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Interaction With NOP Regulations

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CHAPTER QUICK TIP

Don't Jeopardize Your Organic Certification

Watch out for contract requirements that could cause you to violate organic regulations and potentially jeopardize your organic certification. To help prevent any buyer pressure to break NOP regulations (such as organic seed sourcing regulations), you could insert language in your contract stating that both parties agree to comply with NOP regulations in all respects.



ORGANIC CERTIFICATION STATUS

How does the contract address organic certification and enforcement?

Evidence of Organic Certification

Nearly every organic contract requires the farmer to provide evidence that the farm operation has obtained federal organic certification under National Organic Program (NOP) regulations. The contract might state that the farmer must provide the buyer with proof of certification by a particular time, such as prior to beginning production, prior to harvest, or prior to making delivery of the organic commodity under contract. The contract might even state that the buyer is not required to pay for the commodity until the buyer receives proof of organic certification.

Organic Certifier Requirements

Furthermore, the contract might include requirements relating to the farm's Accredited Certifying Agent (ACA or organic certifier). For example, the buyer might require the farmer to use a specific organic certifier. If you have a good relationship with an organic certifier who is not specified in the contract, you may wish to negotiate the ability to use your current certifier. However, buyers may have a valid reason to require a specific certifier, such as the need for a certifier authorized to issue international organic certifications.

Status of Organic Certification

The contract might also address changes in the farm's organic certification status. For example, a contract might require the farmer to notify the buyer of any change in the farm's status. If your contract has such a requirement, be sure you understand all of the types of actions the buyer would consider to be a change in status that you would be expected to report. For example, must you report complaints, investigations, noncompliance notices, proposed suspensions or revocations, mediations, or appeals? Or would you only need to report an actual suspension or revocation?

Example: Buyer Termination Due to Investigation Provision

Buyer may cancel the Agreement if any part of Seller's organic operation is under investigation for non-compliance.



It is preferable to avoid contract provisions allowing the buyer to terminate the contract if NOP merely investigates your farm for noncompliance. Farmers cannot control whether they become subject to certifier or NOP investigation; a mistaken impression or false report could potentially trigger an investigation. Even after receiving a notice of proposed suspension or appeal, farmers have the right to request mediation and/or appeal.¹ Under current law, participating in both the mediation process and the appeals process stops the proposed suspension or revocation from becoming final until those processes are completed.² Thus, a noncompliance investigation—or even a proposed suspension—could end up being resolved between an organic farmer, certifier, and the NOP without changing the organic status of the product under contract.

Additionally, an investigation of part of your farm might not even affect the organic product under contract if the investigation relates to a different product entirely, or a portion of your production that is not needed to fulfill the contract.

Beware of broad termination rights related to organic principles.

Watch out for contract language giving the buyer broad rights to terminate the contract if you “act inconsistently with organic production principles” or something similar. “Organic production principles” appear to be broader than the actual NOP regulations, and such a provision would therefore potentially allow the buyer to terminate the contract even if you were in full compliance with the NOP regulations.



Example: Buyer Termination Due to Noncompliance with Organic Principles Provision

Buyer may cancel the Agreement if Seller is involved in any activity inconsistent with the principles underlying organic production, or if such activity is the subject of publicity (including via electronic media).

The language in the example above is much broader than necessary to protect an organic buyer's interest. A narrower provision, perhaps allowing termination upon suspension or revocation of certification, would protect the buyer while not allowing unjustified or premature termination. Language requiring the farmer to provide notification of a noncompliance investigation would not be unreasonable, provided that the buyer cannot terminate the agreement if the farmer provides adequate assurance that the organic contract will be fulfilled.³



Example: Buyer Rights Upon Investigation or Revocation/Suspension of Organic Certification

Buyer may terminate the contract if the organic crop under contract is subject to suspension or revocation of organic certification. Producer agrees to notify Buyer of any investigation or notice of noncompliance with NOP regulations; however, Buyer may not terminate the contract solely due to investigation or notice of proposed suspension/revocation if Producer provides adequate assurance that Producer will be able to fulfill the contract by providing a certified organic crop meeting contract specifications.



PROHIBITED SUBSTANCES AND GMOS

How does the contract address pesticide residues and other prohibited substances?

NOP Regulations on Prohibited Substances

Although the NOP regulations state that farm products cannot be sold as organic if residues of pesticides or prohibited substances exceed five percent of U.S. Environmental Protection Agency (EPA) tolerances, the NOP regulations do not mandate regular testing for these substances.⁴ Instead, organic certifiers may test if there is reason to believe that an organic product or input has come into contact with a prohibited substance or has been produced using excluded methods (such as genetically modified organisms (GMOs)).⁵

Prohibited substances are typically synthetic substances, although some natural substances are also prohibited.⁶ (GMOs are also prohibited, as discussed in the next section, but the NOP regulations refer to GMOs as “excluded methods” rather than “prohibited substances.”)⁷ The “National List” is the portion of the NOP regulations that lists particular allowed and prohibited materials.⁸ All synthetic materials are prohibited for organic crop and livestock production unless they are specifically approved by NOP and appear on the National List. All natural products are allowed, unless they are specifically prohibited and appear on the National List.

Testing Requirements Beyond NOP Regulations

If the contract requires that your organic commodity be tested for pesticides or other prohibited substances, know that this is a requirement that goes beyond the NOP requirements. If your contract requires testing, keep these considerations in mind (as discussed in more detail in Chapter 6, pages 6–20 through 6–24):

- Who will pay for the initial testing? (Ideally, the buyer.)
- Who will conduct the test? Will it be a specially qualified individual? Is there a testing protocol? (Ideally, a qualified individual with a testing protocol.)
- When will the test be conducted? Prior to shipment, upon delivery, or after processing? (Ideally, prior to shipping or immediately upon delivery.)
- Where will the test be conducted? In the field, at the buyer's facility, in a sterile environment, or in a laboratory? (Ideally, in a sterile environment or in a lab.)
- What are the test criteria? What is the test measuring? What is the rejection level? (Ideally, the contract should state a specific rejection level for any testing.)
- Can you dispute a test result you disagree with and, if so, how? Can you get an independent test, and/or a laboratory test? Who will pay for any additional testing? (Ideally, the contract should include a dispute resolution mechanism that includes independent testing paid for at least in part by the buyer.)
- Will you have access to the test samples? (Ideally, yes.)

Keep Your Own Samples

Consider keeping duplicates of any samples you send to the buyer, and, in addition, including language in the contract allowing you access to any samples tested by the buyer.

Beware of Contract Prohibitions on “All Synthetics”

Some organic contracts will prohibit all synthetic herbicides, vaccines, antibiotics, hormones, and other substances. Keep in mind that the NOP regulations allow some synthetics in organic production (those that appear on the National List). If your contract has a blanket prohibition on synthetics or chemicals, you should double-check your inputs to make sure they are both approved for organic production and are also non-synthetic. If you cannot easily do without a particular NOP-approved synthetic, consider negotiating a specific exception for that substance.

How does the contract handle GMOs?

Genetically modified organisms (GMOs) pose a serious threat to farmers who grow organic crops for which there is a GMO equivalent. Although

there are many steps farmers can take to reduce their risk of GMO contamination, it is almost impossible to guarantee that a crop is 100 percent GMO-free. This is especially true for farmers who grow organic corn or organic soybeans, because the GMO varieties of these crops are so prevalent. Currently, the U.S. Department of Agriculture (USDA) has approved over 15 types of GMO crops that may be planted without governmental oversight. These include corn, sweet corn, soybeans, canola, cotton, flax, alfalfa, sugar beets, tobacco, potatoes, squash, papaya, linseed, rice, plums, and tomatoes.⁹ GMO wheat is not approved for planting as of the date this guide was written, but it has been approved for trial plots.

NOP Regulations on GMOs (Mere Presence Not Prohibited)

Federal organic regulations do not require that certified organic farm products be entirely free of GMOs. The regulations simply prohibit the use of GMOs in organic production.¹⁰ Organic farmers are required to create appropriate buffer zones and adopt appropriate handling practices to protect the crop from contamination.¹¹ Nonetheless, if drift from a neighboring farm introduces GMOs to your organic crop, your crop can still be certified organic—as long as you fulfilled all of the other organic requirements. Similarly, if a truckload of certified organic soybeans produced in compliance with the organic rules tests positive for the presence of GMOs, the status of the soybeans' organic certification remains unchanged.

Although a farm's organic certification is not at risk due to the mere presence of GMOs if organic practices have been followed, buyers may still expect 100 percent non-GMO compliance and reject your organic production if the certified organic commodity tests positive for any level of GMOs. Consequently, you may wish to consider the issues discussed below prior to signing an organic contract.

Does the Contract Address GMOs?

Farmers should know what their buyers' expectations are regarding the presence of GMOs in the organic product under contract. Accordingly, if your contract is silent on GMOs, make sure to ask about buyer expectations, and consider working with the buyer to fully describe the buyer's GMO-related expectations in the contract text.

An easy way to address GMOs without agreeing to specific anti-contamination measures or testing protocols is to simply state that you will comply with the NOP regulations regarding GMOs. This language should reassure the buyer that you will not use GMO seed, that you will not feed GMO crops to organically managed animals, and that you will

take appropriate measures to prevent GMO contamination as detailed in your Organic System Plan.



Good Example: Compliance with NOP Regulations on GMOs Provision

Seller and Buyer agree that all measures taken by Seller related to genetically modified organisms (GMOs) will comply with the federal organic regulations regarding organic production (the NOP regulations).

Does the Contract Set a GMO Rejection Level?

If you discover your buyer does have expectations about the presence of GMOs or GMO levels, your organic contract should state the GMO rejection level or range. The “rejection level” is the percentage of GMOs present in your organic commodity that will trigger rejection of your shipment. This is critical information, because if the contract prohibits GMOs but does not state a rejection level, the buyer could reject your shipment if it has even a tiny presence of GMOs.

GMO-Free Standards

With the rise of GMOs in the United States since the late 1990s, it is increasingly difficult for organic farmers to maintain 100 percent GMO-free products,¹² especially after an organic commodity has been exposed to potential GMO contamination during transportation and delivery. Due to this difficulty, farmers should be cautious about representing that their contracted organic commodities are 100 percent GMO-free.

There is no legal standard for the meaning of “GMO-free” in the United States. “Certified organic” status is the only legal standard that prohibits the use of GMOs in the production process. However, the U.S. market’s rejection level for “GMO-free” commodities is often considered to be .9 percent, based on the level for mandatory GMO labeling in the European Union.

Some buyers, having experienced difficulty obtaining 100 percent GMO-free farm products, will agree to pay a premium for organic commodities that are entirely free from the presence of GMOs. Consider negotiating a GMO-free premium structure with your buyer if you are absolutely

confident that you can provide GMO-free crops or livestock—or if you are willing to risk rejection based on the unintended presence of GMOs.

Does the Contract Require Measures to Prevent GMO Contamination?

If your contract calls for measures to prevent GMO contamination in addition to those set forth in your Organic System Plan, make sure the anti-contamination measures are feasible and that you can afford the time and money required to carry out those measures. Please see pages 8–11 through 8–13 of this chapter for a discussion of anti-contamination measures and corresponding contract considerations in the transportation context.

Does the Contract Require GMO Testing?

Some organic buyers require that organic farm products be tested for the presence of GMOs.

- *Types of GMO Tests*

The first consideration to discuss with the buyer is what type of GMO test will be conducted. There are two major types of GMO tests.¹³ The first is known as a “strip test” that can be used in a field setting to immediately detect the presence of modified DNA. Strip tests allow rapid, on-site results, but can produce false positives and cannot detect the precise percentage of GMOs in a sample. Additionally, multiple strip tests could be required for the same commodity, because each test can only detect one out of the many types of genetic modifications that exist.

The second type of GMO test, the PCR (polymerase chain reaction) test, is much more precise than a strip test but must be conducted in a laboratory at a higher cost. The PCR test method is recognized as more sensitive and reliable than any other GMO test method, and it can determine the precise percentage of GMOs in a sample. Moreover, when proper protocols and samples are used, it is extremely rare for a PCR test to produce a false positive or false negative result. Thus, if accuracy is extremely important, the PCR test should be used instead of the strip test.

- *Questions to Ask About GMO Testing*

You should discuss the following questions related to GMO testing with your buyer and consider including the details of the discussion in your contract:

- Who will pay for the initial test (or tests)? (Ideally, the buyer.)
- Who will conduct the test? Will it be a specially qualified individual? Is there a testing protocol? (Ideally, a qualified individual with a testing protocol.)
- When will the test be conducted? Prior to shipment, upon delivery, or after processing? (Ideally, prior to shipment or immediately upon delivery.)
- Where will the test be conducted? In the field, at the buyer's facility, in a sterile environment, or in a laboratory? (Ideally, in a sterile environment or in a lab.)
- What are the test criteria? What will the test measure? What is the rejection level? (Ideally, the contract should state a specific rejection level for any testing.)
- Can you dispute a test result you disagree with and, if so, how? Can you get an independent test, and/or a laboratory test? Who will pay for any additional testing? (Ideally, the contract should include a dispute resolution mechanism that includes independent testing paid for at least in part by the buyer.)
- Will you have access to the test samples? (Ideally, yes.)

You might also consider negotiating contract language calling for initial DNA strip tests, with PCR as a backup for any shipments that test positive for GMOs.

Example: GMO Testing Provision

Organic product must test negative for GMOs. Product will be tested via "strip test" mechanism upon delivery. Shipments that test positive for the presence of GMOs will be re-tested once. Buyer shall bear the cost of these tests. Producer will be notified within one business day of any positive GMO tests. Producer may opt for a PCR test at Producer's expense; PCR results will be final.



Does the Contract Require GMO-Free Documentation?

Instead of testing for GMOs, some organic contracts may require documentation of farmers' GMO-free production processes. For example, farmers could obtain verification from their seeds and planting stock suppliers affirming that each variety of seed and planting stock is not the product of genetic engineering or GMOs and has not been treated with synthetic materials prohibited by the NOP regulations. These verifications are generally signed by an authorized representative of the company selling the seed or planting stock.

GMO-Free Labeling and Certification

As consumers become more aware of GMO-related issues, some organic handlers are beginning to use "GMO-free" labeling as a marketing strategy. No state or federal government has enacted a GMO labeling law (although labeling bills have been introduced in Congress and in state legislatures nationwide) or even created a certification system for GMO-free products. Thus, while some organic food companies simply use a version of the words "GMO-free" on their packaging, some organizations have created private non-GMO certification programs to fill the labeling gap. Companies using either approach are likely to be even more interested in ensuring that farmers supply them with documentation that products supplied are GMO-free.

The Non-GMO Project

The Non-GMO Project is a non-profit organization that has developed a process-based standard for verification of non-GMO status. Companies that achieve certification of their non-GMO status are allowed to use the Non-GMO Project label as a marketing tool. The Non-GMO Project verification system and certification is increasingly being required by larger organic buyers. For more information about the Non-GMO Project, see www.nongmoproject.org.



If your contract requires you to obtain a non-GMO certification in addition to organic certification, be sure to factor the time and cost of this additional certification into your calculation of what you are likely to earn under the contract. If the additional certification seems likely to be too

burdensome, consider negotiating for GMO testing or GMO-free documentation as substitutes for the certification.

Protect Yourself From GMOs

In addition to carefully considering the questions above, you can take steps to help protect yourself from GMO contamination and, thus, from GMO-related contract problems. As mentioned above, it is a good idea to obtain non-GMO affidavits from seed and other input suppliers when applicable. Furthermore, you should retain receipts documenting your inputs, seed tags, letters from seed suppliers, and copies of any GMO test results. You can also take photographs to document the existence of buffer zones, runoff diversions, windbreaks, and other anti-contamination efforts.¹⁴

Does the contract have specific isolation, buffer, or other anti-contamination requirements?

NOP Regulations on Anti-Contamination Measures

NOP regulations require “necessary” measures to prevent contamination by pesticides, GMOs, and other prohibited substances, but do not require farms to take specific actions.¹⁵ Organic farmers must, however, work with their organic certifiers to include specific anti-contamination measures in their Organic System Plans (OSPs) that are appropriate to their particular farm operations. Farmers must comply with their OSPs once the OSPs have been approved. Generally, the anti-contamination measures include buffer crop plantings, windbreaks, no-spray signs, and neighbor notification.

Under the NOP regulations, any equipment used for both organic and non-organic (conventional, transitional, and buffer) production must be thoroughly cleaned prior to each use in an organic crop.¹⁶ This includes planting equipment, haying equipment, tarps, harvesting equipment, grain handling/drying equipment, on-farm wagons, trailers, trucks, storage units, etc.

Note that your contract may require particular anti-contamination requirements that go beyond what is in your OSP. Does the contract require particular signage (such as “NO SPRAY” signs of a particular size or color), neighbor notification within a certain distance, equipment clean-out logs, or specific sizes or locations of buffer crop plantings?¹⁷ If your contract requires specific anti-contamination measures, make sure those measures are both (1) feasible, and (2) consistent with your OSP. If you have concerns about how the contract requirements will fit with

your OSP, communicate with your organic certifier before signing the contract.

Other Contract Concerns Related to Anti-Contamination Measures

- *Avoid promising too much.*

One contract pitfall to avoid is a provision stating you will “prevent all risk of contamination and protect organic integrity” or similar language. No matter how many preventative measures you take, you cannot prevent all risk of contamination, so it is best not to promise that you can. Similarly, try to avoid promising that you will make “all efforts” or take “all measures” to prevent contamination. That kind of language implies you will take every possible measure (regardless of cost or effectiveness) to protect your crop, and if you don’t, you could be in violation of the contract.

Instead, consider negotiating language stating you will take “reasonable measures” or “commercially reasonable measures.” That way, you are limiting your promise to a smaller range of anti-contamination measures. Or, you could specify exactly what you are required to do (specify the size of buffer zones, specific handling practices, etc.). That way, both you and the buyer are on the same page as far as what steps you are contractually required to take to prevent unwanted drift or other contamination. Or, you could simply state that all measures taken to prevent commingling and contamination will comply with NOP regulations.

Good Example: Anti-Contamination Provision

In order to prevent contamination of the organic product subject to this Agreement, Grower agrees to take commercially reasonable anti-contamination measures in compliance with NOP regulations.



- *Who pays for anti-contamination prevention?*

In most cases, the farmer will be expected to pay for all anti-contamination measures because contamination prevention—for better or worse—has become an integral part of organic farming. In a best-case scenario, contamination prevention costs should be

offset somewhat by the organic premium. However, if the buyer wants to require specific anti-contamination measures that are outside the normal bounds for organic operations, consider negotiating a cost-sharing structure (or simply an increased base price) to compensate for those measures.



ACCESS TO PASTURE AND THE OUTDOORS

Does the livestock or poultry contract address access to pasture or access to the outdoors?

NOP Regulations on Access to Pasture

If the livestock or poultry contract requires “access to pasture,” is it clear what that term means? Under the NOP pasture standard for livestock, 30 percent of organic livestock’s dry matter intake must be grazed from organically managed pasture throughout the entire grazing season, which must total at least 120 days per year.¹⁸

Recommendations on Access to Pasture

If your contract references access to pasture, you may wish to consider the following:

- Is the contract definition of “access to pasture” the same as NOP’s definition, or is it more or less stringent?
- If the contract requires more access to pasture than the NOP regulations require, be sure that grazing more than 30 percent of dry matter intake is feasible with respect to: (1) the amount of organic pasture you can grow or rent; (2) the number of animals you raise; and (3) your local climate.
- Does the contract include exceptions to the pasture requirement for severe weather, such as drought or flooding? If not, consider building in disaster and weather-related exceptions. The NOP regulations provide exceptions in such cases through “temporary variances,” discussed in more detail in Chapter 4, page 4–6. You may wish to ensure that your contract either: (1) defines “access to pasture” as “compliance with NOP access-to-pasture rules”—which will build in the temporary variance safety valve; or (2) expressly excuses you from access-to-pasture obligations for livestock in case of severe weather or disaster.



Good Example: Access to Pasture Provision

Seller will provide access to pasture in accordance with the NOP regulations on pasture, including the regulations providing NOP-declared temporary variances from NOP regulations.

NOP Regulations on Access to the Outdoors

Similarly, if your contract requires “access to the outdoors” for poultry or other livestock, is the contract clear about what that term means? With certain exceptions, the NOP regulations require year-round access for all animals to the outdoors, shade, shelter, exercise areas, fresh air, clean water for drinking, and direct sunlight of a type suitable to the species, its stage of life, the climate, and the environment.¹⁹ The current outdoor access requirements (listed in the NOP regulations under “Livestock Living Conditions”) are rather vague, and the National Organic Standards Board (NOSB) and NOP are currently studying how to clarify “access to the outdoors” in preparation for potential future rulemaking.²⁰

Recommendations on Access to the Outdoors

If your contract references access to the outdoors, you may wish to consider taking the following steps:

- Either define “access to the outdoors” requirements as “in accordance with NOP regulations,” or state specific requirements in the contract (for example, five outdoor square feet per laying hen).
- If your contract does include specific outdoor space requirements, consider whether you can physically provide that amount of space.
- Be certain you can afford to provide the required outdoor access.
- If the contract requirements that exceed NOP regulations seem too burdensome, consider negotiating language that allows you to maintain your current practices or make an affordable upgrade.



ORGANIC SEED ISSUES

How does the contract handle organic seed requirements?

It is important for organic farmers and buyers to be in agreement about the use of certified organic seed for growing certified organic crops.

NOP Seed Regulations

The NOP regulations on seed require farmers to use certified organic seed (and certified organic transplants)—unless the farmer can document that organic seed (or transplants) are not commercially available.²¹ “Not commercially available” means unavailable from organic sources in the form, quality, quantity, or equivalent variety necessary for the organic operation. If the organic seeds you need are not available, you must provide proof to your certifier that you made good-faith efforts to obtain organic seed.²² Keep in mind that high price is not an excuse for failing to purchase organic seed.

If certified organic seed is not commercially available, the NOP regulations allow farmers to use untreated, non-GMO, conventionally grown seed.²³

Contract Issues Regarding Organic Seed

Although the NOP seed regulations may seem relatively straightforward, problems can arise when organic contracts attempt to impose requirements that are either stricter or more lenient than the regulations. For example, a buyer may want to require a farmer to use a particular type of seed even though it is not certified organic. On the other hand, an organic contract might require organic seed with no exception for cases when certified organic seed is not commercially available. A farmer who diligently satisfies all of the NOP regulations could still run into trouble with a buyer who is expecting certified organic seed to be used (even if the contract doesn't explicitly say so), and later finds that the farmer used conventional seed.

While the farmer's use of conventional seed might have been in perfect compliance with the NOP regulations due to commercial unavailability,

the buyer might reject the delivery based on its assumptions about the use of organic seed.



Example: General Agreement to Comply With NOP Regulations on Seed

Grower and Buyer agree that Grower will comply with the federal organic regulations (NOP regulations) regarding organic seed sourcing.

Because of these risks for confusion and conflicting expectations, consider the questions discussed below when reviewing an organic contract for crops to be grown from seed, seedlings, or transplants.

Does the contract address seed?

If the contract makes no mention of seed, make sure the buyer understands that you will plant certified organic seed for the contracted organic crop if it is commercially available. Make sure the buyer understands that if certified organic seed is not commercially available, you will plant untreated, non-GMO conventional seed. You may wish to include this language in the contract, or language similar to the following: “Seller and Buyer agree that Seller will comply with the federal organic regulations regarding organic seed sourcing.”

Obtain Documentation and Keep Records

If you are unable to find certified organic seed, make sure to keep records of the efforts you made to find organic seed, including names and contact information of seed and planting stock suppliers, and notes about quantity, quality, and form. You will need this documentation for your organic certifier, and the buyer may wish to see it as well. Additionally, if you purchase non-organic seed, it is wise to obtain written verification from the seed supplier that the seeds are untreated and non-GMO, especially if the type of seed you purchase has a GMO equivalent.²⁴

Does the contract require you to plant a particular type of seed?

If the contract requires you to plant a particular seed variety, check to see whether the seed required by the contract is certified organic. If it is not organic, check to see whether a certified organic version of the seed is commercially available before signing the contract. If there is a certified organic version available, the NOP regulations require you to use the certified organic variety. In order to avoid violating the NOP regulations, you may wish to negotiate with the buyer to ensure the contract allows for the use of the certified organic seed variety.

Does the contract require you to plant seed provided by the buyer?

If the contract requires you to plant buyer-provided seed, you may wish to address the following factors in your contract:

Quality

You may wish to negotiate contract language requiring the buyer to provide seed of good quality. You might wish to further require the buyer to: (1) reimburse you for all losses you may incur as a result of bad quality seed (including lost profits), and (2) protect you from any consequences resulting from bad quality seed. It would not be fair, for example, for you to bear the cost of replanting poor quality seed. Even worse, it would be unfair for you to lose an entire crop as a result of poor quality seed. Additionally, if the resulting crop fails to meet the contract quality standard as a result of bad seed, it would be unfair for the buyer to penalize you for poor quality upon delivery. Thus, you may wish to include language stating that, if the resulting crop does not meet the buyer's contract quality standards due to low-quality buyer-provided seed, the buyer will purchase the crop at the contract price that would have been paid for contract-quality seed.

Moreover, consider including contract language preserving your right to: (1) reject any seed that is of poor quality; (2) request substitute seed; and/or (3) procure substitute seed from another supplier. You may also wish to require the buyer to provide test results and/or affidavits that show the seed is uncontaminated and of the appropriate quality.

Proof of Commercial Unavailability for Non-Organic Seeds

If the buyer provides you with non-organic seed, the buyer should also provide proof that organic seed is not commercially available for that variety. This proof should be the same kind of evidence that organic

farmers provide to certifiers showing that the buyer conducted a good faith search for organic seed (as discussed on page 8–17 of this chapter).

You may also wish to have an affidavit from the buyer's supplier certifying that the non-organic seed is both untreated and non-GMO.

Agricultural Production Methods

The buyer may wish to require particular agricultural production methods in conjunction with buyer-supplied seed. You may wish to clarify whether you are bound to follow the agricultural production methods or whether they are simply advisory. Additionally, if you follow required production methods and, as a result, the crop is unsuccessful, does the contract protect you from losses resulting from the contract's required production methods?

Timeliness of Seed Delivery

Does the contract require the buyer to deliver the seeds in a timely fashion? You may wish to negotiate contract language obliging the buyer to deliver the seeds by a certain date to ensure timely planting. Also, you may wish to include a penalty for the buyer's late delivery, such as a set financial penalty or a promise to reimburse you for any losses caused by late delivery.

Payment

Will the buyer be providing the seed free of charge, or will you be required to pay for it? If you are required to pay for it, can you purchase it from any supplier, or do you have to purchase it from the buyer? If you have to purchase it from the buyer, is the buyer's price competitive with other suppliers?

Additionally, who is required to pay for shipping? If you will be covering the costs, can you choose the freight company, or will you have to reimburse a company of the buyer's choosing?

Bonus for Planting Particular Seed

Does the contract provide any type of bonus if you agree to plant a particular seed? For example, a buyer might agree that a farmer who plants a seed with particular properties (such as a high protein content) will automatically qualify for a premium payment rate.

Adapted to Local Conditions?

You may also wish to ensure that the contract requires buyer-provided seed to be adapted to local conditions—including your soils and climate.

Don't Jeopardize Your Organic Certification

If you plant conventional seed in violation of the NOP regulations, you jeopardize your organic certification status. Keeping the severity of this consequence in mind, you may wish to negotiate language in the contract to require a buyer who supplies seed to provide either: (1) certified organic seed; or (2) proof of the commercial unavailability of organic seed that you provide to your certifier.

**Example: Buyer Provides Proof of Commercial Unavailability Provision**

If Buyer provides Seller with non-organic seed, Buyer agrees to provide Seller with written documentation showing that Buyer has complied with the NOP regulations on organic seed (i.e., that organic seed is not commercially available within the meaning of the NOP regulations, and Buyer has attempted to source organic seed from a number of providers). Furthermore, if organic seed is not commercially available, Buyer agrees to provide Seller with written documentation showing that the seed provided is untreated, non-GMO, and free of contamination.

**Does the contract place restrictions on your use of buyer-provided seed or the resulting crop?**

Some organic contracts include strict rules about how farmers must handle buyer-provided seed. These restrictions can have serious consequences, as discussed below.

Questions to Consider Regarding Buyer-Provided Seed Restrictions:

- *Do you have to account for how buyer-provided seed was used?*

If you have to account for how you used the seed, you may wish to ensure the contract states how this accounting should be accomplished.

- *Do you have to promise not to give the seed to anyone else?*

If you make a contract promise that you will not give the seed to anyone else, be careful to comply with this provision. The buyer could sue you for considerable damages if your failure to keep the seed to yourself results in a competitor gaining access to proprietary seed.

- *Do you have to return any unused seed?*

If you must agree to return any unused seed to the buyer, the contract should state who must pay for the return of the unused seed.

- *Can you sell crops grown from buyer-provided seed to another purchaser?*

If you are permitted to sell crops grown from buyer-provided seed only to the buyer, you should seriously consider negotiating a safety valve provision for rejected or unpurchased product. Without such a provision, you could end up in a situation where even though the buyer refuses to pay for or rejects your crop, you are prohibited from finding another willing buyer. In that situation, you could lose the benefit of an entire season's harvest.

Example: Buyer Maintains Control of All Seedstock Provision

Seller shall use the proprietary seedstock provided by Buyer and shall account for and return any unused seedstock. Any production from the seedstock shall be delivered to Buyer, or otherwise accounted for. In no case shall crops produced by Seller for Buyer be given or sold to any other purchaser. Seller shall not retain seedstock, or save seeds from the resulting crop.

Allowing for an exception through written permission:

Producer agrees that no soybeans will be saved, sold to any other parties, or used for seed purposes without written permission from Buyer.



To prevent losses related to rejection of crops resulting from restricted buyer-provided seed, you should seriously consider including contract language that allows you to find another purchaser for any portion of the crop that the buyer refuses to purchase or rejects for any reason (including any amounts in excess of the estimated harvest).



**Example: Allowing Farmer to Sell Crop Elsewhere
If Buyer Rejects or Fails to Pay**

In return for Buyer's agreement to purchase all crops grown from seed provided by Buyer at the full contract price, Seller agrees that crops produced by Seller for Buyer shall not be given or sold to any other purchaser. Seller further agrees that Seller shall not retain seedstock, or save seeds from the resulting crop. However, should Buyer reject Seller's delivery, fail to pay Seller fully or promptly, or otherwise fail to purchase all crops grown from seed provided by Buyer at the full contract price, Buyer agrees that Seller may cover by selling crops grown from seed provided by Buyer to another purchaser.



ACCESS TO RECORDS, SPLIT OPERATIONS & TRANSITIONAL SUPPORT

Does the contract give the buyer access to your organic records (or to your certifier's records)?

Some organic contracts require farmers to allow buyers access to farm records. The main concerns with such provisions are issues of timing and scope.

Timing of Buyer Access to Records

Does the contract allow the buyer access to your records “at any time?” If so, you could potentially be in violation of your contract if you refuse your buyer access even at inconvenient times like midnight on Christmas Eve. Therefore, it’s better to include language limiting the buyer’s access to “reasonable times” or “during business hours.”

Scope of Buyer Access to Records

Similarly, you may wish to limit the buyer’s access to only certain kinds of records, or only records from a certain time period. If your contract allows access to “all records,” the buyer may rightfully have access to all of your records—not just organic or farm records. Furthermore, such open-ended language could allow the buyer access to records going back decades. Therefore, consider whether the buyer’s access to your records should be limited in time (for example, the last five or ten years) and in type (for example, organic records for this farm).

Direct Access to Certifier Records and NOP Certifier Disclosure Rules

Some organic contracts require that the buyer have direct access to records held by the farmer’s organic certifiers. Sometimes, buyers require farmers to sign “releases” allowing the certifier to directly send records or information to the buyer.

The NOP regulations require certifiers to keep non-public farmer information confidential unless the farmer has given written permission for release. With the exception of basic certification information and results of testing for pesticide residues and other prohibited substances,

your organic certifier is not permitted to disclose other information about your operation unless you have permitted it in writing.²⁵ According to the NOP regulations, organic certifiers must “maintain strict confidentiality” with respect to farmer clients and must not disclose to third parties any business-related information obtained during the organic certification process.²⁶ However, certifiers are permitted to disclose business-related information if permitted in writing by the farmer.²⁷

To some extent, then, the NOP regulations allow the farmer to decide what the certifier can release to a buyer. To limit the information about your operation that the buyer can get from the certifier (which you may want to do to ensure the buyer does not access sensitive, extraneous, or confidential information), you could ask the buyer what information it needs and then agree in writing only to the release of that specific information.

Don't Make Promises for Your Certifier

It is unwise to agree to contract language promising that an organic certifier will directly provide a buyer with any information. As a general rule, it is risky to make contract promises on behalf of a certifier (or anyone else) who is not a party to the contract. This is risky because you cannot be sure a certifier will release records according to the buyer's wishes. For example, you could end up in a situation where the certifier fails to provide the buyer with access or notifications, even if you have signed a release allowing the certifier to do so. At minimum, therefore, if your buyer insists that you allow direct access to certifier records, do not promise anything to the buyer beyond your agreement to the certifier's release of specific information.

You Can Require Copies

To ensure you are kept informed about what information the certifier is sending the buyer, you could include language in the contract requiring that the buyer send you copies of any records released to the buyer by your certifier regarding your farm operation.

Example: Limited Access to Certifier Records Provision

Seller agrees that Organic Certifier may release to Buyer copies of Seller's records directly related to non-compliance investigations, proposed suspensions or revocations of certifications, or other violations of the NOP regulations. Organic Certifier may release the above records only for the current or past calendar year unless Seller has given advance written permission. Additionally, Seller does not agree to the release of sensitive and/or confidential information by Organic Certifier to Buyer without Seller's advance written permission. Furthermore, Buyer agrees to provide Seller with copies of any records released by Organic Certifier regarding Seller within 15 business days of receipt.

**Does the contract address “split operations” or the presence of non-organic crops or animals?****NOP Regulations on Split Operations**

The NOP regulations allow farms to be “split operations,” meaning part of the farm is certified organic, while another part of the farm produces non-organic crops, dairy or livestock.²⁸ Farmers with split operations must take steps to prevent commingling, and must use adequate measures to segregate organic from non-organic crops and production inputs.²⁹ Accordingly, organic certifiers can inspect the non-organic side of the farm operation to ensure it is not compromising the organic portion of the farm, and farmers with split operations must include in their OSP a description of the measures the farmer has established to prevent commingling and organic crop contact with prohibited substances.³⁰

Beware of Contract Prohibitions on Split Operations or Presence of Non-Organic Animals or Crops

Even though most certified organic buyers are themselves split operations handling both organic and non-organic products, some buyers include provisions in organic contracts prohibiting farmers from running split operations. Some buyers go even further, prohibiting any presence of

non-organic, cloned, or GMO animals or crops on the contracting farm. If you do not run a split operation, this requirement might not seem problematic. However, even if you run an organic-only operation, you might unintentionally run into trouble with this prohibition if animals have to be transitioned out of organic production (for example, for health reasons), or if fields become ineligible for organic certification (for example, due to floodwater contamination). Additionally, most organic farmers will have non-organic crops on their farms in the form of buffer crops. Many will have fields or animals transitioning to organic.

Clearly, then, it is best not to sign a contract prohibiting the presence of any non-organic animals or crops on your farm. If your buyer is concerned about commingling or contamination, you could offer to keep records of non-organic commodity movement (conventional, buffer, and transitional) and make them available to the buyer on a regular basis.³¹ Additionally, you could make available records of steps you have taken to ensure organic integrity.



Create Exception for Buffer Crops, Transitional Products

If a buyer insists on a contract provision prohibiting any non-organic commodities on the farm, and you are willing to comply, consider (at minimum) including an exception for buffer crops, transitional crops or animals, and nonorganic crops or animals present on your farm for reasons beyond your control.

Does the contract provide support for an organic transition?

Some organic buyers provide financial support to farmers during the three-year organic transition process. For example, some contracts include higher-than-conventional transition prices or lump-sum payments for farmers transitioning from conventional production to organic production. While this is an admirable practice that supports new organic farmers, be aware of whether the contract requires you to repay any transitional support if your farm fails to attain certification after three years. If such a requirement is triggered, you could be forced to repay a significant sum of money. Also, the transition payments, while helpful, are unlikely to cover the entire cost of transitioning to a new system of farming.

Exclusivity Required?

Be particularly aware of any strings attached to transition support provided by the buyer. For example, you might have to agree that for some period of time post-transition you will only sell your organic products to the buyer who provided transition support. Make sure you are willing to continue the contract relationship for that extra period of time.

Add an Exclusivity Escape Clause

Note that, while you may have to agree to sell only to the buyer who provided transition support, the buyer is unlikely to promise to purchase all of your organic production during that time (due to the buyer's desire to maintain flexibility in case the market becomes over-supplied). Thus, you could end up in a situation where you have promised to sell only to one buyer, but that buyer won't purchase your organic product. You may wish to include contract language stating that if the buyer refuses to purchase your product for any reason, you can sell the product to another buyer without penalty.



Don't Go Organic Just Because of Transition Support

It may be wise to consider whether demand for your newly transitioned organic product is likely to remain strong after you achieve organic certification. Organic buyers often offer transition support as an incentive for farmers when demand for a certain commodity exceeds supply. However, organic supply and demand relationships often fluctuate, leading to periods of oversupply and low prices (for example, organic dairy in 2008-2009).³² Although you cannot predict the future, be cautious about entering the organic market just for the transition payments. If you are committed to organic production for the long term, transition payments are very valuable; but if you are only looking for short-term gain, the transition may not be cost-effective even with the transition support.

Premium Pricing

Instead of providing direct support for the transition to organic, some buyers will pay a premium price for transitional products. The premium is

unlikely to equal the organic premium that buyer offers, but would likely be higher than the conventional price. If your contract includes a transitional premium, the contract should make clear whether it is tied to the conventional price (conventional price plus some amount) or the organic price (organic price minus some amount). Depending on your transitional commodity, one formula may be significantly more profitable for you.

Verification of Transitional Status

Finally, does the contract address how your transitional status will be verified? You may wish to negotiate a verification process to protect yourself against any claim by the buyer that your farm is not making satisfactory progress in the transition. On the other hand, you may not want to make the transition process more difficult by adding additional paperwork requirements for yourself.

CHAPTER 8 — ENDNOTES

- ¹ See 7 C.F.R. §§ 205.662 (non-compliance), 205.663 (mediation), 205.681 (appeals) (2012).
- ² See 7 C.F.R. § 205.681 (2012). There have been bills proposed in Congress that would change NOP enforcement procedures and eliminate the stay associated with an appeal. However, at the time this guide was printed, none of these proposals had been adopted.
- ³ See U.C.C. § 2-609 (1977) (“Right to Adequate Assurances”).
- ⁴ See 7 C.F.R. § 205.671 (2012).
- ⁵ See 7 C.F.R. § 205.670(b) (2012).
- ⁶ See 7 C.F.R. §§ 205.2, 205.105, 205.272, 205.600, 205.602, 205.604 (2012).
- ⁷ See 7 C.F.R. § 205.2 (2012). The NOP regulations define “excluded methods” as: “[a] variety of methods used to genetically modify organisms or influence their growth and development by means that are not possible under natural conditions or processes and are not considered compatible with organic production. Such methods include cell fusion, microencapsulation and macroencapsulation, and recombinant DNA technology (including gene deletion, gene doubling, introducing a foreign gene, and changing the positions of genes when achieved by recombinant DNA technology). Such methods do not include the use of traditional breeding, conjugation, fermentation, hybridization, in vitro fertilization, or tissue culture.” See Lynn A. Hayes, *Farmers’ Guide to GMOs*, at 54 (Farmers’ Legal Action Group, 2d ed. 2009), available at <http://flaginc.org/topics/pubs/arts/FGtoGMOs2009.pdf>.
- ⁸ See 7 C.F.R. §§ 205.600-606 (2012).
- ⁹ See Center for Environmental Risk Assessment, *GM Crop Database*, available at http://cera-gmc.org/index.php?action=gm_crop_database.
- ¹⁰ See 7 C.F.R. § 205.2 (2012). The NOP regulations define “excluded methods” as: “[a] variety of methods used to genetically modify organisms or influence their growth and development by means that are not possible under natural conditions or processes and are not considered compatible with organic production. Such methods include cell fusion, microencapsulation and macroencapsulation, and recombinant DNA technology (including gene deletion, gene doubling, introducing a foreign gene, and changing the positions of genes when achieved by recombinant DNA technology). Such methods do not include the use of traditional breeding, conjugation, fermentation, hybridization, in vitro fertilization, or tissue culture.” GMOs are deemed an “excluded method” in organic production. See Lynn A. Hayes, *Farmers’ Guide to GMOs*, at 54 (Farmers’ Legal Action Group, 2d ed. 2009), available at <http://flaginc.org/topics/pubs/arts/FGtoGMOs2009.pdf>.
- ¹¹ See 7 C.F.R. § 205.272 (2012); see also Lynn A. Hayes, *Farmers’ Guide to GMOs*, at 53-54 (Farmers’ Legal Action Group, 2d ed. 2009), available at <http://flaginc.org/topics/pubs/arts/FGtoGMOs2009.pdf>.
- ¹² See *Organic Seed Growers and Trade Ass’n v. Monsanto Co.*, 11 Civ. 2163 (NRB), 2012 WL 607560 (S.D.N.Y. February 24, 2012).

- ¹³ Non-GMO Project, *GMO Testing Guidelines* (2012), available at <http://www.nongmoproject.org/industry/about-gmo-testing/guidelines/>.
- ¹⁴ See Jim Riddle, *GMO Contamination Protection: What Does it Take?*, available at http://swroc.cfans.umn.edu/prod/groups/cfans/@pub/@cfans/@swroc/documents/article/cfans_article_390283.pdf.
- ¹⁵ See 7 C.F.R. §§ 205.201, 205.272 (2012).
- ¹⁶ See 7 C.F.R. §§ 205.201, 205.272 (2012).
- ¹⁷ See National Sustainable Agriculture Information Service (ATTRA), *Forms, Documents and Sample Letters for Organic Producers* (2005), available at <https://attra.ncat.org/attra-pub/viewhtml.php?id=170> (providing templates for equipment cleaning log, clean transport affidavit, buffer crop disposition records, sample neighbor notification letter, and adjoining land use verification). If the contract requires you to maintain an equipment clean-out log, the ATTRA website has a free template for download at <https://attra.ncat.org/attra-pub/OrganicFieldDocForms/1P.xls>.
- ¹⁸ See 7 C.F.R. §§ 205.240, 205.2 (2012).
- ¹⁹ See 7 C.F.R. § 205.239 (2012).
- ²⁰ See 7 C.F.R. § 205.239 (2012).
- ²¹ See 7 C.F.R. §§ 205.2 (commercially available), 205.204 (seeds and planting stock practice standard) (2012).
- ²² This is sometimes informally referred to the “3-source” rule—meaning that you should document that you attempted to obtain organic seed from three sources prior to deeming the organic seed commercially unavailable. However, the NOP regulations make no reference to the number of organic sources required; it could be more or less than three, depending on the circumstances.
- ²³ See 7 C.F.R. § 205.204(a) (2012).
- ²⁴ See National Sustainable Agriculture Information Service (ATTRA), *Forms, Documents and Sample Letters for Organic Producers* (2005), available at <https://attra.ncat.org/attra-pub/viewhtml.php?id=170>.
- ²⁵ See 7 C.F.R. § 205.504(b)(5) (2012). Entities seeking organic certifier accreditation must submit the following: “A copy of the procedures to be used, including any fees to be assessed, for making the following information available to any member of the public upon request: (i) Certification certificates issued during the current and 3 preceding calendar years; (ii) A list of producers and handlers whose operations it has certified, including for each the name of the operation, type(s) of operation, products produced, and the effective date of the certification, during the current and 3 preceding calendar years; (iii) The results of laboratory analyses for residues of pesticides and other prohibited substances conducted during the current and 3 preceding calendar years; and (iv) Other business information as permitted in writing by the producer or handler.”
- ²⁶ See 7 C.F.R. § 205.501(a)(10) (2012); see also National Organic Program, Instruction, *Disclosure of Information Concerning Operations Certified*

Under the National Organic Program (November 23, 2011), available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5088941>.

- ²⁷ See 7 C.F.R. § 205.504(b)(5) (2012); see also National Organic Program, Instruction, *Disclosure of Information Concerning Operations Certified Under the National Organic Program* (November 23, 2011), available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5088941>.
- ²⁸ See 7 C.F.R. § 205.2 (2012).
- ²⁹ See 7 C.F.R. § 205.272 (2012).
- ³⁰ See 7 C.F.R. § 205.201(a)(5) (2012).
- ³¹ National Sustainable Agriculture Information Service (ATTRA), *Documentation Forms for Organic Crop and Livestock Producers* (2011), available at <https://attra.ncat.org/attra-pub/summaries/summary.php?pub=358>.
- ³² See Farmers' Legal Action Group, *Tools for Dairy Farmers in Tough Economic Times* (November 2010), available at <http://flaginc.org/topics/pubs/arts/DairyNov2010pdf.pdf>.