



BEYOND PESTICIDES

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March 31, 2014

National Organic Standards Board
Spring 2014 Meeting
San Antonio, TX

Re. NOP-NOSB “Collaboration”

These comments are submitted on behalf of Beyond Pesticides. 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, 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 groups around the world.

In these comments, we would like to address recent USDA actions that usurp and deny the authority of the NOSB granted to it under the *Organic Foods Production Act* (OFPA). We believe these actions endanger public trust in the organic label. We urge the NOSB to: not abdicate its responsibilities under OFPA; support motions to delist sunset materials in subcommittee; support a motion on every petition to add an annotation calling for an expiration date in 5 years; and disclose interests fully on every issue, and ask others to do so.

The National Organic Program (NOP), in effecting changes outside of the collaborative process defined in the NOSB Policy and Procedures Manual (PPM) does not meet with the expected process of NOSB and public review.

OFPA¹ directs the Secretary to consult with the NOSB,² and gives the NOSB the responsibility for advising the Secretary in all aspects of the implementation of the Act, as well as spelling out several specific areas of responsibility.

Responsibilities of the NOSB designated by OFPA include providing recommendations to the Secretary regarding implementation of the law and developing the proposed National List and amendments to the list. OFPA gives the NOSB the responsibility and authority to set limits on exemptions on the National List. Although USDA may refuse to issue exemptions recommended by the NOSB, it may not under the law,³ issue exemptions for synthetic materials other than those proposed by the NOSB. Moreover, the National List and changes to the National List must be “based on” recommendations of the NOSB.

¹ 7 USC Chapter 94 - Organic Certification

² §6503(c), §6506(c)(2)(ii)

³ 7 U.S.C. § 6517(d)(2).

In recent months, USDA has:

1. Established a Conflict of Interest policy that improperly influences the independent deliberation and full participation of the Board.
2. Prevented the NOSB from carrying out its duty to advise the Secretary by preventing the GMO Ad Hoc Subcommittee from recommending actions to the Secretary regarding seed purity;
3. Reversed long-standing NOSB policy on sunset;
4. Asserted the right to relist sunset materials in the absence of a recommendation by the NOSB and acted to relist in opposition to a recommendation by the NOSB;
5. Denied promised NOSB participation in writing guidance for biodegradable mulch film;
6. Pulled from the agenda of the fall 2013 NOSB meeting a definition of production aids proposal passed by the Materials Subcommittee, after having received public comment on a discussion document at the spring 2013 NOSB meeting;
7. Showed little progress on the implementation of an inert ingredients policy recommended by the NOSB;
8. Limited NOSB workplan to issues already priorities of NOP;
9. Restricted the scope of NOSB action to those within the authority of the NOP/AMS, contrary to the broader scope required by OFPA;
10. Changed organic policy making from one driven by the public process to one controlled by USDA, which can choose to dismiss critical issues.

In the comments on this issue that we submitted in Fall 2013, we addressed the first seven of these issues in detail. These comments will address the final three issues, which are part of a more general issue, the fact that USDA is, contrary to the requirements of the Federal Advisory Committee Act, exerting undue influence on the recommendations of the NOSB. The memo issued by NOP on February 27, 2014, and published on the NOP website on March 6, states, "Once a work plan is assigned to a subcommittee, NOP must ensure that the subcommittee is not inappropriately influenced by the appointing authority (e.g., the NOP itself) or by any special interest."

The duty to avoid inappropriate influence by the appointing authority does not begin upon assignment of a work plan to a subcommittee. It begins much earlier—with the appointment of the FACA committee members—and continues through all aspects of the committee's work. Recent actions by USDA will result in the NOSB's recommendations becoming totally dominated by the USDA, which is contrary to the purpose of FACA.

USDA limits the NOSB workplan to issues that are already priorities of NOP. In its February 27, 2014 memo, NOP states, "**USDA and NOP Priority:** Item must be a priority for the USDA/NOP." And again, "An item must have been a USDA and NOP priority to be on work plan." However, OFPA gives the NOSB the duty "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."⁴ This duty to advise transcends NOP priorities. Indeed, the

⁴ 7 U.S.C. § 6518(a).

NOSB should help to establish NOP priorities. This is further reflected in the responsibility, never undertaken by the NOSB, to “hire a staff director.” Clearly, OFPA intends that the NOSB play a large role in setting priorities of the National Organic Program.

Recent USDA/NOP pronouncements restrict the scope of NOSB action to those within the authority of the NOP/AMS, contrary to the broader scope required by OFPA. Again, OFPA requires 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.”⁵ Implementation of OFPA extends beyond the arbitrary limits of the NOP. For example, organic production is severely affected by unrestrained genetic drift from genetically engineered crops. NOP has no authority to take action affecting producers of genetically engineered crops or the allowance of the use of genetically engineered seed. The USDA does have such authority. Therefore, recommendations to the Secretary concerning actions that affect the production, sale, and use of genetically engineered seed fall within the purview of the NOSB.

Recent USDA/NOP announcements change organic policy making from one driven by the public process to one controlled by USDA, which can choose to dismiss critical issues. For example, NOP has changed the decision-making procedure for sunset—a procedure set by a public process—reversing the standard for the decision; has limited “timely” input into the sunset process to a time when the public does not have access to subcommittee proposals; has arbitrarily removed an agenda item; has imposed a conflict of interest policy that does not require public disclosure of potential conflicts; has limited public participation in policy decisions that affect the way decisions are made about organic production; and has required that USDA/NOP priorities drive the public process. The NOSB was designed to maximize public input from a community with strong and often conflicting views about the meaning of “organic.” Through that input and a definition of “decisive vote” that enforces concurrence of most of the community on any exceptions from the general rules of OFPA, the public has come to have trust in the USDA organic seal. That trust may be abruptly destroyed as a result of the USDA’s recent actions.

Through all of the above actions, USDA has exerted undue and inappropriate influence on the recommendations of the NOSB, by prohibiting the board from advancing recommendations that were inconvenient in some way for the agency. Again, we urge the board to reject the undue and inappropriate influence of the USDA that denies the NOSB and the public their due roles in setting organic policy. Please at least take the following actions:

1. Do not abdicate board responsibilities under OFPA. For example:
 - a. The Crops Subcommittee proposal on vinasse effectively leaves classification to the NOP. The NOSB must identify criteria distinguishing synthetic from nonsynthetic vinasse before proposing use restrictions.
 - b. The Compliance, Accreditation, and Certification Subcommittee’s proposals on retail certification guidance and 206(e) are not proposals at all. The first turns

⁵ 7 U.S.C. § 6518(a).

over the task to the NOP, and the second reissued a discussion document as a proposal without even addressing comments received.

2. In your subcommittee consideration of sunset materials, vote for a motion to delist. A motion to delist is the only way to ensure full Board participation in the review of the sunset material.
3. Introduce a motion on every petition to add an annotation calling for an expiration date in 5 years. Do not vote to support any petition to list a material that does not include an expiration date unless you are certain that the material should be on the National List forever.
 - a. Why? We're only asking you to do this if you think it likely that new information may arise in the next five years regarding health or environmental impacts, the need for the material, or its compatibility with organic agriculture. If so, the material should be reconsidered according to the standards for listing a material—with a decisive vote required for relisting. Under the new sunset rules imposed by the NOP, this can only happen if the material is re-petitioned.
 - b. It doesn't mean you need to vote for the material. If you don't want to vote for the material, you should regard the expiration as a fail safe –if the material is listed, then the NOSB will at least have a fair chance to reconsider in 5 years.
4. Disclose your interests fully on every issue, and ask others to do so.
 - a. Why? The NOP policy allows but does not require public disclosure of possible conflicts of interest.
 - b. As an NOSB member, you should know the viewpoint from which information provided by your fellow board members arises. You may think you know, by virtue of that person's official constituency, but you may not know that person's private business dealings.
 - c. Create peer pressure for disclosure.

Thank you for your consideration of these comments.

Sincerely,



Terry Shistar, Ph.D.
Board of Directors

Attachment: Comments from Fall 2013 on NOP-NOSB collaboration



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September 27, 2013

National Organic Standards Board
Fall 2013 Meeting
Louisville, KY

Re. General: NOP-NOSB “Collaboration”

These comments are submitted on behalf of Beyond Pesticides. 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, 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 groups around the world.

In these comments, we would like to address recent attempts by the USDA to usurp and deny the authority of the NOSB under the Organic Foods Production Act (OFPA). We believe these efforts endanger the future of the organic label. We urge the NOSB to reject (i) additions to the National List that raise potential health, safety, or essentiality concerns until there is a clear collaborative process in place and the sunset process is reinstated to require materials review to effect a material’s relisting, and (ii) the adoption of NOP-required policies in its policies and procedures that do not meet with NOSB member approval. NOP, in effecting changes outside of the collaborative process defined in the Policy and Procedures Manual (PPM) does not meet with the expected NOSB and public process of review.

Responsibilities of the NOSB designated by OFPA include providing recommendations to the Secretary regarding implementation of the law and developing the proposed National List and amendments to the list. OFPA gives the NOSB the responsibility and authority to set limits on exemptions on the National List. Although USDA may refuse to issue exemptions recommended by the NOSB, it may not, according to 7 USC 6517(d)(2), issue exemptions other than those proposed by the NOSB.

In recent months, USDA has:

1. Taken control over deciding who votes, by denying the NOSB’s right to determine and implement its own conflict of interest policy;
2. Prevented the NOSB from carrying out its duty to advise the Secretary by preventing the GMO Ad Hoc Subcommittee from recommending actions to the Secretary regarding seed purity;
3. Reversed long-standing NOSB policy on sunset;

4. Asserted the right to relist sunset materials in the absence of a recommendation by the NOSB and acted to relist in opposition to a recommendation by the NOSB;
5. Denied promised NOSB participation in writing guidance for biodegradable mulch film,
6. Pulled from the agenda of the fall 2013 NOSB meeting a definition of production aids proposal passed by the Materials Subcommittee, after having received public comment on a discussion document at the spring 2013 NOSB meeting; and,
7. Showed little progress on the implementation of an inert ingredients policy adopted by the NOSB.

1. USDA has taken control over the determination of eligibility to vote on NOSB motions.

The NOSB has passed a conflict of interest (COI) policy, according to which the Board decides, based on disclosed interests, whether a member must recuse himself or herself from voting or other participation. The Policy Development Subcommittee has sought to clarify that policy, but the NOP has refused to allow the NOSB to vote on the policy preferred by the subcommittee. Instead, the NOP has insisted that the subcommittee bring to the Board a policy that gives the NOP sole authority to determine, based on information disclosed only to it –and not the full board or the public— whether a member has a conflict that requires recusal. The NOP cites discretionary authority allowing it to act, but does not give any substantial reason or justification for this action.

By taking complete control over the COI policy, USDA may determine who votes. If USDA determines who votes, then the NOSB is no longer an independent board making recommendations to the Secretary, as required by the Federal Advisory Committee Act.⁶ Instead, the USDA can determine the votes by determining who votes. Up until the NOP required policy, the NOSB functioned with transparency, enabling board members and the public full knowledge of the disclosed interests of each board member on topics under consideration.

2. USDA has prevented the NOSB from carrying out its duty to advise the Secretary by preventing the GMO Ad Hoc Subcommittee from recommending actions to the Secretary regarding seed purity.

The GMO Ad Hoc Subcommittee has issued a discussion paper on seed purity issues twice. As indicated in the published notes from the subcommittee calls, the subcommittee produced a proposal that the NOP refused to publish because “portions of the draft seed purity document pertaining to compensation aspects cannot be implemented by the USDA.” When asked for specific criticisms, the NOP replied that it preferred a report to an action item.

We believe that the fact that portions of a recommendation are outside the USDA’s current authority is irrelevant. The AC/21, for example, produced a recommendation on crop insurance that is also outside the authority of the USDA. The Board has a duty to advise the Secretary. It

⁶ The Federal Advisory Committee Act §5(b)(3) requires that USDA must assure that the advice or recommendations of advisory committees will not be inappropriately influenced by the agency or by any special interest, but will instead be the result of the advisory committee’s independent judgment.

should be able to carry out that duty regardless of the “preferences” of the NOP. The importance of the advice being a part of the transparency of the board process enables NOP and the Secretary to find creative ways, with public input, to solve problems identified by the organic community. Should the Secretary believe that the advice is misdirected or inappropriate, that should become a part of the public dialogue that the NOSB facilitates.

3. The NOP has arbitrarily reversed the long-standing NOSB policy on sunset.

We have submitted lengthy comments addressing NOP actions regarding sunset and will not repeat them all here. OFPA establishes a sunset for exemptions from the general prohibition on synthetics (and nonorganic ingredients.) The term “sunset” is defined in many dictionaries, and all of those definitions include the notion that sunset is a provision of a law that will automatically be terminated after a fixed period unless it is extended by law. The NOP states that it does not need to take an action to relist. That is just not consistent with the definition of “sunset.”

The NOSB has responsibility for recommending exemptions to be listed on the National List. As such, it establishes procedures to follow in arriving at recommendations. Those procedures are constrained by OFPA, which prescribes criteria, the five year sunset, a two-thirds decisive vote, and limitations on USDA’s authority. Within the parameters established by OFPA, the NOSB has set policies, contained in its Policy and Procedures Manual (PPM). Since the NOSB has the responsibility to recommend exemptions for listing on the National List, it is within the purview of the NOSB to decide how it will do so. NOSB policy calls for stating motions “in the affirmative” –that is, as a motion to (re)list—so that a two-thirds majority is required to exempt a synthetic material from the default prohibition in OFPA. In reversing this policy, the NOP is encroaching on the NOSB’s authority to recommend substances for the National List.

4. USDA has asserted the right to relist sunset materials in the absence of a recommendation by the NOSB and acted to relist in opposition to a recommendation by the NOSB, both of which are contrary to OFPA.

According to the process in the USDA September 16 Federal Register notice (78 FR 56811), if there is no recommendation from the NOSB to allow the material to sunset, the NOP will take action to relist the material. This is clearly in opposition to OFPA §6517(d)(2), “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,” and §6517(e), “No exemption or prohibition contained in the National List shall be valid unless the National Organic Standards Board has reviewed such exemption or prohibition as provided in this section within 5 years of such exemption or prohibition being adopted or reviewed and the Secretary has renewed such exemption or prohibition.” §6517(e) makes it clear that the action required is a relisting, not a vote to delist.

In the May 3, 2013 Federal Register notice (78 FR 25879) taking action on sunset items on which the NOSB voted at its May 2012 meeting, the NOP proposes allowing uses specifically prohibited by the recommendations adopted by the NOSB. This is clearly in opposition to OFPA sections cited above.

5. USDA denied agreed- to NOSB participation in writing guidance for biodegradable biobased mulch film.

The NOSB recommendation on biodegradable biobased mulch films stated, “(D) Grower must take appropriate actions to ensure complete degradation.” Because there was concern about determining what those “appropriate actions” might be, when conditions vary from farm to farm, the narrative supporting the recommendation stated,

It is expected that NOP, in conjunction with the NOSB, will develop guidance that explains proper practices for utilizing the biodegradable mulch film. In addition, it is expected that the inspection process and certification review will determine that biodegradation of the mulch film is occurring so that it does not accumulate in the fields where it is used.

The NOSB vote to allow biodegradable biobased mulch film may have been very different had the NOP not agreed to development of guidance in collaboration to the NOSB. This lack of follow-through and adherence to agreements undercuts the ability of the NOSB and the public to use a collaborative process to craft solutions on behalf of the organic community.

The process of developing the guidance was discussed at the meeting. Ms. Sonnabend:

So we've discussed with the Department about this and they concur that while the rulemaking process is going on if we just leave it at appropriate actions we can then develop a guidance that the NOSB will recommend for and the NOP will cooperate with on exactly what those appropriate actions are, what conditions the mulch may or may not be appropriate from because we think there may be some environmental conditions, soil conditions and the like that these mulches have not been shown to break down properly and the research is still ongoing. But it would enable us to put all that in guidance along with what a certifier would do to verify that the mulch was completely broken down or that the appropriate actions were being taken.

In discussing workplans at both the October 2012 and April 2013 meetings, the chair of the Crops Subcommittee mentioned working with the NOP on the guidance. However, the item, which was on the workplan, was taken off the schedule.

In the Federal Register notice proposing the listing of biodegradable biobased mulch film, the USDA says,

AMS has not determined if [sic] there is a demonstrated need for guidance on the use of mulch film at this time. We understand that guidance may be needed in the future depending on the prevalence of adoption of use of mulch film by organic growers and any problems observed by certifying agents with degradation on organic fields. AMS is interested in comments on whether guidance on management practices is necessary at this time to prevent mulch film from accumulating in fields.

It is clear from the transcript of the meeting that the development of guidance was an important part of the decision of NOSB members to support the listing of biodegradable biobased mulch film, so collaboration between the NOSB, NOP and the public is undermined, given that the NOP now indicates that the development of such guidance is optional. Going forward, the NOSB cannot trust agreements made by the NOP as a condition of its votes.

6. USDA pulled from the agenda of the fall 2013 NOSB meeting a definition of production aids proposal passed by the Materials Subcommittee, after having received public comment on a discussion document at the spring 2013 NOSB meeting.

The Materials Subcommittee of the NOSB presented a discussion document on production aids at the Spring 2013 NOSB meeting, received public comment, and passed a proposal on August 27, 2013 (with voting continuing through August 28) to bring to the Fall 2013 NOSB meeting. NOP removed the proposal from the Spring 2013 NOSB agenda with notification to the NOSB at the last minute. The discussion document discussed at the May 2013 NOSB meeting indicated the following: There has been discussion on the National Organic Standards Board (NOSB) over past years concerning the meaning of “production aids.” The examples given in the Section 6517 (c)(1)(B)(i) of OFPA the are materials that have a minimal impact on food, soil, or the ecosystem. However, there have in the past been requests to allow a range of substances under this category, including (as recommended by the NOSB in August 2005) “carriers, stabilizers, adjuvants, fillers, extractants, excipients and solvents that do have an active function in the formulations of farm production aids such as fertilizers, soil amendments, compost inoculants, sanitizers, aquatic plant extracts, and fish emulsions” and “active substances used in pest control (disease, weed, insects and nematodes) that do not fit into other OFPA categories.”

Many on the board and in the community have identified the need for a clear definition of production aids. The definition is critical to the board’s responsibility in managing the National List. Pulling a proposal from the agenda that was passed by a subcommittee, had been subject to a discussion document, and developed with input and oversight of the NOP, without a collaborative process and a discussion further erodes public trust in the standard setting process that supports the organic label.

7. USDA has shown little progress on the implementation of an inert ingredients policy adopted by the NOSB.

The NOSB and NOP recognized the critical need to review so-called inert ingredients that are allowed in materials on the National List. A year ago, the NOSB adopted a recommendation, in collaboration with the NOP, to begin the review of inert ingredients that currently reference the obsolete “List 3” and “List 4” no longer supported by EPA.

NOP acknowledged in its February 27, 2013 memo to the NOSB that “the obsolete references to EPA “Lists” currently found in 205.601(m) (synthetic inerts allowed in organic crop production) and 205.603(e) (synthetic inerts allowed in organic livestock production) would be

replaced with specific approved synthetic inert ingredients. The NOSB also described a plan for continued collaboration with the Inerts Working Group, which includes representatives from the NOP.” However, there is no evidence that the NOP is moving ahead with the plan as outlined to review inert ingredients, even though the NOP indicated that it intended to conduct a public notification and comment process, including:

“Notification of the public of inert ingredients known to be in use in organic production;
Notification to the public of the NOSB’s review plan, including the groupings of inert ingredients for which NOSB will conduct its review; and
A request for public comments regarding any other inert ingredients currently used in organic production that are not identified in the list provided by the NOP.”⁷

Is the public to believe, given the lack of collaboration identified above, that the NOP is moving ahead with a process that requires board review? Does the NOP not expect harm to the organic label and public trust in the underlying standards if it does not move ahead as agreed to with the NOSB? Issues like inerts review must be addressed and they require collaboration that the NOP has rejected.

USDA has violated the agreement, as expressed in the NOSB’s PPM, to work in collaboration with the NOSB.

As is demonstrated in the above examples –and NOSB members can surely produce more— the NOP has recently interfered with the NOSB’s efforts to carry out its statutory responsibilities. In our comments on the May 3 Federal Register notice, we compared the actions of the USDA to the first proposed rule, in which USDA proposed to allow genetically modified organisms, irradiation, and sewage sludge in organic production. Recent actions are worse –they amount to a clear denial of the NOSB’s authority over the process of creating and maintaining the National List.

In this respect, we now see the PPM as a nonfunctional document that is being ignored by the NOP at will. The NOP’s decisions with regard to the PPM’s implementation and its decisions to ignore the previously agreed-upon policies constitute arbitrary and capricious behavior. We therefore urge the board to seek to capture the standards of practices for making decisions on board process rather than invest energy in revising and updating a document that the NOP has chosen to violate.

We believe that NOP’s actions fail to meet the spirit and letter of the law. However, even if NOP believes it has the discretionary authority to act, the actions pose a critical threat, which may have disastrous consequences for the organic label. The credibility of the National Organic Program depends on the fact that an independent board of stakeholders is the gatekeeper for the National List and can advise the USDA on implementation of the law. It depends on

⁷ Memorandum to the NOSB, Miles McEvoy, February 27, 2013

“sunset” meaning that exemptions come to an end after five years if they are not reevaluated and voted to be relisted.

Some of us have argued for the organic label, against contentions that a government agency cannot be trusted to do the job right, citing the protectiveness of OFPA criteria, the ability to correct mistakes and require alternatives to synthetics that are more compatible and consistent with organic principles, and the role of an independent NOSB. If the NOSB is no longer able to function as designed and sunset no longer means sunset, the defenders of the NOP will be forced to admit we were wrong and support a different model.

We urge the NOSB to stand up for organic integrity by insisting on the authority of the NOSB to manage the National List. Please do not make changes to the PPM that give up that authority. Please do not recommend listings where there are open questions, in the hope that the NOSB will be able to answer and respond in five years. When voting on sunset materials in subcommittee, please remember that the only way the NOSB can fulfill its duty to review sunset materials is for the subcommittee to make a recommendation opposing relisting. When the NOP promises to involve the NOSB in processes like writing guidance, hold them to their promises.

Thank you for your consideration of these comments.

Sincerely,

Terry Shistar, Ph.D.
Board of Directors