

Demise of the National Organic Standards Board?

The Organic Foods Production Act of 1990, part of the 1990 Farm Bill, authorized the Secretary of Agriculture to appoint a 15-member National Organic Standards Board (NOSB). The board's main mission is to assist the Secretary in developing standards for substances to be used in organic production. The NOSB also advises the Secretary on other aspects of implementing the national organic program. Visit its website at: <http://www.ams.usda.gov/nosb/index.htm>

This article was originally featured on the Montana Organic Association's (MOA) website, and is reprinted here.

By Barry Flamm, Ph.D.

The original and current purpose of the *Organic Food Production Act of 1990* (OFPA) is to bring integrity and order to organic food production and marketing by establishing uniform standards. The Act, established by the U.S. Congress, and the implementing regulations, adopted by the U.S. Department of Agriculture (USDA), is driven by the organic community's desire to ensure that "organic" is something special and help assure a continuing organic community role in the process. Under the Act, the Congress established the National Organic Standards Board (NOSB) and gave it very important duties. In its Report (1990) on the bill, the Senate Agriculture Committee stated that, "The Committee regards this Board as an essential advisor to the Secretary [of Agriculture] on all issues concerning this bill and anticipates that many of the key standards will result from recommendations by this Board. . .[It] is generally responsible for advising the Secretary on all aspects of the implementation of OFPA, specifically, the Board is responsible for evaluating substances for inclusion on the Proposed National List."

The NOSB is intended to be the voice of the organic community and to represent its broad interests. The 15-member Board is comprised of four organic farmers, two organic handlers, one organic retailer, three with expertise in areas of environmental

protection and resource conservation, three who represent public interest or consumer interest groups, one with expertise in fields of toxicology, ecology or biochemistry, and one certifying agent.

The Board has served a vital role from the very beginning of USDA's organic program, holding meetings and consulting with the public in developing recommendations for implementing the standards. When these recommendations were ignored by the USDA, there was unprecedented public response leading to the rule's rewrite, excluding such undesirable features as allowing the use of genetically modified organisms (GMOs), sewage sludge, and irradiation.

To guide its important activities, the NOSB developed a Policy and Procedures Manual (PPM). In keeping with the desire for openness, the policies were developed with full public review and with an opportunity to comment before a Board vote on the proposed procedure. The policies and procedures were reviewed and improved over time and was overseen by the Policy Development Committee of the Board. The six Standing Committees did much of the actual work for the Board. Their proposals were submitted for public review and comments in writing and presentations were shared at open public meetings, which in recent years have been held semi-annually at different locations around the country.

These were extraordinary events with valuable information and

interactions that led to better decisions. Unquestionably, Board members put in many hours of hard, difficult work over their five-year terms in service to the organic community.

The National Organic Program (NOP) was established in the Agricultural Marketing Service (AMS) within USDA to administer the OFPA requirements. Its staff was very small for many years until political change occurred in 2008, when a substantial increase occurred along with newly declared USDA support for organic and a pledge to “organic integrity from farm to table —consumers trust the organic label.” Collaboration and working relations between the NOSB and NOP grew with apparent benefits to the organic community.

In 2013, all began to change without public notice or opportunity to comment or consult with the NOSB. NOP took away the Board’s ability to develop its work plan and agenda, thus severely limiting its ability to provide

independent advice to the Secretary as mandated by law. The NOP effectively disbanded the Policy Development Committee (PDC, aka sub-committee) and indicated that the Policy and Procedures Manual was no longer in force, but would be used at the discretion of the program. The most immediate and serious result was that in September of 2013, Deputy Administrator Miles McEvoy announced dramatic changes in the approval process for synthetic and non-organic materials allowed on the National List for use in organic food and agriculture. The changes to the “sunset” provision were in conflict with the PPM and were implemented without consultation with the NOSB, the organic stakeholders or the public.

The fall 2013 NOSB public meeting was canceled during the federal government shutdown, thus the public did not have that opportunity to express concerns in person on these actions by the NOP. At the April 2014 meeting, the Deputy Administrator announced that he was co-chairing the meeting, thus intruding on the independence and authority of the NOSB and limiting discussion on the serious changes that had been made.

No stronger condemnation of NOP’s “sunset” action could be stated than that of the principal authors of the *Organic Food Production Act*. On April 24, 2014, Senator Patrick Leahy and Representative Peter De Fazio wrote Agriculture Secretary Tom Vilsack to raise concerns about the sunset policy change “which we believe to be in conflict with the letter and intent of the statute. We are particularly

concerned that such a substantive change was made without the benefit of full notice and comment.” They reminded the Secretary that OFPA “establishes the overall principle that, in order for any product to be labeled as organic it must be produced and handled without the use of synthetic chemicals.” The law recognizes there may be a need for temporary exemptions, thus it provided for a very thorough review process whereby certain synthetic chemicals could be permitted for use, but would sunset after five years. The process requires the NOSB to review the material based on a stringent list

of scientific and market considerations and analyze its impact on human health and the environment, compatibility with organic principles, and the availability of alternatives. They also pointed out that “the law specifies that two-thirds of the full NOSB must vote in favor of allowing the synthetic material to be used.”

Leahy and De Fazio expressed “great concern that we learned about a policy change implemented by your agency

(USDA) which turns the sunset policy of OFPA on its head to create a presumption that all synthetic materials on the National List will be automatically renewed at the five year sunset mark and to establish a high hurdle (two thirds vote) to remove from the list.” They strongly stated, “We are urging you to reverse this policy change.”

Also on April 24, 2014, former past chairs of the National Organic Standards Board, Jim Riddle - Chair '05, Jeff Moyer - Chair '09, and myself - Chair '12, wrote Secretary Vilsack to express “grave concerns regarding recent changes unilaterally enacted by the USDA’s NOP that significantly erode the authority, independence and input of the NOSB.”

The major objections expressed in the letter were: arbitrary announcements that dramatically change the approval process for synthetic and non-organic materials allowed for use in organic food and agriculture; changes in the sunset procedures required by law, and reversing years of accepted procedure employed by the NOSB; and, NOP intruding on the independence and authority of the NOSB by controlling work plans and agendas and co-chairing Board meetings, thus interfering with the important duties of listening to public concerns and interests and providing meaningful input to the Secretary. Lastly, we expressed dismay that “the disbanding of the NOSB Policy Development Committee (aka sub-committee) was again done in an arbitrary, unilateral and disre-



spectful manner by the management of the NOP with no public discussion or consultation. This committee carefully and seriously charted a path of practices employed by the NOSB that was crafted in public and adopted with input from all NOSB members and organic stake holders..."

We appealed to the Secretary to intervene in this matter and suspend the policies enacted by Mr. McEvoy.

Instead of addressing the concerns of Senator Leahy and Representative De Fazio, the former NOSB Chairs, and others, USDA/NOP tried to cement the radical changes on May 8, 2014, through an amendment to the NOSB Federal Advisory Board Charter, which also improperly assigns authorities to the USDA to terminate NOSB, a statutory Board with duties clearly enunciated.

In response to these USDA actions, 20 organizations have, pursuant to the Administrative Procedures Act, petitioned amendments to the 2014 NOSB Charter that: 1) accurately reflect the continuing and non-discretionary duties of the NOSB and (2) accurately reflect the mandatory, continuing and interminable status of the NOSB. [The Secretary has partially responded as of this writing.]

The 11-page petition explains the need for the amendments and concludes by stating that, "Recent actions on the part of the USDA have undermined the carefully crafted and contemplated OFPA framework and balance of community representation..." The signatories to the petition are: Beyond Pesticides, Organic Seed

Growers and Trade Association, Center for Food Safety, Midwest Organic and Sustainable Education Service, Maine Organic Farmers and Gardeners, The Cornucopia Institute, Northeast Organic Dairy Producers Alliance, La Montanita Coop NM, Food and Water Watch, Equal Exchange, Northeast Organic Farming Association Interstate Council, NE Organic Associations of Connecticut, Massachusetts, New Hampshire, New Jersey, New York, and Vermont, Organic Consumers Association, Organically Grown Company, and PCC Natural Markets.

The issues may sound complicated, but it really boils down to two questions: 1) Does the organic community and public want a strong NOSB as prescribed by OFPA? 2) Does the organic community and the public believe and want the implementation of the overall principle of OFPA that for any product to be labeled organic it must be produced and handled without the use of chemicals, with only temporary exemptions allowed, and then only after stringent review?

Will there now be a community uproar as occurred in the nineties when USDA tried to push through unsuitable regulations?

We hope to hear your voices loud and clear.

Barry Flamm

Montana Organic Association (MOA) Lifetime member, former MOA Board Member, recipient of the MOA Lifetime of Service Award 2006, NOSB Board Member January 2008 – January 2013, NOSB PDC Chair 2008 – 2011, and NOSB Board Chairman 2012.

Voices from the Field

Jay Feldman (Executive Director, Beyond Pesticides, NOSB member 2010-2015, chair of NOSB Crops Committee, 2012-2013) *comments that past and future success of the organic label and related food production practices relies on a strong collaboration among all the stakeholders. It is absolutely critical that concerned organizations and individuals make their views known to their elected representatives in Congress and the Secretary of Agriculture. Beyond Pesticides has set up a 'Save Our Organic' webpage that makes it easier to send a letter to members of Congress and Secretary of Agriculture Tom Vilsack. While we encourage everyone to send their own personal message through this webpage, a form letter can be sent from the site at <http://beyondpesticides.org/SaveOurOrganic>.*

We're seeking through a petition filed with USDA on the NOSB charter an acknowledgment by the Secretary of Agriculture that Congress set up the NOSB to operate with clear statutory mandates that supersede USDA authority. In this respect, the petition addresses a narrow issue of the Board's charter and Congress' determination that it exist as a permanent body, not subject to the discretion of the Secretary of Agriculture. This is a clear legal requirement that is undermined by the 2014 charter language, which misrepresents (and contradicts previous charters) the Board as a time-limited body with narrowed responsibilities subject to the Secretary's discretion. The petition, citing legal requirements, requests that the Secretary correct the charter language to reflect the ongoing and permanent nature of the

Board. However, the limited issues of the petition represent the larger USDA disregard for a range of mandatory duties of the Board that are established by the *Organic Foods Production Act* and may require further legal action.

The organic sector requires committed organic consumers to thrive or, in fact, exist. That is why the NOSB has recognized historically in its Policy and Procedures Manual that organic consumer expectations are critical to the viability of the organic label. The organic standards, rigor of review of allowed materials (including synthetic substances), independence of the National Organic Standards Board, transparency of the decision making process, and public involvement are key elements of organic label integrity and consumer trust in the organic seal as a meaningful symbol.

Organic consumers first must understand how important their voice is in the organic policy arena. While people can become alienated from governmental decision making, organic consumers must recognize that the organic label and the history of policy that supports it was formed with critical consumer influence, which forced the prohibition of genetically engineered organisms, irradiation, and sewage sludge—practices USDA originally proposed allowing. Unless consumers make their voice heard by contacting their members of Congress and Secretary of Agriculture Tom Vilsack (see above) to express their opposition to changes (announced in the September 16, 2013 Federal Register (78 FR 56811, National Organic Program-Sunset Process) and in the USDA *Organic Insider* on March 6, 2014), ultimately the organic choice in the marketplace will not mean as much as it does today and could mean in the future. People need to spread the word. Food coops and retailers should speak out on behalf of their members and customers by contacting decision makers and educating shoppers.

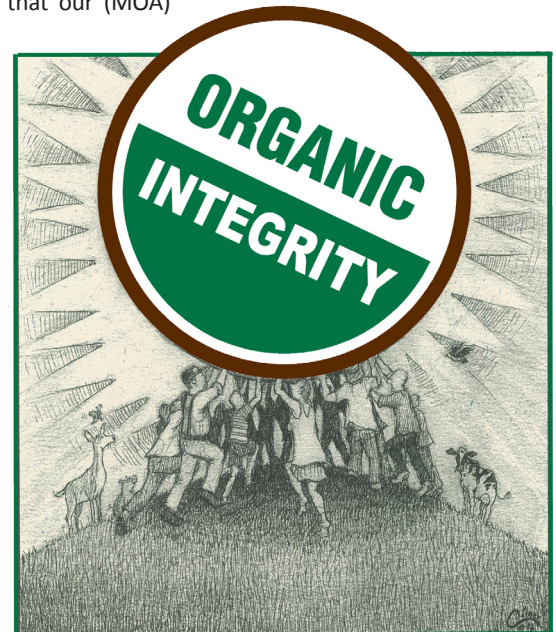
Jim Gerritsen (President, Organic Seed Growers and Trade Association and owner/operator of Wood Prairie Farm, Maine www.woodprairie.com) *believes that organic farmers and organizations need to educate each other and the public about the issues that have led to the erosion of the integrity of the NOSB. He emphasizes that the organic community needs to hold those agencies and individuals responsible and demand accountability. He also urges all to get involved and have their voices heard or risk losing our organic livelihood and community.*

Mr. Gerritsen cites the farmer, novelist and poet, Wendell Berry, quote: “We don’t have a right to question whether we’re going to succeed or not. The only question we have a right to ask is what’s the right thing to do? What does this earth require of us if we want to continue to live on it?”

Nathan Brown (Almatheia Dairy, Belgrade, MT, and Chairman of the Board MT Organic Association (MOA)) *would like to see the changes made by USDA on the Sunset Policy reversed and the five-year review of prohibited synthetic substances put back into place.*

This is an issue that our (MOA)

membership should be aware of and I will do my best to keep myself and our membership informed on this as best I can.



Liana Hoodes (Director, National Organic Coalition (NOC)) *shared several items about sunset and other items related to the issue of USDA not honoring the mandate of the NOSB.*

1. Two letters we sent to Miles McEvoy last fall following the “sunset decision;”
2. NOC’s position on Sunset: <http://bit.ly/NOCPositionSunset>;
3. For a more comprehensive review of the history of sunset and the current policy, see NOC member Beyond Pesticide’s website: <http://bit.ly/SunsetReviewBP>; and,
4. Another recent action by USDA that changes the NOSB charter from a mandatory to a discretionary committee caused many NOC groups to sign on to an administrative petition asking for a reversal of this policy.

I think it is fair to say that many or most agree that there was something not working with implementation of sunset policy in the past. What NOC and others believe is that the wholesale change by USDA/NOP does nothing to fix the problems, and may make them worse, while setting a foundational policy (how synthetics are continuously reviewed) on its head.

In terms of what happened at the NOSB meeting regarding sunset, for instance, it is not clear that this new policy actually makes anything easier for the NOSB or NOP—in fact, it may increase the workload. In part, because of confusion in the new policy that any materials would ever come off the list, the NOSB was reticent (at the April meeting) to approve materials, and sent quite a lot back to the committees for more information.

NOC is currently engaged in an exercise of seeing if we can identify the problem areas in the old sunset policy and how they can be fixed.



Food Co-ops Speak Out to Save Organic Label

Organic Caucus SIGN ON Letter from Co-ops
August 18, 2014

To the Congressional Organic Caucus,

We the undersigned organizations are writing to ask you to advocate reversal of USDA's unilateral changes to the organic program's Sunset Provision. We believe these changes violate the intent and the letter of the *Organic Foods Production Act* (OFPA).

A high bar to allow and renew synthetics

We have re-read OFPA and the letters from Sen. Leahy and Rep. DeFazio to Sec. Vilsack, as well as the letter from three former chairs of the National Organic Standards Board, and we respectfully disagree with the Deputy Administrator's statement that the changes "shouldn't make it harder" to remove items from the National List.

NOP staff has admitted in various settings that materials up for Sunset from the National List of Allowed and Prohibited Substances were subject to being removed by a minority vote, and that materials some interests wanted to renew [leave on the list] weren't getting enough votes, so USDA changed the voting process. In other words, NOP staff has admitted publicly it changed the rules to *make it easier* to keep synthetics on the National List.

OFPA established the two-thirds supermajority requirement for "Decisive Votes" [Sec. 2119 (i)] intentionally to establish a very high hurdle for prohibited synthetics to be allowed, even temporarily, in organics. Within the context of the overarching principle

in Sec. 2105 [7 USC 6504], that foods labeled organic must be "produced and handled without the use of synthetic chemicals ...," Congress certainly intended the Sunset Provision to emphasize the *temporary* nature of exemptions.

USDA's policy change makes relisting and renewal of synthetics much easier. Now, only six votes are needed for a synthetic to be allowed continued use, not the 10-vote supermajority mandated by OFPA. This assumes the full board even gets to vote on the relisting, since the murky nature of how these materials would be handled in subcommittees seems to preclude a full board vote if the subcommittee approves continued use.

Now, even if nine NOSB members oppose relisting, a six-vote minority favoring continued use would determine the "Decisive Vote" to enable continued use. This is contrary to Congressional intent for consensus in requiring a supermajority for Decisive Votes, through any plain reading of the law.

OFPA's framers meant clearly to establish a very high hurdle to add an exemption and to renew any exemptions —not a high hurdle to allow, and a low hurdle to renew.

Policy change without public comment

USDA's unilateral changes have been labeled a "power grab" with cause, since they were announced without the benefit of full notice and opportunity for public comment.

When asked where the changes originated, NOP staff has stated that "USDA did recently adjust how it works with the National

Organic Standards Board to be more consistent with how other federal advisory boards are managed [under the *Federal Advisory Committee Act (FACA)*].”

The unique powers and authority granted to the NOSB by OFPA have rubbed some USDA officials the wrong way from inception. But attempting to redefine the NOSB “to be more consistent with how other federal advisory boards are managed” contravenes what Congress enacted into law. (Note that FACA Sec. 9 says: (b) Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions.)

Congress knowingly and intentionally granted exceptional and unique powers and authority to the National Organic Standards Board —unlike most other federal advisory committees. In passing OFPA in 1990, Congress knowingly and intentionally superseded the provisions established by FACA in 1972. In other words, OFPA overrides FACA.

Subcommittee eliminated

We are very concerned by the NOP’s elimination of the Board’s Policy Development Subcommittee and control of the NOSB work plan and agenda. This unilateral, top-down action suggests that NOSB under the new rules would no longer be allowed to create a subcommittee to work on topics of its choosing, such as the GMO subcommittee or a subcommittee to study nanotechnology.

OFPA established the NOSB to advise the Secretary of Agriculture on the organic program. NOSB cannot advise the Secretary well if its authority to develop a work plan and agenda, or create committees and procedures, is diminished or denied.

Mandates ignored

There are two other OFPA provisions that appear to be contravened by USDA’s management of the organic program.

Sec. 2119 (j) “Other Terms and Conditions” states, “The Secretary shall authorize the Board [NOSB] to hire a staff director. . .” To date, staff directors have been hired not by the Board as the law stipulates, but rather by the USDA. This must be rectified.

Also, Sec. 2119 (j) (3) “Technical Advisory Panels” says, “The Board [NOSB] shall convene technical advisory panels to provide scientific evaluation of the materials considered for inclusion in the National List. . .” To date, TAPs have been convened by USDA unilaterally, not the Board, as stipulated by the law. Selection of



TAP reviewers by USDA has become so shrouded in secrecy that NOSB members do not even know who the TAP reviewers are. This must be rectified.

We realize the pressure USDA, and you in particular, must be facing from industry. Manufacturers and processors barely mustered the votes to allow carrageenan (even with flawed TAP reviews). They nearly lost DHA, and larger orchards did lose antibiotics for growing apples and pears.

Yet, changing the rules and admitting they were intended to reverse the

course of Sunset —to enable renewal of synthetics with just six of 15 votes— and to refashion the NOSB under FACA, violates the intent of Congress and the letter of the law in OFPA. The drafters of OFPA required a two-thirds supermajority for Decisive Votes, requiring a higher level of consensus across the full range of organic stakeholders, to ensure both credibility of the organic label and public support for organic products.

As significant stakeholders in the National Organic Program, we ask you to reverse these policies. We ask you, respectfully, to utilize the full notice and comment rulemaking procedures when there are changes NOP considers important.

Sincerely,

- PCC Natural Markets, Seattle, Washington
- Central Co-op, Seattle, Washington
- Marlene’s Markets, Tacoma and Federal Way, Washington
- The Markets, Bellingham, Washington
- Skagit Valley Food Co-op, Mt. Vernon, Washington
- Tonasket Food Coop, Tonasket, Washington
- Sacramento Natural Foods Co-op, Sacramento, California
- Ocean Beach People’s Organic Food Coop, San Diego, California
- Ashland Food Co-op, Ashland, Oregon
- Outpost Natural Food Cooperative, Milwaukee, Wisconsin
- One Degree Organic Foods, B.C., Canada
- Dill Pickle Food Co-op, Chicago, Illinois
- Wheatsville Food Co-op, Austin, Texas
- La Montanita Food Co-op, Albuquerque, New Mexico
- People’s Food Co-op of Kalamazoo, Michigan
- Whole Foods Co-op, Duluth, Minnesota
- Mississippi Market Natural Foods Co-op, St. Paul, Minnesota
- The Merc Community Market & Deli, Lawrence, Kansas
- New Leaf Market Co-op, Tallahassee, Florida
- Los Alamos Cooperative Market, Los Alamos, New Mexico
- Hanover Consumer Co-op, Hanover, New Hampshire
- Wild Oats Market, Williamstown, Massachusetts
- Eastside Food Cooperative, Minneapolis, Minnesota
- [The co-ops are still accepting sign-ons of other co-ops.]