



# National Organic Program Appeals Refresher: Mediation and Settlement Agreements

February 10, 2015

USDA Agricultural Marketing Service  
National Organic Program



# Objectives



- Review the role of mediation and settlement agreements in the adverse action process
- List the steps from proposed adverse action to executed settlement agreement
- Review a model settlement agreement and sample terms
- Review NOP's use of settlement agreements
- Reviewing operation surrenders

# 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)
- **A Notice of Noncompliance is not an adverse action!**

# Certifier-Operator Mediation



- When issuing a Proposed Suspension or Revocation or Denial of Certification, certifiers must allow the operator to request mediation
- The **ultimate** 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

# Settlement Agreements



- A settlement agreement is an agreement signed by both parties where both agree to take certain actions.
- Once in place, the agreement becomes the tool that closes the proposed adverse action.
- Mediation is the **process**. A Settlement Agreement is the desired **product** of that process.



## Certifier Issues Adverse Action

- Includes Options of MEDIATION or APPEAL



## Operator Considers Options

- Operator must feel empowered to request MEDIATION or APPEAL

# Basic Steps



## Operator Requests Mediation

- Certifier Says YES or NO

## If Certifier Decides NO

- Tell operator about appeal rights

## If Certifier Decides YES

- If YES, it is a simple YES to start process.
- Cannot do “YES, If.....”

## Establish mediation process

- Informal settlement agreement
- OR, more formal mediation towards a settlement

# Certifiers Need Criteria for Mediation Decision Process



## Deciding NO

- **Sample Criteria**
  - Low likelihood of correction (repeated issue)
  - No path to compliance (e.g., prohibited substance on all land)

## Deciding YES

- **Sample Criteria**
  - Corrective action could resolve the issue
  - Additional oversight actions would effectively ensure compliance

# Scenario: Accepting Mediation After a Proposed Suspension



**Operator received a Notice of Proposed Suspension for not providing an annual OSP update and for not paying fees.**



## **Incorrect Response**

- **We will accept your request for mediation if we receive your OSP update and check by XXX date.**



## **Acceptable Response**

- **We accept your request for mediation (may include mediation conditions – e.g., mediation fees, timeframes)**
- **We would like to use informal mediation and propose a settlement agreement for you to consider.**

# Remember, Keep the Process Sequential!



**Issue the Adverse Action Notice  
Offering Mediation OR Appeal**



**IF Mediation Requested, and You Decide YES,  
ACCEPT Mediation**



**THEN, engage in Mediation,  
With the goal of a settlement agreement**

# Now, Onto Mediation!



## Informal

- May be as simple as offering a proposed settlement agreement to the operator, **and then, you might....**
- Follow-up with a phone call to discuss terms
- Finalize settlement agreement if all agree

Goal of Informal and Formal Mediation is the Same:  
**A settlement agreement  
both certifier and operator agree to.**

# Informal Is a Collaborative Process



- During informal mediation, 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 agreeable to both parties.

# Now, Onto Mediation!



## Formal

- Certifier needs a process to identify:
  - Qualified mediator, mutually agreed upon by both parties
  - Time and Location
  - Format (e.g., In-person, phone, video)
  - Mediation fees and payment

**Goal of Informal and Formal Mediation is the Same:  
A settlement agreement  
both certifier and operator agree to.**

# 30 Days to Reach Agreement



- Agreement must be reached within 30 days of the mediation session.
- If no agreement is reached, operator has 30 days from termination of mediation to appeal the adverse action.
- The operator is appealing the original adverse action, NOT the decision to terminate mediation.



# Benefits of an Agreement



- Documents the issue and resolution in a formal way – demonstrates seriousness of a proposed adverse action.
- Provides documentation trail for how an adverse action was addressed.
- Provides a monitoring tool, prompting you to confirm that all corrective actions were completed.

# Best Practices and Bad Paths



## Best Practice

- Follow the sequential steps: proposed adverse action, mediation consideration, then settlement proposal.
- Use to highlight importance of compliance in a targeted area, and to resolve correctable issues.
- Approach mediation as a collaborative process that can lead to long-term improvement.

## Bad Path

- Do NOT put settlement terms in an adverse action notice or in a response to a mediation request
- Do NOT make an adverse action “more strict” just to allow room for possible settlement
- Do NOT propose terms that will not lead to compliance

# What to Include in a Settlement: Part 1



## Parties

- Name of certifier, operator, and responsibly connected persons

## Corrective Actions and Other Terms

- What operator agrees to do

## Outcome

- What certifier agrees to do in return (close proposed action)

## Timeframe

- When corrective actions will be implemented

# What to Include in a Settlement: Part 2



## Consequences

- What will happen if terms are broken

## Effective Date

- Date the settlement agreement will take effect

## Signatures

- By authorized representatives of both the certifier and operation

# Sample Terms



- 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)
- 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).

# Sample Terms



- Other specific actions with timeframes to demonstrate compliance. Examples:
  - Provide specific elements of a revised recordkeeping system that demonstrates compliance.
  - Provide specific subset of records at a future point that demonstrates ongoing compliance.
  - Adjust a practice to bring operator into compliance, and provide evidence that the practice has been implemented.
  - Agree to notify certifier within a specific time period if a specific element of OSP changes (beyond already required notifications).

# Consequences of a Broken Settlement



- The certifier **reissues 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.
  - Remember, you can't propose terms that are inconsistent with the USDA organic regulations (So, term can't be shortcut to suspension)

# How NOP Oversees Certifiers



- NOP may review and reject Settlement Agreements (§ 205.663) – Certifiers can request a review if uncertain about direction
- NOP will review Settlement Agreements during certifier audits to:
  - Confirm that terms were designed to bring operator into full compliance
  - Verify settlement agreement terms were implemented

# Handling Surrenders



- What if the operator surrenders in the midst of all this?

# Accepting Surrenders



- Operators may surrender at any time.
- If you receive a surrender after proposing an adverse action:
  - Tell operator adverse action process will continue
  - Continue the adverse action process (e.g., if there is no appeal, issue final notice so it is on the record)
- If an operator surrenders after an operator has appealed, the appeal process will also continue



- If the dispute is not resolved at the certifier-operator level, the operator may appeal the proposed adverse action.
- Let's review USDA appeal roles and 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:** 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

# Refresher: Appeals Team Notes for Certifiers



- Be careful when citing the sections of the USDA organic regulations that were allegedly violated.
- An incorrect citation or notice may affect appeal outcome.
- In some cases, the Administrator Decision has noted incorrect citations OR the appeal was closed without a decision due to certifier error
- Provide sufficient evidence to support the alleged violations of the USDA organic regulations.

# Refresher: NOP Settlements



- NOP sometimes uses settlement agreements as an alternative dispute resolution tool in appeals.
- **Goal:** Resolve issue (through corrective action or suspension) 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. An administrative proceeding may take months.

# Certifier Responsibilities



- NOP settlement agreements are between the USDA and the operator.
- NOP tells certifier about proposed terms and may ask for 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.

# Closing Points



- Settlement agreements can be a productive outcome from a mediation process.
- Settlements may not allow a noncompliance to continue! The terms must resolve the issue or take the operator out of production.
- Adverse actions are serious, and certifier error may affect appeal outcome.
- Certified appellants remain certified throughout the appeals process.
- If an appeal is filed, do not resolve an adverse action or take a final action without USDA direction.

# Template Settlement Agreement



# 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] charging [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]