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May 12, 2006

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Comments on National Organic Program - Revisions to Livestock Standards Based on Court Order (Harvey v. Johanns) and 2005 Amendment to the Organic Foods Production Act of 1990 (OFPA), Docket No. TM-06-06-PR

To Whom It May Concern:

Pursuant to the notice of proposal rulemaking found at 71 Fed. Reg. 24820 (April 27, 2006), the Center for Food Safety provides the following comments. CFS is a non-profit, membership organization that works to protect human health and the environment by curbing the proliferation of harmful food production technologies and by promoting organic and other forms of sustainable agriculture. See generally <http://www.centerforfoodsafety.org>. CFS and its True Food Network represents over 40,000 members of the public.

CFS also notes that comments relevant to many of the issue proposed in this rulemaking were filed with the USDA, Agricultural and Market Service, National Organic Program (NOP) on June 22, 2005, by CFS and other organizations in a "Petition for Rulemaking to Provide Clarification of Product Labeling Under the Organic Foods Production Act."¹

¹ To date the agency has not provided the petitioners with a substantive response to this petition. Pursuant to the agency's regulations found at 7 C.F.R. § 1.28, the agency is required to provide a substantive response within a reasonable period time. In submitting these comments, CFS in no way waives its legal rights to obtain such a response.

I. Comments on Proposed Amendments to §205.236

The Proposed Rule does not clarify the standards for conversion of dairy livestock to organic. Under the USDA's proposed rule it is still unclear whether a certified dairy operation must manage any new replacement milking cows from the last third of gestation or from no later than one year prior to the production of organic milk or milk products. It is important that the agency clarify this rule together with the conversion standard included in the Congressional amendment so that all dairy operations operate under one set of rules and consumers are able to have notice of the standards under which their dairy products are produced.

CFS believes that after a farm transitions to organic, all replacement animals should be managed organically from the last third of gestation. This provision is essential to close a loophole that threatens the integrity of organic dairy and could allow practices inconsistent with consumer expectation. In the proposed rule the agency states, "Contrary to many reports since Congress amended the OFPA, this does not mean that dairy cows can be fed prohibited substances or genetically modified organisms (GMOs)." 71 Fed. Reg. 24823/3 CFS agrees that the amendment does not allow such practices, however, a failure by the agency to properly address the replacement dairy animal issue would maintain a loophole that could allow such practices. Absent a requirement that once all dairy farms are converted to organic production that all replacement animals must be managed organically from the last third of gestation, any replacement animals could be obtained from a conventional farm. It is during this conventional rearing that the replacement animals could be fed GMOs, administered antibiotics and hormones and have no access to the outdoors. Consumers do not expect organic farms to be sourcing animals from such operations. Even if such replacement animals were to follow a one year conversion period, consumers do not expect that once a dairy farm is converted to organic that the dairy farm will continually replace animals with new animals that have been subjected to either feed containing excluded methods or exposure to antibiotics or other non-organic practices.

Additionally, a failure to clarify the replacement animal issue would continue to undermine those farmers who raise organic heifers. Without a clear last third of gestation provision, many dairy operation will have no incentive to replacement animals with animals that have been continuously managed under an organic system. Absent an incentive to the market demand for organic heifers will be suppressed and make such animals less available at a time when the organic dairy sector is growing. It would also fail to provide an economic reward to those dairy farms that have invested in conversion and are in a position to market organic heifers.

In sum, CFS believes that the proposed rule needs to be amended to include a distinct provision that addresses the replacement animal issue. Additionally, it is important to note that the Congressional amendment was explicit discussing transition in terms of "dairy farms" and not herds. Accordingly, CFS believes the proposed regulation should be amended as follows:

§ 205.236 Origin of livestock.

(a) Livestock products that are to be sold, labeled, or represented as organic must be from livestock under continuous organic management from the last third of gestation or hatching: *Except*, That: ...

(2) *Dairy animals – conversion of herds.* Milk or milk products must be from animals that have been under continuous organic management beginning no later than 1 year prior to the production of the milk or milk products that are to be sold, labeled, or represented as organic. *Except,* That, crops and forage from land, included in the organic system plan of a dairy farm that is in the third year of organic management, may be consumed by the dairy animals of the farm during the 12 month period immediately prior to the sale of organic milk and milk products.

~~(f) Once an entire, distinct herd has been converted to organic production, all dairy animals shall be under organic management from the last third of gestation:~~

(H) [Reserved]

(3) *Dairy animals - replacement stock.* Once an operation has been certified for organic dairy production, all dairy animals, including all young stock whether born on or brought onto the operation, shall be under organic management from the last third of gestation.

As the agency states, Congress passed the OFPA to develop national organic standards for organically produced products “to assure consumers that agricultural products marketed as organic meet consistent, uniform standards.” 71 Fed. Reg. 24820/2. CFS agrees that in order to meet consumer expectation the standards need to be both written and enforced in a consistent manner. The proposed regulation as amend above creates consistent standards for transition dairy operations to organic production and individual replacement animals and meets consumer expectation.

II. Comments on Failure to Revise § 205.605

(A). Amendment of §205.605

The agency states that in November 2005 Congress amended the OFPA by permitting the addition of synthetic substances appearing on the National List for use in products labeled “organic.” 71 Fed. Reg 24821/1. Consistent with the agency’s interpretation of the Congressional amendments, §205.605 should under go the following amendment:

§205.605 Nonagricultural (nonorganic) substances allowed as ingredients in or on processed products labeled as “organic” or “made with organic (specified ingredients or food group(s)).”

The following nonagricultural substances may be used ~~as ingredients~~ in or on processed products labeled as “organic” or “made with organic (specified ingredients or food group(s))” only in accordance with any restrictions specified in this section.

Consistent with this amendment the NOP should also further clarify the status of synthetic substances

by rescinding its ‘draft’ policy allowing some synthetic substances,² such as some processing aids and food contact substances, to be used in products labeled “organic” or “made with organic” without review by the National Organic Standards Board.³ For example, the “draft” policy would allow things such as the synthetic juice preservative dimethyl dicarbonate to be used in organic products without public and NOSB review. As recently shown at the April 2006 NOSB meeting, consumer expectation is that organic products are not highly processed with chemicals, additives, or preservatives.⁴

(B) Amendment of §205.600(b)

In Harvey the Court ordered that regulations establishing criteria for review synthetic substances found at §205.600(b) were contrary to the plain language of the OFPA. 396 F.3d at 40. CFS agrees that the Congressional amendment to the OFPA permitting synthetic substances for use in handling alters the need for the NOP to remove the regulations at §205.600(b). CFS strongly supports stringent regulatory review criteria for use during the evaluation of any synthetic substance proposed for inclusion on the National List. CFS believes there needs to be a technical correction in §205.600(b) to be consistent with the agency’s interpretation of the Congressional amendment. The regulation should be amended as follows:

§205.600 Evaluation criteria for allowed and prohibited substances, methods, and ingredients.

The following criteria will be utilized in the evaluation of substances or ingredients for the organic production and handling sections of the National List:

(a) Synthetic and nonsynthetic substances considered for inclusion on or deletion from the National List of allowed and prohibited substances will be evaluated using the criteria specified in the Act (7 U.S.C. 6517 and 6518).

(b) In addition to the criteria set forth in the Act, any synthetic substance used in handling ~~as a processing aid or adjuvant~~ will be evaluated against the following criteria:

² USDA/NOP, “Synthetic Substances Subject to Review and Recommendation by the National Organic Standards Board When Such Substances Are Used as Ingredients in Processed Food Products” available at <http://www.ams.usda.gov/nop/NOP/PolicyStatements/SyntheticSubstances.html> (last visited May 3, 2006)

³ The NOP has stated that the current Food Contact Substance policy is not final and “is part of an ongoing deliberation about how the Act and Rule operate.” Brief of Appellee at 23-24, n. 11, Harvey v. Veneman, 396 F.3d 28 (1st Cir. 2005) (No. 04-1379).

⁴ See e.g. Presentation of Margaret Wittenberg, Whole Food Market, USDA/NOSB Dairy Pasture Symposium, Market Expectation and Perceptions Panel, April 18-19, 2006.

III. Proposed Amendments to § 205.606

(A). USDA Proposed Amendments.

CFS believes the proposed amendments to § 205.606 are consistent with the Court's ruling in Harvey v. Johanns, 396 F. 3d 28 (1st Cir. 2005).

(B). Authority Concerning Commercial Availability

The Congressional amendment to OFPA gave the Secretary the ability to “develop emergency procedures for designating agricultural products that are commercially unavailable in organic form for placement on the National List for a period of time not to exceed 12 months.” These agricultural products can make up only “less than 5%” of the ingredients in processed product labeled as “organic.” While amending §205.606, the agency has remained silent on its implementation of the amendments’ “emergency procedures.” CFS believes that if the agency intends to exercise the authority granted under the amendment, it must implement the procedures through notice and comment rulemaking that proposes and explains under what conditions and criteria the Secretary shall determine such agricultural products to be “commercially unavailable.”⁵ While the agency seems to suggest that the court deadlines in Harvey v. Johanns justify the short and inadequate 15 day comment period in this rulemaking, a commercial availability rulemaking should include a 60-day public comment period.

Respectfully submitted,

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Legal Director

⁵ The agency has notified Congress that it will engage in rulemaking if it chooses to establish a new commercial availability procedure. See USDA, “The National Organic Program Impact of Harvey v. Johanns and Restoring the NOP to pre-Lawsuit Status, A report to Congress” (March 2006) at 19 (“USDA will engage in notice and comment rulemaking and work with the NOSB to develop procedures that ensure the integrity of the seal and the maintenance of NOP standards. Procedures will be developed that permit businesses to adapt to unforeseen events and to continue to operate smoothly during otherwise disruptive periods, thereby encouraging investment and enhancing growth and stability in the organic business community;” Id. at 21 (“Finally, Congress continued to ensure that any changes to the NOP regulations would be done by engaging in notice and comment rulemaking. This goes a long way to ensuring that the organic standards will not be weakened, and the organic community’s concerns will be addressed.”)