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One False Move: The History of Organic Agriculture and Consequences of Non-compliance With the Governing Laws and Regulations

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ARTICLE

ONE FALSE MOVE: THE HISTORY OF
ORGANIC AGRICULTURE AND
CONSEQUENCES OF NON-
COMPLIANCE WITH THE GOVERNING
LAWS AND REGULATIONS*SARA N. PASQUINELLI**

I. INTRODUCTION

Since the enactment of the Organic Foods Production Act of 1990,¹ the organic agriculture and products industry has grown at an exponential rate and has matured as a small but notable sector of the consumer economy. Between 1992 and 1997, acreage of organic crops doubled to 1.3 million acres.² As of 2005, the amount of organic acreage in the United States rose to more than 4 million acres.³ This trend is projected to continue as organic cropland continues to expand.⁴ Also as of 2005, for the first time all fifty states in the United States had at least some

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¹ 7 U.S.C.A. § 6501, et seq. (Westlaw 2010).

² CAROLYN DIMITRI & CATHERINE GREENE, U.S. DEPARTMENT OF AGRICULTURE, ECONOMIC RESEARCH SERVICE, AGRICULTURE INFORMATION BULLETIN NO. 777, RECENT GROWTH PATTERNS IN THE U.S. ORGANIC FOODS MARKET 1 (Sept. 2002), *available at* <http://aib777.pdf>.

³ United States Department of Agriculture, Economic Research Service, Economics of Food, Farming, Natural Resources, and Rural America, Organic Production Overview, *available at* www.ers.usda.gov/Data/Organic/ (last visited March 30, 2010).

⁴ DIMITRI & GREENE, *supra* note 2, at 1.

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certified organic farmland in production.⁵ California leads all states in the amount of certified organic acres in production.⁶

Sales of organic food and beverages in the United States have also grown at a staggering rate, from \$1 billion in revenues in 1990 to an estimated \$23 billion in 2009 (representing approximately 3% of total United States food sales).⁷ The industry is estimated to generate revenues in excess of \$50 billion by 2025, with a continued growth of approximately 18% to 20% per year.⁸

Organic products are sold through three main venues in the United States: 1) natural-food stores; 2) conventional grocery stores; and 3) direct-to-consumer markets (e.g., farmers' markets).⁹ According to the Organic Trade Association, almost 93% of organic sales take place through natural-food stores and conventional grocery stores whereas the remaining 7% occurs through farmers' markets, foodservice, and marketing channels other than retail stores.¹⁰ These percentages are notable because historically organic products were available primarily through farmers' markets, not grocery stores, since organic farms were traditionally smaller, family-run operations. Now that organic production has vastly increased and with the influx of new market chains, such as Whole Foods, which have increased the organic market share in the grocery industry, there is greater availability of organic products in stores.¹¹

⁵ Organic Production Overview, *supra* note 3.

⁶ *Id.* California has 1,916 certified organic farming operations, compared to the second leading state in organic production, Wisconsin, which has 580 certified organic operations. *Id.* California also leads in total cropland acreage of organic production, with 223,263 acres in organic cropland, compared to the next highest state, North Dakota, which has 143,322 cropland acres. *Id.*

⁷ United States Department of Agriculture, Economic Research Service, Economics of Food, Farming, Natural Resources, and Rural America, Organic Agriculture: Organic Market Overview, available at www.ers.usda.gov/briefing/organic/demand.htm (last visited February 7, 2010); see also, Nanette Hansen, *Organic Food Sales See Healthy Growth: Mainstream Food Companies Promote Natural Brands*, MSNBC, Dec. 3, 2004 www.msnbc.msn.com/id/6638417/.

⁸ *Id.*; see also What's News in Organic, Issue 33 (Dec. 2005), available at www.ota.com/pics/documents/Whats_News_33.pdf.

⁹ *Id.*

¹⁰ *Id.*

¹¹ While some contend that Whole Foods has done well in expanding the organic market, others (such as author Michael Pollan) criticize that it has done so at the peril of local foods, producers, and distributors. See Michael Pollan, My Letter to Whole Foods (June 14, 2006), available at www.michaelpollan.com/article.php?id=80. Ronnie Cummins, national director of the United States Organic Consumers Association, said that Whole Foods Market simply uses the term *natural* as a marketing tool. Ronnie Cummins, The Organic Monopoly and the Myth of 'Natural' Foods: How Industry Giants Are Undermining the Organic Movement, CommonDreams.org, (July 9, 2009), www.commondreams.org/view/2009/07/09. Cummins concluded that "Whole Foods Market now is a big-box retailer – and it's much more concerned about competing with the other big

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As market forces and consumer demand for the availability of these products increases, the rules and regulations crafted for the organic industry are now being put to the test to see if the integrity of these productions can be maintained to protect consumer confidence, and at the same time, allow organic enterprises to function cost-effectively and minimize risk factors. The most fundamental of these risk factors is the decertification of an organic crop, farm, or processed item due to mistake, error, or commingling with prohibited materials. For an organic product, be it fresh produce or a processed commodity, the road to the consumer is fraught with pitfalls. Failure to understand or properly comply at any step of the process could result in catastrophic losses and render the producer vulnerable to damages far in excess of the potential gains.

This Article provides an overview of the types of factors that may lead to the decertification of organic products, and the current regulatory scheme to evaluate and adjudicate potential violations. The underlying rationale for the enforcement of the Organic Foods Production Act of 1990 may lie in protection of the integrity of the product, as well as protection of the environmental system that is integral to its production. However, the risk factors for transitioning the U.S. food economy to a larger market share in order for organic food to reach a broader population could be an unintended disincentive.

Part II of this Article discusses the origins of the organic movement. It also delineates the legal framework governing organic production in the United States—the Organic Foods Production Act and National Organic Program regulations. Part II also discusses the requirements and procedures governing the organic certification process, as well as who does and does not need to obtain certification. Lastly, Part II discusses the enforcement and appeals provisions set forth under the Organic Foods Production Act and National Organic Program regulations.

Part III of this Article analyzes appeals to the National Organic Program, the majority of which involve the failure to comply with procedural requirements of the Organic Foods Production Act and implementing regulations and the use of prohibited materials in production.

Part IV concludes with projections of the continued growth of the

boxes than issues of ethics and sustainability.” Alex Renton, *Ripe Target*, THE GUARDIAN, Mar. 27, 2007, available at www.guardian.co.uk/business/2007/mar/27/supermarkets.usnews; see also Steven Shapin, *Paradise Sold: What Are You Buying When You Buy Organic?*, THE NEW YORKER, May 15, 2006, available at www.newyorker.com/archive/2006/05/15/060515crat_atlarge?currentPage=1.

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organic industry and the impact that various risk factors have on such growth.

II. BACKGROUND/OVERVIEW

A. ORIGINS OF THE ORGANIC AGRICULTURE MOVEMENT

For most of human history, the agricultural practices employed could be characterized as organic (that is, without the aid of synthetic pesticides or herbicides).¹² It was only during the twentieth century that synthetic pesticides and herbicides were introduced into the agricultural production process.¹³

The negative impacts of synthetic pesticides on the environment and wildlife, particularly dichlorodiphenyltrichloroethane, commonly known as “DDT,” were first revealed in the book *Silent Spring*, by Rachel Carson, in the 1960s.¹⁴ *Silent Spring* played a large role in fomenting the environmental movement in the 1970s and 1980s.¹⁵ During this same time, farmers, particularly on the West Coast, started organizing to reduce the use of pesticides in farming.¹⁶ In California, the organic movement was led by the California Certified Organic Farmers organization (CCOF).¹⁷ In Oregon, it was led by Oregon Tilth and in Washington by Tilth Producers’ Cooperative.¹⁸ Oregon was the first state

¹² See G.T. MILLER, *LIVING IN THE ENVIRONMENT* (Belmont: Wadsworth/Thomson Learning 12th ed. 2002).

¹³ See Alexandra B. Klass, *Bees, Trees, Preemption, and Nuisance: A New Path to Resolving Pesticide Land Disputes*, 32 *ECOLOGY L.Q.* 763, 768 (2005) (“The first synthetic, organic insecticides and herbicides were discovered and produced in the early twentieth century, which led to an explosion of the discovery, use and production of hundreds of commercial pesticides in the 1940s and 1950s. World War II hastened this development by creating conditions where tropical warfare and the accompanying insect-related diseases such as typhus, encephalitis, dengue, and malaria devastated troops on both sides. To address this problem, the U.S. government conducted intense research to assess potential insecticides and ultimately recognized the unique qualities of dichloro-diphenyl-trichloroethane (DDT) to eradicate such pests as malaria-carrying mosquitoes and other disease-carrying insects.”).

¹⁴ RACHEL CARSON, *SILENT SPRING* (1962).

¹⁵ See Josie Glausiusz, *Better Planet: Can a Maligned Pesticide Save Lives?*, *DISCOVER MAGAZINE*, Nov. 2007, available at discovermagazine.com/2007/nov/can-a-maligned-pesticide-save-lives.

¹⁶ See California Certified Organic Farmers, www.ccof.org/history_ab.php#sec1 (last visited Jan. 24, 2010).

¹⁷ *Id.*

¹⁸ See California Certified Organic Farmers, About CCOF, www.ccof.org/about.php (last visited Apr. 17, 2010); Oregon Tilth, History, www.tilth.org/about/history (last visited Jan. 24, 2010); see also Tilth Producers, A History of Tilth Producers’ Cooperative,

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in the United States to pass organic standards legislation, followed by Washington.¹⁹ Then in 1990, California enacted the California Organic Foods Act.²⁰

B. LEGAL FRAMEWORK GOVERNING ORGANIC PRODUCTION IN THE UNITED STATES

i. *Organic Foods Production Act (OFPA)*

Prior to passage of the federal Organic Foods Production Act of 1990 (OFPA),²¹ there was no nationally recognized definition of “organic.”²² “Previously, private and State agencies had been certifying organic practices, but there was no uniformity in standards and therefore no guarantee that ‘organic’ meant the same thing from state to state, or even locally from certifier to certifier.”²³ The lack of a federal definition meant that neither the Food and Drug Administration nor the U.S. Department of Agriculture (USDA) could monitor or enforce organic labeling practices.²⁴ The OFPA was enacted in 1990 as Title XXI of the Farm Bill.²⁵ It sought “to establish national standards governing the marketing of certain agricultural products as organically produced products.”²⁶ Further goals of the OFPA were to “assure consumers that organically produced products meet a consistent standard” and “to facilitate interstate commerce in fresh and processed food that is organically produced.”²⁷

www.tilthproducers.org/tprodhist.htm (last visited Jan. 24, 2010).

¹⁹ See Gordon G. Bones, *State and Federal Organic Food Certification Laws: Coming of Age?*, 68 N.D. L. REV. 405, 410 (1992).

²⁰ See CAL. FOOD & AGRIC. CODE § 46000 (Westlaw 2010); see also California Certified Organic Farmers, *supra* note 16.

²¹ 7 U.S.C.A. § 6501, et. seq. (Westlaw 2010).

²² See 136 Cong. Rec. H3078 (daily ed. Mar. 1 1990) (Representative DeFazio stated that “the lack of a national definition for the term ‘organically produced’ stands like a wall between buyer and seller . . . It’s time growers and consumers got a clear picture of just what organically grown really means.”).

²³ Organic Trade Association, *Organic Food Production Act Backgrounder*, available at www.ota.com/pp/legislation/backgrounder.html (last visited Apr. 17, 2010).

²⁴ See National Organic Program 62 FR 5850, 65855 (Dec. 16, 1997) (“USDA regulation of labeling claims for organic food would allow the USDA and other federal agencies whose jurisdiction includes ensuring the veracity of labeling claims to prosecute those who mislabel products sold as organic.”).

²⁵ Organic Trade Association, *supra* note 23.

²⁶ 7 U.S.C.A. § 6501(1) (Westlaw 2010).

²⁷ 7 U.S.C.A. § 6501(2), (3).

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ii. *OFPA Regulations*

The OFPA required the USDA to establish implementing regulations governing organic production in the United States.²⁸ In 2002 (over twelve years after the enactment of the Act), the USDA adopted the National Organic Program (NOP) regulations as the uniform standards for the production and handling of agricultural products in the United States.²⁹

These regulations require that products labeled as organic originate from farms or handling operations certified by a USDA-accredited state agency or a USDA-accredited private entity.³⁰ To receive an organic certification, a farm must submit an “organic production or handling system plan” to the certifying accredited agent for approval.³¹ Producers who comply with the standards of the NOP may label their products “USDA Certified Organic.”³²

a. Establishment of the National Organic Standards Board (NOSB)

The OFPA further directs the Secretary of Agriculture to appoint a 15-member National Organic Standards Board (NOSB) to counsel the Secretary on aspects of implementing the NOP³³, including establishing the National List of Allowed and Prohibited Substances and evaluating proposed amendments thereto.³⁴ The National List of Allowed and Prohibited Substances identifies synthetic substances that may be used, and the non-synthetic substances that cannot be used, in organic production and handling operations.³⁵ Once the NOSB evaluates proposed amendments to the National List of Allowed and Prohibited Substances, it makes a recommendation to the Secretary.³⁶

Members of NOSB are appointed for a five-year term and represent numerous sectors. The Board must include four farmers, two handlers/processors, one, retailer, one, one scientist (with expertise in

²⁸ 7 U.S.C.A. §§ 6503, 6504.

²⁹ 7 C.F.R. § 205 et seq. (Westlaw 2010); *see also* National Organic Program, 65 Fed. R. 80548, 80551 (Dec. 21, 2000).

³⁰ *See* 7 U.S.C.A. §§ 6514, 6516; 7 C.F.R. § 205.400(b).

³¹ 7 C.F.R. § 205.400(b).

³² USDA, National Agricultural Library, Publications, Organic Production/Organic Food: Information Access Tools, What Is Organic Production? (June 2007), www.nal.usda.gov/afsic/pubs/ofp/ofp.shtml.

³³ 7 U.S.C.A. § 6518(a), (b) (Westlaw 2010).

³⁴ 7 U.S.C.A. § 6517(a), (b).

³⁵ 7 U.S.C.A. § 6517(b).

³⁶ 7 U.S.C.A. § 6518(k)(2).

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toxicology, ecology or biochemistry), three consumer/public interest advocates, three, environmentalists, and one certifying agent.³⁷

The legislative history of the OFPA indicates that the NOSB was formed to play a key role in the development and implementation of regulations “as an essential advisor to the Secretary on all issues concerning” NOP.³⁸ The thought was that since the NOSB included members from every segment of the organic industry, including farmers, retailers, consumers and environmentalists, it would be able to protect all interests.³⁹

b. What is the Definition of “Organic” Under the OFPA?

The OFPA defines does not define the term “organic,” but rather defines the term “organically produced” as “[a]n agricultural product that is produced and handled in accordance with this chapter.”⁴⁰ Additionally, NOP regulations define “organic production” as “[a] production system that is managed in accordance with the Act and regulations in this part to respond to site-specific conditions by integrating cultural, biological, and mechanical practices that foster cycling of resources, promote ecological balance, and conserve biodiversity.”⁴¹

The NOSB defined “organic” at its 1995 meeting in Orlando, Florida, as inclusive of, among others, the following principles and practices:

Organic agriculture is an ecological production management system that promotes and enhances biodiversity, biological cycles and soil biological activity. It is based on minimal use of off-farm inputs and on management practices that restore, maintain and enhance ecological harmony.

“Organic” is a labeling term that denotes products produced under the authority of the Organic Foods Production Act. The principal guidelines for organic production are to use materials and practices that enhance the ecological balance of natural systems and that

³⁷ 7 U.S.C.A. § 6518(b)(1)-(7).

³⁸ S. REP. 101-357 (July 6, 1990), reprinted in 1990 U.S.C.C.A.N. 4656, 4950.

³⁹ See 7 U.S.C.A. § 6518(b); see also S. REP. 101-357 (July 6, 1990), reprinted in 1990 U.S.C.C.A.N. 4656, 4950 (listing different representative groups required to be on the NOSB, and stating that “[r]equiring a two-thirds vote, the Committee believes, will adequately prevent any one interest from controlling the Board.”).

⁴⁰ 7 U.S.C.A. § 6502(14) (Westlaw 2010).

⁴¹ 7 C.F.R. § 205.2 (Westlaw 2010).

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integrate the parts of the farming system into an ecological whole.

Organic agriculture practices cannot ensure that products are completely free of residues; however, methods are used to minimize pollution from air, soil and water.

Organic food handlers, processors and retailers adhere to standards that maintain the integrity of organic agricultural products. The primary goal of organic agriculture is to optimize the health and productivity of interdependent communities of soil life, plants, animals and people.⁴²

C. ORGANIC CERTIFICATION REQUIREMENTS AND PROCEDURES

i. Role of Organic Certifying Agents

The USDA accredits state, private and foreign organizations or persons to become “certifying agents.” Certifying agents certify that organic production and handling practices meet the national standards.⁴³ Only USDA-accredited agencies can act as certifiers, and they must have expertise in organic farming and handling techniques.⁴⁴ Certifiers must also be able to fully implement all aspects of the certification program, including hiring an adequate number of inspectors to carry out inspections.⁴⁵ Applicants are assessed by USDA and may be reviewed by a panel of organic experts appointed by the Secretary of Agriculture.⁴⁶

Accreditation may be granted by USDA for a period not to exceed five years and may be renewed.⁴⁷ User fees are collected from each

⁴² Organic Trade Association, *supra* note 23.

⁴³ See United States Department of Agriculture, Agriculture Marketing Service, National Organic Program, Accreditation & Certification, *available at* www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&navID=NationalOrganicProgram&leftNav=NationalOrganicProgram&page=NOPAccreditationandCertification&description=Accreditation%20and%20Certification&acct=nopgeninfo (last visited Feb. 7, 2010).

⁴⁴ Organic Trade Association, *supra* note 23.

⁴⁵ *Id.*; see also General Accreditation Policies and Procedures, NOP 2000, Revision Date: Sept. 30, 2008, 2, *available at* www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3004331&acct=nopgeninfo.

⁴⁶ Organic Trade Association, *supra* note 23; see also General Accreditation Policies, *supra* note 45.

⁴⁷ Organic Trade Association, *supra* note 23; see also General Accreditation Policies, *supra* note 45.

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certifying agency to cover the cost of the accreditation program.⁴⁸ Certifying agents must keep records of all their activities for ten years.⁴⁹ The OFPA requires public access to documents upon request; however business-related information is considered strictly confidential and is generally not disclosed to anyone other than the USDA and state agencies.⁵⁰ The USDA will conduct on-site audits of all records of a certifying agent.⁵¹

ii. Who Needs To be Certified

NOP regulations require that operations or portions of operations that produce or handle agricultural products that are intended to be sold, labeled, or represented as “100 percent organic,” “organic,” or “made with organic ingredients” be certified.⁵²

iii. Who Does Not Need To be Certified

A producer or handling operation that sells less than \$5,000 a year in organic agricultural products does not need to be certified.⁵³ While exempt from certification, such a producer or handler must abide by the national standards for organic products in order to label its products as “organic.”⁵⁴ In addition NOP regulations provide that certification is not needed for handlers, including final retailers,

- do not process or repackage products;
- only handle products with less than 70% organic ingredients;
- process or prepare, on the premises of the establishment, raw and ready-to-eat food labeled organic;
- choose to use the word “organic” only on the information panel; and
- handle products that are packaged or otherwise enclosed in a container prior to being received by the operation and remain in the same package.⁵⁵

⁴⁸ Organic Trade Association, *supra* note 23; *see also* General Accreditation Policies, *supra* note 45.

⁴⁹ Organic Trade Association, *supra* note 23.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² 7 C.F.R. § 205.100(a) (Westlaw 2010).

⁵³ 7 C.F.R. § 205.101(a)(1).

⁵⁴ *Id.*

⁵⁵ 7 C.F.R. § 205.101(a)(2)-(4), (b)(1), (2).

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iv. *Certification Process*

An applicant must submit specific information to an accredited certifying agent in order to be certified as “organic.”⁵⁶ Such information includes:

- The type of operation to be certified;⁵⁷
- A history of substances applied to land for the previous 3 years;⁵⁸
- The organic products being grown, raised, or processed;⁵⁹
- The Organic System Plan (OSP), which is a plan describing practices and substances used in production. The OSP must also describe monitoring practices to be performed to verify that the plan is effectively implemented, a record-keeping system, and practices to prevent commingling of organic and non-organic products and to prevent contact of products with prohibited substances.⁶⁰

Applicants for certification must keep accurate post-certification records for five years concerning the production, harvesting, and handling of agricultural products that are to be sold as organic.⁶¹ These records must document that the operation is in compliance with the regulations and verify the information provided to authorized representatives of the USDA, including the certifying agent.⁶² In addition to assessing the OSP, the certification agency performs annual on-site inspections of each farm or handling operation participating in its program.⁶³ User fees are also collected from each grower or handler to cover the cost of the certification program.⁶⁴

⁵⁶ See 7 C.F.R. § 205.401.

⁵⁷ Organic Agriculture: Organic Certification, available at www.ers.usda.gov/Briefing/Organic/certification.htm (last visited April 17, 2010); see also ANN BAIER, ORGANIC CERTIFICATION PROCESS 3, ATTRA: NATIONAL SUSTAINABLE AGRICULTURE INFORMATION SERVICE (2005), available at http://attra.ncat.org/attra-pub/summaries/organic_certification.html (information generally needed for certification includes land use history, field maps, crop rotation plans, pest management plans, measures to maintain organic integrity, etc.).

⁵⁸ Organic Agriculture: Organic Certification, *supra* note 57.

⁵⁹ *Id.*

⁶⁰ 7 C.F.R. § 205.401(a) (requiring an OSP); see also Organic Agriculture: Organic Certification, *supra* note 57; see, generally, BAIER, *supra* note 57.

⁶¹ 7 C.F.R. § 205.103(a), (b).

⁶² 7 C.F.R. § 205.103(b)(4).

⁶³ Organic Trade Association, *supra* note 23.

⁶⁴ *Id.*

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D. ENFORCEMENT AND APPEALS PROCESS

Under the OFPA, the Administrator of the Agricultural Marketing Service (under the NOP), accredited certifying agents, and State Organic Programs have the authority to deny, revoke, or suspend organic certification.⁶⁵

These entities have a responsibility to work cooperatively with certified organic operations or applicants for certification to identify problem areas and resolve issues of alleged noncompliance well before a decision to revoke, suspend, or deny certification is made.⁶⁶ If informal resolution efforts fail, the applicant has a right to appeal the decision.⁶⁷

i. Appeals in a State with No State Organic Program

In a state that has no State Organic Program, an appellant must appeal the decision of the NOP or certifying agent within thirty days of receiving the decision letter or within the timeframe specified in the letter, whichever is later.⁶⁸ Unless timely appealed, the decision to deny, revoke, or suspend certification will become final.⁶⁹

The appeal must include 1) a copy of the decision, and 2) a statement of reasons for believing the decision was not proper or did not follow NOP regulations, policies or procedures.⁷⁰ The Administrator of the Agricultural Marketing Service will review the information contained in the appeal and decide whether to sustain or deny the appeal.⁷¹

If the appeal is sustained, the appellant will be granted certification, or if the decision was for revocation or suspension, the appellant will be notified that certification will continue.⁷² If the appeal is denied, appellant will be notified that a formal proceeding to deny, suspend, or

⁶⁵ 7 C.F.R. § 205.405(a) (Westlaw 2010) (authority to deny certification); 7 C.F.R. § 205.660(b)(1), (2) (authority to revoke or suspend organic certification). Further discussion of State Organic Programs will be provided in subdivision 2, *infra*.

⁶⁶ 7 C.F.R. § 205.680.

⁶⁷ 7 C.F.R. § 205.680(a); *see also* USDA Appeals Process: Certified Organic Operations or Certification Applicants, *available at* www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateM&navID=NationalOrganicProgram&leftNav=NationalOrganicProgram&page=NOPAppealsProcess&description=Appeals%20Process&acct=nopgeninfo (last visited Feb. 7, 2010).

⁶⁸ USDA Appeals Process, *supra* note 67.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

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revoke the certification is being initiated.⁷³ There are two levels of appeal within the USDA: 1) an Administrative Law Judge, and 2) a judicial officer.⁷⁴ After the appeal has been decided by a judicial officer, the appellant may appeal the decision to the U.S. district court for the district in which the appellant is located.⁷⁵

ii. *Appeals in a State with a State Organic Program*

a. State Organic Programs (“SOP”)

The OFPA provides that each state may implement an organic program for agricultural products that have been produced and handled within the state, using organic methods that meet the requirements of the Act and the regulations implementing the Act.⁷⁶ A SOP may contain more-restrictive requirements for organic products produced and handled within the state than are contained in the NOP.⁷⁷

According to the National Association of State Organic Programs, the vast majority of states do not have SOPs.⁷⁸ Only California, Texas, and Utah have SOPs.⁷⁹ As this Article went to press, Georgia’s SOP was pending.⁸⁰

b. Appeals to a SOP

Included in USDA’s requirements for approving a SOP is the approval of the SOP’s appeal procedures. An SOP’s appeal procedures

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ 7 U.S.C.A. § 6507(a) (Westlaw 2010); *see also* USDA State Organic Program Approval Procedures, available at www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3014011&acct=nopgeninfo (last visited Feb. 7, 2010).

⁷⁷ USDA State Organic Program Approval Procedures, *supra* note 76 (if more-restrictive requirements are proposed, however, the state must provide “detailed description and justification” for these requirements, and “must address environmental conditions or specific production and handling practices particular to the State”).

⁷⁸ National Association of State Organic Programs, State Organic Programs, available at www.nasda.org/nasop/stateprograms.htm (last visited Feb. 7, 2010); *see also* Maria Savasta-Kennedy, *The Newest Hybrid: Notes Toward Standardized Certification of Carbon Offsets*, 34 N.C. J. INT’L L. & COM. REG. 851, 873 n.91 (2009).

⁷⁹ National Association of State Organic Programs, *supra* note 78. Utah also made plans in 2009 to discontinue its SOP. *Id.*; *see also* California Organic Program, available at www.cdfa.ca.gov/is/i_&c/organic.html.

⁸⁰ National Association of State Organic Programs, *supra* note 78.

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must be equivalent to those provided under the NOP, as previously described. The following appeals procedures apply to decisions made by SOPs or accredited certifying agents.⁸¹

The appellant must appeal either within thirty days of receiving the notification letter, or within the timeframe specified in that letter, whichever deadline comes later.⁸² Unless timely appealed, the decision to deny, revoke, or suspend will become final.⁸³ The following information must be included in the appeal: 1) a copy of the decision, and 2) a statement of reasons for believing the decision was improper.⁸⁴

If the appeal is sustained, the appellant will be granted certification, or if the decision was for revocation or suspension, the appellant will be notified that certification will continue.⁸⁵ If the SOP denies the appeal, the appellant will be notified of the next step in the state appeals process. If the appellant loses at the highest state level, then the final decision of the state may be appealed to the U.S. district court for the district in which appellant is located.⁸⁶

III. ANALYSIS OF APPEALS TO THE NOP

To date, twenty-five decisions have been appealed to the USDA's National Organic Program for formal review and adjudication.⁸⁷ At press time for this Article, none of these appeals had advanced beyond the NOP to the U.S. district court. An analysis of these cases reveals two major areas where certified entities have sought redress.

A. FAILURE TO COMPLY WITH PROCEDURAL REQUIREMENTS

The first type of decertification cases are procedural cases in which certified producers have allegedly failed to comply with the requisite filings and recordkeeping requirements of the OFPA. Because the integrity of the certification depends on the accuracy of the provenance of the goods, the requirements for the paper trail are rigorously enforced.

As demonstrated in a number of the recordkeeping cases, decertification typically resulted from a lack of proper documentation and was preceded by extensive written notice to the producer, with

⁸¹ USDA Appeals Process, *supra* note 67.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See Table with a summary of these twenty-five NOP appeals at the end of this Article.

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numerous notifications and outreach to the producer before decertification proceedings were initiated.

In many instances, the failure to comply with documentation by the producers was due to inexperience or failure to recognize the implications of their acts of omission. Most of these cases occurred in the early years of the program with small producers. Retroactive remedial action by a producer may be able to mitigate the extent of the decertification.⁸⁸

B. PROHIBITED MATERIALS USED

The second type of decertification case involves circumstances in which prohibited materials were used in the production of an organic product intentionally or by mistake (or there was contamination or commingling of organic and non-organic products), resulting in denial of certification or the decertification of the product, crop or underlying acreage.

In only one case did the Agency use its discretion to allow organic certification of a field where inadvertent application of a synthetic product resulted because of the manufacturer's failure to properly clean equipment when the fertilizer was manufactured. Even in that instance, the Agency did not allow certification of the crop that was planted simultaneously with the fertilizer application, but would allow subsequent certification so long as all other regulatory provisions were met.⁸⁹

On a related note, California recently experienced a debacle related to the use of prohibited substances in organic farming that nearly had disastrous consequences. A company, California Liquid Fertilizer, sold a liquid fertilizer product that was approved by organic regulators.⁹⁰ The problem was that the company had been using ammonium sulfate (a prohibited synthetic fertilizer) instead of the fish bones and chicken feathers it was supposed to be using as a nitrogen source.⁹¹ In this case, the California Department of Food and Agriculture investigated, and the product was removed from the market in 2007.⁹² Many of the state's

⁸⁸ See Summary Table of NOP Appeals.

⁸⁹ See Summary Table of NOP appeals, citing *In re Family Gardens Decision*, APL-008-07 (2007).

⁹⁰ Jim Downing, "Organic Farms Unknowingly Used a Synthetic Fertilizer," THE SACRAMENTO BEE, December 28, 2008. There were other companies making similar liquid fertilizers, but California Liquid Fertilizer had its grasp on the liquid fertilizer market share. *Id.*

⁹¹ *Id.*

⁹² *Id.*

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largest organic farms used this fertilizer, but CCOF decided not to revoke certification, on the ground that the farmers did not know they were using an unapproved chemical.⁹³

IV. DECERTIFICATION CASE STUDY

A colleague of mine represented a large agricultural food processor in the business of processing potatoes into frozen french fries.⁹⁴ Part of the facility was certified for organic production by the State of Washington. The only difference between the facility's organic production and conventional production was the use of a de-foaming agent during the conventional production process that was listed as a prohibited substance on the National List of Allowed and Prohibited Substances, and a de-foaming agent that was an approved substance during organic production process.⁹⁵ A spigot that was adjusted depending on whether the facility was processing organic potatoes or conventional potatoes controlled the release of the two de-foaming agents. The potatoes generally underwent three washings during the processing.⁹⁶

On one occasion during organic processing, it was discovered after the first wash of the potatoes that the spigot had been turned in the wrong direction, allowing the prohibited de-foaming agent to be used on the organic potatoes.⁹⁷ The second and third washes were then performed with the approved de-foaming agent.⁹⁸

After this incident, the facility reported itself to the State of Washington.⁹⁹ State officials informed the facility that the contaminated batch could not be sold as an "organic" product.¹⁰⁰ After evaluating the pros and cons of appealing the State of Washington's decision, the facility decided not to appeal, for numerous reasons.¹⁰¹

Namely, the facility's legal counsel undertook an analysis of relevant NOP appeals and determined that mistaken and unintentional use of a prohibited substance was not a defense and was not grounds for

⁹³ *Id.*

⁹⁴ Interview with René Robin, Director of Permitting, Utilities & Power Plants, North America, SunPower Corporation (Oct. 10, 2009).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

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waiver of the organic standards.¹⁰²

Second, an appeal to the NOP was unnecessary because the State of Washington did not de-certify the facility, it just de-certified the contaminated batch.¹⁰³ The State also commended the facility for self-reporting and implementing safeguards to prevent the mistake from happening again.¹⁰⁴ The State of Washington, however, would only allow the facility to re-label the potatoes as conventional or discard the batch in its entirety.¹⁰⁵

In the end, while the facility was not decertified, it did suffer financially. Not only did the facility incur significant legal fees, but it also incurred liability to the downstream users of the potatoes with whom it had contracts.¹⁰⁶

This case exemplifies some of the common pitfalls that organic farmers can fall into and shows some conventional farmers are hesitant to switch to organic production methods. As discussed further below, risk of potential liability, even from unintentional contamination and reasonable mistakes, as well as lost profit, leads many conventional farmers to have major reservations about switching from conventional production methods to organic.

V. CONCLUSIONS

Despite the strict statutory and regulatory framework articulated above, the organic industry is continuing to grow at a steady pace. In fact, the organic industry is predicted to generate revenues in excess of \$50 billion by 2025 with a continued growth of approximately 18% to 20% per year.¹⁰⁷

Despite the growth in the organic industry, the stringent legal framework, among other factors, poses an impediment for some farmers in transitioning to organic production.¹⁰⁸ A study done by California

¹⁰² *Id.*; see also Summary Table of NOP Appeals.

¹⁰³ Interview with René Robin, Director of Permitting, Utilities & Power Plants, North America, SunPower Corporation (Oct. 10, 2009).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Organic Market Overview, *supra* note 7; see also What's News in Organic, *supra* note 8.

¹⁰⁸ See Ron Strohlic & Luis Sierra, California Institute for Rural Studies, *Conventional, Mixed and "Deregistered" Organic Farmers: Entry Barriers and Reasons for Exiting Organic Production in California* 6 (2007), available at www.cirsinc.org/Documents/Pub0207.1.PDF ("Certification costs, which can be particularly onerous for smaller farmers," as well as the "[h]igh levels of paperwork and record keeping required for organic certification," were among a number of factors found that could discourage conventional farmers from transitioning to organic production.).

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Institute for Rural Studies (CIRS) in 2007 sought to understand why the 18-20% annual growth in organic sales is not accompanied by similar growth in organic acreage.¹⁰⁹ CIRS interviewed more than seventy conventional, mixed, and deregistered farmers in California.¹¹⁰ The study found that half of the deregistered growers left farming entirely (mostly for personal reasons), and the other half reverted to conventional farming.¹¹¹

The study concluded that principal barriers to farmers transitioning into organic include the following:

- Financial losses associated with the transitional period;¹¹²
- Higher costs of production;
- Potentially lower yields;
- Challenges in accessing stable, profitable markets;
- Costs of recordkeeping associated with certification;
- Limited access to technical assistance and marketing expertise;
- High labor costs;
- Lack of access to organic prices and markets; and
- Limited access to credit and financing.¹¹³

Notably, the study also found that farmers that adopted organic farming practices primarily for economic gain (rather than a philosophical commitment to organic) were more likely to revert to conventional production with changing economic circumstances, because they did not appreciate the need to shift their mindset to the “whole

¹⁰⁹ *Id.* at iii (“[T]he U.S. organic sector has been growing by a vigorous 20% per year. . . .

Nonetheless, organic agriculture plays an extremely small role in California’s overall agricultural landscape. There were only 1,757 registered organic farms in California in 2003, representing just 2.2% of all farms in the state. Similarly, California’s 174,000 acres in organic production represent a mere 0.63% of all farmland. At the same time, the number of organic farms in California has remained virtually constant since 1998, with growth in some years offset by a nearly 10% decline between 2001 and 2003. The small number of organic farms is exacerbated by a “deregistration” rate of approximately 20% of organic growers each year. For example, 358 farms discontinued organic registration in 2002, of a total of 1,847 registered growers. That same year witnessed the entry of only 303 new registered organic growers, representing a net decrease of 55 organic farmers.”)

¹¹⁰ *Id.* at ii.

¹¹¹ *Id.* at iv.

¹¹² There are programs that are helping farmers with the transition, including the Environmental Quality Incentives Program (EQIP), which is administered through the USDA. *See* Environmental Quality Incentive Program, *available at* www.nrcs.usda.gov/PROGRAMS/EQIP/index.html#prog. EQIP offers funds to farms (not more than \$20,000 per farm per year- not more than \$80,000 per farm in any six-year period) in order to “provide financial assistance to implement conservation practices.” *Id.* This funding, however, is finite. *Id.* “EQIP offers contracts with a minimum term that ends one year after the implementation of the last scheduled practices and a maximum term of ten years.” *Id.*

¹¹³ Strohlic & Sierra, *supra* note 108, at 5-6.

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farm' system based on soil health and the inter-relationship of all on-farm systems."¹¹⁴

VI. AFTERWORD

Just prior to the publication of this article, on March 19, 2010, the USDA announced that it plans to conduct regular pesticide testing of organic products beginning in September 2010.¹¹⁵ This effort by the USDA was in response to an audit report conducted by the Inspector General of Agriculture, entitled "Oversight of the National Organic Program," which concludes that there was insufficient testing and a general lack of oversight within the National Organic Program.¹¹⁶

The USDA's pesticide testing will focus on "high-risk" growers whose fields are adjacent to conventional fields, and those growers which also produce non-organic products. This new level of enforcement strives to maintain consistent, uniform standards for organic production, and renewed consumer confidence in the USDA Organic label.

Also as a result of the audit report, the National Organic Program will conduct unannounced inspections of producer and processor facilities, as well as reviews of products once they reach their retail destination, i.e., grocery stores. These inspections seek to ensure accurate labeling and compliance with the National Organic Program regulations.¹¹⁷

Summary of National Organic Program Appeal Decisions¹¹⁸

Date/ Cite	Case Name/ Certifier	Key Issues	Outcome
001-04	<i>In re</i> Will and Vanessa Comley,	Failure to submit payment for continued certification and updated	Remained certified under original certifier until surrender of certification, regardless of obtaining second

¹¹⁴ David Kupfer "California Farmers Rethinking Organic Certification: California Farmers Dropping Organic Certification Cite Crop Management, Yield and Marketing Challenges As Reasons For Opting Out," Rodale Institute, March 15, 2007 www.rodaleinstitute.org/california_farmers_dropping_organic_certification.

¹¹⁵ See William Neuman "U.S. Plans Spot Tests of Organic Products," N.Y. TIMES, March 19, 2010 www.nytimes.com/2010/03/20/business/20organic.html.

¹¹⁶ GIL H. HARDEN, ACTING ASSISTANT INSPECTOR GENERAL, U.S. DEPARTMENT OF AGRICULTURE, OVERSIGHT OF THE NATIONAL ORGANIC PROGRAM 1 (March 9, 2010), available at www.usda.gov/oig/webdocs/01601-03-HY.pdf.

¹¹⁷ See Business Law Section of the State Bar of California, Agribusiness Committee E-Bulletin, March 23, 2010.

¹¹⁸ NOP appeals decisions are available at the NOP Reading Room, www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateJ&page=NOPReadingRoomHome.

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Date/ Cite	Case Name/ Certifier	Key Issues	Outcome
	Comley Dairy Farms/ NOFA-NY	farm plan resulted in suspension of certification. (205.406) Meanwhile attempted to obtain a new certifying agent. Did not surrender certification to the first certifier.	certifier.—Owes back fees. Appeal denied.
002-04	<i>In re</i> Scott and Dana Kittredge, Kittredge Ranch II/ Oregon Tilth (OTCO)	Ordered and planted treated oat seed with prohibited fungicide in 2002, applied for certification in 2004. Prior-year treated oat seed was not a prohibited material use, and did not get updated standard. Requested exception. Received erroneous information from the certifying agent in 2002 as to whether use of the treated seed was OK, minimum quantity and quick breakdown of prohibited material.	Misinformation from certifying agent and lack of awareness of changed standard are not grounds to waive NOP compliance.—3-year period free of substance controls, with no residual activity of substance. Appeal denied .
003-04	<i>In re</i> Windy Hill Farm ICS	Certified by ICS in 2002, submitted production plan re: treatment inputs for dairy, stating “no prohibited materials used.” Later found some materials used, but minor. Told to improve practices by certifier, but did not. Later inspections revealed additional violations re: minor use of prohibited materials.	Admission of improper practice and bad record keeping. Intent to improve practice not sufficient. Certification revoked Appeal denied.
2005			
002-05	<i>In re</i> Ricci D. Landwehr GOA	Used treated corn seen when no commercially available alternative existed, based on information provided by certifier. Seed order placed in January, new	Misinformation from certifier and ignorance of changes do not constitute grounds to waive compliance. Does not make findings as to timing of change in regs, and receipt of new standard after seed order place. Does not make findings as to hardship or

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Date/ Cite	Case Name/ Certifier	Key Issues	Outcome
		rules received in February. Cited use of best knowledge, extreme hardship of decertification, and unfair, unintended consequences.	unintended consequences.
008-05	<i>In re</i> Promatora Agricola el Toro CCOF	Treated seeds and string of inadequate documentation that Mexican government required seed treatment. Appellant cites 7 C.F.R. § 205.204(a), which states that prohibited substances may be used when the application of the material is a requirement of federal or State state phytosanitary regulations.	Only applies to restrictions set by U.S., - not by foreign governments. Mexico does not require the reverse treatment.
009-05	<i>In re</i> K.N. Sreerama OCI	Citrus growers in Ventura - asked to treat with authorized materials for insect. Contractor used unauthorized spray on oranges and lemons at two locations. Then claimed clerical error. Testing showed prohibited materials. Claimed tragic error due to lapse in oversight, mistake and cover-up by contractor. New testing showed no detectable levels. Cites 7 C.F.R. § 205.672 re: emergency treatment also applicable. EPA letter of low risk and no detectible detectable levels.	No matter if the use of the prohibited substance is deliberate or unintentional, crop is compromised. Emergency section inapplicable because treatment was voluntary. EPA letter and testing of no risk and no detectable level—the 3-year period must be free of prohibited substances. —Even if not willful, error is not grounds for waiver of standard.
012-05	<i>In re</i> Stroh Farm OCIA	Unannounced inspection re: flax storage, sales and records. Alleged farmer evaded availability. Records showed farmer offering more organic	Evidence inconclusive re evading inspection. Issue of overage not resolved.

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Date/ Cite	Case Name/ Certifier	Key Issues	Outcome
		flax for sale that he produced. Subsequent scheduled inspection showed no violation.	
014-05	<i>In re</i> Integrity Certified International, Inc ICI	Annual Update requirements for Certifiers. Major and minor forms needed. (Audit, Review and Compliance ARC) of AMS instructed ICI to submit corrective actions. Numerous extensions.	Ample opportunity to provide materials - no longer accredited to certify.
2006			
001-06	<i>In re</i> Dan Juneau, Juneau Farms ICS	FVO Standards - Inventory Records, and sales for both organic and non-organic for review. Audit trail "willful" violation. Mediation and documentation provided.	Evidence does not show willful violation. Revocation not appropriate. Absence of pattern of non-compliance no evidence that integrity compromised.
003-06	<i>In re</i> Four Feathers Fruit Farm WSDA	Apples - self reported spray - protested length of suspension due to unintended application, low probability of residue in the remaining environment, low concentration of application of pesticides, operational changes.	3-year timeframe during which the land is not eligible for certification is mandated and not amenable to reduction based on consideration of intent or low residual activity. Did not affect other parts of the orchard not sprayed. (2 of 4)
004-06	<i>In re</i> Premium Waters, Inc. AMFSII	Attempted to obtain certification for spring-water collection and bottling operation to label water as "organic." Appellant argued that water could be certified as an organic product because 1) labeling standards do not include water in calculating the percentage of organically produced ingredients in a product, thereby excluding water as a certified organic	Denial appropriate. Water is <u>not</u> an agricultural product as defined by NOP and certification, processing, or handling of water as organic is not permitted. Under 7 C.F.R. § 205.301, product composition, regulations prohibit the use of the term organic to modify water as an ingredient. Organic flavored water products are allowed provided that the word "organic" is clearly used to describe the flavoring and not the water. Exclusion of water from the National List of Allowed and Prohibited Substances has no bearing on the

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Date/ Cite	Case Name/ Certifier	Key Issues	Outcome
		ingredient but not a certified organic product; and 2) water is absent from the National List of Allowed and Prohibited Substances. Agent denied certification, citing regulatory provision that excludes water from the percent of organic products in a raw or processed product labeled as organic.	eligibility of water for organic certification.
005-06	<i>In re</i> One Straw Orchards, LLC/Plum Daisy LLC CDA	Failed to update dairy system plan to continue certification. Reasons for noncompliance included lack of resources and information.	Burden on operator to fulfill the requirements. Neglect to update plan diminishes significance, but departed from severity of sanction. Since integrity of operation not compromised - suspended until compliant but not revoked.
006-06	Nature's International Certification Services NICS	Denial of accreditation for Nature's International Certification Services.	Denial of accreditation for Nature's International Certification Services because of conflict of interest -Upon receiving accreditation, Nature's International Certification Services intended to certify members of the CROPP/Organic Valley Cooperative to the NOP standards. -All CROPP members are joint owners in a common venture, i.e., the sale of marketing of various organic products under the Organic Valley label. -As a condition of membership, CROPP members must maintain organic certification, the attainment of which is proposed to be monitored and supervised by NCIS. -Two parties responsibly connected to NICS, the Executive Director and his spouse, are CROPP dairy pool members and would benefit from an inadvertent influence on certification decisions involving any CROPP member or CROPP applicant.
011-06	Productores Organicos del	Denial of certification of a Community Grower	Denial of certification of a Community Grower Group (CGG)

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Date/ Cite	Case Name/ Certifier	Key Issues	Outcome
	Istmo de Tehuantepec, Oax./ DESAMEX Organic Crop Improvement Association	Group (CGG)- a CGG in theory enables a large number of producers from the same geographical region who share common agricultural practices to collectively market product(s) under one certificate. Here, group of 189 participants in 8 communities producing organic sesame and peanuts. Internal Control System which was comprised of an individual who served as both the internal control officer and internal inspector. Also, 2 advisors from the marketing company assisted in the internal inspections and conducted technical and administrative training. Scope of certifying agent's initial inspection included the ICS and a sample of 39 growers representing each of the 8 separate communities.	-Deviations from the organic system plan demonstrate that growers not adequately prepared to comply with NOP standards (2 growers involved in unreported insecticide application to land bordering the crop field and use of empty fertilizer bags to store harvested crops). -Also certifying agent concluded that ICS was not adequate to prevent, detect and manage noncompliances in order to verify the organic integrity of the crops. -Administrator found that agent's policy for certifying CGGs was flawed because it only selected a percentage of the producers for both the initial and annual inspections – does not fulfill requirement in 7 C.F.R. § 205.403(a)(1) whereby “a certifying agent must conduct an initial on-site inspection of each production unit, facility, and site that produces or handles organic products that is included in an operation for which certification is requested. An on-site inspection shall be conducted annually thereafter for each certified operation that produces or handles organic products for the purpose of determining whether to approve the request for certification or whether the certification of the operation should continue.”
017-06	<i>In re</i> Carter Farm OC/Pro	Was certified organic, then lack of organic feed required conventional feed and removal, then return. Said some animals born into organic production.	Feeding of conventional grain constituted a lapse in organic management and permanently disqualifies each animal and edible products from organic status.
2007			
005-07	<i>In re</i> Ken Fehringer CDA	Used herbicide on specified fields removed from certification. Then wanted to recertify fields excluding treated area.	Revocation of certification found excessively punitive. Only a portion of field affected. Applicant's method of mitigation not good enough but would

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Date/ Cite	Case Name/ Certifier	Key Issues	Outcome
		CDA said all to be decertified re: inadequate buffer zones and contamination.	introduce a degree of uncertainty. None of the harvest from the buffer zone or commingled in storage was allowed, but no other decertification.
006-07	<i>In re</i> Ashley Williams North Carolina Crop Improvement Association	Denial of certification for burning crop residue prior to planting soybean crop intended to be sold as organic. Certifying agent denied certification, citing restrictions on crop burning, but did not assert that the action was used solely as a means of disposal. Appellant claimed burning was necessary after a failed attempt to bury or incorporate wheat crop by plowing. State cooperative concurred with this procedure, and certifying agent agreed with coop.	Basis for denial was not upheld so appeal sustained. 7 C.F.R. § 205.203(e)(3) prohibit the burning of crop residues solely as a means of disposal, but permit the practice for disease suppressions or stimulation of seed germination. Appellant sufficiently established that burning wheat crop residue in the field was acceptable practice for viable seed germination. In that limited case, then, burning was allowed. No blanket approval for burning, though.
008-07	<i>In re</i> The Family Garden QCS	Certification denied for portion of operation because Nature Safe 8-5-5 (allowed substance) accidentally containing prohibited substance, synthetic urea, was found on field slated for planting of organic onions. Appellant argued denial inappropriate because the prohibited substance was applied inadvertently and involved an extremely small quantity. Manufacturer supported position, claiming responsibility for product adulteration, and characterized effect of prohibited material as	Certifying agent properly used its authority to deny certification to that portion of the operation from which a crop intended for certification would be harvested within 36 months of the application of a prohibited substance, synthetic urea. However, exceptional circumstances in this case compelled the Agency to modify the adverse action. Citing NOP Preamble, which states that a compliant operation should not be penalized for the unintentional incorporation of excluded methods or products of excluded methods if they take reasonable steps to avoid contact with the products of excluded methods as detailed in their approved organic system plan. Preamble was applicable in this case because the means of contamination exceeded the reasonable expectation of

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Date/ Cite	Case Name/ Certifier	Key Issues	Outcome
		benign and not persistent.	the operator's ability to prevent such introduction – provided that the exception does not compromise the organic integrity of the product. Onions planted simultaneously with the fertilizer application may not be sold, marketed or labeled organic. Subsequent crop may be certified organic so long as all other regulatory provisions were met because product was a nutrient rather than a toxin.
009-07	<i>In re</i> Richard and Mary Clemson Washington State Department of Agriculture	Proposed revocation of NOP certification. Tried to transfer certification to new owner—USDA certification is not transferable; new application is necessary. Certifying agent issued a notice of non-compliance and proposed revocation citing willful violations of National Organic standards. “Knowingly sold, labeled and represented non-certified products prior to submission of product information and after notification that products had not been approved..”	ApplicantApplicants filed an appeal to allow them to be eligible for potential certification of another operation during the next five years. ApplicantApplicants admitted that they had packaged non-compliant products but claimed that they had not done so willfully. Agency found that appellants failed in their responsibility as a handler to demonstrate the compliance of productsproducts’ contents and labels and obtain approval of the certifying agent prior to manufacture, and such failure resulted in the sale and distribution of some products that were not genuinely organic. Appellants were clearly informed that certification remained pending yet continued to manufacture and not take sufficient action to prevent further distribution of a significant quantity of noncompliancecompliant products. Then, once in violation of NOP regulations, the appellants failed to halt further production and subsequent flow of noncompliant products into the marketplace. Certification suspended, and appellants restricted from applying for organic certification of any operation or being responsibly connected to a certified organic operation for 2 years.
014-07	<i>In re</i> Jeff and Jane Mosel, Rice lake	Preemption of initial certification review of Rice Lake Dairy’s	Impact of 5-year denial of initial certification and refusal to accept an application for certification is akin to

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Date/ Cite	Case Name/ Certifier	Key Issues	Outcome
	Dairy, LLC MOSA	application because of applicant's admission to feeding conventional corn silage to dairy cows in Feb. 2005, when Rice Lake Organic was suspended for failure to complete an updated organic production plan to continue certification, and applicant's failure to disclose any discontinuity in organic management in the subsequent request for reinstatement. Following reinstatement of certification in June 2005, Rice Lake Organic resumed shipment of milk represented as organic. Certifying agent found a willful violation of NOP regulations and that corrective action was not possible. Denied initial certification to Rice Lake Dairy and refused to accept an application for certification for a 5-year period from any applicant to which this applicant could be responsibly connected.	revocation. NOP regulations do not permit this—generally a denial of certification does not have a sustained adverse effect or restrict an operation from continuing to pursue certification immediately following its issuance (except in cases of prohibited substances). (<i>See</i> 7 C.F.R. §§ 205.401, 205.405(e)). Applicant for organic certification that is not restricted from applying for certification by an active suspension or revocation may not be denied certification as a punitive sanction for a past violation, if the operation otherwise appears capable of complying with NOP regulations. Prior violation of NOP regulations was not a valid determinant of the present request for certification, and appellants may resume the certification review process.
018-07	<i>In re</i> Back to Basics Farm NOFA-NY	Denial of certification of portion of the dairy herd operation. NOP regulations permit a 1-year conversion for an entire, distinct dairy herd, whereby livestock would be raised in compliance with all provisions of the NOP (except that during 9 months of conversion period, feed ration could contain up to 20% non-organically produced feed—remaining 80% of	Certifying agent properly denied certification to offspring of conventional milk cows because of appellant's unsupported claim of continuous organic management from the last third of gestation. Calves born to cows that entered the last third of gestation during the conversion period were eligible for certification, but appellant did not provide evidence that these cows were included and managed in accordance with an organic system plan and therefore failed to preserve the eligibility.

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Date/ Cite	Case Name/ Certifier	Key Issues	Outcome
		<p>the feed had to be organic feed or feed raised from land that was included in the organic system plan and managed in compliance with organic crop requirements). Appellant chose to convert a herd of 27 heifers to organic status using the 80/20 feed exemption. Upon completion of the 1-year conversion, the operation was certified for pasture, hay and 27 dairy replacement heifers. Also intended to incorporate 22 other dairy livestock into the certified operation (which were born to conventional cows that resided on the operation throughout conversion period). Appellant asserted they were eligible for certification because they were fed organic feed during last trimester of pregnancy. Appellant failed to maintain records per NOP regulations.</p>	<p>Following 12-month period of continuous organic management, milk from these cows and calves could be sold, labeled and represented as organic. However, these livestock as dairy replacement animals may not be incorporated into a whole herd that completed a whole-herd conversion to organic status and are permanently ineligible to qualify as organic slaughter stock.</p>
023-07	<i>In re</i> Cassel Farms, Mark and Allen Cassel MOSA	<p>Revocation of certification of operation for 5 years for use of prohibited substances and failure to immediately notify the certifying agent, MOSA, of such use.</p>	<p>Failure to immediately notify MOSA of application of prohibited substances did not comply with requirements of 7 CFR § 205.400(f)(1), because 8 days elapsed between the application of the prohibited substances and the unannounced inspection by MOSA, and appellant confirmed that he did not intend to notify MOSA until the fall inspection. Agency found revocation for 5 years too severe – more appropriate to suspend the affected crop fields that had contact with the prohibited</p>

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Date/ Cite	Case Name/ Certifier	Key Issues	Outcome
			substances for 3 years as required by NOP regulations.
2008			
002-08	Floyd Eash, Eash Farms GOA	Appeal of proposed suspension of certification (for 3 years) of a portion of operation for planting corn seed that had been treated with prohibited substances.	Part 205 of NOP regulations provides a 3-year timeframe during which land used to grow crops must meet the standards relating to allowed and prohibited substances before the crops grown can be sold on that land as certified organic. The Administrator has determined that planting of seeds treated with a prohibited substance is an application of a prohibited substance. Such action justifies suspension (even if use was unintentional or amount was minimal).
006-08	Blue River Organic Seeds, LLC Maury Johnson OneCert	Appeal of proposed suspension of certification of seed handling operations because unable to certify ingredients of Natural II coating. Issues related to divergent determinations between certifying agents – such issues must be referred to NOP for reconciliation before pending sanction is applied.	In Feb. 2006, OneCert granted organic certification to Blue River Organic Seeds for handling. In a portion of certified handling operations, seeds were coated with Natural II product. OneCert was unable to obtain the Natural II formulation and declared that the prohibition on the use of Natural II was a final determination. In Dec. 2006, OCIA (another certifying agent) granted organic certification to Blue River Organic Seeds for handling and approved use of Natural II to coat organic seeds. Appellant was then concurrently certified by OneCert and OCIA. July 2007, appellant learned that OCIA was unable to verify the compliance of Natural II for organic production and therefore ceased using it. OneCert determined that appellant's resumption of use of Natural II was a willful violation of NOP regulations. Agency found OneCert exceeded its enforcement jurisdiction in proposing to suspend a portion of an operation that was certified exclusively by another certifying agent. Prior to proposed suspension, handling operation was in conformance with the limitations imposed by OneCert (since

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Date/ Cite	Case Name/ Certifier	Key Issues	Outcome
			it had ceased use of Natural II). Allegation of willful violation is not supported because actions were disclosed to and approved by a certifying agent. Appeal sustained—certification issued by OCIA to Blue River Organic Seeds remains in effect. Blue River effectively surrendered the certification by OneCert and thus has no further obligations to OneCert.
010-08	Kelsey Corners Ronald Clark Valeria Goude NOFA-NY	Appeal of proposed revocation of certification for use of prohibited feed to dairy livestock. Feed use was neither included in the organic system plan nor permitted for consumption by livestock in a certified organic operation.	Certifying agent found discrepancy between appellant's organic system plan and the implementation pertaining to livestock feed. Certifying agent sampled feed and found presence of mammalian byproducts. NOP regulations § 205.237(b)(5) prohibit feeding mammalian byproducts to mammals. Appellants, therefore, knowingly violated NOP regulations—supports revocation of certification. Appellants cannot apply for organic certification or be connected to any certified organic operation for 5 years from date of occurrence, April 11, 2008. Cease to maintain organic operation and, therefore, in accordance with 7 C.F.R. § 205.236(b)(1), all dairy livestock may never be sold, labeled or represented as organic slaughter stock. Also, milk products from these animals may never be sold, labeled or represented as organic.

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