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What Does "Organic" Mean Now? Chickens and Wild Fish are Undermining the Organic Food Production Act of 1990

by

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WHAT DOES "ORGANIC" MEAN NOW? CHICKENS AND WILD FISH ARE UNDERMINING THE ORGANIC FOODS PRODUCTION ACT OF 1990

(Evolution of the Legal Definition of "Organic" - Business Interests Must Be Stopped from Re-defining "Organic" Contrary to the Purposes of the Organic Foods Production Act of 1990)

I. INTRODUCTION

Suppose you go shopping at your neighborhood grocery store. Like many Americans, you are concerned about your health and try to purchase fresh and wholesome foods. Also, you like to support environmentally-friendly companies that avoid chemicals when possible. You notice that some of the products are labeled "organic." You heard that a federal law was recently passed setting standards for organic foods - this is good, because now you know "organic" on a label really means something! You start filling your shopping cart with organic broccoli, organic chicken, and organic salmon. You see a can of vegetable soup labeled "70% organic." Hmm...not as good as 100%, but pretty good. The pie says "made with organic peaches." The organic stuff is more expensive, but hey, it's for your health, right? You make your purchase and leave the store knowing your extra dollars are supporting companies that promote a healthful lifestyle. Right?

Maybe not. What if you discovered the "organic" chicken you bought grew up eating non-organic feed? What if you found out the "organic" salmon in your basket swam in a polluted area of the ocean and was high in mercury? This is a likely scenario if Congress does not deter the business interests that are broadening the definition of "organic" to their advantage.

The Organic Foods Production Act of 1990 (OFPA)[1] took twelve years of study before its implementation on October 21, 2002.[2] The demands

[1] Organic Foods Production Act of 1990, 7 U.S.C.S. §§ 6501-6523 (2003) LEXIS.

[2] Alisa Harrison and George Chartier, *Veneman Marks Implementation of USDA National Organic Standards,* Oct. 21, 2002, *at* http://www.usda.gov/news/releases/2002/10/0453.htm.

of the public were heard, and in the end, the OFPA held the organic foods industry to high standards; however, special interests were waiting in the wings to find a way to profit from the popularity of organic products without following the rules. Farmers and producers who were already marketing organic products attempted to amend the statute to allow synthetic substances, so that they could continue to call well-known products "organic."[3] Investors who recognized the unprecedented growth of the organic market exerted pressure on legislators to make overnight changes to legislation that had taken over a decade to enact.[4] In this article, I will propose that Congress repeal the April 16, 2003, amendment to Section 2107 (7 U.S.C. § 6506[5]) of the OFPA, which allows wild-harvested seafood to be labeled as "organic."[6] Such a repeal would reverse deplorable harm already done to the OFPA. I will also propose that Congress and the organic industry stay vigilant against other attempts to thwart the purposes of the OFPA for profit.

II. ORGANIC FARMING IN THE UNITED STATES

The dictionary defines "organic" as: "(1) of, relating to, or derived from living organisms; (2) of, relating to, yielding, or involving the use of food produced with the use of feed or fertilizer of plant or animal origin without employment of chemically formulated fertilizers, growth stimulants, antibiotics, or pesticides."[7]

In 1942, Jerome Irving (J. I.) Rodale [1898-1971], a Pennsylvania farmer and publisher called the "Guru of the Organic Food Cult,"[8] was the first person to use the word "organic" to describe a farming operation.[9] His theory was that natural additions to the soil, such as manure and compost, caused "microbiological action" which resulted in better

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[3] *Organic Rule Should Expand Synthetics, Better Protect Fields From Drift, Says OTA; Organic Trade Association*, FOOD CHEMICAL NEWS, May 1, 2000, LEXIS.

[4] Elizabeth Allen, *Food Regulations; Natural Selection?; Federal Rules Limit the "Organic" Label, But Set Off Loophole Hunts*, SAN ANTONIO EXPRESS-NEWS (TEXAS), May 21, 2003, at 1E, LEXIS.

[5] Organic Foods Production Act of 1990, 7 U.S.C.S. § 6506 (2003), LEXIS.

[6] H.R. 1559, 108 Cong. § 1 (2003), LEXIS 108 Bill Tracking HR 1559.

[7] MERRIAM-WEBSTER DICTIONARY, *at* http://www.m-w.com (last visited Aug. 30, 2003).

[8] *J. I. Rodale and the Rodale Family Celebrating 50 Years as Advocates for Sustainable Agriculture*, *at* http://www.dep.state.pa.us/dep/pa_env-her/rodale_bio.htm (last visited Aug. 30, 2003).

[9] *100,000 Organic Farmers in U.S. by 2013: The Rodale Institute Announces Major Initiative, Launches NewFarm.org*, ASCRIBE NEWSWIRE, May 22, 2003, LEXIS.

water-retention and healthier plants.[10] He believed, conversely, that chemical amendments to the soil actually acted as a detriment, reducing natural action and retarding plant growth.[11] In 1972, Robert Rodale, J. I.'s son,[12] verbalized the definition of "organically grown" that is now commonly known: "Food grown without pesticides; foods grown without artificial fertilizers; grown in soil whose humus content is increased by the additions of organic matter; grown in soil whose mineral content is increased by the application of natural mineral fertilizers; has not been treated with preservatives, hormones, antibiotics, etc."[13]

In the late 1940's, organic farming took hold in the United States.[14] The first organic farmers worked tirelessly on individual farms to accomplish the goal of providing for their families.[15] As organic farms thrived, farmers were able to bring excess produce to market using the first "organic" labels.[16] Within twenty-five years, organic agriculture was clearly established but outside of the mainstream.[17] Gradually, public awareness led to increased demand for organic foods, and growers responded by planting more acreage using organic production methods.[18] Still, even into the 1990's, the organic industry was mainly small-time local business, with its main presence at farmers' markets, food co-ops, and local grocery stores.[19]

More recently, consumers have become acutely aware of the environment and how chemical farming can adversely affect the safety of meats, fruits, vegetables, and grains that are served at their tables.[20] The truth is that animals raised by factory-farming methods more easily contract dis-

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[10] *J. I. Rodale and the Rodale Family Celebrating 50 Years as Advocates for Sustainable Agriculture, supra* note 8.

[11] *Id.*

[12] *Id.*

[13] Stephen Barrett, *The Truth About Organic "Certification": Does it Help Ensure Safer Foods – or Just Costlier Ones?*, NUTRITION FORUM, March 13, 1998, LEXIS.

[14] See *The National Organic Program; Background and History, at* http://www.ams.usda. gov/nop/Consumers/background.html (last visited Feb. 17, 2003).

[15] Samuel Fromartz, *Small Organic Farmers Pull Up Stakes,* N.Y. TIMES, Oct. 14, 2002, *available at* http://www.newfarm.org/news/101402/small_farmers.shtml.

[16] *The National Organic Program; Background and History, supra* note 14.

[17] Kenneth C. Amaditz, Article: *The Organic Foods Production Act of 1990 and its Impending Regulations: a Big Zero for Organic Food?*, 52 FOOD DRUG L. J. 537, 538 (1997), LEXIS.

[18] *Id.*

[19] *USDA Delays Organic-Farming Standards*, COLUMBUS DISPATCH (OHIO), Dec. 16, 1997, at 1G, LEXIS.

[20] Timothy J. Sullivan, *Implementation of National and International Organic Certification and Labeling Standards*, 7 S. J. AGRI. L. REV. 43, 44, (1997), LEXIS.

eases, causing farmers to use antibiotics to keep livestock healthy.[21] The chemical farming methods of the last fifty years have resulted in unprecedented water pollution from "agricultural run-off containing toxic pesticide residues and soluble fertilizers."[22] In 1989, the Natural Resources Defense Council wrote a report contending that alar, a "synthetic growth promotant"[23] used on apples, caused cancer.[24] This resulted in alar being removed from the market.[25] By 1997, more than 132 different pesticides had polluted the water in forty-five states and residues had appeared in "fish, human tissue and breast milk."[26] In 2001, the Environmental Protection Agency (EPA) determined that over nine hundred million pounds of synthetic pesticides were being used annually in the United States.[27] Farmers in 2001 sprayed the nation's food crops with seventy-one different pesticides known to cause cancer.[28] A month before the first national organic standards were implemented, it was estimated that almost a billion tons of pesticide were being sprayed annually in the United States.[29] Modern methods to produce more food, such as the use of growth hormones on livestock, dairy cows, and poultry, adversely affect the quality of the nation's food supply.[30]

Consumers became aware that cheap factory farming was costing them in environmental and health problems.[31] In a 2002 survey, 4,014 Ohioans were questioned about food safety, and they listed pesticide residues as the highest risk, "followed by contamination of drinking water, growth hormones in meat or milk, bacterial contamination, bio-terrorist attacks on the food supply, mad cow disease, and genetically modified foods."[32]

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[21] Kirsten S. Beaudoin, Comment: *On Tonight's Menu: Toasted Cornbread With Firefly Genes? Adapting Food Labeling Law to Consumer Protection Needs in the Biotech Century*, 83 MARQ. L. REV. 237, 251, (Fall 1999), LEXIS.

[22] John Bell Clark, Article: *Impact and Analysis of the U.S. Federal Organic Food Production Act of 1990 With Particular Reference to the Great Lakes*, 26 U. TOL. L. REV. 323, 324, (Winter 1995), LEXIS.

[23] *Id.* at n16.

[24] WIKIPEDIA, *available at* http://en2.wikipedia.org (last visited Nov. 7, 2003).

[25] Clark, *supra* note 22, at 328.

[26] Carol M. Browner, *Regulatory Issues of Crop Production: Keynote Address,* Feb. 24-26, 2001, *at* http://nutrition.tufts.edu/conferences/crop_production/browner.html.

[27] Elizabeth Gilbert, *Food: An Organic Experience*, THE TUFTS DAILY, Feb. 26, 2001, *available at* http://nutrition.tufts.edu/news/matters/2001-02-26.html.

[28] *Id.*

[29] Jason Best, *Organic Nation; Living Green*, ONEARTH, Sept. 22, 2002, at 12, LEXIS.

[30] Beaudoin, *supra* note 21.

[31] Gilbert, *supra* note 27.

[32] Martha Filipic, *Pesticides & Polluted Water are Major Concerns for US Consumers*, June 11, 2003, *at* http://www.organicconsumers.org/foodsafety/water062303.cfm.

For many people, organic food is perceived as more healthful.[33] Because organic production methods avoid using synthetic substances, consumers generally believe that organic foods are free of pesticides and other chemicals.[34] In 2000 and 2001, people surveyed said they bought organic products for healthfulness (66%), taste (38%), and environment (26%).[35] Indeed, "organic produce is one-third as likely to contain pesticides as regular produce, and if pesticides are present, they are at lower levels and there are fewer different pesticides."[36] According to an article in the *Los Angeles Times*, consumers believe they are helping the environment when they buy organic foods and clothing.[37] In a ten-year period, from 1986 to 1996, the organic market grew to more than forty times its size, until annual sales reached $3.5 billion.[38] Farmers woke up to a market in which products "grown without" were more profitable than ever.[39] As a result, labels with inaccurate claims were styled to attract consumers,[40] because customers willingly paid fifty-seven percent more for "organic" products.[41] Foods perceived as "safer foods" brought premium prices.[42] In 1997, when the USDA Agricultural Marketing Service proposed the national organic standards, Secretary Dan Glickman stated, "Consumers are willing to fork over a little more for that tomato."[43] However, consumers were also deceived by profiteers into paying higher prices for foods labeled with the popular "organic" label in a marketplace without agreement about what "organic" meant.[44] Cases were publicized in which produce grown with chemicals was sold as

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[33] Rick Franzen, Note: *Will GATT Take a Bite Out of the Organic Food Production Act of 1990?*, 7 MINN. J. GLOBAL TRADE 399, 407 (Summer 1998), LEXIS.

[34] *Id.*

[35] Don Lotter, Ph.D, *Recent Patterns in the U.S. Organic Market II: Price Premiums and Consumer Demand*, Mar. 14, 2003, *at* http://www.newfarm.org/news/031203/drdon_pricepremium.shtml.

[36] *Fewer Pesticides*, August 10, 2002, *at* http://abclocal.go.com/kfsn/features/consumerwatch/consumer_081002_pesticides.html.

[37] Lori Schiraga, *Ventura County Perspective; USDA Proposal Would Weaken Organic Standards; Measure Ignores Recommendations and Would Permit Synthetic Substances and Production Practices, Processes Incompatible With the Industry*, L.A. TIMES, VENTURA COUNTY EDITION, Mar. 15, 1998, at B19, LEXIS.

[38] Beatrice Trum Hunter, *A Win For Consumers; U.S. Dept. of Agriculture Proposes Regulations for a National Organic Food Certification Program*, CONSUMERS RESEARCH MAGAZINE, Feb. 1998, at 8, LEXIS.

[39] Clark, *supra* note 22, at 328.

[40] Franzen, *supra* note 33, at 403.

[41] Hunter, *supra* note 38.

[42] Gilbert, *supra* note 27.

[43] Barrett, *supra* note 13.

[44] Clark, *supra* note 22, at 328.

"organic," and California and other states reacted to the public outcry by regulating organic practices.[45] Even those who marketed and sold the produce were confused.[46] No one could determine whether an "organic" claim was reliable or a fraud whose purpose was to empty the pocketbook.[47] Attractive claims were meaningless: "pesticide-free, ecologically grown, biodynamic, natural, and sustainable."[48]

Thus, the need for standardization in the use of the "organic" label arose, but there was disagreement about what "organic" meant, how to certify producers, and who should enforce the standards. An effort by the organic food industry to regulate organic labeling was unsuccessful, because there was too much disagreement about what the standards should be.[49] In 1973, Oregon passed the first legislation to certify organic products.[50] By 1990, Minnesota, New Hampshire, Ohio, and Vermont, had enacted laws for the implementation of organic certification programs.[51] Other states, including California, had certification laws that were not mandatory.[52] Even as late as 1998, because national regulations had not been enacted, the federal government could not prevent anyone from using a fraudulent organic label.[53] According to Susan Bellinson, spokeswoman for Whole Foods Markets in Michigan, there were thirty-three different organic labeling laws among the states when the national standards finally went into effect in 2002.[54]

III. THE ORGANIC FOODS PRODUCTION ACT OF 1990

In the late 1980's, Congress used its powers under the Commerce Clause[55] and agreed to draft legislation defining "organic."[56] Congress set out to create uniform national organic standards to put an end to the

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[45] Fromartz, *supra* note 15.

[46] Hunter, *supra* note 38.

[47] *Id.*

[48] Clark, *supra* note 22, at 329.

[49] Franzen, *supra* note 33, at 402.

[50] Amaditz, *supra* note 17, at 540 and at n18 (citing OR. REV. STAT. § 632.925 (1973)(now at § 616.406 (1996)).

[51] Clark, *supra* note 22, at n12.

[52] *Id.*

[53] Donna Gorski, *Conserving Organic Standards; USDA's Proposed National Set of Organic food Standards,* DAIRY FOODS, March 1998, at 43, LEXIS.

[54] Neal Haldane, *New Organic Label Standards Spark Grocer Education Drive; Federal Rules to Define What Goods Can Use Designation*, THE DETROIT NEWS, Oct. 16, 2002, at 2B, LEXIS.

[55] Franzen, *supra* note 33, at 401.

[56] *The National Organic Program; Background and History, supra* note 14.

confusion caused by the various state laws.[57] On March 1, 1990, Representative Peter A. DeFazio, a Democrat from Oregon, and twenty-two co-sponsors introduced a bill, H.R. 4156,[58] in the House of Representatives "to promote the production of organically produced foods through the establishment of a national standard production for organically produced products and providing for the labeling of organically produced products, and for other purposes."[59] On October 21, 1990, The Organic Foods Production Act of 1990 (OFPA), a "voluntary labeling act,"[60] was passed by Congress as part of the 1990 Farm Bill.[61] The stated purposes for the OFPA were "(1) to establish national standards governing the marketing of certain agricultural products as organically produced products; (2) to assure consumers that organic products meet a consistent standard; and (3) to facilitate interstate commerce in fresh and processed food that is organically produced."[62] The United States Department of Agriculture (USDA) was selected to write regulations for producers, handlers and certifiers.[63] Under the law, the USDA would supervise the National Organic Program (NOP), whose purpose was to write national standards and develop a certification program together with the National Organic Standards Board (NOSB).[64] The NOSB, appointed by the Secretary of Agriculture, would consist of fifteen members[65] from different areas of the organic industry:[66] farmer/grower, handler/processor, re-

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[57] Franzen, *supra* note 33, at 400.

[58] H.R. 4156, 136 Cong. § 2 (1990).

[59] *Id.*

[60] Franzen, *supra* note 33, at 400.

[61] *National Organic Program Overview,* Dec. 2000, *at* http://www.ams.usda.gov/nop/facts/overview.htm.

[62] Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3935, Title XXI, § 2102 (codified at 7 U.S.C.S. § 6501) (2003), LEXIS.

[63] *The National Organic Program; Background and History, supra* note 14.

[64] *National Organic Program Overview, supra* note 61.

[65] Composition of Board. The Board shall be composed of 15 members, of which – (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 shall be an individual who is a certifying agent as identified under section 2116 [*7 USCS § 6515*].

Organic Foods Production Act of 1990, 7 U.S.C.S. § 6518(b) (Law. Co-op. 2003), LEXIS.

[66] *The National Organic Program; Background and History, supra* note 14.

tailer, consumer/public interest, environmentalist, scientist, and certifying agent.[67] The NOSB had two roles: (1) to establish a "proposed" National List of Allowed and Prohibited Substances (the National List[68]), "substances that could be used in organic production and handling,"[69] and (2) "to make general recommendations to the Secretary concerning the implementation of the regulations."[70]

The "organic plan" was an integral part of the OFPA,[71] establishing procedures for such processes as manuring, handling produce, soil fertility, and livestock production.[72] Each producer or handler was required to submit an organic plan for his own farming, handling or manufacturing operation, complying with the requirements of the OFPA as to organic standards.[73] The applicant was required to provide a copy of the organic plan to a certifying agent[74] and to any applicable state certification program.[75] Those farmers and producers who complied with the law were allowed to use the USDA "certified organic" label on their products[76] on or after October 1, 1993.[77] State organic labels were also permitted if the state's program met the Act's requirement to be at least as strict as the national program.[78]

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[67] *The National Organic Program; Background Information, at* http://www.ams.usda.gov/nop/FactSheets/Backgrounder.html (last visited Jan. 20, 2003).

[68] "The term 'National List' means a list of approved and prohibited substances as provided for in section 2118."
Organic Foods Production Act of 1990, 7 U.S.C.S. § 6502(12) (2003), LEXIS.

[69] *The National Organic Program; Background and History, supra* note 14.

[70] Sullivan, *supra* note 20, at 58.

[71] Amaditz, *supra* note 17, at 541.

[72] The term "organic plan" means a plan of management of an organic farming or handling operation that has been agreed to by the producer or handler and the certifying agent and that includes written plans concerning all aspects of agricultural production or handling described in this chapter including crop rotation and other practices as required under this chapter.
Organic Foods Production Act of 1990, 7 U.S.C.S. § 6502(13) (2003), LEXIS.

[73] Amaditz, *supra* note 17, at 541.

[74] A certifying agent is defined as "the chief executive officer of a State or, in the case of a State that provides for the Statewide election of an official to be responsible solely for the administration of the agricultural operations of the State, such official, and any person (including private entities) who is accredited by the Secretary as a certifying agent for the purpose of certifying a farm or handling operation as a certified organic farm or handling operation in accordance with this title."
Organic Foods Production Act of 1990, 7 U.S.C.S. § 6502(3) (2003), LEXIS.

[75] Amaditz, *supra* note 17, at 541.

[76] Franzen, *supra* note 33, at 400.

[77] Organic Foods Production Act of 1990, 7 U.S.C.S. § 6505(a) (2003), LEXIS.

[78] Amaditz, *supra* note 17, at 544.

Although Congress mandated the issuance of regulations under the OFPA[79] "not later than 540 days after the date of enactment of [the OFPA],"[80] implementation of the final standards took over twelve years, with an additional eighteen months for farmers and handlers to comply with the new standards by changing their methods and creating new product labels.[81] It was not until 1992 that the USDA organized the membership of the NOSB so they could begin their part of the rule-making process.[82] In April 1995, the NOSB reached a consensus and defined organic agriculture as:

> [A]n ecological production management system that promotes and enhances biodiversity, biological cycles, and soil biological activity. It is based on minimal use of off-farm inputs and on management practices that restore, maintain, and enhance ecological harmony. "Organic" is a labeling term that denotes products produced under the authority of the Organic Foods Production Act. The principal guidelines for organic production are to use materials and practices that enhance the ecological balance of natural systems and that integrate the parts of the farming system into an ecological whole. Organic agriculture practices cannot ensure that products are completely free of residues; however, methods are used to minimize pollution from air, soil and water. Organic food handlers, processors and retailers adhere to standards that maintain the integrity of organic agricultural products. The primary goal of organic agriculture is to optimize the health and productivity of interdependent communities of soil life, plants, animals and people.[83]

On December 16, 1997, the USDA Agricultural Marketing Service announced the first proposed national organic standards to regulate how organic foods could be produced, handled, and labeled,[84] but the final rules were still years away. The six hundred pages of proposed rules were released for ninety days of public comment.[85] Agriculture Secretary Dan Glickman said the rules would create a national standard to replace existing conflicting laws and to address the treatment of organic imports.[86] The definition of organic farming was based on methods for producing and handling agricultural products, employing a system de-

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[79] Clark, *supra* note 22, at 332.

[80] Organic Foods Production Act of 1990, 7 U.S.C.S. § 6521(a) (2003), LEXIS.

[81] *Labeling and Marketing Information*, Dec. 2000, *at* http://www.ams.usda.gov/nop/facts/labeling.htm.

[82] Schiraga, *supra* note 37.

[83] *Solano County; Organic Program Overview*, *at* http://www.co.solano.ca.us/ SubSection/SubSection.asp?NavID=799 (last visited Sept. 10, 2003).

[84] Gorski, *supra* note 53.

[85] Kenneth Howe, *Organic Food Proposals Criticized*, S.F. CHRONICLE, Dec. 16, 1997, at C1, LEXIS.

[86] *USDA Delays Organic-Farming Standards*, *supra* note 19.

signed to assure the use of organic substances and procedures until the product reached the consumer.[87]

The OFPA, written by the staff of Vermont Senator Patrick Leahy, particularly Kathleen Merrigan, was described as "precise and well-crafted," but the final product appeared in many ways to reflect the special interests of the chemical and organic industry at the expense of the growers and consumers.[88] The USDA proposed to allow "synthetic substances and production practices and processes fundamentally incompatible with organic agriculture."[89] For example, the USDA ignored the recommendations of the NOSB and allowed the possibility of genetic engineering and irradiation in products called "organic."[90] Those in the organic community who expected the USDA to support stringent standards found it deplorable that the USDA even called for comment on these controversial issues.[91] Even California law, which had been used as an example by the authors of the proposal, was stricter;[92] California's definition of organic did not include any bioengineered or irradiated foods.[93] Katherine DiMatteo, executive director of the Organic Trade Association lamented, "We are very disappointed that the preamble to the standards contains questions relating to the potential inclusion of genetically modified organisms, food irradiation, the use of antibiotics in livestock and dairy production and the use of sewer sludge.[94] These practices have never been a part of organic agriculture and we will fight to keep them out of the final regulations."[95] "Irradiation is used to kill bacteria on food,"[96] and sewer sludge is "treated human waste" used as fertilizer.[97]

While most of the outcry was about the use of irradiation, genetic engineering, and sewer sludge,[98] the organic community was also upset by the possibile inclusion of "amino acids as growth promoters, antibiotics (when necessary to save an animal's life), synthetic animal drugs, food

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[87] Barrett, *supra* note 13.
[88] Clark, *supra* note 22, at 330.
[89] Schiraga, *supra* note 37.
[90] *USDA Delays Organic-Farming Standards, supra* note 19.
[91] Howe, *supra* note 85.
[92] *Id.*
[93] *Id.*
[94] Gorski, *supra* note 53.
[95] *USDA Delays Organic-Farming Standards, supra* note 19.
[96] Richard T. Estrada, *Organic Rules Abolish Sludge, Irradiation*, MODESTO BEE, May 9, 1998, at A1, LEXIS.
[97] Hunter, *supra* note 38.
[98] Barrett, *supra* note 13.

additives, and animal feed from nonorganic sources."[99] Agribusiness was criticized for trying to define organic to fit marketing needs instead of striving to hold organics to high standards.[100] Laurie Schiraga, program coordinator with the Environmental Defense Center, encouraged concerned citizens to protest by joining "a coalition including the organic industry and environmental, consumer, farming and animal welfare advocates in urging the USDA to withdraw its proposed organic regulations and adopt the recommendations of the NOSB."[101]

The creators of the OFPA included a provision requiring solicitation of public input[102] by the NOSB and the USDA National Organic Production Program (NOPP).[103] Pursuant to the law, a ninety-day comment period was opened; however, due to the enormity of the protest, the time period was extended an additional forty-five days until May 1, 1998.[104] Ultimately, due to the opposition, the time period was extended again, and final action was not taken until the summer of 1998.[105]

On May 8, 1998, Agriculture Secretary Dan Glickman announced the decision that genetic engineering, sewer sludge, and irradiation would not be allowed in the national organic standards.[106] The rule was scheduled to be re-written by June 12, 2000,[107] and by that date, the USDA had received over forty thousand comments,[108] some that were "one hundred pages, single spaced," said Kathleen Merrigan, administrator of USDA's Agricultural Marketing Service. "It was one of the largest [public responses] in the history of federal government."[109] "The organics industry has disagreements, like any business," said Bob Scowcroft, executive director of the Organic Farming Research Foundation in Santa Cruz, "but we were remarkably united in demanding the integrity of organics be preserved."[110] On December 21, 2000, the Final Rule was published in

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[99] *Id.*

[100] Curt Anderson, *Organic Rules Leave Bad Taste; USDA Seeks More Feedback*, THE COMMERCIAL APPEAL, Feb. 7, 1998, at B10, LEXIS.

[101] Schiraga, *supra* note 37.

[102] Organic Foods Production Act 7 U.S.C.S. §§ 6509(g), 6517(d)(4) (2003), LEXIS.

[103] Clark, *supra* note 22, at 331.

[104] Gorski, *supra* note 53.

[105] Franzen, *supra* note 33, at 405.

[106] Estrada, *supra* note 96.

[107] Michele Dula Baum, *U.S. Government Issues Standards on Organic Food*, CNN.COM, Dec. 21, 2000, *at* http://asia.cnn.com/FOOD/specials/2000/organic.main/story.html.

[108] Barbara H. Brandon and Robert D. Carlitz, Article: *Online Rulemaking and Other Tools For Strengthening Our Civil* Infrastructure, 54 ADMIN. L. REV. 1421 (Fall 2002), n97, LEXIS.

[109] Baum, *supra* note 107.

[110] Estrada, *supra* note 96.

the *Federal Register*, establishing the National Organic Program (NOP) and its regulations, providing national organic standards, the National List, labeling requirements, and a program for certifying organic operations.[111]

Nearly two years later, on October 21, 2002, the USDA's rules, codified at 7 C.F.R. 205, were implemented by Agriculture Secretary Ann M. Venemen.[112] Now "organic" was legally defined in the United States to exclude poultry, eggs, and milk from animals raised with antibiotics or growth hormones.[113] Food products could not be labeled "organic" if they had been produced with "conventional pesticides, petroleum-based fertilizers or sewage sludge-based fertilizers, bioengineering, or ionizing radiation."[114] To label a crop "organic," producers could not use substances prohibited by the OFPA on the land for at least three years before harvest.[115] Before meat could qualify as "organic," poultry must have been raised using approved organic methods from the time they were two days old, and for livestock the time period was "from the last third of gestation."[116] Also, aside from supplemental vitamins, animals must have eaten only organic feed.[117] After products are ready for market, handlers must make sure that organic products remain pure, without contamination by non-organic products.[118]

The specially designed USDA "certified organic" label could only be used by farmers or producers certified by accredited agents[119] according to OFPA standards.[120] Pursuant to Title 7, Subtitle B of the Code of Federal Regulations (regulations of the Department of Agriculture), there are four ways that organic foods can be labeled, depending on the product:

100% organic products	"Must contain 100% organically produced[121] ingredients,"[122] except that water and salt are not considered or-

[111] 65 Fed. Reg. 80548 (Dec. 21, 2000), LEXIS.

[112] Harrison and Chartier, *supra* note 2.

[113] Bill Daley, *Organic Labeling*, HARTFORD COURANT, Oct. 21, 2002, at D4, LEXIS.

[114] *Id.*

[115] *Organic Production and Handling Standards,* Dec. 2000, *at* http://www.ams.usda.gov/ nop/facts/standards.htm.

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] Sullivan, *supra* note 20, at 43.

[120] Franzen, *supra* note 33, at 404.

[121] "The term 'organically produced' means an agricultural product that is produced and handled in accordance with this chapter."
Organic Foods Production Act of 1990, 7. U.S.C.S. § 6502(14) (2003), LEXIS.

[122] Daley, *supra* note 113.

	ganic ingredients.[123] The product may display the term "100 percent organic" and/or the USDA seal.[124] The certifying agent's name must be written on the label preceding a statement or phrase indicating that the product is certified organic.[125]
Organic	Must contain at least 95 percent organic ingredients,"[126] and the product label must list the percentage of organic ingredients.[127] Also, the term "organic" may be used to describe particular ingredients making up a 100% organic product.[128] The USDA seal may be used, and a certification statement is required.[129]
Made with organic ingredients	Must contain (by weight or fluid volume, excluding water and salt) at least 70 percent organically produced ingredients.[130] The package panel or other label must list ingredients identifying which ones are organic.[131] The package may not display the USDA seal, although the certifying agent's information must be there.[132]
Some organic ingredients	For products containing less than 70 percent organic ingredients, specific organic ingredients may be listed on the label, but neither the word "organic" nor the USDA seal may be used.[133]

Percentages of ingredients in food products are calculated by weight or fluid volume and "rounded down to the nearest whole number."[134] The USDA seal must be a replica of the seal described in the regulations, using white, brown, green, and black colors, with part of the design similar to a cultivated field.[135] Handlers and producers are subject to at least one annual inspection,[136] and they must keep detailed records of their operations.[137] A person who purposely labels or sells an item as organic

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[123] 7 C.F.R. § 205.301(a) (2003), LEXIS.
[124] 7 C.F.R. § 205.303 (2003), LEXIS.
[125] *Id.*
[126] Daley, *supra* note 113.
[127] 7 C.F.R. § 205.303 (2003), LEXIS.
[128] *Id.*
[129] Daley, *supra* note 113.
[130] 7 C.F.R. § 205.301(c) (2003), LEXIS.
[131] 7 C.F.R. § 205.304 (2003), LEXIS.
[132] Daley, *supra* note 113.
[133] *Id.*
[134] 7 C.F.R. § 205.302 (2003), LEXIS.
[135] 7 C.F.R. § 205.311 (2003), LEXIS.
[136] Organic Foods Production Act of 1990, 7 U.S.C.S. § 6506(a)(5) (2003), LEXIS.
[137] Amaditz, *supra* note 17, at 542; Organic Foods Production Act of 1990, 7 U.S.C.S. § 6506(b)(1)(B) (2003), LEXIS.

that does not qualify under the NOP regulations is subject to a civil penalty of up to ten thousand dollars.[138] From the date the new regulations became effective, organic farmers and handlers had eighteen months to adjust their growing and processing operations and revise their product labels[139] to conform to the new standards.[140]

The new label assured consumers that the final product complied with the standards of the federal law.[141] "Certified organic" was a description of the process used to grow, manufacture, and/or handle the product, [142] rather than the quality of the product. This definition is upheld by the legislative history of the OFPA,[143] and Congress defined "organically produced" as "an agricultural product that is produced and handled in accordance with" the OFPA.[144] This manner of defining "organic" was recognized by Assistant Secretary of Agriculture Joann Smith when she instructed the NOSB board at its first meeting not to "characterize organic food as safer than regular food."[145] According to Secretary Smith, the OFPA was not a "food safety" law.[146] Clearly, the "organic" name was not given because of the appearance, taste, or nutrition of the product, but instead because it complied with OFPA production standards.[147]

By October 2002, the NOSB had already accredited over fifty agencies to take on the task of certifying companies and farmers as organic pursuant to OFPA standards.[148] The distinctive new labels were expected to further the organic cause, increasing sales as the public became aware of the organic marketplace, which grew at least twenty percent larger each year from 1992 to 2003.[149] In May 2003, the Organic Trade Association counted over eleven billion dollars annually in sales, with estimated future growth in the organic industry of twenty to thirty percent per year. [150]

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[138] *Labeling and Marketing Information, supra* note 81.

[139] Organic Foods Production Act of 1990, 7 U.S.C.S. § 6519(a) (2003), LEXIS.

[140] *Labeling and Marketing Information, supra* note 81.

[141] Franzen, *supra* note 33, at 404.

[142] *Id.*

[143] *Id.* at 407.

[144] Amaditz, *supra* note 17, at 542.

[145] Clark, *supra* note 22, at 331.

[146] *Id.*

[147] Franzen, *supra* note 33, at 404.

[148] *New Labels Simplify Shopping; You'll See New Information This Month on Organic Foods, Making Smart Shopping Easier,* NATURAL HEALTH, Oct. 1, 2002, at 21, LEXIS.

[149] Haldane, *supra* note 54.

[150] *100,000 Organic Farmers in U.S. by 2013: The Rodale Institute Announces Major Initiative, Launches NewFarm.org, supra* note 9.

In 2003, there were over 12,220 certified organic farmers in the United States, more than "one-half of one percent of all farmers."[151]

Now, under the federal statute, it takes a farmer time, effort, and expense to complete the organic certification process. When farmers change from conventional farming to organic farming, they discover that natural fertilizers and biological control of insects are more expensive, and they must hire more employees to compensate for the machinery they used before.[152] To comply with NOSB regulations, land must meet chemical-free requirements for over three years before its crops are legally organic.[153] "Even the saw-dust used to grow organic mushrooms has to be organic."[154] Unlike their forebears, today's farmers must pass inspections of their productions methods from beginning to end, from the seeds they plant to the packaging materials, by an accredited certifying agent, before they can advertise their wares as organic.[155] The new rules not only govern how produce is grown, but also how it is handled.[156] According to the USDA, retailers are often surprised to discover they must change the way they stack and spray organic fruits and vegetables to comply with the rules.[157] For example, if non-organic peaches are stacked above organic plums, and a retailer mists them with water, chemicals from the peaches could trickle down onto the plums, causing the plums to instantly lose their organic status.[158] In their salad bar, Whole Foods Markets erected a wall of salad dressings to separate organic lettuce from conventionally grown lettuce, and "organic cheese is sliced in different areas than non-organic."[159] Because of the increased costs faced by organic farmers, Congress has been petitioned to provide monetary support to encourage farmers to make the change to organic.[160]

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[151] *Id.*

[152] *USDA Delays Organic-Farming Standards, supra* note 19.

[153] Hunter, *supra* note 38.

[154] Best, *supra* note 29.

[155] John Fetto, *Consumer Trends Help Save a Fading Piece of America,* AMERICAN DEMOGRAPHICS, Aug. 1999, at 44, LEXIS.

[156] *The Evolving Organics Marketplace,* PROGRESSIVE GROCER, Mar. 1, 1998, LEXIS.

[157] *The Evolving Organics Marketplace,* PROGRESSIVE GROCER, Mar. 1, 1998, LEXIS; also at 7 C.F.R. § 205.272(a) (2003), LEXIS: The handler of an organic handling operation must implement measures necessary to prevent the commingling of organic and nonorganic products and protect organic products from contact with prohibited substances.

[158] *The Evolving Organics Marketplace, supra* note 156.

[159] Haldane, *supra* note 54.

[160] Nancy Chapman, *What's the Big Deal Over "Little" Organic?,* PREPARED FOODS, Nov. 1, 1999, at 26, LEXIS.

On the positive side, organic farming is profitable at the cash register. Compared to non-organic foods, the prices are notably better: non-organic soybeans cost $6.47 per bushel, while organic soybeans cost $16.50 per bushel.[161] Surveys conducted in 2000 and 2001 showed the price of organic broccoli thirty percent higher, organic carrots twenty-five percent higher, and organic corn (grain) seventy-five percent higher.[162] The organic farmer's extra expenses cause prices to go higher, of course, but demand also pushes up prices, because there are not enough organic products to meet the increasing demand.[163] Organic foods costing up to fifty percent more have not discouraged sales.[164] As the new rules take effect, they may tempt bigger growers to enter the organic market, increasing the supply and decreasing the cost, so that even more shoppers can afford and enjoy chemical-free foods.[165]

IV. ATTEMPTS TO CASH IN ON ORGANICS BY WATERING DOWN THE DEFINITION

The vision of a small but dedicated group of farmers in the1940's has been transformed into big business, the natural result of consumer demand that continues to grow.[166] The "fastest growing segment of the food market," sales of organic products generated more than eleven billion dollars in 2003, with an increase to twenty billion dollars expected by 2005.[167] Between 2001 and 2004, the number of acres planted with organic corn and soybeans is expected to more than double, from 260,000 to over 650,000.[168] Even name-brand companies are jumping on the organic bandwagon.[169] Early in 1999, Sunrise Organic cereal, a General Mills brand cereal made from organic wheat and corn, appeared on grocery store shelves.[170] H. J. Heinz bought out the Earth's Best company which succeeded in the organic baby food market.[171] Whole Foods

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[161] Fetto, *supra* note 155.

[162] Lotter, *supra* note 35.

[163] Franzen, *supra* note 33, at 403.

[164] *Organizing Organics; National Standards Set for Pesticide and Chemical Free Products,* Dec. 21, 1997, *at* http://more.abcnews.go.com/sections/living/dailynews/organic_standards001221.html.

[165] *Id.*

[166] Fromartz, *supra* note 15.

[167] Lance Gay, *Fish Gain Coveted "Organic" Label,* SCRIPPS HOWARD NEWS SERVICE, Apr. 14, 2003, LEXIS.

[168] *Organic Trade Association Praises U.S.C.A. Report Showing Organic Feed is Readily Available, Acceptably Priced*, PR NEWSWIRE, July 21, 2003, LEXIS.

[169] Chapman, *supra* note 160.

[170] *Id.*

[171] Hunter, *supra* note 38.

Market, the "world's largest natural and organic foods supermarket," became the first national "certified organic" grocer after being certified by Quality Assurance International in compliance with the new federal laws.[172] There are more organic multi-ingredient products available than ever, from "soy burgers to soups to organic frozen TV dinners."[173] "Organic Coca-Cola is right around the corner," says Eliot Coleman, longtime organic farmer.[174]

As the organic industry grew and more farmers and businesses wanted a piece of the profit, special interests sought easier ways to comply with the rules. Even before the final rule was published, there was pressure to amend the proposed rule to expand the list of synthetic substances allowed to include enzymes, fermentation materials, and defoaming agents, so that popular organic products would not be forced off the market.[175] The Organic Trade Association wanted the rules to allow dairy animals to be fed non-organic feed until three months before certification, an enormous difference from the twelve month requirement proposed by the USDA.[176] Pressure to water down the rules that took more than a decade to hammer out often came from larger companies entering the lucrative organic marketplace to increase their profit margin.[177]

In 2002, Fieldale Farms, a poultry company in Georgia, "attempted to get representatives in Congress and the USDA to create an exemption from the one-hundred percent organic feed requirement, but failed."[178] Supporters of the poultry industry insisted it was impossible to find enough organic feed and claimed the price was too high, double or triple the price of non-organic feed.[179] Fieldale Farms supported the argument that organic feed was too scarce,[180] but the truth was that other producers had successfully entered the organic market and were using organic la-

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[172] *Whole Foods Market(R) is America's First National Certified Organic Grocer; Pioneering Retailer Sets Benchmark With Company-Wide Certification,* PR NEWSWIRE, June 6, 2003, LEXIS.

[173] Best, *supra* note 29.

[174] *Id.*

[175] *Organic Rule Should Expand Synthetics, Better Protect Fields From Drift, says OTA; Organic Trade Association*, *supra* note 3.

[176] *Id.*

[177] Allen, *supra* note 4.

[178] *Organic News and Information; Background; Congress Action Undermines Organic Rules, at* http://www.theorganicreport.com/pages/201_congress_action_undermines_organic_ rules.cfm (last visited July 26, 2003).

[179] Steve Raabe, *Foes Battle Organic-Feed Shift; Federal Measure Threatens Integrity, Industry Leaders Say*, THE DENVER POST, Feb. 18, 2003, at C-01, LEXIS.

[180] *Last-Minute Provision Eases "Organic" Standards For Meat Producers,* THE FOOD INSTITUTE REPORT, Feb. 17, 2003, at 1, LEXIS.

bels without experiencing shortages of organic feed.[181] However, the OFPA was not written to allow an exemption due to the cost of organic feed. When the authors of the OFPA allowed for an "exemption for prohibited substances" because of "unavailability" at Title 7, United States Code section 6517(a)(1)(A)(ii), "unavailability" "was not meant to be read as 'commercially unavailable,' but as 'solely unavailable.'"[182]

When Fieldale's efforts failed at the USDA, it approached Representative Nathan Deal, a Republican from Georgia.[183] Fieldale had previously made a contribution of four thousand dollars when Nathan Deal ran for office, but according to Fieldale Farms' vice president, there was never an expectation of a return favor, as reported in the *Gainesville Times*, Deal's home newspaper.[184] The *New York Times* reported that "Speaker of the House J. Dennis Hastert added a last-minute provision at the request of Representative Nathan Deal of Georgia in a closed-door meeting February 12 [2003] of the House of Representatives conference committee."[185] The provision was added to the last page of "the agriculture section of a Senate-House compromise omnibus spending bill" and effectively destroyed the requirement that "organic" animals be fed "organic" feed.[186] Although Representative Deal may have encouraged passage of the rider so that one Georgia poultry farmer, Fieldale Farms, could cut costs by feeding its chickens non-organic feed and still use the "organic" label,[187] the law as written created a huge loophole allowing all livestock to be fed regular feed and still be called "organic."[188]

The provision, section 771 of the Consolidated Appropriations Resolution of 2003,[189] which was agreed upon by both chambers of Congress on February 13, 2003,[190] would not make any funds available to enforce the OFPA's requirement that organic livestock be fed one hundred percent

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[181] *Congress Undermines Organic Label, at* http://www.wholefoods.com/issues/org_feed02-03.html (last visited July 27, 2003).

[182] Clark, *supra* note 22, at 339.

[183] Carole Sugarman, *Organic Outrage: Weakened Labeling Causes Furor; FIFRA/FQPA; National Organic Program Standards Watered Down by New Law*, PESTICIDE AND TOXIC CHEMICAL NEWS, Mar 3, 2003, at 23, LEXIS.

[184] *Id.*

[185] *Organic News and Information; Background; Congress Action Undermines Organic Rules, supra* note 180.

[186] Raabe, *supra* note 179.

[187] Allen, *supra* note 4.

[188] *Senate Passes Leahy Amendment to Repeal Anti-Organic Rider,* April 4, 2003, *at* http://www.wholefoods.com/issues/org_ leahyamendment.html.

[189] Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Programs Appropriations Act, Pub. L. No. 108-7, § 771, 117 Stat. 11 (2003), LEXIS.

[190] H.R. Bill Tracking Rep. No. HJR 2 (2003), LEXIS.

organic feed, unless the Secretary of Agriculture prepared a report showing that organic feed could be purchased for no more than double the price of non-organic feed.[191] President George Bush signed the spending bill on February 20, 2003,[192] which read as follows:

> Sec. 771. None of the funds made available in this Act may be used to require that a farm satisfy section 2110(c)(1) of the Organic Foods Production Act of 1990 (7 U.S.C. 6509(c)(1)) in order to be certified under such Act as an organic farm with respect to the livestock produced on the farm unless the report prepared by the Secretary of Agriculture pursuant to the recommendations contained in the joint explanatory statement of the Managers on the part of the House of Representatives and the Senate to accompany Public Law 107-171 (House Conference Report 107-424, pages 672-673) confirms the commercial availability of organically produced feed, at not more than twice the cost of conventionally produced feed, to meet current market demands.[193]

From the time the OFPA was enacted in 1990, it was clear in the statute that livestock would not be described as organically-grown unless it was fed one hundred percent organically-grown feed, including every mouthful of grass, grain, or anything else ingested, besides salt and water, by the animals.[194] The NOSB's Livestock Committee recommended that the OFPA's standards for livestock be enforced, and the public offered support for the committee's decision, maintaining that it was unnecessary to use non-organics to raise livestock for slaughter.[195]

The organic industry immediately reacted to the anti-organic rider. The organic community pleaded with Congress to rally behind the "Leahy-Snowe Organic Restoration Act," which was drafted to repeal the troublesome provision.[196] George Siemon, Founding Farmer/CEO of the Organic Valley Family of Farms and Livestock Committee Chair of the NOSB, said, "This rider is a slap in the face to organic farmers. It threatens the economic viability of organic farmers, undermines the foundations of organic agriculture, and tears down public trust in the

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[191] *Congress Undermines Organic Label, supra* note 181.

[192] H.R. Bill Tracking Rep. No. HJR 2, *supra* note 190.

[193] Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Programs Appropriations Act, *supra* note 189.

[194] Clark, *supra* note 22, at 343; 7 U.S.C. § 6509(c)(1) (2003) reads: "For a farm to be certified under this title as an organic farm with respect to the livestock produced by such farm, producers on such farm shall feed such livestock organically produced feed that meets the requirements of this title."

[195] Clark, *supra* note 22, at 344.

[196] J. Mark Huffman, *Organic Valley Calls For "Organic Restoration Act"; News & Trends; Organic Valley Family of Farms Lobbies Congress*, DAIRY FOODS, Mar. 1, 2003, LEXIS.

USDA organic seal."[197] The Organic Trade Association published a call to action, instructing its members to contact their legislators in Washington and ask them to join with Senator Leahy and Representative Farr in support of the bill to restore organic standards for livestock.[198] Known as the "father of the national organic standards and labeling program," Senator Patrick Leahy was instrumental in the organic movement as the principal author of the legislation resulting in the Organic Foods Production Act.[199] "The anti-organic rider is particularly galling because so many producers have already made the commitment to organic production. For most, this is a huge financial commitment, and the rider has put everyone in a legal limbo," Leahy said.[200] The OTA published a full page in the *New York Times*, calling the rider a "stealth amendment" and accusing legislators of making "a mockery of America's new organic labeling law" by sneaklily adding the amendment to the 2003 appropriations bill when no one was looking.[201] With the OTA's encouragement, e-mails and telephone calls started flowing, demanding that Congress act to reverse the damage.[202] Agriculture Secretary, Ann Veneman, lamented what had happened: "The National Organic Program is the product of ten years of hard work and development . . . I am concerned that the language inserted in the Omnibus Appropriations Act could weaken the NOP."[203]

On February 26, 2003, Senator Leahy, a Democrat from Vermont, and Senator Olympia Snowe, a Republican from Maine, presented the bipartisan S.457 bill, known as the "Organic Restoration Act of 2003," in the Senate, calling for removal of "the limitation on the use of funds to require a farm to feed livestock with organically produced feed to be certified as an organic farm."[204] On February 27, 2003, Representative Farr introduced the H.R. 955 bill in the House of Representatives to amend and repeal "Section 771 of the Agriculture, Rural Development, Food

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[197] *Organic Valley Family of Farms Calls on Congress to Pass the Leahy-Snowe "Organic Restoration Act,"* PR NEWSWIRE, Feb. 26, 2003, LEXIS.

[198] *Organic News and Information; Background; Congress Action Undermines Organic Rules, supra* note 178.

[199] *Senate Passes Leahy Amendment to Repeal Organic Rider, supra* note 188.

[200] *Id.*

[201] *OTA Launches Campaign to Roll Back Redefinition of "Organic"; Organic Trade Association Launches National Campaign,* FOOD & DRINK WEEKLY, Mar. 17, 2003, LEXIS.

[202] Gay, *supra* note 167.

[203] Ann M. Veneman, *Release No. 0076.03; Regarding National Organic Program*, Feb. 26, 2003, *at* http://www.usda.gov/news/releases/2003/02/0076.htm.

[204] S. 457, 108th Cong. § 1 (2003), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:s457is.txt.pdf.

and Drug Administration, and Related Agencies Appropriations Act, 2003 (Division A of the Consolidated Appropriations Resolution, 2003; Public Law 108-7)."[205] Legislators were amazed by the force of the pro-organic opinion; on April 9, 2003, an article was published in Capital Hill's newspaper, *Roll Call*, about Whole Foods Market and its customers' campaign entitled, *Political Game of Chicken: Whole Foods Pressuring Congress to Change Provision*.[206] On April 12, 2003, Congress approved the bill, causing a quick turn-around of the harmful legislation within less than sixty days.[207]

However, the victory was bittersweet. A trade-off had been made in the Senate by Senator Ted Stevens of Alaska, who agreed to vote for the repeal of the anti-organic rider only if other legislation was enacted allowing wild seafood to qualify as organic, legislation which was supported by Alaskan fishermen who were eager to market their wild salmon with the profitable organic label.[208] This new legislation was added to the Iraq war spending bill,[209] as follows:

> Sec. 203 Wild Seafood. Section 2107 of the Organic Foods Production Act of 1990 (7 U.S.C. 6506) is amended –
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> (1) by redesignating subsections (c) and (d) as subsections (d) and (e) respectively; and
>
> (2) by inserting after section (b) the following:
>
> (c) Wild Seafood.
>
> (1) In general. Notwithstanding the requirement of section 2107(a)(1)(A) requiring products be produced only on certified organic farms, the Secretary shall allow, through regulations promulgated after public notice and opportunity for comment, wild seafood to be certified or labeled as organic.
>
> (2) Consultation and accommodation. In carrying out paragraph (1), the Secretary shall –
>
> (A) consult with
>
> (i) the Secretary of Commerce;
>
> (ii) the National Organic Standards Board established under section 2119;

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[205] H.R. 955, 108th Cong. § 1 (2003), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:h955ih.txt.pdf.

[206] *Organic Feed Regulations Restored!*, *at* http://www.wholefoods.com/issues/org_feed04-03.html (last visited July 27, 2003).

[207] *Id.*

[208] Allen, *supra* note 4.

[209] Gay, *supra* note 167.

> (iii) producers, processors, and sellers; and
>
> (iv) other interested members of the public; and
>
> (v) to the maximum extent practicable, accommodate the unique characteristics of the industries in the United States that harvest and process wild seafood.[210]

Senate Appropriations Committee chairman Ted Stevens said organic labels should be allowed to "provide new marketing opportunities for Alaska fishermen."[211] Previously, in 2000, Stevens had called for a study funded by the Agriculture Department, to determine whether wild seafood could be certified as organic through the federal organic program.[212] Critics said that no one knows what wild fish eat because they are not controlled,[213] and tests have shown that wild fish are higher in mercury and PCB's (polychlorinated biphenyls) than farmed fish.[214] Seventy-five thousand dollars later, the USDA's advisory panel decided that only land-based farming would be included in the National Organic Program, because ocean-bred animals could not meet the federal standards.[215] The agency left open the possibility that farmed fish could somehow qualify for the organic label some day.[216] Unbelievably, Senator Stevens' 2003 legislation orders the Agriculture Department to allow organic labels on wild fish and Alaska salmon, despite the previous decision that wild food cannot qualify because of lack of controls.[217] This was a blow to fish farmers, and pro-organic forces were outraged.[218]

It is a fact that organic certification in the OFPA depends on verification of a controlled environment for plants or animals, such as what they have eaten and whether they have been treated with particular pesticides.[219] For example, in May 2000, when federal hearings were underway, no agreement could be reached about organic standards for honey because of debate about the meandering habits of honeybees.[220] Even if a

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[210] H.R. 1559, 108 Cong. § 1 (2003), LEXIS.

[211] Gay, *supra* note 167

[212] *Id.*

[213] *Id.*

[214] Ben Raines, *Your Deadly Diet*, HEALTH, June 2003, at 124.

[215] Gay, *supra* note 167.

[216] *Fishy Labeling; Congress Approved a Provision to Allow Wild-Harvested Seafood to be Labeled Organic*, BETTER NUTRITION, Aug. 1, 2003, LEXIS.

[217] Gay, *supra* note 167.

[218] *Fishy Labeling; Congress Approved a Provision to Allow Wild-Harvested Seafood to be Labeled Organic, supra* note 216.

[219] Christine Blank, *Skirmish Likely Over Federal Alaskan Salmon Hearings*, SUPERMARKET NEWS, Apr. 17, 2000, at 29, LEXIS.

[220] *Id.*

wild fish hatches in a perfectly clean mountain lake and grows fat and healthy until caught by a fisherman using organic bait and an organic cotton net, the fish still cannot be labeled "organic."[221] It is not "organic" by federal standards unless it was raised in a controlled environment pursuant to the OFPA and its regulations, according to Bob Scowcroft, executive director of the Organic Farming Research Foundation.[222] Concerned about mercury and PCB found recently in fish, he warned, "You don't know whether they were caught in factory seafood boats . . . You certainly don't know if the fish went near an urban polluted river or not."[223] When the debate was underway, Whole Foods opposed organic labeling for wild seafood.[224] "We are disappointed that another organic related issue that was already rejected by the public is being introduced again."[225] Because the public had been satisfied with the decision not to allow for organic wild fish, the organic industry did not expect the curve ball pitched by Senator Stevens.[226] It was obvious that the Senator, and many Alaskan salmon fishermen, did not appreciate the distinction between a "naturally-grown" fish and an "organically-grown" fish when they proposed the amendment,[227] which showed no understanding of the meaning of the organic label.[228] As Katherine DiMatteo, executive director of the Organic Trade Association, confirmed, "The term 'organic' on a food product really describes a complete system of production that begins on a farm. At its core, agriculture is a land-based system [and] standards for organic agricultural production do not translate readily to a water-based system. What part of 'no' isn't clear?"[229] Now, officials must begin the daunting process of re-writing the OFPA, complying with the provisions of the amendment which require more consultation with the organic community, the seafood industry, and the public.[230] It is clear that Congress should repeal the amendment before the unraveling of the OFPA begins with enactment of the organic wild fish legislation.

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[221] Jay Lindsay, *Special Interests Trying to Write Rules Governing Organic Fish,* Apr. 9, 2003, *at* http://www.organicconsumers.org/ge/fish041103.cfm.

[222] Allen, *supra* note 4.

[223] *Id.*

[224] *Repeal Amendment Passes in Senate,* Apr. 2003, *at* http://www.wholefoods.com/issues/ ord_feed-repealsenate.html.

[225] *Id.*

[226] Lindsay, *supra* note 221.

[227] *Organic Feed Regulations Restored, supra* note 206.

[228] *Organic Trade Association Says: Congress Blunders Again...,* PR NEWSWIRE, Apr. 12, 2003, LEXIS.

[229] *Id.*

[230] Lindsay, *supra* note 221.

V. CONCLUSION

The first stirrings of concern about a need for organic certification took place in the 1970's.[231] It was not until nearly twenty years later that the national Organic Food Production Act of 1990 was passed.[232] It took seven more years before a set of national organic standards was proposed.[233] It took five additional years of study before the standards were implemented.[234] Six months later - **only half a year** - the long-awaited standards are already being dismantled!

Congress should react immediately by repealing the April 16, 2003, amendment to Section 2107 of the Organic Foods Production Act of 1990 (OFPA), which allows wild-harvested seafood to be labeled as organic. The amendment showed no understanding of what the organic label means.[235]

One of the three purposes of the Organic Foods Production Act of 1990 was to "assure consumers that organic products meet a consistent standard."[236] A look at the legislative history of the OFPA reveals a master plan, to define "organic" by the quality of the production of the food, not the quality of the food itself.[237] The production of a fish includes its environment, feeding, and handling. A wild fish, by common definition, is a fish whose environment, feeding, and handling are not under controlled conditions. When a commercial fisherman catches a fish, he cannot know about everything that lurks beneath the surface of a lake, river, or ocean. Even if a fisherman could prove that perfectly organic conditions exist in the water beneath his boat, he would not know under what conditions the fish was raised. He would not know what the fish ate from the moment it hatched, or whether the fish had ever swam in polluted water. Unlike an organic farmer who knows the condition of the soil around the tree's roots, a fisherman cannot assure the consumer of the "consistent organic standard" of a wild fish. For Congress to uphold the April 16, 2003 amendment is to thwart the purpose of the OFPA.

The organic industry must stay vigilant as to other attempts by special interests to use a profit motive to re-define "organic." Popularity of the prized "organic" label must not be allowed to lead to the downfall of

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[231] Amaditz, *supra* note 17, at 539.

[232] Franzen, *supra* note 33, at 400.

[233] Gorski, *supra* note 53.

[234] Harrison and Chartier, *supra* note 2.

[235] *Organic Trade Association Says: Congress Blunders Again, supra* note 228.

[236] *Relevant Sections; Federal Organic Foods Production Act of 1990,at* http://www.ams. usda.gov/nop/orgact.htm.

[237] Franzen, *supra* note 33, at 406.

meaningful standards as companies compete. Advocates cannot let down their guard.[238] "We don't feel like we can relax on watching their every move at this point, because too many things have sort of slipped in and slipped out without proper disclosure," said Urvashi Rangan, director of the Consumers Union website *ecolabels.org*.[239] Use of the press, e-mail and letter-writing campaigns by pro-organic forces are all effective ways to support efforts to maintain stringent standards to benefit the United States for generations to come.[240]

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[238] Allen, *supra* note 4.

[239] *Id.*

[240] Estrada, *supra* note 96.