

2009

## Organic Foods Production: What Consumers Might Not Know about the Use of Synthetic Substances

Aubrey Parlet

Follow this and additional works at: <http://lawcommons.luc.edu/lclr>



Part of the [Consumer Protection Law Commons](#)

---

### Recommended Citation

Aubrey Parlet *Organic Foods Production: What Consumers Might Not Know about the Use of Synthetic Substances*, 21 Loy. Consumer L. Rev. 392 (2009).

Available at: <http://lawcommons.luc.edu/lclr/vol21/iss3/6>

This Student Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola Consumer Law Review by an authorized administrator of LAW eCommons. For more information, please contact [law-library@luc.edu](mailto:law-library@luc.edu).

# ORGANIC FOODS PRODUCTION: WHAT CONSUMERS MIGHT NOT KNOW ABOUT THE USE OF SYNTHETIC SUBSTANCES

*Aubrey Parlet\**

## I. INTRODUCTION

Only a handful of trends in the diet habits of Americans have ever swept the country as quickly as the semi-recent “organic” trend.<sup>1</sup> American consumers can’t walk through their favorite grocery stores without being bombarded with products bearing the label “organic”.<sup>2</sup> According to one study, organic food sales are anticipated to increase an average of 18% each year beginning in 2007 until at least 2010.<sup>3</sup> However, does the same fate that awaited so many other diet trends await the organic trend?<sup>4</sup> Will organic products, similar to other diet trends, later be discovered not to be what they initially appeared to be?<sup>5</sup> For many products bearing the United States Department of Agriculture (“USDA”) label of “organic,” this untimely fate seems almost certain as products bearing the label “organic” have come under scrutiny.<sup>6</sup> The most common questions surround consumers’ confusions and misconceptions. For example, many consumers may wonder, “what does organic mean?” or “what differentiates organic products from other products?” or “what really goes into the making of an organic product?”<sup>7</sup> And while many American consumers may *think* that they know the answers to these basic questions, they may be surprised to find out that their conceptions surrounding the organic

---

\* J.D. Candidate, May 2010, Loyola University of Chicago School of Law, Bachelor of Arts in Psychology, Creighton University.

<sup>1</sup> Chad M. Kruse, Comment, *The Not-So-Organic Dairy Regulations of the Organic Food Production Act of 1990*, 30 S. ILL. U. L. J. 501, 501 (2006).

<sup>2</sup> *Id.*

<sup>3</sup> Organic Trade Association, Industry Statistics and Projected Growth, <http://www.ota.com/organic/mt/business.html> (last visited January 17, 2009).

<sup>4</sup> Kruse, *supra* note 1, at 501.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

trend are ill-founded and wrong. Even worse, upon discovering that their initial conceptions are incorrect, they may be left with a lack of instructive information and no way to correct their misconceptions.

Due to these common and yet seemingly unanswerable consumer misconceptions, the Organic Foods Production Act ("Act") needs to be refined and amended so that consumers' understanding of organic products can be enhanced. In today's America, where organic farmers face competition from larger factory-style farms who also use the USDA "organic" label and offer cheaper products, consumers deserve protection.<sup>8</sup> As it stands right now, consumers are being left in the dark as to what the new USDA "organic" label *actually* means and what the Organic Foods Production Act entails.<sup>9</sup>

This note will explore the Organic Foods Production Act, the National List of synthetic substances, and case law relating to the Act. Section II will provide an overview of the Act and will specifically address the state of organic foods prior to the enactment of the Act, the enactment of the Act, the purposes of the Act, and the definition of "organic" along with qualifications and exceptions. The third section will examine some influential case law relating to organic foods and the Act, and the fourth section will follow-up by analyzing the impact of the cases discussed in section three; primarily the amendments to the Act that were a direct result of case decisions. Finally, in Section V, this note will address the outlook for the future of organic foods, including newly developing issues and the future of the Act; specifically the need for refinement and additional amendments in order to ease consumers' confusion.

## II. OVERVIEW OF THE ORGANIC FOODS PRODUCTION ACT

The Organic Foods Production Act<sup>10</sup> ("Act") was the first action taken by Congress to better regulate organic products and processes. The Act, codified in 1990, begins by defining its purposes and laying forth basic definitions.<sup>11</sup> The Act then proceeds to lay the foundation for the National Organic Production Program and the National Standards for Organic Production.<sup>12</sup> Additionally, the Act sets forth compliance requirements, general requirements, and requirements for the State Organic Certification Program; prohibited crop production practices and materials; guidelines for animal production practices and materials; handling guidelines; other additional guidelines; other

---

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Organic Foods Production Act, 7 U.S.C. §§ 6501-6523 (2006).

<sup>11</sup> 7 U.S.C. §§ 6501-6502.

<sup>12</sup> 7 U.S.C. §§ 6503-6504.

production and handling practices; the requirements for an “organic plan”; the guidelines for an accreditation program; requirements of certifying agents; and information on peer review of certifying agents.<sup>13</sup> Moreover, the Act establishes the National Organic Standards Board, identifies what will happen in the event of a violation of the Act and lays forth procedures for administration and administrative appeal.<sup>14</sup> The Act also authorizes appropriations for carrying out the Act and establishes a national organic certification cost-share program.<sup>15</sup> Most importantly for our purposes, the Act sets forth information regarding a “national list” of approved and prohibited substances relating to organic products.<sup>16</sup>

### III. THE STATE OF ORGANIC FOODS IN THE YEARS PRIOR TO THE ENACTMENT OF THE ORGANIC FOODS PRODUCTION ACT

Organic foods have had a place in society since long before the 20<sup>th</sup> century.<sup>17</sup> In fact, organic farming techniques were really the first farming techniques of modern man due to a lack of technology.<sup>18</sup> There were no synthetic substances available to early farmers. Accordingly, all of their farming practices were naturally organic, and the food produced was therefore organic as well. It was the introduction of chemically synthesized farming products such as DDT and urea that caused the term “organic” to emerge as a separate identity beginning in the 1960s.<sup>19</sup> Ever since, the public’s awareness of the health and ecological problems associated with the use of chemicals and synthetic substances, such as insecticides, has rapidly increased.<sup>20</sup> The growing awareness of the consequences to individuals and to the environment created consumer demand for products, particularly food, grown without ecologically destructive and toxic chemicals.<sup>21</sup>

Organic food was embraced as an alternative to destructive chemicals and the market for organic products expanded.<sup>22</sup> With the expanding market, the need for standards and regulation expanded as well.

---

<sup>13</sup> 7 U.S.C. §§ 6505-6516.

<sup>14</sup> 7 U.S.C. §§ 6518-6521.

<sup>15</sup> 7 U.S.C. §§ 6522-6523.

<sup>16</sup> 7 U.S.C. § 6517.

<sup>17</sup> BRIAN BAKER, ORGANIC FARMING COMPLIANCE HANDBOOK: A RESOURCE GUIDE FOR WESTERN REGION AGRICULTURAL PROFESSIONALS, BRIEF HISTORY OF ORGANIC FARMING AND THE NATIONAL ORGANIC PROGRAM 1 (2005), <http://www.sarep.ucdavis.edu/Organic/complianceguide/intro2.pdf>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> BAKER, *supra* note 17, at 1.

Among the first regulations to be instituted to help govern organic food and organic production methods was the voluntary standards and certification program promulgated by the Rodale Press in 1972.<sup>23</sup> Subsequently, numerous other programs were implemented and the popularity of organic food continued to increase. In 1980, the "Report and Recommendations on Organic Farming" was produced by Robert Papendick, a USDA-ARS soil scientist.<sup>24</sup> This report was widely regarded as the first recognition by the USDA that organic farming methods deserved research support because they were indeed viable.<sup>25</sup>

Over the next several years there was an organic farming boom spurred by the farm crisis of the 1980s.<sup>26</sup> In 1989, the television show "Sixty Minutes" broadcast an expose on Alar, a destructive chemical, and the sale of organic commodities increased overnight.<sup>27</sup> Subsequently, the organic market faced limited supply and overwhelming demand.<sup>28</sup> To make matters more difficult for the organic foods market, there was a lack of regulation. State laws were either inconsistent or nonexistent.<sup>29</sup> Furthermore, there were inadequate enforcement programs and an increase in fraud that threatened the value and the meaning of the label "organic."<sup>30</sup> It was because of the increase in fraud relating to the label "organic" that Congress was persuaded in 1990 by a coalition of farming, consumer, animal welfare, and environmental organizations to pass the Organic Foods Production Act as a part of the 1990 Farm Bill.<sup>31</sup>

---

<sup>23</sup> See *id.* (stating that "Rodale was also responsible for helping to organize the establishment of California Certified Organic Farmers and Oregon-Washington Tilth Organic Producers Association in the early 1970s").

<sup>24</sup> See *id.* (noting that Robert Papendick is a soil scientist with the USDA-ARS and is based at Washington State University in Pullman).

<sup>25</sup> *Id.*

<sup>26</sup> See *id.* (noting that "The farm crisis of the 1980's brought bankruptcy and foreclosure rates not seen since the 1930's. A few large-scale bankrupt conventional farms were still able to plant and harvest crops without using purchased inputs. At the end of a transition period, they discovered that there were buyers who would pay a premium for their crops that were 'organic by neglect' because of the absence of chemical inputs. These farms were possibly the first to go organic for strictly economic reasons and were of considerably larger scale than the organic farms that existed prior to their entry into the organic sector. Their market entry made the organic sector more competitive with conventional agriculture. The ability of these farmers to produce without chemical inputs, their rapid expansion of the organic market, and their obvious profitability gained the attention of other nonorganic farmers who faced financial difficulties").

<sup>27</sup> BAKER, *supra* note 17, at 1.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

#### IV. THE ENACTMENT AND THE PURPOSES OF THE ORGANIC FOODS PRODUCTION ACT

Due to an increasingly health-conscious society and a growing consumer interest and demand for organic products, The Organic Foods Production Act ("Act") was promulgated by Congress.<sup>32</sup> When enacted in 1990, there were three stated purposes for the Act.<sup>33</sup> Even with the passage of several amendments to the Act in the years since 1990, the underlying purposes have remained the same.

One of the stated purposes for the Act is "to establish national standards governing the marketing of certain agricultural products as organically produced products."<sup>34</sup> A second purpose is "to assure consumers that organically produced products meet a consistent standard."<sup>35</sup> Finally, a third purpose is "to facilitate interstate commerce in fresh and processed food that is organically produced."<sup>36</sup> In essence, the basic purposes of the Act are to help consumers better understand the meaning of "organic" and limit what producers can label as being "organic" in order to better protect consumers in their search for organic products. For our purposes, we will not be concerned with the third purpose of the Act, relating to interstate commerce, and will instead be primarily concerned with the first and second purposes of the Act, relating to consumers and consumer protection. A foundational starting point for determining whether the purposes of the Act are being adequately upheld is the all-important, yet seemingly vague, definition of "organic."

#### V. THE "DEFINITION" OF "ORGANIC:" QUALIFICATIONS AND EXCEPTIONS

When searching the Act for a definition of "organic," one might be surprised when their search is unavailing. The Act, while including definitions for common terms such as "person" and "livestock" along with a variety of definitions for more complex terms such as "botanical pesticides" and "certifying agent" fails to provide a definition for the basic term "organic."<sup>37</sup>

The closest the Act comes to defining "organic" is in the Act's definitions of "certified organic farm," "certified organic handling operation," "organic plan," "organically produced," and "state organic

---

<sup>32</sup> 7 U.S.C. § 6501.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> 7 U.S.C. § 6502.

certification program.”<sup>38</sup> Aside from those terms, the Act is deficient in providing even a basic definition of “organic.”

Despite the shortcoming of the Act of never specifically defining “organic,” the Act does provide for certain qualifications that must be met in order for a product to be labeled “organic.” Specifically, in order to be sold or labeled as an organically produced product under the Act, an agricultural product shall:

have been produced and handled without the use of synthetic chemicals, except as otherwise provided in this title; except as otherwise provided in this title and excluding livestock, not be produced on land to which any prohibited substances, including synthetic chemicals, have been applied during the 3 years immediately preceding the harvest of the agricultural products; and be produced and handled in compliance with an organic plan agreed to by the producer and handler or such product and the certifying agent.<sup>39</sup>

Of particular interest for our purposes is the mention of synthetic substances. The Act claims that products may not be termed “organic” if they have been produced and handled with the use of synthetic substances, unless an exception for certain synthetic substances applies.<sup>40</sup> The exceptions to the prohibition of the use of synthetic substances, however, are broader than consumers may realize.

In general, the Act states that the Secretary shall establish a National List of approved and prohibited substances that “shall be included in the standards for organic production and handling” for products to be sold or labeled as organically produced under this title.<sup>41</sup>

---

<sup>38</sup> *Id.* (defining “certified organic farm” as meaning “a farm, or a portion of a farm, or site where agricultural products or livestock are produced, that is certified by the certifying agent under this title as utilizing a system of organic farming as described by this title”; defining “certified organic handling operation” as meaning “any operation, or portion of any handling operation, that is certified by the certifying agent under this title as utilizing a system of organic handling as described under this title”; defining “organic plan” as meaning “a plan of management of an organic farming or handling operation that has been agreed to by the producer or handler and the certifying agent and that includes written plans concerning all aspects of agricultural production or handling described in this title including crop rotation and other practices as required under this title”; defining “organically produced” as meaning “an agricultural product that is produced and handled in accordance with this title”; and defining “state organic certification program” as meaning “a program that meets the requirements of 7 USC § 6506, is approved by the Secretary, and that is designed to ensure that a product that is sold or labeled as ‘organically produced’ under this title is produced and handled using organic methods”).

<sup>39</sup> 7 U.S.C. § 6504.

<sup>40</sup> *Id.*

<sup>41</sup> 7 U.S.C. § 6517 (The Act goes further to state that “the list established under subsection (a) shall contain an itemization, by specific use or application, of each synthetic substance permitted under subsection (c) (1) or each natural substance prohibited under subsection (c) (2).” The Act

At the outset, the National List provides evaluation criteria for allowed and prohibited substances, methods, and ingredients.<sup>42</sup> The most recent version of the National List states certain substances that may be used in organic crop production if the use of such substances does not contribute to contamination of soil, water, or crops, and may only be used when the other provisions of the National List prove to be insufficient against pest control.<sup>43</sup> Among allowable synthetic substances for crop production are the following: alcohol, ethanol, isopropanol, calcium hypochlorite, chlorine dioxide, ozone gas, weed barriers, hydrogen peroxide, soaps, boric acid, sulfur, ethylene gas, and numerous others.<sup>44</sup> Additionally, the National List provides for synthetic substances that are allowed for use in organic livestock production.<sup>45</sup> Such allowable synthetic substances include aspirin, vaccines, alcohols, calcium hypochlorite, electrolytes, glucose, iodine, hydrogen peroxide, magnesium sulfate, magnesium hydroxide, oxytocin, lidocaine, and several others.<sup>46</sup>

Aside from enumerating a list of allowable synthetic substances, the National List also provides for certain non-synthetic substances that are prohibited for use in organic crop production.<sup>47</sup> The list of such substances includes arsenic, lead salts, tobacco dust, ash, and a few select other substances.<sup>48</sup> Additionally, the National List provides for a number of non-synthetic substances that are prohibited for use in organic livestock production.<sup>49</sup> This list includes strychnine, among others.<sup>50</sup>

Safe to say, the list of allowable synthetic substances is longer than the list of disallowed non-synthetic substances; something that may surprise consumers of organic products, who would likely expect the opposite to be true. The length of the National List would likely

---

then proceeds to lay forth the guidelines for prohibitions and exemptions in subsection (c) of § 6517, and the procedure for establishing the National List in subsection (d) of § 6517).

<sup>42</sup> See generally 7 C.F.R. §§ 205.600 - 205.606.

<sup>43</sup> See 7 C.F.R. §§ 205.600-205.606 (providing the full guidelines for the most recent National List).

<sup>44</sup> See 7 C.F.R. § 205.601 (providing the full list of allowable synthetic substances for use in organic crop production).

<sup>45</sup> See 7 C.F.R. § 205.603.

<sup>46</sup> See *id.* (providing the full list of allowable synthetic substances for use in organic livestock production).

<sup>47</sup> 7 C.F.R. § 205.602.

<sup>48</sup> See 7 C.F.R. § 205.602 (providing the full list of non-synthetic substances that may not be used in organic crop production).

<sup>49</sup> 7 C.F.R. §§ 205.604-200.605 (the National List also includes a list of non-agricultural (non-organic) substances that are permissible as ingredients in or on processed products labeled as "organic" or "made with organic (specified ingredients or food groups)" and a list of non-organically produced agricultural products that are permissible as ingredients in or on processed products labeled as "organic," however these lists are not our focus).

<sup>50</sup> See 7 C.F.R. § 205.604 (providing the full list of non-synthetic substances that may not be used in organic livestock production).

surprise consumers because “organic” is commonly thought of as being synonymous with “all natural.” The synthetic substances that are permissible for inclusion in “organic” products are certainly not “all natural.” It is particularly for this reason, the existence of common misconceptions among consumers, that the Act needs to be refined and amended. The need for amendments to the Act was best demonstrated in two influential cases, namely, *Harvey v. Veneman*<sup>51</sup> and *Mass Indep. Certification, Inc. v. Johanns*.<sup>52</sup> Both cases display just how seriously misleading the Act can be for consumers. Clearly, the Act was (and still is) in need of being amended.

#### *A. Harvey v. Veneman*

In the case of *Harvey v. Veneman*, the plaintiff was an organic farmer whose claims alleged that several provisions of the National Program Final Rule were inconsistent with the Organic Foods Production Act.<sup>53</sup>

On appeal, the court found that the district court had erred in deciding that the plaintiff lacked standing to challenge the Final Rule provision, because he had a substantial interest in the resolution of the issue at bar.<sup>54</sup> The Final Rule provision at issue dealt with the conversion of regular dairy animals into organic dairy animals.<sup>55</sup> The plaintiff had the necessary standing because the record clearly contained the plaintiff’s particular allegations that he indeed dealt consistently with organic dairy farmers and had indeed purchased organic dairy products.<sup>56</sup> The court held, on the merits, that the challenged provision dealing with the conversion of non-organic to organic animals directly conflicted with a provision in the Organic Foods Production Act.<sup>57</sup> The challenged provision required two different levels of organic feed during the 12-month period leading up to the sale of dairy products as “organic,” whereas the Organic Foods Production Act only required a single type of organic handling during the same 12 month period.<sup>58</sup> Additionally, the court held that the Final Rule provision providing for the use of synthetic substances in the handling of products bearing the label of “organic” was also directly in

---

<sup>51</sup> *Harvey v. Veneman*, 396 F. 3d 28, 29 (1st Cir. 2005).

<sup>52</sup> *Mass. Indep. Certification, Inc. v. Johanns*, 486 F. Supp. 2d 105, 106 (D. Mass. 2007).

<sup>53</sup> *Harvey*, 396 F. 3d at 31 (noting that the plaintiff was appealing from an order of the district court, granting summary judgment to the defendant, the United States Secretary of Agriculture).

<sup>54</sup> *Id.* at 34.

<sup>55</sup> *Id.* at 33.

<sup>56</sup> *Id.* at 34.

<sup>57</sup> *Id.* at 36.

<sup>58</sup> *Id.* at 33-38.

conflict with the language of the Organic Foods Production Act (which merely contemplated the use of various synthetic substances during the initial stages of producing or growing organic products, but not during the final handling and processing stages).<sup>59</sup>

Ultimately, the court of appeals reversed the district court's grant of summary judgment in regards to the challenged conversion to organic and synthetic substance provisions, but affirmed in all other respects.<sup>60</sup> The case was then appealed again.

On subsequent appeal, the court found that the 2005 amendments to the Organic Foods Production Act eliminated the language in the Act that the circuit court of appeals had relied upon in striking down the regulations.<sup>61</sup> Thus, the Act now authorized the use of synthetic substances, whether ingredients or processing aids, for use in handling operations.<sup>62</sup> The only condition was that the synthetic substances must be a part of the National List.<sup>63</sup> As a result of this ruling, the decree of the circuit court of appeals could not be enforced.<sup>64</sup>

### *B. Mass. Indep. Certification, Inc. v. Johanns*

In the case of *Mass. Indep. Certification, Inc. v. Johanns*, the plaintiff was an organization that certified organic producers and handlers of agricultural products.<sup>65</sup> At issue was a challenge by the plaintiff to regulations adopted by the United States Department of Agriculture ("USDA") under the Organic Foods Production Act of 1990.<sup>66</sup> Basically, the organization sought a declaratory judgment of relief from the adopted regulations, which denied all private certification agencies of organic food producers the right to an administrative appeal of decisions made by the USDA.<sup>67</sup>

The plaintiff contended that the regulations, by denying the plaintiff the right to appeal, violated the Organic Foods Production Act and unlawfully deprived the plaintiff of due process rights guaranteed by the Constitution of the United States.<sup>68</sup> Essentially, the Act in an early provision limited appeals to "producers and handlers," thereby

---

<sup>59</sup> *Harvey*, 396 F. 3d at 39.

<sup>60</sup> *Id.* at 35-45.

<sup>61</sup> *Harvey v. Johanns*, 462 F. Supp. 2d 69, 74 (D. Me. 2006).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* See also *Harvey v. Johanns*, 494 F. 3d 237 (1st Cir. 2007) (affirming the decision of the court that the Organic Foods Production Act now authorized the use of synthetic substances so long as they were a part of the National List and the decree of the circuit court of appeals could no longer be enforced).

<sup>65</sup> *Mass. Indep. Certification, Inc. v. Johanns*, 486 F. Supp. 2d 105, 109 (D. Mass. 2007).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

excluding certifying agents.<sup>69</sup> In a later provision in the same Act, however, the term “persons” rather than “producers and handlers” was used, thereby making the question of who was entitled to an appeal ambiguous.<sup>70</sup> It was asserted that the use of different terminology at different points in the Act was meant to be demonstrative of different and possibly broader meanings in regards to the appellate process.<sup>71</sup> For example, the term “person” could arguably be intended to have a meaning that encompassed certifying agents, thereby granting them a right to appeal USDA decisions.<sup>72</sup>

Ultimately, however, the court ruled that the regulations were not contradictory to each other in their use of different terminology when referring to the same general topic, of who should be granted leave to appeal a USDA decision, because one provision in the act, § 6506, resolved the issue.<sup>73</sup> In that section of the act, it was plainly stated that the National Organic Program should provide for appeals by producers and handlers.<sup>74</sup> There was no mention of providing for appeals by other “people,” such as the plaintiff certifying agent.<sup>75</sup> Accordingly, it was not incorrect for the Secretary of the USDA to conclude that Congress intended such appeals to be limited to the specific categories of “producers and handlers.”<sup>76</sup> The USDA’s motion to dismiss was granted, and the plaintiff was obviously not given an opportunity to appeal.<sup>77</sup>

## VI. THE IMPACT OF THE *HARVEY* AND *MASS. INDEP. CERTIFICATION, INC.* CASES: AMENDMENTS TO THE ORGANIC FOODS PRODUCTION ACT

Perhaps the most important impact of two cases described above was that they shed light on several problems: the Act, as it stood, lacked specificity, was ambiguous and contradictory in certain areas and led to the unfortunate result of being confusing, rather than informative, to those involved in the production, trade and purchase of organic products.

The reaction to the outcome of the *Harvey* case has varied from very negative reactions, to reactions that initiated change. For example, the Organic Farming Research Foundation reacted with the

---

<sup>69</sup> *Id.* at 111.

<sup>70</sup> *Id.*

<sup>71</sup> *Mass. Indep. Certification, Inc.*, 486 F. Supp. 2d at 119.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Mass. Indep. Certification, Inc.*, 486 F. Supp. 2d at 120-21.

following statement:

“From March 2005 onward, we opposed amending OFPA in response to the *Harvey vs. Johanns* decision without a full investigation of regulatory options and without a full vetting of proposed legislation by all stakeholders. Our initial concerns were about the vulnerability of the law to other, unfriendly changes; potential damage to consumer confidence in the integrity of the organic label; and the likelihood that the amendments might actually weaken organic standards. The first concern was not realized at this time but the recent action sets a precedent for such changes to be made in the future. The second and third concerns may prove to be well founded. Reporting and commentary in the national media has clearly struck a blow to the image of organic integrity.”<sup>78</sup>

Another reaction was that of Congress. Congress reacted to the *Harvey* decision by enacting amendments to the Act in 2005, after the *Harvey* decision had been handed down.<sup>79</sup> On November 10, 2005, the 2006 Agriculture Appropriations Bill was proposed to amend the Act.<sup>80</sup> Within the Bill were directions to the Secretary to evaluate the effects of the *Harvey* decision on the National Organic Program and report any such effects.<sup>81</sup>

Ultimately the Bill changed three specific portions of the Act.<sup>82</sup> First, it changed § 6510 to “prohibit the use of any synthetic ingredient not appearing on the National List during the processing or any postharvest handling of the product.”<sup>83</sup> Additionally, the Bill changed the title of § 6517 (c) (1) to “Exemption for prohibited substances in organic production and handling operations.”<sup>84</sup> Finally, the Bill eliminated § 6517 (c) (1) (B) (iii), a provision which stated that “only a non-synthetic substance could be used in handling.”<sup>85</sup>

---

<sup>78</sup> Policy Statement Organic Farming Research Foundation, *Harvey vs. Johanns* (2nd Statement) (Nov. 12, 2005), [https://ofrf.org/policy/policy\\_statements/harvey\\_vs\\_johanns\\_II.html](https://ofrf.org/policy/policy_statements/harvey_vs_johanns_II.html) (last visited January 19, 2009) (going on to further note that “We publicly stated our position early in the process, but our staff and Board remained open to hearing all viewpoints and proposals. We recognized that the needs of some dedicated and long-standing organic businesses appeared to be critically affected. We also recognized the sincere and long-standing interests of consumer and public-interest groups in upholding the original construction of the law. However, we have remained certain that severely disputed changes to the law are counter-productive to the broad interests of organic farmers and consumers. Our position has its roots in our basic organizational purpose, which is: to foster the improvement and widespread adoption of organic farming practices. “Improvement” is the positive goal that should govern any changes to the OFPA. In our view, this was not an outcome of the recent amendments”).

<sup>79</sup> A. Christine Green, Commentary, *The Cost of Low-Price Organics: How Corporate Organics Have Weakened Organic Food Production Standards*, 59 ALA. L. REV. 799, 814 (2008).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Green, *supra* note 79, at 814.

The three changes to the act resulted in synthetic substances being permitted during the handling stage, provided that they were a part of the National List.<sup>86</sup> Additionally, with the changes the Secretary could now “develop emergency procedures for designating agricultural products that are commercially unavailable in organic form for placement on the National List for a period of time not to exceed 12 months.”<sup>87</sup> Finally, the Bill stated that milk and dairy products could be labeled as “organically produced” if “crops and forage from land included in the organic system plan of a dairy farm that is in the third year of organic management may be consumed by the dairy animals of the farm during the 12-month period immediately prior to such products’ sale.”<sup>88</sup>

As the amendments that were promulgated as a result of the *Harvey* case indicate, perhaps the biggest impact of the two cases discussed above is the recognition that the Act is a young Act, and is a work in progress. Hopefully future amendments and refinements will further clarify the Act so that it can better fulfill its stated purposes and better serve consumers.

## VII. THE OUTLOOK FOR THE FUTURE OF ORGANIC FOODS: NEWLY EMERGING ISSUES AND THE FUTURE OF THE ACT

One newly emerging issue relating to organic products is the increasing demand for organic milk.<sup>89</sup> According to one source, in the United States there is a rapidly increasing demand for organic milk.<sup>90</sup> This is due to changing consumer tastes.<sup>91</sup> Consequently, as more retailers are entering the organic sector, the amount of land being farmed organically is also increasing.<sup>92</sup> Additionally, with an increased amount of organic milk entering the market, venues besides supermarkets (such as independent retailers) are benefitting and growing because the demand for organic milk helps their profitability.<sup>93</sup> It is predicted that the demand for organic milk will rise steadily at an annual 25 percent rate, benefitting farmers, the economy, and

---

<sup>86</sup> *Id.*

<sup>87</sup> *See id.* (continuing by explaining that “Thus, the Secretary can put a synthetic ingredient on the National List, and it may be used in or on and during production, processing and handling of processed products labeled as organic (meaning at least 95 percent organic ingredients) and still bear the USDA seal, restoring § 205.605 (b) of the NOP regulations).

<sup>88</sup> *Id.*

<sup>89</sup> RNCOS Industry Research Solutions, *Demand Rises for Organic Milk; Bright Future Prospects*, June 20, 2007, <http://www.rncos.com/Blog/2007/06/Demand-Rises-for-Organic-Milk-Bright-Future-Prospects.html> (last visited January 22, 2009).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

consumers.<sup>94</sup> However, what consumers will *really* benefit from an increase in the prevalence of organic milk?

According to another source, it is likely that only a small margin of consumers will actually benefit from the increased prevalence of organic milk.<sup>95</sup> Certain demographic characteristics have been linked to so-called “organic milk households” in comparison to so-called “conventional milk households.”<sup>96</sup> Such characteristics include region, education, age of the head-of-household, and household income.<sup>97</sup> Data collected have shown that organic milk households are more common on the east and west coasts and less common in the central and southern regions.<sup>98</sup> Additionally, households that are headed by someone under the age of 54 are more likely to purchase organic milk.<sup>99</sup> Furthermore, the higher the household income, the more likely that the household is an organic milk household as compared to a conventional milk household.<sup>100</sup> The same positive correlation is true with respect to education levels attained by persons living in each household.<sup>101</sup>

The statistical correlations among certain demographic characteristics and a person’s likelihood of purchasing organic versus conventional milk help to demonstrate the weaknesses of the Act. Perhaps one reason for such strong demographic correlations with the likelihood of purchasing organic milk is due to the fact that the Act is unclear. The Act is ambiguous and at times hard to decipher. Not all people would be able to dissect it in order to understand just what makes milk “organic.” Furthermore, as already discussed, there is no straightforward definition of “organic” to be found anywhere within the Act. Accordingly, it may be the case that because the Act is so complicated and difficult to understand, only people with higher levels of education are really aware of what makes something “organic.” Perhaps people with a lower level of education cannot decipher the Act. It is possible that the reason certain demographics are more likely than others to buy organic milk is because the Act is only catering to certain

---

<sup>94</sup> *Id.*

<sup>95</sup> CAROLYN DIMITRI & KATHRYN M. VENEZIA, UNITED STATES DEPARTMENT OF AGRICULTURE (“USDA”) ECON. RESEARCH SERV., RETAIL AND CONSUMER ASPECTS OF THE ORGANIC MILK MKT., 10-11 (May 2007), available at <http://www.ers.usda.gov/publications/LDP/2007/05May/LDPM15501/ldpm15501.pdf>.

<sup>96</sup> *Id.* at 10 (explaining that households that purchased at least some organic milk are referred to as “organic households” while households that never purchase organic milk are referred to as “conventional households”).

<sup>97</sup> *Id.* at 10-11.

<sup>98</sup> *Id.* at 10 (noting that “this finding may reflect the fact that consumers in the East and West have had access to organic food for a longer period of time, since natural products supermarkets... have operated on the two coasts since the early 1990s and are just now moving into the Central and Southern regions).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 10-11.

<sup>101</sup> *Id.*

demographics. If this is the case, then the Act is clearly not living up to its stated purposes, and should be refined in order to better serve *all* consumers, as opposed to just serving *some* consumers.

To reiterate, one of the stated purposes for the Act is “to establish national standards governing the marketing of certain agricultural products as organically produced products.”<sup>102</sup> A second purpose is “to assure consumers that organically produced products meet a consistent standard.”<sup>103</sup> Finally, a third purpose is “to facilitate interstate commerce in fresh and processed food that is organically produced.”<sup>104</sup> In essence, the basic purposes of the act are to help consumers better understand the meaning of “organic” and limit what producers can label as being “organic” in order to better protect consumers in their search for organic products. Currently, the stated purposes of the Act are not living up to their full potential, as demonstrated by the studies of newly emerging organic milk issues.

The problems with the Act arise because after the purposes of the Act are laid forth, the remainder of the Act is ambiguous, unclear, and at times contradictory, leading to consumers’ confusion. As previously stated, this confusion could be factor as to why the purchase of organic milk is associated with certain demographic characteristics. In the future, these problems should ideally be resolved through refinement and additional amendments.

As to the future of the Organic Foods Production Act, as it stands right now it is a work in progress: improvements have been made to make the Act more specific and clear, but more work still needs to be done so that consumers can be more certain of what the word “organic” really means, particularly when it comes to the use of synthetic substances and the regulation of such substances.

## VIII. CONCLUSION

Due to the fact that the organic production standards are in a period of turmoil as the National Organic Program bows to the demands of corporate organic retailers and producers through less-stringent enforcement and ambiguous interpretations of the Act, the best advice for consumers of organic products who care about their health and the health of the environment, as well as the integrity of the label “organic” is to be certain that they do their homework before purchasing pricey so-called “organic” products.<sup>105</sup> Consumers should be

---

<sup>102</sup> 7 U.S.C. § 6501.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Green, *supra* note 79, at 830.

aware of changes to organic production standards, ownership of organic brands, where and how organic products were produced, and producers that are committed to high standards.<sup>106</sup>

In short, until the Act is further refined or amended, perhaps the best protection for consumers will come from self-education.

---

<sup>106</sup> *Id.*