



BEYOND PESTICIDES

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

October 2, 2015

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. HS: Flavors Proposal

These comments to the National Organic Standards Board (NOSB) on its Fall 2015 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.

Beyond Pesticides supports the proposal to annotate flavors. We also support the plan outlined by the Handling Subcommittee (HS) and urge its adoption as a recommendation by the NOSB by adding an expiration date to the listing. Finally, we thank the HS for its careful and concise description of the history and the issues.

While we are commenting on proposed changes in annotations to materials under sunset review, we do this under protest because of NOP's failure to follow legally prescribed public process when changing the rules governing the NOSB's policies and procedures. Although we support the adoption of changes at sunset to annotations that limit, but do not expand, uses of synthetic materials, and the application in 2015 or 2016 of the NOSB recommendation to that effect, NOP has disallowed this procedure after adopting it as a procedural rule change governing materials review. The record reflects that the NOSB-adopted procedural rule proposing the allowance of restrictive annotations at sunset involved a vote on the changed listing, along with a back-up vote on the current listing. The second, or back-up, vote was adopted to ensure that possible delays at USDA did not cause disruption when sunset rules required default removal of materials from the National List if relisting did not occur at the end of a five-year period. However, under the new sunset process unilaterally promulgated by the NOP on September 16, 2013 without public hearing and comment, the NOP policy now explicitly prohibits annotations at sunset.¹

¹ AMS/NOP issued a rule in 78 FR 56811 (September 16, 2013), stating, in part: "Can NOSB recommend a change to or addition of an annotation to a substance during Sunset Review? Can the NOSB recommend moving a substance to a different section of the National List during the Sunset Review?"

However, NOSB subcommittees are proposing to move forward listings with changed annotations along with a vote on sunset—for micronutrients and List 4 “inerts” on §205.601, List 4 “inerts” on §205.603, and flavors on §205.605(a). In addition, the HS is proposing to change the listings of alginic acid from §205.605(a) to §205.605(b) and carnauba wax from §205.605(a) to §205.606. These actions are not allowed by the current NOP-directed sunset procedure. Has NOP changed the procedural rules governing NOSB review of materials again? This abuse of agency discretion and failure to comply with administrative procedure regarding reinterpretations of rules governing materials review undermines a historically transparent and collaborative process and, we believe the, legal requirements in administering NOP and the NOSB. If the NOP and NOSB believe that there are instances in which the board should modify annotations and/or list at sunset—and we believe there are—then the NOP must revoke its policy and reinstate the board-adopted policy, prior to adopting changes to annotations at sunset.

As the HS points out, given the complexity of types of flavors, it is not always obvious what is organic about an organic flavoring product. When flavors were approved for addition to the National List in 1995, the NOSB laid out a plan:

- First, to list for use in organic foods flavors meeting these conditions (others for made with organic):
 - All of the flavor constituents used in the natural flavor are from natural sources and have not been chemically modified in a way which makes them different than their natural chemical state.
 - The natural flavor has not been produced using any synthetic solvent and carrier systems or any artificial preservatives.
- Second, manufacturers should document in their Organic Handling Plans progress towards wholly organic natural flavors:
 - 1) Natural flavor constituents and non-synthetic carrier base and preservative agents (e.g., grain ethanol, non-synthetic glycerin and non-synthetic acetic acid).
 - 2) Organic flavor constituents, organic carrier base, and organic preservative agents.
 - 3) Organic flavor constituents extracted using organically produced solvents, organic carrier base, and organic preservative agents.

No. For substances already on the National List, changes to or addition of annotations, or changes to the location of a substance on the National List (e.g., agricultural versus nonagricultural), cannot be proposed during the Sunset Process. In the past, NOSB made recommendations to further restrict the use of substances during Sunset Review. At times, these recommendations have not been exposed to robust public comment and have been difficult for AMS to implement through rulemaking actions by the sunset date. The difficulties with implementing these recommendations include the level of analysis required to assess how organic stakeholders may be affected by the recommendation and the deadline for completion of the Sunset Process. If the NOSB identifies new information that it believes merits reconsideration of a use restriction on a substance (e.g., to expand its use, further restrict its use, or correct its restrictive annotation) or the location of a substance on the National List, then a member of the NOSB or a member of the public can file a petition for changes to the use or classification of a substance through the National List Petition Process (www.ams.usda.gov/nop).” *National Organic Program –Sunset Process*. 78 FR 56811. See <http://www.gpo.gov/fdsys/pkg/FR-2013-09-16/pdf/2013-22388.pdf>.

The rule was published with the current listing, applying to both organic and made with organic foods on §205.605(a): “Flavors, nonsynthetic sources only and must not be produced using synthetic solvents and carrier systems or any artificial preservative.”

The current HS proposal, which is slightly stronger than the OTA petition, calls for the listing, “Non-synthetic flavors may be used when organic flavors are not commercially available. All flavors must be derived from organic or nonsynthetic sources only, and must not be produced using synthetic solvents and carrier systems or any artificial preservative.”

This is a small step along the path laid out in the original recommendation, according to which, producers of flavors used in organic foods should have –and presumably should have been acting on—a plan to move towards all-organic flavors. Given the elapsed time, we must agree with concerns voiced by the HS that the proposal does not go far enough. To address these concerns, the HS said,

It is the subcommittee’s opinion that this is just a first step and that future NOSB’s should continue to push industry in the development and adoption of organic flavors along the lines original envisioned in 1995:

Current - Natural flavor constituents and non-synthetic carrier base and preservative agents

Proposed, when commercially available: Organic flavor constituents, organic carrier base, and organic preservative agents

Future: Organic flavor constituents, organic carrier base, and organic preservative agents and then organic flavor constituents extracted using organically produced solvent, organic carrier base, and organic preservative agents.

It has taken 20 years to move from step one to step two in this progression. We suggest that in order to ensure that the final step will occur in the near future, the HS should add a deadline for moving to the final step. This could be accomplished by adding an expiration date (which would be the same as the next sunset date) to the proposed listing:

Until June 27, 2022, non-synthetic flavors may be used when organic flavors are not commercially available. All flavors must be derived from organic or nonsynthetic sources only, and must not be produced using synthetic solvents and carrier systems or any artificial preservative.

Thank you for your consideration of these comments.

Sincerely,



Terry Shistar, Ph.D.
Board of Directors