



BEYOND PESTICIDES

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October 12, 2016

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. PDS: Policy and Procedures Manual Revisions

These comments to the National Organic Standards Board (NOSB) on its Fall 2016 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.

Comments on the Process Followed by the Policy Development Subcommittee

The Policy and Procedures Manual (PPM), as adopted by the NOSB at the Spring 2016 meeting, outlines in section IV.G.3 the way proposals and discussion documents should be presented for consideration by the board:

Presenting Subcommittee Proposals and Discussion Documents at NOSB Meetings

NOSB Subcommittees and task forces should follow the outline below when presenting proposals or discussion documents for consideration by the Board:

1. **Introduction:** A brief summary of the issue or statement of the problem.
2. **Background:** An explanation with sufficient detail and rationale to support the proposal, including reasons why the proposal should be adopted, historical context, and the regulatory framework pertinent to the issue.
3. **Proposal:** A concise explanation of the recommended action.
4. **Subcommittee Vote:** The Subcommittee vote shall be reported. In the case of petitions to add materials to the National List, two votes will be reported; one for classification of the material as a synthetic or non-synthetic, and the other a motion to list.
5. **Public Comment:** A brief summary of the public comments
6. **Minority View:** If applicable, the minority view of a Subcommittee or task force member shall be reported. After the Subcommittee's proposal has been presented and

the motion to adopt has been made, it is usual to allow the minority to present their views. The minority report is presented for information purposes only. If the Board then determines that the minority view has merit, it may send the proposal back to Subcommittee for further work, since it would be a substantive change to the proposal as presented.

The 2012 edition of the PPM contained further guidance on writing proposals. This was moved to the Member Guide by the 2016 revisions, but the summary of the changes does not indicate that changes were made. This guidance says,

Recommendations not related to material petitions or sunset reviews, should include the following sections:

I. Introduction:

This section consists of a brief summary of the recommendation, its main issues and its relevance to the organic community. This section should also mention the goals and intent of the proposed recommendation.

II. Background:

This section should present the issues that justify the development of the recommendation as well as any relevant work done by the NOSB in the past.

III. Relevant areas in the Rule:

This section should mention any areas of the Rule or OFPA which provide the basis for the recommendation.

IV. Discussion:

This section should be used to expand on the intent of the recommendation. It is also a place to emphasize the SWOT of the recommendation (strength, weaknesses, opportunities and threats). No recommendation is 100% perfect and this section can serve to clarify the tradeoffs and advantages of a recommendation. Thus, it is advisable to mention all major alternatives reviewed by the committee. If appropriate, different stakeholders groups should be identified indicating how each group's needs are met or affected.

V. Recommendation:

This is the core, or deliverable, of the recommendation.

VI. Committee Vote:

This section should present the names of the members who moved and second the motion to approve the recommendation. As a norm, a motion should always be presented in the affirmative. In the case of recommendations for petitions to add materials to the National List, two votes should be taken and recorded, the first for a synthetic or non-synthetic material classification, and the second to list or not list the material. The record should list the number of synthetic and non-synthetic votes, yes and no votes for listing, and the number of abstentions and absences.

The proposal of the PDS for changes in the PPM has not followed the procedures in the PPM for presenting proposals. The PDS has paraphrased the changes in a table and shown them in a redlined version of the PPM. However, the PDS has not provided an explanation with sufficient

detail and rationale to support the proposal, including reasons why the proposal should be adopted, historical context, and the regulatory framework pertinent to the issue. It has not given the background and reasons for the changes. Nor has it discussed strengths, weaknesses, opportunities and threats. Although the reasons for most of the changes may appear to be obvious to the subcommittee, the NOSB and the public may not be aware of the needs perceived by the PDS. This is particularly true of the change in voting procedure, which is not simply “to require majority voting.” Some explanation is also needed regarding why the PDS believes the change to Appendix 2 to be adequate to address the NOSB recommendation for an open docket.

Importantly, the PPM evolved through discussion documents, public input and concurrence from previous NOSB votes over more than a decade. It provides a process that establishes public trust in the decision making process, with full transparency and public input, leading to public trust in the organic label. Failing to adhere to this longstanding commitment to transparency and public input in procedures governing board decision making threatens public perception of organic integrity and weakens the value of the label in the marketplace.

Comments on Proposed Changes to the PPM

III.D. Role of the Administrative Team is clarified.

Since the Designated Federal Official (DFO) is not necessarily the same as the Advisory Committee Specialist (ACS) –the DFO is sometimes the Deputy Administrator and sometimes the ACS– the language should specify whether one or both are members of the Administration Team. With this clarification –that the Administrative Team includes the DFO and the ACS– we agree with the added clarification that the Administrative Team does not make decisions.

III.I. Recordkeeping sections are clarified and include updated reference to relevant section of the general records scheduled 6.2 applicable to FACA committees as well as the GSA memo to CMO’s on FACA disclosures.

General Records Schedule 6.2

Some explanation is needed regarding General Records Schedule 6.2 and why it is cited in the PPM.

The sentence, “These records shall be available for public inspection and copying, subject to the Freedom of Information Act, 5 U.S.C. 552,” should be changed to reflect the memo subsequently cited, “the GSA March 14, 2000 memo that is available online here: <http://www.gsa.gov/portal/content/100785>.” That memo states,

Although advisory committee records may be withheld under FOIA's provisions if there is a *reasonable expectation* that the records sought fall within the exemptions contained in section 552(b), agencies may not require members of the public or other interested parties to file requests for non-exempt committee records under the request and review process established by FOIA section 552(a)(3).

It also says,

In Food Chemical News V. Department of Health and Human Services (980 F. 2nd 1468, 299 U.S. App. DC 25), the District of Columbia Court of Appeals held that:

"...under section 10(b) of FACA an agency is generally obligated to make available for public inspection and copying all materials that were made available to or prepared for or by an advisory committee. Except with respect to those materials that the agency reasonably claims to be exempt from disclosure pursuant to FOIA, a member of the public need not request disclosure in order for FACA 10(b) materials to be made available. Thus, whenever practicable, *all 10(b) materials must be available for public inspection and copying before or on the date of the advisory committee meeting to which they apply.*" (Emphasis added)

Accordingly, agencies may not delay making available non-exempt records to interested parties under FOIA procedures as an administrative convenience, or for other reasons.

We support the inclusion of the definition and handling of records according to General Records Schedule 6.2. However, since this proposal places requirements on NOP in handling records, we request that the PPM also include a provision requiring NOP to report annually on its compliance with this provision. We are still waiting for documents requested according to these guidelines more than 1½ years ago. They did not arrive in time for them to be useful with regard to the consideration of the methionine proposal on the agenda at the spring 2015 meeting. The process should ensure that they will arrive in time to read them before that listing is up for sunset review.

This proposed change is inconsistent with PPM section III.J.2, regarding professional and ethical standards.

In PPM section III.J.2, NOSB members are advised:

- Refrain from sharing working documents with the public. Working documents are defined as information that a board member gains by reason of participation in the NOSB and that he/she knows, or reasonably should know, has not been made available to the general public (e.g. is not on the NOP or other public websites, or is a draft document under development by an NOSB Subcommittee).
- Do not circulate draft Subcommittee documents until they are finalized and publicly available to all on the AMS/NOP website.

The proposed change, taken with FACA, prohibits these restrictions on sharing information with the public. FACA states,¹

Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents

¹ FACA, section 10(b).

which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

The preamble to the regulations explains:

The purpose of section 10(b) of the Act is to provide for the contemporaneous availability of advisory committee records that, when taken in conjunction with the ability to attend advisory committee meetings, ensures that interested parties have a meaningful opportunity to comprehend fully the work undertaken by the advisory committee. Records covered by the exemptions set forth in section 552(b) of FOIA generally may be withheld. However, it should be noted that FOIA Exemption 5 generally cannot be used to withhold documents reflecting an advisory committee's internal deliberations.

NOSB members should not be prohibited from making public information to which public access is guaranteed under FACA –especially since NOP has such a poor track record of providing timely access to such information.

Meeting documents and voting records.

We also support the inclusion of documents provided the board in the official meeting record, as well as the voting summary with votes by NOSB member.

IV.H. Revised sections on petitions and proposals to allow the NOSB to remove National List items by adding a proposal to remove to the work agenda. Former process was via public petition only.

We support this proposal. Again, we believe that the PDS should have offered background on this issue. For example, at the fall 2015 meeting, public input at sunset requested the removal of a ivermectin, but the NOSB subcommittee had not gathered the information necessary to support that action. Therefore, the removal action was postponed to a later meeting.

VIII.C. Clarified order of procedures of rules under which the NOSB operates.

We support this proposal. As presented, it may seem arbitrary because it is not supported with reasons. However, this hierarchy of rules is approximately that suggested by *Robert's Rules of Order Newly Revised*: law, charter, constitution and by-laws, rules of order, standing rules, and custom.²

² *Robert's Rules of Order Newly Revised*, 11th edition. Pages 10-19. *Robert's Rules of Order Newly Revised in Brief* 2nd edition. Pages 84-88.

VIII.F. Clarified election of officers to require majority voting.

This section proposes major changes. First, it changes the election procedure to require a majority rather than a plurality, as currently required (“candidate receiving the greatest number of votes.”) Second, in the case of a failure to reach a majority, it requires the withdrawal of the candidate with fewest votes.

Both of these changes require support that is more than a short one-line summary –which is misleading. The first part of the proposal is not a clarification; it is a change. The second part of the proposal is not justified. Where is the experience that justifies it? At this point, we cannot support this section.

The last sentence that is added says, “In the event of only one nominee for office, the vote may be by acclimation.” While acclimation may be a factor in choosing an officer, we suggest that in this case acclamation is the proper procedure.

Appendix 2. Specified goal of publishing the next NOSB meeting docket as soon as possible after previous NOSB meeting to create an “open docket” for public input.

These comments address the implementation of the NOSB recommendation adopted in April 2013, which called for the establishment of a “year-round online communication mechanism for all stakeholders to communicate with the NOSB and with the program on matters of interest and concern.”

We do appreciate that NOP –and through this proposal the PDS– have made an attempt to partially fulfill the intention of the NOSB by opening the docket early for the fall 2016 meeting. In doing so, it allows NOSB subcommittees to receive information that can meet two of the goals of the public communications policy previously adopted by the NOSB:

1. Inform discussions early in the materials or policy review process through the collection of complete background and perspectives; and
2. Reduce the amount of new information coming to the Board and NOP late in its deliberations on an issue without adequate time to verify or fully assess it.

However, the communications policy was also designed to facilitate two-way and open communication. The other two goals of the public communications policy were thus:

3. Increase transparency for the NOSB, NOP, and the public itself to ensure that everyone has access to the same information in a timely fashion; and
4. Help the Board and NOP to become aware of issues that may not be on the workplan or may not have been generated internal to the NOP and NOSB process, but are important based on the experience and expertise of those in the organic community.

These goals are consistent with FACA requirements.

FACA requires transparency.

§ 102–3.170 of the FACA regulations says:

How does an interested party obtain access to advisory committee records?

Timely access to advisory committee records is an important element of the public access requirements of the Act. Section 10(b) of the Act provides for the contemporaneous availability of advisory committee records that, when taken in conjunction with the ability to attend committee meetings, provide a meaningful opportunity to comprehend fully the work undertaken by the advisory committee. Although advisory committee records may be withheld under the provisions of the Freedom of Information Act (FOIA), as amended, if there is a *reasonable expectation* that the records sought fall within the exemptions contained in section 552(b) of FOIA, agencies may not require members of the public or other interested parties to file requests for non-exempt advisory committee records under the request and review process established by section 552(a)(3) of FOIA.

Although the early opening of the docket allows the NOSB to benefit from early public comment, it has not been used in a way that communicates to the public the information and policy alternatives being considered by the board, which would allow the public to “comprehend fully” the work of the NOSB. In order to meet the NOSB objective #3, some improvements should be made:

- The subcommittee notes should describe in more detail the deliberations of the subcommittee. The notes should include arguments advanced for different alternatives, the reasons given, and the perspectives from which those arguments and reasons are derived. Subcommittee member positions should cite TRs to justify their perspective in cases where they have been prepared for the NOSB. Most perspectives are identified as coming from “a member” of the subcommittee. Occasionally, if that member is the lead on the issue, s/he is identifiable when the notes say, “The lead said...” In most cases, however, the notes preserve the anonymity of subcommittee members, which does not permit the reader to understand the perspective driving the opinions. Since the NOSB is a stakeholder board, members of the public should be able to see how their perspectives are represented by NOSB members.
- Materials made available to subcommittee members should be made available to the public through the docket. This includes “records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, or other documents which were made available to, or prepared for or by” the NOSB.³ This protocol would have the additional benefit of saving time for the FOIA officer, to whom requests for information are forwarded, contrary to the requirements of FACA.⁴

³ General Services Administration, 2001. Federal Advisory Committee Management: Final Rule. 36 FR 139: 37748.

⁴ General Services Administration, 2001. Federal Advisory Committee Management: Final Rule. 36 FR 139: 37748. “May an agency require the use of its internal FOIA procedures for access to advisory committee records that are not exempt from release under FOIA? A: No.”

The NOSB recommendation envisioned public dialogue.

In order to better meet objective #4, the docket must encourage comments on other topics, including suggestions for topics that the NOSB should put on its work agenda. The NOSB is required by the Organic Foods Production Act to advise the Secretary on the implementation of the law. In adopting the public communications recommendation, the NOSB recognized that, “The input from the organic community is valuable in the deliberations of NOSB, the NOP, and the community decision-making process.” It also recognized the need to be “aware of issues that may not be on the workplan or may not have been generated internal to the NOP and NOSB process, but are important based on the experience and expertise of those in the organic community.”

Thus, the docket must solicit not only comments addressing “specific topics noted on the meeting agenda,” but also comments on the organic program in general.

Finally, we submitted early comments on a few issues and have seen no indication (in subcommittee notes, for example) that they were considered prior to writing subcommittee proposals.

NOSB members are not special government employees, and the PPM should be changed to recognize that fact.

Although the PPM states that NOSB members are “representatives,” not special government employees (SGEs), some conflict of interest provisions were specifically added to apply rules for SGEs to NOSB members. There are reasons that FACA distinguishes SGEs from representatives and reasons that Congress established the NOSB as a committee of representatives. Conflict of interest is at the root of this distinction, and the PPM describes it well:

NOSB members are classified as **representatives** under the Federal Advisory Committee Act (FACA). Each representative is appointed to articulate the viewpoints and interests of a particular interest group. The Organic Foods Production Act (OFPA) prescribes these interest groups, which include farmers/growers, handlers, certifiers, environmentalists/conservationists, scientists, consumers and public interest groups, and retailers. Representatives are appointed to speak in “we” terms, serving as the voice of the group represented (e.g., “we farmers/growers believe...”). As such, NOSB members are not expected to provide independent expert advice, but rather advice based on the interests of the groups served.

NOSB members represent the interests of a particular group. As such, many of the interests are **acceptable interests**. An interest is acceptable if it is carried out on behalf of a represented group, and if a Board member receives no disproportionate benefit from expressing the interest. True **conflicts of interest** arise when an interest:

- Directly and disproportionately benefits you or a person associated with that member;
- Could impair your objectivity in representing your group; or
- Has the potential to create an unfair competitive advantage.

As was pointed out at the spring 2016 meeting, the directive “Do not accept compensation for teaching, speaking, and writing related to your board duties” may appear to apply differently from those working on salary from those paid specifically for their work on the NOSB. However, that is a false distinction because a person who takes time from regular duties to write NOSB proposals and attend (and speak at) NOSB meetings is paid for that work as much as someone who is paid by the hour. Both receive compensation for their work related to board duties, and that is fitting with the definition of “representatives.” It would be more fair if all were paid equally, but that is not the way the Congress set up the NOSB –undoubtedly fearing the fiscal note of such a provision.

Conclusion

The proposal of the PDS for changes to the PPM has not followed the procedures in the PPM for presenting proposals. The PDS has not provided an explanation with sufficient detail and rationale to support the proposals, including reasons why the proposals should be adopted, historical context, and the regulatory framework pertinent to the issue. It has not given the background and reasons for the changes.

With regard to specific proposals:

- Beyond Pesticides supports the clarification that the Administrative Team does not make decisions.
- We support the inclusion of the definition and handling of records according to General Records Schedule 6.2. However, since this proposal places requirements on NOP in handling records, we request that the PPM also include a provision requiring NOP to report annually on its compliance with this provision. We also ask the PDS to examine other provisions of the PPM that conflict with this proposal. We also support the inclusion of documents provided the board in the official meeting record, as well as the voting summary with votes by NOSB member.
- We support the revised sections on petitions and proposals to allow the NOSB to remove National List items by adding a proposal to remove to the work agenda.
- We support the proposal that clarifies the hierarchy of rules under which the NOSB operates.
- We oppose the proposed changes in election procedures in view of the lack of support given.
- We support opening the NOSB docket early, but point out that this alone does not implement the NOSB recommendation for an open docket.

- In addition, we highlight another area needing attention –application of rules for special government employees to NOSB members.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Terry Shistar". The signature is written in a cursive style with a horizontal line at the end.

Terry Shistar, Ph.D.
Board of Directors