

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

**Date:** 11-11-06

**Subject: Commercial Availability Criteria for National List § 205.606 Materials**

**Chair: Kevin O'Rell**

**Recommendation**

The NOSB hereby recommends to the NOP the following:

Rulemaking Action: \_\_\_\_\_  
Guidance Statement: XXX  
Other: \_\_\_\_\_

**Statement of the Recommendation (including Recount of Vote):**

The NOSB recommends the attached 3 modifications to petition procedures be adopted to establish acceptable criteria and procedures to determine commercial availability.

**NOSB Vote: Motion:** Julie Weisman **Second:** Bea James

*Board vote: Yes - 14 No - 0 Abstain - 0 Absent - 0*

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

The NOSB is proposing further clarifications to the terms of commercial availability as it will be used by the NOSB, certifying agents, and industry to assist in the petition for placement /removal of a material on/from 205.606 of the National List.

**Response by the NOP:**

## National Organic Standards Board

### Recommendation for the Establishment of Commercial Availability Criteria National List § 205.606 Materials

October 19, 2006

#### **Introduction**

In light of the June 9, 2005 court final order and judgment arising from *Harvey v. Johanns*, the NOSB has been asked to review petition procedures for adding materials to § 205.606 of the National List. In particular, the NOSB is proposing further clarifications to the terms of commercial availability as it will be used by the NOSB, certifying agents, and industry to assist in the petition for placement/removal of a material on/from § 205.606 of the National List.

#### **Background**

With respect to Count 1 of *Harvey v. Johanns*, the court final order stated that “the Secretary must issue a declaratory judgment that 7 CFR § 205.606 shall not be interpreted to create a blanket exemption to the National List requirements specified in 7. U.S.C. 6517.” These “requirements permit the use of nonorganic agricultural products in or on processed organic products when their organic form is not commercially available.”

Further, “consistent with OFPA, 7 CFR §205.606 shall be interpreted to permit the use of a nonorganically produced agricultural product that has been listed in § 205.606 pursuant to National List procedures and when a certifying agent has determined that the organic form of the agricultural product is not commercially available.”

USDA was ordered to notice the content of this Declaratory Judgment and Order within 30 days in the 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.

At the time of the final order and judgment, the court cited the Court of Appeals decision – recognizing that some producers, handlers, and certifiers may have misinterpreted § 205.606 to mean that any nonorganic agricultural product – if determined commercially unavailable by an accredited certifying agent, could be used in organic products without being individually listed pursuant to National List procedures. While that is clearly contrary to the plain meaning of OFPA, because of the potential for confusion recognized by the Court of Appeals, and to enable an orderly transition to compliance with the regulation as interpreted in the Declaratory Judgment, the court final order also granted that “products produced in conformance with the misinterpretation identified by the Court of Appeals and described above, and certified by an accredited certifying agent, may continue to be produced and sold for two years from the date of the Judgment and Order. No non-conforming products may enter the stream of commerce after that date.” That date is June 9, 2007.

However, the current petition procedures for placing nonorganic agricultural substances or materials on the National List on § 205.606 related to commercial availability are not adequate. The NOP has asked the NOSB for a recommendation for further guidance to strengthen the petition procedures and to further elaborate on commercial availability as it relates to materials petition for § 205.606 of the National List.

## **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 **commercial availability**, 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**

To add 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 USDA regarding the status of the substance. If a substance is to be added to or removed from § 205.606, 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.

Section C of the recommendation below proposes standardized criteria to be used by ACAs when making commercial availability determinations for substances on § 205.606.

### **A. Revise procedures for petitioning materials onto § 205.606.**

“Information to be Included in a Petition,” as posted on the NOP website, should be amended to include information needed to assist in the determination of commercial availability of nonorganic agricultural materials. The following additions to this document are recommended:

1. Add the following bullet to Item A:

- Agricultural (nonorganic) materials 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 material the petition must state why the material 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 unavailability of an organic form of the material. Industry information includes, but is not limited to the following:
  - Regions of production (including factors such as climate and number of regions)
  - Number of suppliers and amount produced
  - Current and historical supplies related to weather events (weather-related events such as hurricanes, floods, droughts that temporarily halt production or destroy crops or supplies);
  - Trade-related issues (e.g., evidence of hoarding, war, trade barriers, civil unrest) that may temporarily restrict supplies;
  - Other issues which may present a challenge to a consistent supply.

**(Note:** The global market is the universe of supply — commercial availability does not depend on local market conditions, except as noted above.)

- When petitioning for the removal from the National List of nonorganically produced agricultural materials, the petition must state why the material 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. NOSB and NOP role in review of petitions

In recommending that an agricultural material should be placed on § 205.606, the NOSB shall ascertain, through technical review, if necessary, that the material is agricultural; and evaluate the information regarding the fragility of supply.

The NOSB and/or appropriate committee shall confer with the NOP regarding the following:

1. Any modifications to NOP procedures made necessary as a result of this Recommendation and;
2. Throughout the petition process for nonorganic agricultural products petitioned for § 205.606.

### C. ACA's role in determining commercial availability of materials on § 205.606

The ACA, in determining that an agricultural material on § 205.606 is not commercially available in 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 material do not meet the functional requirements for the form or quality necessary to the operation.

[Note: The global market is the universe of supply – local market conditions are not sufficient criteria – aside from as described above.]

2. Validate that the applicant or operator has credible documentation that the material is not commercially available in an organic form by reviewing available information listing known sources of organic materials;
3. Maintain and submit to the NOP annually an up-to-date list of materials that have been granted allowances in nonorganic form. (The list shall maintain the confidentiality of material 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.);
4. Require certified operators to update commercial availability information in each organic system plan update;

**Conclusion**

NOSB recommends the above 3 modifications to petition procedures be adopted to establish acceptable criteria and procedures to determine commercial availability.

*Board vote:*

*Moved: Julie Weisman*

*Second: Bea James*

*Yes- 14*

*No-0*

*Abstain-0*

*Absent - 0*