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## **Organic Agriculture in the U.S.: Program and Policy Issues**

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# Organic Agriculture in the U.S.: Program and Policy Issues

## Summary

Congress passed the Organic Foods Production Act (OFPA) in 1990 as part of a larger law governing U.S. Department of Agriculture (USDA) programs from 1990 through 1996 (P.L. 101-624, the Food, Agriculture, Conservation, and Trade Act of 1990). The act authorized the creation of a National Organic Program within USDA to establish standards for producers and processors of organic foods, and permit such operations to label their products with a “USDA Organic” seal after being officially certified by USDA-accredited agents. The purpose of the program, which was implemented in October 2002, is to give consumers confidence in the legitimacy of products sold as organic, permit legal action against those who use the term fraudulently, increase the supply and variety of available organic products, and facilitate international trade in organic products.

Due to the newness of the National Organic Program, it is difficult to gauge its overall impact on the organic industry. However, a recent USDA report states that the number of people seeking USDA accreditation to become certification agents increased by more than 130% between 2002 and 2005, suggesting significant growth in the number of farm and processing operations going into organic production. USDA estimates that sales of organic foods rose from \$6 billion in 2000 to \$10.4 billion in 2003. The annual rate of market growth since 1990 has remained steady at about 20%.

Policy issues affecting the National Organic Program since implementation largely reflect the differences in interpretation among stakeholders of the language and intent of OFPA and the actual operation of the program under the final rule. The most recent issues concern, first, USDA’s efforts to write a new regulation governing livestock access to pasture, and second, a lawsuit brought by a plaintiff who argued that USDA’s administration of the NOP has been too lenient concerning the use of certain synthetic ingredients in foods bearing the “USDA Organic” label, and too lenient concerning the process for converting a dairy herd from conventional to organic production. The final judgment in the case, which was issued in June 2005, requires the Department to develop new rules based on the original statutory language. The revised rules would become effective two years after the date of the judgement, up until which time products made under the old rules would be allowed into commerce.

Subsequently, however, conferees on the FY2006 USDA appropriations bill attached a provision that amends the OFPA in such a way as to largely maintain the NOP regulations as they were before the court decision. This action is likely to worsen the rift between those who welcomed the court ruling because they felt it would force USDA to write stricter regulations that would more closely reflect the statute, and those (a sizeable consortium of major food companies) who predicted that new rules written to satisfy the court decision might severely limit current and future lines of organic products and economically harm all sectors of the industry.

This report will be revised as events warrant.

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# Organic Agriculture in the U.S.: Program and Policy Issues

## Background

Organic farming, as defined in the final rule establishing the USDA National Organic Program (NOP), is “a production system that is managed in accordance with the [Organic Foods Production] Act and regulations ... to respond to site-specific conditions by integrating cultural, biological, and mechanical practices that foster cycling of resources, promote ecological balance, and conserve biodiversity.”<sup>1</sup> This definition indicates that organic agriculture is both an approach to food production based on biological methods that avoid the use of synthetic crop or livestock production inputs (spelled out in detail in the December 2000 rule), and a broadly defined philosophical approach to farming that puts value on resource efficiency and ecological harmony.

Interest in organic farming migrated from Europe to the United States in the early 1900s. Beginning in the 1950s, as the U.S. public became more concerned about the potential adverse environmental and public health effects of agricultural chemicals and so-called “factory farming” methods, private research organizations began to conduct scientific investigations into non-chemical and non-intensive farming techniques, and a small but slowly increasing number of farmers began to adopt organic production practices. Except for a brief period from about 1978 to 1981, USDA did not conduct any activities in support of organic agriculture until OFPA required the Department to begin rulemaking to establish the National Organic Program in 1990.

## Organic Sector Statistics<sup>2</sup>

In 2001 (the most recent year for which data are available), there were 2.3 million acres of cropland and pasture under organic management in 48 states, with half of that amount having been added between 1997 and 2001. Nationwide there were about 7,000 certified organic operations in 2001, according to USDA. Fresh produce is the largest sector of the organic industry, with California, Washington, and Colorado having the greatest number of acres devoted to organic fruit and vegetable production. Colorado, Texas, and Montana have the most acreage of organic pasture for livestock. In the Northeast, Southeast, and Upper Midwest, small-scale growers

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<sup>1</sup> 7CFR205.2.

<sup>2</sup> USDA, Economic Research Service. *Recent Growth Patterns in the U.S. Organic Foods Market*. Report No. AIB777. September 2002. Available online at [<http://www.ers.usda.gov/publications/aib777/>].

of organic fruits, vegetables, herbs, and flowers are a significant component of individual states' agriculture industries.<sup>3</sup>

Since 1990, sales of organic products have been growing 20% per year on average. Estimated growth rates from 2005 through 2010 range from 9% to 16% annually. The estimated value of sales of organic foods was \$6 billion in 2000 and \$10.4 billion in 2003. In 2003, 47% of organic foods were sold through conventional retailers, 44% through natural food stores, and 9% through farmers' markets, restaurants, exports, and other marketing channels.<sup>4</sup> Despite sustained market growth, organic food sales constitute about 1.8% of the total U.S. retail sales of food. Various sources of export data estimated U.S. exports of organic foods at between \$125 million and \$300 million in the 2000-2002 period.<sup>5</sup> The biggest export market is Canada; other major markets are Japan, the European Union, and other countries in Asia.

The high growth rate in sales of organic products can be attributed in part to the higher prices that organic producers and processors receive for their products, according to USDA economists. They speculate that part of the price premium may be due to higher production costs and to higher demand relative to supply. For the 2000-2004 period, the annual average farmgate price premiums for fresh organic broccoli and carrots fluctuated from 75% to 133% above the prices of conventionally grown broccoli and carrots, according to ERS. Price premiums for the two vegetables at the wholesale level never went below 125% in the same period.<sup>6</sup> The ERS study goes on to say that:

Laws of supply and demand, however, make it unlikely that price premiums contributing to higher profits and market growth can coexist over the long run: as long as higher profits exist, new suppliers will enter the market, and once market supply increases faster than demand, price premiums and the commensurate level of higher profits are likely to decline.... Many organic industry participants and observers believe that the price premiums ... need to decrease if organic foods are to penetrate much beyond the 2- to 3-percent level into the mainstream.<sup>7</sup>

The consumer studies that ERS reviewed did not permit any clear estimate of future demand for organic products. The studies showed that price, size, packaging, appearance, and concerns about health and nutrition, taste, food safety, and the

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<sup>3</sup> For a detailed graphic representation of the distribution of organic crop and pasture acreage and number of operations per state, see [<http://www.ers.usda.gov/Amberwaves/Feb03/pdf/indicators.pdf>].

<sup>4</sup> USDA. Economic Research Service. Price premiums hold on as U.S. organic produce market expands. Report VGS-308-01. May 2005. Available online at [<http://www.ers.usda.gov>].

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

environment all play varying roles in consumer decisions to buy organic food. Surveys on race, ethnicity, and income levels showed significant diversity.<sup>8</sup>

## **The Organic Foods Production Act of 1990**

Congress passed the Organic Foods Production Act (OFPA) of 1990 (Title 21 of P.L. 101-624, the Food, Agriculture, Conservation, and Trade Act of 1990; the 1990 farm bill) with widespread support from organic industry groups, the National Association of State Departments of Agriculture, and other farm and consumer groups. The organic industry petitioned Congress to draft the act in the late 1980s, after it had been frustrated in its attempts to come to an internal consensus on production and certification standards. The industry maintained that federal standards would reduce consumer confusion over the many different state and private standards then in use, and would promote confidence in the integrity of organic products over the long term. Manufacturers of multi-ingredient organic food products stated that uniform standards would facilitate labeling. Others held that regulations would help the organic industry expand product lines and increase marketing opportunities. Industry analysts asserted that a consistent U.S. organic standard would facilitate access to a potentially lucrative international organic market.

The Organic Foods Production Act of 1990 authorized a National Organic Program to be administered by USDA's Agricultural Marketing Service (AMS). The act established a 15-member National Organic Standards Board (NOSB) to "assist in the development of standards for substances to be used in organic production" (referred to as the "National List") and to "provide recommendations to the Secretary regarding implementation."

Under the program, producers, processors and handlers who wish to market their products as organic are required to follow production practices as spelled out in detail in regulations (7 CFR 205). USDA accredits private and state certification agents, who visit producers, processors, and handlers to certify that their operations abide by the standards; they conduct annual reviews to verify continued compliance. It is illegal for anyone to use the word "organic" on a product if it does not meet the standards set in the law and regulations.<sup>9</sup> The presence of the "USDA Organic" seal on a product means it is 95% or more organic. Labels on products having 70% to 95% organic content can say "made with organic (specified ingredients or food groups)," but cannot carry the seal. Foreign organic producers and handlers wishing to export products to the United States may be certified by a USDA-accredited certification agent in their own country, if there is one; or USDA may accept

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<sup>8</sup> Ibid.

<sup>9</sup> Farms and handling operations that sell less than \$5,000 a year in organic agricultural products are exempt from certification; however, these producers and handlers must abide by the national standards for organic products and may label their products as organic.

certification by agents accredited by a foreign government; or, USDA may negotiate an equivalency agreement with another nation's organic program.<sup>10</sup>

The regulations under the OFPA are intended to set uniform *minimum* standards for organic production. States may adopt additional requirements after review and approval by USDA. Furthermore, private organic organizations are permitted to affix their own labels in addition to the USDA label, indicating that the product meets their standards as well as the national ones. The private label may indicate only that the organization's standards are in addition to (but not superior to) the national standards. AMS reviews certification agents for re-accreditation every five years. AMS enforces the regulations by revoking or suspending a producer's certification or an agent's accreditation if a satisfactory solution to a program violation cannot be found.

The NOP final rule became effective on February 21, 2001; the program itself became fully operational on October 21, 2002. In the first step toward implementation, USDA accredited private and state certification agents, who in turn began to certify organic producers and handlers according to the standards found in 7 CFR 205. After October 21, 2002, all products sold as organic had to be in compliance with the regulations and carry the "USDA Organic" seal.

## **Congressional Action on Related Legislation**

**Cost-Sharing Start-Up Costs.** Although the OFPA requires the cost of the National Organic Program to be fully supported by user fees collected for USDA accreditation and certification services, Congress has appropriated funds on several occasions to help the program in its initial stages. The FY2001 USDA appropriations act (P.L. 106-387) contained \$639,000 to cover accreditation costs. In FY2002, under the Agricultural Management Assistance Program authorized by the Federal Crop Insurance Act (P.L. 106-224), Congress made \$1 million available to state agriculture departments in 15 designated states to help defray the costs of certification for small-scale producers and processors.

The 2002 farm bill (P.L. 107-171, the Farm Security and Rural Investment Act), which was enacted in May 2002, also provided additional funds to support program start-up. Title X of the farm act gave USDA authority to continue to defray the costs of producers and handlers seeking organic certification through FY2007, and authorized a one-time, mandatory transfer of \$5 million from the Commodity Credit Corporation (CCC) to establish a national organic certification cost-share program under the NOP. Federal funds may not cover more than 75% (\$500 maximum) of a producer's or handler's costs for becoming certified. The transfer occurred in

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<sup>10</sup> A July 2005 audit by the USDA Office of Inspector General (OIG) states that USDA had 41 accredited certification agents in foreign countries. The report also found that as of August 2004, AMS had negotiated only one equivalency agreement with a foreign country (Japan). The OIG recommends implementation of internal operating procedures "to assure that the NOP is achieving its intended objectives to ensure that organic products meet consistent, uniform standards." The audit report is available online by going to [<http://www.usda.gov/oig/audits.htm>] and following the links from "View Audit Reports and News Releases," to the listing by "Agency Subject of Report." It is under the Agricultural Marketing Service, July 2005.

FY2002 and remains available until fully expended, which is expected to occur in 2006.<sup>11</sup>

**Value-Added Producer Grants.** The rural development title of the 2002 farm bill established a competitive grant program to promote research on the development and marketing of value-added agricultural products, to be funded through an annual transfer of \$40 million from the CCC to USDA through FY2006. Projects on organically produced commodities are eligible for these grants. Congress authorized \$40 million in mandatory CCC funds to be made available each year through FY2007, but the actual funding levels so far have been volatile. The program received \$50 million in mandatory funds in FY2003, consisting of \$40 million in unspent funds from the first CCC transfer in FY2002 and \$10 million of the \$40 million CCC transfer for FY2003. In FY2004 and FY2005, appropriators prohibited the spending of the mandatory funds and instead appropriated about \$15 million annually.

**Research.** The research title of the 2002 farm bill renewed expiring authority for a competitive grant program to support research and extension activities on organic production, processing, and international marketing. The conference report also added language calling for an emphasis on classical and advanced research on genetics to improve organic crops; research to identify the marketing and policy constraints on the organic industry; and expanded on-farm research. The act authorized \$3 million to be transferred annually from the U.S. Treasury to USDA, beginning in FY2003, to support this research.<sup>12</sup> Other provisions in the research title: (1) require USDA's Economic Research Service (ERS) to gather and maintain segregated data on the production and marketing of organic agriculture; and (2) require ERS and the National Agricultural Library to make it easier for U.S. organic producers, researchers and extension professionals to obtain the results of organic research conducted in foreign countries.<sup>13</sup>

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<sup>11</sup> The CCC is a wholly owned government financing institution for USDA agencies that administer mandatory programs, such as the farm commodity price and income support programs for wheat, cotton, rice, and certain other crops; agricultural export subsidies; and certain conservation and trade programs. CCC funds are considered mandatory funds that must be made available for the purposes authorized. In practice, however, appropriators sometimes prohibit or place restrictions on funding for mandatory programs in the annual appropriations bill. A July 2005 audit of the NOP by USDA's Office of Inspector General (OIG) found that AMS has not been properly documenting its procedures for maintaining and controlling cost-share programs, which makes it difficult if not impossible to monitor the use of funds. AMS officials have promised to implement proper procedures by the end of FY2005.

<sup>12</sup> Information on Integrated Organic Program research grants are available on the Cooperative State Research, Education, and Extension Service website at [<http://www.csrees.usda.gov/fo/funding.cfm>].

<sup>13</sup> ERS published a paper in August 2005 entitled, "Market-Led Growth vs. Government-Facilitated Growth: Development of the U.S. and EU Organic Agriculture Sectors." Available online at [<http://www.ers.usda.gov/Briefing/Organic/>]. Congress has not appropriated funds to date for a National Agricultural Library International Organic Research Collaboration.



Concerning the availability of production and marketing data on organic agriculture, an official of the Organic Trade Association (OTA) states that many gaps exist, and that the Economic Research Service still is relying extensively on external data sources for much of its information. As of September 2005, a comprehensive USDA survey of the entire organic sector has not been conducted. USDA's Agricultural Marketing Service has not yet begun to provide market news on the organic sector, which would permit up-to-date price discovery. Separate export and import data for organic products are not being collected at the borders. These deficiencies hamper business planning and expansion, complicate crop insurance premium-setting and loss payments, among other issues, according to OTA.

**Exemption from Check-Off Programs.** The 2002 farm bill contained a provision concerning issues related to the organic industry and USDA commodity research and promotion programs. These are programs that support generic advertising to promote an agricultural product (e.g., the milk mustache ads). They are funded by assessments that producers, processors, other handlers, and frequently importers, are required to deduct from revenue at the time of sale (thus they usually are called "check-off" programs). Congress has passed many laws authorizing national check-off programs for various farm commodities; there currently are 15 in operation. (For more information on check-off programs, see CRS Report 95-353, *Federal Farm Promotion ("Check-off") Programs*, by Geoffrey S. Becker.)

The Senate version of the 2002 farm bill (S. 1731) would have established a check-off program for organic commodities, but the provision was not adopted in conference. The enacted bill instead included language exempting producers and handlers who have a certified 100% organic operation from having to pay assessments under any existing commodity check-off programs in which they currently participate. For example, a producer who grows peaches on an entirely organic farm that has been certified under the NOP would be eligible to be exempted from paying an assessment under the marketing order for peaches and nectarines, when he sells his crop to a wholesaler or other handler. The proposed rule on the exemption for producers appeared in the *Federal Register* in April 2004 (69 FR 22690). Final rules for both producers and handlers of organic commodities were published in January 2005 and became effective in February 2005 (70 FR 2744 and 2763, respectively).

**Livestock Feed Regulations Changed, Then Reversed.** The conference report accompanying the Consolidated Appropriations Resolution for FY2003 (P.L. 108-7/H.J.Res. 2; H.Rept. 108-10; February 21, 2003), contained a provision that made a controversial change in the National Organic Program. Section 771 of the law effectively deleted the NOP standard that requires livestock and dairy producers to provide 100% organically produced feed for their animals in order to qualify for organic certification. It further provided that, if USDA surveys found that in some geographic areas organic feedstuffs cost more than twice what conventionally produced feed cost, then livestock and dairy producers in that area could be certified as organic without having to meet the NOP standard.

Reaction to this provision from several Members of Congress, the organic industry, and a few large food processors who had already committed resources to complying with the original rule, was swift and negative. Senator Leahy, who

championed OFPA and its inclusion in the Food, Agriculture, Conservation, and Trade Act of 1990, circulated a “Dear Colleague” letter on February 12, 2003, urging Senators to remove Section 771 from H.J.Res 2, but without success. On February 26, 2003, Senator Leahy introduced S. 457, the Organic Restoration Act of 2003, and on February 27, Representative Farr introduced H.R. 955, a bill to repeal Section 771. The conference report accompanying emergency wartime supplemental appropriations for FY2003, which the President enacted on April 16, 2003, contained the language from H.R. 955 repealing the earlier action taken in P.L. 108-7 (Section 2104 of H.Rept. 108-76; P.L. 108-11).

USDA released the report on organic feed availability in June 2003. It states that “ample acreage is available to provide more than enough feed grains to meet the needs of organic livestock and broiler producers ... [and] with limited exceptions, prices for organic poultry rations are not more than twice the prices of convention poultry feed rations.”<sup>14</sup>

## USDA Regulatory Activity

**Interpretive Issue Statements.** In April 2004, the National Organic Program headquarters in USDA released “issue statements,” i.e., guidelines for interpretation of program regulations in four areas. These were livestock feed, livestock health, inert ingredients in approved organic pesticides, and the inclusion of non-food items like lotions and cosmetics within the scope of the NOP. AMS issued the statements administratively (rather than through the *Federal Register*). Many program participants were immediately critical of the Department for not giving the issue statements to the National Organic Standards Board for advance review, since the critics viewed them as revisions of the regulations, not simply as clarifications. USDA rescinded the issue statements in May 2004, and asked the Board to provide feedback on them, which it did in October 2004.

Subsequently, on August 23, 2005, the Department issued a memorandum reversing its original position on the “scope of program” issue.<sup>15</sup> The memorandum states that, if all standards for organic agricultural ingredients are met, then the organic seal can be used on personal care products, supplements, and pet foods. This reversal was prompted by a lawsuit that was brought against USDA after it released the issue statement in April 2004 saying that nonfood organic products could not carry the “USDA Organic” seal.

The sequence of events is at issue here, more so than the issue statements themselves. The NOP is a new program covering a sector of U.S. agriculture that wants to be perceived as decidedly different from conventional agriculture, which has been covered by USDA marketing and regulatory programs for almost a century. Unlike other marketing programs, the NOP regulations are much more prescriptive

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<sup>14</sup> USDA, Agricultural Marketing Service. *Organic Feed for Poultry & Livestock: Availability and Prices*. Available online at [<http://www.ams.usda.gov/nop/prodhandlers/feedstudyjune2003.pdf>].

<sup>15</sup> Available online at [<http://www.ams.usda.gov/nop/TodaysNews.html>]; see August 24, 2005.

regarding production and manufacturing practices, and NOP officials understandably might still be learning how to deal with these new factors in a regulatory setting. Thus it might be expected that NOP officials could on occasion take administrative action without thinking it necessary to consult the National Organic Standards Board, or might differ with the Board on the form and substance of a proposed regulation. Situations of this sort were largely responsible for the Department's taking 11 years to publish an NOP final rule after OFPA enactment in 1990. Similarly, the National Organic Standards Board and industry stakeholders might perceive program officials' failure to consult the Board on how certain regulations should be interpreted as dismissive of their input.

An audit report on the NOP released in July 2005 by USDA's Office of Inspector General (OIG) directly addresses these concerns.<sup>16</sup> The report found that "AMS has not established protocols for working with the National Organic Standards Board or resolving conflicts with them," and recommends that the NOP "establish procedures for receiving, reviewing, and implementing recommendations from the Board." The report states that "AMS also needs to improve management controls for administering the NOP," and recommends that AMS "resolve and implement internal operating procedures for such things as the resolution of complaints to govern program operations." The OIG made 10 recommendations in all. AMS officials agreed with them and promised to implement solutions by the end of FY2005, or publish draft procedures for public comment by the end of December 2005.

**Peer Review of Accreditation.** Section 2117 of OFPA (7 CFR 205.509) requires that a three-person panel periodically review NOP's accreditation procedures, site evaluation reports, and decisions, in order to determine their adherence to the regulations. This part of OFPA has not been implemented to date because the statutory language is vague concerning some basic issues; e.g., how to find a sufficient number of experts in organic accreditation who themselves are not USDA-accredited certification agents.

In lieu of the three-person panels, USDA contracted in 2003 with the American National Standards Institute (ANSI), a private, non-profit organization that administers the U.S. voluntary standardization and conformity assessment system (part of a world-wide system commonly referred to as ISO 9000; ISO stands for International Standards Organization).<sup>17</sup> ANSI conducted a peer evaluation of the NOP accreditation system and delivered its report in December 2004.<sup>18</sup> It found a number of discrepancies between NOP's accreditation policies and procedures and those outlined in ISO 9000. Furthermore, ANSI reported that it had difficulty assessing the discrepancies because USDA has not fully documented the quality system it uses to assess applicants for accreditation.

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<sup>16</sup> USDA, Office of Inspector General. *Audit Report: Agricultural Marketing Service's National Organic Program*. The audit report is available online by going to [<http://www.usda.gov/oig/audits.htm>] and following the links from "View Audit Reports and News Releases," to the listing by "Agency Subject of Report." It is under the Agricultural Marketing Service, July 2005.

<sup>17</sup> Notice was published in the *Federal Register* on August 13, 2003 (68 FR 48334).

<sup>18</sup> Available online at [<http://www.ams.usda.gov/nop/CertifyingAgents/ANSIReport.pdf>].

The question of how to implement the original statutory language remains to be addressed by NOP officials and the National Organic Standards Board.

## Controversy over “Access to Pasture”

In January 2005 a newspaper article about a Colorado organic dairy operation raised a major controversy within the industry and among some public interest groups.<sup>19</sup> The article focused on a 5,300-cow organic farm where the animals were fed almost exclusively on grain and allowed outdoors mostly for exercise.

The NOP regulation at the core of the dispute is 7 CFR 205.239(a)(1-2): “The producer of an organic livestock operation must establish and maintain livestock living conditions which accommodate the health and natural behavior of animals, including (1) Access to the outdoors, shade, shelter, exercise areas, fresh air, and direct sunlight suitable to the species, its stage of production, the climate, and the environment; (2) Access to pasture for ruminants[.]”

The news article cites organic dairy producers who argue that the regulation means that organic cattle must get some of their nutrition, as well as fresh air and sunshine, from grazing on pasture. The Colorado operator maintains that his animals have outdoor access, but that in an arid state like Colorado, providing sufficient pasturage for all his cows to graze would be an insurmountable requirement.

At a February 2005 meeting of the National Organic Standards Board, members discussed and recommended new language for 7 CFR 205.239, which it forwarded to National Organic Program officials for approval.<sup>20</sup> The emphasis in the revised language was on allowing cows at the appropriate “stage of life” to graze pasture “during the pasture’s normal growing season.” At the August 2005 Board meeting, the NOP staff rejected the recommendation saying it lacked a “clear and concise regulatory objective,” and asked the Board to rework it.<sup>21</sup> It could be a year before a proposed rule reflecting a revised NOSB recommendation could be published for comment in the *Federal Register*, a delay that some speakers at the Board meeting argued was unacceptable. A guidance document that the Board posted on its website for comment in March 2005 is serving unofficially as an interim interpretation of the current “access to pasture” requirement until a proposed revised standard can be published.<sup>22</sup>

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<sup>19</sup> “Organic Milk Debate; Dairies dispute ‘organic’ values; Ex-hippie farmers contest practices of big producers,” *Chicago Tribune*, January 10, 2005. See [<http://www.organicconsumers.org/organic/milk011105.cfm>].

<sup>20</sup> Minutes of February 28-March 3, 2005, NOSB meeting available online at [<http://www.ams.usda.gov/nosb/meetings/meetings.html>].

<sup>21</sup> Minutes of August 15-17, 2005, NOSB meeting available online at [<http://www.ams.usda.gov/nosb/meetings/meetings.html>].

<sup>22</sup> “NOSB Livestock Committee Recommendations for Guidance; Pasture Requirements for the National Organic Program,” National Organic Standards Board, March 2, 2005. Available online at [<http://www.ams.usda.gov/nosb/meetings/meetings.html>].

The issue is sensitive because it involves the question of farm size. USDA considers the NOP to be a marketing program that is size-neutral. On the other hand, many in the industry hold that organic farming *practices* are an integral part of the meaning of the term “organic,” particularly with respect to standards for the treatment and feeding of livestock. Some observers argue that if the pasturage in certain parts of the nation can support only small dairy or beef cattle herds, or none at all, then such farms should be small or nonexistent in those areas. Others are concerned lest the regulations become so prescriptive that they deprive producers and processors of the opportunity to benefit from the expanding market for organic products.

## Court Ruling Controversy

In June 2005, a First Circuit Court sided with an organic farmer who had filed suit against USDA claiming that several provisions of the final NOP rule were more lenient than the underlying statutory language allowed.<sup>23</sup> Specifically, the court determined that certain “natural” substances not commercially available in organic form had to be individually reviewed to determine their status for the National List of Approved and Prohibited Substances before they could be used in organic-labeled products. Second, the court determined that synthetic substances that heretofore had been approved in the regulations and used in commerce could not be used in the processing or handling of organic-labeled products. And third, it ruled that the USDA regulation on converting a dairy herd from conventional to organic production did not in any way reflect the statutory language and was thus invalid. The District Court in this case set a one-year time frame for USDA to develop new regulations and allowed another year beyond that (until June 2007) for the industry to come into compliance.

Stark differences of opinion within the organic industry on the impact of the court judgement became immediately apparent. Representatives of consumer groups and some food retailing groups welcomed the decision. They maintained that consumers consider the organic label to mean the absence of synthetic ingredients and that the new, stricter regulations would reconfirm consumer confidence in the OFPA as enacted. These groups have expressed strong opposition to resolving the court decision issue by amending the OFPA.

Conversely, a large number of organic food manufacturers were apprehensive that the ultimate outcome of the court decision would be to force the discontinuation of hundreds of existing, organic-labeled food and beverage products, and/or end manufacturers’ ability to use the “USDA Organic” seal, which commands premium prices in the marketplace. These stakeholders supported the efforts of the Organic Trade Association to have Congress effect a legislative solution to the issues raised by the court decision.

In late September 2005, during floor debate on its version of the FY2006 USDA spending bill (H.R. 2744), the Senate adopted an amendment requiring the Secretary to conduct a survey to determine the impact of the decision and of various

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<sup>23</sup> *Harvey v. Veneman*, 396 F.3d 28 (1<sup>st</sup> Cir. 2005).

approaches to addressing it, including amending the OFPA to effectively undo the court's action.

In late October 2005, conferees on the FY2006 agriculture appropriations bill adopted a second provision in committee. The overall effect of this provision is to change the statutory language to make moot the latter two of the three court holdings. Specifically, the provision amends the OFPA: (1) to allow "natural" but non-organic products to be used as long as they are subject to the National List evaluation process; and additionally, to permit USDA to develop an expedited procedure for approving the addition of such products to the National List for a limited time period; (2) to remove the original language that generally prohibits the inclusion of synthetic substances on the National List (although there are other requirements that must be met); and (3) to provide a statutory basis for a new regulation on converting dairy herds to organic that is related to on-farm production of organic feed and forage.

## **Conclusion**

It will be necessary for USDA to write new regulations to address these three areas. Barring further legislative changes, the new rules will be based on revised statutory language. The history of the NOP, however, indicates the difficulty in predicting the outcome of the notice and comment process. This area of public policy may remain contentious, depending upon the ability of the organic community's diverse stakeholders to develop a workable consensus among themselves on interpreting the OFPA. Additional debate on the statute could happen when Congress begins consideration of the next farm bill, expected in 2007. Hearings on various parts of a farm bill could begin in 2006.