

Court Weighs in on Organic Integrity

The organic label gets a check up

By Jay Feldman

Do organic consumers think there are synthetic ingredients in processed food labeled organic? It turns out, not surprisingly, that an overwhelming majority does not. And, the First Circuit Court of Appeals ruled that the law does not allow it. The ruling came on January 26, 2005, with the final judgment and order on June 9, 2005. Beyond Pesticides and major environmental, consumer and farm groups submitted friend of the court briefs to support Maine blueberry farmer and organic inspector, Arthur Harvey, who filed the lawsuit (*Harvey v. USDA*) in October 2002, just days after the U.S. Department of Agriculture (USDA) issued the final organic rule.

A truth and labeling law

The group of consumers, farmers and processors that sat down to construct the *Organic Foods Production Act* (OFPA), of which I was a part, helped codify the belief that the Act was intended to be a truth and labeling law (in addition to a production standards law), that clearly describes the contents of the product and offers consumers and organic producers an opportunity to support production systems that strive to incorporate the greatest percentage possible of organic ingredients. It was understood at the time that it would be difficult to process many products with all organic ingredients, but if the product was to display the premium “gold standard” USDA organic product seal, its ingredients must be no less than 95% organically produced, allowing 5% to be natural, but not organically produced.

Recognizing that not all foods could meet this standard, the group created other categories of labeling that would enable consumers to buy the best available, to support organic to the extent or degree that product could be produced organically. So, it created other labeling categories that enable consumers to determine the organic ingredient content of the product.

Through the regulatory process, as the nation focused on the so-call “big three” issues that drew the second highest number of public comments on a federal rulemaking in the government’s history—when USDA proposed allowing sewage sludge, irradiation and genetically engineered ingredients in organic food—the issue of labeling dropped from public attention. The result was a rule that rejected the “big three,” but allowed synthetic ingredients in the 5% portion of products labeled organic.

Consumers Union on synthetics

Consumers Union released in June 2005 its nationwide survey results of 1200 U.S. adults who were queried about their current expectation of whether artificial ingredients (their lay term for “synthetic”) were contained in food labeled as “organic” or “made with organic.” (See <http://www.eco-labels.org>).



The results are instructive.

- 46% of consumers buy “organic” food products, the highest number ever.
- 85% of consumers say they do not expect food labeled as “organic” to contain artificial ingredients.
- 74% of consumers say they do not expect food labeled as “made with organic” to contain artificial ingredients. (The “made with organic” label provision of OFPA allows the use of synthetic ingredients in the 30% non-organic portion of the product, but does not allow the use of the organic seal).

Consumers Union concludes:

- USDA should act swiftly to implement the ruling of the court prohibiting the use of synthetic ingredients in food labeled “organic.”
- The public needs to be better informed about the classes of organic labels.

The organic food production law has been a tremendous success. It helped move organic from being marginalized by proponents of chemical-intensive agriculture to a \$20 billion dollar industry that has rejected toxic chemical use and provided benefits to farmers, farmworkers, consumers and the environment. Groups like Beyond Pesticides point to organic as the solution to the pesticide problem. That is why advocates for organic believe it is so important to maintain the clarity of the label and not muddy the meaning of organic by allowing synthetic ingredients to be added.

Implementing the court decision

On June 23, 2005, six agriculture, retail and food safety groups, including Beyond Pesticides, petitioned USDA for a number of regulatory changes designed to ensure the long-term integrity of the organic label, to create an equitable and consistent standard that aids dairy farmer transition to organic, and to bring the current National Organic Program (NOP) regulations into compliance with the federal court's January 2005 ruling. (To see a copy of the petition, go to www.beyondpesticides.org/organicfood.)

"The *Organic Foods Production Act* is strong as it stands and needs to be defended against weakening through interpretation or unwarranted tinkering," said Joseph Mendelson, legal director for Center for Food Safety. "

Having initially lost on all counts, Mr. Harvey prevailed in January 2005 when the Court of Appeals ruled in his favor on the following three counts:

- Synthetic substances are not permitted in processing of items labeled as "organic," and only allowed in the "made with organic" labeling category.
- Provisions allowing up to 20-percent non-organic feed in the first nine months of a dairy herd's one-year conversion to organic production are not permitted, citing the law's requirement for 100 percent organic feed for one-year.
- All exemptions for the use of non-organic products "not commercially available in organic form" must be reviewed by National Organic Standards Board, and certifiers must review the operator's attempt to source organic.

"Both consumers and retailers whom we represent view the outcome of the Harvey lawsuit as an opportunity to strengthen the regulations within the USDA's National Organic Program and to further differentiate organic products in the marketplace," noted Robynn Shrader of the National Cooperative Grocers Association.

Michael Sligh, from Rural Advancement Foundation International, and founding chair of the USDA's National Organic Standards Board, concluded, "We believe that consumer and farmer rights and expectations under OFPA should be preserved and defended, and that the organic industry must be willing to adopt practices that maintain the integrity, high standards, and market viability of the organic label in the long term."

Under the court order, USDA has two years to bring the regulations into compliance with the law, 12 months to publish a proposed rule change and 12 months to go to final implementation.

The future

The public interest community is united in the position that the existing law can and should work. However, the organic

industry represented by the Organic Trade Association (OTA) has chosen not to join the consumer-farmer petition. OTA's website does not disclose the association's position. When the court decision came down in January, OTA stated that it would continue to help grow the organic market. "The court decision may hamper that growth rate in the short term, but OTA is optimistic that its members and others in the organic community can pull together to maintain the momentum for organic agriculture," said Katherine DiMatteo, OTA's executive director. However, in a piece prepared more recently by OTA

for distribution throughout the organic industry, the association writes, "[The court decision] will result in fewer market opportunities for organic farmers, and consumers will find significantly fewer products with 95 percent or more organic ingredients on store shelves." OTA believes food companies that use synthetic ingredients and lose the use of the USDA organic seal will choose to increase the percentage of non-organic ingredients in their products, rather than continue to use as much organic ingredient as possible and adopt new labeling to notify consumers about the percentage of organic ingredients. Others in the industry are talking about changing the law to allow synthetic materials in processed food labeled organic and have raised the subject with members of Congress.

Those who have worked with organic policy from the Act's inception are hoping that over the long timeframe of the court order, the industry can adjust to the spirit and intent of the statute in a manner that does not cause any economic harm or economic dislocation and that meets consumers' expectations. The beauty of OFPA is that not only do people get food that they want, but they get to support a land production system that incorporates their values. The court decision has provided an opportunity to build on the core values that gave birth to the organic movement and will help it grow into the future.

To support the petition, contact Beyond Pesticides (info@beyondpesticides.org) indicating your support, name, address, email, and organization (if any). Also, contact the OTA and ask the association to support the petition—Katherine DiMatteo, Executive Director, OTA, PO Box 547 Greenfield MA 01302, 413-774-7511, Ext. 17, info@ota.com.

Two amicus briefs were filed in the case: One was filed by Beyond Pesticides, Center for Food Safety (CFS) and Rural Advancement Foundation International USA, with legal representation from the Farmers' Legal Action Group and CSE. The second was filed by Organic Consumer's Association, Public Citizen, Sierra Club, Northeast Organic Farming Association (Massachusetts Chapter), Greenpeace USA, Waterkeeper Alliance, Merrill and John Clark (Roseland Organic Farms) and others, with legal representation from James Handley, Handley Environmental Law.

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