



Client Alert

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USDA Issues Final Rule, Draft Guidance, and Procedures on New Periodic Testing Requirements for Organic Products

On Friday, November 9, 2012, the Agricultural Marketing Service (AMS) of the Department of Agriculture (USDA) issued a final rule (Final Rule) requiring periodic residue testing and sampling for products labeled, sold, or represented as “organic” (organic products).¹ The rule revises 7 C.F.R. § 205.670 as part of the USDA National Organic Program (NOP) effort to maintain the integrity of organic products. The Final Rule, which becomes effective January 1, 2013, was concurrently published with a memorandum to certifying agents as well as other documents relevant to the NOP, including a draft guidance entitled *NOP 5028 Responding to Results from Pesticide Residue Testing* and instructions for organic certifying agents entitled *NOP 2610 Sampling Procedures for Residue Testing* (Click [here](#) for Corresponding Documents).²

Agency Rationale Behind the New Rule

The USDA believes the new testing requirements will facilitate enforcement action against producers intentionally using prohibited substances or methods, by providing agents with a method to monitor compliance with USDA regulations. The Final Rule was issued in response to the USDA’s Office of Inspector General’s March 2010 audit of the NOP.³ Specifically, the audit recognizes that none of the four organic certifying agents that the Office of Inspector General had visited had conducted periodic residue testing, because the certifying agents had thought residue testing was required only under certain circumstances. Relying on 6505(a)(6) of the *Organic Food Production Act of 1990* (OFPA) (7 U.S.C. § 6505(a)(6)) for authority, the AMS initially introduced the testing requirements in its proposed rule on April 29, 2011.⁴

This bulletin provides a summary of the significant provisions of the Final Rule.

- 1 National Organic Program; Periodic Residue Testing, 77 Fed. Reg. 67,239 (Nov. 9, 2012) (to be codified at 7 C.F.R. pt. 205).
- 2 <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&navID=OrganicStandardslinkNOPCertifiedOperations&rightNav1=OrganicStandardslinkNOPCertifiedOperations&topNav=&leftNav=NationalOrganicProgram&page=NOPOrganicStandards&resultType=&acct=nopgeninfo>
- 3 U.S.D.A., *Office of Inspector Gen. Audit Rep.* 01601-03-Hy, (Mar. 2010), available at <http://www.usda.gov/oig/webdocs/01601-03-HY.pdf>.
- 4 National Organic Program; Periodic Residue Testing, 76 Fed. Reg. 23,914 (proposed Apr. 29, 2011) (to be codified at 7 C.F.R. pt. 205).

Current Testing Requirements

Prior to this Final Rule, testing had been a part of the NOP as required by the OFPA to ensure organic agricultural products labeled as such met certain standards. Under existing regulations, the AMS requires organic product producers to make their organic products accessible for inspection and subjects the organic products to preharvest or postharvest testing if “there is reason to believe that the agricultural input or product has come into contact with a prohibited substance or has been produced using excluded methods.” 7 C.F.R. § 205.670(a),(b) (2012). The AMS specifically provides for the possibility that inspection and testing may be conducted by an agent accredited by the AMS who certifies that the production or operation complies with the USDA organic regulations. 7 C.F.R. § 205.2 (2012). During this inspection, the agent tests facilities for any prohibited substances and methods, including certain pesticides,⁵ arsenic or other contaminant metals, genetic engineering, synthetic hormones, and antibiotics except in organic apple and pears.

Summary of the New Rule

To ensure that more facilities are tested and inspected, the Final Rule adds new requirements to the current testing requirements. Specifically, the Final Rule and its Corresponding Documents provide for the following:

- Minimum Mandate: Certifying agents are now obligated each year to test five percent of the operations they certify.
- Samples: Residue sampling may be performed on both preharvest samples such as soil samples, tissue samples, or water, as well as postharvest samples.
- Sample Amounts: While no residue testing method is specifically required, certain sample testing procedures are recommended.⁶
- Records: Certifying agents must maintain records and provide the public access to them upon request.
- When to Collect Samples: Certifying agents are granted discretion in determining when samples should be collected. However, the NOP suggests in several documents⁷ possible criteria that agents may use to identify facilities to test: when it is suspected that a prohibited substance has been applied; when it is suspected that contamination from genetically modified organisms, antibiotics, or prohibited substances may have occurred; when pesticides drift may have occurred; to gather evidence as part of an investigation; or as part of a surveillance sampling program.

⁵ See USDA, NOP 2611-1, *Prohibited Pesticides for NOP Residue Testing*, July 22, 2011, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5088987>.

⁶ See USDA, NOP 2610, *INSTRUCTION Sampling Procedures for Residue Testing*, Nov. 8, 2012, at § 4, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5088986>.

⁷ See USDA memorandum to NOP agents Re: Periodic Residue Testing of Organic Products available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5101236>; USDA, NOP 2610, *INSTRUCTIONS Sampling Procedures for Residue Testing*, Nov. 8, 2012, at §§ 4.2-4.5, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5088986>.

Consequences of Violation

After a certifying agent takes test samples from a facility, the agent submits the samples to an accredited laboratory⁸ to conduct the residue testing. Once the laboratory sends the results to the agent and the agent receives the results, the certifying agent then interprets and responds to the results based on a USDA draft guidance entitled *NOP 5028 Responding to Results from Pesticide Residue Testing*.⁹ The guidance document discusses potential test results and the corresponding appropriate response by the certifying agent:

- No enforcement action: If the tests detect residues of prohibited pesticides to be less than .01 parts per million (ppm), agents may not take enforcement action.
- Potential enforcement action: If the tests detect residues of prohibited pesticides to be at or above .01 ppm, agents may take appropriate enforcement action. Potential enforcement actions include issuing a notice of non-compliance, requiring corrective actions to prevent future contamination, suspending or revoking the operation's organic certification, and imposing civil penalties.
- Report violations to appropriate agency: If the residue detected also violates other regulations or tolerances of other agencies such as the Food and Drug Administration (FDA), the Environmental Protection Agency (EPA), a state food safety program, or a foreign health agency, the agent should report these violations to the appropriate agency.
- Notification to Organic Producer of Conditions Required to Promote Product: If pesticide residues below the FDA Action level but above .01 ppm are detected, or if pesticide residues are at or above .01 ppm but at or less than five percent of EPA Tolerance levels, the agent should notify the organic producer that it is permitted to promote its product as "organic" only if residues are not a result of intentional or direct application of prohibited pesticides.

Conclusion

While the general concept of testing as required by the Final Rule is not new, the Final Rule increases the likelihood that organic product facilities may be subject to agency enforcement action. Facilities should review their internal procedures to ensure compliance with the NOP.

⁸ See USDA, NOP 2611, *INSTRUCTION Laboratory Selection Criteria for Pesticide Residue Testing*, Nov. 8, 2012, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5088988>.

⁹ See USDA, NOP 5028, *Draft Guidance Responding to Results from Pesticide Residue Testing*, June 13, 2011, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5091382>.

Mr. Kitchens acknowledges Sari Bourne who assisted in the preparation of this article. Ms. Bourne is a recent graduate of Emory University School of Law and an employee of Arnall Golden Gregory LLP in our Food and Drug law practice. Ms. Bourne is resident in our Washington, D.C. office but is not yet admitted to practice.

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