

The National Agricultural
Law Center



University of Arkansas
NatAgLaw@uark.edu | (479) 575-7646

An Agricultural Law Research Article

**State and Federal Organic Food
Certification Laws: Coming of Age**

by

Gordon G. Bones

Originally published in NORTH DAKOTA LAW REVIEW
68 N. D. L. REV. 405 (1992)

www.NationalAgLawCenter.org

STATE AND FEDERAL ORGANIC FOOD CERTIFICATION LAWS: COMING OF AGE?

GORDON G. BONES*

I. INTRODUCTION

Critics of conventional agriculture have attempted to link the use of pesticides and other nonorganic¹ materials in our food chain to cancer and other chronic diseases in humans. Studies supporting this claim have heightened the food safety controversy and increased market demand for organic produce.² As the supply and demand for organically grown produce has increased, so have the complexity and sophistication of standards designed to minimize consumer confusion³ and to ensure the authenticity of organically

* B.S.B.A., Northern Arizona University, 1979; J.D., University of Nebraska, 1986; LL.M., University of Arkansas, 1991. Partner in the Law Firm of Meyer and Bones, Sacramento, California. The author would like to thank Stuart Fishman, Portland Oregon, author of *The Guide to the U.S. Organic Foods Production Act of 1990*, for his technical support in preparation of this article.

1. A related claim by critics of conventional agricultural methods is the lack of "agronomic responsibility." The purpose of organic agriculture is to maximize the health of the soil, the health of plants deriving nourishment from the soil, and the health of animals and humans who eat the plants. Nonorganic materials, which include many synthetic fertilizers, destroy the soil microorganisms which help maintain soil fertility. Not all synthetics are detrimental, and not all organics are beneficial to the soil, our health, and the environment. Therefore, each agricultural soil amendment or additive must be evaluated by scientists from various disciplines not merely on the basis of its chemistry or method of manufacture, but on the basis of its long-term effects on the soil, our health, and the environment.

2. For a legal definition of organic, see *infra* notes 21, 54, and 114, and accompanying text. Critics of current agricultural production, processing, and distribution systems refer to such studies as the Natural Resources Defense Council (NRDC) report, which predicted that over 6,000 school-age children would ingest enough foods containing carcinogenic chemical residues to die from cancer. See Sewell & Whyatt, *Intolerable Risk: Pesticides in Our Children's Food*, NRDC, Feb. 27, 1989, at 3. The study identified the ripening agent, Alar, often used on apples, as a carcinogen. Officials in the Food and Drug Administration and the Environmental Protection Agency challenged the NRDC report and assured a Senate subcommittee that there is no imminent risk from eating apples containing Alar. See Melinda Beck, *Warning! Your Food, Nutritious, and Delicious, May Be Hazardous to Your Health*, NEWSWEEK, March 27, 1989, at 16. See also Ross, *Truth in Produce*, AMERICANS FOR SAFE FOOD, CENTER FOR SCIENCE IN THE PUBLIC INTEREST, April 12, 1981, at 13. Americans for Safe Food (ASF) is a coalition of over 80 consumer, environmental, farm, and rural advocacy groups with the goal of increasing the availability of safe food in the market place. ASF is associated with the Center for Science in the Public Interest (CSPI), a nonprofit consumer and health advocacy organization founded in 1971. It is supported by its 150,000 members, foundation grants, and the sale of educational publications.

Supermarket demand for fresh organically grown produce has decreased significantly since the Alar controversy. Apparently the controversy created a false demand from retail food purchasers and distributors.

Organic producers were not then ready to adequately fulfill this increased demand for reasonably priced, high quality produce, and the average consumer generally did not purchase organically grown produce as anticipated. However, demand for processed organic foods has continued to rise since the beginning of the Alar controversy.

3. Consumers may be confused by the term "natural" and "organic." The USDA, but

grown produce.⁴

In recognition of common interests, challenges and goals among organic producers, self-governing trade associations have been formed.⁵ Also, certification associations have been created to protect the consumer from misleading statements and fraudulent advertising and to enhance the credibility of producers before wholesale, retail, and consumer markets. Certification associations have established food certification programs and required members to comply with specific production and labeling practices.⁶ Organic producers in all states have access to one or more certification associations to inspect and certify their organic farming operation. This is true, despite the fact that twenty-eight states do not have statutes or regulations governing organically grown

not the FDA, regulates labels for naturally produced foods. A "natural" product does not contain artificial ingredients such as chemical preservatives, artificial colorings and flavorings, and other synthetic additives. The significance of the term "natural" to the consumer has been diluted such that it may have lost all meaning. See Charles P. Mitchell, *State Regulation and Federal Preemption of Food Labeling*, 45 FOOD DRUG COSM. L.J. 123, 125 (1990). Many of the same techniques are utilized in natural and organic food production. A clear distinction between organically grown produce and natural foods should be resolved by the regulations to be promulgated under the Organic Foods Production Act of 1990.

4. Dave Kendall, *It's Organic—But is it Better?*, 10 THE NEW FARM 28-34 (1988). A Task Force was formed by the initiation of the United Fresh Fruit and Vegetable Association in July 1989 to achieve an uniform definition of "organic" which would be understood by producers, retailers, and consumers. The 45 attendees representing conventional agriculture, organic growers and shippers, trade associations, state departments of agriculture, and federal agencies approved the following:

- 1) Organic food production systems are based on farm management practices that replenish and maintain soil fertility by providing optimal conditions for soil biological activity;
- 2) organic food is determined by an independent third-party certification program to be produced in accordance with a nationally approved list of materials and practices;
- 3) only nationally approved materials have been used on the land and crops for at least three years prior to harvest;
- 4) organic food has been grown, harvested, preserved, processed, stored, transported and marketed in accordance with a nationally approved list of materials and practices; and
- 5) organic food meets all local, state, and federal regulations governing the safety and quality of the food supply.

5. There are several prominent trade associations, including the national and state chapters of the Organic Foods Production Association of North America (OPTHANA). The California Certified Organic Farmers (CCOF) is both an organic food producer trade association and a certification association.

6. Dave Kendall, *Farmers Must Ensure Organic Purity*, 10 THE NEW FARM 32 n.4 (1988). Before the establishment of private and state organic food certification programs, "health" or "natural" food specialty stores marketed produce advertised as chemical-free. As the controversy over food safety and the demand for organically grown produce increased, it became necessary to ensure the organic purity.

A certification program allows a recognized authority to define and promote organic food as a unique and meaningful product by the use of a guarantee. Such a guarantee conveys to the consumer that the product bearing the certification mark meets clearly defined standards and is as advertised.

food.⁷

Over the decade of the 1980s, the organic produce industry grappled with defining organically grown food,⁸ standardizing production methods, and establishing record-keeping requirements, labeling procedures, and enforcement methods. Many associations have sponsored organic food certification legislation⁹

7. Conversation with Stuart Fishman, December 12, 1992. Some prominent certification associations with the ability to certify in several states include: Organic Certification (OCCI), (OGBI), Oregon Tilth, the International Federation of Organic Agricultural Movements (IFOAM), Americans for Safe Food (ASF), and the Natural Organic Farmers Association (NOFA).

8. Dave Kendall & Mike Brusko, *What Does "Organic" Really Mean?*, 10 THE NEW FARM 8 (1988). Organic farming practices generally denote the use of naturally occurring materials and the exclusion of synthetically compounded materials in the production of food.

See also FARMER'S FOR ALTERNATIVE AGRIC. RESEARCH, REDUCING THE USE OF PESTICIDES IN AGRICULTURE: A FARMER'S PERSPECTIVE, 4-8 (1990). "Sustainable agriculture" and "organic farming" are related terms but are not synonymous. Sustainable agriculture should not be confused with a return to primitive or nonindustrialized agriculture and the complete abolition of all agricultural chemicals. The goal of a "sustainable," "low-input," "regenerative," or "alternative" agricultural system is the dynamic utilization of renewable resources and the conservation of energy, soil, and water. Growth regulators and seed hybrids may be used to optimize productivity. The use of legumes, crop residues, green manures, and organic wastes are encouraged though supplemental chemical fertilizers may be used. In addition, pesticides may be used for such purposes as Integrated Pest Management (IPM).

The efficient use of primarily renewable resources reduces energy demand, maintains organic matter in the soil, and removes potential sources of pollution. Sustainable agriculturalists assert that the off-farm environmental costs of conventional agriculture are underestimated and economic productivity may be achieved by minimizing inputs rather than by increasing production output. The price of synthetic compounds and pesticides tends to fluctuate with the price of oil and natural gas. Therefore, a low-input producer may minimize the affect of world oil prices on overall input costs, according to proponents of sustainable agriculture.

9. Such associations and related associations are often active in sponsoring or supporting legislation which promotes sustainable agriculture. *See* DAN HOWELL, CENTER FOR SCIENCE IN THE PUBLIC INTEREST, ORGANIC AGRICULTURE: WHAT THE STATES ARE DOING 5-7 (1989). In addition to organic food standardization and labeling, the following programs have been initiated:

- 1) Taxing pesticides and synthetic fertilizers—Iowa's Groundwater Protection Act, passed in 1987, places a tax on agricultural chemicals which is used to finance programs for the reduction of farm chemical use;
- 2) targeting Federal Oil Overcharge Settlement Funds to Low-Input Agriculture—Oil companies paid over \$6 billion into a Department of Energy Escrow account in settlement of alleged violations of federal petroleum price and allocation regulations. Iowa, Wisconsin, and Minnesota have used such funds for programs which reduce farmers' use of oil-based pesticides and fertilizers;
- 3) certifying Independent Soil Testing Laboratories—Iowa and Minnesota have established voluntary certification programs for private laboratories to ensure accurate, reliable fertilizer recommendations;
- 4) statewide Sustainable Agriculture Programs—Iowa, Ohio, Minnesota, Wisconsin, and California have established sustainable agriculture programs within their departments of agriculture or state universities to promote research and provide information to producers; and
- 5) sustainable Agriculture Education—students at the University of Vermont and the University of Maine can earn four-year degrees in sustainable agriculture, and the University of California at Santa Cruz provides a full curriculum in agroecology and sustainable agriculture.

at the state level to further legitimize, enhance, or supplant their own labeling programs.¹⁰ Washington, Texas, and Colorado have established certification programs operated directly by the state government.¹¹ Four other states have adopted statutes whereby the state government closely cooperates with certification entities.¹² Fifteen states have certification programs consisting of organic labeling statutes and regulations.¹³ In these fifteen states, certification associations perform inspection and certification functions for the producer, handler, processor, distributor, and retailer. The degree of state oversight of these associations differs significantly throughout the nation.

As interstate transportation and sale of organic produce has increased, the organic produce industry has recognized the need for national standards to assure consistent and uniform organic food labeling throughout the United States.¹⁴ The Organic Foods

10. NATIONAL AGRICULTURAL LIBRARY, USDA ORGANIC CERTIFICATION, SRB 90-04, at 2-3 (1990). The Organic Foods Production Association of North America (OFPANA), Greenfield, Massachusetts is recognized as the primary national spokesperson for the organic food industry. The most active state organization is the California Certified Organic Farmers (CCOF), Santa Cruz, California. Both organizations have been influential in the passage of state and federal organic food production legislation. International organizations associated with organic food standardization are discussed *infra*.

11. WASH. REV. CODE § 15.86.010 (Supp. 1992) (Organic Food Products); TEX. AGRIC. CODE ANN. § 12.0175 (West Supp. 1992) (Organic Certification); COLO. REV. STAT. § 35-11.5-102 (Supp. 1991) (Organic Certification Act). The Washington legislature passed a law in 1985 defining "organic" for labeling purposes and enabling the state department of agriculture to establish standards and certify organic producers. WASH. REV. CODE §§ 15.86.010-.020 (Supp. 1992). The department began certifying producers in 1988 in accordance with rules developed in cooperation with organic producers. Foods so produced may bear the Washington State Department of Agriculture Organic Food Certification Program seal. In addition to administering the state certification programs, the Texas and Colorado departments of agriculture have helped organic food producers form cooperative associations.

12. MINN. STAT. ANN. § 31.95 (West 1990) (Organic Food); N.H. REV. STAT. ANN. § 426:6-b (1991) (Certification); OHIO REV. CODE ANN. § 901:3-8 (Baldwin 1990) (Standard of Identity for Organic Foods); VT. STAT. ANN. tit. b, § 181 (1991) (Organic Farm Advisory Board). The state contracts with independent organic certification associations which were formed as self-regulating entities. They now operate with minimal oversight from state government. For example, in Minnesota, the Minnesota Organic Growers and Buyers Association is responsible for certification in the state.

13. ALASKA STAT. § 3.58 (1990) (Sale of Organic Foods); CAL. HEALTH & SAFETY CODE § 26469.20 (West 1990) (California Organic Food Act); CONN. GEN. STAT. § 21a-80 (1990) (Natural or Organically Grown Foods); IDAHO CODE § 22-1101 (1990) (Organic Food Products); IOWA CODE ANN. § 190b.1 (West 1989) (Organic Food); ME. REV. STAT. ANN. tit. 7, § 551 (1989) (Foods Labeled as Natural or Organic); MONT. CODE ANN. § 50-31-103 (1990) (Truth in Labeling Act for Organic Foods); NEB. REV. STAT. § 81-2234 (1990) (Organic Food); N.M. STAT. ANN. § 76-22-2 (Michie 1990) (Organic Commodity Act); N.D. CENT. CODE § 4-38-01 (1989) (Organic Food Certification); OKLA. STAT. tit. 2, § 5-301 (West 1989) (Oklahoma Organic Food Act); OR. REV. STAT. § 616.406 (1989) (Organic Food Regulations); S.D. CODIFIED LAWS ANN. § 39-23-1 (1990) (Organic Food); VA. CODE ANN. § 3.1-385 (Michie 1990) (Virginia Organic Food Act); WIS. STAT. § 97.09 (1988) (Rules for Organic Food Certification). These states provide a definition of "organic" and establish production standards, but generally do not require mandatory certification.

14. Many mainstream food and agricultural groups, including the United Fresh Fruit and Vegetable Association, may have provided the major impetus for national legislation,

Production Act, passed as Title XXI of the 1990 farm bill,¹⁵ provides minimum federal production and labeling standards for all states, including those without organic foods production laws. Most significantly, the federal law provides for a definition of organically grown produce¹⁶ and standards for its production, processing, and distribution.¹⁷ The federal law has also raised new issues which must be addressed—in particular, the regulatory authority of FDA and USDA and the extent of federal preemption of state organic food laws.

This article first discusses the development of state regulation of the organic produce industry and compares the state operated certification program in Texas¹⁸ with California's labeling statute. This is followed by a description and analysis of the new federal law.

II. STATE ORGANIC FOOD CERTIFICATION

A. FOOD LABELING AS TRADITIONAL STATE FUNCTION

For over two hundred years, the role of state government in the regulation of food quality and safety has been critical. State legislation to protect the public from adulterated food and fraudulent claims was first enacted in 1785.¹⁹ However, state power in regulating food has been limited by Congressional authority granted under the Commerce and Supremacy Clauses of the United States Constitution.²⁰ Most notably, the federal government exercised jurisdiction over foods sold in interstate commerce with passage of the Pure Food and Drugs Act of 1906 and the Meat Inspection Act of 1906. Despite Congressional authority to regulate interstate commerce, pervasive, stringent food standardi-

rather than organic produce industry. One goal of such groups was to help guarantee a market niche for their membership. However, CCOF, OPTANA, and other organic produce associations took the initiative in the legislative process to avoid a loss of political influence.

15. Food, Agriculture, Conservation and Trade Act of 1990, Pub. L. No. 101-624, Title XXI, Organic Food Production Act, 104 Stat. 3359, 3935 (1990), 7 U.S.C. § 6504 (1990).

16. 7 U.S.C. § 6502(14) (Supp. 1990).

17. Significantly, proposed standards for livestock and livestock products are not contained in the legislation, because the trade has failed to reach agreement. In addition, the USDA has prevented the sale of livestock labeled "organic" as discussed *infra* note 64. Detailed standards for processed food products are also lacking, but may be included in subsequent regulations.

18. Washington State also operates its own certification program. Unlike Texas, the source of law is statutory rather than regulation.

19. Janssen, *America's First Food and Drug Laws*, 9 FDA CONSUMER 5, 17 (1975). Massachusetts passed the first such law prohibiting food adulteration.

20. U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause); U.S. CONST. art. VI (Supremacy Clause).

zation and labeling requirements have not been adopted.²¹

The absence of strong federal action in regulating food has allowed the states to exercise significant authority. The Supreme Court upheld state regulation of food as a legitimate and traditional public health, safety, and welfare function in *Florida Lime & Avocado Growers, Inc. v. Paul*.²² In *Florida Lime*, the Court stated that "readying of foodstuffs for market has always been deemed a matter of peculiarly local concern."²³

In reliance on the holding in *Florida Lime* and because of the Food and Drug Administration's failure to promulgate rules regulating organic foods, the states have adopted their own organic food standards.²⁴ Oregon passed the first organic foods labeling law in 1973²⁵ and provided the impetus for subsequent legislation in other states. Most notably, California adopted many provisions of the Oregon law in enacting its labeling law in 1979.²⁶ State administered certification programs such as that found in Texas have been passed more recently. The Texas Department of Agriculture is directly involved in certification, whereas California allows private certification organizations to certify produce as organically grown. A more detailed comparison of the schemes follows.

B. COMPARING THE TEXAS AND CALIFORNIA SCHEMES

Texas administers a very comprehensive certification scheme which became operative June 15, 1988.²⁷ The Texas Organic Certification Act simply authorizes the Texas Department of Agriculture (TDA) to establish a program to promote natural, lean, organically grown products.²⁸ More specific organic food stan-

21. Charles D. Nyberg, *The Need for Uniformity in Food Labeling*, 40 FOOD DRUG COSM. L.J. 230-33 (1985).

22. 373 U.S. 132 (1963).

23. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963).

24. Charles P. Mitchell, *State Regulation and Federal Preemption of Food Labeling*, 45 FOOD DRUG COSM. L.J. 123, 141 (1990).

25. See OR. REV. STAT. § 616.406 (1991).

26. CAL. HEALTH & SAFETY CODE § 26569.13 (1979) (repealed 1990). Though California used the Oregon model, it included a definition of "synthetic," introduced public disclosure of farming methods and supply purchasing records so that any member of the public could determine how an organic food was grown and trace the product back from retailer to grower. Finally, California required a mandatory label statement which quoted the provision in the California Code for the standards.

27. The current Texas scheme does not specifically prohibit the sale of a food product in Texas as "organic," whether grown in Texas or elsewhere. However, no grower or retailer may affix the term "Texas Department of Agriculture (TDA) Certified" or the TDA certification symbol, unless such use is approved by TDA.

28. TEX. AGRIC. CODE ANN. § 12.0175 (West Supp. 1991). Under such a "generic commodity certification" law, the state is given broad authority to issue certification regulations. Accordingly, regulations may be issued creating certification procedures for

dards are contained in state administrative regulations.

California's certification program varies significantly from the Texas scheme because state involvement is more limited. The governing statute is found in the Health and Safety Code, within the Sherman Food, Drug, and Cosmetic law. Until 1990, California organic food producers, handlers, and distributors operated under the Organic Foods Act of 1979, which became effective January 1, 1981. The primary purpose of this prior law was to set standards for the labeling of food as "organic."²⁹ More specific standards were established, and enforcement of the certification program was funded under the California Organic Foods Act of 1990.³⁰

1. *Defining Organically Grown and Handled Food*

a. Texas

The Texas Administrative Code defines organic farming as "a system of ecological soil management that relies on building humus levels through crop rotations, recycling organic wastes, and applying balanced mineral amendments and that uses, when necessary, mechanical, botanical, or biological controls with minimum adverse effects on health and the environment."³¹ Organic food is defined as "food that is produced under a system of organic farming and that is processed, packaged, transported and stored so as to retain maximum nutritional value without the use of artificial preservatives, coloring or other additives, ionizing radiation, or synthetic pesticides."³²

b. California

California's law does not define organic farming or organically grown and handled food. However, under the Organic Foods Act of 1990, certain materials are either permitted or prohibited in the production, handling, and processing of raw agricultural commodities, meat, fowl, fish, eggs, and dairy food products.³³ Use of the

organic food (as in Texas), hormone-free beef, or any other commodity grown under a set of production standards, without further enabling legislation.

29. CAL. HEALTH & SAFETY CODE § 26569.13 (1979) (repealed 1990). Supporters of the California organic certification program maintain that high demand for organic foods created a sellers' market and provided opportunities for fraud and misrepresentation to consumers. Organic sales by California producers exceeded \$500 million in 1990, and there are 90,000 acres farmed using organic methods.

30. CAL. HEALTH & SAFETY CODE § 26569.20 (West Supp. 1992).

31. TEX. ADMIN. CODE tit. 4, § 18.1 (1988).

32. *Id.*

33. CAL. HEALTH & SAFETY CODE § 26569.21(p) (West Supp. 1992).

organic food label may only be used by producers, handlers, and processors in compliance with the standards described hereinafter.

2. *Soil and Crop Management Standards*

a. Texas

As a means of fostering the soil's organic content, specific tillage, crop rotation, and manuring soil management methods must be followed under Texas regulations.³⁴ Soil amendments, fertilizers, and growth regulators may be characterized as permitted, prohibited, or regulated.³⁵ Permissible sources of nitrogen,³⁶ phosphorus,³⁷ potassium,³⁸ calcium,³⁹ magnesium,⁴⁰ and micronutrient fertilizers are described in the regulations. In addition, certain nonsynthetic sources of growth promoters are permitted but not regulated.⁴¹ In contrast to the California scheme, Texas characterizes some fertilizers and growth promoters as regulated rather than prohibited. Such a characterization allows producers to change from conventional to organic production with the one-time use of synthetic materials to start a soil building program. A regulated material may be temporarily used as a supplement if such use falls within the context of an overall farm plan.⁴²

Water quality must be measured for salinity and contamination before farm certification.⁴³ Texas regulations provide for permissible, prohibited, and regulated methods of weed control,⁴⁴

34. TEX. ADMIN. CODE tit. 4, § 18.3 (1988).

35. *Id.* §§ 18.7, 18.8.

36. *Id.* § 18.4(b)(1). Permissible sources of nitrogen include green manures, nitrogen-fixing crops, composted materials, nitrogen fixing organisms.

37. *Id.* § 18.4(c)(1). Permissible sources of phosphorus include colloidal, soft-rock, and hard rock phosphate, bone meal, and bat guano.

38. *Id.* § 18.4(d)(1). Permissible sources of potassium include wood ashes, granite, feldspar, and greensand rock dusts, sulfate of potash magnesia, natural potassium sulfate, and kainite.

39. *Id.* § 18.4(e)(1). Permissible sources of calcium include agricultural limestone, agricultural gypsum, kiln dust, calcified seaweed, corn calcium, and calcium oxide.

40. *Id.* § 18.4(f)(1). Permissible sources of magnesium include dolomitic limestone, kieserite, and sulfate of potash magnesia.

41. *Id.* § 18.5(a). "A producer may use: (1) natural cytokinin formulations such as dry or liquid seaweed extract; (2) natural enzymes; (3) herbal preparations; (4) biodynamic preparations; (5) rhizobial inoculants; (6) free-living nitrogen-fixing bacteria or other microbial cultures; (7) blue-green algae; (8) cellulolytic bacteria; (9) natural rooting hormones; (10) humates; or (11) adjuvants and wetting agents for foliar applications." *Id.*

42. *Id.* §§ 18.4(b)(3), (c)(3), (d)(3), (e)(3), (f)(2) & (h)(3). See also *infra* notes 77-78 and accompanying text.

43. *Id.* § 18.7(c).

44. *Id.* § 18.7(d). Permissible forms of weed control include mechanical cultivation, mulching, crop rotations, intercropping, border mowing, grazing, and electrical or flame weeding. Prohibited forms of weed control include synthetically compounded or petroleum-distillate herbicides, synthetic growth regulators, and certain toxic level

insect control,⁴⁵ and disease control.⁴⁶

b. California

Naturally occurring fertilizers, pesticides and growth regulators are permitted in California.⁴⁷ Certain materials not easily classified as synthetic or organic under the law may be applied to crops, soil or water prior to harvest,⁴⁸ including bordeaux mixes, detergents, dormant oils, fish emulsion, gypsum, lime-sulphur, summer oils, and trace elements.⁴⁹

Synthetic fertilizers,⁵⁰ pesticides, or growth hormones are

micronutrients. Regulated forms of weed control include plastic mulches and mulches made of recycled newspapers. *Id.*

45. *Id.* § 18.7(e). Permissible forms of pest control include planting pest resistant crops, timing plantings to avoid pest cycles, vacuuming, water jets, physical barriers, sound, biological control by natural predators, pheromones, rock powders, insecticidal soaps, dormant oil sprays, pureed arthropods or plants such as hot peppers or garlic, and microbial and viral disease organisms. Prohibited forms of pest control include lead salts, arsenic and insecticides, nematicides, acaricides, rodenticides, molluscicides, and ovicides. Regulated forms of pest control include botanical insecticides, such as pyrethrum, rotenone, sabadilla, quassia, and ryania and traps containing prohibited pesticides. *Id.*

46. *Id.* § 18.7(f). Various forms of preventative management are permitted as forms of disease control, but the use of fungicides, fumigants, synthetic sterilizing agents, or synthetic bactericidal agents is prohibited. Copper and sulfur-based fungicides, including bordeaux mixes, tri-basic copper formulations, cupric oxide, copper sulfate, elemental and liquid sulfur, lime sulfur, and dilute chlorine bleach, are regulated. *Id.*

47. CALIFORNIA CERTIFIED ORGANIC FARMERS, RETAILER'S AND DISTRIBUTOR'S GUIDE TO ORGANIC FOOD AND FARMING 1, 17-23 (1991) [hereinafter GUIDE]. Any material not otherwise prohibited is deemed permitted under the statute. Accordingly, petroleum distillates are permitted for use on deciduous fruit trees during their dormant phase.

48. *See id.* at 6. It may be more accurate to state that the materials, though obviously either "synthetic" or "organic," fall within the grey zone because they were used in organic farming before passage of the law and are assumed to have minimal impact on human health and the environment.

49. CAL. HEALTH & SAFETY CODE § 26569.21(p)(3) (West Supp. 1992). These materials fall within the grey zone of synthetic natural materials when used in organic farming. The following describes materials in the grey zone and their respective purposes.

- 1) Bordeaux mixes—copper compounds and lime that retard fungus;
- 2) detergents—soapy substances used as insecticides;
- 3) dormant oils—petroleum and other oils applied to trees to smother insect eggs;
- 4) fish emulsion—a natural nitrogen source which may contain phosphoric acid as a stabilizer; however, fortification with urea is prohibited;
- 5) gypsum—hydrous calcium sulfate, from which plaster of Paris is made, is used as a source of calcium;
- 6) lime-sulphur—an aqueous calcium polysulfide solution may be used as fungicide or insecticide. Lime and sulfur may be applied as basic elements unless chemically altered by industrial processes;
- 7) summer oils—lighter than dormant oils, applied to fruit;
- 8) trace elements—zinc, magnesium, calcium, copper, etc., may be applied if soil tests demonstrate insufficient quantities; and
- 9) fungicide-treated seeds may be used to grow organic plants until 1994.

GUIDE, *supra* note 47, at 6-7.

50. CAL. HEALTH & SAFETY CODE § 26569.21(t) (West Supp. 1992). "'Synthetically compounded' means formulated or manufactured by a process which chemically changes a substance extracted from naturally occurring plant, animal, or mineral sources, excepting microbiological processes." *Id.*

prohibited materials.⁵¹ In addition, synthetically compounded petroleum products including aromatic petroleum solvents, diesel, and petroleum fractions such as carrot oil and weed oil are prohibited.⁵²

California water quality provisions are less stringent than corresponding Texas regulations. So long as the producer, handler, processor or retailer is not the source of the prohibited material found in water, use of water containing a prohibited material is permissible.⁵³

3. *Livestock, Dairy and Egg Production and Handling Standards*

a. Texas

Standards for organic livestock production and processing of animal products were originally proposed under Texas regulations.⁵⁴ The proposals were withdrawn on May 26, 1988, because of concerns over federal preemption of meat labeling under the Meat Inspection Act.⁵⁵

b. California

There is no specific provision requiring any feed supplied to livestock, fowl, or fish raised for meat production to be one-hundred percent organically grown in accordance with the above provisions and regulations adopted by the California Department of Food and Agriculture (CDFA).⁵⁶ However, this would appear to be the intention of the law as implemented by CDFA. Use of manures and artificial rumen stimulants are prohibited as feed.⁵⁷ In addition, any feed supplied to dairy animals within one year of the taking of milk or to fowl within six months of the laying of

51. *Id.* § 26569.21(p)(1)(A).

52. *Id.* § 26569.21(p)(3).

53. *Id.* § 26569.21(p)(4). Though "incidental" contamination of water is allowed, residue limits under the law (5% of EPA tolerance levels) would apply to a food product contaminated by water containing prohibited materials.

54. TEX. ADMIN. CODE tit. 4, § 18.9 (Livestock Production and Animal Husbandry), § 18.10 (Audit Trail for Livestock Products), § 18.11 (Dairy and Egg Production), § 18.12 (Mixed Conventional/Organic Livestock Production), § 18.13 (Slaughter), § 18.14 (Processing of Animal Products), § 18.16 (Meat, Dairy and Egg Products), and § 18.28 (Livestock Records).

55. See *infra* notes 272-73 and accompanying text.

56. CAL. HEALTH & SAFETY CODE § 26569.21(p)(1)(B) (West Supp. 1992). See also CAL. FOOD AGRIC. CODE § 14904 (West Supp. 1992) (concerning the adoption and enforcement of organic food regulations). CDFA is required to promulgate regulations for the manufacture, distribution, and labeling of organic livestock feed, but not for the production of organic livestock feed. The labeling regulations will probably include a requirement that the feed be 100% organically grown in accordance with the intent of law.

57. CAL. HEALTH & SAFETY CODE § 26569.21(p)(1)(C), (D) (West Supp. 1992).

eggs, must meet the above requirements and regulation to be certified as organic.⁵⁸ Antibiotics are exempted from the list of prohibited materials if used ninety or more days before slaughter⁵⁹ to treat a specific animal for a specific disease, or when administered thirty or more days before milking or laying of eggs.⁶⁰

4. *Testing and Inspection*

a. Texas

The Texas Department of Agriculture (TDA) is responsible for soil fertility testing and monitoring,⁶¹ crop management,⁶² post-harvest handling,⁶³ the handling and processing of organic crops,⁶⁴ and residue testing⁶⁵ to assure maintenance of organic food standards. TDA may also require testing of soil for off-farm sources of heavy metals, herbicides, or other suspect contaminants introduced by application of manure.⁶⁶ Finally, tissue, forage, and chemical residue tests may be reviewed by TDA as necessary to assure the authenticity of the produce.⁶⁷

b. California

A certification organization is required to conduct at least two initial physical inspections on the farm or at the food processing site⁶⁸ prior to the initial certification. The soil on which the raw commodities are grown must be tested or analyzed at least once to determine the fertility of the soil or growing medium. One fertility analysis sample for each forty acres of a farm must be made.⁶⁹ The certification organization must also prepare a quarterly list of all persons whose production or processing of food is certified or pending certification. In addition, an annual inspection of the farm or food processing site by the certification organization must

58. *Id.* § 26569.21(p)(2)(B).

59. *Id.* § 26569.21(p)(1)(A).

60. *Id.* § 26569.21(p)(2)(A). The use of the medication must be by a licensed veterinarian or within the general supervision of a veterinarian. *Id.*

61. TEX. ADMIN. CODE tit. 4, § 18.6 (1988). The purpose of such testing is to determine the existence of prohibited materials and to determine if synthetic fertilizer supplements are necessary to build the soil during the transition from conventional to organic farming. Such fertilizer could only be used as a regulated material.

62. *Id.* § 18.7.

63. *Id.* § 18.8.

64. *Id.* § 18.15.

65. *Id.* § 18.18(a).

66. *Id.* § 18.6.

67. *Id.* § 18.29(a).

68. CAL. HEALTH & SAFETY CODE § 26569.31 (West. Supp. 1992).

69. *Id.*

include a review of the records and a fertility analysis.⁷⁰ CDFA may request copies of the inspection documents used by the certification organization.

5. *Certification Requirements*

a. Texas

Producers must first be certified by TDA before any “TDA Certified” term or logo may be affixed to organically grown produce. However, TDA certification remains voluntary, and producers may market produce as “organic” without TDA certification. Whole farms are certified upon documentation that the applicant will manage a farm for organic production. The documentation consists of a three-year farm plan submitted to TDA that must include (1) a three-year rotation plan for each field, as applicable, (2) a three-year plan to stabilize nutrients in the soil of each field and (3) designation of a 25-foot buffer zone to separate land managed organically from other cultivated agricultural land owned and operated by a conventional producer.⁷¹ The same documentation must be generated for individual farm units or fields. However, in addition to the above requirements, the applicant must describe methods used to avoid contamination of organically managed units or fields in addition to designation of a buffer zone.⁷²

The Texas certification program is designed to guarantee authenticity of food from producers through all facets of the distribution chain. Thus, in addition to producer certifications, handlers, processors, distributors, and retailers must be certified by TDA. As a part of certification, complete detailed applications must verify the use of procedures to prevent commingling of TDA certified organic produce with other conventionally grown produce.⁷³ Retailers must also be able to trace TDA-certified products back to the producer or supplier.⁷⁴ Retailers and distributors are not required to annually renew their certification; however, the certification may be revoked by TDA.⁷⁵

70. *Id.* § 26569.32.

71. TEX. ADMIN. CODE tit. 4, § 18.21(b)(c)(1)-(3) (1988). Apparently this 25-foot buffer zone may either lie fallow or be farmed according to organic food production standards. However, if organic food is grown on the land, it must be sold as conventional produce.

72. *Id.* § 18.21(c)(4).

73. According to Mr. Keith Jones, TDA Organic Food Program Specialist, a retailer generally has adequate inventory controls and may be issued a certificate.

74. TEX. ADMIN. CODE § 18.33(e) (1988). Distributors must also agree to sell Texas certified products only to certified retailers.

75. *Id.* § 18.33(e)(2).

b. California

Like Texas, actual certification of the facility or farm remains voluntary under California law.⁷⁶ Thus, under current law, producers need not be certified to label their produce as organic. Most producers obtain certification because of the marketplace advantages in using the certification organization's seal.⁷⁷ Private certification organizations, including the California Certified Organic Farmers, certify a member's whole farm or a portion of a farm in accordance with organization standards and in compliance with provisions of the state law. The producer can then label the product as certified by the appropriate organization in accordance with the labeling provisions.

Though certification is voluntary, every person engaged in the production or handling of raw agricultural commodities or eggs sold as organic, or in the production, handling, or processing of meat, fowl, and dairy products sold as organic must register with CDFA and comply with provisions of law.⁷⁸ Such mandatory registration of producers, processors, and handlers, is required beginning January 1, 1992.⁷⁹ Since registration does not involve certification, there is no inspection of processing operations. In addition, assertions that food is organic may not be verified or records reviewed through the registration process. Registration does include payment of a fee, which is used to fund enforcement of the program.

Significantly, retailers are not required to register. Retailers represented by the California Grocers Association and other retail trade associations argued successfully that they would be so overburdened with record-keeping that many members might decide not to provide shelf space for organically grown and

76. CAL. FOOD & AGRIC. CODE § 46009 (West Supp. 1992); CAL. HEALTH AND SAFETY CODE § 26569.24(c) (West Supp. 1992). Beginning January 1, 1992, registrants will be prohibited from using the word "CERTIFIED" unless certified under an approved voluntary certification program. *Id.* § 26569.24(h).

77. CAL. FOOD AND AGRIC. CODE § 46002 requires the registrant to pay the applicable registration fee and furnish the following: 1) gross sales revenues, 2) nature of registrants business, 3) map of facility or farm, 4) substances supplied, 5) name of certifying organization, if any, and 6) a public information sheet including the registrant's name, address, and nature of business. *Id.* Actual certification as required by CAL. HEALTH AND SAFETY CODE § 26569.30 subjects the registrant to the above registration process and 1) two initial physical inspections of the registrant's premises, 2) fertility analysis of the soil and growing medium, and 3) annual inspection of facility including soil analysis and adequacy of record-keeping system. *See* CAL. HEALTH & SAFETY CODE § 26569.31.

78. AB 2012, 1989-90 Leg., Reg. Sess., Stat. 1990, c. 1262 (codified at CAL. FOOD AND AGRIC. CODE § 46002).

79. CAL. HEALTH & SAFETY CODE § 26569.35(a) (West Supp. 1992).

processed foods.⁸⁰

Also beginning January 1, 1992, certification organizations must register and file a certification plan with the state which contains a detailed description of the organization's program.⁸¹ Persons involved in making certification decisions or setting certification standards within the certification organization must be listed on the registration form.⁸² Finally, no foods may be certified as organic unless the producer has been in compliance with applicable standards for at least one year. Such compliance must be verified by the certification organization. CDFA is to perform a written evaluation of each organization's certification plan at least biannually⁸³ and may perform an audit of procedures and records at any time.⁸⁴ The organization's certification plan⁸⁵ and the written evaluation⁸⁶ by CDFA must be made available for public inspection. Organic producers⁸⁷ may also be certified under federal law, and all private certification organizations and state agencies must be accredited by the the United States Secretary of Agriculture effective October 1, 1993.⁸⁸

80. See *supra* note 78.

81. CAL. HEALTH & SAFETY CODE § 26569.30(a)(b) (West Supp. 1992).

82. *Id.* § 26569.30(d).

83. Discussions with Paul Branum, Manager, California Organic Program, Division of Inspection Services, CDFA.

84. CAL. HEALTH & SAFETY CODE § 26569.30(g) (West Supp. 1992). The certification organization must meet minimum qualifications. *Id.* § 26569.30(c). It must certify for at least 10 entities and have no financial interest in the sale of food. *Id.* Prior to the initial certification of the producer or processor, the certification organization must conduct at least two physical inspections of the premises, including the record-keeping system. *Id.* At least one of these inspections must include soil fertility analysis. For field crops, there must be one sample taken per 160 acres or for the management unit, whichever is less. *Id.*

As a part of the ongoing certification program, a list must be filed with CDFA of all persons whose production is certified and of those who have pending certifications at the end of each calendar quarter. *Id.* § 26569.32(a). An annual physical inspection of the premises and records, including a soil fertility analysis must be made on an annual basis. *Id.* § 26569.33. The organization's certification plan must be filed annually as a part of registration and include a detailed description of:

1. Information required from producers on growing practices and methods for verifying information supplied;
2. qualifications of, and training requirements for inspectors;
3. procedures for inspection, including frequency and items covered;
4. procedures for soil/tissue sampling and analysis;
5. criteria for certification; and
6. the process for certification decision-making and identification of persons with decision-making authority.

Id.

85. *Id.* § 26569.33.

86. *Id.* § 26569.30(f).

87. *Id.* § 26569.30. See also CAL. FOOD & AGRIC. CODE § 46009 (West Supp. 1992), which provides that private certification organizations, CDFA and the County Agricultural Commissioners will be responsible for certifying producers of organic food and processors of organic meat, fowl, and dairy products. The Department of Health Services certifies all other processed food sold as organic.

88. 7 U.S.C. § 6515 (1990).

6. *Record-keeping Requirements*

a. Texas

Each certified whole farm, farm unit, or other production unit must keep a record of field-by-field fertilization, cropping, and pest management; if a crop is produced from more than one field, records must show the source of shipment by date, lot, bin, or shipment number.⁸⁹ Producers of organic produce and other produce grown on the same farm must maintain separate records for organically grown and conventionally grown produce.⁹⁰

TDA may review all soil, tissue, forage, bacteria, contamination, and residue tests in soil, water, or crops.⁹¹ Tests on any crop must be identified to trace the product from the farm to its retail distribution.⁹²

b. California

Raw commodity producers,⁹³ producers of meat, fish, and poultry,⁹⁴ and handlers of organic produce⁹⁵ must comply with

89. TEX. ADMIN. CODE tit. 4, § 18.26 (1988).

90. *Id.* § 18.27(a). Only owners or operators of certified farms must keep records of conventional food production as well as organic food production. Conventional producers have no record-keeping requirements under the organic foods production regulations.

91. *Id.* § 18.29(a).

92. *Id.* § 18.29(b).

93. CAL. HEALTH & SAFETY CODE § 26569.28(a) (West Supp. 1992). Raw commodity producers must maintain records of the following for two years after the food is sold:

- 1) all materials applied to crops or soil, including dates and quantities of application;
- 2) dates and quantities of crops harvested;
- 3) a clear map of the crop area indicating growing areas and acreages for each crop;
- 4) records relating application of any prohibited materials to specific planting, transplanting or budding dates; and
- 5) sales invoices including names and addresses of buyers, date and quantity of each transaction, and a statement of compliance with the state law.

Id. § 26569.28(a), (f).

94. *Id.* § 26569.28(b). Producers of meat, fish and poultry must maintain records of the following for two years after the food is sold:

- 1) all names and addresses of sources of suppliers of livestock as well as verification from the supplier that animals were raised in compliance with state law since birth; and
- 2) all feed, treatments, medications or chemicals used during the raising and processing of livestock and evidence that these materials meet state verification standards.

Id. § 26569.28(b), (f)

95. *Id.* at § 26569.28(c). Handlers (distributors, wholesalers, packers, processors and manufacturers) of "organic" food must maintain records of the following for two years after the food is sold:

- 1) all names, addresses and registration numbers of all suppliers;
- 2) dates and amounts of each transaction;
- 3) shipping invoices identifying "organic" food;
- 4) documentation of certification claims;

specific record-keeping requirements. Retailers of organic produce⁹⁶ must also maintain such records as supplied to them by wholesale distributors, but only for one year.

The California Department of Food and Agriculture (CDFA) or the Department of Health Services (CDHS) can, at any time, demand copies of these records. Such records must then be supplied to the authorities within seventy-two hours of the request.⁹⁷ In addition, a request from the public must be honored within ten days of the request.⁹⁸ However, CDHS and CDFA must remove confidential proprietary and financial information provided to them when responding to the request.⁹⁹ The enforcement agency must track the food through the chain of custody and obtain records of materials applied at any point in the chain.¹⁰⁰

7. Labeling Requirements

a. Texas

The TDA "Certified Organic" logo may only be used on food produced on land certified by TDA.¹⁰¹ Certified producers, handlers, and retailers must display the TDA certificate in each store where TDA-certified organic food is sold.¹⁰² The approved signs,

- 5) all materials used in the processing or manufacturing of organic products; and
- 6) all pesticides applied to the food by the handler while in their custody, and a list of all substances routinely used in or around where the food is kept.

Id. § 26569.28(c), (f).

96. CAL. HEALTH & SAFETY CODE § 26569.28(e)(f) (West Supp. 1992). Retailers of "organic" food are required to maintain the following records for not less than one year after they receive the food:

- 1) the name, address, and organic registration number of all suppliers;
- 2) the date and quantity of each transaction;
- 3) invoices indicating compliance with the state law;
- 4) documentation of certification claims from the distributor or certification organization;
- 5) all pesticides applied to the food by the retailer; and
- 6) a list of all substances routinely used in or around the area where organic foods are kept.

Id.

97. *Id.* § 26569.29(a).

98. *Id.* § 26569.29(b). The California law has international implications. Any grower or handler whose product is sold as organic in California may be required to make public disclosure to anyone in the world. CDHS and CDFA cannot force growers and handlers outside of California to keep records, but the first importer may be prevented from selling the product if the importer cannot provide information requested for disclosure by a member of the public.

99. *Id.* A portion of the producer's registration form has been designated as a "public information sheet." Any member of the public may file a request for records of materials applied to any given product sold or offered for sale. *Id.* For a given item of produce or a specific processed product, a person can request that the enforcement agency obtain and provide the records which show what was used to grow, store and process that food. *Id.*

100. *Id.*

101. TEX. ADMIN. CODE tit. 4, § 18.36(2) (1988).

102. *Id.* § 18.33(e)(3).

price cards, and other marketing tools are supplied to the retailer by TDA.¹⁰³

b. California

California law allows use of the label "organic," "organically grown," "naturally grown," "wild," "ecologically grown," or "biologically grown" (collectively "organic labels") if pesticide residue does not exceed ten percent of the federal Environmental Protection Agency (EPA) tolerance level or, if no tolerance level has been established by EPA, does not exceed ten percent of the federal Food and Drug Administration (FDA) action level.¹⁰⁴ This percentage of the EPA tolerance or FDA action level was reduced to five percent effective January 1, 1992.¹⁰⁵

Labels on raw produce that are marketed as "organic" must be displayed prominently and contain the words "ORGANICALLY GROWN IN ACCORDANCE WITH THE CALIFORNIA ORGANIC FOODS ACT OF 1990," or like language. Similar labels must appear on the grower's and wholesaler's sale containers. At the retail level, labels must appear prominently over the bin, case, or container holding the food.¹⁰⁶ Processed food, meat, poultry, fish or milk marketed as "organic" must bear a label saying "ORGANICALLY GROWN AND PROCESSED IN ACCORDANCE WITH THE CALIFORNIA ORGANIC FOODS ACT OF 1990," or similar language.¹⁰⁷ Labels of "certified organic" food must also state the name of the certifying organization.¹⁰⁸ Those labels conforming to prior state law may be used until January of 1992.¹⁰⁹ Failure to comply with the labeling aspects of the law could result in prosecution for fraud, false advertising or mislabeling and civil liability to customers.¹¹⁰

103. *Id.* § 18.33(e)(4). TDA conducts market research on supermarket chains' receptiveness to selling organically grown produce and organizes meetings between organic farmers and retail supermarkets. With TDA assistance, a large Texas supermarket chain, HEB Stores, began marketing organic produce in 1989. TDA has also helped establish organic marketing cooperatives and encouraged retail food chains to buy commodities from producers' cooperatives and has promoted organically grown produce.

104. CAL. HEALTH & SAFETY CODE § 26569.23(a) (West Supp. 1992). Tolerance levels are set by statute under the Federal Insecticide Fungicide Rodenticide Act, and action levels are established by FDA regulations pursuant to the Federal Drug, Cosmetic Act for processed food additives. See 21 C.F.R. § 109 (1991) (human food); 21 C.F.R. § 509 (1991) (animal feed).

105. CAL. HEALTH & SAFETY CODE § 26569.23(b) (West Supp. 1992).

106. *Id.* § 26569.24(a)(1).

107. *Id.* § 26569.24(a)(2)-(3).

108. *Id.* § 26569.24(c).

109. *Id.* § 26569.11 (repealed 1990). See also *id.* § 26569.50 (referring to § 26569.22).

110. *Id.* § 26569.40(b).

8. *Transition to Organic*

a. Texas

Texas regulations allow producers to apply for use of TDA "Certified Organic"¹¹¹ and the "Organic Certification Pending—Transitional" logos.¹¹² A producer who has satisfied all certification requirements except passage of time from use of synthetic chemicals must market under the transitional label. The applicant requesting certification must submit verifying documents¹¹³ and be inspected by TDA to become eligible to use the logos.¹¹⁴

b. California

The California statute provides for a period prior to planting or harvest of any organic crop during which prohibited materials may not be used. Until 1995, no prohibited material may be applied for twelve months prior to the planting of a crop to be sold as organic. Prohibited materials may not be applied twenty-four months prior to harvest beginning in 1995, with the period being extended to thirty-six months prior to harvest beginning in 1996.¹¹⁵ However, the federal standard which becomes effective October 1, 1993 does not allow the use of prohibited materials thirty-six months prior to harvest. Thus, this section of the California standard will be pre-empted by the federal law.¹¹⁶

9. *Organic Food Advisory Board*

a. Texas

Texas regulations allow TDA to appoint a Certification Review and Standards Advisory Committee to assist in reviewing applications for certification and implementation of the program and to propose amendments as necessary.¹¹⁷ The Committee is composed of four organic producers; one organic food processor; one technical advisor, agronomist, or horticulturist; two consumer representatives; and one retailer or distributor of organic food.¹¹⁸

111. The TDA logo used for labeling is green and may state that it was organically grown without the use of pesticides or chemical fertilizers in fertile soil which generates its own nutrients, resists erosion and produces the most wholesome food possible.

112. TEX. ADMIN. CODE tit. 4, § 18.33 (1988). The transition logo used for labeling is blue and yellow.

113. *Id.* § 18.33(c)(3).

114. *Id.* § 18.33(d).

115. CAL. HEALTH & SAFETY CODE § 26569.22(a) (West Supp. 1992).

116. Food, Agriculture, Conservation and Trade Act of 1990, Pub. L. No. 101-624, Title XXI, Organic Food Production Act, 104 Stat. 3359, 3935 (1990), 7 U.S.C. § 6504.

117. TEX. ADMIN. CODE § 18.33(f)(1) (1988).

118. *Id.* § 18.33(f)(3).

b. California

California law requires the director of CDFA to establish and appoint thirteen members to an Organic Food Advisory Board (Board). Six members are to be organic producers: a processor, a handler, two consumer representatives, an environmental representative, and, two technical representatives.¹¹⁹ The purpose of the Board is to assist implementation of the Organic Food Production Law of 1990 and to make recommendations to the Director of CDFA on which materials may be used in growing organic food.

10. *Enforcement*

a. Texas

TDA has authority to make inspections of certified producers, processors, retailers, distributors, as well as applicants for certification.¹²⁰ In addition to inspections prior to application to use the logo and certification of the applicant, TDA may conduct unannounced informal inspections in cases of suspected standards violations.¹²¹ Written or oral complaints are investigated and remedial actions are taken.¹²² TDA must maintain the records of all complaints, investigations, and remedial actions for four years. This administrative record may become a part of the review record of any proceeding involving a certified person or an applicant for certification.¹²³ Texas has not established specific penalty provisions under the organic foods production regulations.

b. California

It is unlawful to certify food in violation of the law,¹²⁴ to certify food as organic unless registered as a certification organization,¹²⁵ or to willfully make a false statement or fail to disclose a fact in registration as a certification organization.¹²⁶ It is also unlawful for a person to produce, handle, or process food sold as organic unless registered or to willfully make a false statement in registration.¹²⁷ A producer does not assume any liability for the

119. CAL. FOOD AGRIC. CODE § 46003(a)-(b) (West Supp. 1992).

120. TEX. ADMIN. CODE § 18.38(a) (1988).

121. *Id.* § 18.38(b).

122. *Id.* § 18.38(d).

123. *Id.* § 18.38(e). Violators are subject to prosecution under the Texas Deceptive Trade Practices Act.

124. CAL. HEALTH & SAFETY CODE § 26569.39(a) (West Supp. 1992).

125. *Id.* § 26569.39(b).

126. *Id.* § 26569.39(c).

127. *Id.* § 26569.40.

fraudulent misrepresentation of a handler or processor who sells his or her conventionally grown produce under an organically grown label.

Any person may file a complaint with CDFA if noncompliance with the law is suspected. Primary enforcement responsibility lies with CDFA and the County Agricultural Commissioners (CACs).¹²⁸ CDFA and the CACs may conduct spot inspections of registrants to verify continuing compliance according to uniform procedures established by the director of CDFA. CDFA has established a procedure for handling complaints, including a complaint form.¹²⁹ Investigation of a valid complaint must begin within three days for perishables and within seven days for nonperishables. Findings must be rendered within ninety days.¹³⁰

CDHS is responsible for processed foods and will continue to investigate violations. However, CDFA and the CACs have jurisdiction over all other commodities at the producer, handler, and retail level. CDFA¹³¹ will have investigatory and rule-making jurisdiction in some instances. Enforcement at the retail level will be made primarily by CACs.¹³²

A notice of violation may be issued for a minor, first offense. Unintentional violations are subject to a penalty not to exceed \$2,500.¹³³ A civil penalty may be levied in an amount not to exceed \$5,000 for each violation to include every invoice, sale, or label which is not in compliance.¹³⁴ The fines are civil penalties levied by the applicable enforcement agency.¹³⁵ A person against whom a civil penalty has been levied may request a hearing within thirty days after issuance of the notice of penalty.¹³⁶

11. *Program Funding*

a. Texas

Nearly twenty-five percent of the TDA certification program costs are funded by certification fees assessed producers, handlers, and retailers, with the remainder from general revenues.¹³⁷

128. CAL. FOOD & AGRIC. CODE § 46006 (West Supp. 1992).

129. *Id.* § 46004.

130. CAL. HEALTH & SAFETY CODE § 26569.47(b) (West Supp. 1992).

131. The pesticide branch has been transferred to the new California Environmental Protection Agency under the Governor's Reorganization Plan.

132. CAL. FOOD & AGRIC. CODE § 46000 (West Supp. 1992).

133. CAL. HEALTH & SAFETY CODE § 26569.43(b) (West Supp. 1992).

134. *Id.* § 26569.43(a).

135. *Id.* § 26569.43(a).

136. *Id.* § 26569.43(d).

137. Organic farming and sustainable agriculture were promoted as a means of

Those registering for participation in the TDA certification program will be subject to a fee structure to be established by new regulations. In addition, cotton and other nonfood products will be certified by TDA as provided by the new regulations.

b. California

California's certification program is funded by means of registration of all producers, handlers, and processors who utilize the program. The registration fee may not exceed \$2,000 and shall be assessed in accordance with a fee schedule to be published annually.¹³⁸

III. FEDERAL ORGANIC FOODS CERTIFICATION

A. LEGISLATIVE HISTORY

State definitions of organic and the standards for organically grown food are inconsistent and conflicting. Food eligible for labeling as organic in one state may not be eligible in another.¹³⁹ Because of these differences in state programs, consumers have questioned the authenticity of foods deemed to be "organically" grown. In addition, producers, processors, handlers, and retailers have been unable to obtain guidance in growing organic produce for interstate distribution.¹⁴⁰ In recognition of the importance of establishing uniform and consistent national standards for organic food production,¹⁴¹ federal legislation was introduced in both the

preserving family farming operations by John Hightower, former Commissioner of TDA. During the Hightower administration, TDA's Organic Food Certification brochures described the certification program and stated that consumers should buy "Certified Organic" for the following reasons: 1) to lower any health risks associated with exposure to pesticide residues in food or water; 2) to help develop and diversify Texas agriculture; 3) to obtain maximum freshness; and 4) to protect human health and the environment.

The emphasis of the current Commissioner is to help develop and diversify Texas agriculture and provide greater assistance to large food producers and processors in addition to the traditional family farming operations, according to Brent Wiseman, TDA Organic Food Program Specialist.

138. See CAL. HEALTH & SAFETY CODE § 26569.35(c) (West Supp. 1992).

139. See *Proposed Organic Certification Program: Joint Hearing Before the Subcommittee on Domestic Marketing, Consumer Relations, and Nutrition and the Subcommittee on Department Operations, Research, and Foreign Agriculture of the Committee on Agriculture*, 101st Cong., 2d Sess. 26 (1990) (statement of Boyd E. Wolf, Secretary, Pennsylvania Department of Agriculture, on Behalf of the National Association of State Departments of Agriculture, Accompanied by Bob Amato, Assistant Executive Secretary).

140. SEN. COMM. ON AGRIC., NUTRITION, AND FORESTRY, FOOD AGRIC., CONSERVATION, AND TRADE ACT OF 1990, REP. NO. 357, 101st Cong., 2d Sess. 289 (1990) reprinted in 1996 U.S.C.C.A.N. 4656, 4943 (1990) [hereinafter CONSERVATION AND TRADE ACT OF 1990].

141. *Id.* at 4943-44. The Senate Report describes conflicts arising from differences in organic standards between states. For example, New Hampshire and Texas "require dairy cows to be fed exclusively organic feed . . ." *Id.* In contrast, Kansas, Maine, and South

Senate and House in the first session of Congress in 1989.¹⁴²

The tempo of involvement of various consumer, environmental, and trade association organizations increased during the second session of Congress in 1990. With the assistance and support of these organizations, Vermont's Senator Leahy introduced the Organic Foods Production Act of 1990 as SB 2108.¹⁴³ Representative Peter DeFazio introduced HR 4156 as the companion bill to SB 2108 which was later marked up, amended, and incorporated in SB 2108.¹⁴⁴ In addition, Representative Gary Condit introduced HR 5045 which had provisions also incorporated in SB 2108.¹⁴⁵ Though SB 2108 was never passed, Title XVI of the Senate version of the 1990 farm bill contained most of its provisions.¹⁴⁶ Representative DeFazio offered a moderate alternative dealing with federal organic food production standards to Senator Leahy's legislation¹⁴⁷ as an amendment to HR 3950 on August 1, 1990, in the House Agriculture Committee. This measure was accepted by a narrow margin¹⁴⁸ by the Committee and HR 3950 was passed on the House floor. The Senate-House Conference Committee adopted portions of both the DeFazio amendment and Leahy's provisions in SB 2108 as the organic foods section of the Food, Agriculture, Conservation, and Trade Act of 1990 (1990 Farm Bill).¹⁴⁹

Dakota require unmedicated feed, while California and Oregon specify a time period during which unmedicated, organic feed must be used prior to milk production. *Id.*

Many large food distributors and retailers concerned about the authenticity of produce have refused to purchase the wide array of organically labeled items. *Id.* Accordingly, consumers have found relatively little or no organically grown and processed food in large grocery stores. The Senate Report concluded that a national standard was essential to achieve credibility with large grocers, to provide a level playing field for producers operating in the organic food market, and to assist the American producer in exporting organically grown foods. *Id.*

142. See generally Charles D. Nyberg, *The Need for Uniformity in Food Labeling*, 40 FOOD DRUG COSM. L.J. 229 (1985) (discussing the public recognition of the need for uniformity). The establishment of state standardization and labeling programs followed by federal uniformity has been the typical pattern for the food industry.

143. S. 2108, 101st Cong., 2d. Sess. § 1602 (1990). SB 2108 represented the culmination of efforts since early 1989 to introduce legislation containing national organic food production standards. S. 1063, 101st Cong. 1st Sess. (1989) sponsored by Senator Lugar from Indiana, and the Farm Conservation and Water Protection Act, S. 970, 101st Cong., 1st Sess. (1989), sponsored by Senator Fowler from Georgia, contained sustainable agriculture and organic production measures. However, SB 2108 was the most comprehensive legislation in Congress and included a definition of organic, a certification scheme, a promotion program, and a pilot labeling program.

144. H.R. 4156, 101st Cong., 2d. Sess. (1990).

145. H.R. 5045, 101st Cong., 2d. Sess. (1990).

146. See CONSERVATION AND TRADE ACT OF 1990, *supra* note 140, at 289.

147. *Farm Bill Conference Stalls After Budget is Rejected*, CQ (Oct. 6, 1990) at 3206.

148. *Id.* House members agreed to the floor amendment, provided USDA would hold hearings on organic livestock production. Rep. Charles W. Stenholm, D-Texas, represented House members objecting to applying the organic definition to livestock production.

149. *Id.*

B. ORGANIC FOODS PRODUCTION ACT OF 1990

The Organic Foods Production Act of 1990 (Act) was signed into law by the President on November 28, 1990 as part of the 1990 Farm Bill. However, most provisions of the legislation will not be fully implemented until October 1, 1993.¹⁵⁰

1. *Findings and Purposes*

The Conference Committee adopted the House version of the bill and omitted the environmental stewardship and the sustainable agriculture purposes contained in the Senate version.¹⁵¹ With the purposes of the bill limited to national standardization and labeling of organically grown food, potential objections from various interest groups were removed. The stated purpose of the Act is to:

- (1) "establish national standards governing the marketing of . . . organically produced products;"
- (2) "assure consumers that organically produced products meet a consistent standard;" and
- (3) "facilitate interstate commerce in fresh and processed food that is organically produced."¹⁵²

2. *National Organic Standards Board*

The establishment of a National Organic Standards Board (Board) is of highest priority and is critical to the implementation of the Act by October 1, 1993. The Secretary must appoint the fifteen-member Board which then must: 1) make recommendations to the Secretary;¹⁵³ 2) develop a Proposed National List of approved and prohibited substances which may be used for organic production and handling, as well as proposed amendments to the National List;¹⁵⁴ 3) convene Technical Advisory Panels to evaluate substances for organic use;¹⁵⁵ 4) evaluate botanical pesti-

150. Food, Agriculture, Conservation and Trade Act of 1990, Pub. L. No. 101-624, Title XXI, Organic Food Production Act, 104 Stat. 3359, 3937 (1990), 7 U.S.C. § 6501-6523.

151. H.R. CONF. REP. NO. 916, 101st Cong., 2d Sess. 1174-1176 (1990). The Senate version had the additional purposes of "encourag[ing] environmental stewardship through the increased adoption of organic, sustainable farming methods; [assisting] emerging and important food industry sectors that produce, process, and market organically produced products; [preserving] the integrity of organic food programs that have been implemented by States and encourage other States to adopt organic food programs" which were not adopted in Conference.

152. 7 U.S.C. § 6501 (Supp. 1990).

153. *Id.* § 6518(k)(1).

154. *Id.* § 6518(k)(2).

155. *Id.* § 6518(k)(3).

cides;¹⁵⁶ 5) advise the Secretary about testing organic products for unavoidable environmental contamination;¹⁵⁷ and 6) advise the Secretary concerning exemptions for organic certified farms which must comply with emergency governmental pest treatment programs.¹⁵⁸

The Board is required to hire a staff director, and USDA employees may be detailed to work with the Board. Members who have been nominated by organic certifying organizations, state governments, and other interested organizations may serve on the Board.¹⁵⁹ Members must serve five years and cannot serve consecutive terms.¹⁶⁰ The Board selects a Chairperson, a simple majority of the Board constitutes a quorum, and decisions must be made by a two-thirds vote of members present at a meeting.¹⁶¹ The Act required that the Board be appointed by May 28, 1991.¹⁶² However, a notice of nominations for members of the Board was not issued until April 16, 1991, and written nominations to the Board were received by or before May 31, 1991.¹⁶³ As of December 31, 1991, the Secretary of Agriculture had not selected members to the Board.¹⁶⁴

156. *Id.* § 6518(k)(4). Botanical pesticides are pesticides derived from plants and are, accordingly, nonsynthetic.

157. *Id.* § 6518(k)(5).

158. *Id.* § 6518(k)(6).

159. *Id.* § 6518(c). The appointed 15 member board shall include:

- (1) four shall be individuals who own or operate an organic farming operation;
- (2) two shall be individuals who own or operate an organic handling operation;
- (3) one shall be an individual who owns or operates a retail establishment with significant trade in organic products;
- (4) three shall be individuals with expertise in areas of environmental protection and resource conservation;
- (5) three shall be individuals who represent public interest or consumer interest groups;
- (6) one shall be an individual with expertise in the fields of toxicology, ecology, or biochemistry; and
- (7) one individual who is a state or private certifying agent."

See id. § 6518(b).

160. *Id.* § 6518(d).

161. *Id.* § 6518(g), (h) (1990).

162. *Id.* § 6518(c) (providing that appointment is to be made within 180 days of enactment of this title).

163. 56 Fed. Reg. 15323 (1991). In addition to the nomination requirements described in the OFPA, the Federal Notice states that "[s]election criteria will include such factors as: demonstrated experience and/or interest in organics; commodity and geographic representation; endorsed support of industry organizations; demonstrated experience or interest in public affairs and/or environmental concerns; expertise in relevant scientific disciplines, and other factors as may be appropriate for specific positions."

164. The Conference Committee on Agriculture Appropriations funded the National Organic Standards Board with \$120,000 in November 1991. Bob Scowcroft, *Congress Funds Organic Standards Board*, CALIFORNIA CERTIFIED ORGANIC FARMERS STATEWIDE NEWSLETTER, vol. VIII, no. 4, at 2 (1991). The Committee also stated that it "[e]xpects the Department will utilize such funds as may be required from the Agricultural Marketing

3. *The National List*

The first task of the newly created Board is the establishment of a National List of approved synthetic substances and prohibited natural substances for use in organic production and handling.¹⁶⁵ Thus, all naturally occurring substances not included on the National List may be used, and all active synthetic ingredients not included on the National List may not be used. Inert synthetic ingredients may not be automatically prohibited.

The National List can include active synthetic substances only if the Secretary determines, in consultation with the Secretary of Health and Human Services and the Administrator of the Environmental Protection Agency, that they do not harm human health and the environment,¹⁶⁶ are necessary to replace unavailable natural substances,¹⁶⁷ and are consistent with organic farming and handling.¹⁶⁸

The Act provides guidance to the Board as to those substances which may be included on the National List. Synthetic substances which may be approved for use include those with an active ingredient that is a copper and sulfur compound, a toxin derived from bacteria, pheromones, horticultural oil, treated seed, fish emulsion, vitamin and mineral, and livestock paracitocides and medicine. Production aids, including netting, tree wraps and seals, insect traps, sticky barriers, rope covers, and equipment cleansers,¹⁶⁹ are also synthetic substances approved for use in organic food production.

Also, a substance containing synthetic inert ingredients¹⁷⁰ where there is no natural substitute may be approved for use.¹⁷¹

Service and other agencies of the Department, as appropriate, in working with the National Organic Standards Board to carry out provisions of this act." *Id.*

165. 7 U.S.C. §§ 6517(a), (b) (1990).

166. *Id.* § 6517(c)(1)(A)(i).

167. *Id.* § 6517(c)(1)(A)(ii).

168. *Id.* § 6517(c)(1)(A)(iii). Certifiers will apparently have leeway in determining what substances are approved and prohibited after the initial National List is developed by the NOSB. Thus, unless or until the NOSB makes a ruling on a substance, a particular substance could be allowed by one state or private certification program and prohibited by another. It is not clear whether USDA must rule on a substance's health or environmental effects before it may be allowed for organic use or if USDA rules on a substance only after a proposal is submitted for consideration for approval or prohibition.

169. *Id.* § 6517(c)(1)(B)(i). The term "substance" is not defined in the statute. Substance may mean a compound or a formulation. A compound consists of chemically bonded molecules, while a formulation is a mixture of compounds. Thus, if a substance means a "formulation," it may contain a synthetic active ingredient which is allowed under the law, even though it contains a "compound" which is prohibited.

170. An inert ingredient is chemically unreactive and does not affect other substances when in contact with them.

171. See 7 U.S.C. § 6517(c)(1)(B)(ii) (1990).

This House provision was approved by the Conference Committee¹⁷² to allow organic farmers an economically viable means of applying certain botanicals to crops.¹⁷³ California organic farmers may be at an economic disadvantage, as the state law prohibits the use of inert synthetic substances for these purposes.¹⁷⁴ The National List may include a substance used in handling which is nonsynthetic but not organically produced.¹⁷⁵

The National List is to be based upon a proposed national list developed by the Board.¹⁷⁶ Technical Advisory Panels convened by the Board will scientifically evaluate the materials considered for inclusion on the National List.¹⁷⁷ The Secretary does not have discretion to exempt synthetic substances other than those recommended by the Board.¹⁷⁸ In addition, a substance prohibited by federal regulatory action may not be listed.¹⁷⁹ Specific procedures must be followed by the USDA when creating or amending the National List. Initially, the proposal or amendment from the Board must be submitted to the Secretary.¹⁸⁰ Along with its recommendations, the Board must submit its evaluations and Technical Advisory Panel evaluations to the Secretary.¹⁸¹ The proposal or amendment must then be published in the Federal Register to allow for public comment.¹⁸² The Secretary must evaluate com-

172. *Supra* note 151, at 1179. The category of synthetic inert ingredients not of toxicological concern to the Administrator of EPA could be approved for use.

173. *Proposed Organic Certification Program Joint Hearing Before the Subcommittee on Domestic Marketing, Consumer Relations, and Nutrition and the Subcommittee on Department Operations, Research, and Foreign Agriculture of the Committee on Agriculture*, 101st Cong., 2d Sess. 13 (June 19, 1990) (Statement of Hon. Peter A. DeFazio, a Representative in Congress from the State of Oregon).

174. Conversation with Stuart Fishman on December 12, 1991.

175. 7 U.S.C. § 6517(c)(1)(B)(iii) (1990).

176. *Id.* § 6517(d)(1).

177. *Id.* § 6518(k)(3).

178. *Id.* § 6517(d)(2).

179. *Id.* § 6517(d)(3).

180. *Id.* §§ 6517(d)(1) & (2). *See also id.* § 6518(l)(m) (describing the criteria for NOSB substance evaluation, including:

- 1) its adverse health/environmental effects using EPA and other information;
- 2) a complete list of its ingredients and whether or not it contains synthetic inert ingredients;
- 3) its potential for detrimental chemical interactions with other organic farming materials;
- 4) its toxicity, persistence and environmental concentration;
- 5) the probability of environmental contamination during its manufacture, use, misuse, or disposal;
- 6) its effects on human health;
- 7) its effects on biological and chemical interactions in the agricultural ecosystem;
- 8) alternative substances or practices; and
- 9) its compatibility with a system of sustainable agriculture).

181. 7 U.S.C. § 6518(l)(3).

182. *Id.* § 6517(d)(4).

ments in response to publication in the Federal Register. The final National List must also be published in the Federal Register along with a discussion of comments received.¹⁸³

An approved synthetic substance or prohibited naturally occurring substance contained in the National List must be reviewed and renewed within five years by the Board, or it will become invalid.¹⁸⁴ In addition, the Board is required to establish procedures for individuals who want to petition the Board to evaluate substances for inclusion on the National List.¹⁸⁵

4. *Organic Standards and Transition to Organic*

Agricultural products identified as organic must not have been grown, processed, manufactured, or distributed using prohibited materials.¹⁸⁶ Prohibited materials may not be used on land for a transition period of three years prior to the harvest of crops identified as organically produced.¹⁸⁷ To ensure the authenticity of the agricultural products identified as organic, they must be certified by a USDA-approved certifying agent.¹⁸⁸

a. Prohibited Crop Production Practices and Materials

Certified organic farmers must use approved seed, seedlings and planting practices.¹⁸⁹ A farm may not be certified if soil amendments contain certain synthetic ingredients or commercially blended fertilizers which are prohibited under the applicable organic certification program.¹⁹⁰ Phosphorus, lime, potash, or materials not permitted under the applicable organic certification program may not be used as a source of nitrogen.¹⁹¹

Natural poisons such as arsenic or lead salts that persist in the environment and transplants that are treated with any prohibited material may not be used by a producer intending to obtain certifi-

183. *Id.* § 6517(d)(5).

184. *Id.* § 6517(e).

185. *Id.* § 6518(n).

186. *Id.* § 6517(a), (b).

187. *Id.* § 6504(2).

188. *Id.* § 6504(3). Section 6512 of the United States Code specifically states, "If a production or handling practice is not prohibited or otherwise restricted under this title, such practice shall be permitted unless it is determined that such practice would be inconsistent with the applicable organic certification program." 7 U.S.C. § 6512.

189. 7 U.S.C. § 6508(a).

190. *Id.* § 6508(b)(1).

191. *Id.* § 6508(b)(2). The statute's reference to these items as sources of nitrogen is in error. It is possible that the purpose of this provision was to allow a certifying agent to prohibit the use of a substance otherwise allowed by the federal law or commonly used by organic farmers.

cation.¹⁹² Plastic mulches may be used only if they are removed at the end of each growing or harvest season.¹⁹³ Growers may be required to test tissue of pre-harvest crops if the soil is suspected of contamination.¹⁹⁴

Raw animal manure may be applied only to a green manure crop, a perennial crop, a crop not for human consumption, or a crop for human consumption if the crop is harvested a reasonable length of time after the application of the manure. A reasonable period of time is to be determined by the certifying agent and may not be less than sixty days.¹⁹⁵ In addition, manure applications may not be applied in a manner which contributes to water contamination by nitrates or bacteria.¹⁹⁶

b. Prohibited Animal Production Practices and Materials

Breeder livestock may be purchased from any source if it is not in the last third of gestation.¹⁹⁷ Livestock that is slaughtered and sold or labeled as organically produced must be fed organically produced feed in accordance with the above requirements for crop production. Plastic pellets for roughage, manure refeeding, feed formulas containing urea, growth promoters and hormones may not be ingested, implanted, or injected in animal production.¹⁹⁸

In providing health care for livestock, producers may not use subtherapeutic doses of antibiotics or synthetic internal paracitides on a routine basis, and they may not administer medication, other than vaccinations, in the absence of illness.¹⁹⁹ In addition to these prohibitions, the National Organic Standards Board shall recommend additional standards for the care of livestock.²⁰⁰

Poultry products sold or labeled organic must be raised in accordance with the Act prior to and during the period in which

192. *Id.* § 6508(c)(1), (3). The applicable governing state official or the Secretary of Agriculture will determine if the arsenic or lead salts have long-term effects in the environment. *Id.* § 6508(c)(1).

193. 7 U.S.C. § 6508(c)(2).

194. *Id.* § 6511(b).

195. *Id.* § 6513(b)(2)(B).

196. *Id.* § 6513(b)(2)(C). The reason for the restrictive provisions concerning manure is the danger of nitrates leaking into a water supply or food crops. Nitrate leaking is also a problem with the misuse of synthetic nitrogen fertilizers.

197. *Id.* § 6509(b).

198. *Id.* § 6509(c). Livestock includes cattle, sheep, goats, swine, poultry, equine animals used for food or in the production of food, fish used for food, wild or domesticated game, or other nonplant life. 7 U.S.C. § 6502(11).

199. *Id.* § 6509(d)(1).

200. *Id.* § 6509(d)(2).

such meat or eggs are sold.²⁰¹ A dairy animal must also be raised and handled according to the Act for not less than the twelve-month period prior to the sale of such milk and milk products.²⁰²

A farm will be certified for organically produced livestock only if producers maintain adequate records and a detailed audit trail from production to distribution. Such records must include the amounts and sources of all medications administered and all feeds and feed supplements bought and fed. Detailed USDA regulations are to be developed through the notice and public comment process by October 1, 1993.²⁰³

c. Prohibited Processing & Handling Practices and Materials

Handlers²⁰⁴ may not add the following substances to certified organically produced agricultural products:

- 1) Nitrates, nitrites or sulfites or any synthetic ingredient during processing or post harvest handling;²⁰⁵
- 2) Ingredients with excessive levels of nitrates or nitrites or heavy metals or toxic residues or sulfites;²⁰⁶
- 3) Ingredients which are not certified organically produced unless included on the National List and accounting for no more than 5% of the product's weight, excluding salt and water;²⁰⁷
- 4) Water which does not meet the requirements of the Safe Drinking Water Act;²⁰⁸ and
- 5) Any bag or storage container containing prohibited substances or which have been in contact with a prohibited substance.²⁰⁹

201. *Id.* § 6509(e)(1).

202. *Id.* § 6509(e)(2).

203. *Id.* § 6509(g). Section 6509(g) provides that "the Secretary shall hold public hearings and shall develop detailed regulations, with notice and public comment, to guide the implementation of the standards for livestock products provided under this section."
Id.

204. 7 U.S.C. § 6510. A handler includes any person engaged in the business of handling agricultural products but does not include retailers of agricultural products not also involved in processing agricultural products. *Id.* To handle means to sell, process, or package agricultural products. *Id.* A handling operation is any operation or portion of an operation that (1) receives or otherwise acquires agricultural products, and (2) processes, packages, or stores such products. *Id.*

205. *Id.* § 6510(a)(1), (3).

206. *Id.* § 6510(a)(2), (3). The permissible level is determined in accordance with the applicable organic certification program. *Id.*

207. *Id.* § 6510(a)(4).

208. *Id.* § 6510(a)(7).

209. *Id.* §§ 6510(a)(5), (6).

In addition, producers and handling operations may not allow organically produced meat to come in contact with nonorganically produced meat.²¹⁰ However, meat handlers are allowed to use synthetic substances if they are not harmful to health or the environment, have no natural substitute, and are consistent with organic farming and handling practices.²¹¹

5. *Residue Testing Requirements*

A system of residue testing to test products sold or labeled as organically produced must be established.²¹² Pre-harvest tissue testing of any crop grown on soil suspected of containing inorganic contaminants may be required.²¹³ Should the inspection reveal detectable amounts of pesticide, nonorganic residue, or a prohibited natural substance, an investigation shall be performed to determine if the organic certification program has been violated by the producer or handler. If such residue is a result of an intentional application of a prohibited substance or is at a level not permitted by the appropriate environmental regulatory agencies, the agricultural product shall not be sold or labeled as organically produced.²¹⁴

6. *Certification Requirements*

The Secretary of Agriculture must establish an organic certification program for producers and handlers and must permit each state to implement its own organic certification program.²¹⁵ A state organic certification program may be more restrictive than the USDA program²¹⁶ unless restrictions contradict the Act or interfere with the sale of organic food certified in other states.

Any governing state official and any private group or individual may be accredited by the Secretary as a certifying agent responsible for certifying organic farms and handlers.²¹⁷ The Secretary must (1) establish adequate enforcement procedures,²¹⁸ (2) design regulations to prevent a financial conflict-of-interest of a

210. *Id.* § 6510(b).

211. *Id.* § 6517(c)(1)(A)(i-iii). Such synthetic substances must be approved by NOSB and USDA and be included on the National List.

212. 7 U.S.C. § 6511(a).

213. *Id.* § 6511(b).

214. *Id.* § 6506(a)(6).

215. *Id.* §§ 6503(a), (b).

216. *Id.* § 6507(b).

217. *Id.* § 6503(d).

218. *Id.* § 6506(a)(7).

certifying agent,²¹⁹ and (3) allow public access to certification documents and laboratory analysis.²²⁰

7. *Submission of the Organic Plan*

To be eligible for certification, the producer or handler must submit an organic plan to the certifying agent in accordance with the applicable state or private organic certification program.²²¹ Such an organic plan must be designed to enhance fertility and organic content of the soil through proper tillage, proper rotation, and manuring management practices.²²²

Wild crop harvesters must (1) describe the crop area boundaries, (2) provide a three-year history proving no prohibited materials were used, and (3) assure that harvest will not harm the environment or crop growth.²²³ A livestock plan, mixed crop and livestock production plan, or handling plan must contain provisions designed to ensure that the agricultural product has been organically produced in accordance with the Act.²²⁴

8. *Accreditation*

The Secretary must establish and implement a program setting forth the requirements for accrediting a certifying agent, who will then be responsible to certify an organic farming or handling operation. To be eligible as a certifying agent, the state official or private individual or group must submit an application to USDA for accreditation and show sufficient expertise in organic farming and handling techniques.²²⁵ The Secretary must review each state certification program at least once every five years and must approve changes in certification programs prior to their implementation.²²⁶ A certifying agent may have his or her accreditation suspended by the Secretary or governing state official who will promptly determine whether farming or handling operations certified by the certifying agent have been properly certified and whether certification actions should be revoked.²²⁷

219. *Id.* §§ 6506(a)(8), 6515(h).

220. *Id.* § 6506(a)(9).

221. *Id.* §§ 6504(3), 6506(a)(2), 6513(a). An organic plan is a written plan of management for an organic farming or handling operation which includes all aspects of agricultural production described in the Act, including crop rotation and other practices.

222. 7 U.S.C. § 6513(b).

223. *Id.* § 6513(f).

224. *Id.* § 6513(c), (d), (e).

225. *Id.* § 6514.

226. *Id.* § 6507(c)(1), (2).

227. *Id.* § 6515(h).

The certifying agent must comply with the terms and conditions of the Act and the applicable program²²⁸ and comply with subsequent regulations.²²⁹ The certifying agent must not have a business interest or financial conflict of interest with clients of the certification program, including client consultations or providing technical advice for a fee. In addition, a certifying agent may not accept gifts or favors.²³⁰

A sufficient number of inspectors must be employed by the certifying agent to implement the state or private organic certification program.²³¹ In addition, all records concerning the certification programs activities must be maintained for a period of not less than ten years. Representatives of the Secretary of USDA and the governing state official must be allowed access to any and all records concerning the certifying agent's activities.²³² However, the business related information of the producer or handler concerning any client must remain strictly confidential and may not be disclosed to third parties.²³³

A private certifying agent must meet additional requirements for accreditation. Upon dissolution or loss of accreditation, the private certifying agent must transfer all records or copies of records concerning the organic certification programs activities to the Secretary of USDA and the applicable governing state official.²³⁴ In addition, a private certifying agent must hold the Secretary harmless for any failure to carry out the provisions of the Act²³⁵ and must also furnish an amount of security to protect the rights of the program's participants.²³⁶

A peer review panel may be established by the Secretary to evaluate an application and prepare a report on each applicant for accreditation. Such a panel must have at least three members who have expertise in organic farming and handling methods, and at least two members must not be USDA or state government

228. *Id.* § 6515(f).

229. *Id.* § 6515(d)(2).

230. *Id.* § 6515(h).

231. *Id.* § 6515(b).

232. *Id.* § 6515(c).

233. *Id.* § 6515(g). It is not clear what is to be included in the term "business related information." It may be consistent with California's disclosure provisions under its Organic Foods Act of 1990. Certifiers will attempt to develop reciprocity with other certifiers so that a food processor has confirmation that all ingredients in their product meet applicable standards, even though the source of the ingredient could be anywhere in the world. It is not known how the exchange of business related information will be facilitated under the federal law.

234. 7 U.S.C. § 6515(c)(3).

235. *Id.* § 6515(e)(1).

236. *Id.* § 6515(e)(2).

employees.²³⁷

9. *Record-Keeping Requirements*

Producers operating a certified organic farm or handling operation must maintain records concerning the production or handling of organically produced products for a period of five years. The record must include a detailed history of substances applied to fields or agricultural products and the names and addresses of persons who applied such substances, including the date, rate, and method of application.²³⁸ Certifying agents must keep records for ten years.²³⁹ A production or handling practice not otherwise prohibited will be permitted, unless it is determined that such a practice is inconsistent with the state or private organic certification program.²⁴⁰

Livestock producers must keep records, including the amount and source of all medications administered and all feeds and feed supplements bought and fed.²⁴¹ Producers must maintain a verifiable audit trail for each animal or each flock in the case of poultry.²⁴²

10. *Labeling Requirements*

After October 1, 1993, no state or private labels or market information will be allowed which declare that a product has been organically produced and handled unless specific standards established by the Act and subsequent regulations are followed by the producer.²⁴³ Domestic and imported food may not be sold or labeled as organically produced unless it meets USDA standards. An exemption from specific United States standards is allowed for foreign foods²⁴⁴ produced and handled according to equivalent

237. *Id.* § 6516.

238. *Id.* § 6511(b).

239. *Id.* § 6515(c)(1).

240. *Id.* § 6512.

241. *Id.* § 6509(f)(2).

242. *Id.* § 6509(e).

243. *Id.* § 6505(a)(1)(n). An agricultural product is organic if it is produced in accordance with the requirements of Title XXI.

244. *Proposed Organic Certification Program: Joint Hearing Before the Subcommittee on Domestic Marketing, Consumer Relations, and Nutrition and the Subcommittee on Department Operations, Research, and Foreign Agriculture of the Committee on Agriculture House of Representatives*, 101st Cong., 2d Sess. 15, 17 (1990) (statement of Daniel D. Haley, Administrator, Agricultural Marketing Service, U.S. Department of Agriculture, Accompanied by Richard Carnevale, Assistant Deputy Administrator of Science and Technology, Food Safety and Inspection Service). Mr. Haley expressed concerns as to the significant expenditures that would be required to certify production and handling practices of foreign countries and advocated rejection of the equivalency provision as a bad precedent. *Id.*

organic standards as determined by the Secretary.²⁴⁵ However, only domestically produced food may affix the USDA seal.²⁴⁶ Imported products may use the country of origin labels for organically produced food meeting USDA standards.²⁴⁷

Another exemption from the labeling requirement is for producers who sell less than \$5,000 of agricultural products.²⁴⁸ Such producers may represent their product as organic without certification.²⁴⁹ This exemption accommodates small and part-time farmers distributing "natural" and "organic" food at "farmer's markets." The National Farm Bureau had recommended that the threshold level be set at \$1,000 so that consumer confidence in the certification program would not be undermined.²⁵⁰

Processed food identified as "organic" on the principal display panel must contain at least ninety-five percent organically produced ingredients by weight (95% test). The remaining nonorganic ingredients must be on the National List.²⁵¹ The Secretary may consult with the Board and the Secretary of Health and Human Services (HHS) and allow individual ingredients used in processed food to be listed as "organic" if the entire product contains at least fifty percent organic ingredients by weight, excluding water and salt.²⁵² In consultation with the NOSB and the Secretary of HHS, the Secretary also has the discretion to allow food with less than fifty percent organic ingredients by weight to be identified as "organically produced" on the ingredients panel.²⁵³

The proportion by weight of each ingredient in the processed

245. 7 U.S.C. § 6505(b). *See also supra* note 151, at 1177 (stating that the House version was adopted in Conference). The Senate version would have allowed the affixation of both a USDA label and one which indicates the state of origin of the product and the certifying organization or state agency.

246. 7 U.S.C. § 6505(a)(2).

247. *Id.* § 6505(b) (providing that imported agricultural products may be sold or labeled as organically produced if produced and handled in accordance with the requirements of Title XXI). Accordingly, United States' neighbors Canada and Mexico may obtain approval from USDA of organically grown produce, affix their applicable labels and ship such produce across the border. Presumably, subsequent regulations will provide specific procedures for USDA approval of foreign grown produce. Otherwise, the Secretary administers a discretionary approval program. *See id.*

248. 7 U.S.C. § 6505(d).

249. *Id.* § 6505(2). The federal law does not mandate certification of growers. Apparently small farmers may use the USDA label so long as the product meets federal standards.

250. *Proposed Organic Certification Program: Joint Hearing Before the Subcommittee on Domestic Marketing, Consumer Relations, and Nutrition and the Subcommittee on Department Operations, Research, and Foreign Agriculture of the Committee on Agriculture* 101st Cong., 2d Sess. 38 (June 19, 1990) (Statement of Stephen J. George, President, New Jersey Farm Bureau, on Behalf of the American Farm Bureau Federation).

251. 7 U.S.C. § 6510(a)(4).

252. *Id.* § 6505(c)(1).

253. *Id.* § 6505(c)(2).

food must be calculated to determine whether the ninety-five percent test has been met.²⁵⁴ However, the principal display panel may not list the processed food as organic because the overall weight of all organic ingredients is less than fifty percent. Thus, as an example, it is essential for the tomato ingredient, comprising the major weight of a processed food sauce, to be nearly one hundred percent organically produced if the product itself is to be listed as organic. In contrast, spices, with proportionately less weight than the organically produced tomato ingredient, could be nonorganically grown, and the processed food sauce itself could still be listed as “organic.”

11. *Enforcement*

A person misusing or tampering with the organically produced label may be subject to a civil penalty of up to \$10,000 and two years imprisonment.²⁵⁵ Growers and handlers who make a false statement, attempt to issue a false organic certification label, or otherwise violate the purposes of the organic certification program cannot be certified for five years.²⁵⁶

An expedited administrative procedure is established for appeal of an action taken by the Secretary, the applicable governing state official, or a state or private certifying agent if such action adversely affects the person or is inconsistent with the organic certification program.²⁵⁷ A final decision of the Secretary may be subsequently appealed to the United States District Court.²⁵⁸

Certifying agents must immediately report violations to the Secretary or Governing State Official.²⁵⁹ Private certifying agents violating the title may lose accreditation for three or more years.²⁶⁰

254. The federal law does not specifically address what proportion of any one ingredient must be organic. However, it appears that the five percent allowed for approved nonorganic ingredients refers to whole ingredients, not parts of ingredients. Phone conference with Stuart Fishman, April 23, 1992.

255. 7 U.S.C. § 6519(a). The Senate version contained a substantial civil penalty of \$50,000 and two years imprisonment for misusing or tampering with the organically produced label.

256. *Id.* § 6519(c)(1)(C). Such a person must be given notice and an opportunity to be heard before a determination is made by the Secretary. *Id.* In addition, the Secretary may waive the penalty. *See id.* § 6519(c)(2).

257. *Id.* § 6520(a).

258. *Id.* § 6520(b).

259. *Id.* § 6519(d).

260. *Id.* § 6519(e).

12. *Appropriations and Subsequent Regulations*

An appropriation for the establishment of the National Organic Standards Board has been made. The remainder of the federal organic foods production program is unfunded.²⁶¹

The USDA must issue regulations within 540 days of the enactment of this Title.²⁶² Extension Service assistance, as well as financial, technical, and administrative assistance, is to be provided by the federal government to any state implementing an organic certification program.²⁶³

C. JURISDICTIONAL CONFLICTS BETWEEN FEDERAL AGENCIES

Significantly, the federal Organic Foods Production Act does not supercede USDA inspection and enforcement authority over meat and poultry under the Federal Meat Inspection Act, the Poultry Products Inspection Act, and the Egg Inspection Act; nor does it supercede EPA enforcement authority under the Federal Insecticide, Fungicide and Rodenticide Act or the Health and Human Services enforcement authority under the Federal Food, Drug and Cosmetic Act.²⁶⁴ Rather, the Organic Foods Production Act is but another layer of law with which the organic producer, processor, and handler must comply. Under certain circumstances, federal agencies have considered the unique requirements of the organic foods industry. Specifically, the Agricultural Marketing Service at USDA allowed an exemption from federal size and grade standards for organically grown pears.²⁶⁵

The Act provides USDA, rather than FDA, with primary federal authority for regulation and enforcement of organic foods certification and labeling. USDA is required to consult FDA about labeling processed foods. In addition, USDA must consult with FDA to determine if substances on the National List harm human health or the environment. Such powers at USDA are exercised by the Food Safety and Inspection Service (FSIS), which must approve labels before food may be sold. FDA has authority to review food labels after the food has been distributed for sale. It is presumed that FDA may review foods with organical labels should

261. *Infra* note 267 and accompanying text.

262. 7 U.S.C. § 6521(a). The date designated for issuance of regulations is May 22, 1992.

263. *Id.* § 6521(b)(1)-(2).

264. *Id.* § 6519(f). This was a House provision which was approved by the Conference Committee.

265. *Id.* § 6505(c)(1).

it decide to exercise its powers under the law.²⁶⁶

Regulations issued under the Act may define the respective roles of USDA in approving the use of the USDA seal, a state logo, and a private certification organization's label. In addition, the respective roles of FDA and USDA over administration of the organic food program may be further delineated by regulations.²⁶⁷

D. JURISDICTIONAL CONFLICTS BETWEEN THE FEDERAL AND STATE GOVERNMENTS

1. *Under the Organic Foods Production Act*

The Act does not specify the information which is permissible in labeling organically grown and processed food with the USDA seal. Arguably, a state government, or a private certification organization within the state, may affix its own informational label to the product.²⁶⁸ Before USDA approval of the additional state label, it must be determined that the state organic certification plan contained requirements more restrictive than those under the Act.²⁶⁹ Legislative history seems to indicate that USDA must approve a state organic certification program, including labeling, so long as it is reasonable and consistent with the overall federal regulatory scheme. Since the terms "reasonable" and "consistent" are not easily defined, the courts may be required to resolve the issue of federal/state jurisdiction over a certification plan, including informational labeling.²⁷⁰

The Act clearly provides that one state may not discriminate against the importation of organic produce from another state if that state is in compliance with federal organic foods standards.²⁷¹

266. Food is defined by the Federal Food, Drug, and Cosmetic Act as "(1) articles used as food or drink for man or other animals, (2) chewing gum, and (3) articles used for components for any such article." 21 U.S.C. § 321(f) (1988). Organic foods fall under this broad definition and accordingly may be regulated by FDA.

267. Despite a federal study of the regulatory jurisdiction between EPA, FDA, and USDA designed to alleviate confusion over labeling, conflicts within the federal government still exist.

268. 7 U.S.C. § 6506(c) states that a state organic certification program may contain additional guidelines governing products labeled as organically produced. For a more detailed discussion of the federal preemption issues surrounding the Organic Foods Production Act, see Kyle Lathrop, *Preempting Apples with Oranges: The Federal Regulation of Organic Food Labeling*, 16 J. CORP. L. (forthcoming 1992).

269. *Id.* § 6507(b).

270. It may also be possible to settle the ambiguous meaning of these terms by regulations to be promulgated under the Act.

271. Until the Act is implemented October 31, 1993, states may set standards for out-of-state products. See WASH. REV. CODE ANN. § 15.86.031(4) (Supp. 1992) (requiring foods labeled or sold as organic within the state to obtain certification in the state of origin meeting all requirements of the Washington Organic Food Products Act). A violator may be subject to civil penalties if products do not meet state law requirements. See *id.*

This is in conformity with the purpose of the Act to facilitate the interstate sale of organically grown produce. However, the Act does not expressly preempt state regulations, and a state may have more restrictive organic food production laws than the federal government. These restrictions will only apply to in-state producers, processors, and handlers selling within the state. Additional expenses incurred to comply with more stringent state laws may harm the intrastate organic foods industry. Ultimately, a level playing field for the entire industry is likely to be achieved by the establishment of national standards.

2. *Under the Federal Fair Labeling and Packaging Act and the Wholesome Meat Act*

State labeling laws do not conflict with the federal Fair Labeling and Packaging Act (FLPA).²⁷² The FLPA contains an express preemption clause which prohibits state labeling requirements that are "less stringent than or require information different from" federal regulations. The Food, Drug and Cosmetic Act does not contain an express preemption provision. Accordingly, information and labeling as to the organic authenticity of produce is permissible.

In contrast, the Wholesome Meat Act of 1967 (WMA)²⁷³ expressly prohibits states from requiring labeling that is "in addition to or different than" the federal requirements.²⁷⁴ In reliance on this provision, USDA has argued that meat produced, processed, and sold may not use the organic label. The CDFA recently requested CACs not to register any livestock, poultry, or dairy producers as organic operations because of potential USDA litigation under WMA. However, organic certification organizations within the state have petitioned CDFA to register all producers, handlers, and processors of organic products, including meat and dairy producers.²⁷⁵

E. HARMONIZING THE FEDERAL LAW WITH INTERNATIONAL STANDARDS

The European Economic Community's (EEC) rejection of United States beef containing growth hormones is an indicator of

272. 15 U.S.C. §§ 1451-61 (1990).

273. 21 U.S.C. § 678 (1990).

274. *Id.*

275. Bob Scowcroft, *Congress Funds Organic Standards Board*, CALIFORNIA CERTIFIED ORGANIC FARMS STATEWIDE NEWSLETTER, vol. VIII, No. 4, at 2 (1991).

international awareness of food safety issues. The fractured jurisdiction of FDA and USDA over food standards and labels does not lend credibility to foods destined for export. Thus, a continuing bias against United States products could result unless trading partners, in particular the EEC, acknowledge a consistently reliable and uniform labeling scheme.

The major organization involved in international organic foods standardization is the International Federation of Organic Agricultural Movements (IFOAM) in Brussels, Belgium. A conference on trade in organic foods was held in Vienna, Austria on November 12, 1991. United States representatives to the conference emphasized the significance of the new United States organic foods production law in providing for reliable labeling laws for imports and exports of organically grown and processed food.

IV. CONCLUSION

The regulation of production, processing, and distribution of safe food to the public has historically been a state health function. Consistent with this pattern, and in the absence of action by the federal government certification associations began to develop standards for labeling food as organic in the early 1970s. As the organic foods production industry grew, many states enacted labeling legislation to support the private certification programs already established. More recently, certain states, Texas, for example, established a certification scheme operated entirely by the state government.

With conflicts between state organic food production laws and the potential for restrictions in the free flow of organic foods in interstate commerce, a uniform federal law became essential to maintain the vitality of the organic food production industry. The Act as passed, established uniformity in the production, processing, and marketing of organic foods. The federal certification and labeling program, when implemented, will allow the states to continue using most aspects of their certification and labeling scheme.

A state plan different than the federal plan is permissible if it is consistent with the purposes of the Act. Though a state program may be more restrictive, it may not curb the sale of organic products between the states if products from other states meet the federal standards. Nor may claims of superiority be contained in state labels. Regulations issued before October 31, 1993 are needed as guidance as to what information may be included in the labeling.

The Act also establishes civil penalties for violations of its provisions and specifies that USDA will enforce the law. FDA and other federal agencies may exercise broad jurisdiction granted them under existing law and may enforce provisions of the Organic Foods Production program. In addition, subsequent regulations may delineate the respective jurisdiction between federal agencies and between the federal and state governments. Finally, court decisions may resolve remaining conflicts.

Congress showed wisdom in allowing USDA 540 days to issue regulations. This period of time is needed for consumer groups, environmentalists, the organic foods industry, federal agencies, and state governments to refine outstanding issues and resolve jurisdictional conflicts of law.