

Colorado Department of Agriculture

Plant Industry Division

Administration and Enforcement of the Organic Certification Act

8 CCR 1203-9

Section 1. Purpose

- 1.01. These permanent rules are intended to facilitate certification of organic producers and handlers by the Colorado Department of Agriculture ("Department") under the United States Department of Agriculture's National Organic Program.

Section 2. Certification of Producers and Handlers Under the National Organic Program

- 2.01. All certification of organic producers and handlers shall be done by the Department in its capacity as an accredited certifying agent for the United States Department of Agriculture's National Organic Program and in accordance with the provisions of the Organic Food Production Act of 1990, 7 U.S.C. § 6501 et seq, (2002) (later amendments not included), incorporated by reference herein, and the National Organic Program Final Rule, 7 C.F.R. part 205 (2010) (later amendments not included), incorporated by reference herein.
- 2.02. Certified copies of the above incorporated material are available for public inspection during regular business hours and may be obtained or examined by contacting the Organic Program Coordinator, Colorado Department of Agriculture, 700 Kipling Street, #4000, Lakewood, CO 80215-8000 or <http://www.ams.usda.gov/AMSV1.0/nop>. The incorporated material may also be examined at any state publications depository library.

Section 3. Fees

- 3.01. Each applicant for certification shall be charged an annual, non-refundable certification fee of not more than \$5,000.00 based on the actual cost of certification activities including but not limited to the category or categories for which the applicant is seeking certification, the type, size and complexity of the operation, the timing of submission of the application with respect to when an inspection must be conducted and any other factors that affect the cost to perform required certification activities for the applicant. Applicants shall submit payment of this fee with their application for certification. Once certified, all producers and handlers certified under the program shall pay this fee on an annual basis for each subsequent year in which they wish to remain certified by the Department.
- 3.02. In addition to the above annual fees, all applicants for and holders of certifications issued by the Department shall be required to pay the costs of any inspections necessary to obtain and maintain certification as follows:
 - a. Inspection time, including travel, will be charged at a rate of not more than \$40.00 per hour.

- b. Mileage for the inspector's travel will be charged at a rate of not more than \$0.40 per mile.
- c. If travel and inspection cannot reasonably be accomplished within one day, the inspector's travel and per diem expenses will be charged according to the policies and rates set forth in Rule 5-1 of the State Fiscal Rules, 1 C.C.R. 101-1.

Section 4. Minimum Standards for Contract Inspectors

- 4.01. The inspector must have sufficient training, knowledge and experience with the National Organic Program rules and generally accepted inspection processes to conduct inspections in any certification category for which they apply to conduct inspections without further training. Inspectors will be selected only in the category or categories for which they can demonstrate sufficient training, knowledge and experience.
- 4.02. A prospective inspector may demonstrate training, knowledge and experience by providing:
 - a. Evidence of inspections conducted within the last three years in specific categories. Inspector evaluations for the inspections should be provided from the accredited certifier along with the contact name of the accredited certifier; or
 - b. Documentation of successful attendance and completion Independent Organic Inspector Association or equivalent training in the past three years; or
 - c. Evidence of other qualifications the Commissioner determines appropriate to demonstrate training, knowledge and experience.
- 4.03. The Department reserves the right to require the prospective inspector to take an examination to determine his or her knowledge of the National Organic Program rules and general inspection processes.

Section 5 – 8 Reserved

Section 9 Statements of Basis, Specific Statutory Authority and Purpose

9.01. Adopted 7-7-89 - Effective 7-7-89.

Adopted 8-24-89 - Effective 10-1-89.

Pursuant to the provisions and requirements of the Organic Certification Act to regulate the production and certification of agricultural crops offered for sale as "organically grown products," Title 35, Article 11.5, CRS, the following rules and regulations are hereby promulgated.

The purpose of these rules and regulations is to comply with the provisions of the associated statute to provide specific guidelines for the production and certification of agricultural products sold or offered for sale as organically grown.

The regulations are designed to:

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Set standards for producing agricultural products that may be certified as having been produced without the use of any synthetically compounded fertilizer or pesticide.

To set certifications procedures to:

Issue evidence of the crop certification and for the sale and distribution of the “organic label” to licensed producers.

To establish procedures for:

Examining and evaluating products offered for sale to “organic producers” as a “plant amendment.”

Establish inspection procedures and policies for enforcement of the Act;

Determine license and inspection fees.

9.02. Adopted 5-1-90 - Effective 5-1-90.

This rule is adopted under the Colorado Organic Certification Act pursuant to Section 35-11.5-104, C.R.S. and deals with the definition of “synthetic pesticide”.

Organic producers may not use synthetic pesticides when growing crops on certified organic farms. In a number of pesticides the active ingredient is naturally derived but the inert ingredients are in some way synthetic. These products are synthetic under the definition of synthetic pesticide in the Rules and Regulations adopted on July 7, 1989. At this time the list of pesticides which do not fall under the July 7, 1989, definition of synthetic is very limited.

The amended definition will permit organic producers a broader selection of pesticide products to choose from and still be able to use natural active ingredients.

These pesticide products will be needed for use by organic producers in the very near future. The time required to go through the public hearing process would prevent many of the growers from using these products in the 1990 growing season. This will result in a financial loss to growers because of uncontrolled insect and disease problems.

The immediate adoption of rule 1.19 is imperatively necessary for the preservation of public health, safety, and welfare, and compliance with the notice and hearing requirements of Section 24-4-103 of the Colorado Administrative Procedure Act would be contrary to the public interest.

9.03. Adopted 6-22-90 - Effective 7-30-90.

The following rule is hereby promulgated under the authority of the Colorado Organic Certification Act, pursuant to Section 35-11.5-104, C.R.S. It deals with the definition of “synthetic pesticide”.

Organic producers may not use synthetic pesticides when growing crops on certified organic farms. In a number of pesticides the active ingredient is naturally derived but the inert ingredients are in some way synthetic. These products are synthetic under the definition of synthetic pesticide in the Rules and Regulations adopted on July 7, 1989. At this time the list of pesticides which do not fall under the July 7, 1989, definition of synthetic is very limited.

The amended definition will permit organic producers a broader selection of pesticide products to choose from and still be able to use natural active ingredients. Without the use of these products certified organic growers may suffer financial losses because of uncontrolled insect and disease problems.

Section 1 of the Rules and Regulations promulgated pursuant to the Colorado Organic Certification Act is amended by substituting the following for subsection 1.19.:

1.19. "Synthetic Pesticide" means any pesticide whose active ingredient contains any synthetically manufactured substance. Any pesticide whose active ingredient does not contain any synthetically manufactured substance is not a "synthetic pesticide" even though it contains an inert ingredient which inert ingredient contains a synthetically manufactured substance. This subsection shall expire on January 1, 1992.

9.04. Adopted 10-18-91 - Effective 11-30-91.

The following rules are hereby promulgated under the authority of the Colorado Organic Certification Act, pursuant to Section 35-11.5-104, C.R.S. They deal with the definition of "synthetic pesticide" and with the subsection which exempts seed and seedlings from the requirements for organic production.

The definition of "synthetic pesticide" expires on January 1, 1992. At the time it was adopted in 1990, the State Agricultural Commission instructed proponents of this definition to re-evaluate it prior to 1992. The concern was over the blanket acceptance of synthetic inert ingredients in pesticides deemed acceptable for use in organic crop production. However, in the fall of 1990 the federal "Organic Foods Production Act of 1990" was passed by the United States Congress. It calls for state organic certification programs to meet certain standards to comply with federal requirements, to take effect on October 1, 1993. This federal legislation will make it necessary to amend the Colorado Organic Certification Act and the Rules and Regulations pertaining to it before this deadline.

It will be appropriate to re-evaluate the definition of "synthetic pesticide" at the same time that other changes, needed to comply with the federal statute, are made to the state legislation and regulations. The expiration date of this definition is therefore extended to October 1, 1993.

Subsection 4.02 exempts seed and seedlings from the requirements for organic production. This provision expires on January 1, 1992. The subsection was included in the regulations because of the great lack of availability of untreated seeds and seedlings in the Colorado organic production areas. This lack of availability is still a problem to Colorado organic producers and termination of this exemption within the next year will create a hardship for many organic producers and cause them to suffer financial losses.

In order to give organic producers more time to find sources of untreated seed, as more of these sources are made available, the expiration date of the provisions of this subsection are therefore extended until October 1, 1993 for seed. The expiration date for seedlings remains at January 1, 1992.

9.05. Adopted 11-19-93 - Effective 12-30-93.

The following rule is hereby promulgated under the authority of the Colorado Organic Certification Act, pursuant to Section 35-11.5-104, C.R.S., (1993 Supp). It defines "synthetic pesticide" and includes an expiration date in the definition.

The definition states that a pesticide is not a synthetic pesticide because it contains a synthetic inert ingredient. This definition thus allows for synthetic inert ingredients in pesticides which may be used by organic producers and it is now set to expire on October 1, 1995. At the present time there are virtually no pesticides being manufactured that do not have synthetic inert ingredients. Organic producers would have great difficulty growing crops without using these pesticides. It is anticipated that by October 1, 1995, federal regulations will provide lists of pesticides acceptable for use in organic production. At that time it will be appropriate to reevaluate this definition.

Section 1 of the Rules and Regulations promulgated pursuant to the Colorado Organic Certification Act is amended by substituting the following for subsection 1.19:

- 1.19. "Synthetic Pesticide" means any pesticide whose active ingredient contains any synthetically manufactured substance. Any pesticide whose active ingredient does not contain any synthetically manufactured substance is not a "synthetic pesticide" even though it contains an inert ingredient which inert ingredient contains a synthetically manufactured substance. This subsection shall expire on October 1, 1995.

9.06. Adopted 11-18-94 - Effective 12-30-94.

These amendments to the rules and regulations are adopted pursuant to § 35-11.5-104, C.R.S. (1994 Supp.).

The purposes of these amendments to the rules and regulations are to establish standards for the use of any other organic labels on agricultural products sold within the state, pursuant to §§ 35-11.5-104(1)(h) and 109(2), C.R.S. (1994 Supp.) and to provide guidance pertinent to the sanction imposed upon an organic producer's license pursuant to §35-11.5-111, C.R.S. (1994 Supp.).

SECTION 4.5 STANDARDS FOR THE USE OF OTHER ORGANIC LABELS ON AGRICULTURAL PRODUCTS SOLD WITHIN THE STATE

- 4.51. Other organic labels are those labels defined in § 35-11.5-103(6) of the Act, specifically, any label, other than the organic certification seal described in Section 7 below, which signifies to a consumer that the labelled product was organically grown. Such other labels may include, but are not limited to, a sign, label, seal, advertisement, or other type of promotional material pertaining to a product containing the words "organic," "organically grown," "certified," "certified organic," "verified," "verified organic," any derivation of said words, or words with similar meaning. Failure to comply with this Section 4.5 is a prohibited act as set forth in §35-11.5-109(2), C.R.S. (1994 Supp.).
- 4.52. No such other organic labels shall be utilized in any fashion unless:
- (a) The product was produced without the use of artificial irradiation, synthetic pesticides, synthetic plant or soil amendments, or fertilizer materials except natural organic fertilizers. Soaps for insecticidal purposes, lime sulphur, and horticultural oils are permissible;
 - (b) In the case of perennial crops, was grown in soil or growth medium free of the application of synthetic pesticides, synthetic soil and plant amendments, and synthetic fertilizer materials for three years prior to harvest; and

- (c) In the case of annual crops and two-year crops, was grown without the use of synthetic pesticides, synthetic soil and plant amendments, and synthetic fertilizer materials for three years prior to harvest.

9.07. Adopted 1-19-96 - Effective 3-1-96.

This amendment to the rules and regulations is adopted pursuant to §35-11.5-104, C.R.S. (1985). It amends the expiration date which is part of the definition of "synthetic pesticide".

The definition states that a pesticide is not a synthetic pesticide because it contains a synthetic inert ingredient. This definition thus allows for synthetic inert ingredients in pesticides which may be used by organic producers and it is now set to expire on October 1, 1997. At the present time there are virtually no pesticides being manufactured that do not have synthetic inert ingredients. Organic producers would have great difficulty growing crops without using these pesticides. It is anticipated that by October 1, 1997, federal regulations will provide lists of pesticides acceptable for use in organic production. At that time it will be appropriate to reevaluate this definition.

Section 1 of the Rules and Regulations promulgated pursuant to the Colorado Organic Certification Act is amended by substituting the following for subsection 1.19:

- 1.19. "Synthetic Pesticide" means any pesticide whose active ingredient contains any synthetically manufactured substance. Any pesticide whose active ingredient does not contain any synthetically manufactured substance is not a "synthetic pesticide" even though it contains an inert ingredient which inert ingredient contains a synthetically manufactured substance. This subsection shall expire on October 1, 1997.

9.08. Adopted 11-13-97 - Effective 12-30-97.

This amendment to the rules and regulations is adopted pursuant to § 35-11.5-104, C.R.S. (1997).

The purposes of this amendment are to delete the expiration date which is found in the definition of "synthetic pesticide" and to require review of this definition upon adoption of applicable federal rules.

FACTUAL FINDINGS

The United States Department of Agriculture is in the process of rulemaking pursuant to the Organic Foods Production Act of 1990, codified at 7 U.S.C. § 6501 et. seq. It is anticipated that these federal rules, which would be controlling, will resolve all issues concerning "synthetic pesticides." The federal rules will likely not be adopted prior to the expiration date found in the definition of "synthetic pesticide."

Section 1 is amended as follows:

SECTION 1. TERMS DEFINED AND CONSTRUED

- 1.19. "Synthetic Pesticide" means any pesticide whose active ingredient contains any synthetically manufactured substance. Any pesticide whose active ingredient does not contain any synthetically manufactured substance is not a "synthetic pesticide" even though it contains an inert ingredient which inert ingredient contains a synthetically manufactured substance. This subsection shall be reviewed upon adoption by the United States Department of Agriculture of rules pursuant to the Organic Foods Production Act of 1990, codified at 7 U.S.C. § 6501 et. seq.

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9.09. Adopted 10-16-02 - Effective 10-16-02.

STATUTORY AUTHORITY:

These emergency rules are adopted by the Commissioner of Agriculture pursuant to his authority under the Organic Certification Act § 35-11.5-104, C.R.S. (2002).

PURPOSE:

The purpose of these emergency rules is to comply with and implement the provisions of H.B. 02-1186 directing the Colorado Department of Agriculture ("Department") to establish an organic certification program that is accredited under the United States Department of Agriculture's National Organic Program, which takes effect October 21, 2002.

NEED FOR EMERGENCY RULE:

The Commissioner of Agriculture hereby finds that immediate adoption of emergency rules for the establishment and implementation of the organic certification program provided for in H.B. 02-1186 is imperatively necessary to comply with federal regulation and to preserve the public welfare. The factual basis for this finding is as follows:

1. The Organic Certification Act §§ 35-11.5-101 – 117, C.R.S. (2002), was originally enacted in 1989 to establish and implement a state program administered by the Department to help identify and assist Colorado farmers in marketing organically raised agricultural products.
2. In 1990, Congress passed the Organic Food Production Act, 7 U.S.C. § 6501 et seq., which authorized the United States Department of Agriculture ("USDA") to establish a national organic certification program that would supercede all state and private certification programs.
3. On December 21, 2000, USDA published its Final Rule at 7 C.F.R. part 205, establishing a National Organic Program ("NOP"). When this program takes effect on October 21, 2002, the Colorado organic certification program established in 1989 will be preempted by the federal program. As of that date, all certifications issued under the 1989 Colorado law will be invalid. From that date on, any person that sells any agricultural product labeled as "organic" must be certified under the federal NOP instead.
4. In response to requests from Colorado organic producers, the General Assembly passed H.B. 02-1186, amending the Organic Certification Act effective June 3, 2002. This bill directed the Department to apply for accreditation to act as a certifying agent for USDA to certify producers and handlers of organic produce under the NOP.
5. The Department applied for accreditation at the end of July, 2002, and was notified within the last month that it can expect to receive accreditation before the October 21, 2002 effective date of the Final NOP Rule. This notification was unanticipated because USDA review of other state's applications for accreditation took more than six months to complete.
6. In order to serve the needs of organic producers and handlers to become certified before October 21, 2002, the Department plans to begin certifying producers and handlers as soon as it receives accreditation. If the Department is not able to certify handlers and producers prior to that date, they will have to try to obtain NOP certification from private certifying agents based outside of the

state in order to continue their organic business. These emergency rules will allow the Department to issue certifications during the interim period until the effective date of the permanent rules, which are scheduled to take effect on January 1, 2003.

9.10. Adopted 10-30-02 - Effective 1-30-03.

STATUTORY AUTHORITY:

These permanent rules are adopted by the Commissioner of Agriculture pursuant to his authority under the Organic Certification Act § 35-11.5-104, C.R.S. (2002).

PURPOSE:

The purpose of these permanent rules is to: (1) repeal all of the existing permanent rules for the administration and enforcement of the Organic Certification Act, §§ 35-11.5-101 – 117, C.R.S. (2002), currently published at 8 C.C.R. 1203-9 (including the Statement of Basis and Purpose as well as Rules 1 through 11) and; (2) replace the current permanent rules with new permanent rules which comply with and implement the provisions of H.B. 02-1186 directing the Colorado Department of Agriculture (“Department”) to establish an organic certification program that is accredited under the United States Department of Agriculture's National Organic Program.

FACTUAL AND POLICY ISSUES:

The factual and policy issues encountered in the proposal of these permanent rules are as follows:

1. The Organic Certification Act §§ 35-11.5-101 – 117, C.R.S. (2002), was originally enacted in 1989 to establish and implement a state program administered by the Department to help identify and assist Colorado farmers in marketing organically raised agricultural products.
2. In 1990, Congress passed the Organic Food Production Act, 7 U.S.C. § 6501 et seq., which authorized the United States Department of Agriculture (“USDA”) to establish a national organic certification program that would supercede all state and private certification programs.
3. On December 21, 2000, USDA published its Final Rule at 7 C.F.R. part 205, establishing a National Organic Program (“NOP”). When this program takes effect on October 21, 2002, the Colorado organic certification program established in 1989 will be preempted by the federal program. As of that date, all certifications issued under the 1989 Colorado law will be invalid. From that date on, any person that sells any agricultural product labeled as “organic” must be certified under the federal NOP instead.
4. In response to requests from Colorado organic producers, the General Assembly passed H.B. 02-1186, amending the Organic Certification Act effective June 3, 2002. This bill directed the Department to apply for accreditation to act as a certifying agent for USDA to certify producers and handlers of organic produce under the NOP.
5. The Department applied for accreditation at the end of July, 2002, and expects to receive accreditation by early October.
6. In order to serve the needs of organic producers and handlers to become certified before October 21, 2002, the Department plans to begin certifying producers and handlers as soon as it receives

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accreditation. In the interim period before these permanent rules take effect, therefore, the Department plans to incorporate the text of these proposed rules in temporary emergency rules.

9.11. Adopted 2-21-03 - Effective 6-2-03.

STATUTORY AUTHORITY:

These amendments to the permanent rules are adopted by the Commissioner of Agriculture pursuant to his authority under the Organic Certification Act § 35-11.5-104, C.R.S. (2002).

PURPOSE:

The purpose of these amendments to the permanent rules is to repeal the current Section 2 of the existing permanent Rules incorporating the federal Organic Food Production Act of 1990 and the National Organic Program Final Rule and replace it with a new Section 2 that contains identical language to the current Rule plus additional language explaining how to obtain the incorporated materials. Nonsubstantive changes will be made to the rule to include the history of Statements of Basis and Purpose in Section 9.

FACTUAL AND POLICY ISSUES:

The factual and policy issues encountered in the proposal of these permanent rules are as follows:

1. On October 30, 2002, the Department adopted new rules pursuant to the Organic Certification Act §§ 35-11.5-101 — 117, C.R.S. (2002), which established a certification fee system and incorporated by reference the federal Organic Food Production Act of 1990 and the National Organic Program Final Rule.
2. On December 5, 2002, the Department received notice from the Colorado General Assembly Office of Legislative Legal Services that, in order to comply with § 24-4-104(12.5)(d), C.R.S., of the State Administrative Procedure Act, Section 2 of the new permanent Rules must specify how the public may obtain or examine the incorporated material.

9.12. Adopted 4-16-09 - Effective 5-30-09.

Statutory Authority

The amendments to the rules are adopted pursuant to the Organic Certification Act, § 35-11.5-104, C.R.S. (2008).

The purpose of these amendments is to carry out the provisions of the Organic Certification Act by:

- 1) updating the zip code for the Department of Agriculture to reflect the current zip code;
- 2) removing the requirement that the annual fee for certification be due to the Department of Agriculture on the anniversary date of initial certification; and
- 3) increasing the reimbursement rate that can be charged for mileage for the inspector's travel to reflect the cost charged to the Department of Agriculture by Fleet Management for the vehicle.

The factual and policy issues encountered in the proposal of this amendment to the rules are as follows:

- 1) The United States Postal Service changed the last four numbers in the zip code several years ago. This change will correct this item in the rule.
- 2) The current rule requires the annual fee for certification be payable each year on the anniversary date of the initial certification. Because the annual fee is paid at the time the updated Organic Systems Plan is provided, this is not always appropriate. The Organic Systems Plan is a forward looking document that needs to be submitted prior to the growing season for crops. When the initial certification is received in August, this sets up an inappropriate time frame for renewal in future years. Removal of this clause will allow the Department of Agriculture to set the date the annual fee is due to coincide with the best time for submission of the Organic Systems Plan.
- 3) The current limit for the reimbursement rate of \$0.30 per mile that can be charged by for mileage for the inspector's travel is lower than what Fleet Management changed the Department of Agriculture when gas prices were high. Fleet Management raised the reimbursement rate to \$0.37 per mile in late 2008. This will allow the Department of Agriculture to be reimbursed at the rate needed to meet Fleet Management's fee should gas prices rise in the future.

9.13. Adopted 12-16-10 - Effective 1-30-11.

Statutory Authority

The amendments to the rules are adopted pursuant to the Organic Certification Act, § 35-11.5-104, C.R.S. (2010).

The purpose of these amendments is to carry out the provisions of the Organic Certification Act by:

- 1) Identifying factors which lead to cost differentiation and the range of application fees charged to entities apply for organic certification; and
- 2) Stating the minimum standards for contract inspectors. The option is now possible as the Organic Act was modified in 2010 adding the provision to allow for the use of contract inspectors.

Factual and Policy Issues

The factual and policy issues encountered when developing these rules include:

- 1) Clarification was needed as to what type of factors are considered when determining the application fee for certified entities.
- 2) In 2010 the Organic Certification Act was amended to allow for contract inspectors. To implement this new provision, standards were needed to state what training, knowledge and experience the Department would require of potential inspectors. This provides the minimum qualification for the department to use in determining if a potential inspector is qualified. In addition it provides information to potential inspectors as to what credentials will be needed to apply as a contract inspector.