

HARVEY AND THE SOUL OF ORGANIC

By Grace Gershuny

There have recently been a lot of accusations and “action alerts” flying around the internet and print media that raise the specter of corporate agribusiness conspiring to “weaken” or “dilute” organic standards. Calling it a “sneak attack,” the Organic Consumers Association (OCA) and others rallied the grass roots to oppose a legislative change to the Organic Foods Production Act (the law that authorized the Federal organic regulations) that was initiated by the Organic Trade Association (OTA). The amendment was passed by Congress on October 27th, along with a directive to USDA to study the organic industry and report back in 90 days.

OCA and others accuse OTA of having been “taken over” by agribusinesses like Dean Foods and WalMart, who, according to OCA, want to undermine the strict organic standards reached through a democratic process in order “get organic cheap.” These accusations are not only based on distortions of truth, but they work against the interests of organic farmers, consumers and everyone else involved. The controversy has left a bitter rift in the organic community, a rift which threatens to unravel years of consensus-building that contributed to USDA publishing an organic regulation that almost everyone could live with at the end of 1999. This is my effort to clarify some of the confusion generated by the accusations and misinformation, and to urge folks who support the bigger organic vision to avoid undermining that vision. I have been a passionate advocate and practitioner of organic agriculture for over thirty years. I developed NOFA’s (Northeast Organic Farming Association) first organic certification program in 1977, and have organized, written, taught, and consulted around agriculture and food system issues since then, as well as keeping my hands in the soil. I was also a founding member of OTA, served on the National Organic Program (NOP) staff for five years, and currently consult for the organic industry, including OTA, on regulatory issues.

What was all the fuss about?

The current scenario begins with a lawsuit filed three years ago by Arthur Harvey, an organic blueberry grower from Maine. Harvey challenged several provisions of the National Organic Program (NOP) regulations as being inconsistent with the law. Although he lost on all counts, in 2004 his appeal was joined by twelve “amici,” primarily consumer and environmental groups; in January of 2005 the First Circuit Court of Appeals found in Harvey’s favor on three counts. OTA’s amendment was intended to change only the language in the law that the court said invalidated the current organic regulations.

If let stand, the Harvey ruling would have blocked the use of “allowed synthetics” in or on organic processed products, including substances like baking powder, one form of pectin, ascorbic acid, and carbon dioxide. By some estimates, this would remove the organic label from up to 90% of current organic processed products (which accounted for 58% of all organic products sold at retail in 2004, according to OTA’s Manufacturers Survey).

Beyond multi-ingredient products such as baked goods and frozen foods, this change would also have affected single ingredient products such as sugar, which uses calcium hydroxide as a processing aid, bananas, which are ripened with ethylene gas, and many whole grains, which are treated with carbon dioxide as a fumigant. Because these key ingredients could not be counted as part of a product’s organic content, additional products would have lost their organic status in a domino effect. This is the primary correction that OTA’s amendment made, and there will now be no need to change the rules for processed organic products.

The second outcome of the Harvey ruling invalidated the rules relied upon by small dairy farms transitioning to organic management, which allowed cows to receive up to 20% non-organic feed until three months prior to selling their milk as organic. OTA’s amendment, which inserted language that allows transitioning dairy herds to consume farm grown feed from land that is in its third year of transition to organic, has generally been supported.

The third Harvey ruling disallowed the procedure by which any non-organic agricultural ingredient may be used in up to 5% of an organic processed product if an organic equivalent is verified to be commercially unavailable. Instead, it stipulated that any non-organic agricultural product must be individually reviewed by the National Organic Standards Board (NOSB) and included on the National List before it can be used—a process that can take a year or longer. OTA’s amendment did not eliminate this problem, but it did include a provision allowing for a temporary emergency exemption for specific products to be issued by the USDA. The exemption would still have to be published in the Federal Register for public comment before it could take effect, and be approved at the next meeting of the NOSB. This exemption could apply to products that may become unavailable in organic form due to natural disasters, crop failures, or other unforeseen factors.

A recent legal analysis by the Congressional Research Service confirms that the amendment’s effect was limited to reversing part of the Harvey ruling, without otherwise changing the law. There had long been discussion about making these and other technical corrections to the law, and there was some agreement among the various stakeholders that this would be supported in the next Farm Bill.

Hardly a “sneak attack.”

For the sake of this discussion, I will refer to those who opposed OTA’s legislative amendment as the “amici.”

Regulatory Fixes and Industry Impact

There is a lot in the OFPA that is both unclear and ambiguous, and the process of trying to write regulations that were consistent with it taught me how frustratingly contradictory it is. The new amendment removes at least one of the contradictions, and the new language ratifies the existing regulations that allow the use of a limited number of approved synthetic substances in up to 5% of organically labeled products. While some continue to insist that this allowance is inappropriate, all organic standards in the world, including the European Union, Canada, and Codex Alimentarius, include allowances for similar lists of synthetic ingredients in organic processed products.

One accusation made is that the amendment would allow hundreds of synthetic substances, known to the cognoscenti as “food contact substances,” to be used in organic processing without review by the National Organic Standards Board (NOSB), the citizen advisory panel authorized by the law. Substances such as sanitizers and boiler chemicals are not currently required to be reviewed by the NOSB and included on the National List, and this amendment does not change this. Concerns about residues of these things getting into organic products can readily be addressed by a regulatory revision. Most certifiers currently interpret the rules requiring protection of organic integrity by insisting that processors protect products from sanitizer and boiler chemical residues on equipment surfaces. A regulatory approach could also make certain categories of these substances off-limits for organic handlers, based on NOSB recommendations—having the NOSB spend its time reviewing each of these materials, which are already scrutinized by FDA, would be pointless.

The charge has been made that the amendment takes authority away from the NOSB. This accusation refers mainly to the emergency exemption provision discussed above. Since the NOSB does not make these decisions now, this charge is groundless. Moreover, the new requirement that each agricultural product must be individually listed will create a huge problem that will tie up the NOSB in examining hundreds or thousands of petitions for agricultural products, none of which should really be concerns for the National List.

The amici argued that the industry could adjust to the Harvey ruling through revising the regulations, without having to change the law. It wouldn’t be so bad, they said, for affected products to just use a “made with organic ingredients”

label. However, many farmer advocates (especially in the Northeast, where we don't sell a lot of ingredients to processors) don't seem to realize that the "made with" label, beyond being less appealing to consumers, also allows almost any non-organic agricultural ingredients, commercially available in organic form or not, to be used in up to 30% of the product composition. It also allows some other unpleasant things like sulfites, nitrates, and unapproved processing aids to be used in producing the non-organic portion.

This translates into a diminished market for a bunch of those organic minor ingredients--why buy expensive organic blueberries for that "made with" pancake mix if you don't have to? And they have also not considered those single ingredient products--can you imagine a "made with organic bananas" label on the box? Big processors such as Stonyfield Farm said that they would stop making organic products at all if the only option was the "made with" label, which consumers don't recognize and won't pay higher prices for, thus eliminating a major market for organic dairy. It's also interesting to note that, when the regulations were being developed, many consumer groups opposed the provision for a "made with organic" label as misleading.

The democratic process

As a member of the organic committee of the National Campaign for Sustainable Agriculture (representing Rural Vermont, on whose Board I serve), I have never been informed or asked for my input about decisions concerning their response to Harvey. I bring this up to suggest that those criticizing OTA's strategy as undemocratic might do well to avoid throwing stones. In various discussions with Campaign members and others, I heard repeatedly that they opposed amending the law at all, since it could open the door for various undesirable changes by agribusiness types. They then came out with their own legislative proposal, which included major new issues that haven't been publicly discussed. Although negotiations between OTA and the amici broke down over this issue, OTA's intent to pursue a legislative strategy was never a secret.

The ironic thing about this is that, in contrast to groups such as OCA, OTA is a democratically controlled, member directed organization. It has about 1600 members, representing the whole spectrum of organic producers, processors, distributors, retailers, suppliers, consultants (including yours truly) and certifiers. Everyone's vote, regardless of scale, counts equally. OTA's Board (which includes representatives of various organic sectors, none of whom are Dean Foods or WalMart) unanimously approved a plan to quickly enact the needed technical corrections to avoid severely disrupting the industry. More information about OTA and its activities is available at www.ota.com.

It is also worth noting that the strategy of changing the rules (which were extensively publicly vetted) through a lawsuit is a decidedly undemocratic approach. While groups such as OCA vociferously lobbied Congress to oppose the legislative amendment, no such public input is possible in influencing a court decision.

What consumers want and what consumers don't know

One of the most frustrating things for me is the sense that the whole meaning of organic has become a hostage to consumer ignorance. Much of the blame for this rests squarely with the organic industry and its imperative to market products as "pure, natural and safe." It is no wonder that, according to a Consumers Union poll, most consumers think that organic products contain no "artificial ingredients."

If someone is ignorant about what you do, does it make sense to work on educating them, or should you change what you do to fit their beliefs? This is the crux of the debate that was raging in the organic community when the OFPA was being drafted. As I argued then, and believe now more strongly than ever, the distinction between "synthetic" (bad) and "natural" (good) is the wrong place to hang the whole definition of what is organic. Consumers must realize at this point that not all synthetics are bad, and not all "naturals" are good.

It should also be obvious to the organic community that the distinctions are not nearly as straightforward as the advocates of this position argued in the eighties. Recent deliberations by the NOSB in attempting to clarify the definition of "synthetic," and efforts to reclassify some substances now designated as synthetic to become non-synthetic, have underscored this fuzziness. The compromise of allowing specific exemptions to the "no synthetics" rule that was crafted into the OFPA does make sense. The distinction between synthetic and non-synthetic in the realm of food additives is, however, pretty meaningless, but that is what we are stuck with.

Much of the controversy, in my opinion, results from a combination of ignorance, ideological blinders, unchecked assumptions, and confusion about the regulatory process. I would like to suggest in closing that one of the biggest unchallenged assumptions holds that making organic standards "higher" and "stricter" protects small producers and consumers. Understandable and well meaning, but really mistaken.

Contrary to the widespread presumption that agribusiness types wish to "loosen" or "weaken" organic standards for their own ends, in reality the increasing bureaucratization of the organic rules benefits the bigger players, who

have regulatory compliance staffs to make sure they are meeting all the arcane requirements. Small, independent producers then feel like organic has been “stolen” from them, as one former colleague put it, and try to find ways to circumvent the rules. Similar issues have arisen over health and safety rules that have put many small producers out of business. From the consumer standpoint, most of these “stricter” organic requirements do nothing whatsoever to improve organic integrity, product quality or environmental protection. Despite these obstacles, the organic industry has grown exponentially over the past decade or so.

Many in the community think it’s fine to get rid of mass produced organic processed products, and believe that big corporate players should be prevented from going organic. They believe that everyone should just buy all their food from local producers and prepare home-cooked meals of whole foods. This may be the ideal choice, but how many American consumers are likely to change their lifestyles this radically? And how about products like cotton? I recently attended an organic fiber training that drove home to me the importance of supporting an inherently mass-production oriented industry for the sake of removing as many acres (and farm workers) as possible from the harm caused by massive toxic pesticides, herbicides and defoliants. It is simply not okay to limit this possibility in the realm of food production in the name of meeting uninformed consumer expectations--at the same time diminishing the range and quality of organic products available to ordinary consumers.

My own vision would have organic become the predominant kind of agriculture in this country (and of course, the whole world), and not remain an elite niche market. For the sake of the planet, I hope that those who support the organic vision will stop erecting more obstacles to its proliferation.

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Reply to Grace Gershuny by Arthur Harvey

Grace Gershuny's article above, circulated in November, is a faithful and authoritative presentation of both USDA and OTA beliefs. It also reveals the

underlying assumptions behind the recent actions to degrade organic standards, as well as previous actions over the past six or eight years.

Gershuny was part of the small group within USDA who crafted the regulation which the court found contrary, in part, to the Act of Congress---the Organic Foods roduction Act of 1990 (OFPA). Others who are still at the National Organic Program are Keith Jones and Barbara Robinson. Richard Mathews has now been transferred to another position in USDA. Gershuny makes several arguments:

1) *That my lawsuit "lost on all counts" until it was joined by consumer and environmental groups, after which the court of appeals ruled in my favor on three counts.*

The fact is that the "friends of the court" gave moral support (not financial) to my appeal, but had no effect on my arguments. The judges made no reference to their briefs in the decision.

2) *The effect of the court ruling would "remove the organic label from up to 90% of current organic processed products"*

This is total nonsense. First, the court order does not apply until June 2007, which gives plenty of time for manufacturers to re-formulate with natural alternatives. No doubt most of these would cost more than the synthetics. Gershuny does not personally claim "up to 90%", but passes along what some other unnamed person has said.

But suppose we re-phrase it to "up to 90% of organic products contain synthetic ingredients that have no natural substitutes." I don't think that could be true, and if it has any degree of truth, then consumers are being hoodwinked wholesale, because they are not being told what goes into their "organic" products.

In my own line of blueberry and apple products, four out of nine are affected, which I did not realize before the court decision. Two blueberry jams with organic sugar will probably be re-labeled "made with organic blueberries" unless the sugar manufacturers eliminate the synthetic processing aids. Two other products were formerly thickened with the synthetic form of pectin, but we have switched to using organic apple pectin and pulp. This actually costs less than the synthetic, although it requires more careful supervision of the process. It also expands the market for organic cider producers who used to discard their pomace. Our customers look for our brand name as much as the organic seal, so I do not expect any loss of market share from the changes in labeling.

3) *The "primary correction" made by the OTA rider is to legalize synthetic processing*

materials for sugar and bananas, plus the use of carbon dioxide in grain storage.

This is a case of throwing out the baby with the bath water which is not even dirty. Carbon dioxide is a perfectly natural part of the air we breathe. USDA lists it as synthetic because of bureaucratic laziness. There are various natural sources for carbon dioxide which USDA ignored in creating the National List. The better procedure here would be for the NOSB to propose more appropriate guidelines for classifying such substances.

Bananas were ripened quite well before synthetic ethylene was available, although at a higher cost.

I am not a food chemist, but I do know that the sugar industry is large and competitive. I would expect them to be diligent in finding natural processing aids, especially since they would know their competitors are doing the same.

4) *The 'made with organic ingredients' label allows "almost any non-organic agricultural ingredients, commercially available in organic form or not, to be used in up to 30% of the product"*

Gershuny might do well to read the organic regulation, at 205.105:

"To be sold or labeled as '100 per cent organic', 'organic', or 'made with organic (specified ingredients or food group(s))', the product must be produced and handled without the use of:

- (a) Synthetic substances and ingredients, except as provided in 205.601 or 205.603;.....
- (e) Excluded methods.....;
- (f) Ionizing radiation.....; and
- (g) Sewage sludge."

If the NOP would get busy and implement this more fully, the "made with" label might deserve more respect than it currently gets from some of the captains of industry.

5) *Switching some products to the 'made with organic' label "translates into a diminished market for a bunch of those organic minor ingredients---why buy expensive organic blueberries for that 'made with' pancake mix if you don't have to?"*

Consider the pancake mix labeled "made with organic flour" at \$2 a box, competing with another brand labeled "made with organic flour and organic blueberries" at \$2.50. Or, Stonyfield raspberry yogurt labeled "made with organic

milk" at 79 cents, next to Horizon yogurt labeled "made with organic milk and organic raspberries" at 89 cents. I don't think any of these brands would even try to market the cheaper label.

6) *"changing the rules (which were extensively publicly vetted) through a lawsuit is a decidedly undemocratic approach"*

This one takes my breath away. Do we not live in a nation of laws, passed by the Congress and protected by the courts against abuses by the executive? I would be the first to agree the American system of government often fails. But does anyone seriously propose that the OTA rider, which tries to rip the heart out of an act of Congress that was developed through many hearings and debates in both houses, is somehow more democratic?

7) *" This is the crux of the debate that was raging in the organic community when the OFPA was being drafted. As I argued then, and believe now more strongly than ever, the distinction between 'synthetic' (bad) and 'natural' (good) is the wrong place to hang the whole definition of what is organic."*

But that distinction is exactly what OFPA is built upon, starting with 6504: "To be sold or labeled as an organically produced agricultural product under this chapter, an agricultural product shall (1) have been produced and handled without the use of synthetic chemicals, except as otherwise provided in this chapter".....

Since Gershuny rejects the basis of OFPA, why did she work for the USDA in drafting the rules to implement the law?

Gershuny does not offer something different on which to base organic standards. It is easy to find shortcomings in the no-synthetics-added principle, but is there in fact a feasible alternative? If industry people succeed in stamping out this principle, there will be nothing to stop industry lobbyists as they team up with USDA to convert organic standards into nothing more than a label which takes advantage of gullible consumers. Farmers must be scratching their heads over the fairly stringent standards they must follow, before they give their produce to manufacturers who can add a long list of synthetic ingredients and processing materials without the consumer's knowledge.

8) *"There is a lot in the OFPA that is both unclear and ambiguous, and the process of trying to write regulations that were consistent with it taught me how frustratingly contradictory it is. The new amendment removes at least one of the contradictions"*

The alleged contradiction in OFPA that Gershuny refers to, is exactly the one

which the court declared is NOT contradictory. USDA argued throughout the litigation that it was contradictory. Perhaps we can now understand the source of her frustration, because she was trying to allow synthetics in the Rule where Congress had created a firewall against them.

Gershuny was not alone in taking that position. There have always been powerful voices, not only among manufacturers, who argued that organic food cannot claim to be safer or better than conventional food. They argue that organic is not about the product, but about the process, or system of production. That wholistic system is believed to benefit the environment. Even though OFPA contains no such doctrine, the rejection of organic food as superior coincides with USDA's refusal to allow claims that organic food is safer for consumers. USDA cannot very well continue to promote conventional agriculture and also organic agriculture, unless it is for the purpose of serving a niche market of irrational consumers who nevertheless can benefit the industry by paying higher prices.

I am not suggesting that Gershuny supports all of these notions, but it is useful to see where she fits into the picture.

As for any other contradictions in OFPA, Gershuny is not specific. I can discuss one that was the subject of my lawsuit. At one point, OFPA guarantees consumers access to certification documents. At another point, it requires certifiers to protect confidentiality of "business information". So how did USDA resolve this? By classifying all documents as business related. True, OFPA is ambiguous on that issue. But not true that Gershuny and the others struggled to find a middle path---they simply did what was best for the manufacturers and other producers.

Another of my original complaints was that USDA had failed to include in the Rule a requirement in OFPA that wild crop lands not be treated with chemicals. This was additional to the 3-year rule, and would mean that wild lands could not be rotated in and out of organic production. In the course of the case, Keith Jones testified that the OFPA requirement was omitted from the Rule because some wild rice handlers were concerned it might limit their ability to obtain crops. Here again, I don't see the USDA staff struggling with contradictions, but rather crafting the regulation to suit manufacturers.

9) *"One accusation made is that the amendment would allow hundreds of synthetic substances, known to the cognoscenti as 'food contact substances', to be used in organic processing...such as sanitizers and boiler chemicals...having the NOSB spend its time reviewing each of these materials, which are already scrutinized by FDA, would be pointless."*

Gershuny's approach to this topic is strange. First, "food contact substances" is not a term of "cognoscenti" (whoever they might be)---it is used by the Food and Drug Administration (FDA) to describe their list of chemicals allowed in processing and packaging without being mentioned on the food labels. They call it "effective pre-market notification", which means: if consumers want to know about them, they can dig through the list of 300+ and try to figure out which ones might be in their food. The list is at www.cfsan.fda.gov/~dms/opa-fcn.html.

Section 409(h)(6) of the FFDCFA (21 U.S.C. 348(h)(6)) defines a food contact substance as "any substance intended for use as a component of materials used in manufacturing, packing, packaging, transporting, or holding food if such use is not intended to have any technical effect in such food." The premarket notification process for food contact substances in section 409(h) of the FFDCFA is the primary method by which the Food and Drug Administration (FDA) authorizes the use of food additives that are food contact substances.'

FDA reviewed all these chemicals, but not for consistency with organic standards.

Gershuny is off the mark talking about equipment sanitizers and boiler chemicals. The issue is chemicals such as are listed below which certainly violate OFPA 6510(a), which says: "shall not....use any packaging materials, storage containers or bins that contain synthetic fungicides, preservatives or fumigants." Or, 6510(b): "use any bag or container that had been previously in contact with any substance in such a manner as to compromise the organic quality of such product;" Funny thing, though---this part of OFPA was never translated into detailed regulations. Was this one of those "contradictory" areas which Gershuny found so frustrating while drafting the regulation?

A sampling of the first 100 in the FDA list:

#1 silver sodium hydrogen zirconium phosphate, rhombohedral....

"antimicrobial additive"

#2 amines, bis(hydrogenated rape-oil alkyd) methyl, N-oxides... "antioxidant and/or stabilizer"

#6 copolymer of acrylonitrile and trivinylcyclohexane ion-exchange... "treating potable water"

#11 4,5-dichloro-2-n-octyl-3(2H)-isothiazolone "as a preservative and slimicide in the manufacture of paper and paperboard intended to contact aqueous and fatty food"

#35 dimethyl dicarbonate "as a microbial control agent in non-carbonated

beverages containing up to and including 100 percent juice"

#41 silicone acrylate resins.... "on paper or paperboard, at a maximum level of 1.3 milligrams per square inch (mg/in²), in contact with all food types...."

#52 agarose resin, crosslinked and alkylated with epichlorohydrin... "as a chromatic material for the isolation and purification of food enzymes"

#55 terpolymer of styrene, divinyl benzene and ethylvinyl benzene, aminoethylated.... "for use in treating aqueous sugar solutions and hydrolyzed starch solutions"

#59 Glycine,N,N-bis-2-hydroxy-3-(2-propenyloxy).... "as a component of paper and paperboard in contact with nonalcoholic food"

#74 tetra-polymer of divinyl benzene, ethyl vinyl benzene, acrylonitrile, and 1,7-octadiene.... "demineralizing sugar solutions...and to soften water for food and beverage production"

#100 polyvinyl alcohol, manufactured as described... "component of coatings applied to fruits and vegetables with inedible peels, excluding citrus fruits."