October 5, 2020

Jennifer Tucker, PhD

Deputy Administrator

National Organic Program

USDA-AMS-NOP

1400 Independence Ave. SW

Room 2642-So., Ag Stop 0268

Washington, DC 20250-0268

RE: AMS-NOP-17-0065; NOP-17-02: Strengthening Organic Enforcement Proposed Rule

Dear Dr. Tucker,

These comments are made on behalf of OrganicEye, investigative arm of Beyond Pesticides, representing thousands of members and supporters around the country who view the integrity of organic agriculture and food production as of paramount importance.

The draft rule presented to the public constitutes an impressive and far-reaching rewrite of the regulations implementing the Organic Foods Production Act (OFPA). However, unlike the process by which the initial regulations were established in 2002, the National Organic Standards Board (NOSB) was only consulted on a portion of the elements in this draft rule. Public engagement was, thus, also limited.

Please allow us to remind you that Section 2119 of OFPA states the Secretary **shall** establish the NOSB to advise the Secretary on “… the implementation of this title.” Furthermore, the law states, “The board **shall** provide recommendations to the Secretary regarding the implementation of this title.” [emphasis added]

The promulgation of the original rule was proceeded by a thorough discussion by the NOSB, intended by Congress to be a diverse panel of expert stakeholders, with abundant opportunity for public input from the most knowledgeable and experienced industry participants. This was clearly fulfilling the intent of Congress.

Although the current draft SOE rule includes many meritorious elements, a number of them have not been discussed publicly. Given the narrow time window for public comments, concurrent with stakeholders and public interest groups working on formal comments pursuant to the upcoming NOSB meeting, and taking into account the impact this pandemic has had on the productivity of many organizations, a wide discussion within the organic community has not been possible.

Currently, a number of separate stakeholder constituencies have been discussing this rule in isolation without benefit of widely sharing their knowledge and perspectives.

Thus, we respectfully request an extension to allow an opportunity for the organic community to collaborate on this proposal prior to proceeding to final rulemaking.

Such an industry-wide discussion must be orchestrated by the NOSB and we recommend scheduling a third meeting during 2021 for that purpose.

In the meantime, we contend that many aspects of this rule can be implemented without formal rulemaking. In addition, some of the new requirements, especially relating to the importation of fraudulent organic commodities and ingredients, may be addressed by more general enforcement authorities such as 18 USC §1001 while the community has a chance to thoroughly vet these proposals.

Alternatively, NOP may expedite rulemaking, limited to focusing on any tools for addressing important fraud which have been more fully vetted publicly, with a final draft issued after involving additional public comments. The expedited rules should be limited to avenues that the program does not currently think they have the legal authority to exercise. However, once again, please allow us to emphasize that the current resources available to the NOP and other federal agencies resulted in the withdrawal of 75% of certified operations in the Black Sea region after greater scrutiny.

In terms of the totality of this draft rule, we believe that its complexity, the need for time for the NOSB process to be involved, and the likelihood that material changes will be made will necessitate issuing a second draft rule.

As a starting point, Beyond Pesticides with its investigative arm OrganicEye in general, supports the detailed comments submitted by the National Organic Coalition (NOC). Furthermore, we also support the comments related to strengthening oversight on imports submitted by the Organic Farmers Agency for Relationship Marketing (OFARM).

In addition, we would like to make the following points of emphasis:

1. We concur with NOC that there is no reason for a 10-day delay in communicating the electronic certificates. They are electronic! They should be transmitted simultaneously with shipment. Twenty-four hours would be more than adequate.
2. This rule is massive and, despite many meritorious elements, adds, in aggregate, tremendous additional regulatory burdens. As such, we believe it deserves additional time to be thoroughly and thoughtfully evaluated, including through public discussions, before public comment closes.
3. We think as recommended by the NOSB in October 2018 pursuant to accreditation, it is time to look at risk-based oversight of certified operations rather than the "organic regulatory theater" which puts honest farmers through the ringer every year with inspections and audits while massive fraud is being simultaneously perpetrated by malefactors.

Although OFPA requires annual inspections, we suggest that farmers and small processors who have demonstrated a high level of compliance and low risk be given the option of yearly virtual inspections, using artificial intelligence and a national database to compare acreage, production, and sales, along with more comprehensive, periodically staggered, full site inspection/audits. This would free up resources in the certification and inspection sector for a much more aggressive approach to unannounced inspections, testing, and full, comprehensive audits.

Under the present system, we have received too many reports of incompetent, unmotivated, and unqualified inspectors and “drive-by inspections.” Coming up with a new formula for more targeted oversight would free up the most experienced inspectors and internal auditors to more adequately do their jobs.

It should be noted that the IRS does not audit every taxpayer every year. But holding the hammer of unexpected and comprehensive audits has a profound impact on compliance.

1. Furthermore, it is imperative that a new, more efficient, and focused approach to inspections and audits be coupled with more aggressive penalties, enforcement action, and follow through. It has become standard practice for the NOP to negotiate settlements with alleged perpetrators, leaving some in business and without substantive penalties. Willful violators need to be prosecuted to the full extent of law, as a deterrent, in order for any current or proposed regulatory oversight to be effective.
2. And finally, we recommend USDA take over control by mandating strict criterion for residue testing and unannounced inspections, including assisting in the selection of audit targets based, in part, on complaints and other reports from the public. In many regards the draft rule calls for far too much discretion by certifiers that have an inherent conflict of interest. This would be especially important if USDA reduces the emphasis on annual inspections/audits and puts more resources into random, and risk-based, focused auditing.

Respectfully submitted on behalf of OrganicEye, investigative arm of Beyond Pesticides.



Mark A. Kastel

Director

OrganicEye