



# BEYOND PESTICIDES

701 E Street, SE ■ Washington DC 20003  
202-543-5450 phone ■ 202-543-4791 fax  
info@beyondpesticides.org ■ www.beyondpesticides.org

April 8, 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

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

## Revision Process

We appreciate the response to fall comments regarding the difficulty of reviewing proposed changes to the Policy and Procedures Manual (PPM). We appreciate, in particular, the clarification that the NOSB will vote on the proposed changes and the publication of a redlined version and an annotated table of contents. **We do not think it is appropriate, however, for the NOSB to consider such a complicated proposal without an explanation and justification of each change.** The PPM was developed through a deliberative public process over many years, resulting in the adoption of procedures that are intended to ensure a transparent and science-based approach that complies with the letter and spirit of the Organic Foods Production Act. This is the document that creates a decision making process that must be trusted by those in the marketplace who ultimately assess the value of the USDA organic label in their purchasing decisions. In this context, the procedures by which the stakeholders that make up the NOSB create or change the PPM will determine the degree to which USDA is upholding the independent decision making authority granted it by Congress or eroding the very decision making foundation that is critical to the growth of the organic sector.

The PDS describes the purpose of the revisions as follows: “The objective of this proposal to revise the April 11, 2012 version of the PPM to reflect the current procedures for the collaborative and productive functioning of the NOSB.” However, the PPM functions as bylaws for the NOSB, and as such, it is prescriptive rather than descriptive. If “current procedures”

have not been adopted by means that are consistent with the policies and procedures in the PPM—such as allowing board members not physically present at board meetings to vote on recommendations before the board— or are contrary to law —such as language preventing the release of materials guaranteed to be public under FACA— then they should not be included in the PPM.

We also ask that future editions of the PPM annotate amendments with notes —for example, if a section is added, it should note, “Added October 2015.” If it was amended in April 2010, it should note, “Amended in April 2010 to add section on xxx.” We note that some sections are annotated in this way.

## Historical Context

The PPM cannot be evaluated without an understanding of the role and importance of the NOSB.

## OFPA and Legislative History

OFPA came into existence when there was already extensive organic certification by non-governmental organizations. As organic production grew, the piecemeal certification posed increasing concerns for consumers who wanted to ensure that their “organic” food was really organic. In spite of the diversity of certifiers, there was a common understanding among members of the “organic community” —which includes growers, processors, and sellers of organic merchandise as well as consumers— about the meaning of “organic.” However, there was also a widespread awareness that the USDA did not share that understanding, and therefore a distrust of putting the program into the agency’s hands.<sup>1</sup> This distrust was shown to be valid when USDA set aside the recommendations of the NOSB in the first proposed organic rule. However, the outpouring of public comments helped to establish for public officials the importance of the organic program’s adherence to the spirit and letter of the law. The public distrust of government and a government label today plays out at USDA and adversely affects the value of the USDA organic label in the market when USDA defies the public process, imposes new interpretations of law without due process, undermines the statutory authority of the NOSB, and seeks to control, influence or pressure the board’s deliberations outside the parameters of the agency’s legal authority. In essence, these actions establish USDA as a hostile environment in which to grow the organic brand with adherence to the underlying principles and practices that were developed over decades of farmers and-consumers working together to establish the sector. In giving legal status to the word “organic,” to maintain accountability to organic stakeholders, and to keep government intrusion in check, Congress explicitly empowered the NOSB to counter an abuse of government authority in an organic sector that daily challenges basic tenets of chemical-intensive and genetically engineered agriculture, which has deep institutional roots within USDA.

---

<sup>1</sup> Treadwell, D. D., McKinney, D. E., & Creamer, N. G. (2003). From philosophy to science: a brief history of organic horticulture in the United States. *HortScience*, 38(5), 1009-1014. Vos, T. (2000). Visions of the middle landscape: Organic farming and the politics of nature. *Agriculture and Human Values*, 17(3), 245-256. [https://wiki.umn.edu/pub/ESPM3241W/KeySourcesTeamEight/Vos\\_2000.pdf](https://wiki.umn.edu/pub/ESPM3241W/KeySourcesTeamEight/Vos_2000.pdf).

## Why NOSB?

Only OFPA's mandate for a board representing the organic community that plays an essential role in the development of organic regulations could temper the distrust of USDA.

## Role of NOSB

The NOSB plays an essential role in advising an agency that operates according to a completely different epistemological and ethical framework. OFPA establishes the following roles for the NOSB:

- To assist in the development of standards for substances to be used in organic production and to advise the Secretary on any other aspects of the implementation of this chapter.<sup>2</sup>
- The Secretary shall authorize the Board to hire a staff director and shall detail staff of the Department of Agriculture or allow for the hiring of staff and may, subject to necessary appropriations, pay necessary expenses incurred by such Board in carrying out the provisions of this chapter, as determined appropriate by the Secretary.<sup>3</sup>
- The Board shall provide recommendations to the Secretary regarding the implementation of this chapter.<sup>4</sup>
- The Board shall develop the proposed National List or proposed amendments to the National List for submission to the Secretary in accordance with section 6517 of this title.<sup>5</sup>
- The Board shall convene technical advisory panels to provide scientific evaluation of the materials considered for inclusion in the National List. Such panels may include experts in agronomy, entomology, health sciences and other relevant disciplines.<sup>6</sup>
- The Board shall, prior to the establishment of the National List, review all botanical pesticides used in agricultural production and consider whether any such botanical pesticide should be included in the list of prohibited natural substances.<sup>7</sup>
- The Board shall advise the Secretary concerning the testing of organically produced agricultural products for residues caused by unavoidable residual environmental contamination.<sup>8</sup>
- The Board shall advise the Secretary concerning rules for exemptions from specific requirements of this chapter (except the provisions of section 6511 of this title) with respect to agricultural products produced on certified organic farms if such farms are subject to a Federal or State emergency pest or disease treatment program.<sup>9</sup>

---

<sup>2</sup> §6518(a).

<sup>3</sup> §6518(j).

<sup>4</sup> §6518(k).

<sup>5</sup> §6518(k).

<sup>6</sup> §6518(k).

<sup>7</sup> §6518(k).

<sup>8</sup> §6518(k).

<sup>9</sup> §6518(k).

- The Board shall establish procedures under which persons may petition the Board for the purpose of evaluating substances for inclusion on the National List.<sup>10</sup>

The provision that requires the Secretary of Agriculture to authorize the NOSB to hire a staff director for the NOP is the clearest indication of the importance of the NOSB in directing its activities and guiding USDA's organic program.

Kathleen Merrigan, former Deputy Secretary of Agriculture, has pointed out "the special role created for the National Organic Standards Board. The NOSB was carefully chartered by Congress to facilitate both a valid consensus among very diverse stakeholders on the numerous questions of interpretation, as well as provide the special 'gatekeeper' function with respect to substances that the Secretary would allow for use in organic production and processing."<sup>11</sup>

**Thus, OFPA created the NOSB as a means of ensuring that the organic community retained independent influence over the organic program, despite its bureaucratic location within USDA, and despite the hostile environment cited above.**

## Comments on Specific "Updates"

### **Beyond Pesticides opposes several changes that reduce the discretionary authority of the NOSB and increase the authority of the NOP.**

#### **1. In the Introduction/Purpose, the proposal deletes "New policies and revisions to existing policies and procedures will be incorporated into the NOSB Policy and Procedures Manual from time to time, as determined by the Board."**

We commented on this change in the fall. The PPM is a living document that serves as bylaws for the NOSB. The NOSB should, as this sentence indicates, have the authority to propose and vote on new policies and revisions to existing policies. Although the PDS has proposed a section IX to address revisions to the PPM, it is inadequate to meet the intent expressed in the previous version, that the NOSB will determine which revisions will be made to the PPM because it states that the NOP must approve the revisions. Thus, **this sentence should be restored in order to clarify the role of the NOSB and PPM.** To the extent that USDA would like to usurp or override board authority to establish procedures to carry out its unique authorities under OFPA, it may use provisions like this to erode the good will and confidence that has been built with consumers and farmers at a critical period in the development of the organic market. As intended, the role of NOP/USDA is to facilitate the authority of the board and intervene only when it believes that a particular action or proposed action is outside the scope and authority of the board. Ensuring that the board establishes with public input the means by which it can

---

<sup>10</sup> §6518(n).

<sup>11</sup> Statement of Kathleen A. Merrigan, Deputy Secretary of the U.S. Department of Agriculture, before the Senate Committee on Agriculture, Nutrition and Forestry September 15, 2010.

best represent the stakeholder groups and carry out the law is the responsibility and authority of the board. And, we have learned, it is not enough for a government agency or program to claim authority, particularly when it is reversing long-held understandings and operations, without justifying its intervention and preemption of board authority with reference to its specific statutory and regulatory authorities.

## **2. The section on NOP-NOSB Collaboration has become less collaborative.**

The current version stresses a commonality of goals, cooperation, and two-way feedback. The proposal creates a mechanical version of “collaboration” involving participation of NOP staff in calls and provision of technical, legal, and logistical support. The current version establishes a framework for NOSB-NOP interaction based on the statutory duties of the NOSB. Historically, the PPM has created a framework for collaborative decision making between the NOSB and the NOP.

We made this comment in the fall. The PDS responded, “The PDS revised Section III E to reflect the importance of both NOP-NOSB collaboration as well as NOP-NOSB mutuality in their respective roles in the organic community.” Section II.E gives lip service to NOP-NOSB collaboration, but ignores crucial aspects of the relationship that are established by FACA and OFPA. In fact, it is improper to assume “mutuality” of roles. Clearly, there are instances where NOP/USDA has squelched board expression in the form of advice to the Secretary or the adoption of workplan items relating to its ability to review substances for the National List with the justification that the program did not have adequate resources to respond, follow-up, or issue a Federal Register Notice. The separation of the board’s responsibility to carry out its statutory authority should not be confused with bureaucratic constraints that preemptively restrain board function. In fact, if the board identifies numerous issues and engages the public to the degree that claimed resource limitations prevent a response from the program, then that may indicate to those who hold the purse strings that more resources are needed to grow the organic sector. The point is that the government agency should not be stifling board and public deliberations on issues deemed important by the NOSB because of some general sense of mutual interest when there is none. The PPM must affirm the importance and right of the board to fulfill its statutory mandate and independent authorities and board members should take that as a sacred responsibility that honors the history of organic and its underlying principles and values.

Interestingly, although OFPA mandates this independent authority, independence is not foreign to FACA. Section 5.b.3 of FACA requires that, “the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority..., but will instead be the result of the advisory committee's independent judgment.” We interpret this to mean that you either seek advice or you do not seek advice. Once you seek advice (in the case of the NOSB, the agency is not seeking advice by Congress had mandated independent outside advice with line item authorities), you do not seek to influence that advice. A serious form of influence is a government official preemptively telling advisors that they may not offer advice because of the associated costs in publishing a Federal Register notice or all the person hours that go into that process are too burdensome, as has been done over the last several years. OFPA, as

pointed out above, requires NOP to consult with the NOSB on a number of issues, including “developing the program.” In addition, the requirement in OFPA for the Secretary to authorize the board to hire a staff director is a clear statutory direction that the NOSB must lead the way. Taken together, these two statutes conflict with parts of the statement in the proposal that “the NOSB cannot direct USDA or bind the Secretary through its actions; for example, it cannot obligate funds, contract, make NOP staffing decisions, or initiate policies of its own accord.” (The language regarding staffing decisions was not present in the 2012 PPM.) The point is that the PPM must reflect this and institute procedures for fulfilling this function loudly and clearly.

The view of “collaboration” in the proposed PPM has moved all the way from the statutory requirement that the NOSB provide the direction for the organic program to allowing the NOSB to participate, as in: “The NOSB may provide comments on guidance or policy memos included in the Program Handbook, or may also make recommendations for new guidance or policies.” Tone and words are critically important here. **It is critical to the functioning of the NOSB as required by OFPA and FACA that the NOP not have control over the NOSB’s essential functions.**

Interestingly, collaboration has always been the cornerstone of the relationship between the NOSB and NOP, but the success of this relationship has been driven by clear respect for each entity’s authority and an awareness that working together helps to ensure stronger decisions and higher integrity. To the extent that USDA now with NOSB concurrence wants to codify the weakening of NOSB’s long standing authority, the agency must point to statutory and regulatory authorities supporting such action by citing code and language. Collaboration only works when both parties affirm the authorities of the other.

### **3. Neither version addresses the provision of §6518(j) of OFPA, “The Secretary shall authorize the Board to hire a staff director.”**

We made this comment in the fall, and the PDS misses the point of our comment with this response: “The PPM should reflect the current operating procedures of the NOSB. Since the NOSB has never had the budget or the recognized authority to hire a staff director due to conflicting government regulations and laws - this is not included in this revision.” As we stated above, the PPM functions as bylaws for the NOSB, and as such, it is prescriptive rather than descriptive. Laws passed by Congress are a higher authority than USDA’s budgetary functions.

Even if it is found to be impossible to carry out the letter of the law, the provision in §6518(j) establishes a relationship between the NOSB and NOP that has been routinely violated by the NOP. The fact that the law requires the board to be able to hire a staff director for the program implies that Congress intended that the NOSB, and not the NOP, must set the direction and priorities for the board, given authorities that exceed the usual advisory duties in FACA. FACA, however, recognizes that boards established by statute, like the NOSB, may have authorities that exceed those outlined in FACA, such as the NOSB’s authority to recommend materials on the National List that the Secretary may not embellish with additional uses. Furthermore, the direction is meant to come from the organic community as a whole, since OFPA §6518(c) requires that board appointments originate “from nominations received from organic certifying

organizations, States, and other interested persons and organizations.” **The appointment process should also be much more transparent.** In addition, the PPM should codify the board’s involvement in providing feedback on performance of the person who serves as director of the NOSB, just as the director of a nonprofit organization undergoes reviews and serves at the pleasure of the board. Even if USDA has direct responsibility over hiring, firing, and reviews, engaging the board through the seeking of advice and input in this process is a critical function. These comments should not be taken to suggest that there is any dissatisfaction whatsoever with the specialist who currently facilitates board operations. Quite the contrary. Again, in scrutinizing the PPM, our focus is on process that complies with the law.

**4. The section on the Advisory Committee Specialist (formerly Executive Director) deletes this sentence: “The most important function of the ED is to facilitate the operation of the Board, while helping to maintain and strengthen its independence.”**

The deleted sentence recognized the role of the NOSB in setting the direction for the National Organic Program. It should be restored.

The role of the ED/ACS is closely related to the issue of the staff director mentioned in the last point. Both relate to the relationship of the NOSB to the NOP. The never-filled role of the NOSB-appointed staff director was replaced by an Executive Director whose “most important function ... is to facilitate the operation of the Board, while helping to maintain and strengthen its independence.” Now, even the job title, which had been a specific title relating to a relationship with the NOSB, has been replaced by a generic USDA job title. Thus, the evolution has gone through these steps:

- OFPA mandated that the Secretary authorize the NOSB to hire a staff director. That would have been a staff position of authority that would be under the direction of the NOSB --and therefore could not be fired by USDA.
- The PPM created the position of an executive director, which was a USDA employee who was supposed to represent the NOSB's interests at NOP. So, even though that person was hired by USDA, s/he could not (supposedly) be fired for representing the NOSB's interests.
- The ACS is a position purely within USDA and it is seen as a "conflict of interest" for that person to represent the NOSB. So, we've slid all the way back from the statute to nothing but support staff working under the direction of the NOP and not able to advocate on behalf of the NOSB.

Given the steady erosion of NOSB authority under the direction of the NOP, perhaps it is time to revisit the original OFPA mandate. A key function of the director within the program is to articulate freely the interests of the board, as articulated by board members.

In addition to these important general considerations, directions to the ACS weaken the support that the position gives to the NOSB and the public. For example, the role of the Executive Director in managing an accurate representation of meeting minutes was removed in the proposal. The details about committee minutes reflecting the “diversity of opinion” were deleted. Subcommittee minutes are no longer published –they have been replaced by notes,

which do not give a complete representation of the subcommittee meetings. Speakers are generally anonymous and reasons are not given for supporting various positions. One might say that they are sanitized to the point where they become useless to a public seeking to understand the thinking of subcommittees, including positions and questions. This is most certainly not due to the ability of the current ACS, but to the instructions she has been given.

The requirement that subcommittee minutes reflect the “diversity of opinion” is important to maintain transparency, allow for ease of education, and make the diversity of opinions available to all NOSB members. Additionally, the NOSB is on record, having adopted a recommendation in 2013 to establish a public docket that would facilitate greater transparency and public input into the deliberations of the NOSB. The docket recommendation was developed in collaboration with NOP, only to be ignored after it was passed resoundingly.

#### **5. The section on NOSB work agendas (formerly workplans) removes from the NOSB the authority to initiate agenda items.**

As stated above, OFPA gives the leadership role to the NOSB, not the NOP. **Authority over work agendas must be restored to the NOSB.** This is an example of where collaboration on issues and priorities has been important to the board carrying out its statutory duty. Ultimately, the NOSB cannot carry out its statutory duty to advise the Secretary if it is denied the ability to determine its workplan.

We made this comment in the fall, and the PDS response falls short: “The PDS revised Section III F to reflect the collaborative nature under which work plans are set with the program. The NOSB has the authority to initiate work agenda items and bring them to the Executive Committee and the NOP for confirmation. The proposed revisions bring the PPM into alignment with the NOSB Charter.”

The proposed revisions make it a criterion for accepting an item on the work agenda that the “[i]tem must be a priority for the USDA/NOP; something that the NOP is able to implement in a reasonable timeframe.” It also places a higher priority on “NOP requests to the NOSB” than on “NOSB requests to NOP” or other projects. This results in the NOSB being unable to address issues important to the organic community, as is pointed out in the Materials Subcommittee discussion document on seed purity when it noted, “A recommendation with this statement in it will not be able to be published by the NOP.”

#### **6. The role of the Policy Development Subcommittee has been redefined in a way that diminishes the ability of the NOSB to establish its own procedures.**

Deleted:

The Policy Development Committee makes draft recommendations for consideration by the Board to provide guidance, clarification or proposed standards of Board operations, policies and procedures. The PDC maintains the content and updates to the NOSB Policy and Procedures Manual (in collaboration with the NOSB Vice Chair) and New Member Guide.



The PDC occasionally works with other committees to develop joint recommendations where policy issues are involved.

Added:

The Policy Development Subcommittee provides guidance, clarification or proposed standards on NOSB operations, policies, and procedures as needed, in collaboration with the NOP.

We made this comment in the fall. The PDS responded, “The PDS has revised Section IV A to reflect the PDS's role in revising the PPM and other internal policy documents.” The PDS added this language, “The Policy Development Subcommittee provides clarification and proposed changes for NOSB internal policies, and procedures as needed, in collaboration with the NOP. The PDS, in collaboration with the NOP, also updates and revises the NOSB Policy and Procedures Manual and the Member Guide.”

Because the major role of the PDS is the development of NOSB policies and procedures, restrictions on its activities and autonomy have a large impact on the NOSB. If all of its functions are described as occurring “in collaboration with the NOP,” then –especially in view of NOP’s attitude towards collaboration as allowing the NOSB to serve limited functions– the proposal still places severe limitations on the functions of the PDS and NOSB as a whole. While collaboration is overarching to the relationship between NOSB and NOP/USDA, as stated above, the repetition of this term throughout the PPM draft seems to suggest that the NOSB is not permitted to initiate action without seeking concurrence from NOP/USDA. Concurrence is not collaboration and the law expressly seeks to empower the Board to initiate in the realm of advice to the Secretary.

**The original wording of this section should be restored in order to restore the authority of the NOSB to establish procedures necessary to carry out its unique statutory responsibilities, in recognition of the role of the NOSB in setting the direction of the NOSB and NOP.**

### *History of the PDS*

The PPM was first adopted by the NOSB at its May 2002 meeting. From the very beginning, it was seen as a “living document” and the NOSB would be “continually amending it and adding to it as needed.”<sup>12</sup> The original draft came from a Board Policy Manual Task Force chaired by Jim Riddle. By October 2003, the Policy Development Committee had been formed and took control over the PPM.

As has been evident from the history of OFPA and the original rule, there has always been some level of conflict between the NOSB and USDA. After USDA issued policy statements allowing the use of antibiotics in organic livestock, the NOSB introduced the section on NOP-NOSB collaboration. This section in the past required much more extensive consultation with the

---

<sup>12</sup> NOSB meeting, May 7, 2002. Transcript p. 233.

NOSB, which was justified by NOP's actions when it failed to consult with the board.<sup>13</sup> Although NOP staff disagreed with some parts of the early versions of the PPM, they did not dispute the authority of the NOSB to write its own policies and procedures.<sup>14</sup> In March 2005, when NOP suggested edits to the PPM, mostly minor, the board then voted on them.<sup>15</sup>

The history of NOP-NOSB interactions over sunset raises critical legal issues that are not addressed here because they are currently being litigated by a group of plaintiffs that represent a wide range of organic stakeholders. We suggest that the PDS not change the PPM on these matters until the legal issues are resolved.

Without going into the actions on sunset, the action of NOP directly challenged the authority of the NOSB to establish its own policy and procedures –an authority it had previously recognized. It was announced at the NOSB “training” conducted by NOP in February 2014 that the Policy Development Subcommittee (PDS) was no longer needed as a permanent working subcommittee, but would be reconstituted on a “consultative” basis and that all items on the PDS agenda/workplan were removed. After that, the PDS did not function until March 2015.

It met on April 22, 2014. The workplan in the notes for that date is empty. The meeting notes reported the following:

- Review Policy Development Subcommittee report. The group discussed the public comment received in response to the NOSB processes that have been instituted by the NOP, such as sunset procedures and workplans. They also discussed how to share this information, which is in the form of a verbal report, with the other Board members prior to the meeting.
- Other Business. The workplan table above was edited to reflect the new designation of the PDS as an ad hoc Subcommittee. A member requested that the PDS keep a regular meeting on the calendar as a placeholder. The 4<sup>th</sup> Tuesday of each month will be retained.

The PDS also met on October 14, 2014. Again, the workplan was empty. The meeting notes reported:

- The PDS was reconvened to discuss revisions to the PPM. The group discussed the next steps beginning with what version of the PPM to use as a basis for this future work. Both the PDS and the NOP worked on revisions beyond the version that is posted on the website (April 2012). The group noted that the version posted on the website does not include the most recent revision date. MA will correct this. The NOSB Chair asked that the NOP send guidance and background documents to clarify who is responsible for what sections. The NOP will review the revisions that were drafted in June 2014 and

---

<sup>13</sup> See, for example, the May 6, 2009 version of the PPM, pp. 24-25.

<sup>14</sup> See, for example, minutes of the October 2004 meeting, p. 4.

<sup>15</sup> Transcript of March 2, 2005. Pp. 24-38.

forward them to the Subcommittee. The PDS will try to meet for an hour at the fall NOSB meeting to discuss the next steps. MA will schedule a PDS call for November.

At the March 10, 2015 meeting, the NOP provided the PDS with a draft of PPM revisions. It is not clear how much of the proposed draft originated with the NOP and how much with the PDS, but it is clear that the current draft cedes much NOSB authority to the NOP.

### *PDS, PPM, and NOSB*

Taken together, OFPA and FACA imply that NOP must recognize NOSB authority to develop its own operating principles. Section 5.b.3 of FACA requires that, “the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority..., but will instead be the result of the advisory committee's independent judgment.” OFPA, as pointed out above, requires NOP to consult with the NOSB on a number of issues, including “developing the program.” In addition, the requirement in OFPA for the Secretary to authorize the board to hire a staff director is a clear statutory direction that the NOSB must lead the way.

Although subordinate to OFPA, the NOSB is administrated under the Federal Advisory Committee Act (FACA). This legislation mandates that federal bureaucrats not interfere with decision-making by independent advisory committees. (Cite OFPA.)

## **7. Establishing the purpose of the PPM**

The beginning of the PPM should make it clear what the purpose of the document will be. In addition, there should be no ambiguity in how much control the NOSB has in their own administration. While the draft PPM begins by stating that the PPM “provides procedures for the functioning of the [NOSB],” it should also be stated that the PPM functions as bylaws for the NOSB.<sup>16</sup>

An important deletion from the 2012 draft was that “Board members are entrusted with a strong responsibility to treat the business of the Board *as fiduciaries for all members of the organic community and the public at large* [emphasis added].” This phrase is an important one because it frames the NOSB’s responsibilities to the public. This is an accurate representation of the NOSB’s role according to OFPA, and it should be maintained in the new draft.

The PPM should be treated as bylaws for the NOSB. Bylaws are “basic rules relating principally to itself as an organization.” Bylaws are subordinate only to laws and the organizational charter.<sup>17</sup> The PPM provides a framework within which the administration of the subcommittees will operate smoothly.

---

<sup>16</sup> Henry M. Robert III and others, 2011. *Robert's Rules of Order Newly Revised*, 11th ed. (Da Capo Press). Pp. 570-588 lay out the basic requirements for bylaws contents, which are all covered in the PPM. Also referred to as RONR.

<sup>17</sup> Henry M. Robert III and others, 2011. *Robert's Rules of Order Newly Revised*, 11th ed. (Da Capo Press). Pp. 10-19. Also referred to as RONR.

As bylaws, the PPM must cite the parliamentary authority. In the past, Robert's Rules of Order Newly Revised (RONR) has served this purpose. While Robert's Rules are referenced by section VIII.C of the proposal, it does not make it clear what the actual authority is. The PPM should make it clear that the authorities governing the NOSB are, in this order, rules prescribed by applicable law (most pertinent are OFPA and FACA), NOSB charter, PPM, other written rules of parliamentary procedure (special rules of order specific to the NOSB and/or RONR, written standing rules covering administrative details, and custom.

Robert's Rules has long been used as an organizational tool to ensure fairness and full discussion of matters before a board. While normally not need to ensure full discussion, if any stakeholder feels the decision making process is not being followed, having a mechanism that provides an opportunity for due consideration is critical to the integrity of the process. To the extent that any stakeholder group feels that the process does not provide such opportunity, the value of the organic label is harmed.

Clearly, the NOSB has authority and a duty to make recommendations of substances to be included on the National List and because the Secretary is not permitted to list synthetic materials that are not recommended by the NOSB or allow non-synthetic materials that are prohibited by the board. As a result, the PPM must include this function as a primary responsibility of the board. In addition to the OFPA mandate that the NOSB "assist in the development of standards for substance to be used in organic production," the law also states that, "The Secretary may not include exemptions for the use of specific synthetic substances in the national List other than those exemptions contained in the Proposed National List or Proposed Amendments to the National list." In a more general sense, the law states, "The national List established by the Secretary shall be based upon a proposed national list of proposed amendment to the National List developed by the National Organic Standards board."<sup>18</sup>

## **Beyond Pesticides opposes provisions that decrease public involvement and transparency.**

### **1. In the section on Additional Administrative Items, the proposal provides for public access to documents and communications according to the provisions of FOIA instead of FACA:**

Freedom of Information Act (FOIA; 5 U.S.C. 552). Under this Act, the public may request documents and other information pertaining to USDA actions. NOSB communications with USDA are subject to these requests, with some exemptions. Some information is routinely exempt from disclosure in or otherwise protected from disclosure by statute, Executive Order or regulation; is designated as confidential by the agency or program; or has not

---

<sup>18</sup> 7 USC 6517.

actually been disseminated to the general public and is not authorized to be made available to the public upon request. When there is a FOIA request for information, the USDA will review all relevant information and determine what qualifies for release, then provide it to the requestor.

However, FACA requires much more prompt response to public requests, and the PPM should cite FACA instead. We recommend including the following guidance. **The following quotations from a General Services Administration memo to Committee Management Officers should be included in the PPM:**<sup>19</sup>

Section 10(b) of the Federal Advisory Committee Act (FACA), as amended, (Public Law 92-463, 5 U.S.C. App.) provides that:

"Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents 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 purpose of section 10(b) is provide 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 fully comprehend the work undertaken by the committee. Records covered by the exemptions set forth in section 552(b) of FOIA may generally be withheld. However, it should be noted that FOIA Exemption 5 cannot be used to withhold documents reflecting an advisory committee's internal deliberations.

...

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). [Emphasis in original.]

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

... Given the plain and unambiguous language contained in section 10(b) of FACA, coupled with controlling case law and DOJ's FOIA guidance, I am encouraging each Committee

---

<sup>19</sup>Public Access to Records (FACA), Memorandum for Committee Management Officers. March 14, 2000. From: James L. Dean, Director, Committee Management Secretariat, Subject: Public Access to Advisory Committee Records <http://www.gsa.gov/portal/content/100785>.

Management Officer (CMO) to assure the maximum timely availability of covered advisory committee records. If you have not already done so, you should consider:

- Amending agency procedures to facilitate the timely release of requested information and materials;
- Segregating information and materials that must be released under FACA section 10(b) from those that must be processed under FOIA; and,
- Expediting requests for release of information and materials that must be legitimately processed under FOIA, including the provision of timely explanations for unanticipated delays to interested parties.

We made this comment in the fall, also making the related comment that “Nonpublic information” has been redefined to include information that is public according to FACA. The PDS replied, “The PDS agrees that the PPM should align and comply with other governing documents the PDS has revised Section III I Additional Administrative Items bullet fourth and fifth bullet points to include FACA disclosure requirements along with FOIA.” Although the revised Section III.I does quote Section 10 (b) of FACA, the proposal also says, “While requests for FACA Board records do not have to go through the formal FOIA request process, those records must be reviewed by AMS/NOP before release, to determine whether any FOIA exemptions apply (e.g., personal information, business proprietary information).” Since the NOSB no longer accepts confidential business information and has not in the past given it to NOSB members,<sup>20</sup> this review should not take long. However, elsewhere, the proposal states as standards of conduct,

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.

Given that the NOP has not complied with the requirements of FACA stated above –providing information requested under FACA in such a way that it “provide[s] a meaningful opportunity to fully comprehend the work undertaken by the committee,”<sup>21</sup> it is incomprehensible that the standards of conduct would prohibit board members from disclosing information that is explicitly public under FACA.

---

<sup>20</sup> Lisa Brines, NOP at spring 2014 NOSB meeting. Transcript, p. 107.

<sup>21</sup> For example, Beyond Pesticides submitted a FACA request on March 27, 2015 for information relating to the NOSB’s consideration of a proposal on methionine that was on the spring 2015 agenda. We have yet (more than a year later) to receive a response.

**It is simply outrageous that USDA would seek to make the work of the incredibly important NOSB stakeholder group, whose operations are vital to public trust in the organic food label and the growth of the organic market, less transparent and take steps that will suggest that organic decision making is cloaked in secrecy and backroom collusion. How is that good for the growth of the organic market? And, if NOP wants to constantly stress the importance of FACA in issuing directives to the NOSB, why isn't it following FACA when it comes to public disclosure and true transparency? The fact that USDA regards responding to requests as such a low priority indicates contempt for the law (FACA) and public participation in making decision.**

## **2. Changes to the requirements for minority reports decrease the full understanding of the NOSB and the public.**

Subcommittees do not make decisions on behalf of the full Board. They digest information and present it in a way that the NOSB and the public can understand it. A minority position is no less important than the position of the majority, and must be accorded equal status by the subcommittee. In fact, the stakeholder function of the board demands that the process gives voice to all points of view so that the public can ascertain and understand what the Subcommittee considered and how it came to its decision. To in any way limit the voice of the minority in the Subcommittee (it may not end up being the minority view of the entire board), is to betray the importance of all stakeholders in the deliberations of the board. Clearly, the stipulations cited below for "minority" reports should be applied across the board to all positions of the Subcommittees, if they are to be included at all. Here, it could be interpreted that the PPM is stifling the inclusion of a view that is not held by the majority. Certainly, there are cases where, in the course of a Subcommittee's work, information is circulated after a vote based on time constraints and information shared orally during a Subcommittee's deliberations. Does this procedure apply to the majority position as well? If not, why not?

The proposal adds new requirements for minority reports:

- They should not include any data or information not introduced on a Subcommittee call; and
- They should be submitted in a timely manner, and will not be accepted after the Subcommittee has voted on its recommendation.

The second of these requirements is impossible to implement, since it could not be determined which is the "minority" opinion until after the vote. The first also does not make sense because the voting process may clarify issues that were not obvious before the vote –or the agenda may not have permitted full discussion– though it is obviously in the interest of each subcommittee member with an opinion on the issue to bring forward relevant information as early in the process as possible.

The proposal also says, "The minority report is presented for information purposes only, and it cannot be acted upon unless there is a motion to substitute it for the report of the Subcommittee." This needs to clarify when such a motion can be made and ensure that an opportunity exists to make such a motion. The NOP may either facilitate the views of all the

stakeholders being articulated and presented to the public as part of a robust consideration of issues, or stifle the rich discussion that has helped grow the organic market. Inviting those discussions and opinions into the NOSB process will ensure that the board is in touch with the range of views that make up the organic community and industry. To do otherwise, will be to stifle the process and undermine the statutory responsibility of the board.

We made this comment in the fall and the PDS seems to miss a critical point of stakeholder representation in the process and public disclosure of the points of view: “The PDS disagrees with this comment. The minority view section was revised to better integrate the minority view into the final NOSB proposal and discussion as well as to facilitate a collaborative NOSB process. Objections raised by this commenter advocate for the NOSB to maintain an uncollaborative and potentially unproductive process with its own members - this is opposite to the objective of the PPM.” Again, the PPM language change in this and in other sections is misappropriating the term collaborative and conflating it with the term concurrence or consensus. Congress never intended that positions of the NOSB emerge with one viewpoint. That is why it sought to establish a board with all possible viewpoints represented. The public wants to know that the facts and science were fully considered and subjected to criteria of the law? Would the drafters of this language somehow suggest that other deliberative bodies, such as the Supreme Court, do away with elaborate and well-researched and cited minority opinions because they are “uncollaborative”?

Let's start over again. There are two main reasons that minority opinions must go forward to the full board:

1. They inform the NOSB and the public of the full range of issues that were discussed by the subcommittee relative to the issue.
2. They permit a full range of possible actions to be considered by the board. The NOP has not allowed the NOSB to vote on a motion that is “substantively different” from the motion proposed by the subcommittee. (This is now in Section VIII.D. of the proposal.) The test contains these points:
  - The extent to which a reasonable person affected by the recommendation would have understood that the published proposal would affect his or her interests.
  - The extent to which the subject of the recommendation or the issues determined in it are substantially different from the subject or issues involved in the proposal.
  - The extent to which the effects of the recommendation differ from the effects of the proposal.

Thus, the proposal as reported out of subcommittee should contain both a full discussion of issues raised in the subcommittee as well as either motions that encompass the full range of options that could result from consideration of those issues or a statement that the board might entertain such options.

An example is the Livestock Subcommittee’s proposal concerning three parasiticides. Public comment supported removing one or two of the three materials from the National List. A discussion document also considered those options. The Livestock Subcommittee (LS) proposes



not to remove any, but to add annotations. A motion to remove one or two of the materials would be consistent with evidence that has been presented, but the LS made not mentioned the possibility, so such a motion could not be considered at the meeting.

The PDS might replace the minority opinion bullet with something along the following lines:

The Subcommittee report should contain a full and accurate account of the issues discussed in relationship to the proposals, as well as an indication of other proposals that might reasonably arise as a result of the discussion. The viewpoints that are not in concurrence with the proposal supported by the majority may be presented in the form of a minority report if, in the opinion of the proponents of those views, it is the best way to ensure a fair consideration of their views.

### 3. Other issues of transparency

- **Minutes of the Administrative Team and NOSB working groups and task forces should be posted in a timely fashion.** This provides transparency both to the Board and the public and neither draft of the PPM allows for this governmental openness.
- **The PPM should incorporate the “Public Communications” recommendation of spring 2012.** The recommendation said:  
PPM, Section VI, Miscellaneous Policies, page 26 is amended by adding a new subcategory (in italics):

***NOSB Policy on Its Advisory Role and Communication with the Secretary of Agriculture** Based on the communications and input it receives from the public the National Organic Standards Board may provide effective and constructive advice, clarification, and written information, as it deems necessary, directly to the Secretary of Agriculture after each of its Board meetings. This information is intended to facilitate public communication with the Secretary on critical issues that may emerge that it believes are important to the implementation and integrity of the organic standards and practices under the Organic Foods Production Act.*

PPM, Section VI, Miscellaneous Policies (page 27), is amended by adding a new subcategory (in italics).

***NOSB Policy for Public Communication Between NOSB Meetings.***

*The NOSB accepts public communications to NOSB members outside of Board meetings and public comment periods to inform the ongoing deliberations of committee work. The Board requests that communications on specific subject matters be sent to the entire Board membership of the relevant committee or, on matters relating to the full Board, be sent to all Board members.*

PPM Section II (page 13) Role of the Executive Director is amended to include the following language (in italics):

- *Receive and maintain an archival record of all communications submitted by the public to the National Organic Standards Board and make communications available to the Board members.*
- *Maintain a public listing posted on the NOP website of contact information for NOSB members, including an email address or other points of contact.*

## Deficiencies of the PPM as Bylaws

As mentioned above, the PPM serves as bylaws for the NOSB. Here we address some issues that should be addressed in relation to that function.

### Definitions

Although bylaws do not typically have a section on definitions, they do define terms that require additional clarity. In the case of the PPM, some terms (not an exhaustive list) that need definition are: *collaboration*, *work agenda*, *advice to the Secretary*, and *minority opinion*. Public comment should be sought specifically on this issue.

### Board membership

Bylaws define membership in the organization. **The appointment process should also be much more transparent and should be consistent with OFPA.** Direction is meant to come from the organic community as a whole, since OFPA §6518(c) requires that board appointments originate “from nominations received from organic certifying organizations, States, and other interested persons and organizations.” **The PPM should offer guidance to USDA in appointing board members in such a way that incorporates nominations from the constituencies that members represent.**

### Presence at a Meeting

It is central to any set of bylaws to define what counts as presence at a meeting –especially if “presence” is to mean anything other than physical presence. We commented on this issue in the fall, pointing out that the proposal removes, “At this time, full Board conference calls or full Board assembly via electronic bulletin board are not permitted.” It adds, under quorum: “In cases of a medical situation preventing attendance in person, a virtual presence is permitted.” It deletes, under election of officers, “Only NOSB Board Members present are eligible to vote for nominated officers. Absent NOSB members will not be eligible to vote.” [Emphasis added.] We argued that before electronic participation in NOSB meetings is allowed, the PPM must clarify the situations, medical or otherwise, in which it would be allowed.

The PDS’s dismissal of this comment by characterizing it as “objections to greater meeting accessibility” is preposterous. The PDS responded,

The NOSB strives to increase access to its meetings to members of the public and to its own members, regardless of their abilities to travel to the NOSB meeting. It would not be in the interest of the public, the NOSB and people of all abilities to limit access and

refuse to use current common communication technology where the medical need is present.

Our comments are clearly not intended to object to greater accessibility. In fact, we stated, “We encourage the NOSB and NOP to expand opportunities for public comment.”

However, the provision for allowing NOSB members to participate when not physically present is a significant change, and **the PPM must be specific regarding the conditions under which electronic participation will be allowed and what mechanisms will be used to approve such participation.**

RONR states, “It is a fundamental principle of parliamentary law that the right to vote is limited to the members of an organization who are actually present at the time the vote is taken... Exceptions to this rule must be expressly state in the bylaws.”<sup>22</sup> The reasoning given in RONR is that those who are physically present at a meeting can be influenced by debate, amendments, and the need for repeated balloting, that would not affect those who are not present. Clearly, electronic presence can be arranged in such a way to ensure the exposure of remote participant to those experiences. However, **the requirements for remote participation must be spelled out in the PPM to ensure those members are actually participating.**

There is also a question of how many people can participate remotely at a single meeting. While it did prove possible for one person to interact remotely with the rest of the board at the fall meeting, it is not clear that two or more people could join the meeting remotely and be able to participate fully. **The PPM must address the question of how many board members can participate remotely at a single public meeting.**

Finally, electronic participation in the meeting also limits interactions between the remote participant and members of the public. The ability to interact with NOSB members directly during breaks as well as during the meeting draws people to the meetings. The NOSB meetings have moved around the country so that more people can participate in this direct interaction. **The PPM should acknowledge the importance of direct face-to-face communication between board members and the public and state that electronic means of participation in meetings will be used only to the extent that it does not interfere with that interaction.**

## Public Comment

**The NOSB should decide the length of public comment.** The proposal allows four minutes for each commenter, with the option of altering it to three or five minutes *at the discretion of the NOP*. The power to accept requests for longer or shorter comments should remain with the NOSB, not the NOP. The time allotted for public comment should only be limited if there is a clear and present need for time saving measure. The proposed draft also states that “Persons must give their names and affiliations for the record at the beginning of their public comment.”

---

<sup>22</sup> RONR, p. 423.

In addition to affiliations, consultants or anyone working on behalf of another party should disclose the name of their clients at the beginning of public comment.

### **Election of Officers – Eligibility to Vote**

The “eligibility to vote” section was deleted from the 2012 PPM. The absence of the language requiring Board members to be present in order to cast a vote in the election of officers may allow Board members to vote on nominations while absent. This could allow for mailed ballots or proxies, both of which should be prohibited. **Regardless of how “presence” is defined for the purpose of participation in meetings, the eligibility to vote also needs to be defined.**

### **Voting**

Changes in voting practices occurred at the spring 2015 meeting without a corresponding change PPM language. The standing procedure for recording votes was to record the individual board member votes for changes to the National List. These were recorded by the NOSB Secretary and the transcript. This “roll call” voting was changed, without public comment or any formal procedures.

Voting was done by a show of hands at the spring 2015 meeting. The record only shows the total votes rather than where the votes are coming from. By itself, this change raises questions about how the record can remain complete and inform that the public about the workings of the NOSB.

With respect to the material review process, the proposed PPM states: “Voting may be by show of hands, roll call, or by use of modern voting devices.” Both the current PPM and the proposal require that the votes of “each” board member be recorded. Although they are recorded, the votes through the show of hands are not necessarily visible to the public and are not part of the public record as published in the transcript. Since members of the NOSB are “representatives” of various parts of the organic community, the members of the community should be able to see how their representatives on the board voted. **The proposed language should be replaced by “Voting will be by roll call vote.”**

### **Subcommittee Procedures**

The proposal deletes details on how subcommittee recommendations are finalized (including the guide for posting for public comment, statement of motions in the positive, and the process for reviewing public comment). **The fact that these subcommittee procedures have been deleted can create confusion and may allow the NOP to take over this function.**

### **Board standards of behavior**

The NOSB must act impartially and not give preferential treatment to any organization or individual. In the past, board members have been willing to meet with, and accept emails and written documents from certain organic stakeholders while shunning others. Whether or not a board member agrees with particular public constituencies, it should be clear that **the NOSB has an obligation to accept input from all US citizens and the organizations that represent them.**

## **The process for NOSB resignations, particularly forced resignations, should be better defined.**

The proposal adds the following:

The NOSB typically has a heavy work load and thus active participation by all 15 members is essential to carry out the mandates in OFPA. When one or more members fail to actively participate in Board work the entire NOSB and the organic community is negatively impacted. If a Board member finds that s/he cannot consistently attend Subcommittee meetings, take on work assignments, complete Subcommittee work in a timely manner, or cannot attend the twice-yearly public meetings and public comment listening sessions, the NOSB Chair shall discuss the matter with the Board member, bring the concerns to the attention of the Executive Subcommittee, and if necessary encourage the Board member to resign.

We support the concept of ensuring that all 15 members of the NOSB are actively contributing. However, this proposal requires improvement in two respects: it should be specific about the situations that trigger the Chair or Executive Subcommittee to “encourage” a resignation; and, it should provide a process for NOSB members to correct conditions that might be leading to a lack of participation.

We would not dictate these conditions for the board, but a reasonable condition would establish some standard for reporting a reason if a board member misses some number of meetings. This would prevent the provision from being used arbitrarily to push someone off the board.

Secondly, it is possible that the failure of a board member to participate arises from problems within the NOSB, NOP, or NOP-NOSB collaborative process that can be corrected. Therefore, a grievance procedure should be established. If a board member believes that s/he has a grievance with the way the NOSB is being managed, s/he should be able to file a grievance with AMS and receive a response within 30 days.

We made this comment in the fall. The PDS responded, “The NOSB has no authority to force the resignation of any of its members, this authority lies with the Secretary. This section only details circumstance where members should be encouraged to resign if they are not participating in the work of the NOSB.” This view has value, but triggers for communication with the Secretary requesting him or her to take action would make any such action less arbitrary.

## **Conflict of interest (COI) policies.**

A basic tenet of democracy is that decisions are made in an open fashion with transparency, based on rules known to all. This contrasts dramatically with dictatorial forms of government all over the world that have thrived on enforcement of rules known only to the enforcers. In that respect, this proposal seems to establish a system that enforces rules without clearly stated criteria and does so out of the public’s eye.

The NOSB, being a Federal Advisory Committee established under FACA (though with additional authority) and composed of “representatives,” is not subject to the same legal requirements that apply to a board composed of government employees or special government employees. The fact that the NOSB is not subject to those rules does not mean that no rules apply to them. There are “applicable COI statutes and regulations” that apply to the board. But we believe it is arbitrary and capricious for the NOP to act on the authority of statutes and regulations that are presumed and not specifically stated and referenced.

We support the efforts of the NOSB to write policies governing conflict of interest of its members, but those policies should remain the board’s policies and not become the NOP’s policies. The board should not abdicate responsibility for the enforcement of any policies that it establishes for itself in this area. It is very important that the NOSB operate, as it was intended by Congress, with independent authority in this and other areas as it collaborates with the NOP.

At the same time, we recognize that NOP may seek to adopt policies that it believes is under its legal authority and should do that with complete clarity and complete citation of applicable laws.

So, there may be two sets of COI rules applicable to the NOSB –those created by Congress and agencies of the federal government in statutes and regulations, and those created by the NOSB and codified as policies in the Policy and Procedures Manual. The NOP is responsible for enforcing the first, and the NOSB is responsible for enforcing the second. Insofar as this proposal seeks to establish procedures for enforcing applicable COI statutes and regulations, it totally fails to be transparent because the applicable statutes and regulations are never named. With regard to the establishment of NOSB policies and procedures, the proposal lacks transparency because conflicts are not disclosed to the public, and may not be disclosed to the full board itself.

We commented on this in the fall, and the PDS response provided no detail: “The PDS believe [*sic*] the COI procedures for NOSB members is clear and aligned with other governing documents.” The NOSB has adopted COI policies and procedures that require open disclosure of potential conflicts. The proposal incorporates the NOP changes that are not publicly transparent, but divulge potential conflicts only to the NOP. The NOP changes also do not divulge the statutory basis of the criteria, nor the particular bases for decisions. They allow for arbitrary decisions based on vague, nonpublic criteria. The COI policies in the current PPM are clear, and allow for a public application by the NOSB itself. If the NOP has additional criteria that it thinks should be applied, it should state them publicly and apply them publicly.

An issue that should trigger the board’s concern occurs when NOSB members make statements from a narrow viewpoint not indicative of the voice their seat is intended to fill. For example, an NOSB member with *professional* ties to large-scale producers might make supportive comments toward a specific material from the perspective of that scale, leaving the views of smaller scale producers unrepresented.

Discussion of potential conflicts that might exist for board members should be discussed in public not in private conversation with NOP. In this sense, these guidelines overstep the NOP's authority to control the process, since the board has historically conducted potential conflicts in public with the board making a determination in public. If NOP were to disagree with the decision of the board on a conflict of interest, it is free to do so in public. While it is understood that Board members may want to consult on the interpretation of the conflict of interest standard, that determination process should be a public one. To the extent that these issues of potential conflict are discussed in public, the transparency strengthens the public belief in the fairness of the process and trust in the organic label. To the extent that the board operates under a veil of secrecy, the value of the label is damaged.

## Materials Review Policies

### Third Party Reviews

NOSB decisions are based to a large extent on information provided by Technical Reviews and Technical Advisory Panels. OFPA explicitly gives the authority to the NOSB to direct third party reviews of materials, stating: "The Board shall convene technical advisory panels [TAPs] to provide scientific evaluation of the materials considered for inclusion in the National List. Such panels may include experts in agronomy, entomology, health sciences and other relevant disciplines."<sup>23</sup> Although both the 2012 PPM and the proposal quote this language directly, TAPs have been convened by USDA, and not the NOSB. The PPM should reflect the law governing the NOSB and its duties and actions.

The NOSB currently relies upon information within the Technical Reports provided by the NOP and public comment to make its final recommendations, rather than TAPs. TAP reviews have the advantage of offering different perspectives on the technical information, thus assisting the NOSB subcommittee in its understanding of the material.

There is no reference to evaluation questions that are in the 2012 PPM. Instead, the new draft places an emphasis on the "contract" the third party experts have in the proposal. Evaluation questions are important and valuable information that should be found in the PPM.

Part of the reason that TRs and TAP reviews are so widely used is that, compared to research undertaken by individual NOSB members, these reviews are assumed to be more neutral. But this is not necessarily the case. Individuals working for contracted reviewers may also have conflicts of interest, and their interests are not disclosed to the NOSB or the public. Therefore, we suggest that another point be added in the following sections.

On Third Party Technical Reviews:

Potential contractors will provide a disclosure of interest statement for both the company and individuals who will be doing the work. This disclosure will be included on the first page of the

---

<sup>23</sup> OFPA § 6518(k)(3).

report. Such disclosure will include any financial interests that he or she has that can be reasonably assumed to influence his or her presentation or content.

On Technical Review Sufficiency Determination:

The subcommittee will review the disclosure of interests submitted by the contractor to determine that no conflict exists that would interfere with the ability to fully evaluate the material without bias.

### **The Sunset Review policy changes.**

We are not commenting on the changes to sunset review procedures because we are in litigation with USDA on changes to the sunset process that were published in the Federal Register without opportunity for public comment on September 16, 2013. We have previously submitted extensive comments on sunset.

### **Conclusion**

**OFPA created the NOSB as a means of ensuring that the organic community retained independent influence and key lines of authority over the organic program, despite being located within USDA, which often takes positions viewed as hostile to organic integrity. The Policy and Procedures Manual (PPM) is the instrument through which the NOSB maintains its ability to set the course for organic production in the United States and advise the Secretary of Agriculture on implementation of organic law. The NOSB must not relinquish that independent authority and the high degree of public involvement that has been the cornerstone of a burgeoning organic sector by weakening the decision making process contained in the PPM. Central to public trust in the USDA organic label is the public's trust in the decision making process that governs organic materials, standards, and criteria, and it is the PPM under the direction of the NOSB that ultimately holds the responsibility for ensuring organic integrity.**

Thank you for your consideration of these comments.

Sincerely,



Terry Shistar, Ph.D.  
Board of Directors