



BEYOND PESTICIDES

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March 1, 2013

National Organic Standards Board
Spring 2013 Meeting
Portland, OR

Re. MS: Confidential Business Information

These comments are submitted on behalf of Beyond Pesticides. Beyond Pesticides, founded in 1981 as a national, grassroots, membership organization that represents community-based organizations and a range of people seeking to bridge the interests of consumers, farmers and farmworkers, advances improved protections from pesticides and alternative pest management strategies that reduce or eliminate a reliance on pesticides. Our membership and network span the 50 states and groups around the world.

We are concerned that petitioners may abuse their right to keep secret confidential business information (CBI). CBI claims have not always been addressed critically by the NOP and NOSB. We cite two examples of materials under consideration at this meeting—DBDMH and sulfuric acid. Both petitions contain claims to CBI that appear to limit the NOSB's ability to fully evaluate a material. Contrary to the directions in the petition form, the petitioners did not include "A Confidential Business Information Statement which describes the specific required information contained in the petition that is considered to be Confidential Business Information (CBI) or confidential commercial information and the basis for that determination." The sulfuric acid petition contains only the general statement that the information pertains to the Maritech® process, but does not describe the specific information, which happens to include "chemical interactions with other substances, especially substances in organic production." The DBDMH petition includes "effects on human health" in its CBI claims and gives no justification for that claim or any other. These petitions should have been sent back to the petitioners by the National Organic Program (NOP) or the Handling Subcommittee.

There is, as described in the discussion document, information for which CBI claims are supported by law. A petitioner does not have a right to have a material listed on the National List, however, and the NOSB does have a right to make disclosure of CBI a condition of consideration for listing. The criterion for deciding whether CBI should be permitted is whether the NOSB can make an informed decision without the withheld information. The biggest conflict seems to be in the area of manufacturing processes, which the NOSB must consider in making a decision, and which is generally accepted as being an acceptable area for CBI claims.

Responses to questions:

1. Should Confidential Business Information be allowed in petitions? Please explain your answer.

As stated above, the criterion should be whether the NOSB has adequate information to make a decision. If a process can be developed that enables the TR contractor to obtain CBI and verify claims made by the petitioner, then it may work to allow CBI. But the CBI must be described specifically, not generally.

2. If CBI is allowed, should it be limited so that it does not involve ingredients or manufacturing processes?

CBI for substances used in organic production and handling should certainly not involve ingredients. All ingredients must be disclosed. This is particularly worth stating in view of the short discussion of CBI in the “Other Ingredients” proposal:

Some brand name formulations currently used in organic processed products may include other ingredients not reviewed because the manufacturer is unable or unwilling to disclose all of the ingredients. Petitions that contain CBI ingredients run the risk of not having those ingredients reviewed.

It should be made clear that not only would those materials not be reviewed, but the petition would be sent back as insufficient.

The claim of manufacturing processes as CBI is generally legally defensible, but again, the NOSB must have information it needs, which includes information about manufacturing inputs and emissions. The reviewing committee should have the flexibility to state that publicly-available information, even that provided through some process such as “Possible Recommendation 2,” is not adequate. In those cases, the committee should be able to state that it will not be able to proceed with the review if manufacturing processes are not disclosed.

3. Do the provisions in Possible Recommendation 2 make sense and are there others that the board should consider?

“Possible Recommendation 2” makes sense if the provision (I) for using affidavits is stated more clearly. It is crucial that the TR contractors be able to verify claims made in the affidavit.

4. Provision I in Possible Recommendation 2 is about using an affidavit to supplement a CBI petition. Comment on whether this is valuable.

An affidavit that says, “We affirm that this material meets all review criteria,” is not really useful to the NOSB. The examples are good, but the general statement should require a more specific statement, such as, “The petitioner may be given the option to characterize in an affidavit information withheld as CBI in relation to review criteria.”

5. Should procedures, such as a Confidentiality Agreement, be developed that would allow the NOSB, but not the public, to see any CBI?

Someone needs to be able to characterize the CBI in a way that is useful to the public, as well as NOSB members, so allowing NOSB members but not the general public to view the CBI does not eliminate that need. We have concerns about releasing the CBI to the NOSB. The NOSB

members need to be able to freely discuss in public the issues surrounding a petition, and this can be difficult if they need to separate public from nonpublic information in the course of their debates. In addition, NOSB members conduct some of their deliberations via emails that may be subject to FOIA. Finally, if someone does release the CBI, it may be difficult to determine who did it, and the ensuing process of assigning blame may distract from the substantive review of the material.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Terry Shistar". The signature is fluid and cursive, with a long horizontal stroke at the end.

Terry Shistar, Ph.D.
Board of Directors