



# National Organic Program Appeals Process Update Mediation and Settlement Agreements

February 19, 2014

USDA Agricultural Marketing Service  
National Organic Program



# Objectives



- Provide an update about the appeals process
- Encourage the use of mediation and settlement agreements in resolving appeals
- Review our roles and possible outcomes
- Convey the importance of citing the correct violations and providing sufficient evidence
- Provide examples of appeals cases that resulted in a settlement agreement
- Group exercise: Put Yourself in NOP's shoes

# Appeals Process Overview



- **Where does our authority come from?**
  - The Organic Foods Production Act calls for an expedited appeals process. The USDA organic regulations set the appeals process parameters.
- **Who may appeal an adverse action?**
  - Certified organic operations, certifiers, applicants for organic certification or accreditation, uncertified operations, and suspended operations or certifiers that have been denied reinstatement.

# Examples of Adverse Actions



- Proposed suspension
- Proposed revocation
- Combined notice of noncompliance and proposed suspension or revocation
- Denial of certification
- Denial of accreditation (only NOP issues)
- Cease and desist notice (only NOP issues)
- Denial of reinstatement (only NOP issues)

# Certifier-Operator Mediation



- Within an adverse action, certifiers must provide the operator an opportunity to request mediation within 30 days' of its receipt.
- The goal of mediation is to reach a settlement agreement that will either:
  - bring the operator into compliance with the USDA organic regulations or
  - facilitate the operator's exit from organic production

# What is a Settlement Agreement?



Contractual document by which two parties mutually agree to resolve a dispute, or an appeal of an adverse action



- Signed by both parties
- Legally binding

# Paths to Dispute Resolution



## Informal Mediation

- Certifiers can settle disputes informally with operations

## Formal Mediation

- Confidential
- Quick / effective
- Voluntary
- Focus on preserving relationships

## Settlement Agreement

# Mediation Process – STEP 1



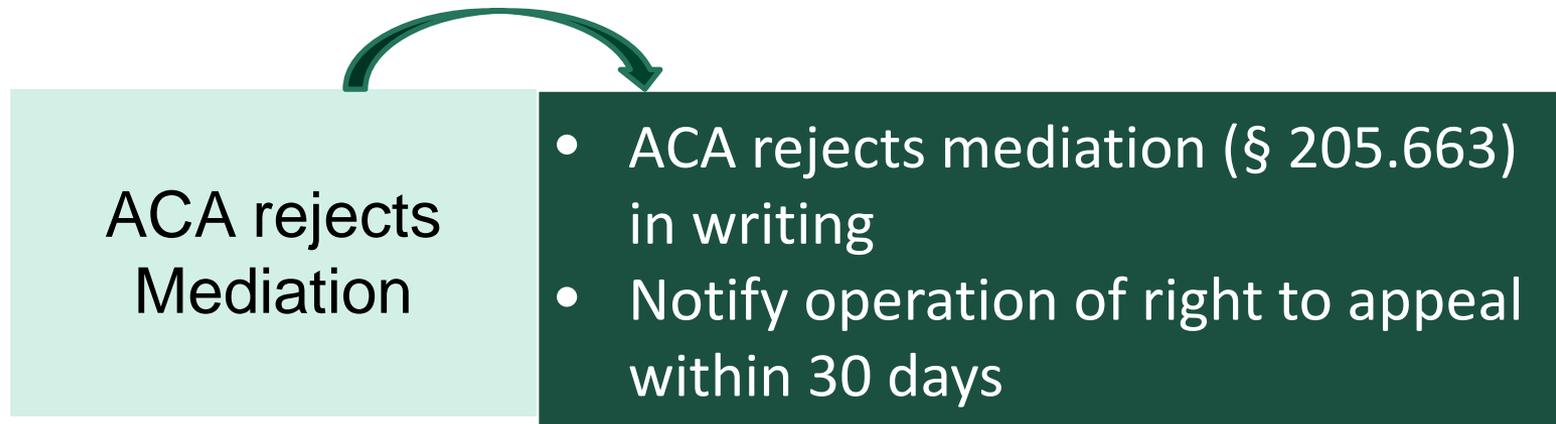
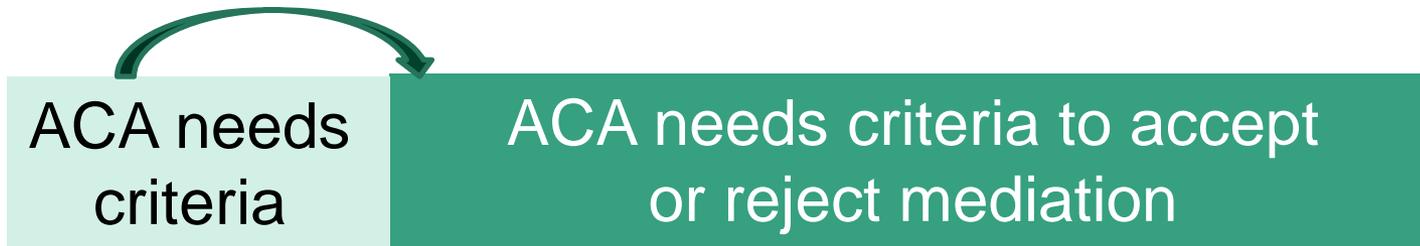
ACA issues an  
adverse action

- Certifier issues an adverse action to an operator

Operation  
requests  
mediation

- Operator requests mediation
- In writing to certifier

# Mediation Process – STEP 2



# Mediation Process – STEP 3



For formal mediation, a number of points should be considered.....

Mediation Logistics

- Mediator
- Time and Location
- In-person or video teleconference
- Fees and payment

Certifier internal procedures

# Mediation Process – STEP 4



## Mediation (§ 205.663)

- Qualified mediator
- Mediator must be mutually agreed upon by both parties
- Must reach agreement within 30 days of mediation session

## Appeal Rights

If unsuccessful, then operation can appeal initial adverse action within 30 days of termination of mediation

# Mediation Process – STEP 5



NOP may review and reject Settlement Agreements (§ 205.663)

- ACA regulatory assessment for compliance

NOP will review Settlement Agreements during ACA audits

ACA may submit Settlement Agreement to NOP with request for review

# Informal Mediation is Encouraged



- Informal mediation can be as simple as offering a settlement agreement to the operator
- When a certifier accepts mediation, the certifier can send a settlement agreement to the operator for consideration with its mediation acceptance letter.
- In turn, the operator must be fully free to:
  - accept or reject the settlement agreement,
  - come back to the certifier for continued informal discussion, or
  - Request a more formal mediation process, to discuss terms that are agreeable to both parties.



## Don't:

- Put settlement terms in adverse action notices
  - This is a process violation that may lead to the appeal being closed without a decision.
  - You may include a proposed settlement as an alternative to the adverse action.
  - **Do NOT make an adverse action “more strict” just to allow room for possible settlement – the adverse action must be defensible on its own!**



## Best Practices:

- Terms must comply with the USDA organic regulations and be mutually agreed upon:
  - **Parties**
    - Name of certifier, operator, operation and responsibly connected persons
  - **Corrective actions** agreed to by the operator
  - **Outcome**
  - **Timeframe** by which the corrective actions will be completed



## Best Practices (continued):

- **Effective date** - Specify the date the settlement agreement will take effect
- **Signatures** - By authorized representatives of both the certifier and certified operation

# Suggested Terms



- Specific actions agreed to by the operator with aggressive timeframes to demonstrate compliance
- Additional residue testing over a set period (may be at the expense of the operation)
- Shorter suspension period than originally offered (except if prohibited substance applied on land), or a suspension to mitigate a proposed revocation
- Additional unannounced inspection(s) over a set time (e.g., 1 each year for next 2 years at operation expense).

# What happens when the terms are broken?



## Consequences:

- Generally, the certifier must reissue the proposed adverse action.
- The certifier may **not** issue a final adverse action as a result of a settlement term being broken
- The operation retains appeal rights stemming from the proposed adverse action.
- Certifiers may not include civil penalties as a term in settlements or as a consequence of breaking one.

# Agreement Template: Introduction



[Insert letterhead of USDA-approved  
Accredited Certifying Agent]

**THIS SETTLEMENT AGREEMENT** is entered into by [insert name of certifier] and [insert name of operator], and any person responsibly connected with [insert name of operator].

[Insert name of certifier] and [insert name of operator] have decided to compromise and settle the issues among them related to alleged violations of the Organic Foods Production Act of 1990 (7 U.S.C. §§ 6501 et seq.) (OFPA), and USDA organic regulations (7 C.F.R. §§ 205 et seq.).

# Agreement Template: Terms



Accordingly, the parties agree to the following:

1. [Insert name of certifier] agrees not to [describe original proposed adverse action] charge [insert name of operator] with [sample language: *alleged violations of the OFPA and the regulations for any actions disclosed by the investigation*] which gave rise to this agreement.

2. [Insert name of operator] agrees to the following:

A. [Insert name of operator] agrees that failure to comply with the settlement agreement shall automatically void paragraph 1 above, and that [insert name of ACA] may thereafter institute the [describe original proposed adverse action] against [insert name of operator].

B. [Insert name of operator] agrees to [describe corrective action(s), outcomes and time frame].

# Agreement Template: Signature



This agreement will become effective upon [date].

\_\_\_\_\_ Date: \_\_\_\_\_

[Insert name of authorized operator representative]

[Insert title of above-named representative]

[Insert name of operator]

\_\_\_\_\_ Date: \_\_\_\_\_

[Insert name of authorized certifier representative]

[Insert title of above-named representative]

[Insert name of certifier]



- If the dispute is not resolved at the certifier-operator level, the appeals process continues on.
- Let's review the roles within the USDA and the possible outcomes of an appeal, especially NOP-initiated settlement agreements.



Appeals are independently reviewed and decided by persons not involved in adverse action.

- **NOP Appeals Team:** Reviews and recommends outcomes for appeals where NOP was not involved in proposing the adverse action
- **AMS Livestock Poultry and Seed Program:** Reviews and recommends outcomes for appeals where NOP was involved in the adverse action
- **AMS Administrator or Associate Administrator:** Makes and issues formal appeal decisions

# Possible Outcomes of Appeal Cases



- **Dismissed:** Untimely appeal; procedural error
- **Closed without a Decision:** Often used when issue has been resolved or operator has been suspended through a different action; adverse action is withdrawn
- **Administrator's Decision Sustaining Appeal:** Supports appellant's case; adverse action is overturned and must be withdrawn
- **Administrator's Decision Denying Appeal:** Upholds adverse action as valid and correct
- **Settlement Agreement:** Appellant agrees to take certain actions that will close the adverse action

# Appeals Case Outcomes in 2013



| Outcome                    | Certifier-Initiated Adverse Actions | NOP-Initiated Adverse Actions |
|----------------------------|-------------------------------------|-------------------------------|
| Dismissed                  | 3                                   | 0                             |
| Closed without a Decision  | 14                                  | 3                             |
| Decision Sustaining Appeal | 0                                   | 0                             |
| Decision Denying Appeal    | 11                                  | 2                             |
| Settlement Agreement       | 18                                  | 7                             |

# Trends in Appeals Closure Rates Over Time



- Average days to closure for all of calendar 2011 = 344 days
- Average days to closure for all of calendar 2012 = 294 days
- Average days to closure for all of calendar 2013 = 196 days
- Average days to close an appeal over the last 6 months = 148 days

Based on NOP experience to date, we are targeting closing the majority of appeals cases in 180 days in 2014.

# Advice to Certifiers from Appeals Team



- Be VERY careful and selective when choosing the sections of the USDA organic regulations that were allegedly violated.
- An incorrect citation or incorrect notice may affect the outcome of the appeal.
- In some cases,
  - the Administrator noted incorrect citations OR
  - the appeal was closed without a decision due to certifier error

# Advice to Certifiers from Appeals Team



- Provide sufficient evidence to support the alleged violations of the USDA organic regulations.
  - Lack of sufficient evidence may result in a settlement agreement or a lesser penalty.

# A Look at NOP Settlements



- NOP has started to use settlement agreements more often as an alternative dispute resolution tool to resolve appeals.
- **Goal:** Resolve issue (through corrective action or suspension) quickly and in a way that brings operator into compliance OR facilitates the operator's exit from organic production.
- **Why?** Resolves issue through correction or suspension right away. Once a settlement is executed, it is implemented immediately, whereas an administrative proceeding may take months.

# Certifier Responsibilities



- NOP settlement agreements are between the USDA and the operator only. The certifier is made aware of proposed terms and may provide input.
- Once a settlement is executed, if suspension is NOT part of the settlement, the certifier oversees the implementation and confirms the terms are met.
  - If terms are broken certifier needs to notify NOP.
- If a settlement includes suspension, the certifier issues a final suspension notice at NOP's direction.

# Settlement Examples



| Situation   | NOP Settlement   |
|---|--|
| <p>Certifier proposed revocation based on systemic recordkeeping issues and a 3<sup>rd</sup> party report of prohibited substance use with livestock.</p> | <p>Operator agreed to a 3-year suspension rather than proposed revocation. This took operator out of production immediately upon settlement.</p> |

# Settlement Examples



| Situation   | NOP Settlement   |
|---|--|
| <p>Operator used treated wood for replacement posts. Certifier issued a non-compliance; operator did not resolve to certifier's satisfaction. Certifier proposed suspension. In appeal, operator noted that he didn't understand what certifier would have found acceptable and that he had acted in good faith to correct.</p> | <p>NOP and operator entered settlement with two terms:<br/>(1) farmer to correct within 30 days;<br/>(2) 1 unannounced inspection in next year.<br/>No suspension.</p> |

# Settlement Examples



| Situation  | NOP Settlement   |
|--|--|
| <p>Certifier proposed revocation because processor had used prohibited substance in tofu production . In appeal, operator noted that certifier had never expressed concerns about the substance during past inspections, and once concern was raised, processor immediately stopped using product.</p> | <p>For this case, it would be hard to justify revocation in court. Because producer immediately corrected problem and certifier had failed to detect substance use in past, NOP and operator agreed to civil penalty; no suspension.</p> |

# Questions to Consider....



## **Put yourself in NOP's shoes:**

- What are the critical facts of the case from your perspective?
- What additional information, if any, would you need to determine how to proceed?
- If you offered a settlement, what terms might you include?
- If you would NOT offer a settlement, why not? Would you close, deny, or sustain the appeal?

# Closing Points



- Settlement agreements can be a productive outcome from a mediation process.
- The top priority is ensuring organic integrity: settlements may not allow a noncompliance to be ongoing – the terms must resolve the issue or take the operator out of production.
- Adverse actions are serious, and a certifier error may affect the outcome of the appeal.
- If an appeal occurs, remember, certified appellants remain certified throughout the appeals process.
- After an appeal is filed, do not take a final adverse action without direction from the USDA.