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MEMORANDUM

September 30, 2004

TO: Kevin O'Rell
Chair, Handling Committee, National Organic Standards Board

FROM: Richard D. Siegel

RE: NOSB Handling Committee Discussion Item, October 13, 2004
Organic Yeast/ Agricultural vs. Non-Agricultural Substances--Action Plan
Potential Impact of the Arthur Harvey Lawsuit on This Action Plan

I was pleased to see that the Handling Committee will present a Discussion Item dealing with organic yeast at the upcoming NOSB meeting on October 13. On behalf of my client, Marroquin International Organic Commodities Services, Inc., we appreciate the Handling Committee's prompt response to our request of July 30 that the NOSB recommend that yeast be listed as an "agricultural product" under Section 205.606.

I understand that after we brought this request to the NOSB, it signaled to the members of the Handling Committee that instead of dealing piecemeal with the yeast question, they should begin to address the overall process of reviewing all the materials currently listed in Section 205.606. This would be in accordance with Recommendation 1b of the Commercial Availability (606) Task Force report, which the full NOSB adopted at its last meeting on April 29 in Chicago.

In this memorandum, I respectfully recommend that the Handling Committee (1) first address the request on yeast independently, in accordance with prior recommendations of the NOSB to list products as "agricultural," and (2) postpone its overall review of materials in Section 205.606 for a later time.

I offer this proposal because there is a serious legal challenge under way to Section 205.606 in Federal Court in the pending lawsuit brought by Arthur Harvey.¹ If the court decides in Mr. Harvey's favor on this issue, as appears likely, then the Handling Committee will be unable to carry out the full review process outlined in Recommendation 1b. This is why I am suggesting that the Handling Committee move ahead with the consideration of the yeast issue, but postpone action on Recommendation 1b until Mr. Harvey's legal challenge is resolved.

The Handling Committee should consider this sequence of action for the following reasons:

First, the companies that manufacture and import organic yeast should not be faced with a long delay. They need relief as soon as possible to have the status of yeast in Sections 205.605(a) and 205.606 changed, so that organic yeast will be eligible for the same acceptance that other organic ingredients enjoy.

In addition, the listing of yeast as an agricultural product under Section 205.606 is not involved in any issue in the Arthur Harvey lawsuit.

Second, the Harvey case could have an effect on whether the Handling Committee can carry out Recommendation 1b. Since oral argument was held on September 9 and a decision is expected by the end of the year, it would be prudent for the Handling Committee to wait to conduct the review outlined in Recommendation 1b until after it learns the outcome of the Harvey case.

Recommendation 1b envisions that some non-organic agricultural products will be "removed" from the National List, yet will still be permitted to be used in processed products, unless organic versions are "commercially available." This runs directly counter to Mr. Harvey's argument in Count 1 of his lawsuit.

Mr. Harvey contends that under 7 U.S.C. § 6517(c)(1)(B)(iii) and (C), each non-organic agricultural product used in a processed product must be reviewed by the NOSB and receive a "specific exemption" in order to be listed on the National List. Mr. Harvey's Count 1 challenges the second paragraph of the current text of Section 205.606 because it broadly permits "any

¹ Harvey v. Veneman, 1st Circuit Court of Appeals, No. 04-1379. This lawsuit challenges the NOP Final Rule on several grounds as not complying with the OFPA statute. On September 9, 2004, a three-judge panel heard oral argument in the case. A total of 12 organizations and individuals in the organic and environmental movements have registered their support for Mr. Harvey's case by joining in filing two separate amicus (friend of the court) briefs. The organizations include the Center for Food Safety, Beyond Pesticides, Rural Advancement Foundation International (RAFI), the Organic Consumers Association, Greenpeace U.S.A., the Sierra Club and Northeast Organic Farming Association/ Massachusetts Chapter.

nonorganically produced agricultural product” to be used in processed products. Mr. Harvey contends that OFPA does not allow any blanket exemption for non-organic agricultural products, only exemptions that are specific. In Count 1 of his suit, he asks that the second paragraph of Section 205.606 be stricken.

If the Court of Appeals rules in favor of Mr. Harvey, then Section 205.606 would be redesigned to list only specific non-organic agricultural products, each of which will need to be reviewed specifically by the NOSB in order to be included in Section 205.606. There would no longer be a general permission category as part of Section 205.606.

This would mean that all agricultural products that are non-organic and used in processing would have to be kept on the National List and individually reviewed by the NOSB. This would prevent the Handling Committee from carrying out Recommendation 1b, since Recommendation 1b calls for “removing” ingredients from the National List but at the same time allowing those ingredients to be used in processing.

Therefore, it is my suggestion that the Handling Committee wait to implement Recommendation 1b until the Court of Appeals has made its decision.

By contrast, if the Handling Committee moves forward to reclassify yeast as an “agricultural product,” this would not be subject to any pending issue in the Harvey case. Mr. Harvey, in fact, believes, as noted above, that Section 205.606 should be solely reserved for the listing of specific agricultural products such as yeast.

Finally, I must point out that there is a strong possibility that the Court of Appeals will rule in Mr. Harvey’s favor on the issue he has raised on Section 205.606. The USDA’s attorneys have in effect conceded that Mr. Harvey’s position is correct and that there should be no blanket exemption for the use of non-organic agricultural products in processed foods.² After the USDA made this concession, Harvey’s counsel, in a reply brief, called on the Court of Appeals to “issue a judgment declaring the meaning of the regulation as now asserted by USDA, and direct USDA to so inform the public and the organic community.”³

Conclusion

For the reasons I have stated, I would propose that the Handling Committee promptly take up the matter of reclassifying yeast as an “agricultural product” under Section 205.606. As I have explained, this is not a question that could be affected by the outcome of the Harvey lawsuit.

² Government’s brief, p. 12, footnote 6.

³ Reply brief, p. 10.

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At the same time, for the reasons I have stated, the Handling Committee would be well advised to postpone its broad review of materials under Section 205.606 until the Court of Appeals decides the Harvey case, because of the strong possibility that the Court of Appeals will impose a new interpretation of Section 205.606 under OFPA that will conflict with the review outlined in Recommendation 1b.

Please let me know if I can give you any further information on the Harvey case or other related matters.