

DISASTER READINESS AND RECOVERY

LEGAL CONSIDERATIONS FOR ORGANIC FARMERS

September 2007

By
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FLAG



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These materials are intended to provide general legal information. Farmers with specific questions should consult an attorney for advice regarding their particular situation.

Disaster Readiness and Recovery: Legal Considerations for Organic Farmers

September 2007

By Jill Krueger, Farmers' Legal Action Group, Inc.

As they do for all farmers, natural disasters pose a significant threat to organic farmers. For over ten years, Farmers' Legal Action Group, or FLAG, has regularly published and updated a *Farmers' Guide to Disaster Assistance*.¹ The *Farmers' Guide* describes federal assistance programs available to farmers facing property, production, and income losses due to natural disaster. The book uses clear language and detailed citations to applicable laws, regulations, and policies to help farmers and their advisors understand and obtain federal disaster assistance. The *Farmers' Guide* includes detailed descriptions of programs such as:

- Federal Emergency Management Agency (FEMA) programs (including Individuals and Households Program, Disaster Unemployment Assistance, crisis counseling, and disaster legal services)
- Federal crop insurance
- Non-insured Crop Disaster Assistance Program (NAP)
- Emergency Conservation Program (ECP)
- Disaster assistance programs for livestock producers
- Farm Service Agency (FSA) Emergency (EM) Loans
- Disaster Set-Aside Program for existing Farm Service Agency (FSA) loans
- Small Business Administration (SBA) Disaster Loans

as well as brief discussions of bankruptcy and federal income tax issues as they relate to losses caused by natural disaster.

This article is a supplement to *Farmers' Guide to Disaster Assistance*. It focuses on aspects of federal disaster assistance that are of particular relevance for organic farmers. The first part of the article discusses steps that organic farmers may take to plan for natural disaster. Advance planning may enable organic farmers to prevent or reduce the effects of natural disaster on their farms, prepare for the agronomic and financial impacts of natural disaster, and improve the resilience of their farms following a natural disaster.

The second part of the article discusses federal programs that provide assistance to farmers in order to recover from natural disaster. In large part, these are the same programs discussed in greater detail in *Farmers' Guide to Disaster Assistance*. However, organic farmers face some barriers to full participation in federal disaster assistance programs. These materials are

¹ The *Farmers' Guide* can be downloaded for free from FLAG's Web site at www.flaginc.org. A bound copy of the book is available for \$40 per book, and orders can be placed by calling FLAG's office at 651-223-5400. A limited number of bound copies of the book are available without charge for family farmers.

aimed primarily at helping farmers to understand and participate in the programs as they exist now. But improving the accessibility and effectiveness of federal disaster assistance for organic farmers is important to individual organic farmers, and may be crucial to restoring local and regional food systems when natural disaster strikes.

The article concludes by addressing questions farmers may have about how natural disaster and disaster recovery may affect their organic certification status. Most organic farmers have invested a number of years in achieving their “certified organic” status, and a loss of that status could have financial consequences for the farmer well beyond the loss of a single year’s crop.

This article is based on information from a variety of sources and includes footnotes with full citations, so that farmers, farm advocates and advisors, certifying agents, and attorneys can find the original sources for the information provided. This article is intended to provide general legal information based upon the laws in effect in the summer of 2007. For advice about a specific situation, farmers should consult an attorney.

I. FARMING TO CREATE YOUR OWN DISASTER PREVENTION AND RECOVERY PROGRAM

Many organic farmers use farming and financial practices that may lessen the risk of harm from natural disaster. Even though these efforts are commonly thought of as “self-help,” there may be assistance for organic farmers to adopt these practices. Assistance in the form of information and education is sometimes referred to as technical assistance. Financial assistance may include a cost share, or even grants and direct payments.

A. Reducing Risk through Crop and Livestock Diversification

Diversification is a basic part of organic farming. Indeed, the National Organic Program (“NOP”) regulations define organic production as a production system managed “to respond to site-specific conditions by integrating cultural, biological, and mechanical practices that foster cycling of resources, promote ecological balance, and conserve biodiversity.”²

Diversification may mean growing both crops and livestock, or growing a variety of either crops or livestock. Or diversification may be expressed in seed or breed variety selection or planting times. Diversification may be expressed through on-farm processing for some or all products of the farm. Diversification may also be expressed in marketing through a variety of buyers, types of buyers, and marketing channels.

Diversification can reduce the impact of a natural disaster because it may mean that a farming operation is producing crops or livestock which respond differently from one another to the effects of a particular disaster. If one farm enterprise is affected by a natural disaster such as excess rain or late freeze, another may be unaffected, or even respond favorably, adding up to a successful overall bottom line for the year. For some

² 7 C.F.R. § 205.2, “Organic production” (2007).

organic farms, diversification is the primary management strategy related to natural disasters.³ However, diversification is not a comprehensive strategy to enable a farming operation to weather a severe natural disaster. Most organic farmers should give careful thought to the other practices discussed in this article, including obtaining some type of crop insurance or coverage under the Noninsured Crop Disaster Assistance Program (NAP), both of which are discussed further below.

B. Conservation Practices to Increase Disaster Resistance and Speed Recovery

Conservation practices required in organic farming may help prevent, prepare for, and lessen the effects of natural disaster. For example, the NOP regulations impose a soil fertility and crop nutrient management practice standard.⁴ Under this practice standard, organic farmers must implement tillage and cultivation practices that maintain or improve the physical, chemical, and biological condition of soil, and minimize soil erosion. The NOP regulations also impose a crop rotation practice standard.⁵ Under this practice standard, farmers must implement a crop rotation that includes, among other things, sod, cover crops, green manure crops, and catch crops. As a result of these practices, some scientific research indicates that soil on organic farms is more drought resistant and drought tolerant.⁶

A variety of federal programs may assist organic farmers to implement conservation practices that will make their farms better able to withstand natural disaster. Some of these programs are discussed below, but there are many others, including the Wildlife Habitat Incentive Program, Conservation Reserve Program, Conservation Reserve Enhancement Program, and Emergency Forestry Conservation Reserve Program.

1. Funding for Research to Test Conservation Farming Practices

Farmers interested in testing whether and how certain farming practices improve disaster resistance and recovery may be able to receive funding to support that research. Funding support is available from public sources, such as the Sustainable Agriculture Research and Education (SARE) program within the United States Department of Agriculture (USDA), and private sources, such as the Organic Farming Research Foundation (OFRF). SARE is divided into four regions of the

³ James C. Hanson, et al., *Risk and Risk Management in Organic Agriculture: View of Organic Farmers*, 19 *Renewable Agriculture and Food Systems* 218-227 (2007), available at www.aren.umd.edu/people/faculty/jhanson/jhanson.htm.

⁴ 7 C.F.R. § 205.203 (2007).

⁵ 7 C.F.R. § 205.205 (2007).

⁶ Don Lotter, et al., *The Performance of Organic and Conventional Cropping Systems in an Extreme Climate Year*, 18 *American Journal of Alternative Agriculture* at 146-154 (2003) (describing research conducted by the Rodale Institute), available at <http://donlotter.net/resume03.html>. See also Preston Sullivan, *Drought Resistant Soil* (2002), available at www.attra.ncat.org.

country, each of which issues calls for proposals with specific deadlines.⁷ In 2007, OFRF issued two requests for proposals, with the next deadline for submission being December 17, 2007.⁸

2. Environmental Quality Incentives Program

The Environmental Quality Incentives Program (EQIP) is a conservation program for land that is in agricultural production.⁹ It is administered by the Natural Resources Conservation Service (NRCS), which is a part of USDA. Farmers who participate in EQIP may receive technical assistance, incentive payments, or cost share assistance. While it is not designed as a disaster program, implementing EQIP conservation practices may help to lessen the impact of a future natural disaster.

A farmer transitioning to organic production may adopt a variety of practices which may be eligible for EQIP assistance. Such practices include diverse extended crop rotations, use of cover crops, establishing buffer zones which may provide wildlife habitat and reduce wind erosion, reintroduction of beneficial insects, reducing tillage, year-round rotational or managed grazing systems, and nutrient management.¹⁰ Participation in EQIP requires a conservation plan to allow NRCS to review and approve the farmer's proposed conservation practices.¹¹ A farmer's conservation plan and organic system plan may refer to one another, or even be combined into one total plan for the farm.

Farmers making the transition to organic production practices may find the transition period to be a good time to consider and adopt practices that will help build their farm's ability to withstand natural disaster as well as provide conservation benefits and help achieve compliance with NOP requirements. Because the transition period can be a difficult time financially for farmers, EQIP assistance can play a crucial role in that process. Some state NRCS offices have adopted land management practice standards to target EQIP incentive payments to farmers who are in the process of transitioning to organic agriculture, such as organic dairy

⁷ For more information about SARE financial assistance and current deadlines, visit the SARE Web site at www.sare.org.

⁸ For more information about OFRF funding, including proposal requirements, visit the OFRF Web site at www.ofrf.org.

⁹ For more information about EQIP, see the NRCS Web site at www.nrcs.usda.gov/programs/eqip/. Or see, Jill Krueger, *Is Your Farm "EQIP"ed for Conservation?: A Farmers' Guide to the Environmental Quality Incentives Program* (Farmers' Legal Action Group, 2007), available at www.flaginc.org or by contacting FLAG.

¹⁰ NRCS Fact Sheet, *Organic Agriculture and Resource Conservation: What Conservationists Need to Know about Organic Growers*, available at http://soils.usda.gov/sqi/management/org_farm_2.html. See also the companion fact sheet, *Organic Agriculture and Resource Conservation: What Organic Growers Need to Know about NRCS and Conservation Programs*, available at http://soils.usda.gov/sqi/management/org_farm_1.html.

¹¹ Compare 7 C.F.R. pt. 205 (2007) with 7 C.F.R. pt. 1466 (2007).

farming.¹² Farmers who are already certified organic may also be eligible to participate in EQIP, though assistance will generally not be approved for practices implemented before the farmer applied for EQIP.

3. Conservation Security Program

The Conservation Security Program (CSP) is a program administered by NRCS intended to encourage and support use of conservation practices on land in agricultural production. CSP provides direct payment and cost-share payments for eligible practices.¹³ However, CSP is currently available only in certain watersheds. CSP encourages “whole farm planning,” including preparing a farm plan that addresses all natural resources concerns on all farmland within the farming operation. Participation in CSP at the whole farm level can significantly improve a farming operation’s resilience in the face of natural disaster. However, farmers may also participate in CSP with less intensive conservation planning for a lower level of assistance. Though there are no formal rules stating that an organic system plan may be used as a conservation plan for purposes of CSP, organic farmers have found that their organic system plans are helpful in preparing their conservation plans for CSP.

4. Agricultural Management Assistance

Another program that may assist organic farmers in preparing for and reducing the risk of natural disaster is Agricultural Management Assistance. In recent years, Congress has directed NRCS to provide financial assistance for “agricultural management” to eligible farmers in 15 states with historically low rates of participation in the federal crop insurance programs. The Agricultural Management Assistance program is currently available in Connecticut, Delaware, Maryland, Massachusetts, Maine, Nevada, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia, and Wyoming to help farmers construct or improve water management structures or irrigation structures; plant trees to form windbreaks or to improve water quality; and mitigate risk through production diversification or resource conservation practices, including soil erosion control, integrated pest management, or transition to organic farming.¹⁴

C. Risk-Sharing through Community Supported Agriculture

In community supported agriculture (CSA), the farmer sells “shares” of the harvest before the season begins, and members receive their share of the harvest at regular

¹² See 2007 Minnesota EQIP Conservation Practice Payment Docket, 440-V-CPM, Amend. MN-49, December 2006 (setting forth Practice 328b, Organic Conservation Crop Rotation and Practice 528, Organic Prescribed Grazing); “2007 Contracts with Organic Incentive Payments,” EQIP Docket pages MN515.P.162-49-50 (March 2004).

¹³ For more information about CSP, see the NRCS Web site at <http://www.nrcs.usda.gov/programs/csp/>.

¹⁴ 7 C.F.R. pt. 1465 (2007).

intervals, most often weekly.¹⁵ Operating as a CSA farm can help an organic farmer minimize the risks of natural disaster. Although operation as a CSA won't reduce the production losses a disaster may cause, it can significantly reduce the financial impact of those losses. CSA farmers should make it clear to those who purchase a share of the harvest that the share owners assume the risk of a poor harvest, or no harvest at all. Many CSA farmers have found that consumers are willing to take that risk, in exchange for the chance to have a closer relationship to one particular farm in their community, and to eat local foods when they are in season. Of course, if there is a reduced harvest or no harvest at all, some members of the CSA may be less likely to return and take the same risk of loss in the next year. Other members may become strong supporters and advocates of "their farmer."¹⁶

CSA farmers are advised to communicate clearly and in writing with potential members about both the risks and benefits of CSA membership, and to communicate with them throughout the season, particularly in the event of adverse weather conditions. Some CSA farms enter into a written contract with members. Although some farmers feel that written contracts could interfere with their efforts to build relationships with members, written documents usually help reduce the risk of misunderstandings.¹⁷

D. Addressing Disaster Risks in Marketing and Sales Contracts

Many organic farmers market directly to the public or to institutions such as food cooperatives, grocery stores, restaurants, schools, prisons, or hospitals. These sales should involve written contracts to help reduce the risk of confusion and misunderstandings. Farmers may want to consider including a provision in the contract addressing the risk of natural disaster. For example, a farmer could negotiate for a provision in a sales contract excusing the farmer from delivering the agricultural products in the event of a natural disaster. Of course, the farmer and buyer are free to change any provision in the contract at any time, or add new provisions, if both agree to do so. But it can be difficult to come to an agreement once disaster has hit. In the absence of a provision excusing them from performance, farmers who lose a crop due to natural disaster could be forced to buy organic goods on the market in order to deliver them to the buyer as required under the contract.

Farmers may also enter into more detailed negotiations with their buyers. For example: Would the buyer accept less than the full quantity specified in the contract, if natural disaster prevented the farmer from performing in full and, if so, would the price remain

¹⁵ Elizabeth Henderson and Robyn Van En, *SHARING THE HARVEST: A GUIDE TO COMMUNITY SUPPORTED AGRICULTURE* (1999). New edition forthcoming in November, 2007.

¹⁶ Samuel Fromartz, *Farmers, Flooding, and Whole Foods' Mea Culpa* (Sept. 12, 2007), available at www.chewswise.com/chews/2007/09/farmers-floodin.html (discussing, among other things, fierce loyalty of CSA members after severe flooding, and noting that, "Through all of this, one thing is certain: good partners—and fanatical customers—are key.").

¹⁷ For a discussion and sample of a basic CSA contract, see Neil D. Hamilton, *THE LEGAL GUIDE FOR DIRECT FARM MARKETING* at 58-61 (Drake University 1999).

the same? If the farmer were excused from delivering products for a certain period of time due to a disaster, would that terminate the contract, or would they resume their relationship as soon as the farmer was able to produce another crop? Would the buyer accept agricultural products that could not be certified organic as a result of the disaster, if they met all applicable food safety standards? Any agreements reached on these and related issues should be written into the contract.

The contract should set out the timeframe within which the buyer must make a decision on whether to accept the goods once delivered. In general, a buyer must accept and pay for the goods if they meet the requirements set forth in the contract, but the buyer may reject the goods if they do not meet contract requirements.

Farmers may encounter a perception from buyers that because of the effects of a natural disaster, their crops are no longer truly organic. While the farmer has retained organic certification for the crops, and the contract requires only delivery of certified organic goods, a refusal by the buyer to accept the offered goods would arguably be a breach of contract. This type of dispute can be difficult for organic farmers, who may rely on ongoing relationships with a small number of buyers. Organic farmers finding themselves in this situation may wish to consult an attorney or a mediation program to see whether there is a solution that could resolve the issue to the satisfaction of both the farmer and the buyer.

Some food processors who enter into contracts with many different farmers charge a percentage or flat fee to create a group pool, or informal insurance network, in case of natural disaster or other crop failure. Farmers may want to ask questions before they enter into such contracts. Is contributing to the pool required or voluntary? If voluntary, does the amount charged seem reasonable in light of the risk protection that would be gained? How would benefits be determined? How do the costs and benefits of the pool compare to the costs and benefits of crop insurance and NAP, which are discussed below?

II. FEDERAL DISASTER ASSISTANCE PROGRAMS FOR FARMERS – SPECIAL CONSIDERATIONS FOR ORGANIC FARMERS

Having addressed key respects in which advance planning can help organic farmers to prepare for, prevent, or improve their resilience following natural disaster, we now turn to federal programs that may help organic farmers to recover from natural disaster.

This section discusses a variety of federal disaster assistance programs for farmers, and highlights issues for each program that may be of particular concern to organic farmers. More detailed information about most programs discussed below is included in the *Farmers' Guide to Disaster Assistance*.¹⁸ Therefore, farmers in search of a thorough discussion of a particular

¹⁸ The *Farmers' Guide* can be downloaded for free from FLAG's Web site at www.flaginc.org. A bound copy of the book is available for \$40 per book, and orders can be placed by calling FLAG's office at 651-223-5400. A limited number of bound copies of the book are available without charge for family farmers.

program are encouraged to consult the *Farmers' Guide*. Farmers in need of legal advice about their particular situation are encouraged to consult an attorney.

A. Emergency Conservation Program

The Emergency Conservation Program (ECP) is a conservation program specifically intended to help farmers recover from natural disaster. It is administered by the Farm Service Agency (FSA) within USDA. Through ECP, FSA can help farmers rehabilitate farmland damaged in natural disasters by reimbursing them for part of the costs of installing or adopting an approved conservation practice.

ECP is designed to help farmers in two ways. First, ECP can be used to restore farmland damaged by wind and water erosion, floods, hurricanes, or other natural disasters. Second, ECP can be used to support water conservation and water enhancement measures during periods of severe drought. ECP may be used to address the needs of both conventional and organic farmers. For example, ECP funds are often used for debris removal or repair of permanent fences.

ECP is offered through county FSA offices, but only when Congress has made funding available for ECP. It is generally a good practice for all farmers to report their conservation needs following a disaster to their local FSA office. This is particularly true for organic farmers, because FSA may not be aware of these farmers' needs if they have had few dealings with FSA. The local FSA office reports local losses to the state and national FSA, so that USDA can distribute any existing ECP funds, or ask Congress for more.

In general, FSA will not provide ECP assistance for activities that are started before a farmer's request for ECP cost-sharing is submitted and approved.¹⁹ A waiver of this requirement is possible on a case-by-case basis if the disaster created a situation that required the farmer to take immediate action.²⁰

Once FSA has found a farmer eligible for ECP, cost-sharing is generally granted for all reasonable expenses incurred in the completion of the approved conservation practice. Eligible costs may include new or used materials, services, the farmer's own or hired labor, and sales tax. All conservation practices implemented must meet FSA's minimum performance standards. In general, an eligible farmer may be reimbursed up to 75 percent of either the farmer's total actual costs or total allowable costs, whichever is less. Limited resource farmers may be reimbursed up to 90 percent of their costs.

B. Disaster Unemployment Assistance

There is sometimes confusion about whether the Federal Emergency Management Agency (FEMA) provides assistance to farmers after a disaster. FEMA does help farmers with the same sorts of needs as other citizens, including housing and other

¹⁹ 7 C.F.R. § 701.15(a) (2007).

²⁰ 7 C.F.R. § 701.15(b) (2007).

necessary expenses, disaster unemployment assistance, crisis counseling, and disaster legal services. FEMA does not assist farmers with needs specific to their farming operations. In general, farmers should contact USDA for farming-related needs.

Disaster Unemployment Assistance (DUA) is a little-known FEMA program that provides assistance to people, including farmers, who normally would not qualify for unemployment benefits. Although funded by FEMA, DUA is administered by each state's department of labor.

In order to be eligible for DUA, a person must have been made unemployed by the disaster. To be eligible for DUA as a self-employed individual, such as a farmer, the person must have been self-employed, or have been about to be self-employed, in the disaster area at the time of the disaster. This self-employment must have been the principal source of income for the applicant, and the applicant's livelihood must have depended on the self-employment.

For farmers, it is generally not enough for DUA eligibility to have suffered a crop loss. The disaster must prevent the applicant from carrying out normal farming activities, regardless of crop loss. This can occur when a farmer is injured in a disaster, when farmland or structures become inaccessible, when farmland is covered with debris or has been reshaped by a storm, when livestock must be moved to another location, and similar situations.

An application for DUA must be filed with the state within 30 days of the official announcement date of the disaster. In limited circumstances, it may be possible to file after the deadline.

DUA will not replace all of a farmer's income. The DUA calculation for an unemployed self-employed farmer is based on the farmer's most recent tax year that ended before the disaster. At a minimum, everyone who qualifies for DUA as unemployed self-employed—including farmers—should receive at least 50 percent of the state's average weekly payment of regular unemployment.

DUA does not appear to involve any particular issues unique to organic farmers. The primary barrier to participation is lack of awareness of the program among farmers generally.

C. Crop Insurance

Crop insurance is both a form of planning and preparation for natural disaster and a form of disaster assistance. Crop insurance represents disaster planning because it must be obtained before the farmer knows if there will be a natural disaster in the coming crop year. It represents disaster assistance because it may provide benefits based on losses caused by natural disaster.

Federal crop insurance covers losses by drought, flood, or other natural disaster. The Federal Crop Insurance Corporation (FCIC) is authorized to define what counts as a drought, flood, or other natural disaster for crop insurance purposes.²¹ The crop provisions in the farmer's specific policy will likely list types of losses covered by the policy.²²

In general, farmers purchase crop insurance from private insurance providers, rather than directly from the federal government. Farmers may contact their local Farm Service Agency office for a list of private insurance companies in the area who have been approved by FCIC to offer federal insurance programs. When a farmer purchases crop insurance, he or she enters into a binding contract. Farmers should always be sure to read and understand a crop insurance agreement before they sign it. Farmers will generally not receive an insurance indemnity (payment) unless they have complied with all terms and conditions of the crop insurance contract. For example, farmers generally must report losses within a specified time period. Both farmers and crop insurance providers are bound by regulations issued by FCIC and the Risk Management Agency within USDA.

Federal crop insurance was not designed with organic farmers in mind, and though some changes have been made in recent years to make it more accessible to organic farmers, it remains problematic for organic farmers and diversified farmers of all kinds. Federal crop insurance tends to cover a smaller portion of the losses of organic farmers than of conventional farmers, and yet it tends to cost organic farmers more. Federal crop insurance can be cumbersome for diversified organic producers, because standard yield-based and revenue-based crop insurance is generally sold on a per crop basis.²³ Thus, an organic farmer growing seven kinds of vegetables would need seven insurance policies. Crop insurance is not available for livestock. In spite of these serious limitations, organic farmers might want to consider taking out crop insurance because it provides some level of protection and because having crop insurance coverage may be a threshold requirement for gaining access to other types of disaster assistance. In addition, one barrier to more effective crop insurance programs for organic farmers is lack of data on organic acreage, yields, and prices. Participation in crop insurance by organic farmers might be one means to contribute to information about the performance of organic crops.

1. Crop Insurance Is Available for Increasing Number of Crops

For many years, crop insurance was only available for a few major commodities, such as corn, soybeans, wheat, barley, and cotton. But that is no longer the case. Congress has encouraged FCIC to expand coverage to new and specialty crops,

²¹ 7 U.S.C. § 1508(a)(1).

²² See, for example, 7 C.F.R. §§ 457.101, Small Grains Crop Provisions, "8. Causes of Loss," 457.141, Rice Crop Provisions, "9. Causes of Loss" (2007).

²³ Newer programs to provide whole farm revenue insurance (including livestock) are discussed below.

certain perishable crops, and nursery crops.²⁴ In any given year, federal crop insurance is likely to be available, whether in permanent policies or pilot programs, in at least some parts of the country for over 100 different crops.²⁵ Consult a crop insurance provider in your area to find out whether coverage is available for a specific crop in your county, and for an organic variety, specifically.

If crop insurance is not available for a particular crop in a farmer's county, a farmer may still be able to obtain coverage under a written agreement. A written agreement is a crop insurance policy that has provisions that differ from the standard policy language approved by FCIC.²⁶ A written agreement can allow a farmer to insure uncommon crops and practices, but this typically comes at a significant cost increase over the standard coverage, and RMA retains discretion to reject an application for a written agreement if it determines the risk of coverage is too high.²⁷

2. Special Criteria Govern Availability of Crop Insurance for Organic Crops

a. Organic Crops in General

Organic farming practices are now addressed in a specific section of standard crop insurance policies.²⁸ In general, coverage is not available for organic crops unless the information needed to determine a premium rate is specified in the actuarial table, or coverage is allowed under a written agreement.²⁹ To consult the actuarial documents and find out whether crop insurance coverage is available for a particular organic crop in your county, contact a crop insurance provider who is active in your area or visit the Risk Management Agency Web site.³⁰ When coverage for organic crops is available, certified organic acreage,

²⁴ 7 U.S.C. § 1508(a)(4), (6).

²⁵ See the Risk Management Agency's Web page at www2.rma.usda.gov/policies/#overview. The 2007 crop list is posted at <http://www2.rma.usda.gov/policies/07croplist.html>.

²⁶ 7 C.F.R. § 457.8, Common Crop Insurance Policy, "1. Definitions, "Written agreement" (2007).

²⁷ NAD Director Review Determination 2004W000436 (Sept. 2, 2004). A searchable database of NAD decisions is available at www.nad.usda.gov/public_search.html.

²⁸ 7 C.F.R. § 457.8, Common Crop Insurance Policy, "37. Organic Farming Practices" (2007); Crop Revenue Coverage (CRC) Insurance Policy, "37. Organic Farming Practices" (Policy No. 05-CRC-Basic).

²⁹ 7 C.F.R. § 457.8, Common Crop Insurance Policy, "37. Organic Farming Practices (a)" (2007); Crop Revenue Coverage (CRC) Insurance Policy, "37. Organic Farming Practices (a)" (Policy No. 05-CRC-Basic).

³⁰ Actuarial tables include public documents that show available coverage levels, information needed to determine amounts of insurance, premium rates, premium adjustment percentages, practices, particular types or varieties of the insurable crop, insurable acreage, and other related information regarding crop insurance in the county. 7 C.F.R. § 457.8, Common Crop Insurance Policy, "1. Definitions, 'Actuarial documents'" (2007). RMA's Actuarial Document Browser is available at <http://www.rma.usda.gov/tools/adb.html>.

transitional organic acreage, and buffer zone acreage are eligible.³¹ Farmers will be required to provide proof of organic certification.

b. No Coverage for Unintended Application or Drift of Prohibited Substances

Federal crop insurance does not provide coverage for contamination of an organic, transition, or buffer zone crop by application or drift of prohibited substances onto the acreage.³²

c. Split Operations

If a farmer has a split operation, growing both conventional and organic crops,³³ the organic crops can be insured if certain requirements are met. In this situation, all of the farmers' organic, transition, and buffer zone acreage for the specific crop must be combined into an "optional unit" for insurance coverage.³⁴ This farmer must purchase the "additional coverage" level of insurance, which costs more than the basic catastrophic level of coverage, as is discussed further below.³⁵

Most requirements to establish an "optional unit" for crop insurance purposes already apply to organic farmers. For example, the farmer must plant the crop so that there is a clear and discernible break in the planting pattern at the outside boundary of an optional unit.³⁶

³¹ 7 C.F.R. § 457.8, Common Crop Insurance Policy, "37. Organic Farming Practices (b), (c)" (2007); Crop Revenue Coverage (CRC) Insurance Policy, "37. Organic Farming Practices (b), (c)" (Policy No. 05-CRC-Basic).

³² 7 C.F.R. § 457.8, Common Crop Insurance Policy, "37. Organic Farming Practices (f)" (2007); Crop Revenue Coverage (CRC) Insurance Policy, "37. Organic Farming Practices (f)" (Policy No. 05-CRC-Basic). For analysis of issues related to genetic drift, see Jill Krueger, *If Your Farm is Organic, Must It Be GMO Free?: Organic Farmers, Genetically Modified Organisms, and the Law*, (Farmers' Legal Action Group 2007), available at www.flaginc.org.

³³ 7 C.F.R. § 205.2, "Split operation" (2007).

³⁴ 7 C.F.R. § 457.8, Common Crop Insurance Policy, "34. Unit Division (c)(3)" (2007).

³⁵ 7 C.F.R. § 457.8, Common Crop Insurance Policy, "34. Unit Division (d)" (2007).

³⁶ 7 C.F.R. § 457.8, Common Crop Insurance Policy, "34. Unit Division (b)(1)" (2007); Crop Revenue Coverage (CRC) Insurance Policy, "2. Unit Structure (b)(1)(ii)" (Policy No. 05-CRC-Basic). Compare 7 C.F.R. § 205.202(c) (2007).

3. Must Follow “Good Farming Practices”

Losses are excluded from crop insurance coverage if the farmer failed to follow “good farming practices.”³⁷

Crop insurance policies generally define 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; or (2) for organic farming practices, those generally recognized by the organic agricultural industry for the area or contained in the organic plan.³⁸

An important aspect of the definition is the idea that good farming practices are those that are generally recognized in the area. The term “generally recognized” is now also defined in the policies, as follows:

[w]hen agricultural experts or the organic agricultural industry, as applicable, are aware of the production method or practice and there is no genuine dispute regarding whether the production method or practice allows the crop to make normal progress toward maturity and produce at least the yield used to determine the production guarantee or amount of insurance.³⁹

³⁷ 7 C.F.R. § 457.8, Common Crop Insurance Policy, “12. Causes of Loss (b)” (2007); Crop Revenue Coverage (CRC) Insurance Policy, “13. Causes of Loss (b)” (Policy No. 05-CRC-Basic) (replacing “production guarantee or amount of insurance” with “Final Guarantee”).

³⁸ 7 C.F.R. § 457.8, Common Crop Insurance Policy, “1. Definitions, ‘Good farming practices’” (2007); Crop Revenue Coverage (CRC) Insurance Policy, “1. Definitions, ‘Good farming practices’” (Policy No. 05-CRC-Basic).

³⁹ 7 C.F.R. § 457.8, Common Crop Insurance Policy, “1. Definitions, ‘Generally recognized’” (2007); Crop Revenue Coverage (CRC) Insurance Policy, “1. Definitions, ‘Generally recognized’” (Policy No. 05-CRC-Basic) (replacing “production guarantee or amount of insurance” with “Final Guarantee”). “Organic agricultural industry” is defined as persons who are employed by the following organizations: Appropriate Technology Transfer for Rural Areas, Sustainable Agriculture Research and Education or the Cooperative State Research, Education and Extension Service, the agricultural departments of universities, or other persons approved by FCIC, whose research or occupation is related to the specific organic crop or practice for which such expertise is sought. 7 C.F.R. § 457.8, Common Crop Insurance Policy, “1. Definitions, ‘Organic agricultural industry’” (2007). It is somewhat curious that accredited certifying agents are not included in this list of members of the organic agricultural industry, though it is possible that FCIC would approve certifiers to play this role.

In general, the insurance provider makes the “good farming practice” determination.⁴⁰ The policies state that the insurance provider may—on its own initiative or at the request of the farmer—request FCIC to determine whether production methods will qualify.⁴¹

The FCIC has established an informal administrative appeal process to allow farmers to seek review of a determination regarding good farming practices, or farmers may seek review of such a determination in court.⁴²

4. Calculating Crop Insurance Benefits (Indemnities)

a. Yield Coverage Policies

Most crop insurance covers the risk of lower yields. In addition to insuring against loss of quantity, some yield insurance provides protection against loss of quality.

The catastrophic risk protection program (CAT) is the minimum level of yield-based crop insurance coverage available.⁴³ The purpose of CAT coverage is to protect against a major crop loss. CAT policies guarantee 50 percent of the farmer’s approved yield.⁴⁴ The 50 percent approved yield calculation acts both to determine eligibility for benefits and the level of benefits. This means that the farmer will only get coverage if the loss is over 50 percent of the approved yield. In addition, payments will only be made on the portion of the loss that exceeds 50 percent of the approved yield.

CAT coverage payments are based on 55 percent of the expected market price for the crop in question.⁴⁵ “Expected market price” is defined in the crop insurance regulations as the price per unit of production anticipated during the period that the insured crop normally is marketed by farmers.⁴⁶ The price is set

⁴⁰ 68 Fed. Reg. 37,697, 37,704 (2003) (prefatory comments to final rule).

⁴¹ 7 C.F.R. § 457.8, Common Crop Insurance Policy, “1. Definitions, ‘Generally recognized’” (2007); Crop Revenue Coverage (CRC) Insurance Policy, “1. Definitions, ‘Generally recognized’” (Policy No. 05-CRC-Basic).

⁴² 7 C.F.R. pt. 400, subpt. J (2007).

⁴³ Catastrophic coverage must also include either a Common Crop Insurance Policy, or a Group Risk Plan Policy. 7 C.F.R. § 402.4, Catastrophic Risk Protection Endorsement, “2. Eligibility, Life of Policy, Cancellation, and Termination (a)” (2007). This means that CAT is not available under Crop Revenue Coverage.

⁴⁴ 7 U.S.C. § 1508(b)(2)(A); 7 C.F.R. § 402.4, Catastrophic Risk Protection Endorsement, “4. Insurance Guarantees, Coverage Levels, and Prices for Determining Indemnities” (2007); 7 C.F.R. § 400.651, “Catastrophic risk protection” (2007).

⁴⁵ 7 U.S.C. § 1508(b)(2)(A)(i); 7 C.F.R. § 400.651, “Catastrophic risk protection” (2007).

⁴⁶ 7 C.F.R. § 400.651, “Expected market price” (2007).

by FCIC before the sales closing date for the crop.⁴⁷ The expected price may be less than the actual price paid by buyers if the actual price typically includes compensation to the farmer for significant amounts of post-production expenses, such as conditioning, culling, sorting, or packing.

Yield-based coverage is also available at higher percentage levels and price levels. Under an “additional coverage” policy, a farmer may elect to insure 50 to 85 percent of the farmer’s approved yield.⁴⁸ Thus, the farmer could receive insurance indemnities for losses as low as 15 percent of yield. Additional coverage insurance pays up to 100 percent of the expected market price for the crop.⁴⁹

b. Organic Farmers Generally Unable to Insure Organic Price Premium

In general, organic farmers have not been able to obtain crop insurance coverage for the full prices their organic crops receive. USDA’s Risk Management Agency (RMA) has published a Fact Sheet on Organic Farming Practices which states that the price elections or insurance dollar amounts available on certified organic acreage, transitional acreage, and any buffer zones for a given crop year will be the price elections or insurance dollar amounts published by RMA for the crop grown using conventional means.⁵⁰ Thus crop insurance coverage for organic crops is available only at expected conventional price levels. The federal crop insurance basic provisions do not specifically address the issue of the expected market price for organic farming practices.

c. Revenue Coverage Policies

Still another approach to crop insurance is the attempt to insure revenue that would have been earned from a crop. There are a variety of individual and group revenue insurance programs available to farmers. The revenue coverage plans are in most ways very similar to traditional yield-based coverage.⁵¹ The important difference, however, is that in the revenue-based programs, in one

⁴⁷ 7 C.F.R. § 400.651, “Expected market price” (2007).

⁴⁸ See the Risk Management Agency’s Crop Policies Web page at <http://www2.rma.usda.gov/policies/>. “Additional coverage” is any insurance coverage providing a level of coverage greater than catastrophic risk protection. 7 U.S.C. § 1502(b)(1).

⁴⁹ 7 U.S.C. § 1508(c)(9). See the Risk Management Agency’s Crop Policies Web page at <http://www2.rma.usda.gov/policies/>.

⁵⁰ Risk Management Agency Fact Sheet, *Organic Farming Practices: 2007 Insurance Fact Sheet*, Program Aid Number 1912 (Dec. 2006), available at www.rma.usda.gov/pubs/2006/organics.pdf.

⁵¹ For the most part, the production history requirements, application and payment deadlines, acreage and production reporting requirements, prevented planting and replanting coverage, and premium subsidies for CRC are similar to those for traditional multi-peril crop insurance. See Crop Revenue Coverage (CRC) Insurance Policy (Policy No. 05-CRC-Basic); 7 C.F.R. § 457.8, Common Crop Insurance Policy (2007).

way or another, payment indemnities—as well as premiums—take into account crop price changes.⁵²

In general, the differences among the various revenue-based insurance plans come from the crop price used to determine the revenue guarantee, the level of coverage available, and the farm unit structure on which coverage is based. The most common of the revenue-based federal crop insurance policies is Crop Revenue Coverage (CRC).⁵³ CRC is now authorized on a permanent basis by FCIC and is widely available. CRC combines protection for both price and yield risk. Under a CRC policy, a producer is guaranteed an income for the crop based on the expected harvest price and the producer's expected yields.

5. Crop Insurance Costs

A portion of the cost for crop insurance is paid by the federal government. The remainder is paid for by the farmer.

a. Yield-based Coverage

The farmer pays an administrative fee for yield-based CAT coverage but does not pay a premium.⁵⁴ The administrative fee for CAT coverage is \$100 per crop per county.⁵⁵ A cooperative association or a nonprofit trade association may pay the CAT administrative fee on behalf of its members if such an arrangement is permitted by state law.⁵⁶

Farmers purchasing yield-based additional coverage generally will be charged both an administrative fee and a premium.⁵⁷ The administrative fee for

⁵² For general information about crop revenue insurance programs, see Risk Management Agency, “2000 Revenue Crop Insurance Plans: Crop Revenue Coverage, Income Protection, and Revenue Assurance” (December 1999), available at www.rma.usda.gov/pubs/2000/2000rcip.pdf.

⁵³ FCIC has proposed amending its regulations in order to offer farmers a choice of yield protection, revenue protection, or both within the Basic Provisions of the crop insurance regulations, rather than the through separate plans such as Crop Revenue Coverage. 71 Fed. Reg. 40,194 (2006). FCIC indicated that it intended to issue a final rule to apply for the 2009 and succeeding crop years.

⁵⁴ 7 U.S.C. § 1508(b)(5), (e)(1)(A); 7 C.F.R. § 402.4, Catastrophic Risk Protection Endorsement, “6. Annual Premium and Administrative Fees (a)” (2007). The federal government pays the farmer's premium for CAT coverage.

⁵⁵ 7 U.S.C. § 1508(b)(5)(A); 7 C.F.R. § 402.4, Catastrophic Risk Protection Endorsement, “6. Annual Premium and Administrative Fees (e)” (2007).

⁵⁶ 7 U.S.C. § 1508(b)(5)(B).

⁵⁷ 7 U.S.C. § 1508(c)(10), (d). 7 C.F.R. § 457.8, Common Crop Insurance Policy, “7. Annual Premium and Administrative Fees” (2007).

additional coverage is \$30 per crop per county for all levels of additional coverage.⁵⁸

The annual premium for additional coverage crop insurance policies is calculated based on the insured acreage, the farmer's share in the crop at the time coverage begins, the premium rate for the crop, any premium adjustments that may apply, and the level of coverage selected by the farmer.⁵⁹ For most policies, information about premium rates and available adjustments will be included in the crop actuarial documents.⁶⁰

b. Revenue-based Coverage

As with yield-based additional coverage, farmers who have revenue-based crop insurance must pay both a premium and an administrative fee of \$30 per crop per county.⁶¹ There is no CAT level of revenue-based coverage, so all revenue-based policies are charged a premium.

The annual premium for revenue-based coverage is based on the approved yield, the base premium rate for the crop, the coverage level selected by the farmer, the base price for the crop, the amount of insured acreage, the farmer's share in the crop, and any adjustment factors.⁶²

c. Waiver of Administrative Fees for Limited Resource Farmers

Limited resource farmers can receive a waiver of crop insurance administrative fees, whether the CAT fee (which is the only cost of CAT coverage) or the administrative processing fee for yield-based additional coverage or revenue-based coverage.⁶³ The waiver is not automatic; it must be requested by the farmer.⁶⁴ No waiver is available for crop insurance premiums.

⁵⁸ 7 U.S.C. § 1508(c)(10)(A); 7 C.F.R. § 457.8, Common Crop Insurance Policy, "7. Annual Premium and Administrative Fees (e)(1)" (2007).

⁵⁹ 7 C.F.R. § 457.8, Common Crop Insurance Policy, "7. Annual Premium and Administrative Fees (c)" (2007).

⁶⁰ 7 C.F.R. § 457.8, Common Crop Insurance Policy, "7. Annual Premium and Administrative Fees (d)" (2007); Crop Revenue Coverage (CRC) Insurance Policy, "8. Annual Premium and Administrative Fees (d)" (Policy No. 05-CRC-Basic). These documents are available from the Risk Management Agency's Web site at <http://www.rma.usda.gov/tools/>.

⁶¹ 7 U.S.C. § 1508(c)(10), (d). Crop Revenue Coverage (CRC) Insurance Policy, "8. Annual Premium and Administrative Fees" (Policy No. 05-CRC-Basic).

⁶² Crop Revenue Coverage (CRC) Insurance Policy, "8. Annual Premium and Administrative Fees (c)" (Policy No. 05-CRC-Basic).

⁶³ 7 U.S.C. § 1508(b)(5)(E); 7 C.F.R. § 402.4, Catastrophic Risk Protection Endorsement, "6. Annual Premium and Administrative Fees (c)" (2007).

⁶⁴ 7 C.F.R. § 402.4, Catastrophic Risk Protection Endorsement, "6. Annual Premium and Administrative Fees (c)" (2007).

A limited resource farmer: (1) has “direct or indirect” gross farm sales of \$100,000 or less in each of the previous two years; and (2) has a total household income at or below the national poverty level for a family of four, or less than 50 percent of county median household income in each of the previous two years.⁶⁵

This definition of “limited resource farmer” in the crop insurance programs was adopted in August 2004.⁶⁶ Farmers who were insured prior to the 2005 crop year and qualified for a waiver of the administrative fee under the prior definition will continue to receive a waiver if they are still eligible under that definition, or if they qualify under the new definition.⁶⁷

d. Premium Surcharge to Obtain Additional Coverage for Organic Crops

The federal crop insurance basic provisions do not appear to specifically address the issue of premiums for insuring organic farming practices. In practice, however, organic farmers are assessed a five percent premium surcharge when they purchase yield-based additional coverage or crop revenue coverage under federal crop insurance.⁶⁸ The Risk Management Agency has published a Fact Sheet on Organic Farming Practices which states that premiums are adjusted to recognize any additional risk associated with covering organic farming practices and are shown in the actuarial documents or contained in the written document.⁶⁹

⁶⁵ 7 C.F.R. § 402.4, Catastrophic Risk Protection Endorsement, “1. Definitions, ‘Limited resource farmer’” (2007). The gross farm sales figure is adjusted every year (beginning in 2004) for inflation according to the Prices Paid by Farmers index.

⁶⁶ 7 C.F.R. § 402.4, Catastrophic Risk Protection Endorsement, “1. Definitions, ‘Limited resource farmer’” (2007).

⁶⁷ 7 C.F.R. § 402.4, Catastrophic Risk Protection Endorsement, “6. Annual Premium and Administrative Fees (c)(2)” (2007). Under the prior definition, a farmer could qualify as a limited resource farmer in one of two ways. First, those who have an annual gross household income of \$20,000 or less from all sources of revenue for each of the last two years. Second, those who: (1) farm less than 25 acres total for all crops, (2) get a majority of their gross income from the farm, and (3) have a gross income from farming operations of not more than \$20,000. See 7 C.F.R. § 400.651, “Limited resource farmer” (2004); 7 C.F.R. § 457.8, Common Crop Insurance Policy, “1. Definitions, ‘Limited resource farmer’” (2004).

⁶⁸ Testimony of Mark Lipson, Review of Economic Impacts of Production, Processing, and Marketing of Organic Agricultural Products, U.S. House of Representatives Committee on Agriculture, Subcommittee on Horticulture and Organic Agriculture (Washington, DC, April 18, 2007); *available at* http://ofrf.org/policy/federal_legislation/federal_legislation.html. Lipson is the Public Policy Director of the Organic Farming Research Foundation, www.ofrf.org.

⁶⁹ Risk Management Agency Fact Sheet, *Organic Farming Practices: 2007 Insurance Fact Sheet*, Program Aid Number 1912 (Dec. 2006), *available at* www.rma.usda.gov/pubs/2006/organics.pdf.

6. Combined Revenue Insurance for the Whole Farm

Two relatively new crop insurance programs that may be of particular interest to diversified organic farmers, particularly those who grow both crops and livestock, are Adjusted Gross Revenue (AGR) and Adjusted Gross Revenue-Lite (AGR-Lite). These revenue-based programs allow a farmer to insure several crops and even livestock under a single policy.

Neither AGR nor AGR-Lite distinguishes between organic and conventional crops. Because the premiums and guarantees are based upon the farmer's tax return, there is no five percent premium surcharge for organic farmers in either program.

a. Adjusted Gross Revenue (AGR)

AGR is a revenue-based insurance plan that guarantees a certain level of farmer revenue for several commodities under a single policy.⁷⁰ No more than 35 percent of the farmer's expected revenue may come from animals and animal products.⁷¹ The AGR revenue guarantee is based on a five-year average taken from the farmer's Internal Revenue Service (IRS) Schedule F income tax forms.⁷² For the 2007 crop year, AGR policies are available in Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, Vermont, and selected counties in California, Florida, Idaho, Maryland, Michigan, New York, Oregon, Pennsylvania, Virginia, and Washington.⁷³

b. Adjusted Gross Revenue-Lite (AGR-Lite)

A modified version of AGR—Adjusted Gross Revenue-Lite, or AGR-Lite—offers whole-farm revenue protection without a limit on the amount of expected revenue from animals or animal products.⁷⁴ Like AGR, AGR-Lite coverage is based on the farmer's income and expense data from the previous five years' tax returns.⁷⁵ Farmers may purchase an AGR-Lite policy in addition to other

⁷⁰ "2007 Adjusted Gross Revenue," Risk Management Agency Fact Sheet (Nov. 2006), *available at* www.rma.usda.gov/pubs/2003/PAN-1667-06rev2.pdf.

⁷¹ "2007 Adjusted Gross Revenue," Risk Management Agency Fact Sheet (Nov. 2006), *available at* www.rma.usda.gov/pubs/2003/PAN-1667-06rev2.pdf.

⁷² Adjusted Gross Revenue Pilot Insurance Policy, "1. Definitions, 'AGR expense history,' 'AGR income history'" (Policy No. 2007-AGR).

⁷³ "2007 Adjusted Gross Revenue," Risk Management Agency Fact Sheet (Nov. 2006), *available at* www.rma.usda.gov/pubs/2003/PAN-1667-06rev2.pdf.

⁷⁴ Adjusted Gross Revenue-Lite Standards Handbook, at 1 (Nov. 2006), available on the Risk Management Agency Web site at www.rma.usda.gov/policies/2007/20030.pdf.

⁷⁵ "2007 Adjusted Gross Revenue-Lite," Risk Management Agency Fact Sheet (Nov. 2006), *available at* www.rma.usda.gov/pubs/2003/PAN-1667-07.pdf.

crop insurance coverage (except AGR), if desired.⁷⁶ For the 2007 crop year, AGR-Lite policies were available in Alaska, Arizona, selected Colorado counties, Connecticut, Delaware, Idaho, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.⁷⁷ The 2007 Farm Bill debate has included proposals to increase the availability and effectiveness of AGR-Lite insurance.⁷⁸

D. Noninsured Crop Disaster Assistance Program (NAP)

USDA's Noninsured Crop Disaster Assistance Program (NAP) provides crop loss coverage on crops that are not eligible for crop insurance in a particular county.⁷⁹ Like crop insurance, NAP must be obtained before the farmer knows whether there will be a natural disaster in the coming crop year.

1. Availability

The purpose of NAP is to provide a level of protection equal to yield-based CAT coverage for crops that are not eligible for crop insurance. To obtain NAP coverage, the crop must be a commercial crop or other agricultural commodity and, in general, the crop must be produced for food or fiber. Livestock is not eligible for NAP coverage, but forage crops—whether mechanically harvested or grazed—are eligible. NAP coverage greater than the catastrophic insurance level has not been authorized by Congress.

Losses are not covered under NAP if they are caused by failure to follow “good farming practices” for the commodity and practice, as defined by USDA.⁸⁰ The NAP regulations define good farming practices as the cultural practices generally used for the crop to make normal progress toward maturity and produce at least the approved yield.⁸¹ The regulations further provide that good farming practices are normally those recognized by the Cooperative State Research, Education, and Extension

⁷⁶ “2007 Adjusted Gross Revenue-Lite,” Risk Management Agency Fact Sheet (Nov. 2006), available at www.rma.usda.gov/pubs/2003/PAN-1667-07.pdf.

⁷⁷ “2007 Adjusted Gross Revenue-Lite,” Risk Management Agency Fact Sheet (Nov. 2006), available at www.rma.usda.gov/pubs/2003/PAN-1667-07.pdf.

⁷⁸ See, for example, Testimony of Scott Marlow, U.S. House of Representatives Committee on Agriculture, Subcommittee on Commodities and Risk Management Hearing (Washington, DC, May 14, 2007); available at www.rafiusa.org/farmbill.html. Marlow is the Farm Sustainability Director of the Rural Advancement Foundation International-USA.

⁷⁹ 7 U.S.C. § 7333.

⁸⁰ 7 C.F.R. § 1437.9(e)(3) (2007). The NAP statute prohibits coverage for this kind of loss. 7 U.S.C. § 7333(h)(3).

⁸¹ 7 C.F.R. § 1437.3, “Good farming practices” (2007).

Service (Extension Service) as compatible with agronomic and weather conditions in the area. The NAP regulations do not specifically provide for the treatment of organic and sustainable farming practices as “good farming practices,” as the crop insurance regulations do.⁸²

2. NAP Benefits

As mentioned earlier, NAP is intended to provide coverage equivalent to yield-based CAT crop insurance (more than 50 percent yield loss). Additional coverage is not available under NAP. Payments are made on yield losses exceeding 50 percent of the farmer’s approved or assigned yield for the crop. Only if the farmer’s yield loss exceeds 50 percent of approved yield will the loss be eligible for NAP. If the farmer is eligible, payments will only be made on the amount of the yield loss that is greater than 50 percent.⁸³

NAP payments for forage crops that are mechanically harvested may be determined using the above calculations. NAP assistance is also available for lost forage on acreage that CCC determines is predominantly grazed, if the loss is greater than 50 percent of the farmer’s expected Animal Unit Days (AUDs).⁸⁴ NAP payments will only be available for the amount of forage loss exceeding 50 percent of expected AUDs.

NAP benefits are paid based on a percentage of what USDA calls the average market price.⁸⁵ The average market price is expressed as a certain dollar amount per ton, bushel, or whatever unit of measure is appropriate for the crop. The price is set by USDA on a harvested basis and is based in part on historical data.⁸⁶

NAP benefits are calculated at 55 percent of the established average market price for the crop.⁸⁷ NAP payment rates are adjusted for crops that are produced with significant and variable expenses that are not incurred because the crop was either not planted or not harvested due to the disaster.⁸⁸

⁸² See 7 C.F.R. § 457.8, Common Crop Insurance Policy, “1. Definitions, ‘Good farming practices’” (2007).

⁸³ 7 C.F.R. § 1437.105(a)(2)-(4) (2007).

⁸⁴ 7 C.F.R. § 1437.403 (2007). Expected AUDs are found by dividing the total acreage of forage in the county categorized by CCC as predominantly grazed by the approved carrying capacity, and multiplying that result by the number of days used to determine the carrying capacity. NAP Handbook, page 4-106, para. 195.A (July 25, 2003) and page 4-107, para. 195.B and C (Jan. 24, 2003). AUDs may be increased for management and maintenance practices, including irrigation.

⁸⁵ 7 U.S.C. § 7333(d)(2); 7 C.F.R. § 1437.11(a) (2007).

⁸⁶ 7 C.F.R. § 1437.11(a) (2007).

⁸⁷ 7 C.F.R. § 1437.11(d) (2007).

⁸⁸ 7 U.S.C. § 7333(d)(3)(A); 7 C.F.R. § 1437.11(c), (d) (2007).

3. Cost

Farmers are required to pay a nonrefundable service fee and apply by the sales closing date in order to receive coverage under NAP.⁸⁹ The total service fee required is based on how many different crops the farmer has and in how many counties. The service fee for NAP coverage is \$100 per crop per administrative county, up to a maximum of \$300 per administrative county per year and \$900 per farmer per year. An “administrative county” is the area covered by a local FSA service office, which may include more than one actual county.⁹⁰ This cap on administrative fees is of some benefit to diversified farmers who grow many crops.

The requirement to pay a service fee for NAP coverage may be waived for limited resource farmers.⁹¹ The waiver is not automatic. It must be requested by the farmer no later than the date the application for coverage is submitted.⁹² The farmer must maintain records for the two preceding tax years to provide evidence of eligibility for a waiver if needed.⁹³ The NAP regulations use the definition of “limited resource farmer” applicable to the federal crop insurance programs set forth above.⁹⁴

E. Emergency Crop Disaster Assistance Programs

Congress has repeatedly authorized ad hoc crop disaster programs to provide assistance to crop farmers for disaster-related losses over the past ten years, often years after a natural disaster occurred. This suggests that farmers should report their losses to the Farm Service Agency and retain their records, so that evidence of their eligibility for assistance will be available if and when a program is authorized later. Though these programs have often had similar names and terms, they have not been made available for every natural disaster, and even when made available, the type of assistance is subject to change, so that farmers should not assume that emergency assistance will address all of their disaster recovery needs.

1. Available for Losses to 2005, 2006, or 2007 Crops Planted or Prevented from Being Planted Due to Disasters on or Before February 28, 2007

Congress most recently authorized the Crop Disaster Program (CDP) in the Agricultural Assistance Act of 2007.⁹⁵ This CDP is for losses to eligible 2005, 2006, or 2007 crops that were planted or prevented from being planted prior to February

⁸⁹ 7 C.F.R. § 1437.6(b) (2007).

⁹⁰ 7 C.F.R. § 1437.3, “Administrative county office” (2007).

⁹¹ 7 C.F.R. § 1437.6(d) (2007).

⁹² 7 C.F.R. § 1437.6(d) (2007).

⁹³ 7 C.F.R. § 1437.7(h) (2007).

⁹⁴ 7 C.F.R. § 1437.6(d) (2007).

⁹⁵ Agricultural Assistance Act of 2007, 110 Pub. L. No. 28, Title IX, § 9001, 121 Stat. 211 (May 25, 2007).

28, 2007, as a result of a disaster declared on or before that date. Farmers who suffered crop losses in more than one of those years may only receive CDP assistance for one of the years. At the time this article was written, regulations had not yet been published to implement 2005-2007 CDP. Sign-up for the program was scheduled to begin on October 15, 2007.⁹⁶

2. Crop Insurance or NAP Coverage for Losses Required for 2005-2007 CDP Eligibility

For 2005-2007 CDP, only those farmers whose losses were covered by crop insurance or NAP will be eligible for a CDP payment.⁹⁷ Thus, farmers who did not have crop insurance or NAP coverage, and those who had coverage but were denied a crop insurance indemnity or NAP payment, will not receive assistance from 2005-2007 CDP.

3. Organic Farmers Have Had Difficulty Receiving Assistance Based upon Organic Prices

As with other crop disaster assistance programs, CDP has generally provided assistance to organic farmers based upon the conventional price for the crops grown. Organic farmers have challenged this approach. In the mid-1990s, three organic farmers in Michigan argued that they should have received payments based on the “end use” of their black turtle beans, pinto beans, and adzuki beans in the certified organic market. The crop disaster payment program regulations at the time required different payment rates when agricultural products had different end uses and the different rates were supported by data.⁹⁸ A 1998 federal district court decision held that, under those regulations, the organic farmers were entitled to a separate payment rate for their organically grown crops.⁹⁹

The Farm Service Agency then issued regulations for a new ad hoc crop disaster payment program which authorized Farm Service Agency county committees to establish up to three separate payment rates for the same crop when there was supporting data that showed a significant difference in yield or value based upon a distinct and separate end use of the crop.¹⁰⁰ However, the regulations specifically prohibited FSA county committees from establishing separate rates or yields for

⁹⁶ USDA Press Release No. 0225.007, *USDA Announces Sign-up Dates for New Livestock and Crop Disaster Programs* (Aug. 24, 2007), available at www.fsa.usda.gov.

⁹⁷ Agricultural Assistance Act of 2007, 110 Pub. L. No. 28, Title IX, § 9001(f), 121 Stat. 213-14 (May 25, 2007).

⁹⁸ See 7 C.F.R. § 1477.6 (1995); 57 Fed. Reg. 10,963 (1992).

⁹⁹ *Pringle v. United States*, 1998 U.S. Dist. LEXIS 19378 (E.D. Mich. 1998) (*unpublished*).

¹⁰⁰ See 7 C.F.R. § 1477.202(d) (2000); 64 Fed. Reg. 18,554 (1999) (1998 Single Year and Multi-Year Crop Loss Disaster Assistance Program).

crops with different cultural practices, including organic practices.¹⁰¹ Similar regulations prohibiting separate payment rates for organic practices were adopted for the crop disaster programs covering losses from 2000 to 2002.¹⁰²

Some organic farmers challenged these regulations before USDA's National Appeals Division, arguing that their crops should receive 2001 and 2002 CDP benefits based on organic prices.¹⁰³ The farmers' administrative appeals were unsuccessful, and they filed suit in federal district court, arguing that the CDP regulations which prevented them from receiving assistance at a higher rate for their losses of higher-value organic crops were arbitrary and capricious. In 2006, a federal district court judge upheld the regulation and ruled against the organic farmers.¹⁰⁴

When Congress authorized the 2005-2007 CDP, it directed USDA to provide CDP assistance in the same manner as under 2000 CDP, with a few changes unrelated to the issue of separate rates for organic crops.¹⁰⁵ The 2000 CDP included the regulatory provision that no separate rates would be established for different cultural practices, including organic practices, and this will presumably also be included in the regulations for the 2005-2007 CDP.

F. Disaster Assistance for Livestock Producers

There is no single overarching disaster assistance program for livestock producers. The types of losses that livestock producers suffer can be placed in several categories: feed shortages and damaged pastures, livestock mortality, lost production (milk, eggs), and damaged or destroyed barns, machinery, equipment, and fences. Some of these losses can be addressed through other standing disaster assistance programs, but some can be addressed only through programs targeted to livestock producers, which are only

¹⁰¹ The regulations were adopted without notice and comment rulemaking, as directed by Congress in order to allow USDA to implement the program more quickly. The debate over the 2007 Farm Bill has included discussion about possibly establishing a "standing" disaster program similar to CDP. One benefit of standing programs is that of a full rulemaking process, in which interested parties may submit comments for consideration by USDA.

¹⁰² See 7 C.F.R. § 1480.12(d) (2002); 66 Fed. Reg. 15,979 (2001) (2000 Crop Disaster Program); and 7 C.F.R. § 1480.12(d) (2004); 68 Fed. Reg. 37,943 (2003) (2001-2002 Crop Disaster Program).

¹⁰³ NAD Director Review Determinations 2004E000091 (June 29, 2004) and 2004E000539 (Aug. 16, 2004). Another organic farmer filed a similar unsuccessful appeal on the same issue related to the 2003-2004 CDP. NAD Hearing Officer Decision 2005E000971 (Oct. 12, 2005). A searchable database of NAD decisions is available at www.nad.usda.gov/public_search.html.

¹⁰⁴ *Partlo v. Johanns*, 2006 U.S. Dist. LEXIS 43071 (D.D.C. 2006). The district court was affirmed by the court of appeals without a written opinion. *Partlo v. Johanns*, 2007 U.S. App. LEXIS 9963 (D.C. Cir. 2007).

¹⁰⁵ Agricultural Assistance Act of 2007, 110 Pub. L. No. 28, Title IX, § 9001(c)(1), 121 Stat. 213-14 (May 25, 2007) (referring to Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act of 2001, Pub. L. 106-387 § 815).

available to the extent that Congress provides special funds for them in appropriation acts.¹⁰⁶

Because assistance targeted to livestock producers tends to be provided on an ad hoc basis, farmers should not assume it will be authorized again if there is a natural disaster in their area. To the extent that crop insurance or NAP is available in a county for pasture, rangeland, and forage crops, organic farmers may want to seriously consider obtaining coverage.

Congress most recently authorized some specific programs for livestock producers in the Agricultural Assistance Act of 2007.¹⁰⁷ The Livestock Compensation Program provides assistance for livestock feed losses due to natural disasters suffered from January 1, 2005, through February 28, 2007.¹⁰⁸ The Livestock Indemnity Program provides assistance for livestock mortality losses due to natural disasters suffered from January 1, 2005, through February 28, 2007. The Dairy Disaster Assistance Program provides assistance for dairy production losses. Farmers who suffered covered losses in more than one of those years may only receive assistance for one of the years. At the time this article was written, regulations had not yet been published to implement the 2005-2007 livestock assistance programs.

USDA has also increasingly sought to develop means of assisting livestock producers that are not dependent upon the appropriations process. For example, USDA has sometimes authorized emergency haying and grazing on Conservation Reserve Program lands.

These programs will give producers an idea of the types of programs that may be offered in future years. Livestock producers should remember that there is no way to know for certain what any future programs may offer or require. At the same time, Congress has repeatedly authorized assistance for livestock producers over the past ten years, often years after a natural disaster. This suggests that farmers, including organic farmers, should report their losses to the Farm Service Agency, and retain their records, so that evidence of their eligibility for assistance will be available if and when a program is authorized later.

G. Farm Service Agency Emergency Loans

The Farm Service Agency (FSA) provides relief for farmers affected by disaster in the form of low interest loans, known as Emergency (EM) loans. EM loans are intended to enable farmers to return to their normal farming operations as soon as possible after a

¹⁰⁶ 7 U.S.C. § 1472.

¹⁰⁷ Agricultural Assistance Act of 2007, 110 Pub. L. No. 28, Title IX, § 9002, 121 Stat. 214 (May 25, 2007).

¹⁰⁸ Forage producers must have participated in crop insurance or NAP during the crop year for which benefits are sought in order to receive crop disaster or livestock assistance. Agricultural Assistance Act of 2007, 110 Pub. L. No. 28, Title IX, § 9012, 121 Stat. 214 (May 25, 2007).

disaster. The interest rate on EM loans has been 3.75 percent for the past several years, though that rate is subject to change.

EM loans are intended for approved uses by farmers engaged in production agriculture. One noteworthy possible use for an EM loan for organic farmers is reorganizing the family farm to improve its profitability.¹⁰⁹ Reorganizing a farm includes changing production practices, enterprises, marketing methods, or other parts of the farm business to promote recovery from the disaster and reduce the potential impact of future disasters.¹¹⁰ To be eligible for EM loans, farmers must have suffered either physical or production losses.

EM loans are available only for production agriculture. They are not available for losses to a nonfarm enterprise.¹¹¹ FSA defines nonfarm enterprises as any business enterprise, including recreation, that is closely associated with the farm operation, is located on or adjacent to the farm, and provides income to supplement farm income.¹¹² Examples of nonfarm enterprises cited by FSA include: raising earthworms, exotic birds, tropical fish, dogs, and horses for nonfarm purposes, welding shops, roadside stands, horse boarding, and riding stables.¹¹³ Organic farmers who operate a nonfarm enterprise in addition to their farming operation may want to explore whether they might be eligible for a disaster loan from the Small Business Administration.

H. Small Business Administration Disaster Loans

Small Business Administration (SBA) disaster loans are available where there has been damage to a home or non-agricultural business conducted on the farm property, but production agriculture and farm enterprises are ineligible for SBA loans. Farmers should seek FSA Emergency loans for losses related to production agriculture. For SBA disaster program purposes, an ineligible agricultural enterprise is a business “engaged in the production of food and fiber, ranching and raising of livestock, aquaculture, and all other farming and agricultural related industries.”¹¹⁴

I. Appeal Rights and Civil Rights

A full discussion of appeal rights and civil rights related to federal disaster assistance programs is beyond the scope of this article. The *Farmers’ Guide to Disaster Assistance* includes brief citations to the regulations and laws prohibiting discrimination and providing for appeal rights for each program.

¹⁰⁹ 7 C.F.R. § 764.3(b)(1) (2007).

¹¹⁰ EM Loan Handbook, page 9-8, para. 162.C (Feb. 8, 2002).

¹¹¹ 7 C.F.R. § 764.4(a)(3) (2007).

¹¹² 7 C.F.R. § 764.2, “Nonfarm enterprise” (2007).

¹¹³ 7 C.F.R. § 764.2, “Nonfarm enterprise” (2007).

¹¹⁴ 13 C.F.R. § 123.201(a) (2007).

In general, an adverse decision in any federal program triggers the right of a farmer to file an administrative appeal.¹¹⁵ The denial of an application to participate in a program and the failure to issue a decision on an application to participate are examples of adverse decisions.

Laws against discrimination vary somewhat by program and implementing agency, but most prohibit treating program applicants or participants less favorably on the basis of at least some of the following categories: race, color, national origin, sex, age, marital status, familial status, sexual orientation, disability, or the receipt of income from any public assistance program.

J. Other Considerations for Organic Farmers Seeking Disaster Assistance

A variety of other insights that may prove helpful for organic farmers can be gleaned from appeals decisions related to a variety of disaster assistance programs. In addition, because federal disaster assistance programs address only a portion of the losses suffered by organic farmers, organic farmers and organic farming organizations have sometimes sought to mobilize a community response to support organic farmers. Some recent models may be found in the response to flooding in the upper Midwest in August, 2007.

1. Report Losses to the Proper Authority

Most organic farmers are well aware of the need for good communication with their certifying agents. They should also realize the importance of good communication with their crop insurance provider or with FSA, if they participate in NAP. Thus, organic farmers should report disaster-related losses and concerns to their certifying agents, but they must also comply with all deadlines for reporting losses to their crop insurance provider or to FSA. It is not sufficient, for crop insurance and NAP purposes, for organic farmers to report crop losses to their certifying agents.¹¹⁶

2. Consult Experts When Considering Experimental Crops

As noted above, farmers must use “good farming practices” in order to receive either crop insurance or NAP payments. For the NAP program, good farming practices are the cultural practices generally recognized by the Extension Service.¹¹⁷ The NAP regulations do not specifically provide for the treatment of organic and sustainable farming practices as “good farming practices,” as the crop insurance regulations do.¹¹⁸

¹¹⁵ Karen R. Krub, *USDA's National Appeals Division Procedure and Practice* (Farmers' Legal Action Group, 2003), available at www.flaginc.org.

¹¹⁶ NAD Director Review Determination 2003W000083 (March 20, 2003). A searchable database of NAD decisions is available at www.nad.usda.gov/public_search.html.

¹¹⁷ 7 C.F.R. § 1437.3, “Good farming practices” (2007).

¹¹⁸ Compare 7 C.F.R. § 1437.3, “Good farming practices” (2007) with 7 C.F.R. § 457.8, Common Crop Insurance Policy, “1. Definitions, ‘Good farming practices’” (2007).

In one appeal, an organic farmer began growing Vinifera wine grapes in the southeastern United States. He experienced crop failures for two years in a row, due to mildew and fungal diseases caused by excessive moisture and humidity.¹¹⁹ The farmer was denied NAP benefits by the Farm Service Agency. The National Appeals Division Director ruled that the three choices to (1) grow a grape variety known to be susceptible to fungal diseases and mildew, (2) in a part of the country that routinely experiences high humidity and moist summers, and (3) use organic farming practices constituted a failure to follow good farming practices.

One lesson from this appeal might be that farmers who plan to grow crops or varieties that are not commonly grown in their area may wish to consult with the Extension Service for an opinion about whether that crop or variety could be organically grown in the region in such a way as to make normal progress toward maturity and produce an approved yield.¹²⁰ If possible, it might be helpful to obtain a written opinion from the Extension Service before making a final decision to plant the crop or variety.

3. Equitable Relief May Be Available

Federal disaster assistance programs may be enacted in haste, without a full notice-and-comment rulemaking process. As a result, concerns of various stakeholders, including organic farmers, may be overlooked. Following a series of hurricanes that struck the state of Florida in 2004, USDA implemented the Florida Vegetable, Fruit and Tropical Fruit Disaster Program.¹²¹ To receive assistance at the highest level for plasticulture practices, farmers were required to have installed irrigation, covered the soil with plastic mulch, fumigated, fertilized the soil, and put in transplants prior to onset of the hurricane. The program requirements did not address requirements for organic farmers barred from applying fumigation to their crops.

An organic farmer was denied benefits under the program due to the failure to fumigate. The farmer appealed and requested equitable relief.¹²² When program participants seek equitable relief, they admit that they did not satisfy all of the program requirements, but argue that they are still entitled to benefits under the program. Equitable relief is generally available for disaster assistance programs,

¹¹⁹ NAD Director Review Determination 2005S000374 (July 7, 2005). A searchable database of NAD decisions is available at www.nad.usda.gov/public_search.html.

¹²⁰ *See also* NAD Hearing Officer Decision 2006ES000770 (Sept. 29, 2006) (Farm Service Agency consulted USDA Plant Hardiness Zone Map, an area orchard renovator, the Cherry Growers Web site, and its own members' knowledge in denying application for Tree Assistance Program benefits for losses to orchard for tart cherry production). A searchable database of NAD decisions is available at www.nad.usda.gov/public_search.html.

¹²¹ 69 Fed. Reg. 63,134, 63,136 (2004) (notice of program implementation).

¹²² NAD Director Review Determination 2006S000224 (June 1, 2006). A searchable database of NAD decisions is available at www.nad.usda.gov/public_search.html.

except for agricultural credit and crop insurance programs.¹²³ In general, there are two grounds for equitable relief: good faith reliance upon misinformation from USDA and good faith effort to comply with program requirements. Equitable relief may be granted by an agency official, such as the FSA State Director, or by the Director of the National Appeals Division (NAD).¹²⁴ Farmers should note that within NAD, only the NAD Director may grant equitable relief. Farmers must develop the evidence that would support a decision to grant equitable relief in the initial NAD hearing, even though NAD hearing officers may not grant equitable relief.¹²⁵

In the appeal under the Florida program, the organic farmer argued that she had made a good faith effort to comply with the plasticulture requirements. FSA agreed that she had used good organic farming practices. The NAD Director held that the farmer acted in good faith by applying proper organic farming practices, particularly in light of the fact that she could have been subject to loss of her organic certification and fines if she had fumigated her crops. The NAD Director granted equitable relief, with the consequence that the farmer was eligible for program benefits.

4. Models for Community Response

In August 2007, extensive flooding hit parts of Minnesota, Wisconsin, and Iowa. The areas affected included a heavy concentration of organic vegetable and dairy farms.¹²⁶ Many individuals were eager to support local organic farmers, and so organic organizations created means to provide support to address needs unmet by federal assistance. The Midwest Organic and Sustainable Education Service (MOSES) established a flood update on its Web site with information tailored to organic farmers.¹²⁷ In addition, a coalition of nonprofit organizations and food co-ops joined to support a “Sow the Seeds” fund, administered by the Institute for Agriculture and Trade Policy, to make grants to assist organic and sustainable farmers in recovering from the flood.¹²⁸

¹²³ 7 U.S.C. § 7996(a)(2); 7 C.F.R. pt. 718 (2007).

¹²⁴ 7 C.F.R. §§ 718.307, 11.9(e) (2007).

¹²⁵ Karen R. Krub, *USDA's National Appeals Division Procedure and Practice*, at 97 (Farmers' Legal Action Group, 2003), available at www.flaginc.org.

¹²⁶ Janet Kubat Willette, *Organic Producers Suffer Severe Losses in Flooding*, Agri-News, Aug. 28, 2007.

¹²⁷ <http://www.mosesorganic.org/mosesgeneral/floodupdate.html>. For example, the MOSES Web site included an article with practical advice on recovery from the flood, including model field flood records and field plans to assist organic farmers with monitoring fields affected by flood water, written by Jim Riddle, the Organic Outreach Coordinator for the University of Minnesota. Jim Riddle, *Impact of Flooding on Organic Food and Fields* (2007). Also posted on the MOSES Web site was an article on *Federal Disaster Assistance for Vegetable Growers Affected by Recent Floods and Droughts* by Paul D. Mitchell of the University of Wisconsin Extension.

¹²⁸ See www.sowtheseeds.org for more information.

III. NATURAL DISASTERS AND ORGANIC CERTIFICATION

Under the National Organic Program (NOP), accredited certifying agents make the decisions to grant, deny, suspend or revoke organic certification. Certifying agents make certification decisions based upon the farmer's organic system plan. Certifying agents look for evidence that farmers have developed and followed an organic plan that meets the requirements of the NOP regulations. Because certifying agents have such an important role in the NOP, it is crucial that organic farmers be in touch with their certifiers in the event of a natural disaster.

The regulations governing organic certification are found in Part 205 of Title 7 of the Code of Federal Regulations, and the underlying statute is the Organic Foods Production Act (OFPA), which begins at 7 U.S.C. § 6501. When the final NOP rule was published in the *Federal Register* in December 2000, it included a lengthy preamble containing USDA's remarks about the rulemaking process, including a discussion of public comments received and how the final rule differed from the proposed rule.¹²⁹ Unlike OFPA and the NOP regulations themselves, the preamble is not the law. However, the preamble can be a useful resource to help farmers and certifiers to understand and interpret the law, or at least to understand how USDA believes the law should be interpreted.

A. Organic System Plan Can Incorporate Disaster Readiness and Recovery

The organic system plan is the key document in organic certification. It is a plan of management for an organic farm that is agreed to by the farmer and the certifying agent.¹³⁰

It includes written plans concerning all aspects of agricultural production, including:¹³¹

- (1) A description of practices and procedures to be performed and maintained, including how often they will be performed;
- (2) A list of each substance to be used as a production input, indicating its composition, source, location(s) where it will be used, and documentation of commercial availability, as applicable;
- (3) A description of the monitoring practices and procedures to be performed and maintained, including how often they will be performed;
- (4) A description of the recordkeeping system implemented;
- (5) A description of the management practices and physical barriers established to prevent commingling of organic and nonorganic products on a split operation and

¹²⁹ 65 Fed. Reg. 80,548 (2000) (prefatory comments). Farmers should take note that changes have been made to the NOP regulations since the "final rule" was published, so the regulatory text set forth in the *Federal Register* must not be relied upon as an accurate statement of all of the current regulations. This article uses the term "final rule" to refer to the program as originally established in 2000 and uses the term "regulations" to refer to the regulations in effect in mid-2007.

¹³⁰ 7 C.F.R. § 205.2, "Organic system plan" (2007).

¹³¹ 7 C.F.R. § 205.201(a) (2007).

to prevent contact of organic production operations and products with prohibited substances; and

- (6) Additional information deemed necessary by the certifying agent to evaluate compliance with the regulations.

These elements of an organic plan can help organic farmers when natural disaster strikes.¹³² For example, an organic farmer's monitoring practices may provide early notice of an impending drought, so that the farmer could seek out assistance to install drip irrigation. Or physical barriers intended to prevent unintended application of prohibited substances might divert runoff from heavy rains, preventing soil erosion.

A less obvious but still important advantage of the organic plan for organic farmers affected by natural disaster is the recordkeeping required. Successful participation in federal disaster assistance programs often requires detailed records of crop yields and prices, and of livestock killed or injured in the disaster, or sold earlier than planned due to feed shortages. A farmer operating under an organic plan is likely to have all of the needed records to establish his or her losses. If a farmer's records are destroyed in the disaster, the certifying agent may have copies.

As suggested above, it is not uncommon for Congress to provide for disaster assistance some years after a disaster occurs. Well-maintained records can help farmers to document losses from previous years and establish eligibility for late-enacted programs.

B. Notify Certifier of Changes Due to Natural Disaster

In order to continue their organic certification, farmers must annually pay the certification fees and submit updated information to the certifying agent.¹³³ An organic farmer affected by natural disaster should immediately notify the certifying agent of any change in the farming operation that may affect the farmer's compliance with organic requirements.¹³⁴ Organic farmers should also notify their certifiers immediately if a natural disaster leads to application, including drift, of a prohibited substance to any field, production unit, site, facility, livestock, or product that is part of an operation.¹³⁵ Farmers may want to ask their certifiers for written agreement to any changes they propose.

The updated organic system plan submitted by the farmer each year must include:

- (1) A summary statement, supported by documentation, detailing any changes made to the organic system plan during the previous year;

¹³² An assertion that a farmer is following organic practices, but is not certified, may not be viewed sympathetically if a farmer seeks to overcome a Farm Service Agency finding that the farmer failed to follow good farming practices. NAD Director Review Determination 2004E000263 (June 1, 2004). A searchable database of NAD decisions is available at www.nad.usda.gov/public_search.html.

¹³³ 7 C.F.R. § 205.406 (2007).

¹³⁴ 7 C.F.R. § 205.400(f)(2) (2007).

¹³⁵ 7 C.F.R. § 205.400(f)(1) (2007).

- (2) Any additions or deletions to the organic system plan, intended to be undertaken in the coming year;
- (3) Updated contact information for the farm operator;
- (4) An update on the correction of minor noncompliances previously identified by the certifying agent as requiring correction for continued certification; and
- (5) Other information as deemed necessary by the certifying agent to determine compliance with organic requirements.

The changes which must be documented would include those instituted as a result of natural disaster, including those instituted under a temporary variance.

C. Temporary Variance from NOP Requirements May Be Possible

The Administrator of the Agricultural Marketing Service (AMS) is the official within USDA who oversees implementation of the NOP. The Administrator has the authority to grant temporary variances from NOP requirements for a variety of reasons, among them natural disasters declared by the Secretary of Agriculture and damage caused by drought, wind, flood, excessive moisture, hail, tornado, earthquake, fire, or other business interruption.¹³⁶ Unfortunately, the regulation defines neither “variance” nor “temporary variance.”

Temporary Variances from NOP Practice Standards

The AMS Administrator may grant a temporary variance from a variety of crop, livestock, and handling practice standards under the NOP, including:

- The soil fertility and crop nutrient management practice standard,
- The seed and planting stock practice standard,
- The crop rotation practice standard,
- The crop pest, weed, and disease management practice standard,
- The wild crop harvesting practice standard,
- The requirements related to origin of livestock,
- The requirements related to livestock feed,
- The livestock health care practice standard,
- The requirements related to livestock living conditions,
- The organic handling requirements,
- The facility pest management practice standard, and
- The commingling and contact with prohibited substance prevention practice standard.

¹³⁶ 7 C.F.R. § 205.290(a) (2007).

Certifiers do not have authority to grant a temporary variance, but may only provide a written recommendation that the Administrator grant one.¹³⁷ If the Administrator establishes a temporary variance, the Administrator must provide written notification to certifying agents and specify the period of time it shall remain in effect, subject to extension as the Administrator deems necessary. When a certifier is notified by the Administrator of the establishment of a temporary variance, the certifying agent must notify each production or handling operation it certifies to which the temporary variance applies. A temporary variance may not be granted to allow the use of prohibited substances. Other than requirements specifically granted a temporary variance, all other organic certification requirements continue to apply.

D. Specific Changes Provided for in the NOP Regulations

Following a natural disaster, organic farmers may find themselves unable to follow some of the crop practices contained in their organic plans. The NOP regulations anticipate such difficulties and set out specific instances where strict adherence to an organic plan may be excused.

1. Changes to Crop Practices

The Administrator may establish a temporary variance for damage caused by drought, wind, flood, excessive moisture, hail, tornado, earthquake, fire, or other business interruption to allow a farmer to use non-organically produced annual seedlings to produce an organic crop.¹³⁸

2. Temporary Confinement of Livestock

In general, an organic livestock producer must establish and maintain livestock living conditions which accommodate the health and natural behavior of animals, including freedom of movement, access to the outdoors, shade, shelter, exercise areas, fresh air, and direct sunlight, as well as access to pasture for ruminants.¹³⁹

While not, strictly speaking, a temporary variance, an organic livestock producer may temporarily confine an animal because of: inclement weather; conditions under which the health, safety, or well-being of the animal could be jeopardized; or risk to soil or water quality.¹⁴⁰ Producers who are considering or using temporary confinement should discuss it with their certifier, in order to reach agreement upon whether there is a need for temporary confinement, the conditions to be provided to

¹³⁷ 7 C.F.R. § 205.290(b) (2007).

¹³⁸ 7 C.F.R. § 205.204(a)(3) (2007). Note that lack of commercial availability alone would not be sufficient to justify use of nonorganically produced annual seedlings. 65 Fed. Reg. 80,548, 80,569 (2000) (prefatory comments).

¹³⁹ 7 C.F.R. § 205.239(a) (2007).

¹⁴⁰ 7 C.F.R. § 205.239(b) (2007).

the confined livestock, and the date or circumstances at which the temporary confinement will end.¹⁴¹

E. Natural Disasters and Applications of Prohibited Substances

One concern that arises with natural disasters such as floods is contaminants that may be carried and deposited by the flood water. Organic farmers should be aware of both generally applicable food safety laws and specific NOP requirements. A comprehensive overview of food safety laws is beyond the scope of this article.

1. Food Safety Laws and Voluntary Programs Not Limited to Organic Farmers

Though not an issue unique to organic farming, it is worth noting that raw agricultural products that contain any added poisonous or deleterious substance as a result of natural disaster or that have been held under unsanitary conditions that may have rendered them injurious to health are considered by the Food and Drug Administration (FDA) to be adulterated and may not be sold for human consumption.¹⁴² The FDA also regulates use of affected agricultural products for livestock feed.¹⁴³

The Agricultural Marketing Service within USDA administers a voluntary auditing program known as Good Agricultural Practices and Good Handling Practices (GAP & GHP).¹⁴⁴ Like organic certification, GAP and GHP provide third-party certification of farming and handling practices. Some buyers may ask for a USDA Good Agricultural Practices and/or Good Handling Practices audit as a general practice or following a natural disaster.¹⁴⁵ If an audit is not required under an existing contract, farmers may want to negotiate for the buyer to pay for the costs of the audit.

¹⁴¹ 65 Fed. Reg. 80,548, 80,573 (2000) (prefatory comments).

¹⁴² 21 U.S.C. § 342(a). *See generally* 21 C.F.R. pt. 109 (2007). This is most commonly applied to fruits and vegetables in flooded fields, but it also applies to the affected products and ingredients in meat and poultry processing establishments. 9 C.F.R. §§ 318.14, 381.151 (2007).

¹⁴³ *See* Greg Roth, *Recommendations for Marketing Flood Damaged Grain Crops* (Penn State Corn and Soybean Management, 2004), *available at* http://cornandsoybeans.psu.edu/marketing_flood_damaged_crops.cfm.

¹⁴⁴ Information about the Good Agricultural Practices and Good Handling Practices program, including the Audit Verification Checklist used by USDA, is available at www.ams.usda.gov/fv/fpbgapghp.htm.

¹⁴⁵ Samuel Fromartz, *Farmers, Flooding, and Whole Foods' Mea Culpa* (Sept. 12, 2007), *available at* www.chewswise.com/chews/2007/09/farmers-floodin.html.

2. NOP Requirements Related to Prohibited Substances

Most NOP requirements related to prohibited substances are well known to organic farmers and prospective organic farmers. Yet it is useful to review these basic requirements and consider how they might apply after a natural disaster.

a. Three-Year Transition Period for Land

Any field or farm parcel from which harvested crops are intended to be sold, labeled, or represented as “organic,” must have had no prohibited substances applied to it for a period of three years immediately preceding harvest of the crop.¹⁴⁶ The list of prohibited substances in § 205.105 includes synthetic substances that are not on the National List, natural substances that are on the National List, and sewage sludge.¹⁴⁷ Irradiation and genetic engineering are prohibited practices mentioned in sections 205.105 and 205.301, so that genetically modified organisms are arguably prohibited substances as well.¹⁴⁸

Unfortunately, the NOP regulations do not define “apply” or “applied.” Thus, it is difficult to know for certain whether a prohibited substance that had been carried to an organic farm as a result of natural disaster would be considered to have been “applied” within the meaning of the NOP regulations. Arguably, the term “apply” bars only an intentional use of a prohibited substance during the transition period. In support of this argument, one could point to the subsection of the rules that immediately follows the ban on application of prohibited substances. That provision states that organic farmland also must have distinct, defined boundaries and buffer zones such as runoff diversions to prevent the *unintended application* of a prohibited substance to the crop.¹⁴⁹ Use of the phrase “unintended application” suggests that “application” entails only intentional use. Arguably, then, because the farmer did not intend for the natural disaster to occur and for prohibited substances to come into contact with the land, those prohibited substances were not “applied.” Under this interpretation, if the farmer took steps to prevent unintended application of prohibited substances as part of the organic system plan, the farmer has met the requirements of the NOP, and the land may continue to be certified organic.¹⁵⁰

¹⁴⁶ 7 C.F.R. § 205.202(b) (2007). A similar restriction applies to the area from which an organic wild crop may be harvested. 7 C.F.R. § 205.207(a) (2007).

¹⁴⁷ 7 C.F.R. § 205.105 (2007).

¹⁴⁸ See Jill Krueger, *If Your Farm is Organic, Must It Be GMO Free?: Organic Farmers, Genetically Modified Organisms, and the Law*, (Farmers’ Legal Action Group, 2007), available at www.flaginc.org.

¹⁴⁹ 7 C.F.R. § 205.202(c) (2007).

¹⁵⁰ 65 Fed. Reg. 80,548, 80,633 (2000) (prefatory comments). In discussing emergency pest and disease treatment programs, USDA noted with apparent approval the previous certifier practice of treating such applications “as drift cases,” so that the specific crop was excluded from sale as organic,

However, one could argue that both intentional and unintentional application of prohibited substances are forbidden. Arguably, “application” is more concerned with whether a substance was actually used on land than with the farmer’s intent. Under this interpretation, if flood waters deposited sediment containing prohibited substances on organic fields, those fields have had prohibited substances “applied” to them and the three-year transition period must be repeated.

The NOP regulations do not allow the Administrator to provide a temporary variance for the land requirements, including the three-year transition period and the duty to take steps to prevent unintended application.¹⁵¹ This does not help with the interpretation of those requirements. It could mean either that no variance is needed because the provisions do not apply to unintentional application caused by natural disaster, or that USDA will require the three-year transition for all applications of prohibited substances, whether intentional or unintentional.

Until there is a clearer resolution of this question, farmers are advised to be in close communication with their certifying agents when a disaster has or may have deposited prohibited substances on their land.

b. Take Steps to Prevent Unintended Application

Organic land must 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.¹⁵²

c. Notify Certifier of Drift or Unintended Application

A person seeking to receive or maintain organic certification must immediately notify the certifier concerning any application, including drift, of a prohibited substance to any field, production unit, site, facility, livestock, or product that is part of an operation.¹⁵³ Drift is defined as the physical movement of prohibited substances from the intended target site onto an organic farm or field.¹⁵⁴ Thus, farmers must notify their certifier of any possible contamination which occurs as a result of natural disaster.

but the organic status of future crop years (i.e. the land) was not affected. USDA stated its intention to address such cases in a similar manner. USDA explicitly acknowledged the possible tension between consumer expectations and the welfare of organic farmers affected by unintended contact with prohibited substances.

¹⁵¹ 7 C.F.R. §§ 205.290; 205.202 (2007).

¹⁵² 7 C.F.R. § 205.202(c) (2007).

¹⁵³ 7 C.F.R. § 205.400(f)(1) (2007).

¹⁵⁴ 7 C.F.R. § 205.2, “Drift” (2007).

d. Certifiers and Others May Test

When there is reason to believe that an agricultural product to be sold as organic has come into contact with a prohibited substance, then the certifier, USDA, or state organic program (if applicable) may require testing of a sample of the agricultural product.¹⁵⁵ A natural disaster may provide the basis for a belief that contamination has occurred.

Certifying agents must submit to USDA the procedures for sampling and residue testing that they will follow.¹⁵⁶ When testing, certifying agents must maintain sample integrity, and testing must be performed in an accredited laboratory.¹⁵⁷ Testing may be required before or after harvest. However, the farmer may not be required to pay for the testing.¹⁵⁸ The certifier must provide the farmer with a copy of the test results.¹⁵⁹

e. Exclusion from Sale as Organic

Following a natural disaster, organic farmers or certifying agents may confirm that prohibited substances are present in or on a crop in the field or in storage. As is discussed further below, when prohibited substances are present in an agricultural product at levels that exceed the NOP tolerance, the agricultural product must not be sold as organic.¹⁶⁰ Although the agricultural product may not be sold as organic, it may be sold in conventional markets if it does not violate any other generally applicable laws.

The exclusion from organic sale based upon contamination with prohibited substances is unique in the NOP regulatory scheme. The NOP is a “process-based” program.¹⁶¹ In general, the NOP regulations set forth farming practices and methods that the farmer must follow, rather than outcomes that must be achieved. But this provision sets forth an absolute ceiling on the presence of certain prohibited substances which must not be exceeded if the product is to be considered organic. Thus, contamination caused by a natural disaster may cause

¹⁵⁵ 7 C.F.R. § 205.670(b) (2007). Compare 7 U.S.C. § 6506(a)(6), which states that a program established under OFPA must require periodic residue testing by certifying agents of agricultural products produced on organic farms to determine whether they contain any pesticide or other nonorganic residue.

¹⁵⁶ 7 C.F.R. § 205.504(b)(6) (2007).

¹⁵⁷ 7 C.F.R. § 205.670(b) (2007).

¹⁵⁸ 7 C.F.R. § 205.670(b) (2007). USDA has taken the position that residue testing expenses are a cost of doing business for the certifier. 65 Fed. Reg. 80,548, 80,628 (2000) (prefatory comments). The section does not address who must pay for testing if it is ordered by USDA.

¹⁵⁹ 7 C.F.R. § 205.402(b)(3) (2007).

¹⁶⁰ 7 C.F.R. § 205.671 (2007).

¹⁶¹ 65 Fed. Reg. 80,548, 80,556, 80,631 (2000) (prefatory comments).

a farmer to lose access to the organic market, despite the farmer's best efforts to follow NOP requirements. There is no exception or temporary variance available for circumstances beyond the farmer's control.

Agricultural products may be excluded from sale if they exceed NOP tolerances or if the organic farmer otherwise failed to comply with NOP requirements.

i. Tolerances Have Been Established for Some Prohibited Substances

A tolerance is defined under the NOP regulations as the maximum legal level of a pesticide chemical residue in or on a raw or processed agricultural commodity or processed food.¹⁶² The Environmental Protection Agency (EPA) has authority to regulate pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).¹⁶³ In general, after a pesticide is registered with the EPA, either a tolerance or an exemption from the need for a tolerance will be established.¹⁶⁴

For prohibited substances with an established EPA tolerance, the NOP tolerance is five percent of the EPA tolerance.¹⁶⁵ Thus, if the EPA tolerance for a prohibited substance were 100 parts per million, the NOP tolerance would be five parts per million.

ii. Unavoidable Residual Environmental Contamination and Prohibited Substances

The second half of the NOP tolerance standard is that prohibited substances must not be present in organic goods at levels greater than unavoidable residual environmental contamination. The NOP regulations define unavoidable residual environmental contamination as background levels of naturally occurring or synthetic chemicals that are present in the soil or present in organically produced agricultural products.¹⁶⁶ The definition further notes that unavoidable residual environmental contamination is below established tolerances. If there is no established tolerance for a given substance, it would seem there could be no point at which a certifier or USDA could determine that unavoidable residual environmental contamination had been exceeded.

However, USDA asserted in the preamble to the final rule that it intended to establish levels of unavoidable residual environmental contamination for purposes of regulating the presence of prohibited substances under the

¹⁶² 7 C.F.R. § 205.2, "Tolerance" (2007).

¹⁶³ 7 U.S.C. § 136 *et seq.*

¹⁶⁴ 40 C.F.R. pt. 180 (2007).

¹⁶⁵ 7 C.F.R. § 205.671 (2007).

¹⁶⁶ 7 C.F.R. § 205.2, "Unavoidable residual environmental contamination" (2007).

NOP.¹⁶⁷ USDA went on to state that these levels would represent limits at which USDA could take compliance action to suspend the use of a contaminated area for organic agricultural production.¹⁶⁸ USDA further stated that, in the interim, unavoidable residual environmental contamination would be defined as the Food and Drug Administration's action levels for poisonous or deleterious substances in human or animal feed.¹⁶⁹ Research for this article did not discover any action taken by USDA since issuance of the final rule in 2000 to establish unavoidable residual environmental contamination levels for any prohibited substances. It is unclear what effect incorporating action levels already enforced by the FDA into the NOP standards would have on organic farmers. Moreover, it is doubtful whether a standard referenced only in the preamble to the final rule and not in the regulation itself could be enforced against an organic farmer as a part of organic certification standards, since the preamble does not have the force and effect of law.

Therefore, until tolerance levels are established in the NOP regulations for unavoidable residual environmental contamination, it seems that an organic farmer could argue that exceeding background levels of unavoidable residual environmental contamination is not a lawful basis for excluding organic products from organic sale or suspending or revoking certification, because no background levels have been established through the rulemaking process.¹⁷⁰

iii. Presence of Prohibited Substances Acts as a Warning Signal

The preamble to the final rule states that the presence of prohibited substances acts as a "warning indicator" to the certifying agent.¹⁷¹ Presence of prohibited substances at levels that exceed the NOP tolerance will result in the crop being excluded from sale as organic. Presence of prohibited substances at levels that do not exceed any established tolerances may result in a proposed suspension or revocation of organic certification, if investigation reveals that the farmer failed to comply with other NOP requirements, including by intentional use of a prohibited substance.¹⁷²

¹⁶⁷ 65 Fed. Reg. 80,548, 80,629 (2000) (prefatory comments).

¹⁶⁸ 65 Fed. Reg. 80,548, 80,629 (2000) (prefatory comments).

¹⁶⁹ 65 Fed. Reg. 80,548, 80,629 (2000) (prefatory comments). The FDA's action levels for poisonous or deleterious substances in human or animal feed are set forth at 21 C.F.R. pt. 109 (2007).

¹⁷⁰ However, the organic farmer might face enforcement action by the FDA.

¹⁷¹ 65 Fed. Reg. 80,548, 80,628 (2000) (prefatory comments).

¹⁷² 65 Fed. Reg. 80,548, 80,629-80,630 (2000) (prefatory comments).

F. Process When Certifying Agents Find a Violation of Organic Requirements, Including As a Result of Natural Disaster

Certifying agents and USDA must follow certain procedures when they believe an applicant for certification or a certified farmer has violated organic requirements.

1. Noncompliance Process for New Certification Applicants

When a farmer applies for organic certification, the certifying agent reviews the application, including the organic system plan, and conducts an on-site inspection.¹⁷³ If the certifying agent concludes that the farmer is not able to comply or is not in compliance with organic requirements, the certifying agent will issue a notice of noncompliance.¹⁷⁴ The farmer has the opportunity to “rebut or correct” the notice of noncompliance.¹⁷⁵ If the certifying agent concludes that the farmer still does not meet organic standards, the certifying agent will issue a written notice of denial of certification. A certifier’s written denial of certification must state the reason(s) for denial and must inform the farmer of the rights to apply again for organic certification, request mediation, and appeal.¹⁷⁶

2. Noncompliance Process for Certified Organic Farm

a. Notice of Noncompliance

If the certifying agent concludes that a certified organic farm is not complying with organic requirements, the certifying agent must provide a written notice of noncompliance.¹⁷⁷ The notice of noncompliance must provide a description of each point of noncompliance, the facts that form the basis for each point of noncompliance, and the date by which the farmer must rebut or correct each noncompliance and submit supporting documentation of corrective action taken.¹⁷⁸ For example, a certifier might issue a notice of noncompliance if a farmer changed his or her crop rotation following a natural disaster without consulting the certifier.

b. Notice of Proposed Suspension or Revocation

When a rebuttal is not accepted, or correction of the noncompliance is not completed by the date provided by the certifying agent, the certifying agent must send the certified operation a written notice of proposed suspension or

¹⁷³ 7 C.F.R. §§ 205.402, 205.403 (2007).

¹⁷⁴ 7 C.F.R. § 205.405(a) (2007).

¹⁷⁵ 7 C.F.R. § 205.405(b) (2007).

¹⁷⁶ 7 C.F.R. § 205.405(d) (2007).

¹⁷⁷ 7 C.F.R. §§ 205.406(c), 205.662 (2007).

¹⁷⁸ 7 C.F.R. § 205.662(a) (2007).

revocation of certification, applicable to the entire farming operation or to a portion of the operation.¹⁷⁹

USDA will suspend or revoke the certification if (1) the farmer does not appeal the proposed suspension or revocation by the appeal deadline, or (2) the farmer is unsuccessful in the appeal.¹⁸⁰ Farmers may sell their agricultural products as “organic” until their certification has been suspended or revoked.

3. Mediation and Appeals

Farmers may seek to enter into mediation with their certifiers for any disputes.¹⁸¹ If mediation is unsuccessful, or if the certifier does not agree to mediate, the farmer may file an administrative appeal with USDA. Farmers may appeal to the Administrator of USDA’s Agricultural Marketing Service when their application for certification is denied, or when they receive a notice of proposed suspension or revocation of organic certification.¹⁸² In California and Utah, the only two states with state organic programs approved by USDA, the appeal must be filed with the state.¹⁸³

Details of Appeals Under the NOP Regulations

An appeal request must include a copy of the adverse decision and a statement of the farmer’s reasons for believing that the adverse decision was improper or inconsistent with NOP regulations, policies, or procedures. Appeals must be filed within the time period provided in the notice from the certifier, or within 30 days form receipt of the notice, whichever is later. The appeal will be considered filed on the date received by the AMS Administrator. Appeals to the Administrator must be filed in writing and addressed to Administrator, USDA, AMS, c/o NOP Appeals Staff, Stop 0203, Room 302-Annex, 1400 Independence Avenue, SW, Washington DC 20250-0203.

¹⁷⁹ 7 C.F.R. § 205.662(c) (2007).

¹⁸⁰ 7 C.F.R. § 205.681(c) (2007).

¹⁸¹ 7 C.F.R. § 205.663 (2007). A certifying agent may not reach any agreement in mediation which would allow a certified operation to violate the NOP requirements.

¹⁸² 7 C.F.R. §§ 205.680, 205.681 (2007). OFPA states that any person may appeal a decision (whether made by a certifier, USDA, or a state organic program) that adversely affects that person or that is inconsistent with the requirements of OFPA and the NOP regulations. 7 U.S.C. § 6520.

¹⁸³ A state organic program is approved by USDA to implement the requirements of the NOP as well as additional guidelines chosen by the state. 7 C.F.R. § 205.2, “State organic program (SOP)” (2007); 7 U.S.C. § 6506(c). A state that acts as an accredited certifying agent within the NOP has not established a state organic program.

A farmer who wishes to appeal a decision of the Administrator may seek further review by an Administrative Law Judge within USDA and the USDA Judicial Officer.¹⁸⁴ Finally, the farmer may seek review in federal court.

4. Civil Penalties

In addition to suspension or revocation, any certified operation that knowingly sells or labels a product as organic, except in accordance with organic requirements, is subject to a civil penalty of not more than \$10,000 per violation.¹⁸⁵ For example, selling products as “organic” after one’s organic certification was revoked would put a farmer at risk of having to pay a civil penalty.

IV. CONCLUSION

This article is intended to help organic farmers to understand and participate in disaster assistance, conservation, and organic certification programs as they exist now. But understanding disaster assistance programs, in particular, often reveals ways in which they fail to serve the disaster readiness and recovery needs of organic farmers. Participation in programs such as crop insurance and the noninsured crop disaster assistance program (NAP) is by no means enough for a comprehensive disaster readiness and recovery plan, but it may be an essential beginning in order to preserve eligibility for other disaster assistance programs. Improving the accessibility and effectiveness of federal disaster assistance for organic farmers is important to individual organic farmers, and may be crucial to restoring local and regional food systems when natural disaster strikes.

¹⁸⁴ 7 C.F.R. § 205.681(a)(2) (2007); 7 C.F.R. §§ 1.131 *et seq.* (2007).

¹⁸⁵ 7 C.F.R. § 205.662(g)(1) (2007).