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An Agricultural Law Research Article

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Organic Food Production Act of 1990**

by

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Originally published in SOUTHERN ILLINOIS UNIVERSITY LAW JOURNAL
30 S. ILL. U. L.J. 501 (2006)

www.NationalAgLawCenter.org

THE NOT-SO-ORGANIC DAIRY REGULATIONS OF THE ORGANIC FOOD PRODUCTION ACT OF 1990

Chad M. Kruse*

I. INTRODUCTION

Few trends in the American diet have been quite as extensive as the recent organic trend, easily identifiable at your favorite grocery store. However, just as many other diet trends are later discovered to not be what they seem, food products bearing the United States Department of Agriculture (USDA) organic label have become increasingly subject to questions such as: “what exactly differentiates this product from the much cheaper ‘non-organic’ one,” or more specifically, what “defines an organic cow?”¹

Ever since the regulations implementing the Organic Food Production Act of 1990² (OFPA) were finalized in December of 2000,³ some farmers have been searching for ways to reap the benefits of the higher profits available to producers of organic goods without sacrificing the industrialization of modern American agriculture. As demand for organic products continues to grow, the means to produce the products becomes more and more complicated. Organic farmers, much like their counterparts who still use synthetics, now face competition with much larger factory-style farms labeling their products with the USDA Organic label and offering cheaper products. Meanwhile, consumers are left in the dark as to what the new USDA Organic label means, especially in the case of dairy and meat products.

* B.S., Anthropology, College of Charleston, 2001; J.D. Candidate, Southern Illinois University School of Law, Spring 2006. I am grateful for the help received from numerous people in the completion of this Comment including SIU Law Journal editors Krissi Geary and Jennifer Jostes. I would like to thank my family for their constant support and Professor Patricia McCubbin for her patience and guidance as an editor, advisor, and mentor.

1. Andrew Martin, *Critics Fear USDA Will be Cowed by Large Dairies*, CHICAGO TRIBUNE, Oct. 19, 2005, at C19.

2. 7 U.S.C. § 6501 (2000).

3. This is the date the national organic program was finalized. U.S.D.A. National Organic Program, 7 C.F.R. § 205.1 (2005). See also Agricultural Marketing Service, 70 Fed. Reg. 7224 (Feb. 11, 2005) (“The Department of Agriculture published its final National Organic Program regulation in the Federal Register on December 21, 2000. The rule became effective April 21, 2001.”). The actual use of the “USDA Organic” label did not start until October 21, 2002. Andrew J. Nicholas, Comment, *As the Organic Food Industry Gets its House in Order, the Time Has Come for National Standards for Genetically Modified Foods*, 15 LOY. CONSUMER L. REV. 277, 277 (2003). See also Geoffrey Cowley, *Certified Organic; Stamp of Approval: New Government Rules Will Define ‘Organic’*, NEWSWEEK, Sept. 30, 2002; Elizabeth Becker, *Organic Gets an Additive: A U.S.D.A. Seal to Certify It*, N.Y. TIMES, Oct. 21, 2002, at A10.

This Comment will explore the recent actions taken against the USDA by citizens and citizen groups seeking clarification and strict regulation and enforcement of OFPA. Section II will begin with a description of organic regulations, or the lack thereof, before the enactment of OFPA and describe the promulgation of the statute contrasted with the final product. The third section will explore OFPA's loopholes, which are currently being taken advantage of, with an emphasis on organic dairy products. In particular, recent action taken by a "farm policy think tank" named Cornucopia,⁴ questioning organic dairy standards, will help to shed light on OFPA issues. Section IV will attempt to explain the commonly-held beliefs of consumers of organic products followed by a discussion on how the loopholes affect those same consumers. In Section V, this Comment will propose possible solutions for the USDA to consider in interpreting and amending OFPA.

II. BACKGROUND

To fully understand the current state of organic regulation, the development of the statute and its regulations must be discussed. In the case of OFPA, this is no easy task because of the excessively long promulgation period before the final release of regulations implementing OFPA was complete.⁵ For this reason, the first part of this section will explain what the goals of OFPA were in 1990 and describe the basic features of OFPA as envisioned by the legislators who promulgated the Act. The second part will discuss the key elements of the organic regulations as they exist today with special emphasis on the application of OFPA to organic livestock.

4. Andrew Martin, *USDA to Clarify Pasture Standards for Organic Dairy Cows*, CHI. TRIB., Jan. 13, 2005, at 16.

5. 7 C.F.R. § 205.1. See also S. REP. NO. 101-357, at 639-40 (1990), reprinted in 1990 U.S.C.C.A.N. 4546, 4945 (explaining that a form of OFPA was first introduced in the Senate in 1989); Cindy Joffe Hyman, Comment, *Food for Thought: Defending the Organic Foods Production Act of 1990 Against Claims of Protectionism*, 14 EMORY INT'L L. REV. 1719, 1719 (2000) (stating, "[o]n December 20, 2000, Agriculture Secretary Dan Glickman released the final version of the highly anticipated national organic standard . . . referred to as the National Organic Program."); Becker, *supra* note 3, at A10 (describing OFPA regulations as the "result of 12 years of lobbying by organic farmers, environmental groups, chefs and food executives").

A. The Intent and Reasoning Behind OFPA

Government regulation of organic food products in the United States was largely unheard of before the development of OFPA.⁶ As stated in the legislative history of OFPA, “much of this title [title 7] breaks new ground for the Federal government and will require the development of a unique regulatory scheme.”⁷ The broad Federal Food, Drug, and Cosmetic Act⁸ (FFDCA) regulated all food products (both human and animal), along with cosmetics, drugs, and medical devices throughout a large part of the 20th Century. Presumably, any food held out to be “organic” by the seller and traded in interstate commerce would have fallen subject to the provision of the FFDCA that provided for a libel action against “misbranded” food items,⁹ but otherwise, claims of “organic” production methods went unchecked at the federal level.¹⁰

States were the first to respond to the need for organic food regulations in the 1970s.¹¹ While twenty-two states had passed organic regulations by 1990, few did more than “benignly ignore” the increasing number of organic labels showing up in commerce.¹² As such, one of the express purposes of OFPA was “to establish *national standards* governing the marketing of certain agricultural products as organically produced products.”¹³

The OFPA was actually one of three bills containing “organic food provisions” introduced in the U.S. Senate in 1989.¹⁴ While the organic industry applauded the attempts at federal regulation, it was unable to convince other interests, such as environmental advocacy groups and private farmers, that nationwide organic regulations were a necessity.¹⁵ These groups favored, instead, the use of “expertise in organic farming . . . at the grassroots

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6. Marian Burros, *U.S. to Subject Organic Foods, Long Ignored, to Federal Rules*, N.Y. TIMES, Dec. 15, 1997, at A1. See also Hyman, *supra* note 5, at 1730; Nicholas, *supra* note 3, at 282–83.
 7. S. REP. NO. 101–357, at 645 (1990), reprinted in 1990 U.S.C.C.A.N. 4656, 4947.
 8. 21 U.S.C. § 301 (2000).
 9. *62 Cases of Jam v. United States*, 340 U.S. 593, 594 (1951).
 10. Burros, *supra* note 6, at A1.
 11. Kenneth C. Amaditz, Comment, *The Organic Foods Production Act of 1990 and its Impending Regulations: A Big Zero for Organic Food?*, 52 FOOD & DRUG L.J. 537, 539 (1997).
 12. *Id.* (citing Jim Motavelli, *Goodness Guaranteed: The Federal Government Finally Puts the Seal of Approval on Organic Produce*, E, Dec. 1, 1994, at 46).
 13. 7 U.S.C. § 6501(1) (2000) (emphasis added). See also S. REP. NO. 101–357, at 1286 (1990), reprinted in 1990 U.S.C.C.A.N. 4546, 5220 (providing Congress’ finding of a “need for a national program to standardize and promote the production of food through organic farming methods”).
 14. S. REP. NO. 101–357, at 639 (1990), reprinted in 1990 U.S.C.C.A.N. 4656, 4945.
 15. *Id.* at 4945.

level”¹⁶ and minimal federal involvement because of the government’s lack of experience in organic food production.¹⁷ Therefore, OFPA was set aside until 1990.¹⁸

The other two express purposes of OFPA were “to assure consumers that organically produced products meet a consistent standard; and . . . to facilitate interstate commerce in fresh and processed food that is organically produced.”¹⁹ The primary commercial device of OFPA, the USDA Organic label, was established to achieve these two goals.²⁰ Though OFPA was created to be more strict than even the strictest of the existing state organic regulations in 1990, the Senate provided for separate state organic regulations as long as the state regulations were as stringent as those contained in OFPA.²¹

Along with the purposes set out in OFPA, the legislature made it equally as clear what OFPA was not designed, at least initially, to accomplish.²² The Senate Report clarified that due to a lack of scientific knowledge on “organic livestock production,” the “USDA, with the assistance of the National Organic Standards Board will elaborate” on such standards as OFPA matures.²³ Also, the Report specifically noted that OFPA “does not attempt to make scientific judgments about whether organically produced food is more healthful, nutritious, or flavorful than conventionally produced food.”²⁴

It was clear early in the legislative history that the National Organic Standards Board²⁵ (NOSB), to be appointed by the Secretary of the Department of Agriculture (Secretary), would play a key role in the

16. *Id.*

17. *Id.*

18. *Id.*

19. 7 U.S.C. § 6501(2)(3) (2000). See also S. REP. NO. 101-357, at 1286-87 (1990), reprinted in 1990 U.S.C.C.A.N. 4656, 5220 (stating “[t]he purpose of this bill, among other things, is to establish national standards governing the production of organically produced products and to encourage environmental stewardship”).

20. S. REP. NO. 101-357, at 643 & 1288 (1990), reprinted in 1990 U.S.C.C.A.N. 4656, 4946 & 5221.

21. S. REP. NO. 101-357, at 643 & 648-50 & 1290 (1990), reprinted in 1990 U.S.C.C.A.N. 4656, 4947, 4949 & 5221-22.

22. S. REP. NO. 101-357, at 642-44 (1990), reprinted in 1990 U.S.C.C.A.N. 4656, 4945-47.

23. *Id.*

24. S. REP. NO. 101-357, at 644 (1990), reprinted in 1990 U.S.C.C.A.N. 4656, 4947. It is important to distinguish here between “healthful” and “nutritious” for the consumer as opposed to “health” of livestock, the later being very much a focus of OFPA. Compare *id.* with U.S.D.A. National Organic Program, 7 C.F.R. § 205.239(a) (stating “the producer of an organic livestock operation must establish and maintain livestock living conditions which accommodate the health and natural behavior of animals.”).

25. 7 U.S.C. § 6518 (2000); S. REP. NO. 101-357, at 1297-99 (1990), as reprinted in 1990 U.S.C.C.A.N. 4656, 5224-25.

establishment of organic standards.²⁶ The Senate Committee referred to the NOSB as “an essential advisor to the Secretary on all issues concerning this bill.”²⁷ The NOSB was made responsible for selecting substances to appear on the “National List,”²⁸ which would turn out to be another very important tool of OFPA.²⁹ The National List provides exceptions to the general rule of OFPA: organic products shall be produced without the use of synthetic substances.³⁰

Perhaps the largest disparity in OFPA discussed in 1990 and the final version of the regulations enacted in 2000 lies in the livestock standards.³¹ In 1990, the USDA prohibited the labeling of meat and poultry as “organic,” therefore limiting farmers’ interest in pursuing such a certification.³² The Senate Report, however, downplays the importance of feeding issues but instead focuses on the concern in 1990 of balancing “between the goal of restricting livestock medications and the need to provide humane conditions for livestock rearing.”³³ The goal of evolving the standards for organic livestock with the changing demands of consumers was placed on the plate of the NOSB.³⁴

B. Contemporary Organic Regulation Under the Authority of OFPA

At the heart of OFPA lies 7 U.S.C. § 6504, which created “[n]ational standards for organic production”³⁵ from which the regulations branch out.³⁶ The section provides the basic prohibition of synthetic chemicals in the production of organic foods for a period of three years before harvest (for

26. S. REP. NO. 101-357, at 650 (1990), as reprinted in 1990 U.S.C.C.A.N. 4656, 4950. See also Agricultural Marketing Service, 70 Fed. Reg. 7224 (Feb. 11, 2005) (briefly describing the role of the NOSB).

27. S. REP. NO. 101-357, at 650-51 (1990), as reprinted in 1990 U.S.C.C.A.N. 4656, 4950.

28. 7 U.S.C. § 6517 (2000). See also S. REP. NO. 101-357, at 1296-97 (1990), as reprinted in 1990 U.S.C.C.A.N. 4656, 5224.

29. S. REP. NO. 101-357, at 653 (1990), as reprinted in 1990 U.S.C.C.A.N. 4656, 4951.

30. S. REP. NO. 101-357, at 655 (1990), as reprinted in 1990 U.S.C.C.A.N. 4656, 4952. See also 7 U.S.C. § 6502(21) (2000) (defining “synthetic” as “a substance that is formulated or manufactured by a chemical process or by a process that chemically changes a substance extracted from naturally occurring plant, animal, or mineral sources.”).

31. Compare S. REP. NO. 101-357, at 665-66 (1990), reprinted in 1990 U.S.C.C.A.N. 4656, 4956-57; with 7 U.S.C. § 6509 (2000), and Department of Agriculture National Organic Program, 7 C.F.R. §§ 205.237, 205.238, & 205.239 (2005).

32. S. REP. NO. 101-357, at 665 (1990), reprinted in 1990 U.S.C.C.A.N. 4656, 4956.

33. *Id.*

34. *Id.* at 4957.

35. 7 U.S.C. § 6504 (2000).

36. *Id.*

cultivated crops).³⁷ Section 6504 also mandates the submission of an agreement between the certifying agent and the producer that sets out the requirements for the producer's goods to be labeled organic.³⁸ This agreement is referred to as an organic plan.³⁹

Section 6504 of OFPA⁴⁰ may give consumers a general idea of how producers of cultivated food products achieve the USDA Organic label for their crops. However, this Comment focuses more on a section of OFPA regulations dealing with organic livestock. The organic livestock regulations are more complicated, if for no other reason, because organic livestock must consume organic feed.⁴¹ For example, a very basic generalization for achieving the organic label on cultivated crops involves: (1) the producer of organic goods and the certifying agent agree on that producer's organic plan;⁴² (2) the producer abstains (with a few exceptions) from the use of synthetics in the production of its goods for at least three years prior to harvest;⁴³ and (3) the producer abides by its organic plan.⁴⁴ Trying to apply this somewhat easy to understand scheme to livestock highlights a possible reason why the USDA did not initially sanction the labeling of livestock as "organic" until further research and development by the NOSB.⁴⁵

The term "livestock" is defined in § 6502 of OFPA as "any 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."⁴⁶ The general provisions applying to the organic livestock producer are found in § 6509 of OFPA.⁴⁷ Section 6509 sets out the basic requirements for breeding, feeding, and medicating "any livestock that is to be slaughtered and sold or labeled as organically produced."⁴⁸ The section can be divided into

37. 7 U.S.C. § 6504(1), (2).

38. 7 U.S.C. § 6504(3).

39. *Id.* See also 7 U.S.C. § 6502(13) (2000) (defining "organic plan" as "a plan of management of an organic farming or handling operation . . . that includes written plans concerning all aspects of agricultural production or handling described in [OFPA]").

40. 7 U.S.C. § 6504.

41. 7 U.S.C. § 6509(c)(1) (2000).

42. 7 U.S.C. § 6506(a)(2) (2000).

43. 7 U.S.C. § 6504(2).

44. 7 U.S.C. § 6504(3).

45. S. REP. NO. 101-357, at 643-44 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4656, 4946-47. The differences between the organic production of these two types of agricultural products in combination with the goals of this Comment make it necessary to discuss OFPA's regulatory scheme with a special focus on organic livestock production rather than OFPA on its face.

46. 7 U.S.C. § 6502(11) (2000).

47. 7 U.S.C. § 6509 (2000). See also U.S.D.A. National Organic Program, 7 C.F.R. §§ 205.236-205.290 (2005) (implementing section 6509).

48. 7 U.S.C. § 6509(a).

three main mandates with respect to organic livestock: (1) the livestock must be fed “organically produced feed” that contains no “plastic pellets for roughage; manure refeeding; or . . . urea;”⁴⁹ (2) no “growth promoters and hormones” may be used on livestock animals “in the absence of illness;”⁵⁰ and (3) poultry and dairy livestock shall be subject to unique, additional requirements relating to organic eggs and dairy products.⁵¹

These “additional guidelines” for poultry and dairy livestock have been some of the most contested portions of the entire OFPA.⁵² The guideline for poultry simply provides that all poultry from which organic eggs or meat will be taken “shall be raised and handled in accordance with this chapter (organic certification) prior to and during the period in which such meat or eggs are sold.”⁵³ Similarly, the dairy livestock provision requires that dairy products to be branded with the organic label “be raised and handled in accordance with this chapter (organic certification) for not less than the 12-month period immediately prior to the sale of such [dairy product].”⁵⁴ Although the text of the U.S. Code provisions of the poultry and dairy livestock guidelines is somewhat brief, the implementing regulations found in the Code of Federal Regulations provide more details.⁵⁵

Part 205 of the Department of Agriculture National Organic Program (NOP) regulations contains four provisions dedicated solely to governing the production of organic livestock.⁵⁶ The first of these dictates the “origin of livestock” and demands that livestock to be “sold, labeled, or represented” as organic livestock “must be from livestock under continuous organic management from the last third of gestation or hatching.”⁵⁷ Section 205.236 further provides an exception for dairy animals who have “been under continuous organic management” at a time “no later than 1 year prior to the

49. 7 U.S.C. § 6509(c)(1), (2).

50. 7 U.S.C. § 6509(d)(1).

51. 7 U.S.C. § 6509(e)(1), (2).

52. See Elizabeth Weise, *Organic Chicken May Not Be All It's Cut Out to Be; Critics Say USDA Skirts Labeling Law*, USA TODAY, Feb. 26, 2003, at D10; Marian Burros, *Eating Well; U.S.D.A. Enters Debate On Organic Label Law*, N.Y. TIMES, Feb. 26, 2003, at F1 [hereinafter Burros II]; Carol Ness, *Organic Food Fight: Outcry Over Rule Changes that Allow More Pesticides, Hormones*, S.F. CHRON., May 22, 2004, at A1; Marian Burros, *Agriculture Dept. Rescinds Changes to Organic Food Standards*, N.Y. TIMES, May 27, 2004, at A17 [hereinafter Burros III].

53. 7 U.S.C. § 6509(e)(1).

54. 7 U.S.C. § 6509(e)(2)(A).

55. U.S.D.A. National Organic Program, 7 C.F.R. §§ 205.236–205.290 (2005).

56. 7 C.F.R. §§ 205.236–205.239.

57. 7 C.F.R. § 205.236(a).

production of the milk or milk products . . . represented as organic.”⁵⁸ An additional exception is provided for those farmers converting a dairy herd from traditional methods to organic certified methods.⁵⁹ This latter exception allows a producer to provide a “minimum of 80-percent feed that is either organic or raised from land included in the organic system plan”⁶⁰ for the first nine months of that conversion year.⁶¹ For the final three months, the producer must supply feed in compliance with the organic feed standards of OFPA.⁶² After the “distinct herd has been converted to organic production,”⁶³ the regulation requires the animals of the (now organic) herd be “under organic management *from the last third of gestation*.”⁶⁴

Three other provisions of § 205.236 also have important implications for the topic discussed in this Comment. Subsection (3) provides “breeder stock” may be brought from a non-organic operation into an organic operation, if that breeder stock is brought into the organic production facility “no later than the last third of gestation”⁶⁵ of the animal to be bred.⁶⁶ Livestock removed from an “organic operation” and instead managed on a non-organic operation may not be “sold, labeled, or represented as organically produced.”⁶⁷ And lastly, breeder stock and/or dairy animals that have not been a part of the organic operation for the final third of gestation may not be labeled or represented as “organic slaughter stock.”⁶⁸ At the end of this subpart of the NOP regulations is placed a reminder that a producer must keep records of animals coming in and leaving the organic operation sufficient to track the animals origin and production.⁶⁹

The section of the regulations entitled “Livestock feed” adds details to the food requirements set out in OFPA.⁷⁰ According to the section, a producer must provide livestock with a “total feed ration composed of agricultural

58. 7 C.F.R. § 205.236(a)(2). Other exceptions also are included in § 205.236, but they apply to poultry and other situations outside the general scope of this Comment. 7 C.F.R. § 205.236(a)(1).

59. 7 C.F.R. § 205.236(a)(2)(i)–(iii).

60. 7 C.F.R. § 205.236(a)(2)(i).

61. *Id.* The “organic system plan” quoted from the statute refers to an organic plan of the farmer which has been previously approved by a certifying agent approved by the USDA. See National Organic Program, 65 Fed. Reg. 80,548, 80,558 (Dec. 21, 2000).

62. 7 C.F.R. § 205.236(a)(2)(ii).

63. 7 C.F.R. § 205.236(a)(2)(iii).

64. *Id.* (emphasis added).

65. 7 C.F.R. § 205.236(a)(3).

66. *Id.*

67. 7 C.F.R. § 205.236(b)(1).

68. 7 C.F.R. § 205.236(b)(2).

69. 7 C.F.R. § 205.236(c).

70. Compare 7 C.F.R. § 205.237(a), with 7 U.S.C. § 6509(c)(1), (2) (2000).

products, *including pasture and forage*, that are organically produced and, if applicable, organically handled.”⁷¹ The regulation also provides for the use of “nonsynthetic substances and synthetic substances”⁷² approved by the OFPA regulations,⁷³ but only as additives or supplements.⁷³ Another passage of the regulation prohibits the use of supplements beyond what is required for maintaining the health of the livestock.⁷⁴

The regulations under the section “Livestock health care practice standard” aim to provide livestock with basic needs, such as diet and health treatment, which closely mimic that of the animals’ “nutritional requirements.”⁷⁵ Included in the health treatment are the “establishment of appropriate housing, pasture conditions and sanitation”⁷⁶ along with the “provision of conditions which allow for exercise, freedom of movement, and reduction of stress.”⁷⁷ Alternatively, the section provides for treatment of sick livestock with synthetic medications but only “when preventive practices and veterinary biologics are inadequate to prevent sickness.”⁷⁸ Finally, the regulation creates a mandate that prohibits the withholding of necessary medicine from an animal “in an effort to preserve its organic status.”⁷⁹

The fourth section of regulations dealing solely with livestock is entitled “Livestock living conditions.”⁸⁰ This provision really sets organic livestock production apart from the industrialized livestock farms by mandating things such as access to direct sunlight, pasture for ruminants, clean, dry bedding, and specially designed shelter.⁸¹ In fact, the very first passage of the regulation states an organic livestock producer “must establish and maintain livestock living conditions which accommodate the *health and natural behavior* of animals.”⁸² Included in such “living conditions,” in addition to the amenities previously mentioned, are: “(1) access to the outdoors, shade, shelter, exercise areas, [and] fresh air . . . suitable to the species, stage of production, the climate, and the environment; (2) *access to pasture for*

71. 7 C.F.R. § 205.237(a) (emphasis added).

72. *Id.*

73. *Id.*

74. 7 C.F.R. § 205.237(b)(2).

75. 7 C.F.R. § 205.238(a)(2). This requirement, for example, mandates fiber be given to ruminants because the ruminant digestive system will become dysfunctional without adequate fiber content in the diet. *Id.*

76. 7 C.F.R. § 205.238(a)(3), (4).

77. *Id.*

78. 7 C.F.R. § 205.238(b).

79. 7 C.F.R. § 205.238(c)(7).

80. 7 C.F.R. § 205.239.

81. 7 C.F.R. § 205.239(1)–(4).

82. 7 C.F.R. § 205.239(a) (emphasis added).

ruminants;” and (3) bedding that if consumed must meet the requirements for feed.⁸³ The design of the shelter must be made to allow for “comfort behaviors, and opportunity to exercise”⁸⁴ in addition to “temperature level, ventilation, and air circulation suitable to the species; and reduction of potential for livestock injury.”⁸⁵

All exceptions to this “accommodat[ion of] the health and natural behavior”⁸⁶ of the livestock provided in the regulations are *temporary*.⁸⁷ In the case of: “(1) inclement weather; (2) the animal’s stage of production; (3) conditions under which the health, safety, or well being of the animal could be jeopardized; or (4) risk to soil or water quality,”⁸⁸ an organic livestock producer may *temporarily* confine an animal in a manner contrary to the organic regulations.⁸⁹

C. The Role of the NOSB in the Organic Regulatory Scheme

The NOSB is established by § 6518 of OFPA to “assist in the development of standards for substances to be used in organic production and to advise the Secretary on any other aspects of the implementation of the National Organic Program.”⁹⁰ The fifteen-member NOSB is composed of scientists, farmers, and retailers with different perspectives on the NOP.⁹¹ Two members have been added to the NOSB since OFPA was introduced to the Senate—one being “an individual with expertise in the fields of toxicology, ecology, or biochemistry”⁹² and another “who is a [NOP] certifying agent.”⁹³

As previously mentioned, the Senate Committee intended the NOSB to be “an essential advisor to the Secretary *on all issues* concerning [OFPA].”⁹⁴ Additionally, several provisions within OFPA specifically delegate an

83. 7 C.F.R. § 205.239(a)(1)–(3) (emphasis added).

84. 7 C.F.R. § 205.239(a)(4)(i).

85. 7 C.F.R. § 205.239(a)(4)(ii), (iii).

86. 7 C.F.R. § 205.239(a).

87. 7 C.F.R. § 205.239(b).

88. 7 C.F.R. § 205.239(b)(1)–(4).

89. 7 C.F.R. § 205.239(b) (emphasis added).

90. 7 C.F.R. § 205.2; see also 7 U.S.C. § 6518(a) (2000).

91. 7 U.S.C. § 6518(b). See also S. REP. NO. 101–357, at 650–54 (1990), reprinted in 1990 U.S.C.C.A.N. 4656, 4950–52.

92. 7 U.S.C. § 6518(b)(6).

93. 7 U.S.C. § 6518(b)(7).

94. S. REP. NO. 101–357, at 650 (1990), reprinted in 1990 U.S.C.C.A.N. 4656, 4950 (emphasis added). See also 7 U.S.C. § 6518(k)(1) (stating “[t]he [NOSB] shall provide recommendations to the Secretary regarding the implementation of this chapter”).

advisory role to the NOSB.⁹⁵ One such instance mandates that the Secretary consult with the NOSB “in developing the [organic certification] program, and the National List.”⁹⁶ With regard to the organic livestock standards of OFPA, the NOSB “shall recommend to the Secretary standards in addition”⁹⁷ to the basic standards contained in § 6509(d)(1) regarding prohibited health care practices for livestock.⁹⁸ References to the NOSB appear throughout OFPA, and taken together with the importance attached to the NOSB’s function in the legislative history, it becomes abundantly clear the NOSB is a very strong component of the organic regulatory scheme.⁹⁹

III. RECENT DEVELOPMENTS

A. Legislative and Administrative Challenges to OFPA Regulations

To understand recent developments in implementation and enforcement of the finalized OFPA regulations, it is necessary to first examine two of Congress’s three attempts at altering the very young legislation. All three of the attempted amendments are recent, and they were all achieved by conniving legislative or administrative methods.¹⁰⁰ In February of 2003, after receiving pressure from a chicken farmer in Georgia, Congress changed the organic feed requirements of OFPA.¹⁰¹ The amendment created an option for organic livestock producers to feed their livestock “non-organic feed when organic feed is twice the price of conventional feed.”¹⁰² The paragraph was included in a spending bill “at the last minute” with no opinion on the new position from the USDA or the NOSB.¹⁰³

95. See generally National Organic Program, 62 Fed. Reg. 65,850, 65,851 (Dec. 16, 1997).

96. 7 U.S.C. § 6503(c).

97. 7 U.S.C. § 6509(d)(2).

98. 7 U.S.C. § 6509(d)(1), (2).

99. S. REP., *supra* text accompanying note 29. See also S. REP., *supra* note 27.

100. See, e.g., Weise, *supra* note 52, at D10; Reuters, *Bill Would Restore Organic Standard*, L.A. TIMES, Feb. 27, 2003, at C10; Ness, *supra* note 52 at A1; Marian Burros, *EATING WELL; Last Word on Organic Standards, Again*, N.Y. TIMES, May 26, 2004, at F4.

101. Weise, *supra* note 52, at D10. See also Burros II, *supra* note 52, at F1 (providing “the provision was included to help a chicken processing company . . . in Georgia.”).

102. *Id.*

103. *Id.*

Almost immediately this amending paragraph was found by organic interest groups and protested by the likes of major livestock corporations.¹⁰⁴ Only two weeks after it was passed, Senator Leahy, the same man who introduced OFPA to Congress in 1990, organized and gained bipartisan support for a bill to reverse the effects of the amendment.¹⁰⁵ Even the USDA changed their “no opinion” status to one of “concern[] that the language . . . could weaken the National Organic Program.”¹⁰⁶ Not only was this amendment reversed, but bipartisan effort to protect organic regulations formed a legislative caucus to “ensure that the growing organic food industry would be protected from further assaults.”¹⁰⁷

The second assault on OFPA came in the form of administrative “guidance” and “directive” statements in April of 2004.¹⁰⁸ By labeling the statements “guidance statements,” the administrators were able to significantly change OFPA standards without public notice and comment—both requirements of agency rule-making.¹⁰⁹ The April 2004 guidance statement changes included:

1. Allowing pesticides with “unknown inert ingredients” to be used on produce labeled organic, if a “reasonable effort has been made to identify [the inert ingredients].”¹¹⁰ The previous regulation required approval by the NOSB before a pesticide could be used.¹¹¹
2. Permitting organic livestock to be fed fishmeal, as a feed supplement, regardless of whether the fishmeal contains synthetic preservatives or toxins.¹¹² Previously, organic livestock was to be fed only organic feed.¹¹³
3. Allowing antibiotics or “any other necessary drug” to be used on dairy cattle, if organic means of treating the cattle failed, as long as a year

104. *Id.* Companies with substantial interest in both the organic and non-organic food markets, such as Tyson Foods, General Mills, and Kraft Foods, were among the groups showing opposition to the bill. *Id.*

105. Elizabeth Becker, *Both Parties Begin Effort to Restore Organic Standard*, N.Y. TIMES, Feb. 27, 2003, at A28 [hereinafter Becker II]. See also Reuters, *supra* note 100, at C10.

106. Burros II, *supra* note 52, at F1.

107. Becker II, *supra* note 105, A28.

108. Ness, *supra* note 52, A1.

109. *Id.* See also *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111–12 (D.C. Cir. 1993) (discussing the difference between interpretive rules and legislative rules in the administrative law context and the requirements for both).

110. Ness, *supra* note 52, at A1.

111. *Id.*

112. *Id.*

113. *Id.* See also 7 U.S.C. § 6509(c)(1) (2000) (stating that for a farm to be certified organic, “producers on such farm . . . shall feed such livestock organically produced feed”).

passes between the treatment and the sale of milk labeled organic from that animal.¹¹⁴ Previously, dairy farmers permanently removed animals treated with antibiotics from the organic herd, their milk never to be labeled organic again.¹¹⁵

4. Allowing seafood, pet food, and body care products to carry the organic label “without meeting any standards other than their own.”¹¹⁶ Previously, regulation of these categories of products was included within OFPA, and producers were able to obtain the label by following the existing standards provided for organic livestock or crops.¹¹⁷

These four changes, much like the February 2003 changes, were quickly attacked by organic interest groups and supporters of strict organic regulation.¹¹⁸ The NOSB was among the first groups to react to the administrative interpretations, stating “[the new changes] certainly weaken the regulations.”¹¹⁹ The NOSB, “an essential advisor to the Secretary on all issues concerning [OFPA],”¹²⁰ was told of these guidance statements only *one* day before they were made effective.¹²¹ These changes did take longer to get reversed than the previous attack on OFPA, but on May 26, 2004, these guidance statements were rescinded by the Secretary of the Department of Agriculture, due to “a tremendous amount of (public) interest.”¹²²

The swift reversals of these degrading changes to OFPA regulations set an early precedent of protecting OFPA from the influence of livestock corporations and other aspiring organic producers.¹²³ The reaction to these legislative and administrative OFPA challenges illustrates the dedication of the organic community and Senator Leahy in preserving the original intent of the OFPA.¹²⁴ Likewise, the one lawsuit questioning interpretation of OFPA

114. Ness, *supra* note 52, A1.

115. *Id.* See also 7 U.S.C. § 6509(d)(1)(A & C) (stating “for a farm to be certified . . . as an organic farm . . . producers on the farm shall not— (A) use subtherapeutic doses of antibiotics; or (C) administer medication, other than vaccinations, in the absence of illness”). Though this language pertains to a “certified organic farm,” this was previously interpreted as the rule governing milk from organic cattle. Ness, *supra* note 52, A1.

116. *Id.*

117. *Id.*

118. Burros III, *supra* note 52, at A17.

119. Ness, *supra* note 52, at A1.

120. S. REP. NO. 101-357, *supra* note 27, at 4950.

121. Ness, *supra* note 52, A1.

122. Burros III, *supra* note 52, A17.

123. *Chicken feed; Organic standards need vigilance*, MINNEAPOLIS-ST. PAUL STAR TRIB., Mar. 1, 2003, at 22A (stating “this sorry episode may be a good thing for organic food. Big companies tried to shape the national organic standards to their liking, but failed . . .”).

124. See Becker II, *supra* note 105, at A28; and Burros III, *supra* note 52, at A17.

has upheld strict compliance with the regulations, especially with regard to dairy livestock.¹²⁵

B. The First Circuit's Decision in *Harvey v. Veneman*

The case of *Harvey v. Veneman*,¹²⁶ and its subsequent history, is the only judicial decision yet dealing with a challenge to organic regulations. Although all counts of the plaintiff, Arthur Harvey's, complaint involved OFPA, the seventh count, dealing with the "Conversion of Dairy Herds to Organic Production,"¹²⁷ is especially applicable to this discussion on organic livestock standards.¹²⁸ While the codified OFPA states that "a dairy animal from which milk or milk products will be sold or labeled as organically produced shall be raised and *handled* in accordance with this chapter for not less than the 12-month period immediately prior to the sale of such milk and milk products,"¹²⁹ the implementing regulations provide a slightly different rule.¹³⁰ The regulations provide for an exception to the twelve month rule for "an entire, distinct herd" of cattle being transferred from non-organic production to organic production.¹³¹ More specifically, the regulations provide that when transferring the distinct herd into organic production, "the producer may: for the first 9 months of the year, provide a minimum of 80-percent feed that is either organic or raised from land included in the organic system,"¹³² as long as 100-percent organic feed is provided "for the final 3 months"¹³³ prior to the production.¹³⁴ Mr. Harvey argued the 80-percent organic feed option directly conflicted with the clear language of OFPA's twelve month provision.¹³⁵

The First Circuit agreed with Mr. Harvey, and stated, "the twelve-month requirement . . . has little meaning if it does not govern situations in which a dairy animal is being 'converted' to organic production."¹³⁶ In addition, the court refused to adopt a lenient interpretation of the word "handled"¹³⁷

125. *Harvey v. Veneman*, 396 F.3d 28, 43-44 (1st Cir. 2005).

126. *Id.* at 28.

127. *Id.* at 43.

128. *Id.*

129. 7 U.S.C. § 6509(e)(2) (2000) (emphasis added).

130. U.S.D.A. National Organic Program, 7 C.F.R. § 205.236(a)(2) (2002).

131. *Id.*

132. *Id.* at § 205.236(a)(2)(i).

133. *Id.* at § 205.236(a)(2)(ii).

134. *Id.* at § 205.236(a)(2)(i)-(ii).

135. *Harvey v. Veneman*, 396 F.3d 28, 43 (1st Cir. 2005).

136. *Id.* at 44.

137. As used in 7 U.S.C. § 6509(e)(2), *supra* note 129.

proposed by the Secretary, in defense of the regulation.¹³⁸ The court eliminated the possibility of an exception in the language of the twelve-month requirement and stated the Secretary's creation of such an exception was "contrary to the plain language of [OFPA]."¹³⁹ This holding again served to strengthen the organic standards and showed support for strict interpretation of OFPA and its implementing regulations.¹⁴⁰

While the reversals of the legislative and administrative actions were for the most part welcomed, the First Circuit's decision in *Harvey v. Veneman* was not taken as easily by the organic industry.¹⁴¹ In fact, James Gormley, of the Natural and Nutritional Products Industry Center, called the court's holding on Harvey's seventh count, "virtual elimination of 'synthetic' ingredients from organic food production, and a . . . disincentive for conventional dairy farmers to convert to organic methods."¹⁴² The holding also disappointed the Organic Trade Association and the CEO of Organic Valley Family of Farms (Organic Valley), who viewed the decision as "a real blow to the stability of organics."¹⁴³ The chief concern expressed by these organizations was the increased feed costs pushed onto producers wishing to convert to organic production, and the resulting disincentive to follow through with the conversion.¹⁴⁴

On the other hand, aspects of the *Harvey v. Veneman* decision were embraced by key players in the organic industry.¹⁴⁵ For example, Ronnie Cummins of the Organic Consumers Association applauded the decision, recalling the expectation of organic consumers and the intention of the legislature in promulgating OFPA.¹⁴⁶ Cummins, though, shared the concern for the creation of a disincentive for converting farmers saying the "[USDA] can't tighten up standards without providing real subsidies to promote organics and to help farmers."¹⁴⁷ Harvey himself expressed delight with the strict interpretation of the standards laid down by the court but also showed a hint of concern for the holding's implications in the organic industry of

138. *Veneman*, 396 F.3d at 44.

139. *Id.*

140. See James Gormley, *The new organics ruling—what now?*, Natural and Nutritional Products Industry Center website, Feb. 15, 2005, <http://www.npicenter.com/anm/templates/newsATemp.aspx?articleid=11721&zoneid=43>.

141. *Id.*

142. *Id.*

143. *Id.* Mr. Gormley quoted Organic Valley Family of Farm's CEO, George Siemon. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

today.¹⁴⁸ All parties opined that they hoped to “come up with a friendly compromise”¹⁴⁹ between concerns of growth in the organic industry and concerns of sacrificing the integrity of the current organic standard.¹⁵⁰

After the *Harvey v. Veneman* decision of January 26, 2005, the case went through subsequent history that had little effect on the seventh count of Mr. Harvey’s complaint.¹⁵¹ In fact, count seven of the *Harvey v. Veneman* decision was addressed on remand by the United States District Court for the District of Maine on June 9, 2005.¹⁵² Using similar language as the January 2005 opinion, the District Court said that section 205.236(a)(2)(i), of the organic regulations, allowing up to 20-percent non-organic feed during dairy herd conversion, was “contrary to the OFPA and in excess of the Secretary’s rulemaking authority.”¹⁵³

C. The Cornucopia Institute Complaint: Grazing Requirements for Dairy Cattle

While the First Circuit was deciding how to rule in the *Harvey* case, another legal challenge to organic regulation enforcement was being initiated by the Cornucopia Institute of Wisconsin (Cornucopia).¹⁵⁴ This challenge was directed at the USDA in the form of complaints questioning the capacity of

148. *Id.*

149. *Id.* Mr. Gormley quoting Mr. Harvey.

150. *Id.*

151. *Harvey v. Johanns*, No. 02-216-P-H, slip op. (D. Me. June 9, 2005), available at <http://www.mindfully.org/Food/2005/Harvey-Johanns-Organic9jun05.htm> (last visited Mar. 13, 2006).

152. *Id.*

153. *Id.*

154. Martin, *supra* note 4, at 16. See also Organic Consumers Assoc., *The Cornucopia Institute Alleges Factory Farms Violating Federal Organic Law*, Jan. 10, 2005, <http://www.organicconsumers.org/organic/cornucopia011205.cfm> [hereinafter Organic Consumers]. The Cornucopia Institute is a think-tank organization, “dedicated to the fight for economic justice for the family-scale farming community.” *Id.* An important faction of Cornucopia is the “Organic Integrity Project,” which serves as a “watchdog assuring that no compromises to the credibility of organic farming methods . . . are made in the pursuit of profit.” *Id.* See also the Cornucopia Institute website, <http://www.cornucopia.org>; an informative website, <http://www.commondreams.org>.

“factory farms”¹⁵⁵ to produce organic dairy products.¹⁵⁶ The specific issue addressed in the Cornucopia complaints was “whether it is legal to confine cows in an industrial setting, without access to pasture, and still label milk and dairy products organic.”¹⁵⁷ First, on January 10, 2005, Cornucopia filed a complaint to the USDA Office of Compliance regarding organic production activities at one Colorado dairy farm.¹⁵⁸ On February 16, 2005, two other complaints were sent from Cornucopia to the USDA regarding “alleged violations of the federal organic law” by two other dairies in Idaho and California.¹⁵⁹ Cornucopia’s position on the organic factory farm issue is consistent between all three complaints: “[a producer] cannot milk 3,000 – 6,000 cows and offer them true access to pasture as required by [OFPA].”¹⁶⁰ Additionally, Cornucopia alleged, “the claim that pasture is impractical, or not cost-effective, in arid Colorado [Idaho, and California] is no excuse under the law.”¹⁶¹

Cornucopia’s argument rested on the plain language of § 205.237 thru § 205.239 of the NOP regulations.¹⁶² Specifically, the Colorado Complaint stated the “Dairy Farm’s allotment of a reported 135 to 250 acre dry exercise lot with no appreciative feed value for 5600 cows does not provide sufficient acreage for fulfilling the pasture feed component and the requirement for access to the outdoors for sunlight, exercise, the promotion of animal health and the reduction of stress.”¹⁶³ The Cornucopia complaints attacked the dairies’ failure to provide pasture, due to inadequate rainfall, stating “climatic conditions and arid climate, which makes pasture impractical or not cost-

155. “Factory farm” is a term of art in the agriculture industry and means different things to different entities. For the purposes of this paper, the term will be used to distinguish between organic producers practicing traditional methods of organic production (i.e., grazing cattle on organic pasture) and organic producers using more industrialized techniques in organic production (i.e., organic grain and corn as feed out of a trough, etc.). Cornucopia’s complaint was directed toward the factory farm organic producers. Factory farms are also sometimes referred to as CAFOs or confined animal feeding operations. Organic Consumers, *supra* note 154.

156. *Id.*

157. *Id.*

158. *Id.*

159. The Cornucopia Inst., *Nation’s Largest Organic Dairy Brand, Horizon, Accused of Violating Organic Standards*, Feb. 16, 2005, <http://www.organicconsumers.org/organic/horizon21705.cfm> [hereinafter Cornucopia].

160. Organic Consumers, *supra* note 154.

161. *Id.*; Cornucopia, *supra* note 159.

162. U.S.D.A. National Organic Program, 7 C.F.R. § 205.237–205.239 (2002). See also Organic Consumers, *supra* note 154; *supra* notes 70–89 (explaining these sections of the National Organic Program regulations).

163. Organic Consumers, *supra* note 154. See also 7 C.F.R. §§ 205.237, 205.239; § 205.237, *supra* note 71, (emphasizing the pasture requirement in the “total feed ration”); § 205.239, *supra* note 83, (emphasizing the “access to pasture for ruminants” regulation).

effective—cannot be used to justify year-round noncompliance with the pasture rule.”¹⁶⁴ Cornucopia filed the Complaint pursuant to 7 C.F.R. § 205.680, which allows for appeal to the Administrator of a “noncompliance decision of the National Organic Program’s Program Manager” by “persons subject to [OFPA] who believe they are adversely affected.”¹⁶⁵ Cornucopia also specifically cited a *Chicago Tribune* article, in the complaint, as lending support to its position.¹⁶⁶

The *Chicago Tribune* article, referred to by Cornucopia, contrasted the views of the organic *factory* farmer with views held by the organic *family* farmer.¹⁶⁷ The article, much like the Cornucopia complaints, focused on the pasture requirement allegedly being avoided by the large dairy farms.¹⁶⁸ The *Tribune* article, however, used the pasture requirement to illustrate two opposing, yet prevailing views of OFPA’s intent: (1) “to support family farmers” who are more easily able to conform to the rigorous organic regulations; and (2) “converting as much land as possible to organic—to preserve the environment,” making organic milk and dairy products more accessible to the American public.¹⁶⁹ The factory farm organic producers argue that organizations like Cornucopia did not have protection of the organic regulations as their top priority, but instead were focused on protecting the small-scale farmer from competition.¹⁷⁰ Likewise, the small-scale organic farmer argues that by skirting certain essential details of the organic regulations and sacrificing organic quality, the factory farms eliminate opportunity for OFPA-abiding, small-scale farmers to compete on the organic market.¹⁷¹ One small organic dairy producer stated his view this way: “[pasture-based, small-scale producers] should not be put at a competitive disadvantage by taking the high-road in organics.”¹⁷²

164. Organic Consumers, *supra* note 154. See also the Cornucopia Institute website, *supra* note 154. The full-text of the Cornucopia complaint is on the organization’s website at http://www.cornucopia.org/aurora_complaint.html (last visited Apr. 3, 2006).

165. *Id.* (citing 7 C.F.R. § 205.680).

166. *Id.* See Andrew Martin, *Organic Milk Debate; Dairies dispute ‘organic’ values; Ex-hippie farmers contest practices of big producers*, CHI. TRIB., Jan. 10, 2005, at 1 [hereinafter Martin II].

167. Martin II, *supra* note 166, at 1.

168. *Id.*

169. *Id.* See also Martin, *supra* note 4, at 16; Steve Raabe, *Mega-Dairy Aurora Organic Admits It’s an Intensive Confinement Organic Feedlot*, DENVER POST, Jan. 16, 2005, <http://www.organicconsumers.org/organic/aurora012405.cfm>.

170. Martin II, *supra* note 166, at 1.

171. *Id.* See also Martin, *supra* note 4; *How now organic cow?*, Wis. State J, available at <http://www.organicconsumers.org/organic/factoryfarm012405.cfm> (Jan. 23, 2005).

172. Cornucopia, *supra* note 159.

One of the premiere organic producers, whose opinion was featured in the *Tribune* article, was Mark Retzloff, president and chief organic officer of Aurora Organic Dairy (Aurora).¹⁷³ Aurora was once a conventional dairy, but in the mid 1990s, Retzloff began the process of converting the farm to meet organic standards. This attempt was the first by a factory farm to undertake production of organic dairy products.¹⁷⁴ Aurora practices some environmentally sustainable production techniques, many of which do not pertain to certification under OFPA, but Retzloff conceded that the farm's dairy cattle "can't feed off pasture grasses because there simply isn't enough rain in the area to support it."¹⁷⁵ Retzloff added that, at the Aurora operation, some cows do graze on organic pasture, "namely cows in the late stages of milk production and those that are dry, or aren't producing milk. . . . Most cows producing milk are kept in outdoor pens."¹⁷⁶ Yet Retzloff maintained Aurora complied with all federal regulations and labeled the Cornucopia complaint "frivolous and destructive to the entire [organic] industry."¹⁷⁷ The Vander Eyk factory dairy, a contemporary of Retzloff's operation and the California target of Cornucopia's February 16 complaint, actually transports the cows in the dairy's organic operation to pasture.¹⁷⁸ Despite these practices, in an interview with the *Denver Post*, Retzloff attributed the Cornucopia complaint to a lack of familiarity with dairy farming in the West.¹⁷⁹

To contrast the large-scale production technique of Aurora, the *Tribune* article provided an example of a small-scale organic dairy production owned by John Kiefer. Located near Madison, Wisconsin, Kiefer and his girlfriend operate an organic dairy operation consisting of only seventy-one cows on pasture land that has long been home to dairy cattle.¹⁸⁰ Kiefer's dairy cattle are able to graze on organic pasture ten months of the year,¹⁸¹ and his certified organic operation is part of a large co-op network of organic producers called

173. Martin II, *supra* note 166, at 1. Aurora Organic Dairy is a fairly young organic dairy that "operates with 5,300 cows on a sloping plain about 40 miles north of Denver." Aurora Organic Dairy was the subject of the January 10, 2005, complaint made by Cornucopia.

174. Martin II, *supra* note 166, at 1.

175. *Id.*

176. Martin, *supra* note 4, at 16.

177. *Id.*

178. Cornucopia, *supra* note 159.

179. Raabe, *supra* note 169.

180. Martin II, *supra* note 166, at 1.

181. *Id.*

Organic Valley Family of Farms.¹⁸² Organic Valley is among the three largest certified producers of organic dairy products, the other two being Aurora and Horizon Organic Dairy.¹⁸³

In response to the Cornucopia complaint, the NOP immediately “issued an internal memorandum requesting that the [NOSB] develop a strict policy on the pasture requirement so that the agency can issue a guidance document, enhancing the enforcement.”¹⁸⁴ The question faced by the NOSB is similar to the one Cornucopia and Aurora answer differently—must organic dairy cattle be allowed to graze on pasture much of the year, or may they be confined in pens, fed organic grain, and allowed to graze only as required by the animal’s stage of production?¹⁸⁵

This immediate call for action did not necessarily mean swift implementation or enforcement of the NOSB’s discussion at the February 2005 meeting.¹⁸⁶ Prior to the meeting, Dave Carter, a member of the NOSB, expressed doubt about the effectiveness of the NOSB, stating “the [NOSB] in 2001 recommended to the USDA that all organic dairy cows have ‘ongoing access to pasture’ . . . [b]ut the USDA has not acted on the recommendation.”¹⁸⁷ Nonetheless, the internal memorandum must have caught the attention of Horizon Organic. The same week of the NOSB meeting, corporate officials from Horizon were making offers to small-scale

182. *Id.* Organic Valley is based in La Farge, Wisconsin and can be found at <http://organicvalley.coop>. Organic Valley’s mission is “to support rural communities by protecting the health of the family farm—working toward both economic and environmental sustainability.” Organic Valley, Our Cooperative-Farmers with a Mission, http://organicvalley.coop/our_story/our_cooperative/index.html (last visited Mar. 28, 2006).

183. Organic Consumers Assoc., *USDA Feels the Heat on Allowing Factory Style Dairies to be Certified as “Organic,”* Jan. 12, 2005, <http://www.organicconsumers.org/SOS/usdaheat011405.cfm> [hereinafter Organic Consumers II]. Horizon Organic Dairy obtains raw organic milk from the two farms targeted by Cornucopia’s February 16, 2005, complaint. Cornucopia, *supra* note 159. Aurora and Horizon Organic have more in common than being two of the three largest organic milk producers. Marc Peperzak, one of the founders of Horizon, serves as a principle, along with Retzloff, of Aurora’s operation in Colorado. Cornucopia, *supra* note 159 (Editor’s Note). This leaves Organic Valley as the only small-scale, co-op organic production amongst the three largest certified organic dairy operations in the United States. Organic Consumers, *supra* note 154. Horizon Organic is now a part of the multi-billion dollar corporation named Dean Foods. *Id.* Horizon Organic’s mission “is to grow the industry while preserving the integrity of the organic label and to feed as many people as possible nutritious, organic food.” White Wave Foods Pasture Statement, Feb. 17, 2005, available at <http://www.horizonorganic.com/newsreleases/2004/pasturestatement.html> (last visited on May 1, 2005) (on file with author).

184. Organic Consumers II, *supra* note 183.

185. Elizabeth Weise, ‘Organic’ Milk Needs a Pasture USDA Ruling on Grazing is Latest Round in Debate, U.S.A. TODAY, Mar. 9, 2005, at 8D; Martin, *supra* note 4.

186. Raabe, *supra* note 169.

187. *Id.*

dairy farmers in the Northeast to convert to organic production.¹⁸⁸ Horizon claimed the company was “having difficulty meeting customer demand for its products,” and was hoping to recruit farmers from the Northeast to help meet the rising demand.¹⁸⁹

D. Recent NOSB Discussion on Pasture Access for Ruminants

The NOP and the NOSB went into their scheduled meeting in February 2005 with the question of pasture requirements for organic dairy cows on the agenda.¹⁹⁰ One of the first news stories, covering the February meeting proclaimed, “[t]he first round has gone to the grazers. The [NOSB] recommended to the USDA that organic rules be revised to make it clear that organic milk can come only from cows that graze in pastures during the growing season.”¹⁹¹ This news story, however, was issued before any result of the meeting had been comprehended by the organic community. Recommendation and guidance documents resulting from the February 2005 meeting were not issued by the NOSB until March 18, 2005.¹⁹² The issuance of these documents was the beginning to a long process of change in the USDA regulations that may take years to complete.

The notice for the February 2005 meeting stated that the “Livestock Committee [of the NOSB] will submit a draft guidance document for [the NOSB’s] consideration on the requirements for access to pasture for ruminants.”¹⁹³ There were actually two guidance documents presented by the Livestock Committee at the meeting: the first was in the form of a redlined

188. Ted Shelsby, *Dairies Consider Organic Future on the Farm*, BALTIMORE SUN, Mar. 6, 2005, at 7G.

189. *Id.*

190. National Organic Standards Board Meeting, available at <http://www.ams.usda.gov/nosb/meetings/0205agenda.html> (last visited Apr. 3, 2006).

191. Elizabeth Weise, *‘Organic’ Milk Needs a Pasture*, USA TODAY, Mar. 9, 2005, at 8D.

192. USDA, FORMAL RECOMMENDATION BY THE NATIONAL ORGANIC STANDARDS BOARD TO THE NATIONAL ORGANIC PROGRAM, (Mar. 18, 2005), NOSB Recommendation for Rule Change, Pasture Requirements for the National Organic Program, adopted Mar. 2, 2005, available at <http://www.ams.usda.gov/nosb/FinalRecommendations/Feb05/PastureRec.pdf> (last visited Mar. 1, 2006) [hereinafter Rule Change]; and USDA, Formal Recommendation by the National Organic Standards Board to the National Organic Program, (Mar. 18, 2005), NOSB Item for Public Comment, available at <http://www.ams.usda.gov/nosb/FinalRecommendations/Feb05/PastureGuidance.pdf> (last visited Mar. 1, 2006) [hereinafter Recommended Guidance].

193. Agricultural Marketing Service, Notice of Meeting of the National Organic Standards Board, 70 Fed. Reg. 7224 (Feb. 11, 2005).

version of 7 C.F.R. § 205.239,¹⁹⁴ and the second involved guidance language for interpreting that same section of the organic regulations.¹⁹⁵

In the first guidance document, the Livestock Committee suggested making the regulation stronger by removing, from section 205.239, the vague and somewhat meaningless requirement that ruminants should have “access to pasture,” and replacing it with more substantial, but perhaps equally vague, language.¹⁹⁶ Where “access to pasture for ruminants” once was, the proposed rule change placed the phrase “[r]uminant animals grazing pasture during the growing season.”¹⁹⁷ If this change were implemented into the Code of Federal Regulations, the regulation would read, “The producer of an organic livestock operation must establish and maintain livestock living conditions which accommodate the health and natural behavior of animals, including: . . . Ruminant animals grazing pasture during the growing season.”¹⁹⁸ The proposed rule change did not provide a definition of “growing season,” but did say that the new requirement applied during “all stages of life except: a) birthing; b) dairy animals up to 6 months of age and c) beef animals during the final finishing stage, not to exceed 120 days.”¹⁹⁹ The guidance document also included a special note saying, “[l]actation of dairy animals is *not* a stage of life under which animals may be denied pasture for grazing.”²⁰⁰

After considering the draft guidance document submitted by the Livestock Committee, the NOSB voted 13 to 1 to adopt the draft guidance and to replace the “access to pasture for ruminants” language of the regulation with the new, more substantial language.²⁰¹ This adoption by the NOSB is, however, limited in power. The NOSB website makes it clear that “[r]ecommendations made by the NOSB are not official policy until they are approved and adopted by USDA.”²⁰²

Directly after voting on the draft guidance document, the NOSB heard a motion to submit a different guidance document regarding

194. 7 C.F.R. § 205.239(a)(1)–(3), *supra* note 83; USDA, National Organic Standards Board Meeting Summary Feb. 28-Mar. 3, 2005, at 8 *available at* <http://www.ams.usda.gov/nosb/MeetingMinutes/FebMarch05/febMarchMeetingSummary.pdf> (last visited Mar. 1, 2006) (hereinafter February Meeting Summary).

195. Rule Change, *supra* note 192; Recommended Guidance, *supra* note 192.

196. February Meeting Summary, *supra* note 194, at 8.

197. *Id.*

198. 7 C.F.R. § 205.239(a)(1)–(3), *supra* note 83; Rule Change, *supra* note 192.

199. *Id.* See also Rule Change, *supra* note 192.

200. February Meeting Summary, *supra* note 194, at 8. See also Rule Change, *supra* note 192.

201. *Id.*

202. National Organic Standards Board homepage, <http://www.ams.usda.gov/nosb/index.htm> (last visited Mar. 28, 2006).

“Recommendation for Guidance Pasture Requirements” to public comment.²⁰³ This second guidance document was created to help certifying agents interpret the new pasture requirements and elaborated on the term “growing season” contained in the proposed rule change.²⁰⁴ This document called for public comment on what constitutes “appropriate pasture conditions,” but also asked more specifically for advice about whether “the text below should be recommended to the NOP for rule change.”²⁰⁵ The “text below” included:

Ruminant livestock shall graze pasture during the months of the year when pasture can provide edible forage. . . . For livestock operations with ruminant animals, the operation’s Organic System Plan shall describe: 1) the amount of pasture provided per animal; 2) the average amount of time that animals are grazed on a daily basis; 3) the portion of the total feed requirement that will be provided from pasture; 4) circumstances under which animals will be temporarily confined; and 5) the records that are maintained to demonstrate compliance with pasture requirements.”²⁰⁶

All of these proposed rule changes and guidance documents somewhat fulfill the news article’s prediction—“the first round has gone to the grazers.”²⁰⁷ The USDA, however, had not yet approved the NOSB’s proposals.

The edited version of section 205.239 was one of the first things addressed by the NOP when it joined the NOSB meeting in August 2005.²⁰⁸ The NOP program development director stated, “the [NOSB’s] recommendation lacked a clear regulatory objective and . . . had numerous ambiguities.”²⁰⁹ The development director also said “[w]e want to make sure the NOSB and the NOP are on the same page.”²¹⁰ Mr. Kastel, of Cornucopia, opined that “the dairy community is very disappointed in this delay,” further stating that there “is great documentary evidence that supports the position of the board.”²¹¹ Meanwhile, the NOSB had a somewhat neutral reaction to the NOP’s action. The NOSB chairman said, “there was more progress than

203. *Id.*

204. Recommended Guidance, *supra* note 192.

205. *Id.*

206. *Id.*

207. Weise, *supra* note 191.

208. Stephen Clapp, *National Organic Board Deals with Pasture and Synthetics Issues*, FOOD CHEMICAL NEWS, Aug. 22, 2005, No. 28, Vol. 47, at 1. See also USDA, FORMAL RECOMENDATION BY THE NATIONAL ORGANIC STANDARDS BOARD TO THE NATIONAL ORGANIC PROGRAM, (August 17, 2005), Guidance for interpretation of § 205.239(a)(2), available at <http://www.ams.usda.gov/nosb/FinalRecommendations/Aug05/PastureGuidance.pdf> (last visited Mar. 28, 2006).

209. Clapp, *supra* note 208.

210. *Id.*

211. *Id.*

we've ever had before in the feedback loop . . . [w]e can't expect every one of our recommendations to be adopted."²¹²

One of the outcomes of the August meeting was a definition for "growing season."²¹³ The NOSB created the definition to reflect public comment received after the February meeting.²¹⁴ The new guidance document defined "growing season" as "the time of year of pasture growth from natural precipitation or irrigation."²¹⁵ Grazing requirements have already been given priority on the agenda for the next NOSB meeting to take place in April of 2006.²¹⁶

E. A 2005 Rider May Have Reversed the Trend

The third challenge to the organic regulations took place in September and October 2005 (2005 rider), in much the same fashion as the first two.²¹⁷ The longevity of this sneak attack, however, was different. The Organic Trade Association²¹⁸ (OTA) had all of its weight behind the 2005 rider, and even though the organic community rebutted with "more than 300,000 letters and

212. *Id.*

213. *Id.* National Organic Standards Board, NOSB Final Recommendations, available at <http://www.ams.usda.gov/nosb/FinalRecommendations/FinalRecommendations.html> (last visited Mar. 28, 2006).

214. USDA, FORMAL RECOMENDATION BY THE NATIONAL ORGANIC STANDARDS BOARD TO THE NATIONAL ORGANIC PROGRAM, (Aug. 17, 2005), Guidance for interpretation of § 205.239(a)(2), available at <http://www.ams.usda.gov/nosb/FinalRecommendations/Aug05/PastureGuidance.pdf> (last visited Mar. 28, 2006).

215. Clapp, *supra* note 208. Another NOSB meeting took place in November of 2005, yet no recommendations from that meeting had been posted on the NOSB website nearly four months later. National Organic Standards Board, NOSB Final Recommendations, available at <http://www.ams.usda.gov/nosb/FinalRecommendations/FinalRecommendations.html> (last visited Mar. 2, 2006).

216. National Organic Standards Board Meeting, available at <http://www.ams.usda.gov/nosb/meetings/meetings.html> (follow "NOSB Meeting: April 2006: Agenda" hyperlink) (last visited Apr. 3, 2006).

217. Stephen Clapp, *Organic Consumers Mobilize Against Industry Rider to USDA Money Bill*, FOOD CHEMICAL NEWS, Oct. 17, 2005, No. 36, Vol. 47, at 2. See also Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act of 2006, Pub. L. No. 109-97, § 797(c) (2005).

218. The Organic Trade Association is a "membership-based business association that focuses on the organic business community in North America. OTA's mission is to promote and protect the growth of organic trade to benefit the environment, farmers, the public and the economy." Organic Trade Association homepage, available at <http://www.ota.com> (last visited Mar. 28, 2006). The Organic Trade Association represents many of the food industry giants (i.e., Dean Foods and Kraft) who have recently become players in the expanding organic market. Julie Deardorff, *The Organic Label Just Won't Stick if Feds Keep This Up*, CHICAGO TRIBUNE, Nov. 27, 2005, at C9.

phone calls to members of Congress,” a House-Senate conference approved the bill.²¹⁹

Opinion was divided on how the 2005 rider affected the organic regulations. A majority of the popular press was critical of the 2005 rider, claiming it significantly changed the organic regulations in two ways: 1) “it weaken[ed] organic standards because it reverse[d] the Harvey court decision that banned the use of synthetics;” and 2) it gave the U.S. Department of Agriculture “the power to approve new synthetic substances if no organic substitute is available, *without* getting a review from the [NOSB].”²²⁰ These two changes, however, had no effect on the organic dairy regulations. A less controversial portion of the 2005 rider addressed the seventh count of Arthur Harvey’s complaint and the organic dairy regulations.²²¹

Some critics said that the seventh count of the Harvey complaint, dealing with the dairy herd conversion regulations, was also “completely reverse[d]” by the 2005 rider passed by Congress.²²² Paula Dinerstein, attorney for Arthur Harvey, disagreed.²²³ All groups did agree, however, that the 2005 rider had some effect on the First Circuit’s ruling on dairy herd conversion.²²⁴ One change involved trimming the total dairy conversion period from four years down to three years.²²⁵ The other, more troubling change affected the manner of treatment for dairy animals even after conversion.²²⁶

Pursuant to the OFPA regulations after the *Harvey* decision, it would take a dairy farmer converting from traditional farming methods to organic dairy production a total of four years to complete the process.²²⁷ This four-year

219. Stephen Clapp, *Organic Industry Rider Leaves Bitter Aftertaste*, FOOD CHEMICAL NEWS, Oct. 31, 2005, No. 38, Vol. 47, at 24 [hereinafter Clapp II].

220. Deardorff, *supra* note 218 (emphasis added).

221. Paula Dinerstein, *Impact of the Harvey v. Johanns Decision—and the OTA Rider on Organic Requirements and Labeling*, at 6–7 available at http://www.sustainableagriculture.net/OTA_impact.pdf (last visited Mar. 13, 2006). See also THE NATIONAL ORGANIC PROGRAM, IMPACT OF HARVEY V. JOHANNS AND RESTORING THE NOP TO PRE-LAWSUIT STATUS, A REPORT TO CONGRESS (Mar. 2006) at 2, 20 available at http://www.ams.usda.gov/nop/NOPCongressStudy1_06_06.pdf (last visited Mar. 28, 2006) [hereinafter NOP Impact].

222. Clapp II, *supra* note 219. See also Joan Murphy, *USDA to Publish Plan for Complying with Harvey v. Johanns*, FOOD CHEMICAL NEWS, Nov. 28, 2005, No. 42, Vol. 47, at 1.

223. Dinerstein, *supra* note 221 at 7.

224. *Id.* See also Trudy Bialic, *Saving Organic Standards: Are They Really Under “Sneak Attack?”* available at http://www.pccnaturalmarkets.com/issues/organic/nos_saving_standards.html (last visited Mar. 13, 2006).

225. NOP Impact, *supra* note 221. See also Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act of 2006, Pub. L. No. 109–97, § 797(c) (2005).

226. Dinerstein, *supra* note 221 at 8.

227. *Id.* See also NOP Impact, *supra* note 221 at 20.

period was the result of three years to convert pasture to organic, and a fourth year to convert the dairy product to organic.²²⁸ After the *Harvey* decision, the dairy cow producing the dairy product had to be fed 100% organic food (including pasture) for at least one year before the dairy product could be labeled USDA Organic.²²⁹ The 2005 rider, instead, allowed for dairy farmers to begin grazing dairy cattle on pasture in the third year of conversion. This new rule trimmed the fourth year from the dairy conversion process.²³⁰

The more troubling aspect of the 2005 rider with regard to organic dairy herd management seemed to allow conventional treatment of organic dairy animals up to one year before the dairy product from the animal receives the USDA Organic label.²³¹ This aspect of the 2005 rider is in stark contrast to the previous regulation which provided, "once an entire, distinct herd has been converted to organic production, all dairy animals shall be under organic management from the last third of gestation."²³² Surprisingly, this aspect of the 2005 rider did not receive the media attention given the other aspects.

The organic community is still absorbing the shock caused by the passing of the 2005 rider, but this third attack on the organic regulations has been more permanent than the previous two.

IV. ANALYSIS

One thing is clear from the previous sections of this Comment: organic regulations under OFPA remain in a state of formation and flux. This section will set out reasons why this flux should end with the organic regulations of livestock strictly construed consistent with natural behavior of the regulated animals. Regulatory language will be used to show that a strict interpretation focusing on the natural treatment of livestock is the only interpretation consistent with OFPA regulations. Principles of policy and consumer expectation will provide support for this natural statutory interpretation as well. It will be made clear that consumers are justified in believing the USDA organic label indicates more humane and natural treatment of USDA organic livestock and that the language of the OFPA regulations encourages such a belief. Another belief, held by some organic consumers, that humane and natural treatment of livestock results in a more healthful product will also be

228. NOP Impact, *supra* note 221 at 20.

229. *Harvey v. Veneman*, 396 F.3d 28, 43–44 (1st Cir. 2005).

230. Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act of 2006, Pub. L. No. 109–97, § 797(c) (2005).

231. Dinerstein, *supra* note 221 at 8.

232. 7 C.F.R. § 205.236(a)(2)(iii). See also Dinerstein, *supra* note 221 at 8.

supported. Finally, it will be argued that these logical policy considerations force a consistent interpretation of OFPA regulations.

The old catch-phrase “you are what you eat” probably has more to do with consumer opinion about organic produce than the initial supporters of OFPA may have envisioned. The life of a cow raised according to the organic regulations is starkly different from that of the same animal raised in the contemporary factory-farm. The most basic difference may lie in the diet of the two animals. A cow raised in strict compliance with OFPA regulations gains much of its nutrition while grazing and roaming about on organic pasture.²³³ Meanwhile, a cow in a conventional factory-farm is confronted with any number of things at the trough (i.e. nonruminant animal protein, crushed corn, grain, protein supplement, etc).²³⁴ The effect of such a diet on the conventionally raised cow creates health problems, such as feedlot bloat²³⁵ and acidosis,²³⁶ that cows raised on pasture will likely never experience.²³⁷ Of these two animals, it does not take a scientist to figure out which is healthier for the consumer. Hence, as consumers are becoming more and more aware of farming practices, the natural, organically raised animal is becoming an increasingly popular choice.²³⁸ And the differences do not stop with the animals’ diet.

The numerous unambiguous references to “pasture” and “exercise” in the OFPA regulations also promote the consumer’s image of organic

233. Analisa Nazareno, *Consumers, Eager to Avoid Mad Cow Disease, Are Increasing Demand for Organically Grown Beef*, SAN ANTONIO EXPRESS-NEWS, Jan. 24, 2004, at 10H.

234. Michael Pollan, *Power Steer*, N.Y. TIMES, Mar. 31, 2002, at 44, available at <http://www.mindfully.org/Food/Power-Steer-Pollan31mar02.htm> (last visited Mar. 28, 2006).

235. Feedlot bloat occurs “when [the cow’s] diet contains too much starch and too little roughage.” This high starch content causes the animal’s rumen to basically shut down and “a layer of foamy slime that can trap gas forms in the rumen.” The gas bubble grows until it is pressing against the animal’s lungs, causing pain and eventually suffocation. *Id.*

236. Acidosis occurs as the result of the normally pH neutral rumen being affected by the acid content of the cow’s corn-rich diet. The end result of acidosis is a severe form of what human’s know as heartburn, and acidosis, if left untreated, can also result in death of the animal. *Id.*

237. *Id.* In fact, cows are herbivores and wouldn’t even look at grain as a possible nutrient source, let alone other animals. *Id.*

238. This shift in consumer interest is exemplified in a number of statistics, but perhaps the greatest indicator is the growth of the organic market. The organic food industry’s worth in 2004 was \$11 million with 73 percent of grocers carrying organic selections and expert predictions \$30.7 billion in annual profits for the organic industry by 2007. See Damien Cave, *Now, She’s Organic (That’s A Plus)*, N.Y. TIMES, Aug. 1, 2004, at 45; Ness, *supra* note 52, at A1; Hyman, *supra* note 5, at 1719; Nicholas, *supra* note 3, at 278. See also Caragh McLaughlin, Senior Brand Manager, Horizon Organic, *Challenges Facing the Organic Milk Industry*, Feb. 17, 2006, available at <http://www.dairyline.com/DPW/organic%20outlook.pdf> (last visited Mar. 13, 2006).

cows—outdoors on grassy pastures, able to walk and meander about.²³⁹ This too is in stark contrast to the confined animal feeding operations discussed above and the images such a feeding operation creates in the mind of the consumers. Additionally, the healthcare provided for organic cows versus conventionally raised cows is quite different. In the OFPA regulations, the healthcare provision mandates “preventive livestock health care practices” and specifically mentions selection of animals “with regard to suitability for site-specific conditions” and “establishment of appropriate . . . pasture conditions . . . to minimize the occurrence and spread of diseases and parasites.”²⁴⁰ Due to the diet problems of feedlot bloat and acidosis, among other problems, the rate of illness at the confined-feeding operation is much higher than on a farm where cows graze on pasture. The difference is so severe, a confined-feeding operation is likely to add antibiotics to the food.²⁴¹ The artificial diet of factory-farmed cows is so much the source of illness that one veterinarian working at such an operation has stated, “if you gave [the cows] lots of grass and space . . . I wouldn’t have a job.”²⁴² As a result of the publicity received by the organic food market in recent years and the growing interest in organic produce, information about agricultural practices, such as those discussed above, have become readily available to the consumer. Therefore, the belief that USDA organic label indicates a more natural product is a reasonable belief to be held by the consumer.

Although it is clear from the legislative history of OFPA the statute was not designed to make scientific judgments about whether organically produced food items are more healthful or nutritious than the non-organic counterparts,²⁴³ studies, often foreign to the United States, find the problems with hormones and residue chemicals to be numerous.²⁴⁴ Hence, the United States continues to sanction the use of synthetics such as bovine growth hormone, while every other major country has banned its use.²⁴⁵ As a result,

239. National Organic Program, 7 C.F.R. §§ 205.237(a), 205.238(a)(3)–(4), 205.239(a)(1), (2), (4)(i) (2005).

240. 7 C.F.R. § 205.238(a)(1), (3).

241. Pollan, *supra* note 234.

242. *Id.*

243. S. REP., *supra* note 24.

244. Susan Gilbert, *Fears Over Milk, Long Dismissed, Still Simmer*, N.Y. TIMES, Jan. 19, 1999, at F7 (contrasting the findings of one Food and Drug Administration study, commissioned by Monsanto, that found “no toxicologically significant changes . . . in rats that ingested [bovine growth] hormone” with a Canadian Government study finding “health effects that had not been cited in the [Monsanto] study”). See also Pollan, *supra* note 234.

245. The issues surrounding bovine growth hormone and other agricultural chemicals are far beyond the scope of this Comment. The scientific work on the agricultural use of hormones, pesticides and herbicides is too great to synthesize here. This argument focuses on the belief held by the public

this more healthful and nutritious view of organic food products is the one chosen by a majority in the growing group of organic produce consumers in the United States.²⁴⁶

Despite the increasing attention received by organic food from the public, many consumers remain unaware of the differences between organic products and conventional products of the same kind. Those consumers would easily be able to decipher the emphasis on natural treatment of animals contained in the OFPA regulations. The regulations, after all, are not discrete about this element of organic certification when they state, “[t]he producer of an organic livestock operation *must* establish and maintain livestock living conditions which accommodate the health and natural behavior of animals.”²⁴⁷ Given that language, it seems logical, for instance, that an organic cow should be provided with its natural choice of food—fresh, green pasture. In fact, it would be hard to formulate a contrary argument.

V. PROPOSED RESOLUTION

The USDA should use the opportunity presented by the current debate over organic dairy, spurred by Cornucopia’s formal complaints and the *Harvey* case, as an opportunity to continue the precedent of strict interpretation of OFPA regulations. By strictly construing the organic regulations and setting high standards for organic farmers to follow, a true distinction between organic foods and non-organic foods will remain strong. If leeway instead is granted, to either the factory-farm groups or the small-scale farming community, the organic regulations will no doubt become skewed and perhaps meaningless.

The USDA, NOP and NOSB should take an additional step toward strict interpretation with its reaction to the 2005 rider, the *Harvey* decision and Cornucopia complaints. The need for a more consistent theme to help guide regulators and producers in construing OFPA regulations is evident in the battles currently taking place between the organic factory-farming corporations and the small-scale organic farms. The regulations provide a theme ready for this consistent interpretation with respect to livestock in 7

rather than substantiating on the basis of that belief. *Id.*

246. Geoffrey Cowley, *Certified Organic; Stamp of Approval: New Government Rules Will Define ‘Organic,’* NEWSWEEK, Sept. 30, 2002, at 50. See also Michelle T. Friedland, *You Call That Organic?—The USDA’s Misleading Food Regulations*, 13 N.Y.U. ENVTL. L.J. 379, 409–10 (2005).

247. 7 C.F.R. § 205.239(a) (emphasis added).

C.F.R. § 205.239.²⁴⁸ The USDA, NOP, and NOSB should acknowledge and give great weight to the “accommodate the health and *natural behavior* of animals”²⁴⁹ language of the regulations when addressing the current attacks on the organic regulations.

Initial recommendations of the NOSB, in February and August of 2005, do seem to give great deference to the health and natural behavior language. By mandating that ruminant animals must be “grazing pasture during the growing season,”²⁵⁰ NOSB takes a step in the right direction. The definition of growing season, however, may allow the organic farmers who were abusing these regulations in the first place, to again explain away their lack of pasture. For example, what exactly is the growing season in the arid section of Colorado where the farm Cornucopia first attacked is located?²⁵¹

Continued reference to natural behavior by the NOSB will send a clear message to the USDA and the organic livestock industry that challenges to the organic regulations, with regard to livestock, will be measured by how closely the production’s treatment of animals parallels that animal’s “natural behavior.”²⁵² This interpretation of the regulations is consistent both with the language of OFPA’s implementing regulations and the currently held beliefs of many organic consumers, as discussed in the analysis section above. Therefore, reinforcement of this natural treatment language from the NOSB would send a clear message to the USDA and organic producers for future questions regarding organic certification of livestock production facilities of any size.

The USDA and NOP must also give the NOSB respect and heed the NOSB’s recommendations on any changes to the organic regulations. Recently, the Agricultural Marketing Service²⁵³ (AMS) has been accused of giving priority to establishing the NOP rather than “establishing a strong working relationship with the [NOSB].”²⁵⁴ The AMS has also recently been

248. National Organic Program, 7 C.F.R. § 205.239 (2005) (stating, “The producer of an organic livestock operations must establish and maintain livestock living conditions which accommodate the health and natural behavior of animals”).

249. *Id.* (emphasis added).

250. Rule Change, *supra* note 192.

251. Organic Consumers, *supra* note 154.

252. *Id.*

253. The marketing service of the USDA. The Agricultural Marketing Service employs specialists “who provide standardization, grading and market news services” for the different agricultural commodity programs, such as Livestock and Seed. Agricultural Marketing Service, Overview of Programs, available at <http://www.ams.usda.gov/admin/overview.htm> (last visited Mar. 5, 2006).

254. Stephen Clapp, *National Organic Program Faces Court Ruling*, FOOD CHEMICAL NEWS, Aug. 8, 2005, No. 26, Vol. 47, at 1.

called out on failing to act “on 26 recommendations from the [NOSB].”²⁵⁵ It is clear that the NOSB interpretations and recommendations alone will not suffice to carry out the true letter of the OFPA. The entire USDA should give the NOSB the respect it deserves and follow not only the NOP regulations, but also the legislative history of the OFPA which referred to the NOSB as an “essential advisor.”²⁵⁶

VI. CONCLUSION

The natural-treatment theme of the OFPA regulations governing organic livestock production was not included by accident. Consumers have a reasonable belief that organic produce is raised in a more natural and humane way. These same consumers are justified in their belief that the natural treatment of the livestock results in a more healthful end-product. Consequently, the organic consumer relies on products bearing the USDA Organic label to be more healthful than the alternative, conventionally raised product. For these reasons, the USDA and NOP should continue the established precedent of strict interpretation of OFPA regulations. Finally, when an interpretation question arises in the OFPA context, legislators and courts alike should err on the side of a natural interpretation.

255. *Id.*

256. S. REP. NO. 101-357, at 650-51 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4656, 4950, *supra*, note 27.