**2 Ariz. J. Envtl. L. & Pol'y 1**

**Arizona Journal of Environmental Law & Policy**
January, 2012

Comment
Sheila Gholkar



# MOVING BEYOND THE INDUSTRIAL ORGANIC FOOD MOVEMENT: RETHINKING ORGANIC FOOD REGULATIONS

## Introduction

One of the fastest growing sectors of the food economy, the sale of organic and non-genetically modified foods has burgeoned from $1 billion in 1990 to $26.7 billion in 2010.[1] Over the past two decades, as the demand for organic foods has grown, the industry has evolved significantly, from a group of small-scale farmers who sold their goods at local farmers markets to large-scale, modern industrial farming operations.[2] As consumers have grown more knowledgeable about the ecological and health effects of pesticide use and chemical fertilizers, they have also begun demanding more information in the marketplace. In a recent decision by the Sixth Circuit Court of Appeals, the court struck down an Ohio law that kept dairy farmers who were compliant with federal organic standards from labeling their goods as free of antibiotics, pesticides or synthetic hormones.[3] The decision was celebrated as a victory for both consumers and the organic industry, since both parties will benefit from consumers having more information to inform their purchases.[4] Ohio's now-voided law illustrates an underlying tension: despite the boom of the industry and the growing demand for organic foods, current standards regulating the production and distribution of organic and non-genetically modified foods may be falling short of protecting the environment and supporting sustainability. The current framework allows for large-scale farming operations to easily adapt their techniques to meet organic production requirements. While this benefits consumers by making organic goods more accessible and affordable, the federal standards do not provide for adequate transparency or consistency. Gaps in the current regulations prevent consumers from accessing information that can more fully inform their purchases, and this calls into question whether Congress has achieved its intent in creating a meaningful national organics program.

## I. The Organic Food Movement: Past and Present

The organic movement traces its roots to the 1960s.[5] Choosing "organic" was not just an alternative to industrial farming; it was an act of political protest for many Americans during the Vietnam War,[6] as the same companies that produced chemicals like Agent Orange were also distributing agricultural pesticides to American farmers.[7] The federal government did not respond to the growing organic food industry for a number of years, and this led some states to provide some form of regulation to attempt to fill the gap. By 1990, nearly half of all states had passed some form of regulation, but each state's approach differed greatly and varied in efficacy.[8] Foods labeled as "organic" could have anywhere from 20 to 100% of organic ingredients.[9] Third-party certifiers were labeling foods as ""ecologically grown," "natural," "wild," and "residue free."[10] In the absence of federal oversight, consumers were left wading through various seals, third-party certifications, and labels, wondering how they differ, and which foods were truly organic.[11]

The Organic Food Production Act ("OFPA" or "Act") emerged in the 1990s, but it took over ten years before the U.S.

Department of Agriculture ("USDA") promulgated final rules to implement the legislation. At last, in 2002, the USDA established guidelines for growing, certifying, and marketing organic foods with the goals of (1) alleviating consumer confusion over organic foods; (2) providing uniform standards for the labeling of organic products; and (3) promoting interstate commerce in the organic food market by harmonizing regulation.[12] In doing so, the OFPA primarily functions through three process-based mechanisms[13]--certification, authentication, and labeling. The regulations thus focus not on the final product itself, but on the processes of growing and preparing organic goods, such as how soil fertility is maintained and how livestock are managed.[14]

To ensure that organic growers comply with federal standards, the regulations require that organic farmers who gross more than $5,000 annually be formally certified through a USDA-accredited certifier in order to sell or label their products as "organic."[15] Farmers who make less than $5,000 each year, and who sell directly to consumers through farmer's markets or other direct methods, are not required to go through the formal certification process.[16] These growers can instead opt to sign a declaration of compliance.[17] However, should these farmers decide to sell their goods through conventional methods (e.g., through grocery stores), they cannot use the label ""certified organic" unless they obtain official certification.[18] But official certification can be pricey and time-intensive,[19] and the certification process presents procedural hurdles that may inadvertently yet significantly narrow the market through which local and small family farmers can sell their goods.[20] Some growers argue that while certification serves certain public-policy interests by helping ensure the integrity of organic goods, the rising administrative costs associated with the certification process has made organic certification an industry in itself.[21]

In addition, once a farm obtains certification, certifying agents will periodically conduct on-site inspections to monitor compliance with federal standards.[22] Certified-organic farmers are required to maintain detailed records of all substances applied to the fields,[23] the names of individuals who applied the substances,[24] as well as water test records, inspection reports, and sales records.[25]

Finally, the organic labeling guidelines prescribe a system in which an organic product can fall into one of four categories: (1) "100% Organic," if the product contains 100% organic ingredients; (2) "Organic," if the product contains between 95 and 99% organic ingredients; (3) "Organic Ingredients," if the good contains between 70 and 94% organic ingredients; or (4) "Some Organic Ingredients," if the product contains less than 70% organic ingredients.[26] Goods that fall into this last category cannot use the word "organic" on the front of the label, but may list the organic ingredients on the back.[27]

**II. Current Regulations May Exacerbate Consumer Confusion and Fall Short of Promoting Sustainability**

Though the OFPA appears to provide a comprehensive framework to regulate the organic food industry, the Act contains several troubling holes that may preclude the benefits of meaningful regulatory scheme.

First, the standards do not ensure that organic foods are truly free of pesticide residues and genetically modified organisms ("GMOs"). Although the current regulations prohibit the use of pesticides and GMOs, the spraying of pesticides on adjacent farms can contaminate the water supply, which may in turn feed nearby organic farms.[28] A Senate Report on the OFPA recognized this risk, indicating that even when organic farms adhere to federal standards, they "may produce products with minimum residues dueto inadvertent environmental contamination, such as drift from a neighboring farm."[29] Despite these concerns, organic crops are generally not tested before being distributed. While Congress recommended in the Act that the regulatory program ""require periodic residue testing by certifying agents" to determine "whether such [certified-organic] products contain any pesticides or other non-organic residue or natural toxicants," nothing in the current regulations actually requires that organic crops be tested regularly.[30] One study conducted by the USDA, the California Department of Pesticide Regulation, and the Consumer Union uncovered that pesticide residues were present in up to 27% of organic produce, despite the regulations' attempts to ban the presence pesticides in organic produce.[31] The authors of the study explained that the results were likely due to "the capacity of wind, rain, fog, and irrigation water to move pesticides beyond the fields where they were applied."[32]

The current regulatory scheme may actually disincentivize post-harvesting testing. Certifying agents can only conduct such tests when they have "reason to believe" that a product has been contaminated with a prohibited substance.[33] Typically, such an obvious breach does not occur. Farmers are required to report any "drift of a prohibited substance to any field, production unit, site, facility, livestock, or product," but in many cases, farmers may remain unaware that such contamination has even occurred.[34] This is further exacerbated by the reality that, even if a certifying agent suspects that contamination has occurred,

the statute requires testing to be done at the agent's expense. There are thus few incentives for agents to conduct post-harvesting testing.[35]

Moreover, there is a gap between the regulatory standards and consumers' perceptions of what those standards mean. A poll in 2000 showed that nearly 70% of consumers believed organic foods to be chemical or residue-free.[36] Similarly, while it is widely accepted that organic foods are free of genetically modified ingredients, this notion may not be accurate, given the frequency with which organic foods are contaminated with products of genetic engineering.[37] However, because organic farmers are prohibited from using most pesticides, antibiotics, or products of genetic engineering, purchasers of organic goods can rest assured that they are not financially contributing to the use of such substances or technology.[38]

Yet the regulations have also failed standardize a variety of claims that third-party certifiers continue to use in marketing food products. For example, despite the public perception of what constitutes "free-range" goods, free-range chickens "still spend all or most of their time indoors, crammed onto a large, feces-covered floor."[39] Regulations require that "free range" chickens have access to the outdoors, but there are no other criteria regulating the use of the term, including the size of the outdoor area, or the amount of outdoor space allotted per animal.[40] While the USDA is working to define terms such as "free range" and "grass fed,"[41] there are a number of other terms that the government is not yet taking steps to address--including "hormone free" and "no chemicals added."[42]

**Conclusion**

While OFPA has indeed provided some baseline standards for regulating the growing organic food industry, the USDA should take steps to provide a more meaningful national organics program that minimizes consumer confusion and better integrates the values of conservation and sustainability that reflect the founding ideals of organic farming. Such solutions could include requiring that residue testing be conducted before organic goods are sold. This would provide a check against contaminations that would otherwise remain unknown, and would prevent mislabeling of foods that are not truly organic. The USDA could additionally implement a more nuanced framework that allows and incentivizes producers to go beyond meeting baseline standards. Such a regulatory scheme could set organic standards as a baseline for production, but allow producers to obtain reduced-cost third-party certification for value-added attributes-- such as whether a producer used all natural methods to control pests, or whether the food was locally produced.[43] This type of framework could serve to not only increase the rigor of the standards,[44] but would also reward small growers whose practices more fully embody the values of purity and healthfulness underlying the organic food movement. Guidance can be sought from countries like Brazil and India, which have implemented informal mechanisms to certify organic goods through co-op groups of farmers who can obtain certification under one certificate, so long as they maintain an internal quality management system.[45] Finally, the USDA could establish strict standards for food descriptors such as "natural" and "residue free," so that consumers can distinguish truly organic foods from competing ones. Closing the gaps in the current regulatory framework will undoubtedly require an innovative approach--but to remain true to the ideals of the organic food movement, the standards should do more to protect our environment, promote a sustainable distribution system, and eliminate the bewildering array of food labels.

Footnotes

1 Industry Statistics and Projected Growth, Organic Trade Ass'n, http://www.ota.com/organic/mt/business.html (last visited Nov. 25, 2011).

2 Small Organic Farmers Foiled by Red Tape, Biz Community, Nov. 28, 2011, available at http://www.bizcommunity.com/Article/196/307/67818.html.

3 State of Ohio Drops Label Restrictions on Organic Milk, Enews Park Forest, Nov. 3, 2011, available at http://www.enewspf.com/latest-news/science-a-environmental/28473-state-of-ohio-drops-label-restrictions-on-organic-milk.html.

4 Id.

[5] See generally Rachel Carson, Silent Spring (25th anniversary ed. 1987) (the first major work about the dangers of pesticides and the connection between consumer decisions and their effects on the environment, written in 1962).

[6] Michael Pollan, The Omnivore's Dilemma: A Natural History of Four Meals 141 (2006).

[7] Id. at 141-43.

[8] Kenneth C. Amaditz, The Organic Foods Production Act of 1990 and Its Impending Regulations: A Big Zero for Organic Food?, 52 Food & Drug L.J. 537, 539 (1997).

[9] Id.

[10] Id. at 537.

[11] Id. at 532.

[12] See 7 U.S.C. § 6501 (1994).

[13] National Organic Program, 65 Fed. Reg. 80,549 (Dec. 21, 2000) (to be codified at 7 C.F.R. pt. 205) ("The emphasis and basis of these standards is on process, not product.").

[14] See Michelle T. Freidland, You Call That Organic? -- The USDA's Misleading Food Regulations, 13 N.Y.U. Envtl. L.J. 380, 384 (2005).

[15] 7 U.S.C. § 6513(a) (1990).

[16] Andrew J. Nicholas, As the Organic Industry Gets Its House in Order, the Time Has Come for National Standards on Genetically Modified Foods, 15 Loy. Consumer L. Rev. 277, 285 (2003).

[17] Id.

[18] Id.

[19] See 7 U.S.C. §§ 6513(a), (f)(2). Farmers must submit a detailed organic plan to a USDA-accredited certifier, including: a three-year management history of the land to verify that no prohibited substances have been applied to it; and descriptions of substances used in production and handling of goods. After a producer submits an organic plan to a certifying agent, the agent reviews the plan for compliance with regulations. If the plan is in compliance, the agent conducts an on-site inspection to verify that the system plan correctly reflects the farm's practices.

[20] Kate L. Harrison, Organic Plus: Regulation Beyond the Current Organic Standards, 25 Pace Envtl. L. Rev. 211, 220 (2008).

[21] Small Organic Farmers Foiled by Red Tape, supra note 2.

[22] 7 U.S.C. § 6506(a)(5) (2006).

[23] 7 U.S.C. §§ 6511d(1)-(2) (2006).

[24] Id.

[25] Nicholas, supra note 16, at 286.

[26] Id. at 288.

[27] 7 C.F.R. § 205.305 (2007).

[28] Friedland, supra note 14, at 399.

[29] S. Rep. No. 101-357, at 300 (1990), reprinted in 1990 U.S.C.C.A.N. 4656, 4954.

[30] Friedland, supra note 14, at 399.

[31] B.P. Baker et al., Pesticide Residues in Conventional, Integrated Pest Management (IPM)-Grown and Organic Foods: Insights from Three U.S. Data Sets, 19 Food Additives & Contaminants 427, 432-34 (2002).

[32] See Friedland, supra note 14, at 400.

[33] 7 C.F.R. § 205.670(b) (2007).

[34] 7 U.S.C. § 205.400(f)(1) (2006).

[35] 7 C.F.R. § 205.670(b) (2007).

[36] A. Elizabeth Sloan, The Natural & Organic Foods Marketplace, 56 Food Tech. 27, 34 (2002).

[37] See Friedland, supra note 14, at 403.

[38] 7 C.F.R. §§ 205.105, 205.206(d), 205.2 (2003).

[39] Donna Mo, Unhappy Cows and Unfair Competition: Using Unfair Competition Laws to Fight Farm Animals Abuse, 50 UCLA L. Rev. 1313, 1355 (2005).

[40] How Free is "Free-Range?", Compassion Over Killing, http:// www.cok.net/lit/freerange.php (last visited Jan. 10, 2012).

[41] United States Standard for Livestock and Meat Marketing Claim, Grass (Forage) Fed Claim, 71 Fed. Reg. 27,662, 27,664 (May 12, 2006).

[42] Eco-Labels, GreenerChoices.org, http://www.eco-labels.org/labelIndex.cfm?mode=view (click on "Label Index" and browse for term) (last visited May 8, 2011).

[43] See Harrison, supra note 20, at 228-31.

[44] Id.

[45] Small Organic Farmers Foiled by Red Tape, supra note 2.