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Ms. Michelle Arsenault, Advisory Committee Specialist
National Organic Standards Board
USDA–AMS–NOP

Submitted via Regulations.gov.

RE: Docket # AMS-NOP-25-0914

NOSB CACS Subcommittee Residue Testing Proposal

Dear NOSB Members:

Thank you for the opportunity to provide comments on the CACS Residue Testing Proposal. MOSA certifies over 1,754 organic operations throughout the United States, including approximately 653 livestock operations, 1,427 crop operations, and 385 handling operations. All MOSA clients are subject to residue testing requirements and action. MOSA is invested in upholding organic integrity and doing our part to help grow the organic sector, in both a practical and achievable manner. We appreciate the CACS's work to help develop a reasonable and enforceable proposal on the topic of residue testing.

Our comments below follow the NOSB outline of challenges and proposals for each subject.

1. Mandated testing of a minimum of 5% of operations annually by certifiers

Challenge: Some certifiers report that their current testing programs are not finding many positives. However, this is likely due to the types of operations being selected by certifiers to test, which can currently include anyone (i.e., does not need to be based on risk), as well as the types of tests being performed.

Proposal: Revise the regulatory language to require that the mandated 5% of testing of operations be selected based on risk as well as randomly.

This proposal mirrors MOSA's current practices, as risk-based considerations are already integrated into our file review process and client risk assessments, while we continue to maintain a standard for random selection. This appears to be maintaining MOSA's status quo.

This proposal does not address the types of tests that are performed as identified in the challenge. Additional guidance on tests accepted and encouraged would be helpful. The scattershot approach to a panel does not allow for focused efforts on non-pesticidal materials or contaminants.

2. Certifiers conducting all testing at their own expense

Challenge: Certifiers must bear the cost of all residue testing. If the selection requirements change to require that a portion of operations be selected based on risk, this is likely to increase costs. Without the ability to directly pass costs of testing on to operations, certifiers are likely to increase the certification costs for all of their certified operations, which is not equitable.

Proposal: Revise the regulatory language to allow certifiers to pass along the cost of residue testing in certain circumstances (e.g., credible complaints or investigations) and when the contamination is determined to be caused by an intentional application or failure of an operation to adhere to their OSP (i.e. results in a noncompliance or adverse action).

We support updating the regulatory text to allow certifiers to charge operations when the test is being done as part of a credible complaint or investigation and when contamination is determined to be caused by an intentional application *by or under the management of our client*. Adding this italicized portion would clarify intent to exclude overspray scenarios and those that are outside of our operator's management. We treat all reports, complaints, and investigations seriously, i.e., as valid pending investigation, but the qualifier would be *after* investigation when the determination is made that *the contamination is a result of our client's intentional application or their knowing use of a prohibited input*. All investigations or complaints would not have the same result. This proposal offers an opportunity to potentially share with some clients some of the expense certifiers incur to meet this regulatory requirement. This gain would be unknown and MOSA would not be able to include the gain in our budget, but any gain is positive in general.

"contamination is determined to be caused by an intentional application or failure of an operation to adhere to their OSP (i.e., results in a noncompliance or adverse action)." [underline added] The underlined portion of statement could lead to unclear application given the NOSB's example- "For example, if an operation didn't follow their cleanout procedures on equipment used in both nonorganic and organic production, which results in a positive test result." We encourage the NOSB to be considering this as a breakdown of the OSP, a systemic failure and in conjunction with contaminants with real and actionable thresholds. An overspray event could be viewed as a failure to adhere to sufficient buffers for example. Additionally, certifiers assess noncompliances for minor contamination of materials without an action threshold under the current regulations, and we often see overspray events that would result in a positive result if testing is performed. Without also guidance on UREC and additional guidance on no-threshhold materials we could see unintended consequences for this generic statement. The main idea is that the certifier can charge as a result of an investigation and the *significant* contamination is their fault.

3. Public access to results

Challenge: Two regulatory sections address public access to results, but they are not aligned.

Proposal: Revise the regulatory language to link the two sections of the regulations together.

We agree regulatory text should align.

The NOSB suggests that certifiers participate in a centralized database such as ORG-Tracker though notes this is outside of NOP's purview. We are participating in ORG-Tracker and keep information readily available for any direct public inquiries as well.

4. Downstream notification of noncompliant organic product to buyers

Challenge: The regulations do not require notification to downstream buyers when a product yields a positive residue result upstream, thereby preventing a noncompliant product from entering the stream of commerce.

Proposal: Revise the regulatory text to include a framework for downstream buyer notification, enabling the removal of noncompliant products from the stream of commerce in a timelier manner. Subsequently update the guidance regarding expectations for buyer response, clarification of importer and first handler obligations, buyer accountability when a trigger event occurs.

Suggestions for excluding circumstances included:

- *Residues exceed action thresholds (e.g., >5% of EPA tolerances)*
- *Willful violations have occurred as determined by a certifier or NOP*

We align wholeheartedly with the NOSB statement, **"Transparency is the foundation of the organic program and a key driver of consumer trust."** Transparency does however have some boundaries when it bumps up against real world regulatory requirements. Certifiers will need additional information about our oversight as this conversation continues. Our clients would be required to notify their *direct* buyers when they learn of either residues exceeding the action thresholds OR willful violations. The example is only for a 5% tolerance material. This does not address when there is not a tolerance established though that is covered in section 5, below. Rulemaking should happen at one time for all residue related topics. We support NOP using the ANPR process to discuss this further with stakeholders.

5. Unavoidable residual environmental contamination (UREC)

Challenge: The current framework that certifiers and organic farmers must use to respond to the presence of pesticide residues in some situations negatively impacts organic farmers who have implemented and followed the contamination prevention strategies in their OSP, and residues are still present. This is often due to atmospheric drift and the fact that certifiers must default to 0.01ppm when assessing the residue, as there is no EPA tolerance for that crop.

Proposal: Revise NOP 2613 as previously recommended to include a different framework for certifiers to evaluate and respond to the presence of residues when there isn't an EPA tolerance for the crop that yielded positive results, as 0.01ppm doesn't seem to work or be fair in some circumstances.

This is clearly an issue for certifiers and clients. Fortunately, the ACA Residue working group has addressed this issue head on by developing guidance that we will follow until there is additional NOP guidance.

The ACA guidance includes the following: “To determine UREC you must be able to confirm that the contamination was not preventable.” The best practices go on to state, “For cases of drift contamination or Unavoidable residual environmental contamination (UREC), conclusions on the status of the organic product must be determined based on whether the level of detection is over the allowed 5% of EPA tolerance.” ACA further outlines a process whereby the incidental contamination below that level is acknowledged and regarded with noncompliance action rather than escalating to classifying as nonorganic and stop sale penalties. We support this framework for assessing compliance in the case of UREC or drift.

We encourage that all residue related rule making and guidance move forward on the same timeline and take into account the ACA’s work so as not to create any inconsistent application or unintended consequences for uncontrolled drift situations in particular. We appreciate that the ACA has developed a guidance chart for assessing compliance based on the contamination type and residue test result. The ACA calls these unintentional, accidental, or otherwise unwilful applications.

MOSA could adapt our processes to build in testing during a suspected or known drift event. We do not currently require residue testing in *all* cases of reported drift and could not factor these circumstances into our planning for either meeting percentage requirements or for budgeting but we have very few drift events annually so adapting our process would be reasonable. These parcels are generally removed from certification voluntarily by the client, making further investigation an unnecessary expense. However, given the opportunity to keep the land certified, testing would be required and should be targeted to the materials suspected or known to have drifted. This would help demonstrate that the Organic System Plan was followed and that the incident resulted from extenuating circumstances that would not have occurred under normal conditions.

Any guidance or regulatory language should be inclusive of cross-scope considerations and include multiple types of contaminants, not just pesticide residues, and include reasonable sanctions for the different types of prohibited materials. We fully support additional guidance looking at drift as an individual type of event that needs its own type of consideration. We’ll look forward to commenting further on proposed guidance.
Thank you for your work on this very important topic.

Respectfully submitted,

The MOSA Certification Team