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September 14, 2019

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

Docket ID # AMS-NOP-19-0038

Re. CACS: Oversight Improvements to Deter Fraud

These comments to the National Organic Standards Board (NOSB) on its Fall 2019 agenda are submitted on behalf of Beyond Pesticides/OrganicEye. 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/OrganicEye 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.

We support the measures in the Spring discussion document. We are disappointed to see a total lack of activity on the part of the CACS, as indicated by an absence of subcommittee notes since February. The failure to report on and follow through on this serious matter risks undermining public trust in the organic label—which the NOSB is entrusted with protecting through its ongoing statutory responsibility to advise the Secretary of Agriculture. In addition to supporting the proposals offered by the CACS in the Spring, our comments propose further action that we believe should be taken by the NOSB.

Fraud prevention and enforcement is essential to the integrity of the organic label.

It is absolutely essential to any government or private standard setting process that enforcement and compliance is operating effectively and trusted by the public. Without an effective enforcement system, the value of the USDA organic label is undermined in the market. Whether related to imported or domestically grown food, enforcement against fraud and an assurance of compliance with organic standards is critical to the ongoing growth and stability of the organic market.

Organic fraud is potentially a problem for domestically and foreign grown and processed organic food.

Fraud is potentially a problem for all food labeled organic, whether produced domestically or outside the U.S. It is a problem whenever someone or a company portrays as organic a product that does not meet the standards for organic certification. Fraud hurts all sectors of the organic community—especially organic producers who follow the letter and spirit of the law and the consumers who depend on the market to provide organic food that meets organic standards. Fraud is a problem when, for example, crops are grown with prohibited inputs, when livestock do not get the required access to pasture, and when crops are produced in artificial media and, therefore, not in compliance with organic standards.

Consumer trust and organic farmer and handler investments are jeopardized by ineffective oversight and enforcement of organic standards by USDA. USDA and accredited organic certifying agents are generally meeting expectations, but the enforcement process has fallen short in several instances, and additional actions are needed to safeguard the integrity of the organic label. We appreciate that organic producers are subject to much more rigorous oversight than their counterparts in chemical-intensive or “conventional” production and processing. This is understandable given the high level of organic consumer expectation and the market premium. However, it is critical that we address any compliance limitations of the organic certification system when it occurs and ensure corrective action in a timely fashion with full transparency. Without this kind of response, public trust in the organic food label will suffer dramatically. Additionally, to the extent that the enforcement system is known to be highly rigorous, it will decrease the likelihood of aberrant behavior.

Reporting by the *Washington Post* in 2017 has highlighted failures of USDA’s oversight of certified organic products. Most of these problems are ongoing. In particular, public attention has been drawn to imports of nonorganic grain entering the certified organic stream of commerce, organic factory eggs, and questionable organic milk. All of these reports raise questions about the integrity of the organic label and whether consumers are getting the quality they expect. The investigations that uncovered this fraud have not been undertaken by the National Organic Program (NOP), but by independent organizations like The Cornucopia Institute, Consumers Union, and Organic Farmers’ Agency for Relationship Marketing (OFARM).

In August 2017, USDA’s Agricultural Marketing Service (AMS) asked the National Organic Standards Board for “recommendations on improving the oversight and control procedures that are used by AMS, certifiers, and operations to verify organic claims for imported organic products.” The first recommendation should seek a broader review than the narrow question that NOP asked. The documented and potential problems go beyond imported organic products and include domestic certification of hydroponic operations, poultry and dairy factory farms subject to the *Post*’s investigative report, and fish from fish farms.

The fraud problem is complex.

As indicated by the long list of proposed actions from the Certification, Accreditation, and Compliance Subcommittee (CACS), there are many aspects to the fraud problem. Just as the fraud problem is complex, so is the required strategy to prevent it. Regulations must be clear, so that they can be enforced. NOP must have the will to enforce, whether the violator is large or small, foreign or domestic. For this reason, it is important to include consideration of conflicts of interest, as outlined by The Cornucopia Institute's Fall 2018 comments. Therefore, the NOSB and NOP must craft a multi-faceted strategy if it is to prevent organic fraud and ensure continued public trust in the USDA organic label.

Some Identified Problems

Organic grain imports

Certified, imported, organic products are required to meet the same standards as certified, domestically produced, organic products. Concerns have been raised about enforcement procedures governing organic grain imports from Turkey. These procedures have fallen short, allowing a surge of soybean and corn imports fraudulently labeled as organic. The 2017 *Washington Post* investigation found that some of those imports have been fraudulently labeled.

Poultry animal welfare standards are required.

Inconsistent enforcement of federal organic standards has been an ongoing problem in the organic poultry and egg sector. To address this problem, USDA published a long overdue regulation to require ALL organic poultry and egg operations to provide meaningful outdoor access for chickens in compliance with the law. In what we believe is a violation of law and certainly bad faith, the Organic Livestock and Poultry Practices rule has been blocked by NOP, which sends the wrong message to a market that is reliant on public trust in the certified organic label. Ironically, most certified operations already meet the standards in the withdrawn rule, but the rule would have helped to create more uniformity in meeting the needs of organic farmers and the expectations of consumers. This failure by NOP to follow through on a NOSB recommendation sends the wrong message to the organic market, and has the effect of causing it long-term economic harm.

Dairy pasture rule enforcement is required.

In 2010, after an open and transparent public rulemaking process, USDA put in place a detailed set of rules to ensure that all certified organic dairy farmers were giving their animals meaningful access to pasture. Similar to the current poultry situation, most dairy farmers were already meeting that standard, but a few very large dairy operations were using a loophole in the regulations to skirt those requirements. However, in some cases, dairy enforcement is still falling short, and some large operations continue to deny their animals meaningful access to pasture.

Hydroponics violates organic standards.

Contrary to a 2010 recommendation by the NOSB, NOP has been allowing hydroponics operations to be certified as organic. This reversal of an NOSB decision without any new scientific information undermines the NOSB process and will have a devastating long-term impact on the credibility of the organic label. In response, organic stakeholders, including growers, consumers, processors, and retailers, have come together around an add-on label that will inform consumers that their organic food has been grown in the soil and managed in accordance with the intent and spirit of Organic Foods Production Act. This add-on label will provide transparency so that consumers can be assured that farmers are engaged in the practices of soil-based agriculture, which are foundational to the principles and values integral to the law.

Those engaged in developing the add-on label are following the long history and legal standards of the organic law, building on its foundation and utilizing the marketplace to enable consumers to make decisions aligned with organic principles and values. To the extent that the NOSB advances an agenda that is divergent from the law with NOP oversight, the program will become increasingly irrelevant, as market forces respond to consumer expectations. And, should USDA seek to change the law, it will inflict grave harm to the value of the USDA organic label.

From its very beginnings, the organic sector has been driven by an alliance of farmers and consumers who defined the organic standards as a holistic approach to protecting health and the environment, with a deep conviction that food production could operate in sync with nature and be mindful of its interrelationship with the natural world—protecting and enhancing the quality of air, water, land, and food. These standards, integral to organic, certainly do not preclude the adoption of other methods that can identify themselves as offering other assets, but adherence to the principles of organic cannot be compromised if we are to sustain the organic market in the future. So, from this perspective, we have a serious fraud and enforcement problem with the current allowance of certified organic hydroponic production.

Aquaculture violates organic standards.

In spite of a lack of standards, NOP has allowed certified organic fish from foreign aquaculture operations to be sold in this country. While the NOSB has never recommended the allowance of synthetic chemical-based aquaculture production practices as certifiable under organic standards, USDA has allowed the importation of fish produced with those very production processes. This allowance constitutes an enforcement and compliance violation.

Fraud crosses boundaries between production categories, as well as between countries.

Fraud in one sector is often linked to fraud in another sector. Excessive imports of feed grains may reflect fraudulent production practices abroad, but they may also reflect livestock production facilities that are overly dependent on grains because they do not provide the required pasture for livestock.

NOP must investigate citizen complaints.

NOP must take seriously complaints filed by citizens and nongovernmental organizations (NGOs). Fraudulent imports have been discovered by OFARM, and fraudulent livestock practices have been documented by The Cornucopia Institute. In both cases, there was systematic fraud, but NOP has tried to ignore the complaints.

The withdrawal of the Organic Livestock and Poultry Practices (OLPP) rule is counterproductive.

The withdrawal of OLPP is counterproductive to fraud prevention. In the statement of purpose when the rule was proposed, AMS said:

This proposed rule would create greater consistency in organic livestock practices. AMS has determined that the current USDA organic regulations (7 CFR part 205) covering livestock health care practices and living conditions need additional specificity and clarity to better ensure consistent compliance by certified organic operations and to provide for more effective administration of the National Organic Program (NOP) by AMS. One purpose of the Organic Foods Production Act of 1990 (OFPA) (7 U.S.C. 6501-6522) is to assure consumers that organically produced products meet a consistent and uniform standard (7 U.S.C. 6501). By facilitating improved compliance and enforcement of the USDA organic regulations, the proposed regulations would better satisfy consumer expectations that organic livestock meet a uniform and verifiable animal welfare standard.

Thus, OLPP is intended to help prevent fraud by clarifying the regulations and creating greater consistency in enforcement.

Peer reviews can help identify opportunities to reduce fraud.

The 2016 Peer Review of the National Organic Program identified a number of opportunities for improvements that would aid in preventing fraud. They include the following.

Requirements vs. guidance:

- There were a number of inconsistencies in use of specific words which have legal interpretation, such as “recommend,” “require,” “should,” “shall,” “must,” and “may.” Incorrect or inconsistent usage of these words and inadequate citations or interpretation of policy or procedure lead to confusion for certifiers or create a legally unenforceable compliance issue. For example, in one file, the noncompliance asserted NOP 2609 as “requiring” certifying agents to conduct unannounced inspections ... when in fact NOP 2609 states ...”*We **recommend** that certifying agents conduct unannounced inspections of 5% of their total certified operations per year.....*”. The NOP Reviewer completing NOP 2005 under Section 205.403 is prompted to assume noncompliance when the certifier has not conducted 5% unannounced inspections. This leads to unenforceable noncompliances being issued.
- NOP 1100 (3/9/11) indicates that program documents “are not applied as binding requirements.” Thus, Guidance, Instruction, and Policy Memo documents do not

themselves establish legally enforceable rights or responsibilities and are not legally binding on the public or program (NOP 1100 - *Legal Effects*), and yet NOP 2609 is used in findings of noncompliance in unannounced Inspections, as are NOSB Recommendations from October 20, 2002 and November 19, 2008 regarding grower groups.

Inadequate oversight:

- Records and required forms in files reviewed do not consistently include the required signature of an NOP official. For example, form LPS 109, dated 8/26/15, in one file does not include the required NOP signature.

Notifications to NOP/Residue Testing:

- “[N]o evidence was observed indicating that the requirements of 205.400(f) (1-2) are assessed during NOP audits. 205.400(f)(1-2) requires that certified operators and applicants must “immediately notify the certifying agent regarding any: (1) application, including drift, or a prohibited substance to any field, production unit, site, facility, livestock, or product that is part of the operation; and (2) change in a certified operation or any portion of a certified operation that may affect compliance...”
- A review of NOP 2005 “Accreditation Assessment Checklist” reveals no questions under section 205.400 to assess certifying agents’ procedures and performance requiring certified operations and applicants to immediately notify the certifier regarding the application of prohibited substances or changes to their operations that may affect compliance, as required by 205.400(f)(1-2).
- NOP 2024, “Information Submission Requirements for Certifying Agents,” and NOP 2024-1, “Annual Report Checklist,” itemize the information that must be submitted by certifying agents to the NOP. There is no mention of the submission of analyses and residue test results, as required by 205.670(d)(1).

Composition of products labeled “organic”:

- All labels making “organic” claims are to be reviewed by certifying agents to determine that the products’ composition, percentage of organic ingredients, and market information are in full compliance with all applicable requirements. NOP 2005 “Accreditation Assessment Checklist” contains detailed “Label Review Worksheets 6a, 6b and 6c.” The worksheets contain extensive instructions to auditors regarding the review of labels making “organic” claims. However, the worksheets contain no instructions for the review of product composition or the review of calculations used by certifying agents to determine the percentage of organic ingredients. Such calculations of organic content directly affect the label claim that can be used on a product making an “organic” label claim.
- All five accreditation files reviewed indicate NOP auditors use the label review worksheets in NOP 2005 to determine if label reviews are handled correctly by certifying agents. The comments entered on the worksheets revealed that NOP auditors do not assess product composition or the method used to calculate the percentage of organic ingredients. One of the NOP auditors recognized this point by stating, “Composition was not reviewed for this

product.” In spite of this, the NOP auditor stated, “No issues noted by the auditor regarding the label.”

- Reviewed accreditation files indicate that NOP auditors, during label reviews, do not assess product composition or the method used by certifying agents to calculate percentage of organic ingredients.
- This review found no forms or instructions for auditors to assess the regulatory status of ingredients and processing aids allowed by certifying agents. An extensive review of NOP procedures and accreditation files finds no guidance for auditors regarding the use of minor ingredients, processing aids, and other non-agricultural substances, including nutrient vitamins and minerals in infant formula and petitioned substances rejected by the NOSB, used during processing that do not appear on the National List.
- No evidence was observed indicating that all ingredients and processing aids allowed by certifying agents were verified by auditors as being in compliance with National List requirements (annotations).
- No evidence was observed demonstrating that NOP has established procedures for auditors to assess certifying agents’ disallowance of substances rejected by the NOSB.

Imports and Equivalency Agreements:

- This review did not access NOP’s compliance with 205.500(c), which addresses the approval of foreign governments’ accreditation programs and equivalency agreements.
- NOP 2402 is not as complete as NOP 2005 and does not address Export Certificate authorizations for products exported to the European Union, Switzerland, Canada, Korea, or Japan.

Various documentation deficiencies:

- NOP 2005-4 “Witness Audit Checklist” contains a number of questions for inspectors, but does not direct the NOP auditor to ask whether the inspector was provided a copy of the previous inspection report and notified of the certification decision and corrective action requirements.
- Consistent accreditation application forms are not being used and retained in order for the NOP to be in full compliance with 205.502.
- One accreditation certificate provided by the NOP expired on Jan. 22, 2013.
- The review of NOP accreditation procedures and five accreditation files reveals that NOP auditors review certifying agent complaint files during audits and report their findings. Complaint files were not provided for review. This includes complaints against certifying agents and complaints against NOP.
- In a letter of proposed suspension, NOP did not provide sufficient details for the suspension, as required by 205.665(c1).

Technology should be employed to prevent fraud.

There are companies providing tracking technology that can assist in preventing fraud. These technologies should not be viewed as a silver bullet, but should be reviewed as a part of a comprehensive fraud prevention strategy. The needs that would be addressed and the capabilities of such programs should be thoroughly understood before embracing them.

Suggestions for NOSB Recommendations

Imported Grain

USDA should institute heightened procedures to ensure that all organic imports are meeting USDA organic standards. These procedures should include the following:

- A requirement that all imported organic products carry an electronic import certificate to help prevent fraudulent labeling of conventional product as organic;
- Implementation of a policy that triggers an immediate USDA audit of any international organic certifier whose accreditation has been revoked by a nation with which the U.S. has an organic equivalency agreement;
- Implementation of a policy that triggers an automatic investigation when there is an extreme surge in imports of an individual organic product category, such as seen recently with organic corn and soybean imports;
- The Global Agricultural Trade System (GATS), operated by USDA's Foreign Agriculture Service, should be updated to track imports of all organic products. Currently, the U.S. government only tracks the value and quantity of a limited number of organic imports product categories.
- The U.S. Customs and Border Protection's automated import/export tracking system, the Automated Commercial Environment (ACE), should be updated to build organic-specific fields and questions into the system. This would provide USDA and the organic sector with more standardized and detailed information about organic imports.
- Controls regarding fumigation of imports, as raised in the Office of Inspector General's (OIG) report: "Controls over organic products fumigated at U.S. ports of entry were inadequate," continuing, "Imported agricultural products, whether organic or conventional, are sometimes fumigated at U.S. ports of entry to prevent prohibited pests from entering the United States. AMS has not established and implemented controls at U.S. ports of entry to identify, track, and ensure that treated organic products are not sold, labeled, or represented as organic. As a result, U.S. consumers of organic products have reduced assurance that foreign agricultural products maintain their organic integrity from farm to table."¹ While the OIG's report relates to imports, we are also concerned about the possibility of fumigation in an uncertified facility, such as a warehouse, that may penetrate packages, as discussed more fully in our comments in Fall 2017 on Exempt/Uncertified Handlers/Brokers. With regard to imports, this issue could most thoroughly be addressed by

¹ USDA Office of Inspector General, 2017. National Organic Program –International Trade Arrangements and Agreements. Audit 01601-0001-21.

requiring that any port that engages in loading and unloading organic grain must be certified.

Dairy pasture rule

The NOSB should urge USDA to take immediate action to bring bad actors in the dairy sector and their organic certifying agents into compliance, or exclude them from the program. The NOSB should carry out its statutory duty to provide advice and consultation to ensure that USDA takes the necessary actions to tighten enforcement.

Hydroponics

The NOSB should insist that hydroponics operations be decertified unless regulations are adopted that provide standards for their management that are in compliance with OFPA. We do not view that as possible, given that OFPA is built on a systems approach in which nutrients are derived principally from the soil. This organic systems approach ensures that certified organic operates as intended—in sync with the natural environment, specifically soil biology and the food webs that are integral to sustaining life.

Aquaculture

The NOSB should insist that products of aquaculture not be certified organic in the U.S. without standards proposed by the NOSB and adopted by NOP. Similar to hydroponics, these systems may be viewed by some as having value, but current and proposed operations do not conform to the standards in organic law.

Conflicts of Interest

Decision making power and access to information and influence are invitations for corruption and are present when individuals move from employment between the NOP, certifier and certified entity. Precautionary measures minimizing the likelihood of abuse should be implemented where personal and professional relationships converge in ways that can facilitate fraud by those willing to engage in unethical conduct. Therefore, the NOSB should recommend the following factors be included in assessing certifier risk for fraudulent conduct:

- (a) the certifier provides services to an operation that employs a former member of the certifier's staff, or**
- (b) the certifier hires an individual who was previously employed by an operation it certifies, or**
- (c) the certifier engages a former National Organic Program employee as a consultant, board member, advisor, or employee.**

Overall

The Peer Review Panel must be convened annually. Its membership should be determined by the NOSB, and it should have the authority to request any files and evaluate any certifier that it judges to be appropriate. We concur with the recommendation of Peer Review Panel member Jim Riddle:

In a November 19, 2014 memo to the National Organic Standards Board, the NOP Deputy Administrator stated that a goal of the peer review was to establish a

“repeatable and transparent peer review process.” In order for the review to be repeatable and transparent, future panels must be provided the following: 1) nonconformities identified during previous audits; 2) corrective actions undertaken in response to previous audits; 3) internal audit reports; 4) management review reports; 5) complaint files; 6) files to assess the NOP’s compliance with 205.500(c) regarding the approval of foreign governments’ accreditation programs and equivalency agreements; and 7) the ability to conduct site visits and interview NOP auditors and other staff members.

In addition, NOC 2009 comments on compliance with §205.509 and the NOSB 2005 Recommendation on ANSI Audit of NOP Accreditation are still relevant to ensuring continuous oversight of NOP.

The procedures used to implement the Peer Review Panel must be publicly accessible, because they are an integral link between the public and the private aspects of the regulatory partnership instituted by OFPA. The process is just as important as the outcome, and we note that International Organization for Standardization (ISO) standards require all audit reports to describe the audit methodology. We understand that a new internal procedure on Peer Review has been outlined in the NOP’s Quality Manual, which should be available to the public.

Conclusion

The problems of inadequate oversight and enforcement by NOP go beyond imports of organic grains and also include poultry animal welfare, access to pasture for dairy, hydroponics, and aquaculture. We suggest specific remedies to these problems and also suggest programmatic changes to prevent future problems:

Imported Grain: USDA should institute heightened procedures to ensure that all organic imports are meeting USDA organic standards.

Poultry: USDA should put into effect the Organic Livestock and Poultry Practices proposed.

Dairy: The NOSB should urge USDA to take immediate action to bring bad actors in the dairy sector and their organic certifying agents into compliance, or exclude them from the program.

Hydroponics: The NOSB should insist that hydroponics operations be decertified until regulations are adopted that provide standards and substances for their management that are in compliance with OFPA.

Aquaculture: The NOSB should insist that products of aquaculture not be certified organic in the U.S. without the listing of allowed substances in the context of systems standards proposed by the NOSB and adopted by NOP.

Conflict of Interest: The NOSB should recommend precautionary measures to ensure that there is no conflict of interest in the oversight of certifiers.

General: The Peer Review Panel must be convened regularly. The procedures used to implement the Peer Review Panel must be publicly accessible. Its membership should be

determined by the NOSB, not the NOP, and it should have the authority to request any files and evaluate any certifier that it judges to be appropriate.

It is clear that the expression “one bad apple spoils the barrel” has direct application to the need for a strong, credible, and transparent enforcement system to ensure compliance with organic standards under OFPA. Without a strong and effective enforcement system, the certified organic label will become tainted over time. People do not expect a flawless standard setting governmental program that never encounters fraudulent practices. Organic farmers and consumers expect, however, that the systems are in place to prevent fraud, that, if found, it will be swiftly and competently addressed, and that a rigorous enforcement system will create a disincentive for additional fraud.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Terry Shistar". The signature is fluid and cursive, with a long horizontal stroke at the end.

Terry Shistar, Ph.D.
Board of Directors