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October 12th, 2010

The National Organic Standards Board
c/o Lisa Ahramjian, Executive Director
1400 Independence Avenue, SW
Room 2646 – So., Ag Stop 0268
Washington D.C. 20250-0268

RE: AMS-NOP-10-0068; NOP-10-08

Clarifying Limitations of § 205.101(b)

Dear NOSB Certification, Accreditation, and Compliance Committee members:

Oregon Tilth supports the general intent behind this recommendation, specifically to prevent the misrepresentation and sale of non-organic goods sold with an organic claim. We're concerned however that the scope of the clarification is not clearly conveyed and it may have unintended consequences.

We request that the CACC make it very clear that the intent of the recommendation is to require traders, brokers and distributors to become certified when the conditions of § 205.101(b) are not met AND ownership is transferred from the certified operator to the uncertified broker, trader, or distributor. When the chain of custody is not broken, handling practices can be reviewed adequately under the respective seller and buyer's Organic System Plans, and a mass balance can be conducted.

The recommended guidance could be interpreted to require *anyone* who touches unpackaged or unsealed product to be certified. Oregon Tilth would like to see the CACC further clarify this recommendation so that it does not include *3rd party contracted transportation of certified product from one certified operator to another*. This would have an unintended impact on current practices where we do not typically see fraudulent activity.

Contracted transportation from the producer to the handler should not be viewed as "handling". This point is supported by the NOP definition of "handle":

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.*

Oregon Tilth offers the following examples for clarity:

Hay & Cattle

Hay is typically transported in bales of various sizes and configurations on trailers without packaging; cattle are transported on the hoof in trailers. If hay or cattle are ***sold*** from a certified farm to an uncertified broker the broker/trader/distributor should be certified organic. In this example, ownership has been transferred and the chain of custody or audit trail is broken providing an opportunity for fraudulent activity.

If the hay or cattle however are sold directly from a certified farm to another certified operator such as a livestock operation or slaughterhouse, and the certified producer contracts a hauler to transport the hay or cattle, the hauler/hauling company should not be required to be certified. The transportation would be covered under the producer's OSP as would the receiving of the hay or cattle be covered under the OSP of the certified buyer.

Grain

Commodities are typically not packaged and are received from one container or vessel and transported in another container or vessel. If the grains are sold from a certified operator to an uncertified broker, the broker should be certified because the grains are not "packaged", and the chain of custody or audit trail is broken.

If the grains however are sold directly from a certified farm to a certified handler, such as a flourmill or soymilk manufacturer, and the certified producer contracts a hauler to transport the grain, the hauler/hauling company should not be required to be certified organic. The transportation would be covered under the producer's OSP as would the receiving of the grain be covered under the OSP of the certified buyer.

Milk

Milk is typically transported in tankers. Although the milk in the tanker is "enclosed in a container", the milk may be transferred into another milk tanker or storage tank in route to its final destination. Oregon Tilth believes the direct transfer of milk in a sealed tamper proof container meets the conditions of § 205.101(b). However if the milk is ***sold*** from a certified dairy to an uncertified broker, and the milk does not remain in the same container it left the dairy in, the broker/trader/distributor should be certified. The chain of custody or audit trail is broken providing an opportunity for fraudulent activity.

In contrast, if the ownership of the milk is directly transferred from a certified dairy to a certified handler, and the certified producer contracts the transportation of the milk, the broker or hauler/hauling company should not be required to be certified. The transportation would be covered under the producer's OSP as would the receiving of the milk be covered under the OSP of the certified buyer/handler.

In the above examples where the certified product is transported from the certified producer to the certified handler via contracted hauling, the OSP would describe the commingling and contamination prevention plan (i.e. truck/trailer/tanker/equipment inspection, the use of clean-truck affidavits, etc.), and it would include a description of the record and ID system used to track the product from the seller to the buyer. Under this system: 1) organic integrity is preserved; 2) the chain of custody is not broken; 3) certified product can be tracked from the seller to the buyer; 3) a mass balance can be performed; and 4) fraud could be detected.

In order to clearly convey the message, which we believe was intended by the recommendation, Oregon Tilth offers suggests the following revisions be made to the proposed public notice:

“This notice is provided to inform the general public and interested parties that the National Organic Program (NOP) staff has determined that the limitations to the applicability of § 205.101(b) have

not been adequately observed and that a number of uncertified handlers have been operating in a manner inconsistent with 7 CFR Part 205 and the National Organic Program.

Handling operations selling or otherwise representing commodities such as grains, soybeans, hay, or cattle and commonly referred to as brokers, traders, or distributors of those commodities, *are not excluded from the requirements of 7 CFR Part 205*, including but not limited to organic certification, *unless* such an 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.

Hay is typically sold ~~or transported~~ in bales of various sizes and configurations on trailers without packaging; cattle are sold on the hoof in trailers. These activities are inconsistent with § 205.101(b)(1)(i). Brokers, traders or distributors **taking ownership** of such organic goods are therefore required to be certified organic operators, maintaining product segregation and records sufficient to verify compliance with OFPA 1990 and 7 CFR part 205, the National Organic Program.

Commodities such as grains and soybeans are typically not packaged and are received from one container or vessel and transported in another container or vessel; this is inconsistent with § 205.101(b)(1)(ii). Brokers, traders or distributors **taking ownership** of such organic commodities are therefore required to be certified organic operations, maintaining product segregation and records sufficient to verify compliance with OFPA 1990 and 7 CFR part 205, the National Organic Program.

Handlers currently engaged in brokering, trading or distribution activities in a manner inconsistent with § 205.101(b) are not in compliance and may be subject to penalties and fines as per § 205.100(c)(1).”

This notice does not apply to the sale, transportation or delivery of certified product by the producer thereof to a certified handler.

Thank you for carefully considering Oregon Tilth’s comments.

Respectfully submitted,

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Oregon Tilth, Inc.

Oregon Tilth, Inc. is a non-profit 501(c)(3) organization that supports and promotes biologically sound and socially equitable agriculture. Oregon Tilth offers educational events throughout the state of Oregon, and provides organic certification services to organic growers, processors, and handlers internationally. An NOP accredited certifier since 2002, Oregon Tilth currently certifies over 650 farms and ranches and over 600 handlers in more than 35 states affording us a broad perspective of current practices and challenges faced by organic producers and handlers. This perspective also extends to the anticipated successes and challenges that this discussion topic will affect upon them.

