

## Residue Testing -- Preamble

### Inspection and Testing, Reporting, and Exclusion from Sale

This portion of subpart G sets forth the inspection and testing requirements for agricultural products that have been produced on organic production operations or handled through organic handling operations.

Residue testing plays an important role in organic certification by providing a means for monitoring compliance with the National Organic Program (NOP) and by discouraging the mislabeling of agricultural products. This testing program provides State organic programs' (SOP) governing State officials and certifying agents with a tool for ensuring compliance with three areas for testing: (1) preharvest residue testing, (2) postharvest residue testing, and (3) testing for unavoidable residual environmental contamination levels.

### Description of Regulations

#### General Requirements

Under the residue testing requirements of the NOP, all agricultural products sold, labeled, or represented as organically produced must be available for inspection by the Administrator, SOP's governing State official, or certifying agent. Organic farms and handling operations must be made available for inspection under subpart E, Certification. In addition, products from the aforementioned organic operations may be required by the SOP's governing State official or certifying agent to undergo preharvest or postharvest testing when there is reason to believe that agricultural inputs used in organic agriculture production or agricultural products to be sold or labeled as organically produced have come into contact with prohibited substances or have been produced using excluded methods. The cost of such testing will be borne by the applicable certifying agent and is considered a cost of doing business. Accordingly, certifying agents should make provisions for the cost of preharvest or postharvest residue testing when structuring certification fees.

#### Preharvest and Postharvest Residue Testing

The main objectives of the residue testing program are to: (1) ensure that certified organic production and handling operations are in compliance with the requirements set forth in this final rule and (2) serve as a means for monitoring drift and unavoidable residue contamination of agricultural products to be sold or labeled as organically produced. Any detectable residues of a prohibited substance or a product produced using excluded methods found in or on samples during analysis will serve as a warning indicator to the certifying agent.

The Administrator, SOP's governing State official, or certifying agent may require preharvest or postharvest testing of any agricultural input used in organic agricultural production or any agricultural product to be sold or labeled as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))." It is based on the Administrator's, SOP's governing State official's, or certifying agent's belief that an agricultural product or agricultural input has come into contact with one or more prohibited substances or has been produced using excluded methods. Certifying agents do not have to conduct residue tests if they do not have reason to believe that there is a need for testing. Certifying agents must ensure, however, that certified organic operations are operating in accordance with the Act and the regulations set forth in this part.

The "reason to believe" could be triggered by various situations, for example: (1) the applicable authority receiving a formal, written complaint regarding the practices of a certified organic operation; (2) an open container of a prohibited substance found on the premises of a certified organic operation; (3) the proximity of a certified organic operation to a potential source of drift; (4) suspected soil contamination by historically persistent substances; or (5) the product from a certified organic operation being unaffected when neighboring fields or crops are infested with pests. These situations do not represent all of the possible occurrences that would trigger an investigation. Preharvest or postharvest residue testing will occur on a case-by-case basis.

In each case, an inspector representing the Administrator, SOP's governing State official, or certifying agent or will conduct sampling. According to subpart F, Accreditation, private or State entities accredited as certifying agents under the NOP must ensure that its responsibly connected persons, employees, and contractors with inspection, analysis, and decision-making responsibilities have sufficient expertise to successfully perform the duties assigned. Therefore, all inspectors employed by certifying agents to conduct sampling must have sufficient expertise in methods of chain-of-custody sampling. Moreover, testing for chemical residues must be performed in an accredited laboratory. When conducting chemical analyses, the laboratory must incorporate the analytical methods described in the most current edition of the Official Methods of Analysis of the AOAC International or other current applicable validated methodology for determining the presence of contaminants in agricultural products. Results of all analyses and tests performed under section 205.670 must be promptly provided to the Administrator, except, that, where an SOP exists, all test results and analyses should be provided to the SOP's governing State official by the applicable certifying party that requested testing. Residue test results and analyses must also be, according to section 205.403(e)(2), provided to the owner of the certified organic operation whose product was tested. All other parties desiring to obtain such information must request it from the applicable certifying agent.

OFPA requires certifying agents, to the extent of their awareness, to report violations of applicable laws relating to food safety to appropriate health agencies such as EPA and FDA. When residue testing indicates that an agricultural product contains pesticide residues or environmental contaminants that exceed either the EPA tolerance level or FDA action level, as applicable, the certifying agent must promptly report data revealing such information to the Federal agency whose regulatory tolerance or action level has been exceeded.

### **Residue Testing and Monitoring Tools**

When testing indicates that an agricultural product to be sold or labeled as organically produced contains residues of prohibited substances, certifying agents will compare the level of detected residues with 5 percent of the Environmental Protection Agency (EPA) tolerance for the specific residue detected on the agricultural product intended to be sold as organically produced. This compliance measure, 5 percent of EPA tolerance for the detected prohibited residue, will serve as a standard for the Administrator, SOP's governing State officials, and certifying agents to assist in monitoring for illegal use violations.

In addition, we intend to establish levels of unavoidable residual environmental contamination (UREC) for crop-and site-specific agricultural commodities to be sold, labeled, or represented as "100 percent organic," "organic," or "made with..." These levels will represent limits at which USDA may take compliance action to suspend the use of a contaminated area for organic agricultural production. Currently, USDA is seeking scientifically sound principles and measures by which it can establish UREC levels to most effectively address issues of unavoidable residual environmental contamination with respect to this rule. However, in the interim, UREC will be defined as the Food and Drug Administration's (FDA) action levels for poisonous or deleterious substances in human food or animal feed. UREC levels will be initially set for persistent prohibited substances (aldrin, dieldrin, chlordane, DDE, etc.) in the environment. They may become more inclusive of prohibited residues as additional information becomes available. Unavoidable

residual environmental contamination levels will be based on the unavoidability of the chemical substances and do not represent permissible levels of contamination where it is avoidable.

Analyses and test results will be available for public access unless the residue testing is part of an ongoing compliance investigation. Information relative to an ongoing compliance investigation will be confidential and restricted to the public.

### **Detection of Prohibited Substances or Products Derived from Excluded Methods**

In the case of residue testing and the detection of prohibited substances in or on agricultural products to be sold, labeled, or represented as "100 percent organic," "organic," or "made with....," products with detectable residues of prohibited substances that exceed 5 percent of the EPA tolerance for the specific residue or UREC cannot be sold or labeled as organically produced. When such an agricultural crop is in violation of these requirements, the certification of that crop will be suspended for the period that the crop is in production. Certifying agents must follow the requirements specified in sections 205.662 and 205.663 of subpart G, Compliance.

The "5 percent of EPA tolerance" standard is considered a level above which an agricultural product cannot be sold as organic, regardless of how the product may have come into contact with a potential prohibited substance. This standard has been established to: (1) satisfy consumer expectations that organic agricultural products will contain minimal chemical residues and (2) respond to the organic industry's request to implement a standard comparable to current industry practices. However, the "5 percent of EPA tolerance" standard cannot be used to automatically qualify agricultural products as organically produced, even if the level of chemical residues detected on an agricultural product is below 5 percent of the EPA tolerance for the respective prohibited substance. This final rule is a comprehensive set of standards and regulations that determines whether a product can or cannot be considered to carry the specified organic labeling terms in subpart D, Labeling. Therefore, in addition to this section of subpart G, Administrative, all other requirements of this part must be met by certified organic operations to have an agricultural product considered "organically produced."

When residue testing detects the presence of any prohibited substance, whether above or below 5 percent of the EPA tolerance for the specific pesticide or UREC, the SOP's governing State official or certifying agent may conduct an investigation of the certified organic operation to determine the cause of the prohibited substance or product in or on the agricultural product to be sold or labeled as organically produced. The same shall occur if testing detects a product produced using excluded methods. If the investigation reveals that the presence of the prohibited substance or product produced using excluded methods in or on an agricultural product intended to be sold as organically produced is the result of an intentional application of a prohibited substance or use of excluded methods, the certified organic operation shall be subject to suspension or revocation of its organic certification. In addition, any person who knowingly sells, labels, or represents an agricultural product as organically produced in violation of the Act or these regulations shall be subject to a civil penalty of not more than \$10,000 per violation.

### **Emergency Pest or Disease Treatment Programs**

When a prohibited substance is applied to an organic production or handling operation due to a Federal or State emergency pest or disease treatment program and the organic handling or production operation otherwise meets the requirements of this final rule, the certification status of the operation shall not be affected as a result of the application of the prohibited substance, except that: (1) any harvested crop or plant part to be harvested that has contact with a prohibited substance applied as the result of a Federal or State emergency pest or disease treatment program cannot be sold, labeled, or represented as "100 percent organic," "organic," or "made with..." and (2) any livestock that are treated with a prohibited substance applied as the result of a

Federal or State emergency pest or disease treatment program or product derived from such treated livestock cannot be sold, labeled, or represented as "100 percent organic," "organic," or "made with..."

However, milk or milk products may be labeled or sold as organically produced beginning 12 months following the last date that the dairy animal was treated with the prohibited substance. Additionally, the offspring of gestating mammalian breeder stock treated with a prohibited substance may be considered organic if the breeder stock was not in the last third of gestation on the date that the breeder stock was treated with the prohibited substance.

### **Residue Testing - Changes Based on Comments**

This portion of subpart G differs from our proposal in several respects as follows:

(1) Reporting Requirements. Commenters were not satisfied with the language in section 205.670(d)(1) that required results of all analyses and tests performed under section 205.670 to be provided to the Administrator promptly upon receipt. They asked that the paragraph be amended to include that: (1) results of all analyses and tests performed under section 205.670 be provided by the Administrator to the appropriate SOP's governing State official and (2) test results be made immediately available to the owner of the material sampled. They stated that since State organic certification programs are responsible for enforcement within their State, results of residue tests conducted by certifying agents must be provided to the SOP's governing State official for routine monitoring and for investigating possible violations of the Act.

We agree with the commenters and have responded to their concerns accordingly. To ensure that SOP's receive results of all tests and analyses conducted under the inspection and testing requirements of subpart G, section 205.670(d) has been amended to include that the results of all analyses and residue tests must be provided to the Administrator promptly upon receipt; Except: That where an SOP exists, all test results and analyses should be provided to the SOP's governing State official.

In regard to the commenters' request that certified organic operations be provided with a copy of test results from samples taken by an inspector, an additional paragraph, section 205.403(e)(2), has been added to subpart E, Certification, that assures that such information is provided to the owners of certified organic operations by the certifying agents.

(2) Integrity Of Organic Samples. We have modified language in section 205.670(c) to clarify our intent regarding the maintenance of sample integrity. The proposed rule stated that "sample integrity must be maintained in transit, and residue testing must be performed in an accredited laboratory." During the final rulemaking process, we did not believe that our intent was clear on this subject. Our intent is to ensure that sample integrity is maintained throughout the entire chain of custody during the residue testing process. Proposed language only suggests that sample integrity be maintained in transit. Therefore, the we have changed the second sentence in section 205.670(c) to state that "sample integrity must be maintained throughout the chain of custody, and residue testing must be performed in an accredited laboratory."

(3) Reporting Residue and Other Food Safety Violations to Appropriate Health Agencies. In the proposed rule, section 205.671(b) under Exclusion from Organic Sale states, "If test results indicate a specific agricultural product contains pesticide residues or environmental contaminants that exceed the FDA's or the EPA's regulatory tolerances, the data must be reported promptly to the appropriate public health agencies." During the final rulemaking process, a group of commenters suggested that we move section 205.671(b) into section 205.670 as paragraph (e). They recommended that we move section 205.671(b) because it does not specifically address the sale of organically produced products, as indicated by the section heading. They

recommended that section 205.671(b) be placed under section 205.670 as paragraph (e) because it dealt with the reporting of residues that exceed Federal regulatory tolerances. The commenters further stated that, while section 205.671(b) creates a duty to report, it is not specific as to who must report.

We have accepted the suggestions of the commenters and have responded accordingly. We have removed section 205.671(b) and relocated it under section 205.670 as paragraph (e). We have also modified the regulatory text of paragraph (e) to include language that instructs certifying agents to report, when residue testing indicates that an agricultural product contains pesticide residues or environmental contaminants that exceed either the EPA tolerance level or FDA action level, as applicable, data revealing such information to the Federal agency whose regulatory tolerance or action level has been exceeded.

(4) Exclusion from Organic Sale. We have reviewed section 205.671(a), removed the requirement to implement the Pesticide Data Program (pdp) estimated national mean as a compliance tool in monitoring for the presence of unacceptable levels of prohibited substances in agricultural products intended to be sold as organic, and added the "5 percent of EPA tolerance" standard.

Commenters voiced the opinion that the estimated national mean would be a difficult standard in organic agricultural production for several reasons. Some stated that the estimated national mean was a new concept that would confuse producers and handlers because they would not know the exact definition of "estimated national mean" and how it would be determined. Others stated that the PDP was too limited in scope to employ an estimated national mean for all commodity/pesticide combinations. Commenters reasoned that PDP data were limited in terms of the agricultural commodities that are sampled and tested.

Another group of commenters stated that PDP data would be unfair to use in the NOP's residue testing plan. They argued PDP data should not be used to set maximum residue levels for organic agricultural products because PDP samples its products as close to the point of consumption as possible. As a result, commenters believe that PDP data may not be totally reflective of residue levels of agricultural products at the farmgate level. Since most residue testing in organic agricultural production takes place at the farmgate, these commenters argued that it would be an inappropriate standard for organic agricultural production.

As a result, a large number of commenters suggested that we reconsider using the estimated national mean as a standard for the maximum allowable residues on organically produced products. Instead, commenters recommended that the NOP incorporate the National Organic Standards Board's (NOSB) recommendation and current industry practice of using 5 percent of the EPA tolerance as a maximum level of pesticide residue on organic agricultural products. Commenters argued that using 5 percent of the EPA tolerance provides a sense of confidence to the consumers of organic agricultural products.

In many respects, we agree with the commenters. We have revisited using PDP data to establish an estimated national mean for commodity/pesticide combinations and for setting a maximum level of pesticide residue that could exclude agricultural products from being sold, labeled, or represented as organic. As a result, we have concluded that such an approach may be somewhat underdeveloped to incorporate into the NOP. We have reached this conclusion based on many of the same arguments presented by commenters (i.e., limited scope of agricultural products tested under PDP, product sampling based upon market availability, testing near the point of consumption, etc.). Also, we estimated that there would be a considerable time lag between the implementation of the NOP and defining a comprehensive list of estimated national means for all commodity/pesticide combinations. Thus, we have decided not to use the estimated national mean as a tool for monitoring organic agricultural products for the presence of prohibited substances and as a standard to exclude agricultural products from being sold, labeled, or represented as organically produced.

Instead, we have decided to follow the recommendation of the commenters by replacing the estimated national mean for specific commodity/pesticide pairs with 5 percent of the EPA tolerance for the specific pesticide. Therefore, when residue testing detects prohibited substances at levels that are greater than 5 percent of the EPA tolerance for the specific pesticide detected on the particular product samples, the agricultural product must not be sold or labeled as organically produced.

We fully understand that the EPA tolerance is defined as the maximum legal level of a pesticide residue in or on a raw or processed agricultural commodity. We also acknowledge that the EPA tolerance is a health-based standard. We are not trying to employ the 5 percent standard in a manner similar to that of EPA. As mentioned in our proposal, the national organic standards, including provisions governing prohibited substances, are based on the method of production, not the content of the product. The primary purpose of the residue testing approach described in this final rule, then, is to provide an additional tool for SOP's' governing State officials and certifying agents to use in monitoring and ensuring compliance with the NOP.

(5) Unavoidable Residual Environmental Contamination. We have defined, as an interim measure, UREC as the FDA action levels for poisonous or deleterious substances in human food or animal feed.

Section 205.671 proposed the use of UREC to serve as a residue testing tool for compliance. Commenters believed UREC levels, as prescribed in section 205.671 of the proposed rule, would be problematic as a standard because they were undefined. Commenters argued that it would be impractical and very expensive to establish UREC levels for every organic crop and region in the United States. They suggested that UREC levels be managed as a practice standard or program manual issue. They also expressed the concern that inconsistent application of UREC levels could create difficulties for certifying agents and certified operations.

We agree that UREC levels should be defined. We are seeking scientifically sound principles and measures by which we can establish UREC levels to most effectively address issues of unavoidable residual contamination with respect to this rule. However, in the interim, the ability to implement an undefined standard would be difficult for certifying agents. Therefore, we have included language in the preamble that temporarily defines UREC as the FDA action levels for poisonous or deleterious substances in human food or animal feed. When residue testing detects the presence of a prohibited substance on an agricultural product greater than such levels mentioned, the agricultural product cannot be sold as organic. We have decided to use FDA action levels for UREC because they encompass many of the toxic, persistent chemicals and heavy metals that are present in the environment and may be found on food and animal feed. As mentioned earlier, the FDA action levels are being employed in this part as temporary measures for compliance. We will continue to seek scientifically sound principles and measures by which to establish UREC levels that more appropriately satisfy the purposes of this part.

### **Residue Testing - Changes Requested But Not Made**

This subpart retains from the proposed rule regulations on which we received comments as follows:

(1) Residue Testing Responsibility. Commenters petitioned that we remove the requirement in section 205.670(b) that states residue tests must be conducted by the applicable SOP's governing State official or the certifying agent at the official's or certifying agent's own expense. The commenters expressed the opinion that we were practicing "micromanagement." They also said that there was no need for the proposal to be so detailed with respect to who pays for residue testing. Based on the commenters' responses, residue analyses are reportedly paid by producers, buyers, brokers, certifiers, and government residue testing programs.

We have not adopted the suggestion of the commenters. In the proposal, we stated that conducting residue tests was considered a cost of doing business for certifying agents. Our position has not changed. Certifying agents can factor residue testing costs into certification fees. It is not our intention to "micromanage" the way that certifying agents conduct business. Section 2107(a)(6) of the Act requires that certifying agents conduct residue testing of agricultural products that have been produced on certified organic farms and handled through certified organic handling operations. OFPA also requires, under section 2112(a) through (c), that certifying agents enforce its provisions by implementing a system of residue testing to test products sold or labeled as organically produced. In addition, subpart E, Certification, authorizes certifying agents to conduct on-site inspections, which may include residue testing, of certified organic operations to verify that the operation is complying with the provisions in the Act and the regulations in this part. Certifying agents are responsible for monitoring organic operations for the presence of prohibited substances; we view residue testing as a cost of doing business. Therefore, we believe that certifying agents should factor monitoring costs associated with implementing the provisions in the Act and Rule into their certification fees.

(2) Reporting to Federal Regulatory Agencies. Commenters disagree with section 205.671(b) of the proposed rule which states that if test results indicate a specific agricultural product contains pesticide residues or environmental contaminants that exceed the FDA action level or EPA tolerance, the data must be reported promptly to appropriate public health agencies. Commenters believe that since results of all analyses and tests must be provided to the Administrator, USDA should be responsible for communicating such test results to other Federal agencies such as FDA or EPA if regulatory tolerances or action levels are exceeded. They also suggested that section 205.671(b) be removed from the national regulations. Commenters expressed the view that such a requirement is not related to organic certification.

We do not agree with the commenters. It is not our intent to create additional responsibility for the certifying agent. Section 205.671(b), redesignated as section 205.670(e), is a statutory requirement. Section 2107(a)(6) of the Organic Food Production Act of 1990 requires certifying agents, to the extent of their awareness, to report violations of applicable laws relating to food safety to appropriate health agencies such as EPA and FDA. Therefore, due to section 2107 of the Act, section 205.670(e) has been included in the national regulations.

(3) "Threshold" for Genetic Contamination. Many commenters suggested that we establish a "threshold" for the unintended or adventitious presence of products of excluded methods in organic products. Some commenters argued that a threshold is necessary because, without the mandatory labeling of biotechnology-derived products, organic operations and certifying agents could not be assured that products of excluded methods were not being used. Others argued that, without an established threshold, the regulations would constitute a "zero tolerance" for products of excluded methods, which would be impossible to achieve.

We do not believe there is sufficient consensus upon which to establish such a standard at this time. Much of the basic, baseline information about the prevalence of genetically engineered products in the conventional agricultural marketplace that would be necessary to set such a threshold-e.g., the effects of pollen drift where it may be a factor, the extent of mixing at various points throughout the marketing chain, the adventitious presence of genetically engineered seed in nonengineered seed lots-is still largely unknown. Our understanding of how the use of biotechnology in conventional agricultural production might affect organic crop production is even less well developed.

Also, as was pointed out in some comments, the testing methodology for the presence of products of excluded methods has not yet been fully validated. Testing methods for some biotechnology traits in some commodities are becoming commercially available. Without recognized methods of testing for and quantifying of all traits in a wide range of food products, however, it would be very difficult to establish a reliable numerical tolerance.

There are publicly and privately funded research projects underway that may provide useful baseline information. Efforts of Federal agencies to clarify the marketing and labeling of biotechnology- and nonbiotechnology-derived crops may also help address these concerns. FDA, for example, is developing guidance for food producers who voluntarily chose to label biotechnology- and nonbiotechnology-derived foods. USDA is also preparing a Federal Register Notice to seek public comment on the appropriate role, if any, that it can play in facilitating the marketing of agricultural products through the development of "quality assurance" type programs that help to preserve the identity of agricultural commodities. USDA, in cooperation with the technology providers, is also working to validate testing procedures and laboratories for some commodities.

All of these efforts may help to provide information on this issue. Practices for preserving product identity, including segregating genetically engineered and nongenetically engineered products, are evolving in some conventional markets. As we discussed in the preamble to the proposed rule, we anticipate that these evolving industry best practices and standards will become the standards for implementing the provisions in this regulation relating to the use of excluded methods. As was also discussed in the proposed rule, these regulations do not establish a "zero tolerance" standard. As with other substances not approved for use in organic production systems, a positive detection of a product of excluded methods would trigger an investigation by the certifying agent to determine if a violation of organic production or handling standards occurred. The presence of a detectable residue alone does not necessarily indicate use of a product of excluded methods that would constitute a violation of the standards.

(4) Certification Status After Emergency Pest or Disease Treatment. We have not modified language in section 205.672 that would affect the certification status of a certified organic operation if the operation had been subjected to a Federal or State emergency pest or disease treatment program.

Section 205.672 states that when a prohibited substance is applied to a certified operation due to a Federal or State emergency pest or disease treatment program and the certified operation otherwise meets the requirements of this part, the certification status of the operation shall not be affected as a result of the application of the prohibited substance: Provided, That, the certified operation adheres to certain requirements prescribed by the NOP. One group of commenters informed us that they did not support maintaining the organic status of an operation that has been directly treated with prohibited substances, regardless of the reason for treatment. They believe that Federal and State emergency pest or disease treatment programs should provide alternatives for organic operations whenever feasible. If no alternative measure is feasible, the organic operation should choose between voluntary surrender of their organic status on targeted parts of the operation or destruction of the crop to eliminate pest habitat. The commenters also suggested that compensation should be provided to organic producers whose crops must be destroyed to eliminate habitat. They feel that allowing the application of prohibited materials to certified organic land without affecting the certification status violates the trust consumers place in organic certification.

We disagree with the position of the commenters. Historically, residues from emergency pest or disease treatment programs have been treated as drift cases by certifiers. In these cases, the specific crop may not be sold as organic, but the organic status of future crop years are not affected. We intend to handle such cases in a similar manner. We understand that commenters would like us to remove the certification of an organic operation that has been treated with a prohibited substance, but organic certification is a production claim, not a content claim. We, along with the commenters, are concerned with consumers trusting organic certification. At the same time, we are concerned with the welfare of certified organic operations. We have tried to include language in section 205.672 that would address both issues. We believe that, if a certified organic grower has been a good steward of his/her land and has managed the production of his/her product(s) in accordance with all regulations in the Act and other requirements in this part,

the certification status of the operation should not be affected. The application of a prohibited substance as part of a Federal or State emergency pest or disease treatment program is outside the control of the certified operation. We also believe that maintaining consumer trust is important. Thus, section 205.672 states that any harvested crop or plant part to be harvested that has been treated with a prohibited substance as part of a Federal or State emergency pest or disease treatment program cannot be sold as organically produced. Therefore, the certified organic operation can retain its certification status, and the consumer can be assured that a product from a certified organic operation that has been in contact with a prohibited substance as the result of a Federal or State pest or disease treatment program will not enter the organic marketplace. Accordingly, we have not made the change to section 205.672 as proposed by the commenters.

(5) Emergency Pest or Disease Treatment Programs. Commenters suggested that the Department add a new paragraph to section 205.672 that states "the certifying agent must monitor production operations that have been subjected to a Federal or State emergency pest or disease treatment program, and may require testing of following crops, or an extended transition period for affected production sites, if residue test results indicate the presence of a prohibited substance." Commenters said the language in the proposed rule did not clearly establish that a transition period could be needed after contamination of a certified organic operation by a government-mandated spray program. They felt that there may be a need for a case-by-case determination by the certifying agent as to when it would be best for a certified organic operation to begin selling its products as organically produced after it has been subject to a government mandated spray program.

We understand that commenters would like USDA to mandate certifying agents to monitor operations that have been subject to Federal or State emergency pest or disease treatment programs; however, we do not see a need to prescribe such a provision. Based on the responsibilities of being a USDA-accredited certifier, it is our belief that certifying agents would monitor a certified organic operation that has been subjected to a Federal or State emergency pest or disease treatment program to make sure that product being produced for organic sale is actually being produced in accordance with the Act and the regulations in this part. Certifying agents have been granted the authority to conduct additional on-site inspections of certified organic operations to determine compliance with the Act and national standards under subpart E, section 205.403. Commenters requested that we include language that would allow certifying agents to recommend an extended transition period for affected production sites if residue tests indicate the presence of a prohibited substance. Again, we understand the commenters' concern, but we are not aware of comprehensive soil residue data that could guide certifying agents in determining appropriate withdrawal intervals for operations that have been subjected to emergency pest or disease treatment programs.

### **Residue Testing - Clarifications**

Clarification is given on the following issues raised by commenters as follows:

(1) Sampling and Testing. Commenters stated that the purpose of residue testing under the Act is to assure that organically produced agricultural products that are sold as organic do not contain pesticide residues or residues of other prohibited substances that exceed levels as specified by the NOP. Based on language in section 205.670(b) of the proposed rule, commenters expressed the opinion that the Agricultural Marketing Service (AMS) was, not only requiring residue testing of organic agricultural products, but also of "any" agricultural input used or agricultural product intended to be sold as "100 percent organic," "organic," or "made with..." when there is reason to believe that the agricultural input or product has come into contact with a prohibited substance. Commenters believe that organic certifying agents may be required to test many nonorganic agricultural inputs (such as seeds, compost, straw, sawdust, and plastic) and nonorganic agricultural products and ingredients used in products labeled as "made with...". They also

argued that such testing would be unnecessary, burdensome, and expensive because such materials are more likely to have come into contact with a prohibited substance. Therefore, commenters suggested that we amend section 205.670(b) by deleting "agricultural inputs" and replacing "agricultural product" with "organically produced agricultural product." They also recommended that we replace the second occurrence of "product" with "organic product." Thus section 205.670(b) would suggest that only organic agricultural products could be required to be tested by the certifying agent.

We understand the concerns of the commenters but believe that the commenters have misinterpreted the intent of section 205.670(b). It is not our intent to mandate residue testing of all inputs and ingredients used in the production of organic agricultural products. Neither is it our intent for certifying agents to abuse residue testing responsibility by conducting residue tests of certified organic operations without reason to believe that the agricultural input or product intended to be sold as organic has come into contact with prohibited substances. Our intent is to make it clear that certifying agents have the authority to test any agricultural input used or agricultural product intended to be sold as organically produced when there is reason to believe that the agricultural input or product has come into contact with a prohibited substance. Section 205.670(b) allows for testing of inputs and agricultural products, but it does not require that all inputs of a product intended to be sold as organically produced must be tested. However, certifying agents must be able to ensure that certified organic operations are operating in accordance with the Act and the regulations set forth in this part. To assure that certifying agents have established fair and effective procedures for enforcing residue testing requirements, section 205.504(b)(6) provides that they must submit to USDA a copy of the procedures to be used for sampling and residue testing pursuant to section 205.670.

(2) Chain Of Custody Training. A commenter suggested that section 205.670(c) address chain of custody training for inspectors that will be performing preharvest or postharvest tissue test sample collection on behalf of the Administrator, SOP's governing State official, or certifying agent. The commenter proposed that all inspectors should be trained to handle chain of custody samples in order to maintain the integrity of the samples.

We agree that inspectors should be appropriately trained to handle chain-of-custody samples in order to maintain the integrity of the samples taken from a certified organic operation. However, we do not believe that the language in section 205.670(c) must be modified to address such an issue. As a USDA-accredited body, a private or State entity operating as a certifying agent must ensure that its responsibly connected persons, employees, and contractors with inspection, analysis, and decision-making responsibilities have sufficient expertise in organic production or handling techniques to successfully perform the duties assigned. The certifying agent must also submit a description of the training that has been provided or intends to be provided to personnel to ensure that they comply with and implement the requirements of the Act and the regulations in this part. In addition, certifying agents must submit a copy of the procedure to be used for sampling and residue testing for approval by the Administrator. Through the accreditation process, therefore, we will be able to assess the expertise of the individuals employed by the certifying agent and provide guidance in areas where additional training is needed to comply with the requirements of the Act and the regulations in this part.

(3) Exclusion from Organic Sale. Commenters expressed that section 205.671(a) could be easily misinterpreted. They said that section 205.671(a) did not make clear that residue testing may not be used to qualify crops to be sold as organic if a direct application of prohibited materials occurred. Commenters suggested that section 205.671(a) include: "Any crop or product to which prohibited materials have been directly applied shall not be sold, labeled, or represented as organically produced."

We do not believe this additional language is necessary. Residue testing cannot be used to qualify any agricultural crop or product to which a prohibited material has been

purposefully/directly applied. The presence of any prohibited substance on an agricultural product to be sold as organic warrants an investigation as to why the detected prohibited substance is present on the agricultural product. It does not matter if the product has come into contact with a prohibited substance through means of drift or intentional application. If the outcome of the investigation reveals that the presence of the detected prohibited substance is the result of an intentional application, the certified operation will be subject to suspension or revocation of its organic certification and/or a civil penalty of not more than \$10,000 if he/she knowingly sells the product as organic. The use of prohibited substances is not allowed in the Act or this final rule. Residue testing is not a means of qualifying a crop or product as organic if a prohibited substance has been intentionally/directly applied. It is a tool for monitoring compliance with the regulations set forth in the Act and in this part.

(4) Emergency Pest or Disease Treatment Programs. Commenters requested that we make a clear distinction between crops or agricultural products that have had prohibited substances directly applied to them and those that have come into contact with prohibited substances through chemical drift. They have proposed that we amend section 205.672(a) to address this issue. Section 205.672(a) of the proposal states that any harvested crop or plant part to be harvested that has had contact with a prohibited substance applied as the result of a Federal or State emergency pest or disease treatment program cannot be sold as organically produced. Commenters did not find this language acceptable because it did not distinguish between the two types of ways that products can come into contact with prohibited substances (drift and direct/intentional application) and how each situation would be addressed with respect to the national organic standards. Commenters believed that section 205.672(a) was fairly ambiguous and open for misinterpretation. Commenters requested that we amend language in section 205.672(a) to include that "Any harvested crop or plant part to be harvested that has contact with a prohibited substance directly applied to the crop as the result of a Federal or State emergency pest or disease treatment program cannot be sold, labeled, or represented as organically produced."

We do not accept the commenters' request and believe that the commenters have misinterpreted section 205.672 of the proposed rule. Section 205.672 specifically addresses certified organic operations that have had prohibited substances applied to them due to a Federal or State pest or disease treatment program. Section 205.672 does not include those organic operations that may have been drifted upon by prohibited substances that have been applied to a neighboring farm as a result of a Federal or State emergency pest or disease treatment program. Any potential drift from a mandatory pest and disease treatment program will be treated in the same manner as drift from any other source.