

## Civil Justice Reform Analysis

### Appendix D.--Executive Order 12988, Civil Justice Reform

Executive Order 12988, Civil Justice Reform, instructs each executive agency to adhere to certain requirements in the development of new and revised regulations in order to avoid unduly burdening the court system. The revised proposal was reviewed under this Executive Order. No comments were received on that review, and no additional related information has been obtained since then. This rule is not intended to have retroactive effect.

States and local jurisdictions are preempted under section 2115 of the Organic Foods Production Act (OFPA) (7 U.S.C. 6514) from creating programs of accreditation for private persons or State officials who want to become certifying agents of organic farms or handling operations. A governing State official would have to apply to USDA to be accredited as a certifying agent, as described in section 2115(b) of the OFPA (7 U.S.C. 6514(b)). States also are preempted under sections 2104 through 2108 of the OFPA (7 U.S.C. 6503 through 6507) from creating certification programs to certify organic farms or handling operations unless the State programs have been submitted to, and approved by, the Secretary as meeting the requirements of the OFPA.

Pursuant to section 2108(b)(2) of the OFPA (7 U.S.C. 6507(b)(2)), a State organic certification program may contain additional requirements for the production and handling of organically produced agricultural products that are produced in the State and for the certification of organic farm and handling operations located within the State under certain circumstances. Such additional requirements must: (a) further the purposes of the OFPA, (b) not be inconsistent with the OFPA, (c) not be discriminatory toward agricultural commodities organically produced in other States, and (d) not be effective until approved by the Secretary.

Pursuant to section 2120(f) of the OFPA (7 U.S.C. 6519(f)), this regulation would not alter the authority of the Secretary under the Federal Meat Inspection Act (21 U.S.C. 601 et seq.), the Poultry Products Inspections Act (21 U.S.C. 451 et seq.), or the Egg Products Inspection Act (21 U.S.C. 1031 et seq.), concerning meat, poultry, and egg products, nor any of the authorities of the Secretary of Health and Human Services under the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301 et seq.), nor the authority of the Administrator of the Environmental Protection Agency (EPA) under the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. 136 et seq.).

Section 2121 of the OFPA (7 U.S.C. 6520) provides for the Secretary to establish an expedited administrative appeals procedure under which persons may appeal an action of the Secretary, the applicable governing State official, or a certifying agent under this title that adversely affects such person or is inconsistent with the organic certification program established under this title. The Act also provides that the U.S. District Court for the district in which a person is located has jurisdiction to review the Secretary's decision.

### Appendix E.--Executive Order 13132, Federalism

This final rule has been reviewed under Executive Order 13132, Federalism. This Order requires that regulations that have federalism implications provide a federalism impact statement that: (1) demonstrates the Agency consulted with the State and local officials before developing the final rule, (2) summarizes State concerns, (3) provides the Agency's position supporting the need for the regulation, and (4) describes how the concerns of State officials have been met. The Order indicates that, where National standards are required by Federal statutes, Agencies shall consult with appropriate State and local officials in

developing those standards.

The Organic Foods Production Act (OFPA) of 1990 (7 U.S.C. 6501 et seq.) establishes national standards regarding the marketing of agricultural products as organically produced, assures consumers that organically produced products meet a consistent standard, and facilitates interstate commerce in fresh and processed food that is organically produced. There has been a great deal of support for this law and these regulations from the organic community.

OFPA and these regulations do preempt State statutes and regulations related to organic agriculture. OFPA establishes national standards regarding the marketing of agricultural products as organically produced, assures consumers that organically produced products meet a consistent standard, and facilitates interstate commerce in fresh and processed food that is organically produced. Currently, 32 States have organic statutes on their books and have implemented them to various degrees. However, the Act contemplates a significant role for the States and, in fact, envisions a partnership between the States and the Federal Government in meeting the requirements of the Statute. The Act allows the States to determine the degree to which they are involved in the organic program. States may choose to: (1) carry out the requirements of the Act by establishing a State organic program (SOP) and becoming accredited to certify operations, (2) establish an SOP but utilize private accredited certifying agents, (3) become accredited to certify and operate under the National Organic Program (NOP) as implemented by the Secretary, or (4) not play an active role in the NOP. 7 U.S.C. 6507 provides that States may establish an SOP consistent with the national program. SOP's may contain more restrictive requirements than the NOP established by the Secretary of Agriculture. To be more restrictive, SOP's must: further the purposes of the Act, be consistent with the Act, not discriminate against organic products of another State, and be approved by the Secretary.

Because implementation of OFPA will have a significant effect on many States' existing State statutes and programs, the U.S. Department of Agriculture (USDA) has reached out to States and actively sought their input throughout the entire process of developing the organic rule. On publication of the first proposal on December 16, 1997, an announcement and information packet summarizing the proposal was sent to more than 1,000 interested parties, including State governors and State department of agriculture secretaries, commissioners, or directors. Over a period of 6 years, numerous meetings were held to provide States an opportunity to provide information and feedback to the rule. In 1994, States were invited to participate in four public hearings held in Washington, DC; Rosemont, IL; Denver, CO; and Sacramento, CA, to gather information to guide development of standards for livestock products. States were also provided the opportunity to comment specifically on State issues at a National Organic Certifiers meeting held on July 21, 1995. They were invited to discuss accreditation issues at a meeting held on February 26, 1996. Following the publication of the first proposal, State and local jurisdictions had the opportunity to provide input at four listening sessions held in February and March 1998 in Austin, TX; Ames, IA; Seattle, WA; and New Brunswick, NJ. A meeting to discuss the role of States in the NOP was held in February 1999. A State organic certifiers meeting to discuss State issues was held at a March 2000 meeting with the National Association of State Organic Programs.

USDA also drew extensively on the expertise of States and the organic industry by working closely with the National Organic Standards Board. The Board met 12 times before publication of the proposed rule on December 16, 1997, and met five times during 1998 and 1999 and two times in 2000. States were invited to attend each of these meetings, and official State certifier representatives participated in Board deliberations in meetings held in July 1998, July 1999, and March 2000.

Public input sessions were held at each meeting to gather information from all interested

persons, including State and local jurisdictions. NOP staff also received comments and consulted with States at public events. They made presentations, received comments, and consulted with States at local and regional organic conferences and workshops and at national and international organic and natural food shows. States were consulted in training sessions held for organic inspectors, as well as numerous question and answer sessions at speaking engagements of the Agricultural Marketing Service (AMS) Administrator, the NOP Program Manager, and NOP staff.

In addition, during August and September 2000, the Administrator and NOP staff engaged in extensive efforts to discuss the proposed rule. While many organizations declined opportunities for these briefings, AMS staff did meet with the National Conference of State Legislatures (NCSL) and, at their request, in lieu of a meeting, provided information to the National Governor's Association (NGA). NGA and NCSL representatives stated they were aware of the development of the final rule but offered no comments during these consultations beyond those submitted by the individual States during the proposed rule's comment period. In addition, between August and October 2000, NOP staff had telephone or e-mail contact with the State organic program directors or other State department of agriculture representatives in 25 States to determine the scope and status of each State's organic program in the context of the issuance of the final rule. These State representatives stated that they were eagerly awaiting the publication of the final rule and had already begun adjusting their programs to conform with the March 2000 proposed rule in anticipation of the publication of the final rule. Finally, States have had the opportunity to comment on two proposed rules. More than 275,000 comments were received on the first proposal, and 40,000 on the second proposed rule-including extensive comments from twelve State departments of agriculture, one State legislator, two members of Congress, and the National Association of State Organic Programs.

Through this outreach and consultation process, States have both provided general feedback to the rule and expressed several specific concerns about how this rule will affect State programs. Overwhelmingly, States were extremely supportive of the March 2000 proposed rule. With a few exceptions, most notably who should bear the cost of enforcement of an SOP, States are supportive of the Federal legislation. We did not receive a single comment from a State that indicated that there should not be a national organic program.

The most prevalent issues they raised regarding the March 2000 proposed rule as to how this rule will affect organic programs in their States, along with USDA's response, are described below. We received no direct comments from States on the Federalism section in the proposed rule. Many of these concerns and others are addressed in more detail in the relevant sections of the rule.

#### Applicability

Regarding section 205.100(b), five States currently offer a "transition to organic" label for producers who are in the process of becoming certified. Many of these States would like to continue to offer this label. However, OFPA does not authorize a "transition to organic" label. Although the States (or private certifiers) are free to come up with a different label for these farmers, they cannot utilize the term, "organic," in any seal or labeling associated with the conversion period. There is no change in this provision from the proposed rule.

#### Accreditation

Regarding section 205.501(a), many States wanted the NOP to add an additional subsection to the Accreditation section requiring certifiers to prove that they can carry out a State's more restrictive standards in order to be accredited to certify in that State. AMS concurs with this

suggestion and has added a new paragraph 205.502(a)(20) requiring the certifying agent to demonstrate its ability to comply with a State's additional requirements.

Regarding section 205.501(b), there was strong support by all of the States for the provision that States with SOP's are able to have higher standards than the NOP for operations within their State. However, there was not consensus among the States on the prohibition on private certifiers requiring more stringent standards.

Although most supported the prohibition on private certifiers imposing additional requirements as a condition of certification because they perceived that it lowered barriers to farmers and processors in their States, three States were strongly opposed to this provision. Because having a consistent national standard is one of the primary purposes of the legislation, there is no change in this provision from the proposed rule.

### State Programs

There was general confusion about what is the difference between a State organic certification program and an SOP. In addition, some States wanted the scope of the NOP's oversight for State organic activities to be limited to certification. A State organic certification program is equivalent to a private or foreign certification program. States wishing to certify operations in their State must apply to the NOP for accreditation.

An SOP, on the other hand, requires the State to submit a plan to the NOP for approval to, in effect, administer the NOP within their State. Included in this is the opportunity to include requirements that differ from the NOP. In creating an SOP, a State is also agreeing to take on enforcement activities that would otherwise be the responsibility of the NOP. One exception to a State's enforcement authority is that States with SOP's do not have jurisdiction over the accreditation of certifying agents and cannot revoke accreditation. They can investigate and report accreditation violations to the NOP. States with only an accredited certification program are only responsible for the level of enforcement that all accredited certifying agents, State, private, or foreign, are required to take on.

Regarding section 205.620(c), several States want broader language than "unique environmental conditions" to be the basis for a State to have the right to establish more restrictive requirements under an SOP. AMS does not concur. There is no change to this language in the final rule. It is the opinion of AMS that the current language is broad enough to cover the scope of more restrictive requirements as authorized by OFPA.

Regarding section 205.620(d), many States want it to be optional for States with SOP's to take on enforcement obligations; several want funding from USDA for enforcement activities. AMS does not concur with this change. AMS does not envision that participation under the NOP will impose additional fiscal costs on States with existing organic programs, other than the costs of accreditation.

Regarding section 205.621(b), several States commented that States with SOP's should not be required to publish proposed changes to their programs in the Federal Register for public comment. AMS concurs with this comment. This language was an oversight from the first proposed rule.

### Fees

A few States commented that the proposed fees for accreditation could cost more than some States could afford to pay. They made some suggestions for reducing accreditation fees, ranging from no fees (a completely federally funded program) to charging reduced rates for

travel or eliminating hourly charges. AMS has no plans to change the fee structure. As in the proposed rule, hourly charges for accreditation will be waived for all applicants in the first 18 months of the program to facilitate the conversion to a national accreditation system.

### Compliance

Regarding section 205.665, several States wanted to know what their authority was to revoke the accreditation of private certifiers in their State who do not meet additional State standards under an SOP. An SOP's governing State official is authorized to review and investigate complaints of noncompliance with the Act or regulations concerning accreditation of certifying agents operating in their State. If they discover a noncompliance, they shall send a written report to the NOP program manager. Because accreditation is a Federal license, States do not have the authority to revoke a certifying agent's accreditation. There is no change in this section from the proposed rule

### Appeals

Regarding section 205.668(b), several State commenters want appeals from SOP's to go to State district court rather than Federal district court. AMS disagrees. The Act provides that a final decision of the Secretary may be appealed to the U.S. District Court for the district in which the person is located. AMS considers an approved SOP to be the NOP for that State. As such, AMS considers the governing State official of such State program to be the equivalent of a representative of the Secretary for the purpose of the appeals procedures under the NOP. Because the final decision of the governing State official is considered the final decision of the Secretary, under the Act it is then appealable to the U.S. District Court, not the State district court.

Regarding section 205.680, State commenters want a process by which people who feel they were adversely affected by the organic program in a State with an SOP may appeal to the SOP's governing State official, rather than the Administrator. AMS has amended the language in section 205.680 to clarify to whom an appeal is made under various situations. If persons believe that they were adversely affected by a decision made by the NOP Program Manager, they appeal to the Administrator. If they were adversely affected by a decision made by a certifying agent (State, private, or foreign), they appeal to the Administrator unless they are in a State with an SOP, in which case, they appeal to the SOP's governing State official. If persons believe that they were adversely affected by a decision made by a representative of an SOP, they appeal such decision to the SOP's governing State official or such official's designee.