



BEYOND PESTICIDES

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Ms. Michelle Arsenault
National Organic Standards Board
USDA-AMS-NOP
1400 Independence Ave. SW.,
Room 2648-S, Mail Stop 0268
Washington, DC 20250-0268

Re. CS, LS, HS, NOP: Miscellaneous issues

These comments to the National Organic Standards Board (NOSB) on its Fall 2015 agenda are submitted on behalf of Beyond Pesticides. Founded in 1981 as a national, grassroots, membership organization that represents community-based organizations and a range of people seeking to bridge the interests of consumers, farmers and farmworkers, Beyond Pesticides advances improved protections from pesticides and alternative pest management strategies that reduce or eliminate a reliance on pesticides. Our membership and network span the 50 states and the world.

Technical Reviews

The decisions regarding listing, relisting, and delisting substances on the National List should be supported by unbiased science. Petitions generally contain support for the requested listing or delisting action, but it can be challenged as biased. In order for the subcommittees and the NOSB to obtain unbiased information relating to the requirements under OFPA, an outside technical review is generally required. When materials are re-examined during sunset review, the subcommittee must determine whether there is new evidence that may require delisting. A technical review should be performed when:

- There has been no previous technical review (TR) or technical advisory panel (TAP) review;
- The most recent technical review is old or clearly inadequate, or if a TAP, TAP reviewers disagreed with the listing decision;
- During the most recent review, subcommittee or NOSB members identified evidence that was missing or in need of re-examination;
- Testimony or comments submitted during the petition or most recent sunset review conflict with the data or assumptions upon which the NOSB relied in previous decisions;
- or
- Subcommittee members present evidence questioning the data or assumptions upon which the NOSB relied in previous decisions.

Checklists

The Petitioned Material Checklist is the best tool for checking a material against OFPA criteria. Use of the checklist ensures that all OFPA criteria are considered by the subcommittee, NOSB, and NOP. It provides a straightforward mechanism for conveying to the public the evidence considered by the subcommittee and NOSB in arriving at judgments leading to proposals and recommendations. It serves as a reminder to all decision-makers of the evidence needed to support a decision. For all of these reasons, every decision to list, relist, or delist a material should be supported by a Petitioned Material Checklist.

Minority Reports

Minority reports must be easily accessible to NOSB members and the public in order that all can see the full range of issues considered by the subcommittee in arriving at its proposal. To that end, the minority report should be integrated into the subcommittee report as much as possible. If conflicting evidence is found regarding OFPA criteria, it should be reflected in the checklist. Critical to organic integrity is the public trust in a robust discussion among stakeholders with full disclosure and transparency.

Sunset

Recent NOP policy changes regarding sunset are contrary to OFPA and interfere with the rational functioning of the National List process.

- Every dictionary and other laws define “sunset” so that the default is that the provision ceases to be in effect at sunset unless deliberately renewed. NOP has reversed this commonsense and legal interpretation of the word, and the rules requiring a vote to delist, rather than to relist, with a two-thirds majority should be reversed.
- OFPA requires that every exception to the general rule that natural materials are allowed and synthetic materials are prohibited be listed “by specific use or application.” When the required annotation is not present, or found to be inadequate, the annotation should be changed at sunset.
- NOP rules allow a subcommittee to decide to relist a material, by failing to bring forward a motion to delist. This rule must be eliminated because a subcommittee may not decide for the full board.
- NOP rules declare that information brought forward at the second sunset meeting “will be considered untimely for purposes of the Sunset Review process” if the subcommittee believes the evidence “merits reconsideration of the conclusions presented in the preliminary review.” This makes the submission of substantive evidence at the second sunset meeting pointless unless it confirms the position of the subcommittee. This rule should be revoked.
- All of the above NOP rules on sunset were promulgated without the benefit of public notice and comment. NOP should revoke them and revert to the former process until new rules are adopted through a notice-and-comment process.
- The September 16, 2013 FR notice says:

If warranted, the NOSB Subcommittees can develop proposals to remove substances as part of their preliminary review. Any proposals to remove a substance must be justified using the evaluation criteria in OFPA and the USDA organic regulations.

There are several proposals to remove that have no such justification, including: ethanol (Crops), isopropanol (Crops), calcium hypochlorite (Crops), chlorine dioxide (Crops), sodium hypochlorite (Crops), soap-based herbicides (Crops), newspaper and other recycled paper (Crops), ammonium soaps (Crops), elemental sulfur (Crops), lime sulfur (Crops), horticultural oils (Crops), insecticidal soaps (Crops), sticky traps and barriers (Crops), sucrose octanoate esters (Crops), pheromones (Crops), vitamin D (Crops), citric and lactic acids (Handling), attapulgit (Handling), bentonite (Handling), calcium carbonate (Handling), dairy cultures (Handling), diatomaceous earth (Handling), enzymes (Handling), flavors (Handling), kaolin (Handling), magnesium sulfate (Handling), nitrogen (Handling), oxygen (Handling), perlite (Handling), sodium bicarbonate (Handling), sodium carbonate (Handling), carnauba wax (Handling), wood rosin (Handling), yeast (Handling), acidified sodium chlorite (Handling), ammonium bicarbonate (Handling), ammonium carbonate (Handling), calcium citrate (Handling), calcium hydroxide (Handling), carbon dioxide (Handling), chlorine materials (Handling), ethylene (Handling), mono- and diglycerides (Handling), hydrogen peroxide (Handling), magnesium chloride (Handling), magnesium stearate (Handling), nutrient vitamins and minerals (Handling), ozone (Handling), phosphoric acid (Handling), potassium acid tartrate (Handling), potassium carbonate (Handling), potassium citrate (Handling), sodium citrate (Handling), sodium hydroxide (Handling), sulfur dioxide (Handling), casings (Handling), celery powder (Handling), colors –beet juice extract, black currant juice, pumpkin juice, and red cabbage extract-- (Handling), orange shellac (Handling), chlorhexidine (Livestock), iodine (Livestock), fenbendazole (Livestock), moxidectin (Livestock), phosphoric acid (Livestock), sucrose octanoate esters (Livestock), excipients (Livestock), and strychnine (Livestock).

Process

While we are commenting on proposed changes in annotations to materials under sunset review, we do this under protest because of NOP's failure to follow legally prescribed public process when changing the rules governing the NOSB's policies and procedures. Although we support the adoption of changes at sunset to annotations that limit, but do not expand, uses of synthetic materials, and the application in 2015 or 2016 of the NOSB recommendation to that effect, NOP has disallowed this procedure after adopting it as a procedural rule change governing materials review.¹ The record reflects that the NOSB-adopted procedural rule

¹AMS/NOP issued a rule in 78 FR 56811 (September 16, 2013), stating, in part: **"Can NOSB recommend a change to or addition of an annotation to a substance during Sunset Review? Can the NOSB recommend moving a substance to a different section of the National List during the Sunset Review?"**

No. For substances already on the National List, changes to or addition of annotations, or changes to the location of a substance on the National List (e.g., agricultural versus nonagricultural), cannot be proposed during the Sunset Process. In the past, NOSB made recommendations to further restrict the use of substances during Sunset Review. At times, these recommendations have not been exposed to robust public comment and have been difficult for AMS to implement through rulemaking actions by the sunset date. The difficulties with implementing these

proposing the allowance of restrictive annotations at sunset involved a vote on the changed listing, along with a back-up vote on the current listing. The second, or back-up, vote was adopted to ensure that possible delays at USDA did not cause disruption when sunset rules required default removal of materials from the National List if relisting did not occur at the end of a five-year period. However, under the new sunset process unilaterally promulgated by the NOP on September 16, 2013 without public hearing and comment, the NOP policy now explicitly prohibits annotations at sunset.

However, NOSB subcommittees are proposing to move forward listings with changed annotations along with a vote on sunset—for micronutrients and List 4 “inerts” on §205.601, List 4 “inerts” on §205.603, and flavors on §205.605(a). In addition, the HS is proposing to change the listings of alginic acid from §205.605(a) to §205.605(b) and carnauba wax from §205.605(a) to §205.606. These actions are not allowed by the current NOP-directed sunset procedure. Has NOP changed the procedural rules governing NOSB review of materials again? This abuse of agency discretion and failure to comply with administrative procedure regarding reinterpretations of rules governing materials review undermines a historically transparent and collaborative process and, we believe the, legal requirements in administering NOP and the NOSB. If the NOP and NOSB believe that there are instances in which the board should modify annotations and/or list at sunset—and we believe there are—then the NOP must revoke its policy and reinstate the board-adopted policy, prior to adopting changes to annotations at sunset.

Subcommittee Reviews

In reading through the subcommittee notes posted on the NOP website, we have found several instances in which the lead on a material has reported that no comments were received on the material or a specific issue when either we submitted comments on that issue or our summary has turned up such comments. In other instances, there was no indication that the lead presented any summary of public comment. This kind of review does not permit the subcommittee, NOSB, or the public to fully evaluate the issues.

Missing Issues

We expected to see, but didn’t, an update on progress on contaminated inputs, and a discussion document packaging substances. Public comment at the spring 2015 meeting was strongly in favor of steps to limit inputs from chemical-intensive farms that could carry antibiotics and other chemicals onto organic farms and possibly into organic food. As droughts

recommendations include the level of analysis required to assess how organic stakeholders may be affected by the recommendation and the deadline for completion of the Sunset Process.

If the NOSB identifies new information that it believes merits reconsideration of a use restriction on a substance (e.g., to expand its use, further restrict its use, or correct its restrictive annotation) or the location of a substance on the National List, then a member of the NOSB or a member of the public can file a petition for changes to the use or classification of a substance through the National List Petition Process (www.ams.usda.gov/nop).” *National Organic Program –Sunset Process*. See <http://www.gpo.gov/fdsys/pkg/FR-2013-09-16/pdf/2013-22388.pdf>.

in the West have farmers looking towards questionable water resources,² it is important that the NOSB, NOP, certifiers, and farmers all be aware of the hazards.

We were told to expect a discussion document on packaging substances, including bisphenol A. When the discussion document comes out, we hope that it will also cover nanomaterials.

Hydroponics

The NOP insistence on certifying hydroponic operations as organic is one more example of the Program's disregard for the leadership role of the NOSB, as we discussed in our comments on the Policy and Procedures Manual. In organic agriculture, soils are valued for the multiple functions a biologically diverse soil food web provides, not just as a substrate for holding plant roots so the plant grows upright.

Many soilless systems, including hydroponics, represent the antithesis of organic production systems because they aim to diminish the ecological complexity of the natural production systems. By reducing the living organisms in a hydroponic system to solely the crop, the ecological balance is lost. Such a 'system' merely feeds the crop with simple inputs of 'required' nutrients. On the other hand, some soilless crop production that is part of a complex ecological system may fit the definition of organic as laid out in the Rule (for example, transplants which eventually are planted in soil, or a system of aquaponics that cycles nutrients from fish through plants and back, and adds wormcastings and compost).

In 2010 the NOSB made a recommendation to the NOP in which they provided guidance on which kinds of soilless production systems should or should not be labeled organic. Organic consumers expect a consistent standard for all organic products.

The central theme and foundation of organic farming is the maintenance and management of organic matter in the soil, along with the diverse populations of organisms that are the foundation of soil ecosystems. Macro- and micro-organisms found in abundance in a well-maintained soil tie together a web of interactions that conserve and recycle the elements between all the living organisms and minerals in the system. It is the management of this ecological balance that defines organic production. Any system labeled organic, (including hydroponics) should also be based on management of this ecological balance.

Hydroponics is the most widely used term for the production of crops without soil. That system of production most often provides nutrients needed to produce a crop by suspending the roots in a nutrient rich solution grown in moist inert material.

² See for example, Potentially harmful chemicals found in oil field water used for irrigation, <http://www.latimes.com/local/california/la-me-oil-water-tests-20150620-story.html>.

Nutrients most commonly used in hydroponic nutrient solutions are synthetic salts. Hydroponic solutions can be made using only natural materials, including natural mineral salts and organic residuals. While some certifiers believe that this makes the production system organic, other certifiers do not because they believe that there is much more to organic production than simply adding materials for crop fertilization or crop protection.

We find this differing interpretation and implementation of the NOP standards by certifiers disturbing. Inconsistencies among certifiers weaken the organic label and reflect poorly on the industry. The NOSB agrees. In 2010 the NOSB made a recommendation to the NOP in which they provided guidance on which kinds of soilless production systems should or should not be labeled organic.

The NOSB considered hydroponics over a period of ten years, in which the Crops Subcommittee issued a series of recommendations and discussion documents concerning organic production of terrestrial plants in containers and enclosures. The most recent recommendation, approved by the NOSB on April 29, 2010 incorporates earlier documents and is attached.

An internet petition³ begun by Vermont organic farmers concerned about the NOP's disregard for the NOSB recommendations has gathered signatures from organic farmers and consumers. Statements from several organic farmers, researchers, and certifiers are included on the website. The statements and signatures demonstrate that the NOP sanction of organic hydroponics is, at the least, controversial, requiring the NOP to publicly issue notice and accept public comment on any intent to allow organic hydroponic agriculture in opposition to the NOSB recommendation.

We urge NOP to adhere to the definition of organic production presented in the Rule.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in cursive script, appearing to read "Terry Shistar".

Terry Shistar, Ph.D.
Board of Directors

³ <http://www.keepthesoilinorganic.org/>