

# NATIONAL CAMPAIGN FOR SUSTAINABLE AGRICULTURE

## *Organic Committee*

P.O. Box 396, Pine Bush, NY 12566, (845) 744-8448, Fax: (845) 744-8477; email: Campaign@sustainableagriculture.net  
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## **The National Organic Program (NOP) -- Implementation Update – Emerging Trends and Challenges**

*How is the program working?  
Are farmers, certifiers, and consumers being served?*

*National Organic standards were adopted in early 2001, with full implementation of the program in October 2002. The organic community had high expectations for a regulatory program that would uphold and increase the integrity of the organic label in the marketplace. The statutory mandate for the Organic Foods Production Act (OFPA, 1990) laid out four essential components of a National Organic Program (NOP):*

- 1. A partnership between government, farmers, consumers and industry*
- 2. Implementation of a consistent national definition of organic*
- 3. Enforcement activities that would carry the force of law*
- 4. Facilitation of trade*

**USDA actions in implementing the national organic standards already threaten to undermine these four essential components of a functioning NOP. A recent case against the Department highlights structural issues in the implementation of the law in two of these components.**

### Issue Outline

#### **1. A unique federal regulatory program partnering with the existing organic community (farmers, industry and consumers)**

- A hallmark of OFPA was its recognition of the existing organic industry: OFPA was to harmonize these standards, not to supercede the knowledge and efficiency of the existing infrastructure.
- The intent was to not “reinvent the wheel” (Senate Report 101-357, July 1990)<sup>ii</sup> or cause undue economic hardship to the existing farmers, producers, and certifiers. This included an acknowledgement of the expertise inherent in organic agriculture, and existing oversight programs.
- The NOSB was put in place to assure this partnership through:
  - Citizen participation in the standard setting process;
  - Development of the National List;
  - Development of livestock standards and other standards not already in existence.
- This partnership included the Peer Review Panel,<sup>iii</sup> to be comprised of individuals with expertise in organic farming and handling, to oversee accreditation decisions.
- NOP’s recent contract with ANSI for a one-time audit is a step at a mid-course review, but is not sufficient to meet the requirement for ongoing peer review as mandated by the law.
- By not recognizing other 3<sup>rd</sup> Party organic Accreditors, the Department has caused undue hardship for certifiers who operate outside of the U.S. They are required to accredit twice – once with USDA, and once with an international accrediting agency
- While a legitimate NOSB has been convened, its recommendations to USDA, guided by careful and transparent discussions have not been acknowledged

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L. Hoodes

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### The National Organic Program (NOP) -- Implementation Update – Emerging Trends and Challenges

#### DRAFT RECOMMENDATIONS TO USDA

1. Publish a timeline, process, and protocols for USDA in addressing NOSB recommendations made since the final rule.
2. Establish a permanent Peer Review Panel. The ANSI external audit addresses the international norms for an Internal Audit, but it does not meet the requirements for establishing a Peer Review Panel.
3. Bring the NOP into full compliance with ISO 61 and ISO 65 guidelines
4. Develop a Program Manual for the NOP's accreditation program (in compliance with ISO 61) which is vetted through the NOSB and make it available to the public.
5. Recognize third party accreditation programs (as recommended by the NOSB) to reduce the expensive and time-consuming burden to certifiers of double accreditation.
6. Recognize that all entities involved in organic -- farmers, producers, and certifiers -- must have appeals rights. The process for these appeals procedures must be promulgated .

#### National Campaign for Sustainable Agriculture Organic Steering Committee Members:

*Michael Sligh, Co-Chair, Rural Advancement Foundation, International, USA*

*Elizabeth Henderson, Co-Chair, Peacework Organic Farm, and Northeast Organic Farming Assoc., NY*

*Roger Blobaum, Organic Watch*

*Robert Hadad, Humane Society of the United States*

*Brian Leahy, California Certified Organic Farmers, and CA Sustainable Agriculture Working Group*

*Mark Lipson, Organic Farming Research Foundation*

*Margaret Mellon, Union of Concerned Scientists*

*Joseph Mendelson, Center for Food Safety*

*Marty Mesh, Florida Organic Growers*

*Nancy Taylor, Western Sustainable Agriculture Working Group*

*Brise Tencer, Organic Farming Research Foundation*

*Staff: Liana Hoodes*

## 2. *Implementation of a consistent national definition of organic*

- A consistent national definition of organic was to be supported by the development of **national standards** governing the marketing of organic products and the **accreditation of certification programs** to assure consumers that organic products meet these standards.
- The process for developing the national standards was to be open to public participation through open communication with USDA through the work of the National Organic Standards Board (NOSB).<sup>v</sup>
- To date, NOP's communication with NOSB has been sporadic at best, with some of the most important standards interpretations still left undecided, or in contradiction with the NOSB's recommendations (see example below).
- A Program Manual and/or regularly and formally-issued guidance documents would help a consistent interpretation of organic – none of these exist.

### Case Study: *An example of Accreditation and Certification gone awry?*

*A central issue has been the effectiveness and objectivity of certifier accreditation. With numerous certifiers already active in the organic industry, and more entering the field, USDA has been challenged to build a program that would ensure the consistent application of the standards through its Accredited Certifying Agencies (ACAs). As the Accrerator, does USDA measure up to the hallmarks of good accreditation: transparency, competency, and independence? What happens if the accreditation process is not implemented properly?*

#### Background of the Case

Massachusetts egg producer, The Country Hen, applied to the NOFA/Mass Organic Certification Program operated by Massachusetts Independent Certification, Inc. (MICI) for organic certification in July 2002. In October 2002, MICI denied certification based upon its determination that the producer failed to provide access to the outdoors to organic livestock as required by the regulations (at the time of application *no* outdoor access whatsoever was provided, and none was proposed). The day after MICI issued its formal denial of certification, its decision was overturned by the Administrator of the Agricultural Marketing Service (AMS) within the USDA. This

reversal came at the request of the Country Hen, and without review or contact with the certifier.

This case has many implications for the entire organic community, from interpretations of standards (outdoor access) to compliance with international norms (ISO 61, which requires a Program Manual for certifiers and Accreditation oversight), as well as an assortment of issues that relate to consumer confidence in the organic label. Ultimately however, it is the performance of the National Organic Program of USDA that is called into question over these issues. <sup>v</sup>

#### Discussion: The Right to Appeal Decisions

USDA has no documented process for overturning MICI's decision, and the Department claims that the regulations do not provide for certifiers to appeal the decisions of the NOP. The MICI case highlights why this situation is incorrect – if the Agency makes a wrong decision, there must be a process for review and, if need be, a remedy for the decision.

[OFPA actually does include a statutory provision stating that: “The Secretary shall establish an expedited administrative appeals procedure under which persons may appeal an action of the Secretary, the applicable governing State official, or a certifying agent under this title that – (1) adversely affects such person; or (2) is inconsistent with the organic certification program established under this title.”<sup>vi</sup>

*What is at stake here is significant: How are certifiers to protect the integrity of organic, the NOP, and its own reputation, if the certifier's decisions may be overturned instantly, arbitrarily, and without recourse to an appeal?*

**Discussion: Confusing Certification and Accreditation**<sup>vii</sup>

OFPA provides legislative authority for USDA to accredit certifying agents, *not* to do the certifying. In fact, the law's intent was to limit the federal government's involvement in the existing industry through a partnership of government and private organizations in standard setting and certification (see Senate Report). Yet, USDA has consistently blurred the line between certification and accreditation. In the case above, the Department overrode a decision that was made by an independent certifier through a documented process -- without transparent review. This appears as though the Department is making certification decisions. And, if the Department is making certification decisions, who is overseeing the Department's certification process (that is, who is accrediting the Department)?

USDA has yet to show specific accreditation procedures that are consistent with commonly-accepted requirements for accreditation; specifically those outlined by the International Standards Organization (ISO 61). This includes: 1) a distinct separation between certification and accreditation; 2) an accreditation manual which explains the policies and procedures of the accreditation system; and 3) accreditation oversight such as a peer review panel.

**Discussion: Weakening the Standards by "Interpretation"**

The MICI case also brings to light the issue of standards interpretation. NOP has often noted that it is up to certifiers to interpret the standards. The law has given the NOSB the purview of clarifying the livestock standards.<sup>viii</sup> In fact, as the complexity of organic standards has increased over the past decade, the NOSB has recommended clarifications of many aspects of the organic standards. NOSB has done this through public input and independent research. Yet since the promulgation of the Final Rule, none of these recommendations have been adopted by USDA in regulatory language, and there has been no feedback as to the status of these recommendations. In the case of outdoor access for poultry, the NOP has actually promulgated standards clarifications that were in contradiction to the NOSB's recommendation and comments from the public.

While the NOSB has worked hard to evaluate issues in a forum accessible to the public, the response from the Department has left the entire organic community with no understanding of where these recommendations fit within the regulatory structure of the National Organic Program.

<sup>i</sup> Title XXI, OFPA, Organic Certification, Sec. 2101; Sec. 2105

<sup>ii</sup> Report of the Committee on Agriculture, Nutrition, and Forestry U. S. Senate to accompany S. 2830, July 6, 1990, p.291

<sup>iii</sup> Senate Report p. 294, Final Rule§ 205.2 Terms Defined: Peer review panel. A panel of individuals who have expertise in organic production and handling methods and certification procedures and who are appointed by the Administrator to assist in evaluating applicants for accreditation as certifying agents.

<sup>iv</sup> Sec. 2104 (c) "Consultation – In developing the program under subsection (a), and the National List under section 2118, the Secretary shall consult with the National Organic Standards Board established under section 2119."

<sup>v</sup> In February 2003, Farmers' Legal Action Group (FLAG) filed a complaint against USDA on behalf of MICI. The documents filed by the parties are public documents are available from the Hearing Clerk in the office of Administrative Law Judges within USDA. The docket number for the appeal is OFPA 03-0001; the telephone number is 202-720-4443.

<sup>vi</sup> OFPA, Sec. 2121(a)

<sup>vii</sup> **Definition of Certification:** Certification verifies that the products conform to the principles and standards which define the label. **Definition of Accreditation:** Accreditation provides oversight of the certification procedures used by certification bodies.

<sup>viii</sup> Senate Report Language (p.292) : "USDA, with the assistance of the National Organic Standards Board will elaborate on livestock criteria." ; OFPA Sec. 2110 (d) (2) "The National Organic Standards Board shall recommend to the Secretary standards in addition to those in paragraph (1) for the care of livestock to ensure that such livestock is organically produced."; and Sec. 2110(g) "The Secretary shall hold public hearings and shall develop detailed regulations with notice and public comment, to guide the implementation of the standards for livestock products provided under this section."