

Response to NOP Federal Register notice on Sunset

<https://s3.amazonaws.com/public-inspection.federalregister.gov/2013-22388.pdf>

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The Notification of Sunset Process, published in the Federal Register on 9-16-13, 78 FR 56811, is a reversal of NOP and NOSB policy on sunset, which has been in effect since implementation of this section of the Organic Foods Production Act began in 2005. Relying on USC Section 6517,¹ NOP used the following language to explain implementation of sunset in its March 4, 2010 NOP memorandum, which was distributed to the public:

“The NOSB has the responsibility to review materials in a timely manner. The NOSB is responsible for making a recommendation regarding whether the listing of an exempted material should be **renewed or removed** during the sunset review. In the absence of a recommendation, the NOP will initiate rulemaking to remove the substance from the National List.”

The NOP in this 2010 memo rightly distinguished the “sunset” process from the “petition” process with the requirement for a decisive NOSB vote to continue to allow OR to allow a new synthetic material on the National List.

This interpretation is restated in the background section of the March 4, 2010 NOP memo:

“If the review and renewal process is not concluded by the expiration date, the use of the material will become prohibited.”

“Sunset” has always relied on a review process that removes allowed materials unless they are decisively approved to remain on the National List, while a decisive vote is required to allow new materials on the National List through the petition process. That is the consistency of the law and the history. Sunset is not the equivalent of a petition to remove, as NOP now seems to be interpreting the law –without legal analysis to justify the change in thinking.

The law is protective of organic integrity and, when followed properly, has advanced the growth of organic. Not following the “sunset” process will undermine public trust in the USDA organic label. “Sunset” is exactly what it means. The burden is on those who believe synthetics are necessary (essential) and can be used without adverse impact to health and the environment. The requirement every 5 years to reassess materials and require a decisive (two-thirds) vote to retain uses is critical to our process as an organic community. To shift that burden and adopt procedures that retain materials indefinitely undermines the backbone of the statute and the economic incentives associated with continuous improvement.

¹ **The Organic Foods Production Act of 1990 (OFPA) Provides for Sunset Review under** SEC. 2118 U.S.C. 6517 NATIONAL LIST. It clearly states that no exemption or prohibition contained in the National List shall be valid unless the National Organic Standards Board has reviewed and renewed the exemptions or prohibitions. The NOSB must act to retain the exemptions or prohibitions; without action by the NOSB, those exemptions and prohibitions will expire. (e) SUNSET PROVISION.-No exemption or prohibition contained in the National List shall be valid unless the National Organic Standards Board has reviewed such exemption or prohibition as provided in this section within 5 years of such exemption or prohibition being adopted or reviewed and the Secretary has renewed such exemption or prohibition.