strongly supports updating the regulations to limit the type of operations that are exempt and excluded from organic certification.

§205.2

Handle. To sell, process, or package agricultural products, including but not limited to trading, facilitating sale or trade, brokering, opening, packaging, repackaging, sorting, treating, closing, enclosing, labeling, relabeling, combining, containerizing, splitting, storing, receiving, private labeling, transloading, or loading.

Combine Handler & Handling Operation definitions: *Handling Operation (handler). Any operation or portion of an operation that handles agricultural products.*

Comments: The suggested wording above will add more specificity and clarity in the definitions and clarify other activities that require certification such as private labeling. We request a definition for brokering and clarification on activities that are considered facilitating sale or trade.

§205.101(b)

A retail operation or a portion of a retail operation that sells, but does not process or package, organically produced agricultural products

Comments: Some retail establishments, especially co-ops and health food stores, re-pack bulk organic into smaller packages. NOFA-NY agrees that this activity should require oversight through certification.

§205.101(e)

An operation that only stores, receives, and/or loads agricultural products, but does not take ownership of, process, or alter such agricultural products.

We also suggest adding "packaged in sealed, impermeable, and tamper evident containers" to the regulation to note that the exclusions apply only to packaged products.

Comments: Operations storing, receiving, and/or loading of unpackaged agricultural products should be required to be certified, as the risk for commingling and contamination is increased. However, clarity is needed on transport companies such as milk and livestock haulers.

We support the inclusion of an additional section:

"205.101(f) *A handling operation that only transports certified organic products from a certified producer, handler or handling operation to another certified producer, handler or handling operation or final retail operation. Such operations must comply with record keeping requirements to (1) demonstrate that the organic integrity of the product is maintained during receiving, storage and loading, and (2) verify both the quantities and the organic status of the product being received, stored and shipped."*

Section (2) Imports to the United States

NOFA-NY supports the addition of this new section covering imports to the United States. Processes to properly trace organic products coming from overseas are essential and protect

the organic industry in the United States. We also support the use of electronic NOP import certifications, and we support clear procedures for the use of these certificates.

§205.2 (Organic exporter and Organic importer of record)

Comments: NOFA-NY agrees that organic exporters and organic importers of records should be required to be certified organic. However, these operations may or may not be required to be certified, based on the proposed definitions.

An organic exporter that is a "final exporter" but not an owner, and an organic importer of record that is responsible for accepting imported organic products within the United States but is not the owner of the product, may be exempt from certification under §205.101(e).

We suggest use of the word "handle" or "handler" to clarify operations requiring certification since those definitions are clearly defined and include ownership.

For activities at port that may not require certification, a transport plan from the owner of the certified product could be required. This plan will detail where products go and what happens at each stage of the transportation. The certifier of the operation responsible for the transportation can then adapt its verification accordingly and plan onsite verification in those areas when the organic activity is ongoing and under the operator's certification.

§205.273(b)

The certifying agent must review an NOP Import Certificate request, determine whether the shipment complies with the USDA organic regulations, and issue the NOP Import Certificate or equivalent, as specified at 205.273(e), available with receipt of product at shipment if the shipment complies with the USDA organic regulations.

Comments: We strongly suggest removing the 30 days and stating that the NOP Import Certificate must be available with the receipt of product at shipment.

205.273(c)

We urge the USDA to shorten the time frame allowed for an importer to submit an electronic import certificate into the ACES system. Allowing importers 10 days to file the electronic certificate after the shipment has reached a U.S. port could mean the difference between preventing fraudulent products from entering the U.S. and having to try to retrieve them once they have entered commerce.

Section (3) Labeling of Nonretail Containers

NOFA-NY supports the requirement to label nonretail containers. This is critical for organic integrity and will aid in traceability through the supply chain and reduce fraud.

205.307

The proposed rule's requirements that non-retail containers be labeled with more information about the organic status of products) is extremely important. **But we believe this requirement should be expanded to large non-retail containers such as trailers, tanks, rail cars, shipping containers, grain elevators/silos, vessels, cargo holds, freighters, barges, or other method of bulk transport or storage.** We do not believe that labeling of these types of large containers is impractical, and note that it is done on a regular basis for other (non-organic) products. Providing a visual indicator that these contain organic products serves as a valuable backstop to other methods, such as organic certificates, and provides one last opportunity to prevent unintended commingling or treatment with irradiation or other prohibited substances.

- USDA/NOP should also investigate available technologies that indicate whether containers have been opened or tampered with during shipping for large-scale shipments.

§205.307(a)

Comments: It is important for traceability purposes for nonretail labels to list the name or OID number of the certified producer of the product, or if processed, the last certified handler that processed or handled the product;

Move 205.307(b)(3) from may to must at 205.307(a).

We also support and refer to other specific language proposed by the National Organic Coalition (NOC) in their comments on 205.2 and 205.307

Section (5) Certificates of Organic Operation

NOFA-NY supports consistency among certifiers and acknowledges the need for updated accessible information for organic certificates and standardization.

205.2

ORGANIC INTEGRITY DATABASE (OID). The National Organic Program's electronic, web-based reporting tool for the submission of data, completion of certificates of organic operation, and other information, or its successors.

Comments: NOFA-NY recommends renaming the definition for the NOP database to 'ORGANIC INTEGRITY DATABASE' or 'OID 'for short. The term "integrity" should be reserved to describe the organic integrity of the supply chain.

§205.404 (b)

The certifying agent must issue a certificate of organic operation. The certificate of organic operation must be generated from OID or

match the certificate in the ORGANIC INTEGRITY DATABASE (OID), in content and design, and may be provided to certified operations electronically.

Comments: Without knowing what data will be required, and how OID will be ensured to not crash, it is difficult to know the administrative burden of requiring certificates be generated from OID. We suggest that either the NOP build an application programming interface (API) for data integration, or allow certifiers to generate standardized certificates on their own with a link to the OID.

The latter being most practical, **we suggest changing the language such that the certificate issued by the certifier must match the certificate in the OID <u>in content and design.</u>**

§205.404 (c)

Comments: NOFA-NY is not in favor of expiration dates on certificates. Expiration dates on certificates only create confusion when the certification itself does not expire. This will create a paperwork and administrative burden to update certificates. Instead, **there should be uniform instruction to all certifiers as to when to update the certificate. Therefore, we recommended removing (6) altogether.**

<u>Section (6) Continuation of Certification</u>

Comments: NOFA-NY supports the revision at §205.406(a) which adds flexibility and efficiency to the annual update process. We are in favor of removing the need to annually update on the correction of minor noncompliances.

Regarding proposed language at §205.406(b) that on-site inspections of the certified operation occur at least once per calendar year, we agree that under extraordinary circumstances, such as a global pandemic, when onsite inspections are not possible, it is important for the NOP to recognize this and allow flexibility with this requirement.

<u>Section (7) Paperwork Submissions to the Administrator</u>

NOFA-NY supports removing §205.405(c)(3) and appreciates that the NOP supports lessening the paperwork burden of accredited certifying agents. We also support the maintenance of current and accurate data in the ORGANIC INTEGRITY DATABASE for all certified operations, provided that the NOP clarifies some of the proposed language.

§205.501 (a)(15)

Maintain current and accurate data in ORGANIC INTEGRITY DATABASE (OID) for each operation which it certifies, operations whose certification has been surrendered, suspended or revoked, and all applicants who were denied certification or withdrew with adverse actions;

Comments: We suggest that a complete list of data fields be provided in order to ensure accurate data is uploaded to the OID. Certifiers need to know what data to report in order to ensure consistency. Also, it is important to be able to track applicants that were denied certification, were surrendered, suspended or revoked, or withdrew with adverse actions.

Section (8) Personnel Training and Qualifications

NOFA-NY supports the use of highly trained certification reviewers and inspectors. However, we are concerned about the specific requirements for personnel training. Specifically, requirements for inspectors are extremely broad and vague, and they will likely shrink the pool of available inspectors. We suggest revisions that will still require the use of trained personnel without having unrealistic training requirements.

§205.501(a)(4)

(i)(B) Initially and every year thereafter, inspectors must demonstrate successful completion of annual training in topics that are relevant to inspection.

(ii)(B) Initially and every year thereafter, all persons who conduct certification review activities must demonstrate successful completion of annual training in topics that are relevant to certification review

Comments: Proposed language requires that inspectors complete 20 hours of training annually. NOFA-NY recommends changing the proposed language to "must demonstrate successful completion of an annual training in topics that are relevant to inspection."

The requirement for 20 hours of training annually is prescriptive and lacks clarity. In addition, quality audit skills are essential, but the requirement for inspectors to have one year of field-based experience related to both the scope and scale of operations prior to being assigned inspections seems excessive.

§205.501(a)(6)

Conduct an annual performance evaluation of all persons who conduct inspections, certification review, or implement measures to correct any deficiencies in certification services; (i) On-site evaluation of inspectors—Certifying agents must observe or review the report from observation of each inspector performing on-site inspections at least once every three years, or more frequently if warranted; and (A) On-site inspector evaluations must be performed by qualified persons as designated by the certifying agent

Comments: NOFA-NY appreciates the ability to share the on-site evaluation report as well as contract with personnel to perform them.

Should organic inspectors be evaluated on-site more frequently than once every three years?

The regulation should not indicate more frequency, since it already does clarify that certifiers have the discretion to evaluate more frequently when necessary according to risk.

Section (12) Noncompliance Procedure for Certified Operations

§205.662(e)(3)

Within 10 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 ORGANIC INTEGRITY DATABASE (OID).

Comments: While we agree that the Organic Integrity Database should be updated quickly in the event of a notification of suspension or revocation, NOFA-NY is concerned that such a short amount of time will create an unnecessary burden for certifiers, and will lead to a focus on getting things done in the time frame rather than verifying that proper procedures were being followed. We request that the requirement to update ORGANIC INTEGRITY DATABASE be lengthened to 10 business days.

Section (16) Grower Group Operations

NOFA-NY supports the further definition and clarification of Grower Groups. However, as detailed below, we find that there are some gaping holes in providing clear definitions, in addressing the harmonization of US and International agreements on many specific areas, as well as lacking significant feedback or agreement from NOSB and the organic community.

Therefore, we support Organic Farmers Association and others who call for the Grower Group section to be withdrawn from this Rule, in order to receive further direction: first from an NOSB working group and full NOSB process, as well as significant communication with IFOAM, EU and other international authorities.

NOFA-NY absolutely agrees that certifiers be accredited to specifically offer Grower Group certification. Auditing an internal control system requires specific skills and guidance. Because of the unique nature of this category, we also agree with NOC's recommendation that that specific qualifications and training standards be established for USDA accreditation personnel, as well.

Areas of concern:

1. **205.2** We are concerned that the grower group operation under 205.2 is restricted to production of only one single crop: this current proposed language could cause confusion because of the "single crop" reference, which has been read by some to suggest that only one crop would be allowed to be produced by a grower group operation. This should be clarified because promoting monocultural production

practices and discouraging crop diversity would be in direct conflict with the principles of organic. We agree with NOC that the proposed definition of "grower group production unit" more appropriately addresses the intent, by defining such a unit as:

> "A defined subgroup of grower group members in geographical proximity as a part a single grower group operation that **use similar practices and shared resources to grow or gather similar crops and/or wild crops.**" (emphasis added)

2. There are no scale and geographic parameters, or guardrails on grower group membership and operations. How big is too big?

3. **205.403(a)(2)(iii)** There is no widespread agreement of rate of inspections of individual operations under the grower group model, and what part the ICS inspection and audit affect the individual inspection numbers (i.e., risk assessment). The proposal at 205.403(a)(2)(iii) seems inadequate in some circumstances. For instance, a grower group with membership of 1000, under either the proposed [1.4 times Square root] inspection rate or others' higher rate of 3% yields ~30-40 inspections per year. That means each operation is inspected once every ~20+ years. This seems flawed and needs to be worked on.

4. Excluding livestock seems unsupported, and could cause significant problems vis-à-vis EU and IFOAM products, as well as honey. However, particularly in the US, there needs to be clear definition and ownership/control parameters so that grower group certification does not become a mechanism for vertically integrated poultry and livestock companies, as well as produce operations, to avoid individual organic certification. This issue cannot be dumped into a guidance later – it must be addressed up front to forestall massive use of this type of certification likely to happen with any ambiguity in the regulations.

5. The European Union is in the process of revising their standards for grower group certification. Since grower group certification includes so many operations around the world, it would make sense to spend some more time in consultation with EU prior to significant, specific standard being developed.

Section (17) Calculating the Percentage of Organically Produced Ingredients

Comments: NOFA-NY agrees that the proposed language on calculating the percentage of organically produced sub-ingredients needs clarification for consistent interpretation. As written, water and salt are to be excluded from each ingredient in the formulation. NOFA-NY does not support this language, as it would have major ramifications on and result in product category changes for currently certified products (products currently labeled as "organic" will need to be relabeled as "made with organic (specified ingredients or food group(s)).").

Section (18) Supply Chain Traceability and Organic Fraud Prevention

NOFA-NY appreciates the additions of ii and iii to 205.501(a)(10) which add clarity. We also support 205.501(a)(13) because of the added cooperation among certifiers. However, we have questions about the scope of the supply chain audit, the depth of auditing both certified and uncertified products, the potential administrative burden, and if certifiers have the capacity to do a complete supply chain audit. Furthermore, certifiers agree that the NOP should coordinate these investigations and funding should come from taxpayer money or congressional appropriations.

Should certifying agents be required to perform a minimum number of trace-back audits each year?

We do not support establishing a specific metric for the number of annual audits that a certifying agent needs to conduct, because the quantity and types of high-risk operations will vary by certifying agent.

Should more specific fraud prevention criteria be included in the regulation?

Yes, the requirements of the organic fraud prevention plan should be included in the regulation or provided in a separate guidance document.

In the preamble, the AMS expects that a robust plan for supply chain oversight and organic fraud prevention would include:

- A map or inventory of the operation's supply chain which identifies suppliers;
- Identification of critical control points in the supply chain where organic fraud or loss of organic status are most likely to occur;
- A vulnerability assessment to identify weaknesses in the operation's practices and supply chain;
- Practices for verifying the organic status of any product they use;
- A process to verify suppliers and minimize supplier risk to organic integrity;
- Mitigation measures to correct vulnerabilities and minimize risks;
- Monitoring practices and verification tools to assess the effectiveness of mitigation measures; and
- process for reporting suspected organic fraud to certifying agents and the NOP.

Other Comments

1. **Implementation timeframe.** AMS is proposing that all requirements in this proposed rule be implemented within ten months of the effective date of the final rule (this is also one year after publication of the final rule).

NOFA-NY believes that one year is not sufficient time to implement all of the proposed changes. We support the Accredited Certifiers Association, and suggest a phased approach, with a 1-year implementation for some items and 2 years for others. We feel this would be more appropriate and spread the cost over a 2-year time period.

Suggested items for 1-year implementation period:

- NOP Import Certificates
- Unannounced inspection
- Continuation of certification (OSP update, annual inspection)
- Annual performance evaluations
- Notification of new certification office
- Mediation procedures
- Adverse action appeals

Suggested items for 2-year implementation period:

- Training programs + inspector qualifications
- Generating certificates in OID
- Certification for all operations that are no longer exempt/excluded
- Supply chain traceability/fraud prevention
- Maintaining current list of operations in OID
- Labeling of non-retail containers (label use-up for some clients)

2. **The accuracy of the estimates in the Regulatory Impact Analysis and Regulatory Flexibility Analysis.**

We feel that the estimated cost to certifiers are extremely low. Proposed changes will affect the following areas, which will increase costs for certifiers:

- Fraud prevention procedures
- Certificate implementation
- Inspector evaluation cost

- Training for all personnel - inspectors and reviewers
- Finding sufficiently trained inspectors
- Increase in the number of operations that need to be certified
- Supply chain traceability audits will require hiring additional staff in order to complete these. May need staff dedicated to performing these audits in some cases. These audits take a lot of coordination among other certifiers and within the certifier to gather the correct information.
- Additional OID uploads and data management

NOFA-NY again applauds the Department for moving ahead on this necessary addition to the organic regulation to Strengthen Organic Enforcement. We have provided some comments and suggestions above, and have noted that where details are not complete, the Department should prioritize the whole, and remove what needs significantly more work. We do not support filling out these details in NOP Guidances to Certifiers. Specifically:

1. We support the removal of Section 16 – Grower Groups, until such time as significant details can be developed and vetted by the National Organic Standards Board and the entire organic community.

2. While we support fast implementation of the Rule, we note that some sections may need more phased implementation, and we support the Accredited Certifiers Association adjusted timeline.

Thank you for the opportunity to comment, as well as the significant step towards improving the integrity of the organic label.