FORMAL RECOMMENDATION BY THE NATIONAL ORGANIC STANDARDS BOARD (NOSB) TO THE NATIONAL ORGANIC PROGRAM (NOP)						
Date: <u>November 30, 2007</u>						
Subject: Further Guidance on the Establishment of Commercial Availability Criteria						
Chair: Andrea Caroe (sign)						
Recommendation						
The NOSB hereby recommends to the NOP the following: Rulemaking Action: Guidance Statement: XXXXXX Other:						
Statement of the Recommendation (including Recount of Vote): The recommendation, as amended, proposes further standardized criteria to be used by NOSB, ACA's, and the organic industry when making commercial availability determinations for agricultural ingredients.						
NOSB Vote:Motion: Bea JamesSecond: Julie Weisman						
Board Vote: Yes - 15No - 0Abstain - 0Absent - 0						
Rationale Supporting Recommendation (including consistency with OFPA and NOP):						

§ 205.2 Commercial availability [defined] – the ability to obtain a production input in an appropriate form, quality, or quantity to fulfill an essential function in a system of organic production or handling as determined by the certifying agent in the course of reviewing the organic plan.

§ 205.201(a) (2) "The producer or handler of a production or handling operation, except as exempt or excluded under § 205.101, intending to sell, label, or represent agricultural products as "100 percent organic," "organic," or "made with organic (specified ingredients or food groups (s))" must develop an organic production or handling system plan that is agreed to by the producer or handler and an accredited certifying agent. An organic system plan must meet the requirements set forth in this section for organic production or handling. An organic production or handling system plan must include:

* * * *

(2) A list of each substance to be used as a production or handling input, indicating its composition, source, location(s) where it will be used, and documentation of **<u>commercial availability</u>**, as applicable:"

Statutory Background

7 U.S.C. 6518:

Sec. 2119. NATIONAL ORGANIC STANDARD BOARD. (k) Responsibilities of the Board.

(2) National List. The Board shall develop the proposed National List or proposed amendments to the National List for submission to the Secretary in accordance with section 2118.

Response by the NOP:

In general agreement

National Organic Standards Board Certification and Accreditation Committee Further Guidance on the Establishment of Commercial Availability Criteria

November 30th, 2007

Introduction

In light of the June 9, 2005 court final order and judgment arising from <u>Harvey v. Johanns</u>, the NOSB was asked to review petition procedures for adding materials to § 205.606 of the National List. On September 12, 2006 the Handling Committee submitted a recommendation to the NOP for the establishment of commercial availability criteria. Although the recommendation establishes the process for establishing commercial availability in the petitioning process, the NOSB is proposing broader clarifications to the terms of commercial availability for use by certifying agents, and the organic industry at large.

Background

The ability for any person to petition to amend the National List is authorized by the OFPA (7 U.S.C. 6518(nl)) and the NOP regulations, in § 205.607 *Amending the National List*. This authorization provides that any person may petition the NOSB for the purpose of handling a substance evaluated by the NOSB recommendation to the Secretary for inclusion on, or removal from, the National List. The NOSB is authorized to review petitions under specified evaluation criteria in OFPA (7U.S.C. 6518(m)), and forward recommendations for amending the National List to the Secretary. Since the NOP regulation became effective in October 2002, several petitions to include synthetic or non-synthetic substances in their respective sections of the National List have been reviewed by the NOSB.

§ 205.606 states "Only the following nonorganically produced agricultural products may be used as ingredients in or on processed products labeled as "organic," only in accordance with any restrictions specified in this section, and only when the product is not <u>commercially available in organic form</u>."

However, some producers, handlers, and certifiers may have misinterpreted § 205.606 to mean that any non-organic agricultural product which was determined by an accredited certifying agent to be not commercially available in organic form could be used in organic products, without being individually listed pursuant to the National List procedures.

In January 2005, the First Circuit decision in *Harvey v. Johanns* held that such a misinterpretation is contrary to the plain meaning of the OFPA and ordered that 7 CFR § 205.606 shall not be interpreted to create a blanket exemption to the National List requirements specified in §§6517 and 6518 of the OFPA (7 U.S.C. 6517-6518).

Consistent with the district court's final judgment and order, dated June 9, 2005, on July 1, 2005, the NOP published a notice regarding §205.606 (70 FR 38090), and on June 7, 2006, the NOP published a Final Rule revising § 205.606 to clarify that the section shall be interpreted to permit the use of a non-organically produced agricultural product <u>only</u> when the product has been listed in § 205.606 pursuant to National List procedures, and when an accredited certifying agent has determined that the organic form of the agricultural product is not commercially available (71 FR 32803).

USDA was ordered to notice the content of this Declaratory Judgment and Order within 30 days in the published Federal Register and on the NOP web site, and remove all conflicting references and notify its certifying agents of the same. USDA-NOP complied with a Federal Register notice published on July 1, 2005 and on its web site.

On January 18, 2007 the NOP released 7 CFR Part 205 (Docket No. AMS-TM-06-0223; TM-06-12) *Notice of Guidelines on Procedures for Submitting National List Petitions*. This Federal Register Notice provides guidance on who may submit petitions, what substances may be petitioned and the information that is required to be included within a submitted petition. Additionally, this notice establishes some new commercial availability evaluation criteria that will be applied

during the petition review of non-organic agricultural substances for inclusion onto or removal from § 205.606 of the National List.

The Federal Register Notice was developed in collaboration with the NOP and based on the October 2006 NOSB recommendation on commercial availability which modified the information to be included in a petition to provide for the review of non-organic agricultural substances to be included onto § 205.606. Although the notice helped to clarify the information to be included for all types of petitions submitted to amend the National List, additional clarification on commercial availability is recommended for use by ACA's for the review of ingredients in specific organic system plans.

Regulatory Citations Background

§ 205.2 Commercial availability [defined] – the ability to obtain a production input in an appropriate form, quality, or quantity to fulfill an essential function in a system of organic production or handling as determined by the certifying agent in the course of reviewing the organic plan.

§ 205.201(a) (2) "The producer or handler of a production or handling operation, except as exempt or excluded under § 205.101, intending to sell, label, or represent agricultural products as "100 percent organic," "organic," or "made with organic (specified ingredients or food groups (s))" must develop an organic production or handling system plan that is agreed to by the producer or handler and an accredited certifying agent. An organic system plan must meet the requirements set forth in this section for organic production or handling. An organic production or handling system plan must include:

* * * *

(2) A list of each substance to be used as a production or handling input, indicating its composition, source, location(s) where it will be used, and documentation of **<u>commercial availability</u>**, as applicable:"

Statutory Background

7 U.S.C. 6518:

Sec. 2119. NATIONAL ORGANIC STANDARD BOARD.

(k) Responsibilities of the Board.

(2) **National List.** The Board shall develop the proposed National List or proposed amendments to the National List for submission to the Secretary in accordance with section 2118.

Discussion

The current petition procedures as required under § 205.606 and § 205.607 (b) for placing nonorganic agricultural substances or materials on the National List specifically as it relates to commercial availability are not adequate. As noted in the background portion of this document on January 18, 2007 the NOP released 7 CFR Part 205 (Docket No. AMS-TM-06-0223; TM-06-12) *Notice of Guidelines on Procedures for Submitting National List Petitions*. Although the Federal Register Notice gives further clarification on submitting information in a petition, further clarification is still needed for the industry at large. Evidence of this was revealed in the March 2007 NOSB meeting in which many petitions submitted for inclusion onto the National List were received by the NOP, but not all of these petitions were eligible for consideration. There were various reasons why many of the petitions did not contain sufficient information; including insufficient documentation of commercial availability.

The NOSB is recommending that the following additional guidance on commercial availability for use by the NOP to educate about and enforce the 606 review requirements of accredited certifying agents.

Additional consideration specifically on commercial availability of organic seed was considered in this guidance document. On March 21, 2001 the NOSB submitted response to questions on commercial availability of organic seed,

then on August 17, 2005 the NOSB submitted a formal recommendation to the NOP on commercial availability of organic seed, and finally during the October 2006 NOSB meeting the Crops Committee submitted a formal response to the public comment concerning the recommendation from the August 2005 commercial availability recommendation of organic seed. Public commenters have submitted serious concerns about the inconsistent efforts to source and organic seed by certified organic farmers and that the verification efforts of accredited certifying agents are inconsistently applied. One commenter reported that only 10% of the seed used on certified organic farms is organic. Organic seed has poses a particular issue regarding the determination of commercial availability primarily because petition procedure for 606 are for agricultural ingredients used in handling and not for petitioning for the use of non-organic seed. There is no requirement that farmers petition the NOSB to review and recommend the listing of varieties of seeds as commercially unavailable as organic. Therefore, the NOSB recommends evaluation of the above listed documents in order to improve the ability to enforce 205.204 as well as collaboration between the certification and accreditation, crops and livestock committees to review the above documents on seed and determine the process for enforcement of commercial availability of organic seed with a goal to present a recommendation at the spring 2008 NOSB meeting

The following recommendation below proposes further standardized criteria to be used by NOSB, ACA's, and the organic industry when making commercial availability determinations for agricultural ingredients..

Recommendation

A. NOSB and NOP role in review of commercial availability

In support of an ACA's role for determining commercially availability of a material the NOSB recommends that the NOP:

Implement training procedures and process to ACA's for protocol on determining commercial availability. Training should include a review of NOP's current and any new courses of action for determining commercial availability, as well as review of procedures for proactive steps that the applicant or certified operator takes to generate the organic form of commercially unavailable organic ingredients and materials.

B. ACA's role in determining commercial availability.

The ACA, in determining that an agricultural ingredient or material listed on § 205.606 is not commercially available in organic form, shall:

- Evaluate the applicant or certified operator's documented claim that no organic substitutes of the ingredients or materials are commercially available in the form, quality, or quantity needed by the operation to fulfill the required function as appropriate to the operation. Documented claims should be accompanied by supporting evidence demonstrating that the organic forms of the ingredients or materials do not meet the functional requirements for the form, quality, quantity or equivalent variety necessary to the operation. Examples of such evidence include but are not limited to test data, market reports, third party research, reports on local growing season, and letters from suppliers. [Note: The global market is the universe of supply for agricultural ingredients – local market conditions are not sufficient criteria – aside from as described above.]
- 2. Validate that the applicant or operator has credible documentation that the ingredient or material is not commercially available in an organic form by reviewing available information that includes a list of all known sources of organic ingredients or materials. Documentation could include various detailed results (commensurate with known supply) of the applicants' efforts to contact credible sources of ingredients or materials and should also show the applicants effort to do such research with proper lead time. Examples of documentation would include dated letters stating ingredient or material, needed and the form, quantity and quality specifications required to fulfill availability, as well as follow up documentation from the addressee explaining the response to the request.

- 3. ACA's will maintain and keep accessible sources of information which list available organic ingredients or materials if the certifying agent finds that such sources exist.
- 4. ACA's will keep an up-to-date listing of certified organic 205.606 ingredients. This list will be maintained and submitted to the NOP annually by the ACA for the NOP to collate into a master list of materials and ingredients that are available in organic form. It is recommended that the data base of all organic materials and ingredients will be maintained by the NOP, or other NOP appointed organization.
- 5. Require certified operators to update commercial availability information in each organic system plan update. The NOSB would like to recommend that the NOP consider requiring a plan to include detailed documentation of proactive steps that the applicant or certified operator is taking to generate the organic form of commercially unavailable organic ingredients or materials. Examples of proactive steps could be, but are not limited to, the following: documentation of research, funding of research, funding or sourcing of development, promotion to develop the organic source of material, incentive or bonus to crops in transition to organic status, hiring of consultants to help promote and source organic material, or grower contracting.

All documentation of the above will be incorporated as part of the ACA's annual audit process of the certified parties to validate authentic and established processes for commercial availability determinations as part of the Organic System Plan.

Conclusion

The NOSB recommends the above additional adaptations be adopted to establish acceptable criteria and procedures to determine commercial availability.

CAC vote:

Moved:		Bea Ja	mes	Second: Ja	Second: Joe Smillie	
Yes:	6	No-	0	Abstain: 0	Absent: 0	