

MAY 8, 2002

FROM ARTHUR HARVEY, RFD, CANTON, MAINE 04221

TO NOSB

SUBJECT: CONSISTENCY WITH O.F.P.A.

DEAR FRIENDS:

IN THE PAST, I HAVE DIRECTED MANY COMMENTS TO THE NOP, MY CONGRESSMEN ^{& SENATORS} SECRETARIES GLICKMAN AND VENEUMAN, ETC. A COPY OF MY FINAL BLAST IS IN FRONT OF YOU. SINCE MY EFFORTS HAVE NOT BROUGHT

SATISFACTORY RESULTS, I VENTURE TO PLACE THEM BEFORE YOU.

IT MAY BE ASKED WHY I DO NOT SUBMIT FORMAL PETITIONS TO AMEND THE NATIONAL LIST. WELL, THE CHANGE I REQUEST IS MUCH DEEPER THAN THAT. IN A NUTSHELL, I WANT YOU TO RE-PROPOSE THE FINAL RULE WITHIN THE FRAMEWORK OF THE ORGANIC FOODS PRODUCTION ACT OF 1990.

LET ME BRIEFLY DESCRIBE SIX URGENT ~~ISSUES~~ ^{MATTERS} WHICH PRESENT SIGNIFICANT LEGAL ISSUES AS WELL AS TRANSGRESSIONS AGAINST CONSUMERS AND FARMERS INTERESTS.

① ,606 CONTAINS LANGUAGE (SECOND PARAGRAPH) WHICH IN EFFECT REPEALS OFPA 6517 (C)(1)(C). THE LAW REQUIRES A LISTING OF SPECIFIC MATERIALS THAT HAVE BEEN THROUGH A T.A.P. PROCESS AND BEEN REVIEWED BY THIS BOARD. BUT THE BOARD HAS SHREK AWAY FROM THIS RESPONSIBILITY. THE RESULT IS A BLANKET APPROVAL IN ADVANCE FOR EVERY AGRICULTURAL PRODUCT INCLUDING THOSE WITH UNKNOWN EFFECTS ON HEALTH. IT IS A PERFECT OUTRAGE THAT A

CERTIFIED ORGANIC PRODUCT MAY CONTAIN 5% OF CONVENTIONAL INGREDIENTS NONE OF WHICH HAVE BEEN REVIEWED. ^{IT MAY ALSO BE THAT} ~~IN FACT~~ THE PRECISE NAMES OF THESE INGREDIENTS MAY NOT BE DISCLOSED TO THE NOSB, THE NOP, OR THE CONSUMER, IF FOOD GROUPS ARE LABELED. FOR CERTIFIED "MADE WITH ORGANIC" THE SITUATION IS EVEN WORSE.

② .501(b)(2) REVERSES A LONG TRADITION OF FEDERAL MINIMUM STANDARDS WHICH HAVE THE BENEFICIAL EFFECT OF PROMOTING COMPETITION AMONG MANUFACTURERS. EXAMPLES INCLUDE THE CONSUMER PRODUCT SAFETY COMMISSION, INTERSTATE MILK SHIPMENT, COAST GUARD EQUIPMENT STANDARDS — TO NAME A FEW.

NOW THE USDA, WITHOUT A STATUTORY BASIS, IS ATTEMPTING TO ELIMINATE COMPETITION AMONG CERTIFIERS. THIS IS CONTRARY TO THE PATTERN IN EUROPE. IT HAS ALREADY LOWERED THE ORGANIC STANDARD IN MY SECTOR BY ALLOWING BLUEBERRY GROWERS TO MANAGE THEIR FIELDS WITH LONG LASTING HERBICIDE APPLIED ONCE EVERY 7 OR 8 YEARS, AND MARKETING TWO-THIRDS OF THEIR CROPS AS ORGANIC.

③ .605(b) IS A CATEGORY OF SYNTHETICS WHICH SHOULD BE FORBIDDEN IN PROCESSED FOOD, ACCORDING TO OFPA 6510(a)(1) AND 6517(c)(1)(B)(iii). THE NOSB HAS STRUGGLED WITH THIS AND MADE SOME AMBIGUOUS DECISIONS. THE RESULT IS .600(b) AND .605(b) WHICH ARE LIKELY TO BE INVALIDATED BY A COURT IF THIS BOARD AND THE NOP DO NOT COME TO THEIR SENSES.

④ THE EXCLUSION OF WHOLESALERS, DISTRIBUTORS AND MOST ~~OTHER~~ RETAILERS FLIES IN THE FACE OF OFPA 6502 (10). THE NOP EXPLAINS THIS EXCLUSION IN THE PREAMBLE, PAGE 80555: "CERTIFYING THESE HANDLERS WOULD BE AN UNNECESSARY BURDEN ON THE INDUSTRY." I BELIEVE IT IS WELL KNOWN THAT TWO-THIRDS OF ALL VIOLATIONS OF ORGANIC INTEGRITY OCCUR IN THESE EXCLUDED OPERATIONS. SO THE QUESTION I POSE IS — WHY SHOULD FARMERS ASSUME THE BURDEN WHEN THE PRIMARY VIOLATORS DO NOT?

⑤ .304(b) AND .100(a) REQUIRE THAT 70% ORGANIC PRODUCTS BE CERTIFIED, BUT OFPA 6510 (a)(4) SAYS ALL CERTIFIED PRODUCTS MUST CONTAIN AT LEAST 95% ORGANIC INGREDIENTS. ALSO, 6505 (c) EXEMPTS THESE PRODUCTS, SO ANY ENFORCEMENT ACTION UNDER .304(b) WILL PROBABLY BE THROWN OUT BY A JUDGE.

⑥ .504(b)(4 AND 5) DO NOT PROTECT THE CONSUMER INTEREST. TRANSPARENCY REQUIRES PUBLIC ACCESS TO CERTIFICATION DOCUMENTS MORE MEANINGFUL THAN THE NAME AND ADDRESS OF THE PRODUCER'S BUSINESS OFFICE PLUS THE CATEGORY OF PRODUCTS. FOR STARTERS, WHY NOT DISCLOSE THE FARM PLAN, LEAVING OUT FINANCIAL AND MARKETING DATA? THAT WOULD BE A LONG STEP TOWARD IMPLEMENTING OFPA 6506 (a)(9) AND 6515 (g).

BIOGRAPHICAL: CHAIR OF INSPECTORS SUBCOMMITTEE, OF OTA'S QUANTITY ASSURANCE WHICH DEALS WITH STANDARDS. COMMITTEE, ALSO, CHAIR OF BY-LAWS COMMITTEE, INDEPENDENT ORGANIC INSPECTORS ASSOCIATION, CERTIFIED BLUEBERRY GROWER, ~~AND~~ PROCESSOR & BEEKEEPER.

To: Secretary Ann Veneman
OMB Director Mitchell Daniels, etc
NOP Director Keith Jones

From: Arthur Harvey, RFD, Canton, Maine 04221 207 388 2860

Subject: RECONSIDERATION OF PENDING ORGANIC RULE

Following are seven groups of reasons to re-examine and re-draft the Final Rule of December 21, 2000, 7 CFR Part 205. (A particular reason is usually listed only once, although it may also apply under a different heading.)

- 1) direct conflicts with legislation
- 2) sections that lack authority
- 3) unenforceable sections; incomplete OMB review
- 4) OFPA requirement not implemented
- 5) internal contradictions in Rule
- 6) OMB follies, or Use Your Imagination!
- 7) Errors in Regulatory Flexibility and Impact Statements

DIRECT CONFLICTS WITH LEGISLATION

Conflicts with Federal Organic Foods Production Act of 1990

- 1) .2, definition of Commingling, .270(b)(2), & .301(c). This allows the blending of organic ingredients with up to 30% non-organic ingredients. OFPA 6510(a)(4) limits such blending to 5% non-organic ingredients.
- 2) .101(b)(1) Wholesalers and distributors are excluded from certification. OFPA, however, requires certification of a handling operation that, at 6502(10), "(A) receives or otherwise acquires agricultural products; and (B) processes, packages or stores such products." The reason given for the exclusion appears on page 80555, Federal Register of December 21, 2000: "Certifying these handlers would be an unnecessary burden on the industry."
- 3) .101(b)(2) excludes retailers such as delis, bakeries and restaurants which are integral to most large natural food stores. This conflicts with OFPA 6502(9 & 17). The exclusion allows most of the retail sector, where most violations of organic integrity occur, to escape inspection and certification.
- 4) .304(b)(2) and .100(a) require that 70% organic products be certified, and that the certifier's name must be on the labels. The USDA seal, however must not appear, according to .304(c). OFPA 6510(a)(4) says all certified products must contain at least 95% organic ingredients.
The effect of the rule is therefore to create the impression that the USDA standard is higher than the certifier's.
- 5) .600(b) and .605(b) Synthetics on the National List are allowed to be added to processed food. This conflicts with OFPA 6510(a)(1), which says it is forbidden to "add any synthetic ingredient during the processing or any post harvest handling of the product". OFPA repeats this at 6517(c)(1)(B)(iii), where substances used in handling are defined as "non-synthetic".
One side-effect of this rule is that the NOSB is bogged down with endless applications by large manufacturers who want to add synthetic (and eventually proprietary) chemicals to the list.
- 6) .101(a)(1) says farmers who sell less than \$5000 per year "must comply with the applicable organic production and handling requirements of subpart C of this part and the labeling requirements of 205.310." OFPA 6505(d) says they are exempt.

SECTIONS THAT EXCEED AUTHORITY FROM OFPA

- 1) .501(a)(11)(iv) says a certifier must prevent conflicts of interest by "not giving advice" to applicants "for overcoming identified barriers to certification." This would fundamentally alter the relation between organic farmers and certifiers. OFPA's definition of Conflict of Interest at 6515(h) provides no support for the ban on freely giving advice.
The preamble to the Rule discloses the actual basis for the ban---it is ISO 65. This is part of an interlocking set of guidelines from a private consortium called ANSI in the United States. ISO guidelines have not been mandated by Congress, nor proposed by USDA for public comment. Indeed, ISO guidelines are copyrighted and may not be copied so they could be discussed or debated. They are simply superimposed on the Rule by USDA fiat.
- 2) .2, definition of Compost requires that it be made by a system developed by another federal program for sewage sludge. It is burdensome to the point of impracticality for small farmers, has no basis in OFPA, and was not developed in consultation with the NOSB as required by OFPA 6503(c).
- 3) .501(b) forbids a private certifier to maintain its own seal or trademark it represents a stricter standard than USDA's. OFPA 6501(a) requires only that "products meet a consistent standard". The normal function of federal product standards is to serve as a foundation, or minimum for industry standards to exceed if they wish. The organic Rule which establishes a uniform standard would prevent future development of standards by the industry, and this is beyond the mandate of OFPA. OFPA specifies a minimum standard for imports, at 6505(b). Imports must be certified by a program "at least equivalent to the requirements of this chapter."
- 4) .204 requires farmers to buy organic seed if it is commercially available. OFPA 6508 requires no such thing. Nor does the Rule require an organic chicken to come from an organic egg, although organic eggs are actually available. The organic seed industry is too immature to supply the demand created by this special interest provision of the Rule. It was put in the Rule without a determination of necessity, OFPA 6506(a)(11), or inconsistency, OFPA 6512. USDA could provide a subsidy or incentives for seed companies, but it should not try to create an industry by regulation.
- 5) .105(e), .301(f), and .2, the definition of Excluded Methods hints at, but does not state, a ban on the use of products of genetic modification. This ambiguous definition bypasses the OFPA categories of synthetic and non-synthetic. It by-passes the OFPA 6503(c) requirement to consult with the NOSB. It is doubtful that an ambiguously worded limitation can stand up in practice. To describe genetic modification as an "excluded method" only, has no practical effect because farmers and handlers could never use such methods anyway. A definition of "Products of Excluded Methods" would pave the way for regulations to control their presence in organic farming and handling.
- 6) .105(g) This creates a category of materials outside what is established by OFPA. Sewage sludge is clearly a synthetic substance.

UNENFORCEABLE PROVISIONS OMB REVIEW INCOMPLETE?

- 1) .105(e) Let us assume for the moment that "excluded methods" means the products of genetic modification. In the absence of mandatory labeling of such products, there is no way to verify that such products are not involved in organic production and handling---unless analytical testing is used systematically. Apart from such testing, which would be very expensive, any system of affidavits and invoices will be discredited almost immediately. Testing, of course, would inevitably lead to tolerance levels, which raises another thorny set of issues. In addition, the Rule's definition of Drift can not include GMO pollen drift.

2) .290 Variance are authorized for three different reasons which are linked by the word "and". This means all three must apply to any variance. Presumably this error survived in the Final Rule because the OMB review was cut short for political reasons.

3) .304(b)(2) and .100(a) requires that 70% products ("made with organic") must be certified. But a manufacturer who so labels products without certification could not be prosecuted, because OFPA 6505(c) exempts these products.

4) .204(a)(1) will collapse in a welter of conflicting decisions by different certifiers as to which seeds are commercially available. This is an inevitable result of several small seed providers scrambling to gain a market foothold with small stocks of debatable equivalence. Farmers will face unnecessary delays, expense and harm from poor quality seeds they are forced to buy from suppliers with no established reputation.

5) Ray Green is the chief enforcement officer for the state of California organic program. In an interview with me on March 12m 2001, he stated that attorneys in his department believe the production requirements in the Rule are generally not enforceable as written, because of vague and ambiguous wording. More specific program manuals which USDA has promised for later will, he said, be considered "underground regulations" which Caliuformia can not enforce.

OFPA REQUIREMENTS NOT IMPLEMENTED

1) OFPA 6506(a)(9) and 6515(g) describe two types of information---confidential business data; and certification documents and the results of residue testing. Only the first is to be kept confidential. The Rule has no provision for separating the two types of information. Because of this the Rule at .504(b)(4 & 5) requires that virtually all certification documents be kept confidential. This is unnecessary and fails to follow the OFPA mandate to assure public access to relevant portions of the application for certification, inspection report, and decisions made by the certifier.

2) .301(b) describes the 5% of non-organic ingredients in a certified product. It says they must be "consistent with" the National List. This rather ambiguous term is used because .606 fails to include the "specific exemptions" required by OFPA 6517(c)(1)(C). .606 allows "any agricultural product", which avoids review by the NOSB which is required by OFPA before items are added to the National List. "Commercial availability" has been substituted for the NOSB process.

3) OFPA's Sunset Provision at 6517(e) is defeated by the system described above. Because the ingredients are not specifically exempted, they cannot be removed from the List every five years. The concept of OFPA---that the National List would shrink over time---has been replaced by an expansive National List.

INTERNAL CONTRADICTIONS & ANOMALIES IN THE RULE

1) .605(b)(34) allows sulfur dioxide to be added to wine up to 100 ppm. This is a preservative that increases sulfite content from about 20 ppm to 100 ppm, which makes it a health issue for some consumers. Such use of sulfur dioxide conflicts with .600(b)(4): "the substance's primary use is not as a preservative". It also conflicts with .2 definition of Processing Aid (2): "Is converted into constituents normally present in the food, and does not significantly increase the amount of the constituents naturally found in the food."

2) .105(a) says no synthetics are allowed in production and handling except specified production materials. .105(d) says specified synthetics are allowed in processing.

3) .2 definition of Non-agricultural substance, conflicts with .605(a)(9)

"flavors, nonsynthetic". The definition refers to any substance extracted from or a fraction of an agricultural product "so that the identity of the agricultural product is unrecognizable". A nonsynthetic flavor would not meet this definition. The definition would apparently also conflict in some ways with the OFPA definition of "agricultural product" at 6502(1).

4) .605 allows nonsynthetic waxes as processing ingredients. Virtually all beeswax now contains significant residues of various pesticides and antibiotics, to the extent that pharmaceutical companies no longer accept beeswax. Waxes should all be required to be organic

5) .307 would allow the USDA seal on a tub of 70% organic unpackaged bread shipped to a retailer. The retailer, excluded from certification by .101(b), may simply offer the bread for sale in the same tub under the sign "made with organic whole wheat", with the USDA seal and the certifier's seal unchanged. No one would be responsible for monitoring such a practice which is not actually prohibited by .309.

OMB FOLLIES, or USE YOUR IMAGINATION, STUPID

A regulation that can be understood only with a creative imagination cannot be consistently applied. If OMB reviewed these sections at all, the reviewer was having a very bad day, or was quite unfamiliar with farm practices.

1) .203(b) "The producer must manage crop nutrients and soil fertility through rotations, cover crops, and the application of plant and animal materials."

Well, I have 25 acres of lowbush blueberries in Maine, certified organic for ten years, and I would never do any of the things mentioned above which the Rule says I "must".

2) 205 is ambiguous as to how many rotation practices are required---if any.

3) .206(a) says the producer "must" use three groups of practices, but .206(b,c,d & e) contain practices which "may" be used.

4) .204(a) as written could not allow certification for growers who use only some or none of the listed seeds, etc. Probably it meant to say: "Any seeds, annual seedlings or planting stock used must be organic."

5) .302(a) Why must a procedure be used to calculate the percentage of organic ingredients in a product labeled "100 percent organic"? Although it seems really weird, the answer could be revealed by applying the first procedure to pizza sauce: "(1) Dividing the total net weight (excluding water and salt) of combined organic ingredients at formulation by the total weight (excluding water and salt) of the finished product." My recipe for pizza sauce is as follows: 50 lb of organic tomatoes, 10 lb of conventional cheese, 10 lb of conventional vegetables, and 5 lb of conventional herbs, spices and sugar. You simmer it all together until you have a finished product weighing 50 lb. So what percentage organic is the finished product, using the quoted procedure above?

6) .309 and .309 "Certified facility" is not defined. No criteria are given for such certification. Obviously this is a rich source for creative imaginations, and a truly astounding variety of practices and outcomes.

7) .403 is clear about initial on-site inspections, but vague as to whether annual inspections would include all sites or only one.

ERRORS IN REGULATORY FLEXIBILITY AND IMPACT ASSESSMENTS

The overriding flaw is in the following statement: "Under the final

sloppy and fraudulent practices are most noticeable---precisely because no certification and inspection is applied

Flaw #9: USDA acknowledges, indirectly, that the organic market in Europe is larger than ours. But the European Union model of minimum standards has not been included among the alternatives considered. An examination of the European experience would show that concerns about reciprocity and consumer confusion are no longer urgent problems.

Flaw #10: One of the largest costs of the Rule is not mentioned in these Appendices. This is a result of superimposing on the Rule a system known as ISO 65 and ISO 61. These systems have not been legislated by Congress nor published for comment by USDA. Nonetheless, they will destroy or severely hinder private certifiers, and increase the cost of certification. They will also have a chilling effect on certifiers offering a helping hand to farmers, whether the certifiers are private or state bodies.

Flaw #11: USDA is proposing to issue program manuals to supplement the Rule. A possible result is that small farmers would be intimidated into more costly practices which are only recommendations. Meanwhile, large farms would hire consultants who can find the cheapest means to compliance with the regulation. Most negative results from program manuals will be avoided if they are created by state and private certifiers. Honey standards are a prime example of state-specific or regional rules which are more relevant than national standards

Flaw #12: The Rule removes, in part, the exemption which OFPA grants to farmers who sell less than \$5000 per year. See .101(a)(1). At page 80677, USDA estimates that exempt farmers will spend one hour per year on recordkeeping to comply with all production requirements and .310. This cannot conceivably happen in one hour. This statement of impact on the smallest farmers is not credible on its face. In addition, these "exempt" farmers will have additional costs of complying with compost rules, organic seeds, weed control, etc

Flaw #13: More incredible than #12 above, is the assertion (page 80677) that exempt handlers will be able, in one hour per year, to maintain records required by .101(c). These records must be sufficient to "prove that ingredients identified as organic were organically produced and handled;" . On the other hand, a certified handler is said to spend 63 hours per year to maintain many of the same records, which is a reasonable estimate. Once again, the economic impact on smaller operations is underestimated, by a factor of 10 or more.

Flaw # 14: The impacts mentioned in #12 and #13 will affect the smallest entities. Now, the Rule at .101(b) excludes some of the largest entities in the industry---wholesalers and retailer that process. Very little economic burden is placed on these excluded, but wealthy operations. No record-keeping, no proving organic integrity, no compliance with most handling standards. Clearly, the larger the business, the more compassion USDA has for it.

On page 80555, it says: "Brokers, distributors, warehouseers and transporters do not alter the product and, in many cases, do not take title to the product. Certifying these handlers would be an unnecessary burden on the industry." Compare this to OFPA 6502(10), definition of Handling Operation as one that "(A) receives or otherwise acquires agricultural products; and (B) processes, packages or stores such products."

SUMMARY AND RECOMMENDATION

When OFPA was passed, the needs of the industry were more similar to what USDA describes in the Appendices. Now, eleven years later, most of these problems have been addressed. Even so, the USDA organic program could serve a valuable function if it is confined strictly within the limits of OFPA. As a baseline standard, the USDA seal would be a factor in every part of the organic market. It would become the dominant factor where other seals have not achieved general acceptance.

Every private certifier would have to offer producers a choice of the USDA seal and/or its own seal. Private seals would have to at least meet the USDA standard which must not, however, exceed the authority of OFPA. The Final Rule currently contains a few sections that exceed OFPA: on compost at .2; on seed at .204; giving advice at .501(a)(11)(iv); and certification of 70% products at .304(b). Also, a few National List anomalies.

The private certifiers would continue their development and leadership to the industry. It should be the role of USDA to encourage this, not to replace it. ..

rule, USDA will implement a program of uniform standards of production and certification, as mandated by the Organic Foods Production Act of 1990 (OFPA). "----page 80663, Federal Register of December 21, 2000.

Flaw #1: OFPA actually mandates that organic products "meet a consistent standard". Most, if not all, other federal product standards are minimum baseline standards which producers are free to exceed, or encouraged to exceed. In this case, USDA is preventing the future development by our industry of additional standards. See 205.501(b).

USDA's rationale is that this "may reduce the cost associated with enforcement actions in consumer fraud cases, and improved access to domestic and international markets..."

Flaw #2: The cost of enforcement has never been an issue in this industry. USDA has simply dreamed this up. In any case, a minimum standard would also simplify enforcement. If enforcement is on the USDA's mind, why are there so many unenforceable parts of the Rule?

Flaw #3: Access to international markets is not mentioned by OFPA

A uniform standard WOULD improve market access for a fraction of producers who remain after the demise of several certifiers and their replacement by more expensive ones. All the present certifiers are small businesses, and likewise their farmer clients, or at least 99% of them. Of 240 certified farms in Maine, 120 will be exempt under the final rule because they sell less than \$5000 per year. Most of the other farms will not be able to afford the cost of certification if it is anything like the USDA estimate of \$579 for small farms (page 80663) plus \$552 for record-keeping. It is not clear how the shrinking ranks of certified farmers will benefit consumers.

Flaw #4: "The impact of this regulation on small certifying agents and other small businesses has also not been measured but may be significant." The correct term for this impact is "widespread devastation". I do not understand how USDA can get away with this cavalier brushing aside the effects on small businesses. (page 80663)

Flaw #5: USDA (page 80663) says the reduced transition for dairy herd conversion should "decrease the cost of the rule". This is true only if the cost of a lower standard for milk, as compared to what OFPA describes at 6508(e)(2), is not considered. To consumers, a lowering of standards is a very large cost

Flaw #6: The paragraph on multiingredient products, acknowledges that reciprocity among certifiers has improved over the past decade, but says: "this pace could eventually slow". USDA's assumption is far-fetched and without evidence. Any certifier who neglect reciprocity puts its clients at a disadvantage. Nearly all certifiers are striving to chieve it.

Flaw #7: The paragraph on foreign markets is outside the scope of OFPA. It is being improperly used as the basis for restrictions placed on small farmers and certifiers.

"Requirements of the Final Rule", page 80666, states: "All products marketed as organic will have to be produced and handles as provided in the OFPA and these regulations."

Flaw #8: Exclusions built into the Rule, for wholesalers and retailers, mean that the majority of organic handlers will be outside any system of inspection and certification. The impact of the exclusions is two-fold:

1) the loss of certification revenue from most value-added commerce will place all the financial burden on farmers and primary handlers who are nearly all small businesses, while many of the excluded businesses are multi-million or even billion-dollar companies.

2) consumers will be ill-served by excluding the portion of the industry where

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