



## National Organic Coalition

### *NATIONAL CAMPAIGN FOR SUSTAINABLE AGRICULTURE Organic Committee*

#### **MYTH AND REALITY: PROPOSED AMENDMENTS TO OFPA PREMATURE AND OVER-REACHING**

Draft amendments to the Organic Foods Production Act of 1990 (OFPA) are currently being circulated for possible incorporation in to the Fiscal Year 2006 Agriculture Appropriation Bill to be considered by the full Senate in the near future. These amendments are being portrayed as minor clarifications of the Act necessitated by a recent adverse court ruling, and a return to the current “status quo.” Nothing could be farther from the truth. The justification for immediate action, and representations about potential adverse impact on the organic food industry make broad assumptions and are not supported by fact. These amendments in no way represent a consensus position of the industry as farmer, consumer and environmental organizations that have always been the core of the organic coalition had no input in the drafting of this proposal. It also ignores a pending rule-making petition before the USDA, which provides regulatory remedies that could be implemented quickly and without opening the law.

Distortions large and small permeate the written justification for this legislative change. These myths--and the reality--are contrasted below.

**MYTH:** This amendment is simply a return to the “status quo,” that existed before the decision in the *Harvey* case.

**REALITY:** The status quo is not in compliance with the statute, and the proposed amendments would enable even further erosion of the standards. The proposed amendment would be a change from the status quo in several ways.

First, even though the Organic Foods Production Act, as enacted in 1990, is clear that synthetic ingredients are not permitted in processed foods labeled as “organic,” the amendment would reverse that provision to allow such synthetic use. While it is true that the National Organic Standards Board did vote to allow the use of some synthetic

materials in processed food, it did so with great hesitation because of the clear lack of authority in this regard, and only then based on the promise that the synthetics would automatically be removed from the National List in 5 years, under the “sunset” provisions of the Act, unless new scientific evidence was presented to justify the synthetic’s maintenance on the List. The proposed amendment would significantly change the assumptions under which the NOSB permitted the synthetics for use in processing. In addition, the proposed amendment does not include the criteria currently used by the NOSB to evaluate substances petitioned for use in processing. Without applicable criteria, this is a significant change from the status quo. The “status quo” for synthetic ingredients currently permitted under the National Organic Program has serious flaws in implementation by USDA. Changes to the statute that weaken limitations on synthetic substances will serve to sanction this misapplied authority and widen the loopholes already permitted by USDA. These loopholes must be closed, or a serious decline in the standards will occur.

Second, the amendment would establish procedures whereby USDA could allow the use of certain non-organic ingredients in organic foods, if USDA determines that the organic forms of those ingredients are not “commercially available.” There is no mention in the proposed amendment of the role of the National Organic Standards Board (NOSB) in making determinations for commercial unavailability. Currently, the NOSB must recommend substances before USDA may place them on the National List. The proposed amendment would significantly weaken the authority of the National Organic Standards Board.

Lastly, while the Court decision struck down the provision of the organic rule that allows dairy producers to use some conventional feed during the process of transitioning their farmers to organic production, the amendment does not seek to re-instate the status quo in this regard. Instead, it seeks to amend the statute to allow dairy farmers to use feed grown on their own farms during their transition to organic production, as long as the feed is also part of a crop/pasture transition to organic. Arguably, this new approach to dairy herd conversion, though different from the approach negated by the Court, could be implemented by USDA through regulatory changes, without legislative changes by Congress.

**MYTH:** Congress must act immediately because of the urgency of the situation.

**REALITY:** Under the final ruling on the Harvey case, USDA has until June 4, 2006 to publish a final rule implementing the Court’s decision. However, in recognition of the need to minimize disruption and facilitate an orderly transition, the Court also clarified that products produced under the old system “may continue to be produced and sold for two years” from the date of the Court ruling (i.e. until June 9, 2007). In addition, the Court clarifies that dairy farmers who are in the process of converting their herds to organic production prior to the new rule becoming effective (i.e. prior to June 4, 2006) can continue that conversion under the old rules. In addition, milk produced using the

old conversion process can still be sold until June 9, 2007. The Court established this generous timeline in order to give USDA time to respond in an orderly fashion, WITHOUT the need for urgent action by Congress.

**MYTH:** “The federal rules. . .are the touchstone of mainstream consumer acceptance of organic products.”

**REALITY:** The public’s perception and beliefs about organic food production and ingredients are the touchstone of the organic industry. Because consumers seek out organic products and pay a premium in the marketplace, their trust in sound production standards and accurate product labeling is instrumental to the industry’s long-term growth and sustainability. In fact, a poll released by Consumers Union in June finds that 85% of consumers say they do not expect food labeled as “organic” to contain artificial ingredients.

**MYTH:** “Prior to the availability of the USDA seal, the organic marketplace languished.”

**REALITY:** The USDA Organic seal was first available for use in October, 2002. The USDA Economic Research Service, in a report issued in September, 2002, stated, “Growth in retail sales has equaled 20 percent or more annually since 1990. According to the most recent USDA estimates, U.S. certified organic cropland doubled between 1992 and 1997, to 1.3 million acres.”<sup>1</sup> Acres of organic land had increased to 2.3 million by 2001. The rate of growth in the organic sector has not been significantly affected by the advent of the USDA program and the use of the USDA seal. Many products carry a private certifiers seal and no USDA seal, or simple text identification of the certifying agent.

**MYTH:** The court ruling blocked use of “small amounts of harmless [synthetic] substances like baking soda, pectin, ascorbic acid vitamins and minerals, etc.” in organic processed foods bearing the USDA seal.

**REALITY:** Only synthetic materials were affected; natural analogs of many of these materials are available to manufacturers. Baking soda, for example, is a natural (non-synthetic) material, and is not affected by the ruling. Currently more than 38 synthetic materials are allowed under the USDA organic regulation with an additional 8 approved and awaiting formal rule-making.

**MYTH:** The court ruling eliminated the “procedure implemented by the Secretary’s organic certifying agents throughout the country for recognizing the effect of crop disasters and other market distorting events on commercial availability of organic agricultural products.”

---

<sup>1</sup> Dimitri, Carolyn, and Greene, Catherine, *Recent Growth Patterns in the U.S. Organic Foods Market*. USDA Economic Research Service, September, 2002.

**REALITY:** The court decision did not address crop disasters, and left intact the Secretary's existing authority to declare an emergency variance for organic crop and handling requirements. The court ruling only limited the application of commercial availability independently by certifiers. It is the absence of formal guidance or rule-making from the USDA with respect to commercial availability that has created an uneven playing field, not the inadequacies of the current statute. The proposed statutory change still requires additional rulemaking, and provides no additional guidance on acceptable standards for commercial availability.

**MYTH:** The USDA was ordered to "vacate" the rules by June 2006

**REALITY:** The court ordered the USDA to revise the rules to comply with the Act. No specific regulation was vacated. The USDA has broad latitude to amend the rules, and is currently subject to a petition for rule-making submitted by a coalition of organic consumer, farmer, public interest and retail organizations. The petition provides specific regulatory language that would satisfy the court order with a minimum of disruption to the industry.

**MYTH:** Companies will have to "drop product lines or re-label them without the USDA seal by the end of 2005."

**REALITY:** The court order allowed non-compliant labels to continue to enter the market until June, 2007.

**MYTH:** "Some have estimated that up to 90% of the multi-ingredient products that today bear the USDA organic seal will have to be removed or re-labeled without use of the USDA seal." (repeated three times)

**REALITY:** The source of this claim is unidentified and its credibility is therefore suspect. Numerous organic products that carry the USDA Organic seal will not be impacted at all, including all fruits, vegetables, grains, beans, flour, meats, eggs, milk, wine, and many other products. The OTA Manufacturer Survey of 2004<sup>2</sup> reported that in 2003, sales of packaged food was \$1.326B out of \$10.381B in organic food sales (12%). The combined sales of packaged food plus sauces/condiments and snack foods categories totals \$2.039B, or 19.6% of organic food sales. Although this is a substantial portion of the organic food market, it is not a majority of products even if the 90% claim were credible. Any non-compliant manufacturer has the opportunity to reformulate products to comply with OFPA by using natural materials and organic ingredients and continue to use the USDA seal, or to re-label their products "Made with Organic."

**MYTH:** The solution is to "clarify" the Organic Foods Production Act of 1990.

**REALITY:** These are substantive changes that need to be subjected to open and honest debate. The allowance of synthetic substances in the "organic" category is directly contrary to OFPA, as ruled by the court. As proposed, synthetic substances could be used in processed foods with no applicable criteria for their assessment, no limitations on their use, or no approved categories being established in law. Such unlimited allowances could

---

<sup>2</sup> <http://www.ota.com/pics/documents/2004SurveyOverview.pdf> OTA Manufacturers Survey 2004, produced under contract for OTA by the Nutrition Business Journal

be used to justify the use of over 400 “food contact substances” in organic processing, without the substances appearing on the National List.

**MYTH:** The proposed changes “will stabilize the market place for farmers.”

**REALITY:** No evidence is presented to substantiate the assertion. Changes to OFPA could quite conceivably have the opposite effect of destabilizing the market by undermining consumer confidence in the organic label. During past experiences where the organic community has perceived an affront on the integrity of organic standards (e.g. USDA’s first proposed rule for organic standards, the Fiscal Year 2003 Omnibus Appropriations rider regarding organic feed requirements for livestock, and USDA’s recently rescinded “directives” regarding organic standards) consumers and farmers have demanded that high standards be retained. The strength of the market for organic food hinges on strong standards.

**MYTH:** “Due to farm crop cycles ... the amendments are needed in 2005.”

**REALITY:** None of the court’s rulings affect organic crop production or impact farm crop cycles. As stated previously, processors have until June 2007 to continue to sell non-compliant products. Furthermore, the USDA can make many of the changes required by the court ruling administratively, without the need for legislative action.

**MYTH:** “The proposed statutory language would expressly prohibit the use of any synthetic substance not appearing on the List.”

**REALITY:** The proposed change to 6510(a)(1) would only prohibit the use of synthetic ingredients not on the List. It would not prohibit the use of synthetic processing aids or food contact substances not on the List.

**MYTH:** OFPA must be amended to eliminate the ad hoc approach to determinations of commercial availability found unacceptable by the Court.

**REALITY:** The USDA, working in cooperation with the National Organic Standards Board, already has the statutory authority to determine that agricultural substances are not commercially available from organic sources and place them on the National List. There is no need for a change to the statute. The USDA, through notice and comment rulemaking, can establish expedited procedures, accompanied by transparent evaluation criteria, for making such determinations.

**MYTH:** OFPA must be amended to eliminate the court’s elimination of special transition rules for dairy operations which allowed the use of non-organic feed, including organic feed and forage from their own farms in the third year of transition.

**REALITY:** The current rule allows transitioning dairy farmers to feed their cows “feed that is either organic or raised from land included in the organic system plan and managed in compliance with organic crop requirements.” This language was not struck

down by the Court. The Court disallowed the use of 20% conventional feed during dairy herd transition. USDA, through notice and comment rulemaking, could clarify that dairy farms, when converting to organic production, could continue to feed their cows feed that is either organic or raised from land included in the organic system plan and managed in compliance with organic crop requirements.