

NOSB ITEM FOR PUBLIC COMMENT

The National Organic Standards Board (NOSB) is seeking public comment on recommendations regarding Accredited Certifying Agent (ACA) Compliance Procedures for Minor Noncompliances until November 30, 2003. With respect to receipt of comments by the NOSB during the comment period, the following provisions have been established to ensure that your comment has the greatest probability of being received and reviewed by the Board:

- **Mail:** Persons may submit comments on listed Board recommendations by mail to: The National Organic Standards Board; c/o Keith Jones; Room 4008 - South Building; 1400 and Independence Avenue, SW; Washington, D.C. 20250-0001.
- **E-mail:** Comments may be sent via internet to respective Board committees by submitting an E-mail to Board committee E-mail accounts provided with each recommendation.
- **Fax:** Comments may be submitted by fax to (202) 205-7808.

Clearly indicate if you are for or against the Board recommendation or some part of it and why. Include recommended wording changes as appropriate. Include a copy of articles or other references that support your comments. Only relevant material should be submitted.

Accredited Certifying Agent (ACA) Compliance Procedures for Minor Noncompliances

**Draft 7 – NOSB Certification, Accreditation, and Compliance Committee
Approved August 15, 2003**

I. Introduction – The NOP Rule allows accredited certifying agents (ACAs) to issue certification with “minor noncompliances”. The terms “minor noncompliance”, “noncompliance”, and “organic integrity” are used in the regulation, but are not defined in the Rule or in OFPA. There is a need to provide guidance to ACAs to ensure that minor noncompliances are established in a consistent manner.

By way of introduction, all readers are reminded that any deviation from the regulation is a violation. The severity of the violation determines the consequences. This guidance document is offered to help ACAs establish appropriate and consistent sanctions for all instances where evidence confirms that noncompliances have occurred.

II. Background – The NOP Rule mentions “minor noncompliances” related to certification in §205.404(a), §205.406(a)(3) and §205.501(a)(18). The term “minor noncompliances” is also used in reference to conditions for accreditation in §205.506(b)(3).

A. Rule Citations:

§ 205.404 Granting certification.

(a) Within a reasonable time after completion of the initial on-site inspection, a certifying agent must review the on-site inspection report, the results of any analyses for substances conducted, and any additional information requested from or supplied by the applicant. If the certifying agent determines that the organic system plan and all procedures and activities of the applicant's operation are in compliance

with the requirements of this part and that the applicant is able to conduct operations in accordance with the plan, the agent shall grant certification. The certification may include requirements for the correction of minor noncompliances within a specified time period as a condition of continued certification. (Underline added.)

§ 205.406 Continuation of certification.

(a) To continue certification, a certified operation must annually pay the certification fees and submit the following information, as applicable, to the certifying agent:

(3) An update on the correction of minor noncompliances previously identified by the certifying agent as requiring correction for continued certification;

§ 205.501 General requirements for accreditation.

(a) A private or governmental entity accredited as a certifying agent under this subpart must:

(18) Provide the inspector, prior to each on-site inspection, with previous on-site inspection reports and notify the inspector of its decision regarding certification of the production or handling operation site inspected by the inspector and of any requirements for the correction of minor noncompliances;

§ 205.506 Granting accreditation.

(b) On making a determination to approve an application for accreditation, the Administrator will notify the applicant of the granting of accreditation in writing, stating:

(3) Any terms and conditions for the correction of minor noncompliances;

B. Preamble Citations:

While the Rule does not define “minor noncompliances”, the Preamble offers some guidance.

On page 80592, the Preamble states, “The certifying agent will make the determination of whether a violation of the Act and regulations is minor. Minor noncompliances are those infractions that, by themselves, do not preclude the certification or continued certification of an otherwise qualified organic producer or handler. The certifying agent would be free to modify the time period for correction should it believe it to be appropriate.”

Page 80593 goes on to state, “(13) Correction of Minor Noncompliances. We have amended section 205.406(a) by adding a new paragraph (3) which requires the certified operation to include with its annual reporting an update on the correction of minor noncompliances previously identified by the certifying agent as requiring correction for continued certification. A commenter recommended adding at 205.406(a) a requirement that the certified operation address any restrictions that have been applied to its certification under 205.404(a). We agree with the commenter that the annual reporting by the certified operation should include an update addressing the certified operation's compliance with the certifying agent's requirements for the correction of minor noncompliances. Accordingly, we amended section 205.406(a) as noted above and re-designated paragraph (3) as paragraph (4). The certifying agent will make the determination of whether a violation of the Act and regulations is minor. Minor noncompliances are those infractions that, by themselves, do not preclude the certification or continued certification of an otherwise qualified organic producer or handler.”

As shown above, the Preamble provides some discussion of “minor noncompliances”, but it does not define the term or establish criteria for the determination of a minor noncompliance.

C. Discussion:

Accredited certifying agents are clearly empowered by the Rule to make determinations whether violations of the Act and regulations are minor. There is a need to define “minor noncompliance” and “noncompliance” to assure that the Rule is consistently administered by all domestic and foreign, new and experienced ACAs. (Note: A previous draft from the Accreditation Committee referred to “major noncompliances”. Since the term “major” is not used in the Rule, the phrase “major noncompliance” has been replaced by “noncompliance” in this guidance document.)

There is also a need to provide clarification of the notification of noncompliance procedures. Such guidance is contained in the Certification, Accreditation, and Compliance Committee's recommendation, which is based on the noncompliance procedures contained in the Rule.

There is a further need to provide examples of minor noncompliances and noncompliances. Such examples are contained in the Addendum to this recommendation. The examples are presented for guidance and discussion purposes, and are not meant as an all-inclusive list. Additional noncompliances can and do occur. The examples address crop production only. No examples are given for livestock production, handling, or labeling violations.

Historically, certifying agents have granted "conditional certification" to operations which are not in full compliance. Synonymous terms include "continuous improvement points" or "certification with minor improvements required". During the inspection and certification process, minor issues are identified which must be addressed in order for the applicant to be certified, or for the certified operator to continue to be granted certification. The concept of conditional certification is embodied in the allowance for "minor noncompliances" contained in the NOP regulation.

When considering the initial certification to a new applicant, an ACA must assess all identified noncompliances to determine which noncompliances are minor, meaning that "conditional" certification can be granted, and which noncompliances affect the operation's organic integrity, therefore precluding certification. All noncompliances which have the potential to negatively affect an operation's ability to maintain organic integrity should be regarded as pre-certification conditions, meaning that the noncompliances must be resolved prior to granting certification. If the noncompliances are not resolved to the satisfaction of the ACA, certification must be denied.

When an operation is granted certification with minor noncompliances, the findings of non-compliance are communicated to the operator, and the operator must respond to the notice of minor noncompliances in a time period specified by the ACA. In essence, the operator's Organic System Plan is amended to include all minor noncompliances, the resolution of which function as conditions for certification of the operation. If a certified operator does not correct or rebut a minor noncompliance in the time period specified by the certifying agent, the minor noncompliance can become a full noncompliance, which can set in motion notification of proposed suspension or revocation proceedings. Likewise, an operation can have so many minor noncompliances that certification of the operation is precluded.

ACAs must examine all evidence presented to determine which noncompliances are minor, and which preclude certification of an operation or portion of an operation. Operations can be certified with minor noncompliances. Operations cannot be certified or remain certified with noncompliances.

As stated in the introduction, all deviations from the regulation are violations. All deviations must be corrected in order for initial certification to be granted or for certification to remain in effect. All findings of noncompliance, including minor noncompliances, must be based on solid evidence. The ACA must provide burden of proof when any finding of minor noncompliance or noncompliance is issued.

ACAs, like certified operators, must maintain auditable records of all noncompliances and sanctions issued. Just as operator records are essential to demonstrate compliance with the regulation, certifier records demonstrate compliance with accreditation requirements. ACA records should demonstrate that sufficient evidence was gathered, proper notification procedures were followed, and all operations with similar violations were treated equitably.

The guidance presented below is offered to help bring consistency and clarity to the establishment of minor noncompliances and noncompliances. While the recommendation has no legal authority, it represents the NOSB's "best thinking" on the subject.

III. Recommendation – The National Organic Standards Board recommends that the NOP consider the following when constructing a guidance document on noncompliances:

A. General

All Notices of Noncompliance and Notices of Proposed Suspension or Revocation of Certification will follow the Certification, Compliance, and Appeals procedures specified in §205.400-205.406 and §205.660-205.681.

B. Definition of terms

- Noncompliance - a finding that affects the integrity of the organic system or the organic product and precludes the certification or continued certification of a producer or handler.
 - Minor Noncompliance - a finding of noncompliance that is correctable, does not affect the integrity of the organic system or the organic product, and does not preclude the certification or continued certification of an otherwise qualified organic producer or handler.
 - Organic integrity - the qualities of an organic product or production or handling system which are obtained through compliance with National Organic Program requirements and which must be maintained from production through handling to the point of final sale in order for the final product to be labeled and/or marketed as organic.
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C. Minor Noncompliances

Situations that Require Issuance of a Minor Noncompliance:

1. The producer or handler's Organic System Plan is incomplete or inaccurate, but the integrity of the organic system is not compromised.
2. The operator's Organic System Plan does not demonstrate full compliance with all applicable provisions of the National Organic Program, 7 CFR Part 205, but the integrity of the organic system is not compromised.

Required Components of a Notice of Minor Noncompliance:

1. A description of each of minor noncompliance.
2. The facts upon which the notification of minor noncompliance is based and the relevant sections of the National Organic Program Rule that are in violation.
3. The date by which the applicant or operator must respond to the Notice of Minor Non-Compliance by either rebutting the notice or instigating corrective actions for each minor noncompliance and submitting supporting documentation for each such corrective action. (It is recommended that ACAs establish standard time frames for applicants and operators to respond to notices of minor noncompliances to ensure equitable treatment of all operators - e.g. 30 days from Notice of Minor Noncompliance.)
4. Notification that if the response is not received within the specified time and corrective actions are not completed, or if there is no rebuttal of the Notice of Minor Noncompliance within the required time period, that further action, including denial, suspension, or revocation of certification, may occur.

Distribution guidelines

All Notices of Minor Noncompliance will be distributed as follows:

- ACA will provide the applicant or certified operator written notification.
- Copy for ACA office file.
- Copy for inspector's file (as required by §205.501(a)(18)).

Resolution process:

The Accredited Certifying Agent will verify by inspection or written documentation that the corrective actions, described in the applicant’s or certified operator’s response to the Notice of Minor Non-compliance, have been completed. When an applicant or certified operator completes the required corrective action(s), the operation’s certification will be granted, or will remain in effect, as applicable. In some instances, ACAs may grant certification or issue notices of continued certification at the same time that a Notice of Minor Noncompliance is issued.

Examples of Minor Noncompliance	Corrective Action
Inadequate buffer zone between organic and nonorganic production. (§205.202(c))	Letter that states that an adequate buffer zone has been established, amending the operation’s Organic System Plan.
Inadequate recordkeeping – Producer does not record all materials applied or fails to record date that material was applied. (§205.103(b)(2))	Letter stating that complete records will be maintained in the future, accompanied by examples of compliant records, amending the operation’s Organic System Plan.

D. Notice of (major) Noncompliance

Situations that Require Issuance of a Notice of Noncompliance:

1. Producers or handlers who represent nonorganic products as “organic”.
2. Applicants or certified operators who are in violation of the National Organic Program, 7 CFR Part 205.
3. Certified operators who violate or fail to implement their Organic System Plans.
4. All findings of noncompliance, except for findings of minor noncompliance.

Required Components of a Notice of Noncompliance:

1. A description of each of noncompliance.
2. The facts upon which the notification of noncompliance is based and the relevant sections of the National Organic Program Rule that are in violation.
3. The date by which the applicant or operator must respond to the Notice of Noncompliance by rebutting the notice or by instigating corrective actions for each noncompliance and submitting supporting documentation for each such correction when correction is possible. (It is recommended that ACAs establish standard time frames for applicants and operators to respond to notices of minor noncompliances to ensure equitable treatment of all operators - e.g. 30 days from Notice of Noncompliance.)
4. Notification that if the response is not received within the specified time and corrective actions are not completed, or if there is no rebuttal of the Notice of Noncompliance within the required time period, that further action, including civil penalties and/or denial, suspension or revocation of certification, may occur.

Resolution process:

The Accredited Certifying Agent will verify by inspection or written documentation that that the corrective actions, as described in the response to the Notice of Non-compliance have been completed. When an applicant or certified operation completes the corrective action, the ACA will send the operation a written notification with dated return receipt stating that the noncompliance issue has been resolved. The operation’s organic certification may then be issued or will remain in effect, as applicable.

E. Notice of Denial of Certification (NDC)

Situations that require issuance of a Notice of Denial of Certification:

1. Findings demonstrate that an applicant for certification is not in compliance.
2. Applicant has failed to address noncompliances, including minor noncompliances, thereby violating the applicant's Organic System Plan.
3. Applicant has not taken corrective action to correct a noncompliance specified in a a Notice of Noncompliance or has not responded to a Notice of Noncompliance by the date specified in the Notice of Noncompliance.
4. The corrective actions undertaken by the applicant are not sufficient for the applicant to qualify for certification.

Examples:

- Findings demonstrate that an applicant is representing nonorganic products as organic, in violation of §205.100(c (1)).
- Findings demonstrate that an applicant has applied a prohibited pesticide, in violation of §205.202(b).
- Findings demonstrate that an applicant has failed to implement a soil management system compliant with §205.203 and §205.205.
- Findings demonstrate that an applicant has failed to establish effective barriers to prevent the commingling of organic and nonorganic items, in violation of §205.272(a).

Components of the Notice of Denial of Certification:

1. Cover letter (optional).
 2. Notice of Denial of Certification.
 3. The reasons for denial, with appropriate National Organic Program citations.
 4. The right to reapply for certification, pursuant to §205.401 and §205.405(e).
 5. The right to request mediation pursuant to §205.663 or to file an appeal pursuant to §205.681.
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F. Notice of Proposed Suspension of Certification (NPSC) or Notice of Proposed Revocation of Certification (NPRC)

Situations that require issuance of a Notice of Proposed Suspension of Certification or Notice of Proposed Revocation of Certification:

1. Findings demonstrate that the certified operation has committed a noncompliance.
2. Certified operator has failed to address noncompliances, including minor noncompliances, thereby violating the Organic System Plan agreed to by the operator and the ACA.
3. Certified operator has not taken corrective action specified in a response to notice of noncompliance or has not responded by the date specified in the notice of noncompliance.
4. The corrective actions undertaken by the certified operator are not sufficient for the operation to remain certified.

Examples:

- Findings demonstrate that a certified producer or handler is representing nonorganic products as organic, in violation of §205.100(c (1)).
- Findings demonstrate that a certified producer has applied a prohibited pesticide, in violation of §205.202(b).
- Findings demonstrate that a certified operator has failed to establish effective barriers to prevent the commingling of organic and nonorganic items, in violation of §205.272(a).

Components of the Notice:

1. Cover letter (optional).
2. Notice of Proposed Suspension of Certification, or Notice of Proposed Revocation of Certification.
3. The reasons for the proposed suspension or proposed revocation with appropriate National Organic Program citations.
4. Proposed effective date of suspension or revocation.
5. Impact of a suspension or revocation on future eligibility for certification, pursuant to §205.662(f).
6. The right to request mediation pursuant to §205.663 or to file an appeal pursuant to §205.681.

Failure to respond

If the operation fails to respond to the Notice of Proposed Suspension of Certification or Notice of Proposed Revocation of Certification by rebutting or appealing the Notice or by requesting mediation, the Accredited Certifying Agent will provide the certified operator written notification with dated return receipt that the operation's certification has been suspended or revoked, as applicable.

G. Distribution guidelines

All Notices of Denial of Certification, Notices of Noncompliance, (except for Notices of Minor Noncompliance), Notices of Proposed Suspension of Certification, and Notices of Proposed Revocation of Certification will be distributed as follows:

- ACA will provide the applicant or certified operator written notification using a delivery service which provides dated return receipts.
- Copy for ACA office file.
- Copy for inspector's file (as required by §205.501(a)(18)).
- Copy sent via fax, email, express service, or regular mail to the National Organic Program Administrator.

IV. Certification, Accreditation, and Compliance Committee vote – 3 yes, 0 no, 2 absent

V. Minority opinion – None.

VI. Conclusion – The National Organic Standards Board recommends that the NOP post the definitions of “minor noncompliance”, “noncompliance”, and “organic integrity” along with noncompliance notification procedures and examples of noncompliances contained in this recommendation to the NOP website as guidance to Accredited Certifying Agents.

**Addendum Draft 7 – NOSB Certification, Accreditation, and Compliance
Committee
Examples of Noncompliances**

Introduction: The matrix below provides examples of minor noncompliances and noncompliances related to crop production. **The examples are presented for guidance and discussion purposes, and are not meant as an all-inclusive list. Additional noncompliances can and do occur.** No examples are given for livestock production, handling, or labeling violations. Please note that a noncompliance may progress from a minor noncompliance to become a noncompliance, or findings may demonstrate that a violation is a noncompliance involving fraud which warrants investigation and criminal prosecution, without having first been detected as a minor noncompliance. Please also note that willful violations, falsifications of evidence, refusals to comply, and other intentional noncompliances are grounds for denial, suspension, or revocation of certification and possible legal action in all instances.

MINOR NONCOMPLIANCES		NONCOMPLIANCES	
Minor Noncompliances → Notice of Minor Noncompliance and Corrective Action		Major Violations → Denial, Suspension, or Revocation of Certification	Fraudulent Actions → Criminal Prosecution
Submitting incomplete or unclear paperwork. §205.201(a)	Failure to submit required paperwork on time.	Refusal to submit required paperwork.	Submitting falsified documentation.
Submitting an unclear Organic System Plan. §205.201(a)	Submitting an incomplete or inaccurate Organic System Plan.	Failure to follow the operation's Organic System Plan.	Submitting a falsified Organic System Plan.
Failure to immediately notify certifying agent of changes to the operation which <u>do not</u> affect the operation's organic status. §205.400(f)	Failure to immediately notify certifying agent of changes to the operation which affect the operation's organic status.	Refusal to notify certifying agent of changes to the operation which affect the operation's organic status.	Providing false information to certifying agent concerning changes to the operation which affect the operation's organic status.
Failure to submit requested documentation to the certifier (such as prior land use forms, non-GMO letters, adjoining land use forms, etc.) §205.201(a)(5)&(6)	Failure to maintain documentation which verifies compliance with NOP standards.	Refusal to implement recordkeeping system that fully discloses all activities and transactions.	Falsifying records.
Maintaining records which are poorly organized and difficult to audit. §205.103(b)(2)	Maintaining records which cannot be audited.	Refusal to maintain records which can be audited.	Denying certifying agent access to records.
Poorly organized records which indicate lack of ability to maintain records for 5 years beyond their creation. §205.103(b)(3)	Absence of a system to maintain records for 5 years.	Refusal to maintain records for 5 years beyond their creation.	Willful destruction of documents.

MINOR NONCOMPLIANCES		NONCOMPLIANCES	
Minor Noncompliances → Notice of Minor Noncompliance and Corrective Action		Major Violations → Denial, Suspension, or Revocation of Certification	Fraudulent Actions → Criminal Prosecution
Failure to fully document compliance with minor noncompliance requirements. §205.103(b)(4)	Failure to fully comply with all minor noncompliances from the previous year.	Refusal to comply with certification requirements (minor noncompliances) from the previous year.	Falsification of documentation; selling non-organic crops or products as organic.
Poorly organized, incomplete, or unclear documentation of approved inputs. §205.103(b)(2)&(4)	Failure to obtain documentation for purchase of approved inputs.	Refusal to obtain documentation to verify purchase of approved inputs.	Falsifying documentation; or, records which verify purchase and application of prohibited materials.
Poor understanding of difference between approved and prohibited materials; no evidence of application. §205.105	Application of “questionable” materials (containing unknown inactive or inert ingredients) without prior approval of certifying agent.	Application of prohibited materials.	Falsification of records concerning application of prohibited materials; selling non-organic crops or products as organic.
Incomplete records concerning compliance with annotation when “restricted” materials are used. §205.103(b)(4)	Failure to keep documentation verifying compliance with annotations when “restricted” materials are used.	Refusal to keep records verifying compliance with annotations when “restricted” materials are used.	Falsification of records concerning compliance with annotations when “restricted” materials are used.
Incomplete documentation of attempts to source organic seeds. §205.204(a)(1)&(2)	Failure to document attempts to source organic seeds.	Use of seeds treated with prohibited materials.	Willful use of treated seeds; falsifying documentation.
Incomplete, unclear, or poorly organized documentation concerning the GMO (excluded method) status of inputs, including seeds, inoculants, and Bt products. §205.105(e) & §205.103(b)(4)	Failure to inquire or document the non-GMO status of inputs, including seeds, inoculants, and Bt products.	Use of GMO inputs, including seeds, inoculants, or Bt products.	Willful use of GMO inputs; falsifying documentation.
Delays in paying certification and/or inspection fees. §205.400(e)	Failure to pay certification and/or inspection fees.	Refusal to pay certification and/or inspection fees.	Falsifying records concerning payment of certification and/or inspection fees.

MINOR NONCOMPLIANCES		NONCOMPLIANCES	
Minor Noncompliances → Notice of Minor Noncompliance and Corrective Action		Major Violations → Denial, Suspension, or Revocation of Certification	Fraudulent Actions → Criminal Prosecution
Poorly organized field history records. §205.103(b)(2)	Incomplete field history records.	Incorrect calculation of the amount of time from the last application of prohibited inputs to projected organic harvest - and the required 36 months have not passed.	Falsifying records concerning the amount of time from the last application of prohibited inputs to projected organic harvest.
Lack of adequate detail or clarity on field maps – e.g. maps which do not show acres, field numbers, and/or adjoining land uses. §205.103(b)(4) & §205.202(c)	Inaccurate maps.	Refusal to provide accurate maps. §205.103(c)	Providing falsified maps.
Not recording field numbers on harvest and/or storage records. §205.103(b)(1)&(2)	Not keeping field activity, harvest, and/or storage records up to date.	Refusal to maintain field activity, harvest, and/or storage records.	Falsifying field activity, harvest, and/or storage records; denying certifying agent access to records.
Not using a consistent lot numbering system, if lot numbers are needed for the operation to verify compliance. §205.307(b)	Not using lot numbers, if lot numbers are needed for the operation to verify compliance.	Refusal to implement a lot numbering system or other audit trail mechanism to verify compliance.	Falsifying lot numbers and/or falsifying other audit control data or documents.
Incomplete records of contracted services, such as planting, spraying, harvesting, storage, processing, and/or trucking. §205.103(b)(2)	Failing to keep records of contracted services needed to verify maintenance of organic integrity.	Refusal to keep records of contracted services, resulting in commingling or contamination of organic crop.	Falsification of records of contracted services, resulting in commingling or contamination of organic crop.
Inconsistent cleaning of harvest equipment and/or storage units, <u>not</u> resulting in commingling or contamination of organic crop. §205.272(a)	Inability to properly clean harvest equipment and/or storage units, <u>not</u> resulting in commingling or contamination of organic crop.	Failure to properly clean harvest equipment and/or storage units, resulting in commingling or contamination of organic crop.	Denying certifying agent access to the operation for inspection of equipment and/or facilities.

MINOR NONCOMPLIANCES		NONCOMPLIANCES	
Minor Noncompliances → Notice of Minor Noncompliance and Corrective Action		Major Violations → Denial, Suspension, or Revocation of Certification	Fraudulent Actions → Criminal Prosecution
Ongoing need to harvest and segregate crops from buffer zones. §205.272(a), §205.201(a)(5) & §205.202(c)	Inadequate buffer zones, possibly resulting in contamination of organic crops.	Failure to segregate crops harvested from buffer zones, resulting in commingling of nonorganic and organic crops.	Intentional application of prohibited material, resulting in residue levels beyond NOP tolerance levels; knowingly selling nonorganic crops or products as organic.
Failure to inform neighbors, highway departments, and/or other parties that land adjacent to organic fields should not be sprayed with prohibited materials (or sign no-spray agreements when these are available). §205.272(a), §205.201(a)(5) & §205.202(c)	Failure to document notification of neighbors, highway departments, and/or other parties that land adjacent to organic fields should not be sprayed with prohibited materials.	Contamination of organic crops with residues of prohibited materials beyond NOP tolerance levels.	Application of prohibited material, resulting in residue levels beyond NOP tolerance levels; knowingly selling nonorganic crops or products as organic.