

Spring 2015 Organic Roundup

By Terry Shistar, Ph.D.

The National Organic Standards Board (NOSB) Spring 2015 Meeting in San Diego contained some highpoints in materials review and a failure in process that has been so critical to public trust in the organic label and growth of the market.

On the bright side, the NOSB showed a willingness to remove materials from the national list, resulting in the denial of seven petitions, out of 10 considered. The NOSB voted on 12 materials due to sunset in 2016 and voted to remove five. The overall statistics on materials votes—which the Organic Trade Association applauded as “in line with a no-growth trend to the National List,” obscures serious problems in process, including future process about how “inert” (potentially hazardous) ingredients and contaminated inputs will be handled.

Crop Materials –2016 Sunset

The NOSB voted against delisting (under USDA announced policy change, the board no longer votes to relist, making it more difficult to remove materials from the list) two crop materials—ferric phosphate and hydrogen chloride (HCl). Beyond Pesticides supported the delisting of the snail poison ferric phosphate because it is ineffective without the synergist EDTA, which is harmful to earthworms. The Crops Subcommittee (CS) chair misrepresented the research on toxicity to earthworms as consisting of a single questionable study. In fact, the CS had requested and received a review from the USDA Agricultural Research Service, which confirmed the adequacy of that study, as well as another that supported its conclusions. Although the CS says that EDTA will be reviewed as part of the “inerts” review process, that process is proceeding at a snail’s pace.

Beyond Pesticides supported the relisting of HCl for delinting cottonseed before planting, in spite of the hazardous nature of HCl, but because progress is being made in the development of mechanical delinting. Organic cotton growers are advocating a switch to mechanical practices. The delisting of HCl at this point would not affect the development of the mechanical alternative, but would prevent organic cotton growers from finding seed. The CS sent a clear message that it expects that the mechanical alternative will be commercially available before the next sunset review in five years.

Methionine –A Setback for Change to Natural Practices

The NOSB considered a petition to increase the amount of synthetic methio-



nine allowed in organic poultry feed, reversing the policy of past boards to step down the allowed synthetic methionine. This petition was considered at the Fall 2014 NOSB Meeting and sent back to the Livestock Subcommittee (LS) for reconsideration when a significant minority of the board indicated that it could not support the motion without an expiration date that incentivizes the transition to natural practices and feed. Despite the fact that the expiration date was a key reason that the full board returned the material to subcommittee for reconsideration, the LS did not bring forth a motion on an expiration date, having neglected to consider the issue in its meetings. A minority report was brought to the full board on the expiration date issue, which enabled consideration of the issue. (Without a minority view the issue would have been considered “untimely” by the National Organic Program (NOP) and could not have been considered for a vote by the board.)

The report also summarized some scientific research not considered by the majority. (In fact, the majority opinion did not cite any scientific support for its proposal.)

The Organic Foods Production Act (OFPA) requires a two-thirds majority of the NOSB to recommend listing of a material on the National List, and a two-thirds majority to keep it on the list at sunset. NOP has referred to this as a “tyranny of the minority.” However, supermajority requirements gener-



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Protecting the Label through Litigation

Groups Challenge Major USDA Change to Organic Rule

On April 8, 2015, organic stakeholders filed a lawsuit in federal court, maintaining that the U.S. Department of Agriculture (USDA) violated the federal rulemaking process when it changed established procedures for the “sunset provision” to allow synthetic materials to remain on the National List unless the National Organic Standards Board (NOSB) votes them off. The rule change was a complete reversal by USDA of the long standing policy that requires all materials to be removed from the list and reviewed by the NOSB before relisting, without the customary public process outlined by the *Organic Food Production Act* (OFPA), and the *Administrative Procedure Act*. The plaintiffs in the case include: Beyond Pesticides, Center for Food Safety, Equal Exchange, Food and Water Watch, Frey Vineyards, La Montanita Co-op, Maine Organic Farmers and Gardeners Association, New Natives, Northeast Organic Dairy Producers Alliance, Northeast Organic Farmers Association Massachusetts, Ohio Ecological Food and Farm Association, Organic Consumers Association, Organic Seed Growers and Trade Association, PCC Natural Markets, and The Cornucopia Institute.

Groups Sue USDA for Failure to Seek Public Comment on Organic Compost Rule

On April 14, 2015, the Center for Environmental Health, Beyond Pesticides, and Center for Food Safety also filed a federal lawsuit challenging the USDA National Organic Program’s (NOP) failure to follow the law in making a substantial rule change to the USDA organic standard. At issue is the contaminated compost guidance released by USDA, which weakens the long-standing prohibition of synthetic pesticide contaminants. The new guidance radically changes organic requirements, allowing organic producers to use compost materials treated with synthetic pesticides, a rule the USDA made without the required rulemaking process. The court rejected a government motion to dismiss the case in September, recognizing that USDA had changed an allowance of what contaminated compost could contain without an opportunity for public comment.

ally have very specific purposes—often, ironically, connected with a concern over a tyranny of the majority, and in the case of organic, ensuring that the decisions of the board do not alienate any of the three key sectors—consumers, farmers, and environmentalists.

The drafters of OFPA recognized that some interests in the organic community could hold more power than others. In the words of James Madison, in *The Federalist Papers*, they recognized that, “A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government.” So, the authors of OFPA took two steps: (1) they created a decision making board that balanced interests, and (2) they required a supermajority of 2/3 for decisive votes.

In the words of the Senate report:

The membership of this board was carefully selected to provide a balance of interests. There was debate during the hearing on S. 2108 regarding appropriate representation on a Board with such great power in setting standards. Some people argued that the Board should be industry-dominated to ensure continuation of the kind of high quality standards associated with organic farming and which make sense from a production viewpoint. Other people argued that industry representation on the Board would be inappropriate and present conflict of interest problems. As a result, the Committee restructured the Board so that the farmers and handlers involved in organic production receive six representatives,

equal to the consumer and environmental organizations, which together also receive six representatives. A single retail member raises the membership total to thirteen. [The House amendment added two more members—a certifying agent and a scientist—to bring the total to 15 on the Board, and the Conference adopted the House version.] In order for any motion to carry, a two-thirds vote is required. If all members are present and voting nine [ten in the final version] votes are required for a successful motion. Requiring a two-thirds vote, the Committee believes, will adequately prevent any one interest from controlling the Board.

What about the view that the supermajority requirement creates the possibility for the “tyranny of the minority”? The fact that is not taken into consideration by adherents of the “tyranny of the minority” position is that OFPA is not neutral with respect to most decisions made by the NOSB. As stated in the Senate report,

Most consumers believe that absolutely no synthetic substances are used in organic production. For the most part, they are correct, and this is the basic tenet of this legislation. But there are a few limited exceptions to the no-synthetic rule and the National List is designed to handle these exceptions.

The Committee does not intend to allow the use of many synthetic substances. This legislation has been carefully written to prevent widespread exceptions or “loopholes” in the organic standards which would circumvent the intent of this legislation. The few synthetic substances that are widely recognized as safe and traditionally used in organic production are explicitly cited in the bill as potential items to be included on the National List of the Board and the Secretary approve of their use.

The National List consists of “exemptions” to the general rule that synthetic substances are not permitted in organic production and nonsynthetic substances are permitted. Thus, it is consistent with the intention of OFPA framers to require a supermajority in order to list a synthetic as an exemption to the general rule.

Regarding the process in the LS, the subcommittee failed to address the charge it was given by the board, including full discussion of an expiration date and the science supporting the majority view.

The process suffered another setback when the NOSB Chair Jean Richardson allowed board member Harold Austin to vote via Skype from his hospital bed. While we are sympathetic to a health emergency, Robert’s Rules of Order is very clear, as pointed out

by NOSB member Colehour Bondera, that absent members may not vote unless “expressly stated in the bylaws.” No such allowance is stated in the Policy and Procedures Manual or any other document governing NOSB meetings. Nick Maravell walked out of the room, refusing to take part in this illegal process, and the resulting 10-4-1 voted attained the necessary two-thirds majority to pass the motion. While the vote would have reached the same conclusion had Mr. Austin been present, the lack of attention to legal NOSB process has become thematic in the last several years, which has sparked outrage from organic community members on key issues.

How is the New Sunset Process Working?

USDA’s new sunset process involves changes in review and deci-

Future Challenges

“Inerts”

Action on “inert” ingredients has been stalled, with most meetings of the Inerts Working Group having been cancelled. However, the National Organic Program (NOP) reported on meetings with EPA’s Safer Choice (formerly Design for the Environment) program. The Safer Choice program has compiled a “Safer Chemical Ingredient List” (SCIL) that has categories based on functional uses, a number of which include uses of so-called “inert” ingredients in pesticide products –chelating agents, polymers, preservatives and antioxidants, solvents, and surfactants, for example.

Each of these functional groups has its own criteria for inclusion on the list. For example, the Safer Choice criteria for surfactants look at rate of biodegradation, degradation products, and level of aquatic toxicity, and require that surfactants with higher aquatic toxicity demonstrate a faster rate of biodegradation without degradation to products of concern.

NOP would like the NOSB to review the SCIL and consider referring to it for inerts review. However, the SCIL was not developed using OFPA criteria. NOP acknowledges this and says,

EPA criteria is [sic] comprehensive regarding environmental and health impacts. NOSB could additionally provide oversight review for other OFPA criteria regarding compatibility and alternatives. NOSB would continue to provide oversight review of EPA SCIL program at each sunset period.

It will be a challenge to ensure that the SCIL is used in a way that complies with OFPA. Historically, EPA’s review of potentially hazardous substances has been risk-based, as opposed to OFPA’s hazard-based requirements. EPA does not have a functioning definition of endocrine-disrupting chemicals that would allow it to evaluate materials. Furthermore, use of a list that was developed for a different purpose may fail to account for hazards that appear in the pesticide use. For example, the criteria for surfactants were developed for use in cleaning products, where aquatic degradation and toxicity to aquatic organisms are the main concerns. The behavior of surfactants when sprayed on crops may bring additional concerns such as impacts on soil organisms that have not been addressed.

Ideally, the NOSB could interface with the Safer Chemical program by contracting with EPA to evaluate materials according to OFPA criteria. (This was an earlier proposal.) Given that the review of “inerts” will now be progressing without a member of the NOSB with the experience of Beyond Pesticides, our oversight of the process will be crucial.

Contaminated Inputs

The CS proposed a plan to look at potentially contaminated inputs in organic production by feedstock or pathway –manure, yard waste, hay or straw, etc. Potential contaminants of each feedstock would be examined for the likelihood they could survive prescribed treatments, such as composting, as well as ways to avoid or mitigate the contamination. The plan provoked much public comment calling for the prohibition of manure from conventional livestock –especially confined animal feeding operations (CAFOs) –in organic production. Commenters produced long lists of potential contaminants in CAFO-sourced manure. On the other hand, many organic producers depend on manure from non-organic farms. There will be a temptation to avoid dealing with inputs like contaminated manure, whose impacts on organic crops is not as obvious as the impacts of persistent herbicides. In addition, protecting organic producers from all of these contaminants will require action outside of the NOSB and NOP that may not be welcomed by USDA.

sion making. While there have been improvements in scientific review process, the decision making process is still broken.

On the positive side, subcommittees requested and received updated technical information concerning many of the 198 listings that will be considered in fall 2015 for 2017 under the five-year sunset review process for allowed synthetic materials. Technical reviews were posted to the NOP website as they were approved by the relevant subcommittees. However, the subcommittee handling of the technical information was mixed. Technical reviews contain much detailed information about each substance. NOSB members who are not on the reviewing subcommittee, as well as the general public, rely on the subcommittee to digest that information and provide a concise summary. The vehicle used for the summary has customarily been an annotated checklist considering requirements of OFPA. It is important that this summary of the information be provided before the first of the two meetings at which the sunset materials are discussed, because any substantive comments presented after that meeting are considered “untimely” under the new sunset process. The CS provided

checklists (clear assessments by legal criteria) for 17 of its 41 sunset 2017 materials; the Handling Subcommittee provided a link, which was broken, to one checklist; the subcommittee did not provide any checklists, only summaries.

The NOSB meeting also provided evidence of the need to be able to annotate or change the restrictions of a listing during the sunset process. The NOSB noted that several handling materials were on the wrong list. The Board also noted that other listings might require annotations –such as the removal of bacteriophages from microorganisms and some limitation on the use of fish oil. The lack of the ability to annotate (based on a policy determination by NOP without any public input) during the sunset process remains a major obstacle to fine-tuning the National List and providing an incentive to adopt organic and natural alternatives.

The voting process is still inconsistent with OFPA. Motions to delist were brought from subcommittee, and required a two-thirds board majority to pass. However, no sunset vote was close enough that the change made a difference.

On the Agenda for the Fall 2015 Meeting

The next opportunity to weigh in on organic standards is the National Organic Standards Board Fall Meeting, held October 26-29, 2015, in Stowe, Vermont. This meeting is filled with annotation proposals, petitions, and 2017 Sunset Materials discussions. Public comments are accepted through October 5, 2015. Below are some of the more pressing matters, for more detailed information, see <http://bit.ly/NOSBaction>. [Public comments can be made at the meeting or through a webinar on October 13 and 20, 2015. Deadline to sign up is October 8, 2015.]

Inerts: The Crops and Livestock Subcommittees have proposed to let other government lists govern without adequate NOSB oversight and review an annotation that would abdicate NOSB responsibility for reviewing “inerts.” Beyond Pesticides is seeking improved oversight of allowed chemicals, and the reversal of nonylphenol ethoxylates (NPEs). So-called “inert” ingredients in pesticide products are neither chemically nor biologically inert. They are designed to enhance the pesticidal activity of pesticide products and can have toxic properties that do not meet the standards of the *Organic Foods Production Act* (OFPA).

Micronutrient annotation: Beyond Pesticides opposes the annotation change proposed by the Crops Subcommittee because it encourages the use of synthetic micronutrients without empirical evidence to demonstrate need. While the CS correctly points to methods other than soil testing to document soil deficiency, we disagree with the intention of the CS to allow “proactive” use of synthetic micronutrients. We disagree with the use of “professional crop advisors and agronomists who know the nutrient needs of specific crops and regions and will write recommendations for correction before the problem of deficiency occurs” because such opinions are not necessarily based on evidence at the site, and because it is contrary to OFPA.

Laminarin: Beyond Pesticides opposes the proposal to classify laminarin as nonsynthetic, which would permit its use without examination of hazards. Not only do we believe that the manufacturing process qualifies this material as a synthetic material, but there are also issues of health and safety that the board should evaluate as it moves forward in determining whether these materials should be recommended for allowance in organic production. Laminarin is extracted from seaweed and is also found in fungi. Laminarin works by amplifying natural plant defenses and by increasing the concentration of anti-herbivore and antifungal metabolites, such as the toxic chemical solanine in potatoes.

Seaweed Extracts: Beyond Pesticides supports the CS proposals to classify seaweed extracts as synthetic and deny the petition for listing on §601. Seaweed extracts, such as laminarin (above), must be classified as a synthetic substance if they are extracted as described in the petitions. Sulfuric acid is added during the extraction process for these materials. It is neutralized with sodium or potassium hydroxide in a later step. While the reaction of sulfuric acid and sodium/potassium hydroxide neutralizes the acid, thus “removing” that effect, it does not remove the sulfur. Sodium or potassium is also added. Thus, sodium sulfate or potassium sulfate is a net addition. It is the remaining material at levels that are of technical concern or that have technical effect that requires the classification of this material as a synthetic. Removal is not the same thing as eliminating the function while creating an added substance in the material.