

**FORMAL RECOMMENDATION BY THE
NATIONAL ORGANIC STANDARDS BOARD (NOSB)
TO THE NATIONAL ORGANIC PROGRAM (NOP)**

Date: 4/21/2007

Subject: Pepper, Chipolte Chile for addition to National List under, §205.606

Chair: Andrea Caroe

Recommendation

The NOSB hereby recommends to the NOP the following:

Rulemaking Action: XXX
Guidance Statement: _____
Other: _____

Statement of the Recommendation (including Recount of Vote):

The Board recommends adding Pepper, Chipolte Chile to the National List under §205.606- nonorganically produced agricultural products

NOSB Vote: **Motion:** Julie Weisman **Second:** Steve DeMuri

Board vote: Yes -9 No-2 Abstain- 0 Absent -4 Recuse- 0

Rationale Supporting Recommendation (including consistency with OFPA and NOP):

The National List of Allowed and Prohibited Substances §205.606

Response by the NOP:

National Organic Standards Board

Final Recommendation for

Date: April 21, 2007

I. List: *(where in FR rule example 205.606)*

National Organic Program Subpart G: The National List of Allowed and Prohibited Substances. §205.606 Nonorganically produced agricultural products allowed as ingredients in or on processed products labeled as “organic” or “made with organic (specified ingredients or food groups(s)).”

II. Committee Summary:

On June 9, 2005, a court final order and judgment arising from *Harvey v. Johanns*, stated that “the Secretary must issue a declaratory judgment that 7 CFR § 205.606 shall not be interpreted to create a blanket exemption to the National List requirements specified in 7. U.S.C. 6517.” These “requirements permit the use of nonorganic agricultural products in or on processed organic products when their organic form is not commercially available.”

Further, “consistent with OFPA, 7 CFR §205.606 shall be interpreted to permit the use of a nonorganically produced agricultural product that has been listed in § 205.606 pursuant to National List procedures and when a certifying agent has determined that the organic form of the agricultural product is not commercially available.”

Effort was made through many channels to elicit from manufacturers, petitions for any non-organically produced agricultural materials that had been using on products labeled and sold as “organic.”

In addition, pursuant to the judgment in *Harvey v. Johanns*, the NOSB was instructed to develop criteria for determining commercial availability, an essential tool in evaluating whether or not petitioned materials could be listed on § 205.606. These criteria were finalized in the NOSB “Recommendation for the Establishment of Commercial Availability Criteria National List § 205.606” of October 19, 2006. That recommendation allows for pro-active listing on 205.606 of materials which may currently be available in an organic form, but the supply of which has a history of fragility due to factors such as limited growing regions, weather or trade-related issues. Furthermore, the recommendation reiterates the role of the Accredited Certifying Agent (ACA) in making the ultimate decision as to whether a 606-listed material may be used, on a case by case basis.

Petitions received for spice materials contained widely varying amounts information with which to assess the current availability or fragility of current supply of organic forms of the petitioned spice material.

The petitioner for Pepper, Chipolte Chile made the case that there is currently no supply of certified organic Chipolte Chile peppers because there are no certified organic handlers who can Process the agricultural raw material into the required form.

The Handling Committee noted that agricultural substances are only required to be evaluated using the criteria specified in the Act (7 U.S.C. 6517 and 6518).

6517(c)(1)(a)

- i) would not be harmful to human health or the environment;
- (ii) is necessary to the production or handling of the agricultural product because of unavailability of wholly natural substitute products; and
- (iii) is consistent with organic farming and handling;

Agricultural substances do not need to be evaluated against section 205.600 (b). (i.e. essentialness). This additional criteria is only required for any synthetic substance used as a processing aid or adjuvant.

The Handling Committee also considered what constitutes “essential” for organic handling of a finished retail product and how that may be different from that of a material used in crop or livestock production. It was agreed that certain spice materials might be essential for creating a product that meets consumer expectations of taste or texture that is authentic to a specific ethnic cuisine. The petitioner identified Peppers, Chipolte Chile as an essential ingredient in the organic consumer products they make for this reason. There were no public comments specifically opposing the listing of Pepper, Chipolte Chile on § 205.606.

The Handling Committee carefully considered the difference between the availability of a raw agricultural product as organic, and the availability of certified organic handlers to process that raw material into one useable for handling purposes. The petitioner for Pepper, Chipolte Chile acknowledged the jalapeno peppers which are smoked to produce the uniquely flavored Chipotle Chile are widely grown throughout the America’s and are available in organic form. However, the majority of processors who are skilled in this specialized smoking process are located in Mexico and are not certified organic. In addition, most of their production is consumed within the Mexican market. Currently, no processor exists with the equipment or technology to process organically-grown jalapeno peppers into Chipolte Chile peppers that has an organic certification and/or is unwilling to use their equipment for a batch of as small as size as would be needed to fulfill current organic requirements.

III. Board Recommendation

Pepper, Chipolte Chile for inclusion on §205.606 of the National List

Moved: Julie Weisman Second: Steve DeMuri

Board vote: Yes-9 No- 2 Absent- 4 Abstain-0 Recuse-0