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Harvey v. Veneman and the National Organic Program: A Legal Analysis

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Summary

The First Circuit's ruling in *Harvey v. Veneman* brought much attention and uncertainty to the U.S. Department of Agriculture's National Organic Program. In the case, Harvey alleged that multiple provisions of the National Organic Program Final Rule (Final Rule) were inconsistent with the Organic Foods Production Act of 1990 (OFPA). The First Circuit sided with Harvey on three counts, putting into question the use of synthetics and commercially unavailable organic agricultural products, as well as certain feeding practices for dairy herds converting to organic production. On remand, the district court ordered a two-year time frame for the implementation and enforcement of new rules consistent with the ruling; however, in the FY2006 agriculture appropriations act (H.R. 2744, H.Rept. 109-255), Congress amended the OFPA to address the holdings of the case. This report describes the OFPA, discusses those holdings where the court determined that a provision of the Final Rule was inconsistent with the OFPA and analyzes the most recent legislative action. This report will be updated as warranted.

The Organic Foods Production Act of 1990

The Organic Foods Production Act of 1990 (OFPA)[1] regulates the marketing of organic products by setting national standards for production and processing (handling). To be labeled or sold as "organic," an agricultural product must be produced and handled without the use of synthetic substances, such as chemical pesticides, and in accordance with an organic plan agreed to by an accredited certifying agent and the producer and handler of the product. Products meeting these standards may be labeled as "organic" and may bear a U.S. Department of Agriculture (USDA) seal. Exceptions to the OFPA's general prohibition on the use of synthetic substances in organic products appear on a National List of Allowed and Prohibited Substances. The OFPA requires the Secretary

[1] 7 U.S.C. §§ 6501-6523. For more information on the National Organic Program and organics, in general, see CRS Report RL31595, *Organic Agriculture in the U.S.: Program and Policy Issues*, by Jean M. Rawson.

to establish a National Organic Standards Board (NOSB) to develop the National List and to recommend exemptions for otherwise prohibited substances. The OFPA contains guidelines for the inclusion of substances on the National List.

The OFPA also requires the Secretary to promulgate regulations "to carry out" the Act. The Secretary published the National Organic Program Final Rule (Final Rule) in December 2000 and it became effective on October 21, 2002 (codified at 7 C.F.R. pt. 205). Among other things, the Final Rule sets forth a four-tier labeling system for organic foods. Under this system, the type of labeling permitted on a product varies according to the percentage of organic ingredients it contains. The labeling scheme distinguishes: products containing 100% organic ingredients, which may be labeled "100 percent organic"; (2) products containing 94 to 100% organic ingredients, which may be labeled "organic"; (3) products containing 70 to 94% organic ingredients, which may be labeled "made with organic (specified ingredients or food group(s))"; and (4) products containing less than 70% percent organic ingredients, which may identify each organic ingredient on the label or in the ingredient statement with the word "organic."[2]

Harvey v. Veneman

In October 2002, Mr. Arthur Harvey filed a *pro se* suit against the USDA in the U.S. District Court for the District of Maine, alleging that multiple provisions of the Final Rule were inconsistent with the OFPA and the Administrative Procedures Act.[3] The district court ruled in favor of the USDA (i.e., granted summary judgment) on all nine counts brought by Harvey.[4] Harvey subsequently appealed the case to the First Circuit and was supported by a number of public interest groups that filed "friends of the court" or *Amici Curiae* briefs. The First Circuit sided with Harvey on three counts and remanded the holdings to the district court for further action.[5] In brief, the court found that:

- nonorganic ingredients not commercially available in organic form but used in the production of items labeled "organic" must have individual reviews in order to be placed on the National List of Allowed and Prohibited Substances;
- synthetic substances are barred in the processing or handling of products labeled "organic"; and
- dairy herds converting to organic production are not allowed to be fed feed that is only 80% organic for the first nine months of a one-year conversion.

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[2] 7 C.F.R. §205.301(a)-(d).

[3] 5 U.S.C. §§ 555(b), 702, and 706(l).

[4] The case was initially heard by a magistrate for the District of Maine. The magistrate recommended summary judgment be granted in favor of the USDA on eight of the nine counts brought. The district court, however, rejected the magistrate's decision as to the one count that favored Harvey. *See* Harvey v. Veneman, No. 02-216-P-H, 2003 U.S. Dist. LEXIS 18162 (D. Me., Oct. 10, 2003) *accepted and rejected in part by* 297 F. Supp. 2d 334 (D. Me., Jan. 7, 2004).

[5] *Harvey v. Veneman*, 396 F.3d 28 (1st Cir. 2005).

The three holdings did not invalidate OFPA provisions, but rather, qualified or invalidated agency regulations, thereby affecting the implementation of the National Organic Program. On June 9, 2005, for example, the district court issued an order pursuant to the circuit court's instructions that established a two-year time frame in which the Secretary of Agriculture is to create and enforce new rules for the implementation of the National Organic Program in compliance with the circuit court's ruling. Under the order, the Secretary is to issue new regulations within a year (June 9, 2006) but has an additional year to start enforcing them (June 9, 2007). The phase-in implementation was selected by the Court in an effort to prevent consumer confusion, commercial disruption, and unnecessary litigation.

The rulings in *Harvey* and subsequent requirements for new regulations, however, appear to have been superceded in part, as a result of amendments made to the OFPA by the FY2006 agriculture appropriations act (H.R. 2744, H.Rept. 109-255, §797).[6] In general, the amendments address many of the legal concerns (e.g., lack of authority for agency action) observed by the First Circuit. The FY2006 act also requires the USDA to submit a report to Congress that evaluates the impacts of *Harvey* within 90 days of enactment.[7] The following paragraphs examine each holding where the court determined that a provision of the Final Rule was inconsistent with the OFPA and then discuss the effect of the applicable provisions from the FY2006 agriculture appropriations act.

Count One: Alleged Exemption for Nonorganic Products Not Commercially Available

Court Action. Plaintiff challenged the portion 7 C.F.R. §205.606 which permits the introduction of nonorganically produced agricultural products as ingredients in, or as substances on, processed products labeled as "organic" when the specified product is not commercially available in organic form. The regulation lists five specific products — Cornstarch, Gums, Kelp, Lecithin, and Pectin — and also allows for any other nonorganically produced agricultural product when the product is not commercially available in organic form. The OFPA, however, requires all specific exemptions to the Act's prohibition on nonorganic substances to be placed on the National List following notice and comment and periodic review.[8] Harvey claimed that §205.606 provided a blanket exemption to the OFPA's review requirements and allowed *ad hoc* decisions to be made regarding the use of synthetic substances. The USDA, on the other hand, maintained that the regulation does not establish a blanket exemption, but rather, only

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[6] The Conference Report (H.Rept. 109-255) for H.R. 2744 passed the House on Oct. 28, 2005, and the Senate on Nov. 3, 2005. This report discusses the legal effects of the amendments contained in H.R. 2744, should it be signed into law by the President.

[7] The report is to: (1) determine whether restoring the National Organic Program to its pre-Harvey operation would adversely affect organic farmers and food processors and consumers; (2) analyze issues regarding the use of synthetic ingredients in processing and handling; (3) analyze the utility of expedited petitions for commercially unavailable agricultural commodities; and (4) consider the use of crops from land included in the organic system plan of dairy farms that are in the third year of organic management. See H.Rept. 109-255, §724.

[8] See 7 U.S.C. §6517(a) (establishment of National List), (d) (notice and comment), (e) (sunset review within five years) and §6518(k) (technical advisory reviews), (l) (required consultations and reviews), (m) (required evaluations).

permits the use of the five products specifically listed in the section. The court found the USDA's interpretation plausible; however, because the district court did not clarify the regulation's meaning, the circuit court also found Harvey's interpretation potentially credible. Accordingly, the court remanded the count to the district court for entry of a declaratory judgment that would interpret the regulation in a manner consistent with the National List requirements of the OFPA.

A declaratory judgement stating that §205.606 does not establish a blanket exemption to the National List requirements in statute for nonorganic agricultural products that are not commercially available was issued on June 9, 2005. The USDA, in compliance with the order, issued a Notice in the Federal Register clarifying the meaning of the regulation on July 1, 2005.[9] However, because of the potential for confusion, the order states that the clarified meaning of §205.606 will not become effective and enforceable until two years from the date of the judgment (June 9, 2007). Whether the products that are currently listed in §205.606 must undergo some type of further review is not clear; however, it was noted in the district court opinion that the NOSB did make recommendations with respect to the five products listed in conformity with its §6517 mandates.[10]

Congressional Action. In the FY2006 agriculture appropriations act, Congress amended 7 U.S.C. §6517(d) — titled "Procedure for Establishing a National List" — to authorize the Secretary of the USDA 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 no longer than 12 months. The amendment does not define what an "emergency procedure" would entail; thus, the Secretary would appear to have the authority to describe the term's parameters and to select the substances subject to it. While this amendment creates an expedited petition process for commercially unavailable organic agricultural products, it does not appear to alter the ruling described above. Accordingly, the clarified interpretation that §205.606 does not create a blanket exemption would still appear to be valid, though the regulation might need to be modified to reflect that there is a new expedited process in place.

Count Three: Use of Synthetic Substances in Processing

Court Action. Plaintiff challenged 7 C.F.R. §205.600(b) and the portion of §205.605(b) that permits synthetic substances as ingredients in, or as substances on, processed products labeled as "organic."[11] Section 205.600(b) provides that synthetic substances may be used "as a processing aid or adjuvant" if they meet six criteria; §205.605(b) lists 38 synthetic substances specifically allowed in or on processed products

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[9] 70 Fed. Reg. 38090.

[10] *Harvey*, 2003 U.S. Dist. LEXIS 18162 at *16.

[11] Upon initial publication of the ruling, there was some confusion as to whether count three applied to products labeled both as "organic" and "made with organic (specified ingredients or food groups(s))." Harvey's intent, however, in bringing the action was only to prohibit the use of synthetic substances in products labeled as "organic." Thus, Harvey filed a Motion for Clarification and the court amended its decision (by adding a footnote) to make clear that synthetic substances are not banned from products labeled as "made with organic." See *Harvey*, 396 F.3d at 39, n. 2.

labeled as "organic." The court found that 7 U.S.C. §6510(a)(1) and §6517(c)(B)(iii) forbid the use of synthetic substances during the processing[12] or handling[13] of a product, unless otherwise required by law.[14] The court noted that the OFPA contemplates the use of certain synthetic substances during the production or growing of organic products, but not during the handling or processing stages. By allowing the use of certain synthetic substances "as processing aids," the court concluded that the regulations contravened the plain language of the OFPA. The circuit court reversed the district court's grant of summary judgment and remanded the count to the district court for entry of summary judgment in Harvey's favor.[15] On remand, the district court ordered the Secretary of the USDA to publish new rules implementing the circuit court's judgment within one year of the date of the judgment (June 9, 2006), but allowed the Secretary to exempt nonconforming products placed in commerce as "organic" for up to two years after the date of the judgment (June 9, 2007).

Congressional Action. The FY2006 agriculture appropriations act amended §6510(a)(1) and strikes §6517(c)(B)(iii) — provisions that the First Circuit relied upon to emphasize that synthetics were not allowed during the processing or handling of a product. Before the amendment, §6510(a)(1) barred a person on a handling operation from adding any synthetic ingredient during the processing or postharvest handling of a covered product. The amendment added the phrase "not appearing on the National List" after "ingredient," thereby apparently allowing the use of synthetics on the National List during processing or postharvest handling of a covered product. Section 6517(c) establishes guidelines for placing substances on the National List and in subsection (B) sets forth specific requirements with regard to the *types of substances* that may be exempted for use in production and handling. Specifically subpart (iii) of §6517(c)(B) states that the substance "is used in handling *and is non-synthetic* but is not organically produced" (emphasis added). This provision, which the court noted "specifically requires the exempted substances be nonsynthetic [sic]," was deleted by the amendment.[16] As there no longer appears to be any general prohibition (though there are other requirements that must be met) against the placement of synthetics on the National List for use during the processing or handling of a covered product, the First Circuit's ruling in count three

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[12] *Processing* is defined as "cooking, baking, curing, heating, drying, mixing, grinding, churning, separating, extracting, slaughtering, cutting, fermenting, distilling, eviscerating, preserving, dehydrating, freezing, chilling, or otherwise manufacturing and includes the packaging, canning, jarring, or otherwise enclosing food in a container." 7 C.F.R. §205.2.

[13] A *handling operation* is defined as "any operation or portion of an operation (except final retailers of agricultural product that do not process agricultural products) that receives or otherwise acquires agricultural products and processes, packages, or stores such products." 7 C.F.R. §205.2.

[14] See 7 U.S.C. §6519(f) for a listing of laws.

[15] Many speculated that these holdings could have had far reaching effects on the organic industry, since it is generally accepted that the use of synthetic substances on the National List is widespread in organic processing. For more information on the impacts of *Harvey* on the organic industry, see CRS Report RL31595, *Organic Agriculture in the U.S.: Program and Policy Issues*, by Jean M. Rawson.

[16] *Harvey*, 396 F.3d at 39.

is likely moot. The Secretary may promulgate new regulations to reflect the changes made in law by Congress.

Count Seven: Conversion of Dairy Herds to Organic Production

Court Action. Plaintiff challenged the Final Rule's exception to the OFPA's requirements for dairy herds being converted to organic production. Pursuant to 7 U.S.C. §6509(e)(2), a dairy animal whose milk or milk products will be sold or labeled as organically produced must be raised and handled in accordance with the OFPA for not less than the 12-month period immediately prior to the sale of such milk or milk products. Section §205.236(a)(2) of the Final Rule, however, allows whole dairy herds transitioning to organic production to use 80% organic feed for the first nine months and 100% organic feed for the final three months. The court found the OFPA's requirement for a single type of organic handling for twelve months and the Final Rule's bifurcated approach in direct conflict. The court determined that nothing in the OFPA's plain language permits the creation of an "'exception' permitting a more lenient phased conversion process for entire dairy herds," and consequently, found the regulation invalid.[17] The circuit court reversed the district court's grant of summary judgment and remanded the count to the district court for entry of summary judgment in Harvey's favor. On remand, the district court ordered the USDA to promulgate regulations implementing the circuit court's decision within one year of the date of the judgment (June 9, 2006) and to start enforcement by June 9, 2007.

Congressional Action. In the FY2006 agriculture appropriations act, Congress amended 7 U.S.C. §6509(e)(2) by adding an exception to the general feeding requirement listed in the provision (i.e., raised and handled in accordance with the OFPA for not less than the 12-month period immediately prior to sale).[18] The new provision — titled "Transition Guideline" — allows crops and forage from land included in the organic system plan of a dairy farm that is in the *third year* of organic management to be consumed by the dairy animals of the farm during the 12-month period immediately prior to the sale of the organic milk or milk products. Generally, crops or forage intended to be sold or labeled as "organic" can not have prohibited substances under the OFPA applied to them for the three years immediately preceding harvest of the crop. Accordingly, this amendment seems to allow feed for dairy animals to come from land that is still transitioning to "organic" status. This change would appear to provide the "exception" for a more lenient conversion process that the First Circuit concluded was absent from the statute. As such, the court's ruling in count seven is likely moot. The Secretary, moreover, may draft new regulations to reflect the changes made in law by Congress.

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[17] Many believed that this holding would prove most costly for small and medium size operations seeking to convert. For example, the USDA, in articulating some of the reasoning for the phased conversion regulation, stated that the one-year organic feed requirement posed an "insurmountable economic barrier for small and medium size operations seeking to convert." *Harvey*, 2003 U.S. Dist. LEXIS 18162 at *51-54 (USDA concurring with commenters).

[18] 7 C.F.R. §205.236 also requires the producer of an organic livestock operation to provide livestock with at total feed ration composed of agricultural products, including pasture and forage, that are organically produced and, if applicable, organically handled.