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# OF AFFECTED ACRES AND ALTERNATIVE MARKETS: WHICH WAY FOR ORGANIC FARMERS?

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## **I. THE MORE THINGS CHANGE . . .**

Organic agriculture is frequently dismissed as a nostalgic, but misguided, attempt to return to the days of our grandparents and great-grandparents. Nearly as frequently, it is dismissed as new-fangled, untested, and too risky. Yet many of the issues that organic farmers seek to address would be recognizable to our grandparents and great-grandparents.

Organic farmers have concerns about integrity—that's not too different from concerns about misbranding, adulteration, and plain old fraud. Organic farmers and their advocates ask, "*Who owns organic?*"—that's not too different from concerns about trusts, monopoly and monopsony power, and price-fixing. Organic farmers are concerned about sustainable production and distribution—that's not too different from concerns about soil conservation, clean water and clean air. Organic farmers are concerned about a fair return on investment—that's not too different from concerns about unequal bargaining power and exploitation.

Most of all, organic farmers have a diversity of opinions about where organic agriculture should go next. Should the focus be on converting as many acres as possible to organic production? Or should the focus be equally on building alternative markets and local and regional food systems? Or should the focus be on globalization at the grass roots, with an emphasis upon fair trade principles here and abroad?

## **II. DEVELOPMENT OF THE NATIONAL ORGANIC PROGRAM IN THE UNITED STATES**

### **A. Pioneers of Organic Agriculture**

#### **1. Sir Albert Howard**

British soil scientist and agricultural advisor stationed in India who observed peasants cycling natural wastes as compost to enrich the soil. Author of *An Agricultural Testament*, 1940.

#### **2. Lady Eve Balfour**

One of the founders of The Soil Association in Great Britain. Author of *The Living Soil*, 1943.

#### **3. J.I. Rodale**

Founder of the Rodale Institute in Emmaus, Pennsylvania, 1947. Established *Organic Gardening* magazine.

## **B. Early Organic Certification Programs**

Organic food is a “credence good”—a good that cannot be visually distinguished from non-organic food by purchasers<sup>1</sup> (though a visit to the farm may help).

Private nonprofit organizations began developing organic certification standards in the early 1970s. 65 Fed. Reg. 80,548, 80,663 (2000).

A number of states passed laws on organic certification or labeling in the 1970s and 1980s. California, Oregon, Washington, and Texas were among the earliest.

Federal activity consisted primarily of studies. USDA produced a report entitled, *Improving Soils with Organic Wastes*, which was a report to Congress in response to § 1461 of the Food and Agriculture Act of 1977, Pub. L. No. 95-113. In addition, a USDA Study Team on Organic Farming produced a *Report and Recommendations on Organic Farming* in July, 1980.

## **C. Organic Foods Production Act of 1990 (OFPA)**

### **1. Forces Leading to Inclusion in 1990 Farm Bill**

Unusually, the Organic Foods Production Act was included in the 1990 Farm Bill, the Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, at the behest of members of the organic community.

The legislative history to the Act reflects some of the reasoning behind organic farmers’ and food processors’ search for federal government regulation of their activities. The history observes that, “Growth in the organic food trade has been hampered by a lack of consistent standards for production.” S. Rep. No. 101-357 at 289 (1990). The Senate report observed that this lack of consistency complicated commerce across both state and national lines. The legislative history also noted growing evidence of consumer fraud. Enforcement of state and private organic standards posed numerous challenges.

### **2. Purposes of OFPA**

OFPA’s stated purposes are (1) to establish national standards governing the marketing of certain agricultural products as organically produced products; (2) to assure consumers that organically produced products meet a consistent standard; and (3) to facilitate interstate commerce in fresh and processed food that is organically produced. 7 U.S.C. § 6501.

### **3. Definition of “Organic” under OFPA**

OFPA employs a circular definition of organic. A food is “organically produced” if it is produced and handled in accordance with the Act. 7 U.S.C. § 6502(14).

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<sup>1</sup> Elise Golan, *et. al.*, *Economics of Food Labeling*, Economic Research Service, USDA. Agricultural Economic Report No. 793 at 26 (2000).

Slightly more helpful is the definition of “organic plan.” 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 the Act. 7 U.S.C. § 6502(13).

Put another way, in order to be sold or labeled as an organically produced agricultural product, an agricultural product must be produced and handled in compliance with an organic plan agreed to by the producer and handler of the product and the certifying agent. 7 U.S.C. § 6504(3).

#### **4. Accreditation and Certification under OFPA**

OFPA requires the Secretary to establish a program to accredit private persons and governing state officials to provide third-party organic certification services to producers and handlers of agricultural products that have been produced or handled using organic methods as provided for in the Act. 7 U.S.C. § 6514. In its explanation of OFPA, the Senate Committee on Agriculture, Nutrition, and Forestry reported that OFPA “reflected the advice” of many members of the then-existing organic industry and “proposed a partnership between government and private organizations in standard setting and certification.”<sup>2</sup> S. Rep. No. 101-357 at 291 (1990) (emphasis added). This Committee also recognized that OFPA resulted in “a creative use of State and private organic farming programs,” and that the Act “breaks new ground for the Federal government and will require the development of a unique regulatory scheme.” *Id.* at 291, 293.

Accredited certifying agents are authorized to grant organic certification to farms and handling operations that the certifying agents determine meet the requirements of the Act and regulations. 7 U.S.C. § 6513(a). Under OFPA, a “certified organic farm” is “a farm, or portion of a farm, or site where agricultural products or livestock are produced, that is certified by the certifying agent under [OFPA] as utilizing a system of organic farming as described by [OFPA].” 7 U.S.C. § 6502(4).

#### **D. National Organic Program Proposed and Final Rules**

##### **1. The Rulemaking Process**

OFPA provided authority for the Secretary of Agriculture to issue proposed regulations to carry out the Act. 7 U.S.C. § 6521. The rules were to be published not later than 540 days

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<sup>2</sup> Part of the advice received from the existing organic industry, as reported by the Senate Committee, cautioned that “[r]ather than reinvent the wheel . . . [OFPA] should take advantage of the network of private organic certification organizations that [already] exist in nearly every State.” S. Rep. No. 101-357 at 291 (1990). In addition, the Senate Committee heard from these organic representatives of “the need to limit severely the Federal Government’s discretionary authority and involvement in this industry since the Government has little experience in this industry.” *Id.*

after enactment of the 1990 Farm Bill, which took place on November 28, 1990. A final rule was not published, however, until 2000, and did not take effect until 2002.<sup>3</sup>

#### **a. Role of the National Organic Standards Board**

As provided under OFPA, the Secretary appointed a National Organic Standards Board (“NOSB”) 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 Act. 7 U.S.C. § 6518(a). For insight into this process, *see* Michael Sligh, *Toward Organic Integrity: A Guide to the Development of US Organic Standards*, Rural Advancement Foundation International–USA (1997).

#### **b. Controversy Over “The Big Three”**

The first proposed rule was issued by USDA on December 16, 1997. 62 Fed. Reg. 62,850 (1997). It departed in many ways from the recommendations of the NOSB. Over 275,000 comments were submitted in response. Many of the comments were concerned with what came to be known as “the big three” issues in the proposed rule: (1) failures to prohibit use of genetically modified organisms, (2) use of industrial sewage sludge, and (3) use of irradiation.

A second proposed rule was issued by USDA on March 13, 2000. Over 40,000 comments were submitted in response.

The final rule was published on December 21, 2000, and took effect on October 21, 2002. 65 Fed. Reg. 80,548 (2000).

### **2. Definition of “Organic”**

The regulatory definition of “organic” is similar to the statutory one. 7 C.F.R. § 205.2. But the definition of “organic production” provides more insight. “Organic production” is defined as “a production system that is managed in accordance with the Act and [NOP regulations] to respond to site-specific conditions by integrating cultural, biological, and mechanical practices that foster cycling of resources, promote ecological balance, and conserve biodiversity. 7 C.F.R. § 205.2 “Organic production.”

### **3. Use of the Organic Label**

The term “organic” may only be used on labels and in labeling of raw or processed agricultural products, including ingredients, that have been produced and handled in accordance with the NOP regulations. 7 C.F.R. § 205.300(a). This requirement applies to all farming and handling operations with more than \$5,000 in annual sales of agricultural products which seek to sell or label their agricultural products as “organic.” 7 U.S.C. § 6505.

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<sup>3</sup> For insight into the challenges of advising clients during this interim period, *see* Suzanne Vaupel, *Advising Producers of Organic Crops*, 2 Drake Agric. Law J. 137 (1997).

The NOP regulations establish four tiers for use of the term organic:

- “100 percent organic.” Must contain 100 percent organically produced ingredients, excluding water and salt, by weight or fluid volume. May bear the “USDA Organic” seal. 7 C.F.R. §§ 205.301(a) and 205.303.
- “organic.” Must contain not less than 95 percent organically produced raw or processed agricultural ingredients, excluding water and salt. May bear the “USDA Organic” seal. 7 C.F.R. §§ 205.301(b) and 205.303.
- “made with organic [specified ingredients or food groups].” Must contain at least 70 percent organically produced ingredients. 7 C.F.R. §§ 205.301(c) and 205.304.
- some organic ingredients. Contains organic ingredients, but less than 70 percent organically produced ingredients. Organic ingredients may be identified on ingredient panel. 7 C.F.R. §§ 205.301(d) and 205.305.

#### **4. Overview of Requirements of the NOP for Farmers**

The Administrator of the Agricultural Marketing Service (“Administrator”) is responsible for exercising the functions of the Secretary under OFPA, including implementation and enforcement of the National Organic Program. 7 C.F.R. § 2.79(a)(8)(1)(iii).

##### **a. The National List**

In general, natural substances are allowed for use in organic farming, and synthetic substances are prohibited. But there are exceptions. The regulations set forth a National List of Allowed and Prohibited Substances that create exceptions to the general rules, as allowed under OFPA. 7 C.F.R. §§ 205.600 *et. seq.*; 7 U.S.C. § 6517.

##### **b. Crop Production**

The final rule set forth organic crop production and handling requirements. Among these requirements are requirements that the land in the organic system plan have had no prohibited substances applied for a period of three years immediately preceding harvest of the crop. 7 C.F.R. § 205.202. Farmers must have buffer zones to prevent contact with prohibited substances. Farmers must implement soil-building crop rotations, as well as other tillage and cultivation practices that prevent erosion and maintain or improve the soil. 7 C.F.R. § 205.203. Farmers must use organic seeds if they are commercially available. 7 C.F.R. § 205.204.

##### **c. Livestock Production**

Among other things, the regulations state that an organic livestock producer must provide conditions which allow for exercise, freedom of movement, and reduction of stress appropriate to the species. 7 C.F.R. § 205.238(a)(4). The regulations also state that the producer of an organic livestock operation must establish and maintain livestock living conditions which accommodate the health and natural behavior of animals, including access to the outdoors, shade, shelter, exercise areas, fresh air, and direct sunlight suitable



to the species, its stage of production, the climate, and the environment. 7 C.F.R. § 205.239(a)(1). The standards require access to pasture for ruminants.

#### **d. Recordkeeping**

The regulations impose substantial recordkeeping burdens. 7 C.F.R. § 205.103 provides:

(a) A certified operation must maintain records concerning the production, harvesting, and handling of agricultural products that are or that are intended to be sold, labeled, or represented as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s)).”

(b) Such records must:

(1) Be adapted to the particular business that the certified operation is conducting;

(2) Fully disclose all activities and transactions of the certified operation in sufficient detail as to be readily understood and audited;

(3) Be maintained for not less than 5 years beyond their creation; and

(4) Be sufficient to demonstrate compliance with the Act and the regulations in this part.

(c) The certified operation must make such records available for inspection and copying during normal business hours by authorized representatives of the Secretary, the applicable State program’s governing State official, and the certifying agent.

#### **e. Penalties for Violations of the Act**

There are penalties for knowing violations of the OFPA. Any operation that knowingly sells or labels a product as organic, except in accordance with the Act, shall be subject to a civil penalty of not more than \$ 10,000 per violation.<sup>4</sup>

### **5. For Further Information**

For a more comprehensive review of the requirements of the National Organic Program, *see* Harrison M. Pittman, *A Legal Guide to the National Organic Program* (National Agricultural Law Center, 2004). For a concise summary of the basic crop requirements, *see* Jim Riddle, *National Organic Program—USDA’s National Organic Rule*, Minnesota Continuing Legal Education, 12th Annual Agricultural Law Institute (2003). For a first person account of the legislative, rulemaking, and implementation processes, *see* Anna Anderson, *Lynn Coody, in Women and Sustainable Agriculture: Interviews with 14 Agents of Change 27* (2004).

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<sup>4</sup> 7 C.F.R. § 205.100(c)(1) (2004).

## **E. Other USDA Support for Organic Farming**

### **1. Certification Cost-Share**

The 2002 Farm Bill established a National Organic Certification Cost-Share Program to help farmers obtain certification. Farmers may receive federal assistance under the program for up to 75 percent of their certification costs, with a maximum payment of \$500 per person.<sup>5</sup>

### **2. Research**

A National Organic Research Policy Analysis conducted by the nonprofit Organic Farming Research Foundation (OFRF) aimed to “confront official neglect,” noting that at that time the Current Research Information System database, which contained data on approximately 30,000 research projects which received funding from USDA in 1995 and 1996, did not have a specific “organic” classification.<sup>6</sup> After taking elaborate measures to evaluate the “organic pertinence” of the projects, the study concluded that less than one-tenth of one percent of USDA’s research funding was dedicated to organic systems and working methods on experimental settings consistent with conditions on organic farms. The study recommended that USDA formally acknowledge that “organic farming can play a significant role in meeting the nation’s agricultural, environmental, and economic development needs” and begin a national initiative for organic farming research. Not content to wait for federal support for research and development, OFRF has made its own grants in support of organic farming research.<sup>7</sup>

The 2002 Farm Bill authorized \$3 million per year for an Organic Agriculture Research and Extension Initiative.<sup>8</sup>

Other relevant programs include the Sustainable Agriculture Research and Education Program (SARE Program) and Appropriate Technology Transfer to Rural Areas (ATTRA), which maintains a helpful website at [www.attra.org](http://www.attra.org).

### **3. Checkoff Exemption**

The 2002 Farm Bill authorized an exemption from research and promotion programs (popularly known as “checkoffs”) and marketing orders for commodities produced by persons who produce and market only 100 percent certified organic products.<sup>9</sup>

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<sup>5</sup> Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10606.

<sup>6</sup> Mark Lipson, *Searching for the “O-Word”: Analyzing the USDA Current Research Information System for Pertinence to Organic Farming*, Organic Farming Research Foundation, 1997.

<sup>7</sup> Jane Sooby, *Investing in Organic Knowledge: Impacts of the First 13 Years of the Organic Farming Research Foundation’s Grantmaking Program*, Organic Farming Research Foundation (2006).

<sup>8</sup> Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, Title VII, Subtitle B, § 7218 (codified at 7 U.S.C. § 5925b).

#### **4. Conservation Programs**

No USDA conservation programs specifically target organic farmers. Yet conservation programs may be utilized as a source of funds to make the transition to organic production, or as compensation for practices farmers have already adopted.

The Environmental Quality Incentives Program (EQIP) provides cost-share assistance for adoption of conservation practices.<sup>10</sup> Some states, including Minnesota, specifically include transition to organic production, as an eligible practice.

The Conservation Security Program (CSP) provides payments both for existing practices, and for adoption of new practices on part or all of a farm.<sup>11</sup> It is currently available only in specified watersheds each year.

### **III. MINNESOTA SUPPORT FOR ORGANIC AGRICULTURE**

Based upon information collected from organic certifiers active in the state, and upon participation in programs and services offered by the state to organic farmers, Minnesota has about 500 certified organic farmers.<sup>12</sup> Some of the programs and services offered by the state are discussed below.

#### **A. Memorandum of Understanding**

Minnesota's Commissioner of Agriculture has a statutory duty to promote opportunities for organic agriculture at the state level. Minn. Stat. § 31.94. Consistent with its statutory duties under Minnesota law, the Minnesota Department of Agriculture entered into a Memorandum of Understanding on Organic Agriculture with the USDA's Natural Resources Conservation Service (Minnesota), University of Minnesota, University of Minnesota Extension Service, and USDA's Farm Service Agency (Minnesota).<sup>13</sup> The memorandum expresses the aspirational commitment to work collaboratively to provide assistance to organic producers, processors/handlers and buyers/consumers in the state of Minnesota, as staffing and budget constraints may allow.

#### **B. Farm Business Management Tuition Cost-Share**

The Minnesota Department of Agriculture is offering an 80 percent cost-share on tuition for Farm Business Management courses offered through the Minnesota State Colleges and Universities. The tuition cost-share is available for certified growers in 2006, 2007, and 2008. Enrollment in the beginning of the calendar year is encouraged. The program is

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<sup>9</sup> Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10607. *See also* 70 Fed. Reg. 2,744 (2005); 70 Fed. Reg. 2,763 (2005).

<sup>10</sup> 7 C.F.R. pt. 1466.

<sup>11</sup> 7 C.F.R. pt. 1469.

<sup>12</sup> E-mail from Meg Moynihan, Minnesota Department of Agriculture, June 7, 2006.

<sup>13</sup> The Memorandum of Understanding, which was signed on April 21, 2003, is available at <http://www.mda.state.mn.us/esap/organic/mou.htm>.

apparently also intended to collect data on the economic performance of organic farming operations. For more information, see <http://www.mda.state.mn.us/esap/organic/bizmgmt.htm>.

### **C. Sustainable Agriculture Loans and Grants**

Organic farmers may be eligible for the sustainable agriculture loan program or a sustainable agriculture demonstration grant under Minn. Stat. §§ 17.115 and 17.116. The Department publishes an annual *Greenbook* to publicize the results under the demonstration grants.

### **D. Minnesota Grown and Organic Directories**

The Minnesota Department of Agriculture has for a number of years published a Minnesota Grown Directory. This year, it will publish a voluntary directory of organic farms. The directories are intended for use by consumers and other farmers.

### **E. Reports on the Status of Organic Agriculture**

Under Minn. Stat. § 31.94(b), the Commissioner is to report to the state legislature on the status of organic agriculture every two years. The most recent report posted on the Minnesota Department of Agriculture's web site is from 2003. It is available at [www.mda.state.mn.us/esap/organic](http://www.mda.state.mn.us/esap/organic). A 2006 report is in progress.

### **F. Organic Advisory Task Force**

In accordance with Minn. Stat. § 31.94(c), the Commissioner of Agriculture has appointed an Organic Advisory Task Force to advise him on policies and practices to improve organic agriculture in Minnesota.

### **G. Minnesota Organic Farmers' Information Exchange**

The Minnesota Department of Agriculture is also a sponsor of the Minnesota Organic Farmers' Information Exchange (MOFIE). MOFIE links farmers with experienced volunteer mentors to provide information needed to farm organically and successfully.

## **IV. EMERGING TRENDS IN ORGANIC AGRICULTURE**

### **A. The Tipping Point?**

The growth in organic farming and food production seems to be receiving a great deal of popular attention at present, most recently in books by Michael Pollan, *The Omnivore's Dilemma: A Natural History of Four Meals* (2006), and Samuel Fromartz, *Organics, Inc.: Natural Foods and How They Grew* (2006).<sup>14</sup>

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<sup>14</sup> Other books that touch on organic foods include books by Marion Nestle, *WHAT TO EAT* (2006) and *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* (2003); and Brian Halweil, *EAT HERE: HOME GROWN PLEASURES IN A GLOBAL SUPERMARKET* (2004).

Each of these two books posits an essential tension between the quest to make organic farming more widespread and the quest to maintain strict organic standards. The timing of the books may have been influenced by the decision in *Harvey v. Veneman*, 396 F.3d 28 (1st Cir. 2005), discussed below.

But the *Harvey* case capped several years of rumbling in the organic community. A precursor to Michael Pollan's book was a lengthy article in the *New York Times Magazine* that trained a skeptical eye on the growth of the organic food industry.<sup>15</sup> In 2003, a report of the Rural Advancement Foundation International–USA asked the question, “Can growth and expansion be balanced with the broadest principles of organic agriculture?”<sup>16</sup> Meanwhile, a widely circulated visual representation of the “Organic Industry Structure” depicted pioneering organic food companies that had been purchased by multinational food corporations.<sup>17</sup>

In recent months, the news that Wal-Mart intends to dramatically increase its organic offerings—while holding prices on these offerings to ten percent above prices for non-organic foods—has received much attention.<sup>18</sup> This is discussed further below.

## **B. The *Harvey* Case**

Arthur Harvey, an organic blueberry grower, organic inspector, and consumer of organic foods, objected that the regulations passed by USDA to implement the National Organic Program were inconsistent with the Organic Foods Production Act in nine different respects. He lost on all counts before the district court in Maine, and appealed on seven counts to the First Circuit Court of Appeals.<sup>19</sup> The three regulations the First Circuit addressed in Mr. Harvey's favor involved:

1. prohibition on use of synthetic ingredients in organic processed foods,
2. use of nonorganic ingredients in organic processed foods when those ingredients are commercially unavailable in organic form, and

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<sup>15</sup> Michael Pollan, *How Organic Became a Marketing Niche and a Multibillion Dollar Industry, Naturally*, N.Y. Times Mag., May 13, 2001.

<sup>16</sup> Michael Sligh and Carolyn Christman, *Who Owns Organic?: The Global Status, Prospects, and Challenges of a Changing Organic Market*, Rural Advancement Foundation International—USA, 2003.

<sup>17</sup> Phil Howard, *Consolidation in Food and Agriculture: Implications for Farmers and Consumers*, CCOF Magazine (a publication of California Certified Organic Farmers) at 2, 5 (Winter 2003-2004). Howard has updated the chart several times to account for subsequent consolidation.

<sup>18</sup> Michael Pollan, *Mass Natural: With Wal-Mart Going Organic, Where Will Organic Go?*, N.Y. Times Mag. 15 (June 4, 2006).

<sup>19</sup> In the interest of full disclosure, FLAG submitted a friend of the court brief with the Center for Food Safety on behalf of Rural Advancement Foundation International–USA (RAFI), Center for Food Safety, and Beyond Pesticides in the case. The court ruled in Mr. Harvey's favor on the three issues argued by the friend of the court brief.

3. allowance of a percentage of nonorganic feed to be fed to dairy animals during the transition to organic management.

Following the First Circuit ruling, the district court in Maine approved a consent judgment offered by the parties which allowed USDA roughly one year to complete rule-making in conformity with the court's ruling, and which allowed nonconforming goods to enter the marketplace for roughly two years from the date of the district court ruling, which was June 9, 2005.

The *Harvey* ruling caused a firestorm within the organic community. By the fall, the Organic Trade Association succeeded in having the Congressional conference committee add amendments to the 2006 Agricultural Appropriations Act to reverse the effects of *Harvey*, and arguably make other changes that extend beyond the scope of *Harvey*.<sup>20</sup> A final rule was just published on June 7, 2006.<sup>21</sup>

### **C. Tension in the Public-Private Partnership**

As noted above, the National Organic Program was conceived as a public-private partnership that would require a unique regulatory framework. As might be expected, there has been substantial tension as this framework has been erected.

Many of these tensions can be viewed as questions under the Administrative Procedures Act. If this is a partnership between the private and public sectors, and private and state certifying agents are accredited as experts in organic farming and food processing, does it make sense to defer to the agency? Do certifying agents act, or act solely, on behalf of USDA? Who has the authority to interpret the regulations that are implemented by certifying agents when they make organic certification decisions?

#### **1. Relations Between USDA and the NOSB**

By statute, the NOSB is to assist in development of standards for substances to be used in organic production and to advise the Secretary on any other aspects of implementation of the NOP. 7 U.S.C. § 6518(a). In some respects, the NOSB's role is similar to that of any board under the Federal Advisory Committee Act. But the NOSB's role has real teeth in it when it comes to the National List—the Secretary may not add substances to the National List unless they have first been recommended by the NOSB. 7 U.S.C. § 6517(d)(2). And the organic community has historically seen the NOSB as a primary vehicle for the participation in the private-public partnership.

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<sup>20</sup> Agriculture, Rural Development, Food and Drug Administration, and Related Agencies of 2006, Pub. L. No. 109-97 § 797 (Nov. 10, 2005). The events leading up to passage of the amendment in the Act are described in *Backlash: The Meaning of Organic* in ORGANICS, INC. 188 (2006).

<sup>21</sup> 71 Fed. Reg. 32803 (2006).

The Office of Inspector General has issued a report finding that the USDA had failed to develop protocols and conflict resolution methods for its work with the NOSB.<sup>22</sup> The volunteer NOSB has come up with literally dozens of recommendations to which the USDA has not responded.

One as-yet-unresolved source of tension is a policy statement by the NOP, proclaiming that some 300 substances on a list of “food contact substances” produced by the Food and Drug Administration were permissible for use in organic food handling, without review by the NOSB or inclusion on the National List.<sup>23</sup>

## 2. Relations Between USDA and Certifiers

Many certifying agents were critical of practices of the NOP during the start-up phase of the program. There is confusion about whether and how the NOP should seek to ensure consistency among certifiers. This boils down to the question of who has authority to interpret the regulations. If by definition an organic plan must be “agreed” to by the certifying agent, may the certifying agent freely interpret the regulations in the absence of a USDA interpretation? May USDA bind certifying agents through an interpretation that has not been subject to notice-and-comment rule-making? These are currently open questions—and resolving them through the administrative appeals process has proved challenging.

OFPA mandates that USDA provide an expedited administrative appeals process in which a person may challenge organic program decisions that are adverse to that person or are inconsistent with the national organic certification program. 7 U.S.C. § 6520. Under the NOP rules, appeals relating to organic certification and accreditation are heard under the Uniform Rules of Practice, 7 C.F.R. 1.131 *et seq.*, and not by the National Appeals Division. The appeal regulations, 7 C.F.R. § 205.681(a), explicitly provide that certifying agents may not appeal when the AMS Administrator sustains a farmer’s or handler’s appeal of the certifying agent’s denial of organic certification.<sup>24</sup>

Finally, because the role of certifying agents is so crucial to the success of the organic label, the drafters of OFPA provided for peer review as a double check on USDA’s

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<sup>22</sup> Office of Inspector General, Northeast Region, *Audit Report: Agricultural Marketing Service’s National Organic Program*, July 14, 2005, available at <http://www.usda.gov/oig/rptsaudits/ams.htm>.

<sup>23</sup> *Synthetic Substances Subject to Review and Recommendation by the National Organic Standards Board When Such Substances Are Used as Ingredients in Processed Food Products*, Dec. 12, 2002, available at <http://www.ams.usda.gov/nop/NOP/PolicyStatements/SyntheticSubstances.html>.

<sup>24</sup> FLAG represents a certifying agent seeking the right to appeal in *Massachusetts Independent Certification, Inc. v. Johanns*, Civ. No. 4:05-cv-40169, currently pending in federal district court in Massachusetts. The USDA Judicial Officer found that he had no jurisdiction over the certifying agent’s administrative appeal. *In re: Massachusetts Independent Certification, Inc.*, 2004 USDA LEXIS 11. Research revealed no other decisions by the Judicial Officer with respect to the NOP.

accreditation process.<sup>25</sup> Despite providing for one in the NOP regulations, USDA has not established a peer review panel. 7 C.F.R. § 205.509. USDA commissioned a one-time audit report of its accreditation practices from the American National Standards Institute. The ANSI report made many recommendations to improve implementation of the NOP.<sup>26</sup>

## **D. Genetically Modified Organisms (GMOs)**

### **1. GMOs as an “Excluded Method” in Organic Farming**

The regulations for the NOP state that the use of GMOs is “not considered compatible with organic agriculture.”<sup>27</sup> Thus, farmers who apply for or who have obtained organic certification may not use “excluded methods.”<sup>28</sup> An “excluded method” is defined as, “A variety of methods used to genetically modify organisms or influence their growth and development by means that are not possible under natural conditions or processes. . . .”<sup>29</sup> The NOP regulations give examples of excluded methods, including cell fusion, microencapsulation and macroencapsulation, and recombinant DNA technology (including gene deletion, gene doubling, introducing a foreign gene, and changing the positions of genes when achieved by recombinant DNA technology). The preamble to the final NOP regulations stated that the term “excluded methods” was chosen to reflect the overall emphasis of the NOP regulations upon the production and handling process, rather than upon the actual product.<sup>30</sup>

#### **a. Three-Year Transition Period Required**

As stated above, the NOP requires a three-year transition period during which no prohibited substance is applied prior to the harvest of an organic crop.<sup>31</sup> A prohibited substance is defined as, “A substance the use of which in any aspect of organic production or handling is prohibited or not provided for in the Act or the regulations of this part.”<sup>32</sup> The use of GMOs is prohibited under the regulations. Taken together, these regulations mean that any field or farm parcel from which harvested crops are intended to be sold, labeled, or represented as “organic” must not have had GMOs applied to it for a period of three years immediately preceding harvest of the crop.

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<sup>25</sup> 7 U.S.C. § 6516.

<sup>26</sup> <http://www.ams.usda.gov/nop/CertifyingAgents/ANSIReportInfo.html>.

<sup>27</sup> 7 C.F.R. § 205.2 “Excluded methods” (2004). The use of traditional breeding, conjugation, fermentation, hybridization, in vitro fertilization, or tissue culture are not excluded methods under the NOP regulations.

<sup>28</sup> 7 C.F.R. § 205.105(e) (2004).

<sup>29</sup> 7 C.F.R. § 205.2 “Excluded methods” (2004).

<sup>30</sup> 65 Fed. Reg. 80,548, 80,549 (2000) (prefatory comments).

<sup>31</sup> 7 U.S.C. § 6504(2); 7 C.F.R. § 205.202(b) (2004).

<sup>32</sup> 7 C.F.R. § 205.2 “Prohibited substance” (2004).



## **b. Use of Organic Seeds Required**

With few exceptions, organic farmers must use organically grown seeds, annual seedlings, and planting stock.<sup>33</sup> The only exception under which the use of prohibited substances is allowed is when the application of the materials is a requirement of federal or state phytosanitary regulations.<sup>34</sup>

## **2. Organic Farmers Must Take Steps to Prevent Contamination with Prohibited Substances, Including GMOs**

The National Organic Program is a “process-based” program.<sup>35</sup> This means that the focus of certifying agents is upon whether farmers who apply for organic certification are able to follow an organic system plan whose production practices are consistent with the Act and the regulations. In addition to refraining from the use of excluded methods themselves, organic farmers must demonstrate the use of reasonable steps to avoid contact with the products of excluded methods from other farms.<sup>36</sup>

### **a. Use of Buffer Zones Required**

Organic farmers must “[h]ave distinct, defined boundaries and buffer zones such as runoff diversions to prevent the unintended application of a prohibited substance to the crop or contact with a prohibited substance applied to adjoining land that is not under organic management.”<sup>37</sup> The rule does not specify precisely what is needed to prevent unintended application of a prohibited substance. For example, “buffer zone” is defined as:

An area located between a certified production operation or portion of a production operation and an adjacent land area that is not maintained under organic management. A buffer zone must be sufficient in size or other features (e.g., windbreaks or a diversion ditch) to prevent the possibility of unintended contact by prohibited substances applied to adjacent land areas with an area that is part of a certified operation.<sup>38</sup>

In general, organic farmers should strive to develop an organic system plan that takes site-specific conditions into account when developing buffer zones and other measures to prevent contamination of organic crops, and then seek the approval of their certifying agents.

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<sup>33</sup> 7 C.F.R. § 205.204 (2004); 7 U.S.C. § 6508(a).

<sup>34</sup> 7 C.F.R. § 205.204(a)(5) (2004).

<sup>35</sup> 65 Fed. Reg. 80,548, 80,556 (2000) (prefatory comments).

<sup>36</sup> 7 C.F.R. § 205.201(a)(5) (2004).

<sup>37</sup> 7 C.F.R. § 205.202(c) (2004).

<sup>38</sup> 7 C.F.R. § 205.2 “Buffer zone” (2004).

### **b. Split Operations Must Meet Certain Conditions**

Special challenges are posed for farmers with “split operations,” that is, an operation that produces or handles both organic and nonorganic agricultural products.<sup>39</sup> Either an entire farm or specific fields of a farm may be certified organic if:

1. the area to be certified has distinct, defined boundaries and buffer zones separating the land being operated through the use of organic methods from land that is not being operated through the use of such methods;<sup>40</sup>
2. the operators of the farm maintain records of all organic operations separate from records relating to other operations and make such records available for inspection;<sup>41</sup> and
3. appropriate physical facilities, machinery, and management practices are established to prevent the possibility of mixing organic and nonorganic products or a penetration of prohibited chemicals or other substances on the certified area.<sup>42</sup>

Farmers with split operations who plant GMO crops on the nonorganic portion of the farm will need to adhere strictly to these requirements.

### **c. Alerting Neighbors to Organic Status May Reduce Risk**

As a practical matter, one step that farmers can take to substantially reduce the risk of contamination is communicating with nearby farming operations about their organic production practices. This communication can take a variety of forms, from conversations over the back fence, to signs posted at farm boundary lines, to letters sent to the neighboring farms.<sup>43</sup> Any of these efforts should be documented in the organic system plan.

### **3. Does the Presence of GMOs Establish Noncompliance with Organic Requirements?**

Perhaps the largest question for many organic farmers is the question of accountability for “genetic drift.”<sup>44</sup> If the presence of GMOs is detected in the crops of an organic

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<sup>39</sup> 7 C.F.R. § 205.2 “Split operation” (2004).

<sup>40</sup> See 7 C.F.R. § 205.201(a)(5) (2004).

<sup>41</sup> See 7 C.F.R. § 205.103(b)(1) and (2) (2004).

<sup>42</sup> See 7 C.F.R. § 205.201(a)(5) (2004).

<sup>43</sup> What should be considered a neighboring farm for these purposes may depend upon the crop that the organic farm is trying to protect from contamination, how likely that crop is to cross-pollinate, how far the crop’s pollen is likely to travel, and the amount of wind in the area.

<sup>44</sup> Numerous law review articles address the problem of genetic drift. Among these articles are: Drew L. Kershen, *Of Straying Crops and Patent Rights*, 43 Washburn L.J. 575 (2004); Roger A. McEowen, *Legal Issues Related to the Use and Ownership of Genetically Modified Organisms*, 43 Washburn L.J. 611 (2004).

farmer, is this fact alone sufficient evidence of the farmer's noncompliance with organic requirements?<sup>45</sup>

**a. Presence of GMOs Triggers Investigation**

In general, a complaint that a farmer planted GMOs or a residue test that indicates the presence of GMOs triggers an investigation.<sup>46</sup> The preamble to the regulations refers to the presence of prohibited substances, which would include the products of excluded methods, as a "warning indicator" that would trigger an investigation but that would not necessarily indicate a violation of organic requirements.<sup>47</sup>

**b. The Question of Avoidability**

The question of when the presence of a GMO in a crop constitutes a violation of organic requirements is confusing. The regulations state that, in order to be sold or labeled as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))," the product must be produced and handled without the use of excluded methods.<sup>48</sup> This could raise the question of whether excluded methods were "used" if GMO pollen drifts onto a field planted with organic seed.

This question is implicitly answered in the following regulatory provisions:<sup>49</sup>

Any field or farm parcel from which harvested crops are intended to be sold, labeled, or represented as "organic," must:

...

(b) Have had no prohibited substances, as listed in § 205.105, applied to it for a period of 3 years immediately preceding harvest of the crop; and

(c) Have distinct, defined boundaries and buffer zones such as runoff diversions to prevent the unintended application of a prohibited substance to the crop or contact with a prohibited substance applied to adjoining land that is not under organic management.

This makes it clear that the key issue is state of mind. Did the farmer intend to plant GMOs? Did the farmer negligently allow GMO contamination?<sup>50</sup>

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<sup>45</sup> One unpublished case, *Campbell v. Ag Finder Iowa Nebraska*, 2004 Iowa App. LEXIS 531 (Iowa Ct. App. 2004) indicates that the presence of GMOs in a 1997 soybean crop precluded a farmer from obtaining organic certification from a private certifier in 1998. However, this was prior to the effective date of the NOP regulations, and thus provides little insight into what would happen in such a case today.

<sup>46</sup> 7 C.F.R. §§ 205.661 and 205.671 (2004).

<sup>47</sup> 65 Fed. Reg. 80,548, 80,628 and 80,632 (2000) (prefatory comments).

<sup>48</sup> 7 C.F.R. § 205.105(e) (2004). There is an exception for certain vaccines.

<sup>49</sup> 7 C.F.R. § 205.202 (2004).

#### **4. Consequences of Genetic Drift for Organic Farmers Beyond the NOP**

##### **a. Potential Lost Sales and Disputes with the Buyer**

For an organic farmer whose crop tests positive for the presence of genetically modified materials, potential loss of certification is not the only issue. In addition to the NOP standards, the farmer must meet any standards specified by the buyer. If the farmer and buyer enter into a contract for organic soybeans, for example, presence of GMOs may not be evidence of a per se breach of contract. However, if the contract specified that the crop must be GMO-free, the farmer may have some exposure.

##### **b. Liability and Patent Infringement Issues Related to Genetic Drift**

Few farmers want to bring legal action against their neighbors. But if GMO contamination causes serious economic harm to an organic farmer, the farmer may consider legal action to recover for the harm.<sup>51</sup> One policy approach some family farm organizations have advocated is to assign liability to the manufacturer of the seed. A bill which would have done this passed in the Vermont Senate and House of Representatives this year, but was vetoed by the governor.<sup>52</sup>

Indiana has acted to regulate suits by GMO seed manufacturers to enforce their patents.<sup>53</sup>

#### **E. Federal Disaster Assistance for Organic Farmers**

As with all farmers, natural disaster poses a significant threat to organic farmers. Some barriers to their participation in federal disaster assistance programs remain. Improving the accessibility and functionality of federal disaster assistance for organic farmers is important both to individual organic farmers, and may be crucial to restoring local and regional food systems when natural disaster strikes.

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<sup>50</sup> The preamble to the rule confirms this interpretation, stating, “When we are considering drift issues, it is particularly important to remember that organic standards are process based. Certifying agents attest to the ability of organic operations to follow a set of production standards and practices that meet the requirements of the Act and the regulations. This regulation prohibits the use of excluded methods in organic operations. The presence of a detectable residue of a product of excluded methods alone does not necessarily constitute a violation of this regulation. As long as an organic operation has not used excluded methods and takes reasonable steps to avoid contact with the products of excluded methods as detailed in their approved organic system plan, the unintentional presence of the products of excluded methods should not affect the status of an organic product or operation.” 65 Fed. Reg. 80,548, 80,556 (2000) (prefatory comments).

<sup>51</sup> The legal claims the organic farmer may have are discussed in David Moeller and Michael Sligh, *FARMERS’ GUIDE TO GMOs* (2004). Available at <http://www.flaginc.org/topics/pubs/arts/FGtoGMOs2004.pdf>.

<sup>52</sup> Vermont Bill S.18 (2006). The text of the bill can be found at <http://www.ruralvermont.org>.

<sup>53</sup> Ind. Code Ann. Chapters 15-4-13 and 15-4-14.

## **1. Limits on Availability of Crop Insurance for Organic Crops**

In general, crop insurance coverage for crops grown using organic farming methods is only available if there are actuarial tables with sufficient information to establish premium rates.<sup>54</sup> Coverage may also be obtainable under a written agreement. Crops covered are those grown on land included in the organic plan—certified organic acreage, transitional organic acreage, and buffer zone acreage must all be included in the organic farming practice unit.<sup>55</sup> The farmer may be required to produce evidence of organic certification.

Crop insurance for organic crops does not provide coverage for contamination of a crop by application or drift of prohibited substances.

## **2. Good Farming Practices**

Many disaster assistance programs award benefits only if the farmer followed “good farming practices.” Historically, organic farmers have been denied coverage for failure to follow good farming practices, even if they were following good organic farming practices. This is beginning to change.

### **a. Crop Insurance**

Since June, 2003, the Federal Crop Insurance Corporation has defined “good farming practices” as

Production methods utilized to produce the insured crop and allow it to make normal progress toward maturity and produce at least the yield used to determine the production guarantee or amount of insurance, including any adjustments for late planted acreage, which are: (1) for conventional or sustainable farming practices, those generally recognized by agricultural experts for the area; (2) for organic farming practices, those generally recognized by the organic agricultural industry for the area or contained in the organic plan.<sup>56</sup>

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<sup>54</sup> 7 C.F.R. § 457.8, Common Crop Insurance Policy, “37. Organic Farming Practices”; Crop Revenue Coverage (CRC) Insurance Policy, “37. Organic Farming Practices” (Policy No. 05-CRC-Basic).

<sup>55</sup> 7 C.F.R. § 457.8, Common Crop Insurance Policy, “37. Organic Farming Practices”; Crop Revenue Coverage (CRC) Insurance Policy, “37. Organic Farming Practices” (Policy No. 05-CRC-Basic). *See also* 7 C.F.R. § 457.8, Common Crop Insurance Policy, “34. Unit Division”; Crop Revenue Coverage (CRC) Insurance Policy, “2. Unit Structure” (Policy No. 05-CRC-Basic).

<sup>56</sup> 7 C.F.R. § 457.8, Common Crop Insurance Policy, “1. Definitions ‘Good Farming Practices’”; Crop Revenue Coverage (CRC) Insurance Policy, “1. Definitions ‘Good Farming Practices’” (Policy No. 05-CRC-Basic). The regulations further define “generally recognized” as meaning there is “no genuine dispute” about the farming practice. 7 C.F.R. § 457.8, Common Crop Insurance Policy, “1. Definitions ‘Generally recognized’”; Crop Revenue Coverage (CRC) Insurance Policy, “1. Definitions ‘Generally recognized’” (Policy No. 05-CRC-Basic).

Farmers may seek review of “good farming practices” determinations made by the insurance provider through a reconsideration process before FCIC.<sup>57</sup>

#### **b. Noninsured Crop Disaster Assistance Program (NAP)**

Under the Noninsured Crop Disaster Assistance Program, “good farming practices” are defined as “the cultural practices generally used for the crop to make normal progress toward maturity and produce at least the individual unit approved yield. These practices are normally those recognized by Cooperative State Research, Education, and Extension Service as compatible with agronomic and weather conditions.” 7 C.F.R. § 1437.3. The agency has indicated that this includes “alternative farming practices and innovations that are supported by data.” 71 Fed. Reg. 13,737 (2006).<sup>58</sup>

### **3. Coverage for Premium Prices**

An important issue for disaster assistance for organic crops concerns whether they are to be treated the same as other crops, or as separate crops, with coverage for organic premium prices if supported by data. The leading, albeit unpublished, case in this area is *Pringle v. United States of America*, 1998 U.S. Dist. LEXIS 19378 (E.D. Mich. 1998). The *Pringle* court held that USDA’s denial of a separate payment rate for organically grown beans under a crop loss disaster assistance program was arbitrary and capricious, in light of undisputed proof that buyers were willing to pay more for organic crops. USDA has subsequently promulgated regulations which prohibit providing assistance at a higher rate for crops grown using different cultural practices. 7 C.F.R. § 1480.12(d). These regulations continue to be challenged.<sup>59</sup>

#### **F. Organic Farmers Look at the Bottom Line(s)**

Many, but certainly not all, organic farmers view organic farming as both a philosophy and a method of farming. This may affect their management of the farming operation.

#### **1. Access to Credit**

One increasingly popular model for organic farms is Community Supported Agriculture, or CSA farms.<sup>60</sup> This model provides access to credit, distribution, and marketing all in one, since subscribers pay a fee at the beginning of the season, and receive a weekly

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<sup>57</sup> 7 C.F.R. § 400.98.

<sup>58</sup> For an unfavorable decision from the National Appeals Division reviewing the denial of NAP benefits for failure to follow “good farming practices,” see [http://www.nad.usda.gov/public\\_search.html](http://www.nad.usda.gov/public_search.html), case number 2005S000374.

<sup>59</sup> For a variety of decisions from the National Appeals Division reviewing a refusal by the Farm Service Agency to consider price premiums for organic crops when calculating payments under the Crop Disaster Program, see [http://www.nad.usda.gov/public\\_search.html](http://www.nad.usda.gov/public_search.html), case numbers 2004E000091, 2004E000539, and 2005E000971.

<sup>60</sup> For more information about CSAs, see Elizabeth Henderson with Robyn Van En, *SHARING THE HARVEST: A GUIDE TO COMMUNITY-SUPPORTED AGRICULTURE* (1999). For a list of CSA farms in the Twin Cities area, see <http://www.landstewardshipproject.org>.

share of fresh farm produce all season long. In this way, farmers have a cash stream early in the year, which enables them to spread out farm operating expenses. If yields are low, the subscribers share in the risk.

For most other farmers, however, access to timely, affordable credit is essential to success. One recent project undertaken by the Land Stewardship Project involved surveys and focus groups with farmers, lenders, and educators (such as extension agents) to discuss barriers to agricultural credit for sustainable and organic farmers.<sup>61</sup> The survey demonstrated that many lenders and even educators have limited familiarity with organic farming and organic markets, so that farmers who have prepared detailed business plans will be in a better position to secure financing.<sup>62</sup>

## **2. Whole Farm Planning: Business Management and The Triple Bottom Line**

Whole farm planning has been adopted by many organic farmers. It strives to consider the “triple bottom line,” asking whether a farming operation is ecologically sound, socially acceptable, and economically viable.<sup>63</sup> A practical workbook-style approach to whole farm planning is found in Building a Sustainable Business, sponsored by the Minnesota Institute for Sustainable Agriculture.<sup>64</sup> The principles of holistic resource management undergird the practice of whole farm planning. Holistic resource management can be a means to examine the potential benefits of various agricultural policies.<sup>65</sup>

## **3. Marketing and Building Regional Food Systems**

As hinted at above, an important debate within the organic community is whether to focus primarily on changes on farming methods (with a secondary focus on food processing methods) in promoting the spread of organic agriculture, or whether to carry along other values with the farming practices, such as an emphasis upon local food distribution to encourage lower energy consumption, as well as provide fresher foods and support local economies.

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<sup>61</sup> Caroline van Schaik, *Getting A Handle on the Barriers to Financing Sustainable Agriculture: The Gaps Between Farmers and Lenders in Minnesota and Wisconsin*, (2003) available at <http://www.landstewardshipproject.org>.

<sup>62</sup> For one decision from the National Appeals Division reviewing a loan denial from the Farm Service Agency submitted for the purposes of organic farming, see [http://www.nad.usda.gov/public\\_search.html](http://www.nad.usda.gov/public_search.html), case number 2005E000935.

<sup>63</sup> An accessible resource geared toward whole farm planning is Ron Macher, *MAKING YOUR SMALL FARM PROFITABLE* (1999). See also Allan Savory and Jody Butterfield, *HOLISTIC MANAGEMENT: A NEW FRAMEWORK FOR DECISION MAKING* (1998) and Allan Savory, *HOLISTIC RESOURCE MANAGEMENT: A MODEL FOR A HEALTHY PLANET* (1988).

<sup>64</sup> *BUILDING A SUSTAINABLE BUSINESS: A GUIDE TO DEVELOPING A BUSINESS PLAN FOR FARMS AND RURAL BUSINESSES* (2003).

<sup>65</sup> George Boody and Mara Krinke, *The Multiple Benefits of Agriculture: An Economic, Environmental & Social Analysis* (2001), available at <http://www.landstewardshipproject.org>.

Direct markets—such as farmers’ markets, farmstands, roadside stands, farm subscriptions, mail-order sales, and Internet sales—account for a significant portion of organic sales.<sup>66</sup> Though it was published in 1999, The Legal Guide for Direct Farm Marketing probably remains the best resource for farmers seeking legal information relating to marketing.<sup>67</sup> Some organic farmers would prefer not to be responsible for marketing their own products. Cooperatives and other producer associations may be attractive options for such farmers.<sup>68</sup>

Some data suggests a trend toward a lower percentage of organic sales through direct markets as mainstream markets become more open to organic foods.<sup>69</sup> To the extent the move to mainstream markets is accompanied by consolidation in the organic sector, concern about a repetition of economic patterns and practices that have diminished the independence and negotiating position of farmers generally, arises for organic farmers in particular.

### **G. An Elitist Niche?**

One of the oft-repeated complaints about organic food is that it costs too much, the implication being that it’s simply an elitist indulgence. Typically, the focus of the inquiry is upon the effect on those who buy organic food. But what about the effect upon those who grow it? Does organic farming appeal to a different kind of farmer?

#### **1. Farmers**

Lower input costs are one important factor that attracts some farmers to organic farming. For example, organic practices emphasize the importance of access to pasture for ruminants. Careful management of the pastures through rotational grazing and management intensive grazing can lower both feed costs and veterinary costs. In the 1990s in Wisconsin, dairy farms that emphasize grazing tripled, at the very same time that many dairy farms ceased operating.<sup>70</sup> The meaning of the NOP requirement that

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<sup>66</sup> Economic Research Service, Organic Farming and Marketing Briefing Room, Questions and Answers, *What is the size of the U.S. Market for organic foods?*, <http://www.ers.usda.gov/Briefing/Organic/Questions/orgqa5.htm> (citing survey data to show that direct markets accounted for between 17 and 22 percent of total organic sales during 1990-96). See also Erica Walz, *Final Results of the Fourth National Organic Farmers’ Survey: Sustaining Organic Farms in a Changing Organic Marketplace*, Organic Farming Research Foundation 48-52 (2004).

<sup>67</sup> Neil D. Hamilton, *THE LEGAL GUIDE FOR DIRECT FARM MARKETING* (1999). A shorter resource intended for farmers just beginning to direct market their products is Jill Krueger, *Before You Sign on the Dotted Line: Questions for Farmers to Ask Before Entering into a Direct Marketing Agreement* (2005), available at <http://flaginc.org/topics/Contracts/index.php>.

<sup>68</sup> Doug O’Brien, Neil D. Hamilton, et al., *THE FARMER’S LEGAL GUIDE TO PRODUCER MARKETING ASSOCIATIONS* (2005).

<sup>69</sup> Carolyn Dimitri and Catherine Greene, Economic Research Service, *Recent Growth Patterns in the U.S. Organic Foods Market*, Agriculture Information Bulletin number 777 (2002).

<sup>70</sup> Samuel Fromartz, *ORGANICS, INC.: NATURAL FOODS AND HOW THEY GREW* 220 (2006). Indeed, the Wisconsin Department of Trade, Agriculture, and Consumer Protection recently



organic ruminant livestock have “access to pasture” is currently the subject of an advance notice of proposed rulemaking, as well as a topic of heated debate.<sup>71</sup> A strict interpretation of “access to pasture” appears to be easier to meet by smaller family farms, especially those in the Midwest and Northeast. The demand for food that bears specific qualities is so great, that a variety of other label claims are also being developed within USDA, such as a new “grass-fed” label.<sup>72</sup>

This phenomenon can be seen in developing regions of the world as well. Vandana Shiva, prominent activist and director of India’s Research Foundation for Science, Technology, and Natural Resource Policy, has stated, “In India, the poorest peasants are organic farmers because they could never afford chemicals.”<sup>73</sup>

In a 2004 survey of organic farmers, 51 percent of respondents stated that they had transitioned from conventional farming methods.<sup>74</sup> The trend is that more organic farmers are coming from the ranks of existing farmers, than from the ranks of non-farmers. Perhaps organic farmers aren’t so different after all.

## 2. Consumers

There are many possible ways of looking at consumer concerns relating to the price of organic food. These concerns raise important questions of justice.<sup>75</sup> One broad category of concern is that organic food costs more than other food, or more than some people would like to pay. Another category of concern is that organic food costs too much in an absolute sense—poor people can’t afford it.

As noted above, Wal-Mart has announced plans to dramatically expand its organic food offerings, and sharply control prices.<sup>76</sup> Some would say that this addresses both categories of concern. Others would question whether it is possible to hold prices on organic food this low while scrupulously observing required practices, reasoning that conventional foods achieve low prices in part by externalizing costs. Others would

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announced it had created a new staff position for an Organic and Grazing Coordinator. *See* [http://www.growwisc.org/news\\_events/newsDetail.aspx?recid=34](http://www.growwisc.org/news_events/newsDetail.aspx?recid=34).

<sup>71</sup> 71 Fed. Reg. 19,131 (2006). Comments on the advance notice of proposed rulemaking are due June 12, 2006.

<sup>72</sup> 71 Fed.Reg. 27662 (2006). *See also* Rural Advancement Foundation International, *GREENER FIELDS: SIGNPOSTS FOR SUCCESSFUL ECO-LABELS* (2000).

<sup>73</sup> Vandana Shiva, *STOLEN HARVEST: THE HIJACKING OF THE GLOBAL FOOD SUPPLY* 118 (2000).

<sup>74</sup> Erica Walz, *Final Results of the Fourth National Organic Farmers’ Survey: Sustaining Organic Farms in a Changing Organic Marketplace*, Organic Farming Research Foundation 96 (2004).

<sup>75</sup> Guadalupe T. Luna, *The New Deal and Food Insecurity in the “Midst of Plenty*, 9 Drake J. Agric. L. 213 (2004).

<sup>76</sup> *Infra* note 18.

question whether lowering prices of some goods effectively addresses problems of poverty and hunger.

Statistical evidence indicates that organic food is widely purchased by persons for whom it is a priority. A survey of more than 26,000 households in 1999 revealed that organic food consumption closely reflected the breakdown of society.<sup>77</sup> In fact, Laurie Demeritt, the president of the company that conducted the survey, the Hartman Group, observed, “When we do organic studies, income is about the only thing that doesn’t skew at all by user and nonuser.”<sup>78</sup> Organic food purchasing is one instance of a broader trend, where consumers in a range of income levels willingly pay premiums for goods and services that are important to them.<sup>79</sup> This has been called “trading up” or “rocketing.”

In addition, organic foods (sometimes certified organic, sometimes not certified organic) are available at many farmers’ markets with little or no price premium.<sup>80</sup> Two programs, the Farmers Market Nutrition Program for Women, Infants and Children, and the Senior Farmers’ Market Nutrition Program, provide coupons or Electronic Benefit Transfer cards so that low income persons may buy fresh local foods, including organic foods, at farmers’ markets. This not a comprehensive solution to problems of hunger and poverty, but it is one important step.

## H. Fair Trade

Part of what farmers mean when they talk about farming and marketing that is “socially acceptable” in the context of whole farm planning is that it is fair to all persons involved in the chain of production and distribution. Indeed, farmers and farm advocates have been exploring for a number of years whether and how to apply the principles of the international fair trade movement to create an analogous label that could be used alongside the organic label to denote this sense of fairness.<sup>81</sup>

Fair trade in both the domestic and international context has just begun to receive academic attention. Among the questions being considered is whether what may be

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<sup>77</sup> ORGANICS, INC. at 245.

<sup>78</sup> *Id.* at 246. See also Lydia Oberholtzer *et al.*, *Price Premiums Hold on as U.S. Organic Produce Market Expands*, Economic Research Service report VGS-308-01 (2005).

<sup>79</sup> *Id.* at 248, citing Michael J. Silverstein and Neil Fiske, *TRADING UP: THE NEW AMERICAN LUXURY* (2003).

<sup>80</sup> Amy Kremen, Catherine Greene, *et al.*, *Organic Produce, Price Premiums, and Eco-Labeling in U.S. Farmers’ Markets*, Economic Research Service report VGS-301-01 (2003).

<sup>81</sup> Domestic Fair Trade Working Group, *Principles for Domestic Fair Trade*, available at <http://www.rafiusa.org/programs/JUSTFOODS.html>; Elizabeth Henderson, *et al.*, *Toward Social Justice and Economic Equity in the Food System: A Call for Social Stewardship Standards in Sustainable and Organic Agriculture*, available at <http://www.rafiusa.org/programs/JUSTFOODS.html>. The Wedge Co-op in Minneapolis launched a new Fair Trade program in May 2003, which it describes as one of the first domestic Fair Trade buying programs in the country. For more information about The Wedge’s fair trade program, see <http://www.wedge.coop/produce/produce-fairtrade.html>.

viewed as ethical or moral standards are really amenable to regulation. Another question is whether fair trade and organic standards are simply a new form of imperialism, perhaps in spite of the best intentions of their American and European proponents.<sup>82</sup> Still another question raised is whether combining concerns of fair labor standards and social justice with concerns embodied in the organic label might reduce the clarity of the organic label and slow the advancement of organic foods in the marketplace, thus leading to fewer acres of land converted to organic production.<sup>83</sup>

These questions are worthy of further consideration. But it is clear that for many organic farmers, organic agriculture means much more than simply converting acres to a system of farming that does not use synthetic pesticides. Indeed, the International Federation of Organic Agriculture Movements (IFOAM) defines organic agriculture as “an agricultural system that promotes environmentally, socially, and economically sound production of food, fiber, timber, etc. In this system, soil fertility is seen as the key to successful production. Working with the natural properties of plants, animals, and the landscape, organic farmers aim to optimize quality in all aspects of agriculture and the environment.”<sup>84</sup>

## V. CONCLUSION

Like most farmers, organic farmers are generally an independent-minded, strong-willed bunch. There is no consensus about how to move organic agriculture forward. What are signs of thrilling progress for some farmers and organic advocates—in terms of acres of production converted to organic agriculture and pounds of pesticides not used—are troubling signs of industrialization—in terms of sharp business and labor practices and nutritionally dubious food delivered at high energy costs—to others.

Recent attention to organic farming in the popular press suggests interest in the question of whether and how organic farming can fulfill the triple bottom line by being economically viable, socially acceptable, and environmentally sound—for individual farmers, for their rural communities, and for the nation.

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<sup>82</sup> Tad Mutersbaugh, *Ethical Trade and Certified Organic Coffee: Implications of Rules-Based Agricultural Product Certification for Mexican Producer Households and Villages*, 12 *Transnat'l L. & Contemp. Probs.* 89 (2002).

<sup>83</sup> William J. Friedman, *The Framework for Global Organic Food Trade Circa 2005: Accomplishments and Challenges*, 60 *Food Drug L.J.* 361 (2005).

<sup>84</sup> Michael Sligh and Carolyn Christman, *Who Owns Organic?: The Global Status, Prospects, and Challenges of a Changing Organic Market*, Rural Advancement Foundation International—USA 1, 2003.