

NOTICE OF PETITION FOR AMENDMENT OF RULEMAKING

June 17, 2014

VIA ELECTRONIC MAIL

Tom Vilsack, Secretary
U.S. Department of Agriculture
1400 Independence Ave., SW
Washington, D.C. 20250
Email: agsec@usda.gov

Miles McEvoy, Deputy Administrator
U.S. Department of Agriculture
Agricultural Marketing Service
National Organic Program
1400 Independence Ave., SW
Washington, D.C. 20250
Email: miles.mcevoy@ams.usda.gov

*Re: Administration Procedures Act Petition for Amendment of Rulemaking
Concerning National Organic Standards Board Charter*

Dear Secretary Vilsack and Deputy Administrator McEvoy:

Pursuant to section 553(e)¹ of the Administrative Procedures Act (APA) and section 1.28 of title seven of the Code of Federal Regulations,² Beyond Pesticides, Center for Food Safety, and the 20 organizations hereby petition for amendment of the National Organic Standards Board (NOSB) Charter, filed on May 8, 2014, by the Agricultural Marketing Service (AMS) of the U.S. Department of Agriculture (USDA) pursuant to the Federal Advisory Committee Act (FACA).³

Agency heads are responsible for amending charters of an advisory committee, be it minor or major amendments.⁴ In seeking the amendment of the NOSB Charter, Petitioners urge USDA to uphold and apply the standards of the Organic Foods Production Act (OFPA), the implementing law for establishment of the NOSB and National Organic Program (NOP).⁵

¹ 5 U.S.C. § 553(e) (“Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”).

² 7 C.F.R. § 1.28 (“Petitions by interested persons in accordance with 5 U.S.C. 553(e) for the issuance, amendment or repeal of a rule may be filed with the official that issued or is authorized to issue the rule. All such petitions will be given prompt consideration and petitioners will be notified promptly of the disposition made of their petitions.”)

³ 5 U.S.C.App.2 §9(c).

⁴ 41 C.F.R. § 102-3.80 (“(a) Responsibility and limitation. The agency head is responsible for amending the charter of an advisory committee. Amendments may be either minor or major. The procedures for making changes and filing amended charters will depend upon the authority basis for the advisory committee. Amending any existing advisory committee charter does not constitute renewal of the advisory committee under § 102-3.60.”).

⁵ 7 U.S.C. §§ 6501-6523.

Petitioners are “interested persons” under the APA and seek amendment of the NOSB Charter to align it with the standards established under OFPA concerning the continuing and non-discretionary status of the NOSB and mandatory duties assigned to the NOSB and USDA. In particular, Petitioners seek amendment of the NOSB Charter to accomplish the following:

- Accurately reflect the continuing and non-discretionary duties of the NOSB; and
- Accurately reflect the mandatory, continuing, and interminable status of the NOSB.

Petitioners

Beyond Pesticides

Beyond Pesticides is a national nonprofit organization based out of Washington D.C. with members in 47 states and the District of Columbia. Beyond Pesticides and its members are, and will be, adversely affected by USDA’s failure to uphold and organic standards and accurately establish through the NOSB Charter the NOSB’s mandatory functions and non-discretionary and irrevocable status as defined under OFPA.

Beyond Pesticides members promote safe air, water, land, and food, and work to protect public health and the environment by encouraging a transition away from the use of toxic pesticides. Integral to this work is the support of the NOP and protecting the integrity of the organic label. A necessary component of protecting organic integrity is significant engagement with the NOSB and NOP to continually improve organic production standards, evaluate the National List, and develop strong organic policy.

Many Beyond Pesticides members produce, handle, certify, and consume organic products. USDA’s failure to promulgate an NOSB Charter that accurately reflects NOSB’s mandatory duties and non-discretionary status as required under OFPA harms Beyond Pesticides members directly by threatening the integrity and necessary regulatory framework needed for the NOP and organic label to continue as intended by OFPA’s drafters and the organic community.

Center for Food Safety

Center for Food Safety (CFS) is a Washington, D.C. based nonprofit organization that works to protect human health and the environment by curbing the proliferation of harmful food production technologies and by promoting organic and other sustainable forms of agriculture. Our membership has rapidly grown to include nearly 500,000 people across the country that support organic food and farming, grow organic food, and regularly purchase organic products.

To achieve its goals, CFS disseminates to government agencies, members of Congress, and the general public a wide array of educational and informational materials addressing the use of pesticides and genetically engineered crops and promoting a strong organic program and independent NOSB. These include reprints of news articles, policy reports, legal briefs, press releases, action alerts, and fact sheets. CFS also sends out action alerts to its True Food Network. These action alerts generate public involvement, education, and engagement with governmental

officials on issues related to organic food and farming and other issues affecting a sustainable food system. Collectively, the dissemination of this material has made CFS an information clearinghouse for public involvement and governmental oversight of the use of harmful technologies in our nation's food supply and promotion of the national organic program.

The Cornucopia Institute

The Cornucopia Institute engages in research and educational activities on organic food and agriculture. With more organic farmer members than any other similar organization, Cornucopia acts as a corporate and governmental watchdog to protect and defend the integrity of organics.

Equal Exchange

A democratic worker cooperative, Equal Exchange's mission is to build long-term trade partnerships that are economically just and environmentally sound, to foster mutually beneficial relationships between farmers and consumers and to demonstrate, through our success, the contribution of worker co-operatives and Fair Trade to a more equitable, democratic and sustainable world.

Food & Water Watch

Food & Water Watch (FWW) is a national non-profit public interest consumer advocacy organization with offices throughout the United States. FWW advocates for common sense policies that will result in healthy, safe food and access to safe and affordable drinking water. To that end, FWW has advocated on issues related to agriculture policy, food safety standards, food labeling regulations and other food policy issues since its inception. FWW staff members have attended NOSB meetings for many years, offering public comments at the meetings and involving our members and supporters in the public comment process. In addition to participating in the NOSB process, FWW also tracks the NOP's regulatory efforts on organic standards and educates the public and legislators about the organic standards and opportunities to increase the integrity and credibility of the organic label.

La Montañita Co-op

La Montañita Co-op is a community owned, consumer cooperative with over 16,500 members. La Montañita believes in the shared benefits of healthy food, sound environmental practices and a strong local economy with results that justify the resources used. While serving La Montañita's membership, the Co-op also collaborates with farmers, local food and environment advocates, and educators to build community awareness about the links between food, health and the environment.

Maine Organic Farmers and Gardeners Association

The Maine Organic Farmers and Gardeners Association (MOFGA), formed in 1971, is the oldest and largest state organic organization in the country. The purpose of MOFGA is to

help farmers and gardeners: grow organic food, fiber and other crops; protect the environment; recycle natural resources; increase local food production; support rural communities; and illuminate for consumers the connection between healthful food and environmentally sound farming practices.

Midwest Organic and Sustainable Education Service

The Midwest Organic and Sustainable Education Service (MOSES) is a nonprofit organization based in Spring Valley, Wisconsin. We promote organic and sustainable agriculture by providing the education, resources and expertise farmers need to succeed.

Northeast Organic Dairy Producers Alliance

Northeast Organic Dairy Producers Alliance (NODPA) is the largest grass roots organization of organic dairy producers in the country with a goal of advocating on behalf of organic milk producers to maintain sustainable pay prices and protect the integrity of the USDA Organic regulations.

Northeast Organic Farming Association – Interstate Council, Connecticut, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, Vermont

The Northeast Organic Farming Association (NOFA) is an affiliation of seven state chapters whose purpose is to advocate for and educate about organic and sustainable agriculture, family-scale farming and homesteading both rural and urban, agricultural justice, and related issues. NOFA is dedicated to a vision of interconnected healthy communities living in ecological balance deeply rooted in a sense of place, grounded in organic care of the land.

Organic Consumers Association

The Organic Consumers Association (OCA) is an online and grassroots non-profit 501(c)3 public interest organization campaigning for health, justice, and sustainability. The OCA deals with crucial issues of food safety, industrial agriculture, genetic engineering, children's health, corporate accountability, Fair Trade, environmental sustainability and other key topics.

Organically Grown Company

Organically Grown Company (OGC) is the largest wholesaler of organic produce in the Pacific Northwest that is wholly owned by growers and employees. For over 30 years, OGC has been a proud supporter of regional organic farmers, the organization is committed to supplying consumers and retailers with organic produce. Organically Grown is committed to organic production and to encouraging ever more sustainable practices in business and trade.

Organic Seed Growers and Trade Association

Organic Seed Growers and Trade Association (OSGATA) is the farmer-controlled national nonprofit membership trade organization of certified organic farmers, certified organic

seed companies, organic seed professionals, affiliate organizations and individuals dedicated to the advancement of certified organic seed. OSGATA is committed to protecting, promoting and developing the organic seed trade and its growers, thereby assuring that the organic community has access to excellent quality certified organic seed, free of genetic contaminants and adapted to the diverse needs of local organic agriculture.

OSGATA envisions a strong decentralized organic seed industry which meets the needs of the market by strengthening and growing certified organic farms and independent companies selling certified organic seed. The expansion of a vibrant organic seed trade will result in sovereign seed systems rich in biodiversity which respond to the ecological, economic, and localized challenges and needs of organic agriculture at every scale.

PCC Natural Markets

PCC Natural Markets is a certified organic retailer, and the largest consumer-owned grocery retailer in the country, whose mission includes creating an environment where the organic supply chain can thrive.

Petitioners Interests

As representatives of organic consumers, farmers, producers, certifiers, and retailers, the above Petitioners have a vested interest in maintaining the integrity of the organic program and ensuring that the mandatory duties and standards established under OFPA are upheld.

Through the following petition, we seek USDA's action to uphold existing organic standards and support the mandatory duties of the NOSB and NOP in relationship to OFPA. We thank you for your consideration and timely response.

Respectfully submitted,

Aimee M. Simpson
*Policy Director and Staff
Attorney*
Beyond Pesticides

Paige Tomaselli
Senior Attorney
Center for Food Safety

Will Fantle
Co-Director
The Cornucopia Institute

Keith Olcott
Compliance Coordinator
Equal Exchange

Patty Lovera
Assistant Director
Food & Water Watch

Robin Seydel
*Membership and
Community Outreach
Coordinator*
**La Montañita Co-op
(New Mexico)**

Ted Quaday
Executive Director
**Maine Organic Farmers
and Gardeners
Association**

Harriet Behar
Organic Specialist
**Midwest Organic and
Sustainable Education
Service**

Ed Maltby
Executive Director
**Northeast Organic Dairy
Producers Alliance**

Steve Gilman
Policy Coordinator
**Northeast Organic
Farming Association –
Interstate Council**

Bill Duesing
Organic Advocate
**Northeast Organic
Farming Association of
Connecticut**

Jack Kittredge
Policy Director
**Northeast Organic
Farming Association/
Massachusetts Chapter,
Inc.**

Janet Wilkinson
Executive Director
**Northeast Organic
Farming Association of
New Hampshire**

Camille Miller
Executive Director
**Northeast Organic
Farming Association of
New Jersey**

Anne Ruffin
Executive Director
**Northeast Organic
Farming Association of
New York**

Enid Wonnacott
Executive Director
**Northeast Organic
Farming Association of
Vermont**

Alexis Baden-Mayer
Political Director
**Organic Consumers
Association**

Natalie Reitman-White
*Director of Organizational
Development,
Sustainability & Trade
Advocacy*
**Organically Grown
Company**

Jim Gerritsen
President
**Organic Seed Growers
and Trade Association**

Trudy Bialic
Director of Public Affairs
PCC Natural Markets

TABLE OF CONTENTS

I. INTRODUCTION1

II. LEGAL BACKGROUND1

 A. Organic Foods Production Act (OFPA)1

 B. Federal Advisory Committee Act (FACA).....4

 i. Charter Content5

 ii. Committee Termination6

 C. Administrative Procedures Act (APA)7

III. PETITION FOR AMENDMENT OF RULEMAKING.....8

 A. 2014 NOSB Charter Should Be Amended to Accurately Reflect Continuing and Non-Discretionary Duties of the NOSB9

 B. NOSB Charter Should Be Amended to Accurately Reflect Mandatory, Continuing, and Interminable Status of NOSB 10

IV. CONCLUSION.....11

 APPENDIX A.....13

 APPENDIX B14

PETITION FOR AMENDMENT OF NATIONAL ORGANIC STANDARDS BOARD CHARTER

I. INTRODUCTION

Petitioners request that the U.S. Department of Agriculture (USDA) issue amendments to the National Organic Standards Board (NOSB) Charter, filed on May 8, 2014, found here as Appendix A. Understanding that this charter is filed pursuant to section 9(c) of the Federal Advisory Committee Act (FACA) and its implementing regulations,¹ terms of the charter must comply with both FACA and Organic Foods Production Act (OFPA) requirements.

As filed, the NOSB Charter improperly assigns authorities to USDA concerning the potential to terminate the NOSB and violates OFPA in its description of mandatory NOSB duties concerning ongoing OFPA implementation. While a valid FACA charter does not require reflection of the very language of a FACA committee's enabling legislation, it must accurately summarize and represent both the general advisory and specific and mandatory duties granted by statute. It must also accurately reflect the continuing nature of a FACA's committee's duration and eligibility for termination as described in the committee's implementing legislation.

Because FACA mandates the filing and renewal of advisory committee charters and vests in agency heads the power of amending committee charters, and OFPA instills the authority to promulgate regulations concerning the National Organic Program (NOP) and its mandatory function of establishing the NOSB, it is thus the responsibility of USDA to uphold OFPA's directives and standards concerning the NOSB and amend the May 8, 2014, NOSB Charter (2014 NOSB Charter).

Petitioners request amendments to the 2014 NOSB Charter that:

- Accurately reflect the continuing and non-discretionary duties of the NOSB; and
- Accurately reflect the mandatory, continuing, and interminable status of the NOSB.

II. LEGAL BACKGROUND

A. Organic Foods Production Act (OFPA)

A driving principle behind the establishment of the NOSB is to give the balanced presence of organic interests a permanent and necessary seat at the organic production standards and implementation table. Drafters of the original bill did not view this presence as temporary or diminutive: "The Committee regards this Board as an essential advisor to the Secretary on all issues concerning this bill and anticipates that many of the key decisions concerning standards will result from recommendations by this Board."² But drafters did not stop there or intend even an "essential advisory" role to be the limits of the NOSB's role. "[The NOSB] is *generally*

¹ See 41 C.F.R. §§ 102-3.5 – 102-3.185 and U.S. Dept. of Agriculture, Departmental Regulations No. 1041-001, Advisory Committee Management, Feb. 8, 1993.

² Report of the Committee on Agriculture, Nutrition, and Forestry, United States Senate, Food, Agriculture, Conservation, and Trade Act of 1990, S. 2830, Report 101-357, July 6, 1990, at 296.

responsible for advising the Secretary on all aspects of the implementation of [OFPA]. Specifically, the Board is responsible for evaluating substances for inclusion on the Proposed National List.”³

Indeed, OFPA in its final form reflects both these general and specific functions by assigning a long list of mandatory duties for the NOSB to carry out:

- The NOSB must provide recommendations to the Secretary on the implementation of OFPA as a whole. Notably, the statute does not state that this duty is at the request or the discretion of the Secretary, nor does it terminate with the initial establishment of the National Organic Program.⁴ This function goes beyond the general advisory functions set forth under the general NOSB provision of OFPA.⁵
- The NOSB must develop the proposed National List *or proposed amendments*. Given that OFPA contemplated a continuous reevaluation of the National List through both the petition process and sunset review and proposed amendments are a necessary result of these continuous reevaluations this is a permanent and ongoing mandatory duty.⁶
- Development of the National List and amendments to that list must follow the specific statutory standards and procedures outlined in the statute, many of which apply to both the NOSB and USDA. This responsibility is not limited to the creation of the first National List, but also the continuing changes to that list.⁷
- The NOSB must follow statutory requirements in establishing the proposed National List or proposed amendments to the National List. These include reviewing available information concerning potentially adverse human and environmental effects from EPA, the National Institute of Environmental Health Studies (sic), and other appropriate sources, compiling manufacturer information concerning complete lists of National List materials, and submitting to USDA results of the NOSB’s and technical advisory panel evaluations for National List materials.⁸

³ Report of the Committee on Agriculture, Nutrition, and Forestry, United States Senate, Food, Agriculture, Conservation, and Trade Act of 1990, S. 2830, Report 101-357, July 6, 1990, at 296.

⁴ 7 U.S.C. § 6518(k)(1) (“The Board shall provide recommendations to the Secretary regarding the implementation of this chapter.”).

⁵ 7 U.S.C. § 6518(a).

⁶ 7 U.S.C. § 6518(k)(2) (“The Board must develop the proposed National List or proposed amendments to the National List for submission to the Secretary in accordance with section 6517 of this title.”).

⁷ 7 U.S.C. § 6518(k)(2); see also 7 U.S.C. § 6517.

⁸ 7 U.S.C. § 6517(l)(1)-(3)

Requirements. In establishing the proposed National List or proposed amendments to the National List, the Board shall—

- (1) review available information from the Environmental Protection Agency, the National Institute of Environmental Health Studies, and such other sources as appropriate, concerning the potential for adverse human and environmental effects of substances considered for inclusion in the proposed National List;
- (2) work with manufacturers of substances considered for inclusion in the proposed National List to obtain a complete list of ingredients and determine whether such substances contain inert materials that are synthetically produced; and

- NOSB members must apply several statutorily-mandated criteria for evaluating potential National List materials, such as effects on human health and alternatives.⁹
- The NOSB must establish National List petition procedures. It is the Board, not USDA that is tasked with establishing these procedures.¹⁰
- The NOSB must perform a host of specific functions beyond National List development and OFPA implementation.¹¹ These include convening technical advisory panels, conducting the initial review of botanical pesticides, continually advising on product residue testing and emergency spray programs.
- The NOSB must select its own Chairperson.¹²
- An NOSB member serves for a term of 5 years.¹³
- The NOSB must review existing National List materials every 5 years during the sunset review process. If the Board fails to conduct this review, the material would no longer be valid on the National List and could not be used in organic production.¹⁴

The overwhelming majority of these mandatory duties do not contain termination dates or even indirect notions of a foreseeable endpoint. A lack of a termination date does not mean that Congress provided no instruction on the matter and left these functions to be governed by default FACA standards or the discretion of the Secretary. These are functions which are specific and integral to the implementation of the act as a whole and as such are interminable unless Congress revokes them. Additionally, none of these functions is left to the discretionary requests or determination of the Secretary. Had the drafters of OFPA wanted to vest more discretionary use of the NOSB for questions or issues related to these duties, it would have communicated this in a clear manner and restricted the number and nature of mandatory duties as other statutes have done.¹⁵

Taking this unique and independent role several steps forward, OFPA and its drafters also instituted several mandatory responsibilities for the Secretary in relation to the NOSB. Through

(3) submit to the Secretary, along with the proposed National List or any proposed amendments to such list, the results of the Board's evaluation and the evaluation of the technical advisory panel of all substances considered for inclusion in the National List.

⁹ 7 U.S.C. § 6518(m) ("In evaluating substances considered for inclusion in the proposed National List or proposed amendment to the National List, the Board shall consider. . .").

¹⁰ 7 U.S.C. § 6518(n) ("The Board shall establish procedures under which persons may petition the Board for the purpose of evaluating substances for inclusion on the National List.").

¹¹ 7 U.S.C. § 6518(k)(3)-(6).

¹² 7 U.S.C. § 6518(g).

¹³ 7 U.S.C. § 6518(d).

¹⁴ 7 U.S.C. § 6517(e) ("No exemption of prohibition contained in the National List shall be valid unless the National Organic Standards Board has reviewed such exemption or prohibition as provided in this section within 5 years of such exemption or prohibition being adopted or reviewed and the Secretary has renewed such exemption or prohibition.").

¹⁵ See, e.g., Plant Variety Protection Act, 7 U.S.C. § 2327(b)(1)-(3).

these USDA duties, an inextricable link exists between the NOSB, USDA, and the organic production standards and label:

- The NOSB must exist. There is no termination date.¹⁶ Where the permanence and non-terminal nature of a committee can be implied through specific functions, the Secretary wields no authority or choice as to whether the NOSB will continue its existence.¹⁷ Nor is this existence limited to National List development and material evaluation, but is extended to the “development of *standards* for substances to be used in organic production and to advise the Secretary on any other aspects of the implementation of [OFPA].”¹⁸
- USDA must consult with the NOSB on developing not only the National List but also the entire National Organic Program.¹⁹ Given continually evolving organic standards and changes to the program, this function does not terminate unless the NOP itself terminates.
- USDA must base the National List on the proposed National List or proposed amendments to the National List developed by the NOSB and cannot include synthetics not recommended by the NOSB.²⁰
- USDA must authorize *the Board* to hire a staff director and detail staff of the USDA.²¹

Through both the multiple mandatory duties assigned to the NOSB and the mandatory duties assigned to the NOP in relation to the NOSB, OFPA does not waiver in its affirmation of the NOSB’s essential and non-discretionary role in the overall organic regulatory framework.

B. Federal Advisory Committee Act (FACA)

FACA established certain controls and transparency in the management and use of advisory committees within the federal government that had been lacking before its enactment. In doing so, FACA recognized that the creation and management of all FACA committees should meet certain baseline requirements, but provided for multiple functions and varying degrees of authority within the committees, agencies, and government executives it set to regulate. This is evident in FACA’s general applicability provision when it states, “The provisions of this Act or of any rule, order, or regulation promulgated under this Act shall apply to each advisory committee except to the extent that any Act of Congress establishing any such

¹⁶ 7 U.S.C. § 6518(a) (“The Secretary shall establish a National Organic Standards Board (in accordance with the Federal Advisory Committee Act) . . .to assist in the development of standards for substances to be used in organic production and to advise the Secretary on any other aspects of the implementation of this chapter.”).

¹⁷ Report of the Committee on Agriculture, Nutrition, and Forestry, United States Senate, Food, Agriculture, Conservation, and Trade Act of 1990, S. 2830, Report 101-357, July 6, 1990, at 296 (“The Secretary is required to appoint a 13-member National Organic Standards Board to assist generally in the development of standard and specifically to formulate a Proposed National List.”).

¹⁸ 7 U.S.C. § 6518(a).

¹⁹ 7 U.S.C. § 6503(c) (“In developing the program under subsection (a) of this section, and the National List under section 6517 of this title, the Secretary shall consult with the National Organic Standards Board established under section 6518 of this title.”)

²⁰ 7 U.S.C. § 6517(d)(1) and (2).

²¹ 7 U.S.C. § 6518(j) (emphasis added).

advisory committee specifically provides otherwise.”²² In other words, FACA applies *unless* a statute goes into further detail.

The result of the FACA statutory framework and implementing regulations is the identification and acknowledgment of four primary categories of FACA committees:

- (a) Required by statute. By law where the Congress establishes an advisory committee, or specifically directs the President or an agency to establish it (non-discretionary);
- (b) Presidential authority. By Executive order of the President or other Presidential directive (non-discretionary);
- (c) Authorized by statute. By law where the Congress authorizes, but does not direct, the President or an agency to establish it (discretionary); or
- (d) Agency authority. By an agency under general authority in title 5 of the United States Code or under other general agency-authorizing statutes (discretionary).²³

Depending on the establishing authority and which category a committee falls under, varying degrees of procedural and management requirements apply under FACA. More importantly, it is emphasized both within FACA and its implementing regulations that “[o]ther agency-specific statutes and regulations may affect the agency’s advisory committees directly or indirectly,” and “[a]gencies should ensure that advisory committee members and staff understand these requirements.”²⁴

There are numerous substantive and procedural responsibilities that can be affected by a committee’s designation as non-discretionary or discretionary, statutory or not, but for the purposes of this Petition and the issues raised within, Petitioners will focus on charter content requirements and how they relate to both OFPA and FACA’s authority granted to the NOSB.

i. Charter Content

FACA requires a charter to be filed for each advisory committee established by Act of Congress.²⁵ OFPA does not provide exceptions to this requirement. The charter must be filed at two-year intervals and expires at the end of the two-year period. Depending on the establishing authority category under which a FACA committee may fall, this two-year renewal and expiration of the charter may coincide with FACA’s default two-year termination date for non-exempted committees.²⁶

By law, the charter must include several specific pieces of information, including “the committee’s objectives and scope of its activity,” “a description of the duties for which the committee is responsible, and if such duties are not solely advisory, “a specification of the

²² 5 U.S.C. App. 2 §4.

²³ 41 C.F.R. § 102-3.50.

²⁴ 41 C.F.R. § 102-3.125.

²⁵ 5 U.S.C. App. 2 § 14 ((2) Any advisory committee established by an Act of Congress shall file a charter in accordance with such section upon the expiration of each successive two-year period following the date of enactment of the Act establishing such advisory committee.”) *See also* General Services Administration, *Federal Advisory Committee Charters*, <http://www.gsa.gov/portal/content/168831>.

²⁶ *Id*; *see also* infra text accompanying note 31.

authority for such functions,” and “the committee’s termination date, if less than two years from the date of the committee’s establishment.”²⁷ Under FACA implementing regulations, these substantive requirements must be incorporated in charters of committees established by statute (both discretionary and non-discretionary) and those established at the discretion of the President or an agency.²⁸ Even subcommittees that report directly to a federal officer or agency must also be described according to FACA’s charter content requirements.²⁹

While the charters of non-discretionary and discretionary committees must contain the same subsections of content or substantive requirements, key differences arise as to how that content is determined and described.

ii. Committee Termination

In part, a statute meant to force reevaluation of potentially unnecessary and under-the-radar advisory committees, FACA required at the outset a standing termination date for all existing and future advisory committees.³⁰ This mandate, however, included two important caveats where this default termination period would not apply:

- (A) in the case of an advisory committee established by the President or an officer of the Federal Government such advisory committee is renewed by the President or such officer by appropriate action prior to the end of such period; or
- (B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.³¹

In the second case, when an advisory committee is established by an Act of Congress, the duration provided for by law can come in both express and implied forms. For example, in an Office of Legal Counsel opinion from the earlier days of FACA’s implementation, Department of Justice attorneys advised the following:

[T]he duration of a statutorily created advisory committee may be otherwise provided for by law either expressly or by implication. Such duration is provided for by implication if the statute that creates or assigns functions to an advisory committee provides for specific function that is continuing in nature and is an integral part of the implementation of a statutory scheme. The statutory assignment to a committee of some regular and well-defined participation in an agency’s administrative process would be sufficient to overcome the rebuttable presumption³²

²⁷ 5 U.S.C. App.2 § 9 (A) - (J).

²⁸ See 41 C.F.R. § 102-3.75 and U.S. Dept. of Agriculture, Departmental Regulation No. 1041-001, Advisory Committee Management, Feb, 8, 1993.

²⁹ See 41 C.F.R. § 102.3.70(c) and 41 C.F.R. § 102-3.75(b)(“Should (b) The provisions of paragraphs (a)(1) through (11) of this section apply to all subcommittees that report directly to a federal officer or agency.”)

³⁰ 5 U.S.C. App 2 § 14 ((2) Each advisory committee established after such effective date shall terminate not later than the expiration of the two-year period beginning on the date of its establishment unless-- . . . ”).

³¹ 5 U.S.C. App 2 § 14. See also 41 C.F.R. § 102-3.55(1) (“The statutory authority used to establish the advisory committee provides a different duration.”).

³² 3 Op. O.L.C. 170 (1978).

Thus, in the event that a committee is established by statute, the government authorities charged with the committee's creation must look for either (1) a specific termination date or (2) the assignment of specific functions that are continuing in nature and an integral part of the implementation of the statutory scheme, implying and providing that no termination date applies.

In relationship to a FACA committee's charter, the filing government official should describe the termination date as provided within the committee's establishing statute—be it directly or indirectly.³³ And in the case where the intent of Congress concerning termination is directly or indirectly provided, it should not be confused with the two-year expiration period of the charter and the non-discretionary duty of the agency head to renew the charter every two years.

USDA Advisory Committee Management regulations provide for the same exception and instruction: "For a statutory advisory committee whose duration is set by law for more than two years, a new charter must be filed every two years after the date of enactment of the law establishing the committee."³⁴ There is no evaluation or eligibility for termination.

As a second option, USDA regulations also provide that a "statutory advisory committee whose duration is not otherwise provided for by law shall terminate two years after the date of enactment of the law establishing the committee."³⁵ Read in conjunction with FACA and previous legal opinions concerning "otherwise provided for by law" in this FACA context, this second USDA regulation would only apply in circumstances where neither an express termination date nor an implied termination date through the assignment of specific functions that are continuing in nature, and an integral part of the implementation of a statutory scheme existed. Because OFPA applies continuing function to the NOSB, this second regulation does not apply.

C. Administrative Procedures Act (APA)

The Administrative Procedures Act (APA) provides interested persons the right to petition for issuance, amendment, or repeal of a rule.³⁶ When an interested party does petition an agency, a responsive action must be taken "within a reasonable amount of time" that concludes the matter.³⁷ USDA holds the exclusive authority to amend and issue the NOSB Charter and thus is the subject agency for such an APA petition. Denial of this petition is subject to judicial review unless there is clear and convincing legislative intent to negate review.³⁸

³³ 5 U.S.C. App. 2 § 14.

³⁴ U.S. Dept. of Agriculture, Departmental Regulation No. 1041-001, Advisory Committee Management, § 10(b) Feb, 8, 1993.

³⁵ *Id.*

³⁶ 5 U.S.C. § 553(e).

³⁷ 5 U.S.C. § 555(b); *see also* 5 U.S.C. §555(e) ("Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding.").

³⁸ *WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 809 (D.C. Cir. 1981)

III. PETITION FOR AMENDMENT OF RULEMAKING

Pursuant to all of the above laws and regulations, USDA has renewed the NOSB Charter on a timely-two-year basis, since the NOSB's inception. On May 8, 2014, the most recent NOSB Charter was filed. The filing of this charter was preceded two months earlier with a Federal Register notice announcing the USDA's intention to renew the charter, but without reference to the specific terms of the charter.³⁹

In several critical components the 2014 NOSB Charter differs substantially from previous charters as well as makes several omissions concerning mandatory duties and authorities of the NOSB. In doing so, the 2014 NOSB Charter violates both provisions of OFPA and FACA concerning the following charter subsections:

Description of Duties. The 2014 NOSB Charter omits specific, continuing, and integral mandatory authorities of the NOSB as well as improperly implies that the majority of the NOSB's duties have been completed. Because it is necessary for a FACA charter to outline any and all authorities vested in a committee by an enabling statute that go beyond a committee's purely advisory functions, Petitioners observe that within the description of duties is a lack of clarity concerning the full spectrum of specific functions that the NOSB must continually perform.

Beyond this general observation, the addition of the following language in what can only be described as a "completion caveat," improperly limits or dismisses many of the non-discretionary functions of the NOSB:

Many of the duties outlined for the NOSB in OFPA have been completed. The current primary focus of the NOSB includes:

- *Evaluate and provide recommendations related to specific substances being considered for inclusion on or removal from the National List.*
- *Respond to NOP requests for advice on specific matters related to the implementation of OFPA.*
- *Provide other recommendations regarding the implementation of OFPA based on public comments and feedback from the organic community.*

As described in detail above concerning the mandatory duties and responsibilities set forth in OFPA for the NOSB, the mandatory duties of the NOSB are not dependent on the request of the USDA and are not limited to only National List materials.

Termination. The inclusion of the "completion caveat" is made worse by USDA's improper description of the NOSB as a FACA committee eligible for two-year termination:

³⁹ 79 Fed. Reg. 13982, *Notice: Intent to renew charter and call for nominations*, March 12, 2014, <http://www.gpo.gov/fdsys/pkg/FR-2014-03-12/pdf/2014-05372.pdf>.

The Committee will expire 2 years after the date of filing unless prior to that date, it is renewed in accordance with FACA, Section 14. The Committee will not meet or take any action without a valid current charter.

To imply that the NOSB could terminate within two years of the filing of this charter is to misrepresent the clear intent of OFPA that NOSB is a non-discretionary, statutory committee without a termination date. As discussed above, default termination dates do not apply to statutory committees where Congress has provided otherwise. The expiration of the charter and responsibility of USDA to renew this charter every two years should not be confused with default termination standards and exemptions from those standards. There is no termination date provided in OFPA for the NOSB or the overwhelming majority of mandatory functions and duties vested in the NOSB, and Congress is clear that this intentional lack of termination date is because of the NOSB's continuing and interminable existence.

Understanding that the duration of the NOSB remains unchanged in the 2014 NOSB Charter and is described as "continuing,"⁴⁰ it cannot be overlooked or glossed over that the USDA has improperly undermined the obvious and clear continuing directive of OFPA that NOSB be designated both "continuing" in duration and excluded from default termination standards.

Taken together, these seemingly minor amendments to the 2014 NOSB Charter misinterpret OFPA and take away statutory authority and presence of the NOSB, reducing the Board to a discretionary and potentially disposable advisory body. To correct these errors and violations of OFPA and FACA, and because the authority to amend a charter is vested within the agency by FACA,⁴¹ Petitioners request that for the following reasons USDA amend the 2014 NOSB Charter.

A. 2014 NOSB Charter Should Be Amended to Accurately Reflect Continuing and Non-Discretionary Duties of the NOSB

Removal of the "completion caveat" must occur to correct the improper assertion that NOSB functions are limited to the narrow categories described within this added paragraph and bullet-point list and the direct assertion that "many of the duties outlined for the NOSB by OFPA have been completed." By law, a FACA charter must represent the specific duties provided for in the implementing statute with authority for those duties specified.⁴²

Omitting important mandatory functions, such as the evaluation criteria requirements, that connote the lasting and mandatory nature of the NOSB's responsibilities, while simultaneously suggesting that many of the duties outlined and supported by OFPA that have come to pass, is not within the USDA's authority under OFPA or FACA. USDA cannot interpret the NOSB's functions to be other than the clear, interminable duties provided by law. Of the

⁴⁰ 2014 NOSB Charter at 3.

⁴¹ 41 C.F.R. § 102-3.85 ("Procedures for making major amendments to advisory committee charters, such as substantial changes in objectives and scope, duties, and estimated costs, are the same as in § 102-3.80, except that for discretionary advisory committees an agency must:(a) Consult with the Secretariat on the amended language, and explain the purpose of the changes and why they are necessary; and(b) File the amended charter as specified in § 102-3.70.").

⁴² 5 U.S.C. App. 2 § 14(c)(2)(F).

listed functions, there may be two that could be feasibly read as being completed; the rest are continuing and non-discretionary in nature. This includes the specific responsibility of the Board to provide recommendations to USDA on the implementation of OFPA.⁴³

Petitioners request that in order to align the 2014 NOSB Charter with OFPA and FACA, the charter be amended to remove the “completion caveat” in its entirety and to include the following:

Evaluation Criteria: In its evaluation of substances considered for inclusion on the National List or of proposed amendments to the National List, the Board must apply and consider the statutory evaluation criteria.

B. NOSB Charter Should Be Amended to Accurately Reflect Mandatory, Continuing, and Interminable Status of NOSB

FACA specifically exempts the application of the mandatory two-year termination to non-discretionary, statutory committees⁴⁴ and implementing regulations at both the GSA and USDA levels have been mindful of this difference.⁴⁵ This applies to both the “duration” and “termination” subsections required within a FACA committee charter.

Where USDA has erred in its recent changes to the 2014 NOSB Charter is in its altered presumption that a lack of an express termination date is the end of its assessment in determining whether the two-year default termination applies. Instead of recognizing what are the implied statements of Congress within OFPA that the NOSB is to be an interminable FACA committee, not beholden to the discretionary evaluation and reinstatement of the agency, USDA has rewritten the law and created an inherent inconsistency within the NOSB’s charter.

As described in the Office of Legal Counsel opinion, the duration of a committee and the application of the two-year default termination provision can be determined based on implied functions. These implied functions must be continuing and integral to the implementation of a statutory scheme.⁴⁶ Presumably, it is the laundry list of NOSB functions that meet this standard (such as the NOSB’s mandatory development of the National List and continuing amendments and mandatory recommendation requirements) that supported USDA’s decision to describe the “duration” of the NOSB as “continuing.” But rather than recognize that this continuing duration also defines the termination provision and exempts the NOSB from the two-year termination requirements, USDA mischaracterizes the NOSB’s status as one that can expire at the end of two years. This misapplies USDA’s obligation to renew the committee’s charter before the charter’s two-year expiration and is in conflict with OFPA, FACA, and the USDA’s own regulations, which provide that no termination occurs for statutory advisory committees whose duration is set

⁴³ 7 U.S.C. § 6518(k)(1).

⁴⁴ 5 U.S.C. App. 2 § 14.

⁴⁵ See 41 C.F.R. § 102-3.75 and U.S. Dept. of Agriculture, Departmental Regulation No. 1041-001, Advisory Committee Management, Feb, 8, 1993.

⁴⁶ 3 Op. O.L.C. 170 (1978).

by law.⁴⁷ The burden is on the agency to file the charter every two years with no potential for NOSB termination.

Because of these inconsistencies and conflicts with both OFPA and FACA, the “termination” subsection of the 2014 NOSB Charter must be deleted and replaced with a more accurate description of the non-discretionary, statutory status of the NOSB. Looking to the NOSB charter preceding the 2014 NOSB Charter, found here as Appendix B and filed in 2012, the termination subsection was described as “Not Applicable.” Reverting to this language would be more in line with the interminable status of the NOSB. An alternative amendment, based on USDA regulations, could include the following:

Because the Board is a statutory committee whose duration is continuing and thus set by law for more than two years, no termination date applies. To support the Board’s continuing status, a new charter must be filed every two years after the date of enactment of the law establishing the committee in accordance with the Federal Advisory Committee Act.

IV. CONCLUSION

Recent actions on the part of the USDA have undermined the carefully crafted and contemplated OFPA framework and balance of community representation and organic program involvement by mischaracterizing the NOSB as a FACA committee subject to the discretionary authority of USDA. FACA does not trump congressional intent where creators of a FACA committee through statute have created express and implied responsibilities and duties beyond purely advisory roles and functions. The NOSB’s Charter must accurately reflect the duties and authorities vested in it by Congress, as well as its non-discretionary and interminable nature.

By amending the 2014 NOSB Charter as Petitioners request, USDA will correct one misstep against its improper assertion of authority over the NOSB and align the charter with the intent of OFPA and FACA.

⁴⁷ U.S. Dept. of Agriculture, Departmental Regulation No. 1041-001, Advisory Committee Management, Feb. 8, 1993.

Thank you for your consideration of this petition. We look forward to your timely response.⁴⁸

Respectfully submitted and filed on June 17, 2014,

Aimee M. Simpson
Policy Director & Staff Attorney
BEYOND PESTICIDES
701 E Street SE, Suite 200
Washington, D.C. 20003
P: 202.543.5450
F: 202.543.4791
E-Mail: asimpson@beyondpesticides.org

Paige Tomaselli
Senior Attorney
CENTER FOR FOOD SAFETY
303 Sacramento St., 2nd Floor
San Francisco, CA 94111
P: 415.826.2770
F: 415.826.0507
E-mail: ptomaselli@centerforfoodsafety.org

⁴⁸ 5 U.S.C. § 555(b) (“[W]ithin a reasonable time, each agency shall proceed to conclude a matter presented to it.”); *id.* § 706(1) (“The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed.”).

APPENDIX A

*Agricultural Marketing Services
National Organic Standards Board
CHARTER
May 8, 2014*

**Agricultural Marketing Services
National Organic Standards Board
CHARTER**

1. Committee's Official Designation

National Organic Standards Board (NOSB)

2. Authority

The National Organic Standards Board is authorized under Section 2119 of the Organic Food Production Act (OFPA) of 1990 (7 U.S.C. 6519), part of the Food, Agriculture, Conservation, and Trade Act of 1990 (FACT Act). The OFPA specified that the NOSB be established in accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. App. 2.

3. Objectives and Scope of Activities

As described in OFPA, the purpose of the NOSB is to “assist in the development of standards for substances to be used in organic production and to advise the Secretary on any other aspects of the implementation of OFPA.” Key activities of the Board include: assist in the development of organic standards and regulations; review petitioned materials for recommending inclusion on or deletion from the National List of Approved and Prohibited Substances (National List); recommend changes to the National List; communicate with the organic community, listen to public comments at public meetings; and communicate and coordinate with the NOP staff.

4. Description of Duties

OFPA defines the following specific responsibilities for the Board starting at Section 2119(k):

1. **IN GENERAL:** The Board shall provide recommendations to the Secretary regarding the implementation of the Organic Foods Production Act.
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.
3. **TECHNICAL ADVISORY PANELS:** The Board shall convene technical advisory panels to provide scientific evaluation of the materials considered for inclusion in the National List. Such panels may include experts in agronomy, entomology, health sciences and other relevant disciplines.
4. **SPECIAL REVIEW OF BOTANICAL PESTICIDES:** The Board shall, prior to the establishment of the National List, review all botanical pesticides used in agricultural

production and consider whether any such botanical pesticide should be included in the list of prohibited natural substances.

5. **PRODUCT RESIDUE TESTING.**—The Board shall advise the Secretary concerning the testing of organically produced agricultural products for residues caused by unavoidable residual environmental contamination.
6. **EMERGENCY SPRAY PROGRAMS.**—The Board shall advise the Secretary concerning rules for exemptions from specific requirements of this title (except the provisions of section 2112) with respect to agricultural products produced on certified organic farms if such farms are subject to a Federal or State emergency pest or disease treatment program.

Additional Duties include:

1. **PETITIONS:** The Board shall establish procedures under which persons may petition the Board for the purpose of evaluating substances for inclusion on the National List.
2. **STANDARDS:** The National Organic Standards Board shall recommend to the Secretary standards in addition to those in paragraph (1) for the care of livestock to ensure that such livestock is organically produced.

Many of the duties outlined for the NOSB in OFPA have been completed. The current primary focus of the NOSB includes:

- Evaluate and provide recommendations related to specific substances being considered for inclusion on or removal from the National List
- Respond to NOP requests for advice on specific matters related to the implementation of OPFA
- Provide other recommendations regarding the implementation of OFPA based on public comments and feedback from the organic community

5. Agency or Official to Whom the Committee Reports

The Board shall provide recommendations to the USDA Secretary through the Agricultural Marketing Service's National Organic Program (NOP) Deputy Administrator.

6. Support

The National Organic Program shall provide administrative support to the NOSB through the work of an Advisory Board Specialist, who is a permanent staff member within the NOP. The NOP may also provide technical support to the Board based on need and available resources.

7. Estimated Annual Operating Costs and Staff Years

The Committee's operating and staffing budget will be up to \$190,000 and 1.0 full time equivalent (FTE).

8. Designated Federal Officer and Advisory Board Specialist

Roles and responsibilities for Board management and meeting coordination and facilitation are governed by FACA and its implementing regulations. The Advisory Board Specialist is assigned to support the NOSB and prepares the advisory committee's and subcommittees' meeting agendas and notes, and attends all committee and subcommittee meetings.

The NOP Deputy Administrator approves NOSB committee and subcommittee work plans; these approved work plans then form the basis of the committee and subcommittee agendas.

During public committee meetings of the Board and at meetings of the Executive Subcommittee, the NOP Deputy Administrator or designee acts as the Designated Federal Officer (DFO). The Advisory Board Specialist or designee acts as the DFO for all other subcommittee meetings. At any committee or subcommittee meeting, the DFO holds the authority to adjourn any meeting when the DFO determines adjournment to be in the public interest, and chair meetings when directed to do so by the official to whom the advisory committee reports.

9. Estimated Number and Frequency of Meetings

The NOSB meets approximately twice per year for public meetings. Board subcommittees meet approximately twice a month by conference call.

10. Duration

Continuing.

11. Termination

The Committee will expire 2 years after the date of filing unless prior to that date, it is renewed in accordance with FACA, Section 14. The Committee will not meet or take any action without a valid current charter.

12. Membership and Designation

OFPA specified the membership composition of the NOSB as follows. The Board shall be composed of 15 members, of which:

- four shall be individuals who own or operate an organic farming operation;
- two shall be individuals who own or operate an organic handling operation;
- one shall be an individual who owns or operates a retail establishment with significant trade in organic products;
- three shall be individuals with expertise in areas of environmental protection and resource conservation;
- three shall be individuals who represent public interest or consumer interest groups;
- one shall be an individual with expertise in the fields of toxicology, ecology, or biochemistry; and

- one shall be an individual who is a certifying agent as identified under OFPA section 2116.

Each member serves a staggered term of five years.

In accordance with USDA policies, “equal opportunity practices will be followed in all membership appointments to the committee. To ensure that the recommendations of the committee have taken into account the needs of the diverse groups served by the Department, membership shall include, to the extent practicable, individuals with demonstrated ability to represent minorities, women, and persons with disabilities.”

The USDA prohibits discrimination in all of its programs and activities on the basis of race, color, national origin, age, disability, and where applicable, sex, marital status, familial status, parental status, religion, sexual orientation, political beliefs, genetic information, reprisal, or because all or part of an individual's income is derived from any public assistance program.

The NOSB members elect one person to become the Board chairperson, one person to become vice chairperson, and one person to become secretary.

To maintain the highest levels of honesty, integrity, and ethical conduct, no Board member shall participate in any “specific party matters” (i.e., matters that are narrowly focused and typically involve specific transactions between identified parties) such as a lease, license, permit, contract, claim, grant, agreement, or related litigation with the Department in which the member has a direct or indirect financial interest. This includes the requirement for Board members to immediately disclose to the NOP’s Advisory Board Specialist any specific party matter in which the member’s immediate family, relatives, business partners, or employer would be directly seeking to financially benefit from the Committee’s recommendations.

All members will receive ethics training annually to identify and avoid any actions that would cause the public to question the integrity of the Committee’s advice and recommendations. Members who are appointed as “Representatives” are not subject to Federal ethics laws because such appointment allows them to represent the point(s) of view of a particular group, business sector or segment of the public.

NOSB members are currently appointed as Representatives. If any members are appointed in the future as “Special Government Employees” (SGEs), SGE’s are considered intermittent Federal employees and are subject to Federal ethics laws. SGE’s are appointed due to their personal knowledge, academic scholarship, background or expertise. No SGE may participate in any activity in which the member has a prohibited financial interest. Appointees who are SGEs are required to complete and submit a Confidential Financial Disclosure Report (OGE-450 form) and, upon request, USDA will assist SGEs in preparing these financial reports. To ensure the highest level of compliance with applicable ethical standards, USDA will provide ethics training to SGEs on an annual basis. The provisions of these paragraphs are not meant to exhaustively cover all Federal ethics laws and do not affect any other statutory or regulatory obligations to which advisory committee members are subject.

13. Subcommittees

The NOSB may propose the creation or termination of subcommittees that report back to the parent committee; as the managing agency for the Board under FACA, the Agricultural Marketing Service has the authority to approve or reject these proposals, and to charter or discontinue subcommittees. The current subcommittees include Crops; Livestock; Handling; Materials and Genetically Modified Organisms; Compliance, Accreditation, and Certification; Policy Development; and Executive.

14. Recordkeeping

The records of this Committee shall be handled in accordance with General Records Schedule 26, Item 2 or other approved agency records disposition schedule. These records shall be available for public inspection and copying, subject to the Freedom of Information Act, 5 U.S.C. 552. Information about this Committee is available online at:

<http://www.ams.usda.gov/AMSV1.0/NOSB>

15. Filing Date

May 8, 2014

APPENDIX B

Agricultural Marketing Services – National organic Program
National Organic Standards Board
CHARTER
May 10, 2012



United States Department of Agriculture

Agricultural Marketing Services - National Organic Program National Organic Standards Board

CHARTER

1. Committee's Official Designation

National Organic Standards Board (NOSB)

2. Authority

The National Organic Standards Board is authorized under Section 2119 of the Food, Agriculture, Conservation, and Trade Act of 1990 (FACT Act), Public Law Number 101-624, enacted the Organic Foods Production Act of 1990 (OFPA) and is also being established in accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. App. 2.

3. Objectives and Scope of Activities

The purpose of the NOSB is to assist in the development of standards for substances to be used in organic production and to advise the Secretary on any other aspects of the implementation of Title XXI of the FACT Act and OFPA. The NOSB also provides effective and constructive advice, clarification, and guidance to the Secretary of Agriculture concerning the National Organic Program (NOP). Key activities of the Board include: assist in the development and maintenance of organic standards and regulations; review petitioned materials for inclusion on or deletion from the National List of Approved and Prohibited Substances (National List); recommend changes to the National List; communicate with the organic community, including conducting public meetings, and soliciting and taking public comments; provide timely information to the NOP; and communicate and coordinate with the NOP staff.

4. Description of Duties

The Organic Foods Production Act of 1990 (OFPA) defines the following specific responsibilities for the Board starting at Section 2119(k):

1. **IN GENERAL:** The Board shall provide recommendations to the Secretary regarding the implementation of the Organic Foods Production Act.
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.
3. **TECHNICAL ADVISORY PANELS:** The Board shall convene technical advisory panels to provide scientific evaluation of the materials considered for inclusion in

the National List. Such panels may include experts in agronomy, entomology, health sciences and other relevant disciplines.

4. **SPECIAL REVIEW OF BOTANICAL PESTICIDES:** The Board shall, prior to the establishment of the National List, review all botanical pesticides used in agricultural production and consider whether any such botanical pesticide should be included in the list of prohibited natural substances.
5. **PRODUCT RESIDUE TESTING.**—The Board shall advise the Secretary concerning the testing of organically produced agricultural products for residues caused by unavoidable residual environmental contamination.
6. **EMERGENCY SPRAY PROGRAMS.**—The Board shall advise the Secretary concerning rules for exemptions from specific requirements of this title (except the provisions of section 2112) with respect to agricultural products produced on certified organic farms if such farms are subject to a Federal or State emergency pest or disease treatment program.

Additional Duties include:

1. **PETITIONS:** The Board shall establish procedures under which persons may petition the Board for the purpose of evaluating substances for inclusion on the National List.
2. **STANDARDS:** The National Organic Standards Board shall recommend to the Secretary standards in addition to those in paragraph (1) for the care of livestock to ensure that such livestock is organically produced.

5. Agency or Official to Whom the Committee Reports

The Board shall provide recommendations to the Secretary and to the National Organic Program, Deputy Administrator.

6. Support

The National Organic Program shall provide administrative support to the NOSB through the work of the Special Assistant to the Board and technical support through Agricultural Specialists in the Standards Department

7. Estimated Annual Operating Costs and Staff Years

The Committee's operating and staffing budget will be \$190,000 and .10 FTE.

8. Designated Federal Officer

A permanent Federal employee will be appointed in accordance with agency procedures to serve as the Designated Federal Officer (DFO). The DFO will prepare the advisory committee's and subcommittees' meeting agendas and notes, attend all committee and subcommittee meetings, adjourn any meeting when the DFO determines adjournment to

be in the public interest, and chair meetings when directed to do so by the official to whom the advisory committee reports.

9. Estimated Number and Frequency of Meetings

The NOSB meets approximately twice per year for public meetings. Sub-committees of the Board meet approximately twice a month by conference call.

10. Duration

Continuing.

11. Termination

Not Applicable.

12. Membership and Designation

The Organic Foods Production Act specifies the membership composition of the NOSB as follows. The Board shall be composed of 15 members, of which:

- (1) four shall be individuals who own or operate an organic farming operation;
- (2) two shall be individuals who own or operate an organic handling operation;
- (3) one shall be an individual who owns or operates a retail establishment with significant trade in organic products;
- (4) three shall be individuals with expertise in areas of environmental protection and resource conservation;
- (5) three shall be individuals who represent public interest or consumer interest groups;
- (6) one shall be an individual with expertise in the fields of toxicology, ecology, or biochemistry; and
- (7) one shall be an individual who is a certifying agent as identified under section 2116.

Each member serves a staggered term of five years.

Equal opportunity practices in accordance with USDA policies will be followed in all appointments to the Committee. To ensure that the recommendations of the Committee have taken into account the needs of the diverse groups served by USDA, membership will include to the extent possible, individuals with demonstrated ability to represent minorities, women and persons with disabilities.

The USDA prohibits discrimination in all of its programs and activities on the basis of race, color, national origin, age, disability, and where applicable, sex, marital status, familial status, parental status, religion, sexual orientation, political beliefs, genetic

information, reprisal, or because all or part of an individual's income is derived from any public assistance program.

The NOSB members elect one person to become the Board chairperson. A co-chairperson may be assigned, especially to facilitate their transition to become the chairperson in the future.

To maintain the highest levels of honesty, integrity and ethical conduct, no Committee or subcommittee member shall participate in any "specific party matters" (i.e., matters are narrowly focused and typically involve specific transactions between identified parties) such as a lease, license, permit, contract, claim, grant, agreement, or related litigation with the Department in which the member has a direct or indirect financial interest. This includes the requirement for Committee or Subcommittee members to immediately disclose to the DFO any specific party matter in which the member's immediate family, relatives, business partners or employer would be directly seeking to financially benefit from the Committee's recommendations.

All members will receive ethics training to identify and avoid any actions that would cause the public to question the integrity of the Committee's advice and recommendations. Members who are appointed as "Representatives" are not subject to Federal ethics laws because such appointment allows them to represent the point(s) of view of a particular group, business sector or segment of the public.

Members appointed as "Special Government Employees" (SGEs) are considered intermittent Federal employees and are subject to Federal ethics laws. SGE's are appointed due to their personal knowledge, academic scholarship, background or expertise. No SGE may participate in any activity in which the member has a prohibited financial interest. Appointees who are SGEs are required to complete and submit a Confidential Financial Disclosure Report (OGE-450 form) and, upon request, USDA will assist SGEs in preparing these financial reports. To ensure the highest level of compliance with applicable ethical standards USDA will provide ethics training to SGEs on an annual basis. The provisions of these paragraphs are not meant to exhaustively cover all Federal ethics laws and do not affect any other statutory or regulatory obligations to which advisory committee members are subject.

13. Subcommittees

The National Organic Program and the National Organic Standards Board have the authority to create subcommittees in consultation with the DFO. Subcommittees must report back to the parent committee. The current sub-committees include Crops; Livestock; Handling; Materials; Compliance, Accreditation, and Certification; and Policy.

14. Recordkeeping

The records of this Committee, formally and informally established subcommittees, or other subgroups of the committee, shall be handled in accordance with General Records Schedule 26, Item 2 or other approved agency records disposition schedule. These

records shall be available for public inspection and copying, subject to the Freedom of Information Act, 5 U.S.C. 552. Information about this Committee is available online at: <http://www.ams.usda.gov/AMSV1.0/NOSB>

15. Filing Date

May 10, 2012