

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

Date: May 22, 2006

Subject: Commercial Availability Criteria

Chair: Kevin R. O'Rell

Recommendation

The NOSB hereby recommends to the NOP the following:

Rulemaking Action: _____
Guidance Statement: XXXXX
Other: _____

Statement of the Recommendation (including Recount of Vote):

See attached Recommendation A, B, and C for commercial availability criteria for petitioning an item on 205.606, for NOSB review of the substance and for ACA's criteria.

NOSB Vote:

Moved by Julie Weisman and seconded by Nancy Ostiguy

Yes – 11

No – 0

Abstain – 1

Absent- 2

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

The objective of this guidance recommendation is to establish consistent criteria and procedures to be followed by all certification applicants, certified operations and ACA's when petitioning materials on 205.606 and when making commercial availability decisions regarding the use of materials on 205.606.

Response by the NOP:

**National Organic Standards Board
Policy Development and Handling Committee
Final Recommendation for the Establishment Commercial Availability
Criteria**

March 30, 2006

Introduction

The NOSB has been asked to provide a draft which addresses the development of criteria for the determination of commercial availability. The objective of this draft is to establish acceptable criteria and procedures to be followed by all certification applicants, certified operators, and accredited certifying agents (ACAs) when petitioning materials onto 205.606 and when making commercial availability decisions regarding the use of materials on 606.

Background

The NOP Rule allows that a non-organic agricultural ingredient may be used in an organic processed product if: (a) it is commercially unavailable in organic form; and (b) the total non-organic content does not exceed 5% by weight (minus added water and salt) of the organic product. Specifically (205.301 (b)) in the Final Rule states: *...A raw or processed agricultural product sold, labeled, or represented as “organic” must contain (by weight or fluid volume, excluding water and salt) not less than 95 percent organically produced raw or processed agricultural products. Any remaining product ingredient must be organically produced, unless not commercially available in organic form or must be nonagricultural substances or non organically produce agricultural products produced consistent with the National List....”*

205.2 of the Final Rule defines “**commercial availability**” as, “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) states, “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 commercial availability, as applicable.”

Until recently, the NOP Final Rule was interpreted to grant a blanket exemption for certifying agents and their clients to determine the commercial unavailability of organic agricultural products which were ingredients. This system allowed for timely determinations to be made regarding commercial availability and, if appropriate, allowances for the use of non-organic agricultural products. Operators who produced processed organic products for retail trade require such determinations to be made within relatively tight timeframes. This may be required for several reasons. The time frame may be as little as one or two weeks in cases of sudden crop failure, or disruption of the processing of a needed ingredient. An organic ingredient may also become suddenly scarce due to the entry of a new product in the marketplace which temporarily consumes the supply of a previously available organic agricultural product.

On July 1, 2005, in a notice to all USDA-accredited certification agents, the USDA stated, “The declaratory judgment issued by the court [Harvey v. Johanns (Civil No. 02-216-P-H)] states that 7 CFR § 205.606 shall not be interpreted to grant a blanket exemption for certifying agents and their clients to determine the commercial unavailability of nonorganic agricultural substances. The declaratory judgment further stated that 7 CFR 205.606 shall be interpreted to permit the use of a nonorganically produced agricultural product only when the product has been listed in section 205.606 pursuant to the National List procedures and when an accredited certifying agent has determined that the organic form of the agricultural product is not commercially available.”

In a Federal Register notice also issued July 1, 2005, the USDA stated, “The court’s order limits an accredited certifying agent’s commercially available determinations for non-organic agricultural products used in or on processed organic products to the substances contained in 7 CFR 205.606.” The deadline for compliance is June 2007, about 16 months from now.

The NOSB and NOP must continue to move forward with the process described in the “Introduction” above in order to avoid a major disruption in the availability of organic processed products in the marketplace. Significant disruptions in the supply of organic processed products into the marketplace after June 2007 could be partly alleviated if procedures could also be established for proactively petitioning non-organic agricultural products onto 606 that have a documented recent history of periodic commercial unavailability as organic.

7 USC 6518 states:

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.

To place a substance on or remove a substance from § 205.606, any person may submit a petition to the NOP and NOSB. The NOP will review the petition for completeness before the petition is considered by the NOSB. Complete petitions will be posted on the Petitioned Substances database and submitted to the NOSB for consideration. The NOSB will review the petition and all supporting information and make a draft recommendation, which will be posted for public comment prior to the next scheduled NOSB meeting. The NOSB will consider the petition, all supporting documentation, and all public comments, and then make a recommendation to the USDA regarding the status of the substance. If a substance is to be added to or removed from § 205.606, the USDA will issue a Proposed Rule in the Federal Register, receive public comments, and issue a Final Rule in the Federal Register to establish the legal status of the substance.

Furthermore, 205.201(a)(2) requires certification applicants and certified operators, as part of their Organic System Plans, to submit a list that states "...documentation of commercial availability, as applicable." There are no standardized criteria for all ACAs to follow which will determine what should be researched in the documentation, and currently there are no processes in place for verifying the documentation accuracy. Section C of the recommendation below proposes standardized criteria to be used by ACAs when making commercial availability determinations for substances on § 205.606.

Recommendation

A. The NOSB recommends using the procedures currently in place for petitioning materials onto 205.606. The document entitled "Information to be Included in a Petition", shown on the NOP website, should be amended to include a description of the information needed for the determination of commercial availability of non-organically produced agricultural products. The following additions to this document are recommended:

1. Add the following bullet to Item A:

- Agricultural (nonorganic) substance allowed in or on processed product labeled as "organic."

2. Add the following bullets to Item B #12

- When petitioning for the inclusion on the National List of nonorganically produced agricultural products the petition must state why the product should be permitted in the production or handling of an organic product. Specifically, the petition must include current industry information regarding availability of and history of non-availability of an organic form of the product, and all factors that may present a challenge to a consistent organic supply.
- When petitioning for the removal from the National List of nonorganically produced agricultural products the petition must state why the product should be prohibited from use in a nonorganic form. Any information acquired since the original petition to add the material to the National List should be provided.

B., In recommending that an agricultural ingredient should be placed on 205.606, the National Organic Standards Board shall review the petitioner's claim that no organic substitutes are commercially available in the appropriate form, quality or quantity needed to fulfill an essential function in a system of organic handling.

C. The accredited certifying agent, in granting a determination that an agricultural ingredient on 205.606 is not commercially available in an organic form, shall:

1. Evaluate the applicant or certified operator's documented claim that no organic substitutes are commercially available in the form, quality, or quantity needed by the operation to fulfill the required function; including test data demonstrating that organic forms of the ingredient do not meet the functional requirements for the form or quality necessary to the operation.
2. Validate that the applicant or operator has documentation proving that the ingredient is not commercially available in an organic form by reviewing credible available information listing known sources of organic ingredients;
3. Notify the certification applicant or certified operator of sources of information which list available organic ingredients, if the certifying agents finds that such ingredients exist;
4. Maintain and submit to the National Organic Program annually an up-to-date list of ingredients that have been granted allowances in non-organic form. (The list shall maintain the confidentiality of ingredient suppliers and parties granted allowances. The reporting requirement shall be implemented through the accreditation process by providing ACAs ample notification and time to adapt data management systems.);

5. Require certified operators to update commercial availability information in each organic system plan update;
6. Acknowledge all complaints concerning allowances granted and provide rationale for determinations. If the investigation of a complaint provides significant new information, then the certifying agent must revisit the allowance; and

Conclusion

It is the opinion of the NOSB members that the three recommendations listed provide the acceptable criteria and procedures to determine commercial availability. The recommendations provide for timely determinations regarding commercial availability.

Moved: Julie Weisman

Second: Nancy Ostiguy

Board vote: Yes – 11 No – 0 Abstain – 1 Absent - 2