

NATIONAL CAMPAIGN FOR SUSTAINABLE AGRICULTURE

P.O. Box 396, Pine Bush, NY 12566, (845) 744-8448, Fax: (845) 744-8477;
email: Campaign@sustainableagriculture.net, www.SustainableAgriculture.net

May 13, 2003

United States Department of Agriculture
National Organic Standards Board
Room 2510 -- South Building
1400 Independence Ave., SW
Washington, DC 20250-0001

National Organic Standards Board:

Following are comments by the National Campaign for Sustainable Agriculture Organic Committee in public response to several key agenda items for the May 2003 NOSB Austin TX meeting. We have three general areas of concern, and several additional specific comments.

1. Policy Review

The NCSA Organic Committee objects to the NOP's use of Policy Statements posted on the NOP's website as replacements for rule changes and interpretations. This is not only bad process in terms of the final promulgation of law, and the participation of the public, but is in violation of the law. Any action by the NOP that sets binding norms cannot be enacted through the posting on the NOP website and requires public notice and comment. See e.g. McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317 (D.C. Cir. 1988). The Administrative Procedure Act requires that any statements of general policy or interpretations of general applicability formulated or adopted by NOP be published in the Federal Register (5 U.S.C. § 552 (a)(1)(D)). Furthermore, the OFPA explicitly provides that any changes in organic livestock standards requires notice and comment rulemaking (7 U.S.C. § 6509(g)). To date, NOP has ignored these legal requirements; continued behavior in this manner will subject the agency to judicial review.

In several of these policy statements NOP has made sweeping changes and ignored NOSB recommendations. Among the more clear examples is NOP's "clarification" of outdoor access for poultry which only served to muddy the waters on that issue, and appears to contradict NOSB May 2002 recommendation (see discussion below). This has created confusion among and between farmers and certifiers, and leaves the consumer with no idea what kind of product they are getting.

Thus, despite having made substantive changes to the scope of existing regulations NOP has made no effort to engage in rulemaking and/or public review of these statements.

We encourage NOSB to continue to review standards, where applicable, and to push for their recommendations to be published as regulations that *have* gone through a public notice and comment.

2. Food Contact Substances.

The policy statement regarding food contact substances (December 12, 2002), entitled *Synthetic Substances Subject to Review and Recommendation by the National Organic Standards Board When Such Substances Are Used as Ingredients in Processed Food Products* places hundreds of new materials on the National List, without NOSB review. This is in violation of OFPA's provision granting NOSB statutory responsibility to review materials, (7 U.S.C. §§ 6517, 6518). Furthermore, enacting such a policy statement violates the procedural requirements of the OFPA that requires any proposed changes to the National List go through notice and comment rulemaking (7 U.S.C. § 6517(d)(4)). Such action also contravenes historic NOSB policy that holds that both processing aids and ingredients need review and inclusion on the National List.

In general, the NCSA endorses many of the conclusions of the OMRI review of this policy paper, and reiterate their concern that "the inclusion of all indirect additives and exemption of certain additives from review that FDA has designated as Food Contact Substances is problematic for the following reasons:

- "It is difficult to identify which materials are considered to be a Food Contact Substance. Legal opinions may provide different interpretations as to status of various substances.
- "The FDA process for review and designation as food contact substances does not match NOP regulatory criteria for substances permitted for organic processing.
- "The NOSB's statutory responsibility to review materials for organic processing will be delegated to FDA without reference to requirements of the OFPA or the regulation.
- "FDA determination of FCS status may not be consistent between similar substances because it is a voluntary system that depends on manufacturer submissions.
- "The policy contradicts the OFPA by allowing preservatives, fungicides and pesticides used in packaging.
- "The policy contradicts the regulation at 7 CFR 205.272 (a), which requires handlers to protect organic products from contact with prohibited substances.
- "The policy does not conform with 7 CFR 205.105(c), which states that "the product must be produced and handled without the use of Nonagricultural substances used in or on processed products, except as otherwise provided in § 205.605."
- "The policy effectively adds materials that can be used under National Organic Program rule without going through the petition, NOSB review, and public comment process to amend the National List.
- "The policy creates an "open" list that effectively adds many materials for use in organic production.
- "The policy may be difficult to reconcile with trading partners and may not be acceptable to consumers interested in organic products that are produced with a minimum of synthetic additives."

The NCSA Organic Committee further supports the following recommendations of the OMRI regarding this policy:

1. "Keep the Processing List as it currently stands as a closed positive list. This means in order to use a substance in organic food processing, it must either be organic or appear on the National List as an approved non-organic substance.
2. "Clarify that materials that do not have food contact, and do not impact the organic system, do not need review using reference to appropriate 21 CFR sections regulating indirect additives. For instance, cleaning and sanitizing materials that do not leave residues and are appropriately rinsed, as well as boiler additives that are not carried in steam, should continue to be exempt from consideration. NOSB should continue to review any materials that are in direct contact with organic products to determine potential impact on organic integrity.
3. "Clarify that the OFPA and 7 CFR 205 ban on preservative, fungicides and pesticides applies to all packaging, whether or not these substances are considered indirect additives. Re-affirm the responsibility of certification agents to verify the prevention of contact with prohibited substances.

Finally, we reiterate our general concern that taking such binding, far reaching actions by posting of statements on the website rather through public comment and review is a violation of administrative procedural law. In fact, where this public process has been circumvented to be more permissive than current organic industry norms (*see OMRI, page 6*), we see this policy-making as a direct threat to the entire organic industry, by loosening the standards for less-than-organic processors to enter the market.

3. 10-Day Comment Period for Rulemaking

Our third general comment concerns the recent practice by NOP of promulgation of a Federal Register Notice of Rulemaking with a shortened, 10-day comment period. While we understand that this particular group of regulations have been a long time in the coming, the shortened comment period once again seems to circumvent the true public review process. While the NOP has been in the forefront of web-based public participation, that practice presents several problems.

First, we must not forget that there is a large segment of the population that does not have daily access to the internet. By using the internet as the *sole* method of informing the public, rural and under-resourced populations have been left out of the process altogether. Where groups such as the National Campaign for Sustainable Agriculture attempt to mitigate that with public outreach to some of the organizations serving these populations, the 10-day comment period prevents any such attempt – there is simply not enough time.

Second, even with daily access to the internet, a NOP-watcher could lose a couple of days by logging on too early one day and late in the day the next -- leaving an 8-day period of comment. This clearly discourages public comment in a process supposedly designed to encourage it.

Finally, since most notice periods are minimally 30 days, it is just too easy to miss the change to 10 days, even while reading the Notice.

The NCSA Organic Committee proposes a standard minimum 30-day comment period for all Federal Register notices regarding the NOP, and encourages the NOP to develop an email list to announce all Federal Register notices. A list-serve alerting participants to a Notice (directing them to view it on the web) would require little if any resource investment at the Department, and would encourage public participation.

4. Origin of Livestock – NOSB Livestock Committee Recommendation

The NCSA Organic Committee concurs with the Livestock Committee Recommendation of April 29, 2003 which calls for a rule change fixing inaccurate numbering of the existing regulation. This will assure that one standard applies to all dairy operations once they have converted to organic production

5. Breeder Stock Clarification NOSB Livestock Committee Recommendation

NCSA Organic Committee concurs with the Livestock Committee Recommendation of April 29, 2003 stating that once breeder stock are converted to organic management they cannot be rotated in and out of organic management and continue to produce organic offspring.

6. Processing Committee Recommendations regarding Chlorine

NCSA Organic Committee concurs with the entire recommendation of the Processing committee regarding chlorine, which is summarized in the following conclusion:

“The NOP rule dropped all reference to direct contact of crops or food that was part of the original NOSB recommendation on chlorine. The original annotation language should be reinstated. The Questions and Answers on the NOP website should be re-phrased to focus on the monitoring of chlorine levels in water which contacts organic products, rather than on waste water which is discharged from the facility. Further, the review of chlorine should be prioritized in the re-review process in light of new information about the relationship of chlorine and trihalomethanes, available alternatives, food safety, health effects, and application procedures.”

7. Accreditation Committee – major v. minor non-compliances definition

There is evidence coming from the field (for instance, with the enforcement of outdoor access standards for poultry) that Accredited Certifying Agents (ACAs) do not define major and minor non-compliances consistently; nor do they deal with them in a consistent manner. Furthermore, Neither the Rule or OFPA define “minor noncompliance”. The lack of consistent administration of the law through the ACAs is problematic: without a consistent definition of non-compliances, certifications may be granted or denied on significantly different grounds.

NCSA Organic Committee concurs with the recommendation of the Accreditation committee regarding ACA compliance procedures – minor vs. major non-compliances: define the terms

clearly, and post noncompliance notification procedures and examples of minor and major noncompliances to the NOP website as guidance to ACAs.

8. Peer Review Panel

The NCSA Organic Committee reiterates its previous comments to this Board regarding the vital importance of the Peer Review Panel and process in ensuring the integrity of the entire Accreditation program. The Peer Review Panel called for in the Organic Food Production Act (OFPA) is the public enforcement mechanism designed to ensure the USDA's accreditation procedures and decisions are appropriate and comport with the law. This Peer Review Panel should include at least two people from the organic community who have training and experience in certification and accreditation issues.

Continued failure of USDA to implement citizens' oversight or peer review of their organic accreditation program not only threatens organic integrity and consumer confidence, but also fails to meet already established international norms. Recent accounts of inconsistent clarifications from the NOP call into question whether the NOP is equitably reviewing and scrutinizing all organic certifying agents' applications for accreditation. In addition to the lack of oversight for the accreditation process, there is also increasing concern that the USDA is abusing its authority by creating loopholes in enforcement of the organic standards.

The institution of the Peer Review process as well as the Peer Review Panel would put an oversight process in place in accordance with the Law.

9. Poultry Outdoor Access clarification

The lack of clarity of the Poultry Outdoor access standard has led to wide-ranging variation in its interpretation. [Refer to Number 1, above]. From second-story porches where birds' feet never touch real ground to open windows and tiny doors that allow access for one bird at a time, to moveable pasture pens – we know that there is quite a range of practices that are now defined as complying with “outdoor access.”

We also know that consumer expectation is very strong in this area – organic consumers believe that their organic birds are “free ranging” – whatever that means.

The NCSA Organic Committee endorses the process set forth by the Humane Society in proposing a detailed clarification of this standard for the Livestock Committee and the Board to review. This proposal necessarily sets the highest bar, and as such should be subject to comments and discussion. On the other hand, ambiguous standards result in a low bar that could easily lead to a CAFO situation – definitely not in keeping with consumer expectations.

Repeating our comment about current NOP “clarification” on the web in the form of a policy statement: This is confusing, not in keeping with the spirit of the NOSB May 2002 clarification, and once again, sets policy through the non-process of web statements, as opposed to the legal avenue of rule-making. This is a clear example of how such a statement

7 4

invites more questions than it answers, and opens the door to wide-ranging interpretation rather than consistent standards.

NCSA Organic Committee therefore supports an ongoing process by the livestock committee and the organic community at large to clarify existing regulation and recommendations, and finalize them through rule-making at some future date for unambiguous interpretation by consumers as well as ACAs. We hope that using the HSUS draft before you will aid NOSB in continuing to be the place where these clarifications are vetted, refined, and promulgated.

Thank you for your consideration of these comments. Feel free to contact us if you have any questions about them.

Liana Hoodes, for
Organic Steering Committee of the National Campaign for Sustainable Agriculture:

- Michael Sligh, *Rural Advancement Foundation International*
- Elizabeth Henderson, *Peacework Organic Farm, Northeast Organic Farming Assoc. -New York*
- Margaret Mellon, *Union of Concerned Scientists*
- Brise Tencer, *Organic Farming Research Foundation*
- Joe Mendelson, *Center for Food Safety*
- Roger Blobaum, *Organic Watch*