

September 1, 2014

To the Congressional Organic Caucus,

We the undersigned organizations are writing to ask you to advocate reversal of USDA's unilateral changes to the organic program's Sunset Provision. We believe these changes violate the intent and the letter of the Organic Foods Production Act (OFPA).

A high bar to allow and renew synthetics

We have re-read OFPA and the letters from Sen. Leahy and Rep. DeFazio to Sec. Vilsack, as well as the letter from three former chairs of the National Organic Standards Board, and we respectfully disagree with the Deputy Administrator's statement that the changes "shouldn't make it harder" to remove items from the National List.

NOP staff has admitted in various settings that materials up for Sunset from the National List of Allowed and Prohibited Substances were subject to being removed by a minority vote, and that materials some interests wanted to renew [leave on the list] weren't getting enough votes, so USDA changed the voting process. In other words, NOP staff has admitted publicly it changed the rules *to make it easier* to keep synthetics on the National List.

OFPA established the two-thirds supermajority requirement for "Decisive Votes" [Sec. 2119 (i)] intentionally to establish a very high hurdle for prohibited synthetics to be allowed, even temporarily, in organics. Within the context of the overarching principle in Sec. 2105 [7 USC 6504], that foods labeled organic must be "produced and handled without the use of synthetic chemicals ...," Congress certainly intended the Sunset Provision to emphasize the *temporary* nature of exemptions.

USDA's policy change makes relisting and renewal of synthetics much easier. Now, only six votes are needed for a synthetic to be allowed continued use, not the 10-vote supermajority mandated by OFPA. This assumes the full board even gets to vote on the relisting, since the murky nature of how these materials would be handled in subcommittees seems to preclude a full board vote if the subcommittee approves continued use.

Now, even if *nine* NOSB members *oppose* relisting, a six-vote minority favoring continued use would determine the "Decisive Vote" to enable continued use. This is contrary to Congressional intent for consensus in requiring a supermajority for Decisive Votes, through any plain reading of the law.

OFPA's framers meant clearly to establish a very high hurdle to add an exemption and to renew any exemptions — not a high hurdle to allow, and a low hurdle to renew.

Policy change without public comment

USDA's unilateral changes have been labeled a "power grab" with cause, since they were announced without the benefit of full notice and opportunity for public comment.

When asked where the changes originated, NOP staff has stated that “USDA did recently adjust how it works with the National Organic Standards Board to be more consistent with how other federal advisory boards are managed [under the Federal Advisory Committee Act (FACA)].”

The unique powers and authority granted to NOSB by OFPA have rubbed some USDA officials the wrong way from inception. But attempting to redefine the NOSB “to be more consistent with how other federal advisory boards are managed” contravenes what Congress enacted into law. (Note that FACA Sec. 9 says: (b) *Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions.*)

Congress knowingly and intentionally granted exceptional and unique powers and authority to the National Organic Standards Board — unlike most other federal advisory committees. In passing OFPA in 1990, Congress knowingly and intentionally superseded the provisions established by FACA in 1972. In other words, OFPA overrides FACA.

Subcommittee eliminated

We are very concerned by the NOP’s elimination of the Board’s Policy Development Subcommittee and control of the NOSB work plan and agenda. This unilateral, top-down action suggests that NOSB under the new rules would no longer be allowed to create a subcommittee to work on topics of its choosing, such as the GMO subcommittee or a subcommittee to study nanotechnology.

OFPA established the NOSB to advise the Secretary of Agriculture on the organic program. NOSB cannot advise the Secretary well if its authority to develop a work plan and agenda, or create committees and procedures, is diminished or denied.

Mandates ignored

There are two other OFPA provisions that appear to be contravened by USDA’s management of the organic program.

Sec. 2119 (j) “Other Terms and Conditions” states “The Secretary shall authorize the Board [NOSB] to hire a staff director ...” To date, staff directors have been hired not by the Board as the law stipulates, but rather by the USDA. This must be rectified.

Also, Sec. 2119 (j) (3) “Technical Advisory Panels” says, “The Board [NOSB] shall convene technical advisory panels to provide scientific evaluation of the materials considered for inclusion in the National List ...” To date, TAPs have been convened by USDA unilaterally, not the Board, as stipulated by the law. Selection of TAP reviewers by USDA has become so shrouded in secrecy that NOSB members do not even know who the TAP reviewers are. This must be rectified.

We realize the pressure USDA, and you in particular, must be facing from industry. Manufacturers and processors barely mustered the votes to allow carrageenan (even with flawed TAP reviews). They nearly lost DHA, and larger orchards did lose antibiotics for growing apples and pears.

Yet changing the rules and admitting they were intended to reverse the course of Sunset — to enable renewal of synthetics with just six of 15 votes — and to refashion NOSB under FACA, violates the intent of Congress and the letter of the law in OFPA. The drafters of OFPA required a two-thirds supermajority

for Decisive Votes, requiring a higher level of consensus across the full range of organic stakeholders, to ensure both credibility of the organic label and public support for organic products.

As significant stakeholders in the National Organic Program, we ask you to reverse these policies. We ask you, respectfully, to utilize the full notice and comment rulemaking procedures when there are changes NOP considers important.

Sincerely,

PCC Natural Markets, Seattle, Washington
Central Co-op, Seattle, Washington
Marlene's Markets, Tacoma and Federal Way, Washington
The Markets, Bellingham, Washington
Skagit Valley Food Co-op, Mt. Vernon, Washington
Tonasket Food Coop, Tonasket, Washington
Sacramento Natural Foods Co-op, Sacramento, California
Ocean Beach People's Organic Food Coop, San Diego, California
Ashland Food Co-op, Ashland, Oregon
Outpost Natural Food Cooperative, Milwaukee, Wisconsin
Dill Pickle Food Co-op, Chicago, Illinois
Wheatsville Food Co-op, Austin, Texas
La Montanita Food Co-op, Albuquerque, New Mexico
People's Food Co-op of Kalamazoo, Michigan
Whole Foods Co-op, Duluth, Minnesota
Mississippi Market Natural Foods Co-op, St. Paul, Minnesota
The Merc Community Market & Deli, Lawrence, Kansas
New Leaf Market Co-op, Tallahassee, Florida
Los Alamos Cooperative Market, Los Alamos, New Mexico
Hanover Consumer Co-op, Hanover, New Hampshire
Wild Oats Market, Williamstown, Massachusetts
Eastside Food Cooperative, Minneapolis, Minnesota
Belfast Cooperative, Belfast, Maine
Bluff Country Co-op, Winona, Minnesota
First Alternative Natural Foods Co-op, Corvallis, Oregon
Organic Consumers Association, Minneapolis, Minnesota
Lexington Cooperative Market, Buffalo, New York
One Degree Organic Foods, B.C., Canada
Nature's Path Foods, Blaine, Washington and B.C., Canada
Northeast Organic Dairy Producers Alliance