

A FUNDAMENTAL FLAW IN THE NATIONAL ORGANIC PROGRAM: THE CASE FOR NATIONAL REGULATION OF ORGANIC INPUT MATERIALS

I. INTRODUCTION

The growing organic fertilizer industry has one very uncommon feature: it desires to be regulated.¹ With organic products, regulation is important because the label is usually the only way for a consumer to tell if the product they are purchasing is truly organic.² Sadly, trust alone is not enough to ensure that every person in the supply chain, from grower, to packer, to processor, to retailer will comply with the rules to maintain a product's organic purity. It is critical to the marketing of organic products that consumers, who pay a premium for those products,³ have faith in the word "organic" on a label.

In the United States, any fresh or processed food product that is labeled organic must be certified under the auspices of the National Organic Program ("NOP"),⁴ part of the United States Department of Agriculture's ("USDA") Agricultural Marketing Service.⁵ To be certified, a farmer must grow his crops only with inputs⁶ that are allowed under the NOP.⁷ While inputs are fundamental to organic crop production, there is no requirement that they undergo their own

¹ See, e.g., Organic Fertilizer Association of California, Goals, <http://www.organicfertilizerassociation.org/goals.aspx> (last visited Nov. 2, 2009) (The first goal on OFAC's list is to develop a California Dept. of Food and Agriculture review and approval process for organic fertilizers); See also Letter from Steven R. Beckley, Executive Director of OFAC to Arnold Schwarzenegger, Governor of California, Sept. 21, 2009 available at <http://www.organicfertilizerassociation.org/ab856govletter.pdf> (last visited Nov. 2, 2009) (in support of AB 856, legislation to give the CDFA authority to regulate organic input materials); Jacob Adelman, *Organic growers call for more oversight*, USA TODAY, Feb. 2, 2009, available at <http://content.usatoday.net/dist/custom/gci/InsidePage.aspx?cId=visaliatimesdelta&sParam=30098255.story>.

² Without scientific testing for the presence of chemicals, it is difficult or impossible to tell, by outward appearances, the difference between an organic and a non-organic product. M. Elizabeth Kunkel and Barbara H.D. Luccia, *Organic Foods*, FAQs.ORG, <http://www.faqs.org/nutrition/Ome-Pop/Organic-Foods.html> (last visited Dec. 24, 2009).

³ Lydia Oberholtzer, et al, *Price Premiums Hold as U.S. Organic Produce Market Expands*, USDA ECONOMIC RESEARCH SERVICE (May 2005), available at <http://www.ers.usda.gov/publications/vgs/may05/VGS30801/VGS30801.pdf> (last visited Dec. 16, 2009).

⁴ National Organic Program, 7 C.F.R. § 205.100 (2009); Organic Foods Production Act, 7 U.S.C. § 6505 (2009).

⁵ NATIONAL ORGANIC PROGRAM, HOME PAGE, <http://www.ams.usda.gov/AMSV1.0/NOP> (last visited Nov. 2, 2009).

⁶ The term "inputs" is used here to describe anything added to crops or soil in organic production, such as fertilizers, nutrients, herbicides, pesticides and fungicides. National Organic Program, 7 C.F.R. § 205.2 (2009).

⁷ National Organic Program, 7 C.F.R. § 205.105 (2009).

organic certification process;⁸ they are simply allowed or not allowed.⁹ In the absence of a federal certification program, several state and private fertilizer approval agencies exist to help growers understand what they may use in their production.¹⁰ As this Comment will discuss, this deficiency in the current organic legislation creates a fundamental flaw in the integrity of the USDA's organic label.

Simply put, organic foods are those that are grown using ecologically friendly practices, without genetic modification, and without the use of any pesticides or fertilizers made from synthetic chemicals.¹¹ In an industry such as organics, where product purity and integrity play a substantial role and where there is rapid growth, an effective system of regulation is vital. Regulations put into place over the past two decades by Congress and the USDA have gained widespread approval,¹² and have played a key role in the expansion of the industry from \$1 billion in sales in 1990 to \$24.6 billion in 2008.¹³ However, there remains a major gap in how organic agriculture is regulated; there exists no federal program to regulate or certify the production of organic input materials.¹⁴ Such a program is necessary because the increasing complexity of blended fertilizer products make it difficult to ascertain whether the product

⁸ 7 C.F.R. § 205.100 (restricts NOP to "agricultural products"); 7 C.F.R. § 205.2 (defines "agricultural products" as those for human or livestock consumption); *See also* Organic Materials Review Institute, *Frequently Asked Questions*, http://www.omri.org/OMRI_FAQ.html (last visited Sept. 13, 2009) [hereinafter OMRI FAQ] (providing supporting interpretation of NOP rules).

⁹ OMRI FAQ, *supra* note 8.

¹⁰ *See* California Certified Organic Farmers, Certification FAQs, http://www.ccof.org/faq_detail.php?id=61 (last visited Sept 13, 2009).

¹¹ *See, e.g.*, National Organic Standards Board, Policies and Procedures Manual § 7, Nov. 19, 2008, *available at* <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3013893>.

¹² Ann M. Vanderman & Beth Hayden, *New Law Paves Way for Expanding Organic Market*, Food Review, May - Aug. 1997, at 28; ORGANIC TRADE ASSOCIATION, U.S. ORGANIC STANDARDS, http://www.ota.com/organic/us_standards.html (last visited Sept. 13, 2009).

¹³ ORGANIC TRADE ASSOCIATION, U.S. ORGANIC SALES GROW BY WHOPPING 17.1 PERCENT IN 2008, MAY 4, 2009, http://www.organicnewsroom.com/2009/05/us_organic_sales_grow_by_a_who.html.

¹⁴ OMRI FAQ, *supra* note 8.

complies with NOP regulations.¹⁵ Recently, reports of organic fertilizer manufacturers using prohibited chemical ingredients to increase the nitrogen levels of their fertilizers have surfaced.¹⁶ This revelation has greatly increased scrutiny regarding how organic fertilizers are manufactured, approved, and regulated for use on NOP-certified crops.¹⁷

The lack of effective regulation of inputs negatively affects every stakeholder in the industry. For example, fertilizer manufacturers are harmed by competition from unscrupulous competitors using synthetic substitutes,¹⁸ are forced to deal with redundant product registration programs,¹⁹ and operate in a generally uncertain regulatory environment.²⁰ Growers need assurance that the products they use in crop production meet the NOP rules,²¹ because they face the potential of decertification²² and the loss of a substantial investment²³ if any materials prohibited by the NOP are used on their crops. Certifying agencies operating under the auspices of the USDA and NOP are reliant on a variety of third parties to help them determine the compliance of input materials that their growers are allowed to use.²⁴ Consumers have learned of chemicals getting into organic products;²⁵ this erodes the reliability of the organic label, which

¹⁵ Interview with Katherine Borchard, Laurence London, and Ray Green, ASCO auditors, in Hanford, Cal. (Sept. 9, 2009) [hereinafter Interview with ASCO] (on file with author); Interview with Timothy Stemwedel, President of California Organic Fertilizers, Inc., in Fresno, Cal. (Aug. 6, 2009).

¹⁶ E.g., Jim Downing, *Organic Farms Unknowingly Used a Synthetic Fertilizer*, SACRAMENTO BEE, Dec 28, 2008.

¹⁷ Jim Downing, *USDA Toughens Oversight of Organic Fertilizer*, SACRAMENTO BEE, Feb. 21, 2009; Letter from Barbara C. Robinson, Acting Director, National Organic Program to All USDA Certifying Agents (Feb. 20, 2009), available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5075469>.

¹⁸ Interview with Timothy Stemwedel, *supra* note 15.

¹⁹ *Id.*

²⁰ *Id.*; Interview with ASCO, *supra* note 15.

²¹ 7 C.F.R. § 205.105; See also California Certified Organic Farmers, *supra* note 10.

²² National Organic Program, 7 C.F.R. § 205.660 (2009).

²³ Melissa VanTine and Sven Verlinden, West Virginia University Extension Service, *Converting to an Organic Farming System* (June 2003), available at <http://www.wvu.edu/~agexten/farmman2/organic/convert.pdf>.

²⁴ See California Certified Organic Farmers, *supra* note 10; Letter from Barbara C. Robinson, Acting Director, National Organic Program, and Mark Bradley, Chief, Audit, Accreditation & Training Branch to All USDA Certifying Agents (Mar. 5, 2008), available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5066877&acct=nopgeninfo>.

²⁵ Jim Downing, *Spiking of Organic Fertilizer Under Fire*, SACRAMENTO BEE, Feb. 4, 2009.

is often the consumer's only tool to distinguish organic products from conventional ones.²⁶

Larger organic conglomerates, in order to protect their interests, have developed their own proprietary certification programs²⁷ which are a hindrance to a fluid and flexible marketplace for organic products.²⁸ Meanwhile, trade associations such as the Organic Fertilizer Association of California and the Organic Trade Association are lobbying various government entities to bring about a better system of regulation in the interests of all involved.²⁹

This Comment will demonstrate the need for better USDA regulation of organic input materials, including established procedures for audits and enforcement, operating under the authority of the NOP. One possible solution, ironically, is to create a program for organic fertilizers similar to the Environmental Protection Agency's ("EPA") pesticide programs. Another option is to promulgate a set of uniform regulations via the Uniform Law Commission.³⁰ National, uniform regulation of organic input materials would solve many existing problems, bringing relief to an industry that has grown in size and complexity beyond what a system of good faith allows.³¹

²⁶ *Id.*; ORGANIC TRADE ASSOCIATION, ORGANIC LABEL REMAINS TRUSTWORTHY AND RELEVANT (July 4, 2009), available at http://www.organicnewsroom.com/2009/07/organic_trade_association_refu.html (provides a general example of the OTA's stance on the integrity and branding of the organic label).

²⁷ CDFA California Organic Products Advisory Committee, Meeting Minutes, July 30, 2008, http://www.cdfa.ca.gov/is/docs/Organics_Minutes_073008.pdf (last visited Sept. 13, 2009) (discussing Earthbound Farm's audit program); Jim Dee, *Organic Farming is a Relationship With the Land: Interview with Myra Goodman, Part I*, NATURALNEWS.COM, Feb. 19, 2009, http://www.naturalnews.com/z025668_farming_salads_food.html.

²⁸ Interview with Timothy Stemwedel, *supra* note 15.

²⁹ ORGANIC TRADE ASSOCIATION, PUBLIC STATEMENT ON LIQUID FERTILIZER, <http://www.ota.com/news/breaking/liquidfertilizer.html> (last visited Sept. 13, 2009) [hereinafter OTA Public Statement on Liquid Fertilizer] (discussing OTA fertilizer materials verification task force).

³⁰ Uniform Law Commission, Home Page, <http://www.nccusl.org/Update/> (last visited Sept. 6, 2009).

³¹ See ORGANIC TRADE ASSOCIATION, THE ORGANIC INDUSTRY, <http://www.ota.com/pics/documents/Mini%20fact%201-08%20confirming.pdf> (last visited Sept. 13, 2009) (demonstrating growth of industry); see also Downing, *supra* note 25; ORGANIC TRADE ASSOCIATION, ORGANIC INDUSTRY SUPPORTS STRICT REVIEW OF LIQUID FERTILIZER FOR ORGANIC PRODUCTION, http://www.organicnewsroom.com/2009/07/organic_industry_supports_stri.html (last visited Sept. 5, 2009).

II. LEGISLATIVE BACKGROUND

Presently, the regulatory agency that controls organic production and labeling is the NOP, which operates under the USDA's Agricultural Marketing Service.³² The NOP is responsible for setting standards as recommended by the National Organic Standards Board,³³ maintaining the National List,³⁴ and regulating accredited organic certification agencies.³⁵ Over the past few decades, as the organic movement grew from the grass roots level into the multi-billion dollar industry that it is today,³⁶ a system of third party certifiers emerged to authenticate and regulate organic foods.³⁷ That led to the Organic Foods Production Act of 1990³⁸ ("OFPA"), which, in the interests of the industry, directed the USDA to set out national standards for the certification of producers and handlers of organic foods.³⁹ The OFPA created the National Organic Standards Board to help set the standards for organic production.⁴⁰

The OFPA also established the National List, which defines which synthetic materials may be used, and any non-synthetic materials that are prohibited.⁴¹ To implement these rules, the OFPA authorized the creation of Accredited Certifying Agencies (hereinafter "Certifiers"), who are in turn responsible for the certification of farms and handling operations to ensure that they are in compliance with the law.⁴² Certifiers undergo certification and auditing from the

³² USDA Agricultural Marketing Service, National Organic Program Background Information, <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3004443> (last visited Sept. 14, 2009).

³³ *Id.*

³⁴ Organic Foods Production Act, 7 U.S.C. § 6517 (2009).

³⁵ See National Organic Program, 7 C.F.R. § 205.500 (2009).

³⁶ See Om Organics, *History of Organics*, <http://www.omorganics.org/page.php?pageid=82> (last visited Sept. 5, 2009).

³⁷ Brandy E. Fisher, *Organic: What's In a Name?*, ENVIRONMENTAL HEALTH PERSPECTIVES, Mar. 1999, at A150, A151.

³⁸ See *id.*; Organic Foods Production Act, 7 U.S.C. § 6501 (2009).

³⁹ See 7 U.S.C. § 6503.

⁴⁰ See *id.* § 6518.

⁴¹ See *id.* § 6517.

⁴² See *id.* § 6514.

USDA, in accordance with NOP regulations.⁴³ In December 2000, over a decade after the OFPA was enacted, the USDA fulfilled its obligations under the OFPA by publishing a final rule, 7 C.F.R. Part 205, and creating the NOP.⁴⁴ Within two years, all certifiers and producers of organic foods were required to comply with the OFPA and NOP regulations.⁴⁵

III. HOW INPUTS ARE REGULATED

A. A Fundamental Flaw

The NOP is focused on certifying agricultural products⁴⁶ so that they may be labeled as being organic.⁴⁷ The NOP only certifies the end products themselves, not the inputs used to grow these products.⁴⁸ This is an important distinction. How could a grower be certain that his crop is truly organic if he has no confidence in the purity of his organic fertilizer? The fact that there is no national certification program available for inputs creates a fundamental flaw in the current system of organic production. This gap in regulation negatively affects everyone in the industry, from fertilizer manufacturer, to grower, to consumer.

Currently, the National List can either restrict specific natural materials, or allow specific synthetic materials for use in organic production.⁴⁹ Rather than providing an approval, or inclusive system by which materials can be allowed, the National List provides only exceptions to the rules.⁵⁰ To the frustration of both organic growers and fertilizer manufacturers, it seems impossible to ask the NOP to confirm whether or not a particular fertilizer product is allowed or

⁴³ *Id.* § 6514; National Organic Program, 7 C.F.R. § 205.501 (2009).

⁴⁴ *See* Om Organics, *supra* note 36.

⁴⁵ *Id.*; ORGANIC TRADE ASSOCIATION, ORGANIC AGRICULTURE AND PRODUCTION, <http://www.ota.com/definition/quickoverview.html> (last visited Sept 5, 2009) [hereinafter OTA Quick Overview].

⁴⁶ 7 C.F.R. § 205.100 (restricting NOP to “agricultural products”); 7 C.F.R. § 205.2 (defining “agricultural products” as those for human or livestock consumption); *See also* OMRI FAQ, *supra* note 8 (providing supporting interpretation of NOP rules).

⁴⁷ 7 U.S.C. § 6505.

⁴⁸ OMRI FAQ, *supra* note 8 (providing supporting interpretation of NOP rules).

⁴⁹ *See* 7 C.F.R. § 205.105.

⁵⁰ *See id.*

disallowed.⁵¹ The USDA and NOP are limited by the statute, which only provides some very basic rules and allows the agency to create exceptions;⁵² they are not certifiers or approvers of input materials.⁵³

The current structure of the National List allows for the use of safe synthetic materials⁵⁴ in the event that an organic substitute is unavailable, and without which a particular type of product could not be produced with an organic label.⁵⁵ Generally, this is good for the organic industry in that it increases the number of products that can be made organically and thus increases the size and scope of the industry.⁵⁶ It is also very friendly to the lobbying groups who represent companies wishing to expand and capitalize on the organic market without risking non-compliance with the NOP.⁵⁷ On the other hand, the structure of the National List does little to provide for regulation of the organic materials that *are* allowed. This is left to private and non-profit groups within the industry,⁵⁸ or to state agriculture departments which often lack authority to regulate or certify farm inputs as organic and in compliance with the NOP regulations.

B. Complex Processed Input Materials

The uncertainty inherent in this vague regulatory framework is not generally an issue for basic unprocessed inputs;⁵⁹ for example, bone meal is just that, bone meal, as is feather meal or

⁵¹ CDFA COPAC, Meeting Minutes, Jan. 22, 2009, http://www.cdfa.ca.gov/is/pdfs/Meetings/012209_Organic_Minutes.pdf (last visited Sept. 14, 2009); Organic Trade Association Fertilizer Verification Task Force Conference Call Minutes, with comments by Tim Stemwedel, Aug. 10, 2009 (on file with author) [hereinafter OTA Task Force Aug. 10].

⁵² The basic rule is that all organic, or natural, input materials, and no synthetic materials may be used in organic production, with the exceptions that are approved by the NOP and placed on the National List. *See generally* OMRI FAQ, *supra* note 8; 7 C.F.R. § 205.105.

⁵³ *See* OMRI FAQ, *supra* note 8.

⁵⁴ National Organic Program, 7 C.F.R. § 205.600 (2009).

⁵⁵ *Id.*

⁵⁶ Kimberly Kindy & Lyndsey Layton, *Purity of Federal 'Organic' Label Is Questioned*, WASH. POST, July 3, 2009.

⁵⁷ *Id.*; Organic Industry Structure, <http://www.organicconsumers.org/organic/orgjune05.pdf> (last visited Sept. 14, 2009).

⁵⁸ *See* California Certified Organic Farmers, *supra* note 10.

⁵⁹ *Id.*

manure.⁶⁰ However, in today's rapidly expanding market, many processed organic fertilizers exist. They use a multitude of organic ingredients and production processes that are often trade secrets and not necessarily known to the grower.⁶¹ These products are valuable because they typically provide more nitrogen at a greater degree of availability⁶² to the plant than many unprocessed materials do.⁶³ There are also fewer food safety issues when applying a processed fertilizer because of the sterilizing processes commonly used in their production.⁶⁴ However, the complexity of these inputs makes it harder to ascertain whether they comply with NOP regulations,⁶⁵ and even if the label on the product says it complies, it must be certain that the manufacturer is not taking illegal synthetic shortcuts.

C. Existing State Input Approval Authorities

The organic industry has attempted to solve this problem much in the way it handled organic product certification prior to the OFPA and NOP.⁶⁶ In the absence of definitive USDA regulation, a patchwork of state agencies and private organizations has emerged to help growers identify which materials comply with the National List.⁶⁷ In the past, the Washington State

⁶⁰ Thomas M. Blessington, et al, *Organic and Inorganic Fertilizers*, Maryland Cooperative Extension, University of Maryland, <http://environmentalhorticulture.umd.edu/ProductionInformation/Organics.pdf> (last visited Sept. 14, 2009).

⁶¹ Products, California Organic Fertilizers, http://www.organicag.com/organic_agriculture.html (last visited Sept. 5, 2009); Products, Converted Organics, <http://convertedorganics.com/index.php/AG-Products.html> (last visited Sept. 5, 2009); Products, BioFlora, <http://bioflora.com/products> (last visited Sept. 5, 2009); Interview with Timothy Stemwedel, *supra* note 15.

⁶² One of the key properties of a nitrogen input is how "available" the nitrogen is to the plant, in other words, how much time and decomposition needs to occur before the nitrogen can be consumed by the plant. Liquid fertilizers generally offer a higher degree of availability of nitrogen than do more traditional dry fertilizers. See K.A. Barbarick, *Organic Materials as Nitrogen Fertilizers*, Colorado State University Extension, available at <http://www.ext.colostate.edu/pubs/crops/00546.pdf> (last visited October 4, 2009).

⁶³ *Id.*

⁶⁴ See, e.g., Stephen Cass, *When Life Gives You Manure, Make Clean Fuel*, DISCOVER MAGAZINE, June 4, 2009, <http://discovermagazine.com/2009/jun/04-when-life-gives-you-manure-make-clean-fuel>; Tim Stemwedel, *Organic Food Safety & Process Validation*, OFAC Fertilizer Seminar, Dec. 10, 2008, <http://www.organicfertilizerassociation.org/Organicfertintegrityts.ppt>.

⁶⁵ Letter from Barbara C. Robinson, *supra* note 24; California Certified Organic Farmers, *supra* note 10.

⁶⁶ See Jim Motavalli, *Goodness Guaranteed*, E - THE ENVIRONMENTAL MAGAZINE, Nov./Dec. 1994, at 46.

⁶⁷ See Fisher, *supra* note 37; Jim Downing, *Federal Raid Heightens Concerns About Fake Organic Fertilizer*, SACRAMENTO BEE, Jan. 24, 2009

Department of Agriculture (“WSDA”) has been the most widely recognized state input materials registration program.⁶⁸ The WSDA’s Brand Name Materials List evaluates processed inputs for use in organic agriculture to ascertain whether they comply with the NOP.⁶⁹ However, in September 2009, the WSDA announced that they would not be renewing any materials under the program in 2010, and that the materials registration program would come to an end without specific authorization from the Washington legislature in their 2010 session to operate such a program.⁷⁰

The California Department of Food and Agriculture, which already regulates fertilizers and organic agricultural products, also supports an organic fertilizer certification program.⁷¹ With the full-fledged support of the Organic Fertilizer Association of California,⁷² a group representing organic fertilizer manufacturers, the California legislature has recently passed Assembly Bill 856, which would allow the state to regulate products used as organic input materials.⁷³ This is great news for the organic fertilizer industry, which has agreed to higher fees to help fund such a program.⁷⁴

⁶⁸ See Washington State Dept. of Agriculture, *Is the WSDA Brand Name Material List accepted Outside Washington State?*, <http://www.westbridge.com/news-pdf-documents/WSDA-Contracts-with-ACAs.pdf> (last visited Nov. 2, 2009).

⁶⁹ Washington State Dept. of Agriculture, *Materials Lists & Material Registration*, <http://agr.wa.gov/FoodAnimal/Organic/MaterialsLists.aspx> (last visited September 6, 2009).

⁷⁰ Letter from Katherine Withey, Organic Material Review Coordinator, Washington State Dept. of Agriculture to Materials Registrant, Sept. 24, 2009 (on file with author) (letter informs materials registrants that their Brand Name Materials List registrations would not be renewed); *Materials Lists & Materials Registration*, WSDA, updated Oct. 30, 2009, <http://agr.wa.gov/foodanimal/organic/materialslists.aspx> (last visited Nov. 2, 2009).

⁷¹ See COPAC Meeting Jan. 22, 2009, *supra* note 51.

⁷² See Organic Fertilizer Association of California, *supra* note 1.

⁷³ Caballero, AB 856 Bill Analysis, Senate Food and Agriculture Committee, July 1, 2009, http://info.sen.ca.gov/pub/09-10/bill/asm/ab_0851-0900/ab_856_cfa_20090706_115957_sen_comm.html (last visited Oct. 4, 2009); Letter from Steven Beckley, *supra* note 1.

⁷⁴ Caballero, *supra* note 73; CDFA COPAC, Meeting Minutes, Feb. 21, 2007, <http://www.cdfa.ca.gov/is/docs/Organic-Minutes-2.21.07.pdf>.

D. Existing Private Input Approval Authorities: The Organic Materials Review Institute

Most organic fertilizers, in addition to carrying the appropriate state registrations, are also submitted for approval to the Organic Materials Review Institute (“OMRI”).⁷⁵ OMRI is a non-profit organization which provides a complete review of input products to determine if they may be used in operations certified under the NOP.⁷⁶ OMRI is an independent third party, and is thus able to confidentially review fertilizer manufacturers’ internal production processes while ensuring and representing to growers that the products are indeed acceptable under the NOP.⁷⁷ The NOP issued a statement in 2008 clarifying that Certifiers may accept OMRI approval in lieu of conducting its own due diligence concerning a particular input used in organic production.⁷⁸ Also, the USDA performs audits of OMRI to ensure that it is in compliance and accountable for its methods.⁷⁹ Over the past three years, OMRI claims that it has continued to strengthen its procedures regarding audits and inspection of high-nitrogen fertilizer manufacturers.⁸⁰

OMRI’s approval program did not prevent companies such as California Liquid Fertilizer and Port Organics, whose products had carried OMRI seals of approval, from operating in violation of the NOP rules.⁸¹ Despite red flags, several years passed before action was taken, and then only by the state fertilizer inspectors, not OMRI.⁸² It is unlikely that OMRI would have been able to discover the fraud, given that OMRI’s approval process has traditionally consisted

⁷⁵ Organic Materials Review Institute, *About OMRI*, http://www.omri.org/OMRI_who.html (last visited Sept. 6, 2009).

⁷⁶ *Id.*

⁷⁷ OMRI Review Program: Frequently Asked Questions, http://www.omri.org/OMRI_frequent.html (last visited Sept. 6, 2009).

⁷⁸ See Letter from Barbara C. Robinson, *supra* note 24.

⁷⁹ OMRI FAQ, *supra* note 8.

⁸⁰ Organic Materials Review Institute, *OMRI Disallows Two Fertilizers*, http://omri.org/OMRI_PR.html (last visited Aug. 8, 2009).

⁸¹ *Id.* No official determination has yet been made that Port Organics were in violation, but all Port products have been suspended from use. Downing, *supra* note 67.

⁸² See Downing, *supra* note 16; Adelman, *supra*, note 1.

only of a desktop review of a product's formulation.⁸³ It was not until 2009, when directed by the NOP,⁸⁴ that OMRI began direct inspections of fertilizer manufacturing facilities and production processes.⁸⁵ Per the NOP directive, these inspections are required only for a segment of the organic input market – liquid organic fertilizers with nitrogen levels that claim to be above three percent.⁸⁶

E. The Need for Audits

An important part of any certification process is to have a reliable system of auditing to ensure that input manufacturers are complying with the law, and not using illegal synthetic ingredients.⁸⁷ Under the NOP, audits are performed for all producers of organically certified products.⁸⁸ For manufacturers of input materials, the auditing processes are not so clear.⁸⁹ It does not appear that the OFPA or NOP provide any direct authority for the third-party inspections for input manufacturers that have recently been unilaterally mandated by the NOP.⁹⁰ State programs may include auditing, but under NOP rules they can only cover production operations within their own borders.⁹¹ There are also still many technical considerations still being debated within the industry regarding the best way to test fertilizer products.⁹² At this time, it remains rather easy for an organic fertilizer manufacturer to use synthetic materials to cut

⁸³ See About OMRI, *supra* note 75.

⁸⁴ See Letter from Barbara C. Robinson, *supra* note 17.

⁸⁵ Interview with ASCO, *supra* note 15.

⁸⁶ Letter from Barbara C. Robinson, *supra* note 17.

⁸⁷ *Id.*; OMRI Disallows Two Fertilizers, *supra* note 80.

⁸⁸ National Organic Program, 7 C.F.R. § 205.403 (2009).

⁸⁹ Interview with ASCO, *supra* note 15.

⁹⁰ After an exhaustive review of the OFPA and NOP texts, as well as all available relevant regulatory and case law, the author has been unable to find any precedence or authority for the NOP to enact rules requiring any sort of inspection or audit for input manufacturers. See Organic Foods Production Act, 7 U.S.C. §§ 6501-6522; See National Organic Program, 7 C.F.R. § 205 (2009).

⁹¹ *Id.* § 205.620(a) (2009).

⁹² W.R. Horwath, Developing testing protocols to assure the quality of fertilizer materials for organic agriculture (2009) (unpublished research proposal, on file with author).

costs and increase profits without being detected.⁹³ The need for effective auditing is highlighted when one considers the magnitude of the economic motives to cheat. Urea, a prohibited nitrogen substitute, has a cost of ten dollars per percent of nitrogen per ton.⁹⁴ On the other hand, fish meal, a common organic nitrogen source, has a cost of \$100 per percent of nitrogen per ton.⁹⁵

IV. EXPOSURE OF DEFICIENCIES IN INPUT REGULATION AND THE NOP RESPONSE

A. Crackdown: Organic Fertilizer Manufacturers Caught Cheating

The Sacramento Bee recently published a series of articles about several organic fertilizer manufacturers using prohibited chemical ingredients to cheaply increase the nitrogen levels of their fertilizers.⁹⁶ Beginning in December 2008, this series of articles first reported on a January 2007 action by the California Department of Food and Agriculture to shut down California Liquid Chemical.⁹⁷ *The Sacramento Bee* went on to report on a February 2009 letter from the NOP to its Certifiers, which stated that the NOP was not confident that two products produced by Port Organics, Ltd. were compliant with organic regulations.⁹⁸

The products being investigated were used on a massive scale – they covered as much as half of California’s market for liquid organic fertilizers.⁹⁹ Their sudden elimination put great stress on organic producers, who had to scramble to find suitable replacements.¹⁰⁰ These were all liquid high-nitrogen fertilizers,¹⁰¹ which generate excellent results for growers, but are

⁹³ *Id.*

⁹⁴ Interview with Timothy Stemwedel, *supra* note 15.

⁹⁵ *Id.*; see, e.g., Downing, *supra* note 67.

⁹⁶ Downing, *supra* note 16; Downing, *supra* note 17; Downing, *supra* note 25; Downing, *supra* note 67.

⁹⁷ See Downing, *supra* note 16.

⁹⁸ Downing, *supra* note 67.

⁹⁹ See Downing, *supra* note 16; Downing, *supra* note 67.

¹⁰⁰ See Interview with Timothy Stemwedel, *supra* note 15.

¹⁰¹ “High-Nitrogen Fertilizers” are those with greater than three percent nitrogen. This definition is established in the NOP letter from Barbara Robinson dated February 20, 2009, which subjects liquid nitrogen fertilizers above three percent nitrogen to additional regulation. Letter from Barbara C. Robinson, *supra* note 17.

known to be difficult and expensive to produce.¹⁰² Synthetic substances are also readily available for use in such products, are easy to conceal, and greatly increase profit margins, thus making them more prone to fraudulent manufacturing practices.¹⁰³

B. The NOP February 2009 Mandate

The February 2009 letter from the NOP advised Certifiers that any operations that continued to use the Port Organics products in question would be in jeopardy of losing their organic status.¹⁰⁴ The NOP letter stated that by October 1, 2009, all liquid products with greater than three percent nitrogen must be reviewed and inspected by third parties to ensure compliance,¹⁰⁵ and Certifiers had to receive full documentation of those inspections, otherwise approval of those products would be rescinded.¹⁰⁶ The letter also required that the third party reviewers themselves undergo NOP auditing, which had already been in place for OMRI.¹⁰⁷

In addition to these directives, the NOP required organizations that approve organic input materials, such as OMRI and WSDA, to add a generic affidavit statement to all registration forms for organic input materials.¹⁰⁸ For example, the WSDA “Non-Organic Ingredient Affidavit” form includes the language, “A knowingly false entry or false alteration of any entry on this certificate may result in a fine of not more than \$11,000 or imprisonment for not more than five years or both (18 U.S.C. § 1001).”¹⁰⁹ This effectively adds a criminal penalty for fraudulent organic fertilizer practices. Under 18 U.S.C. § 1001, it is a crime to knowingly and

¹⁰² See Interview with Timothy Stemwedel, *supra* note 15. CCOF, *Liquid Organic Fertilizers: Friend or Foe?*, http://ccof.org/pdf/CCOF_liquid_fert_article_spring_2007.pdf (last visited Oct. 5, 2009) (demonstrating difficulty of creating high-nitrogen fertilizers).

¹⁰³ See Downing, *supra* note 16; Horwath, *supra* note 92.

¹⁰⁴ Letter from Barbara C. Robinson, *supra* note 17.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*; OMRI FAQ, *supra* note 8.

¹⁰⁸ Audio recording: Barbara Robinson, Acting Director, National Organic Program, Organic 101: USDA Organic Compliance and enforcement, held by the Organic Trade Association at All Things Organic (June 16-18, 2009) (available for purchase from the Organic Trade Association at <http://organicexpo.confex.com/organicexpo>).

¹⁰⁹ Non-Organic Ingredient Affidavit, WSDA, http://agr.wa.gov/FoodAnimal/Organic/Certificate/2009/Proc_Handler_Retail/13-AGR2252_Non-Org_IncredAffidavit_12-08.pdf (last visited Oct. 5, 2009).

willfully make a false or fraudulent statement to the federal government.¹¹⁰ While this may create criminal penalties for those who fraudulently use synthetic ingredients in organic inputs, it does little to resolve the regulatory issues at hand.

C. OMRI Audit Results

In accordance with the February 2009 letter from the NOP, OMRI conducted complete audits of seventeen organic fertilizer manufacturers. In order to facilitate the inspection process, OMRI contracted with Certifiers who had sufficient capacity to test and audit organic fertilizer manufacturers.¹¹¹ On September 30, 2009, OMRI released a report on their initial round of audits.¹¹² The audits covered three major NOP-mandated compliance criteria: no evidence of fraud in formulation; no synthetic nitrogen stored within 100 yards; and successfully completing the records audit, which covered such things as balancing raw material mass input against completed product mass output.¹¹³ Of the twenty manufacturers audited by OMRI, only seven were able to successfully meet all three criteria by the October 1, 2009 deadline.¹¹⁴

Part of the reason there was such a high initial failure rate may be that this was the first such audit, and there was no established guidelines or procedures by which the audits were conducted. In the case of California Organic Fertilizers, Inc., the audit was conducted in September 2009 by Agricultural Services Certified Organic (“ASCO”), who was contracted by OMRI to perform the inspection.¹¹⁵ According to ASCO inspectors at the time of their inspection, the audit process was very much in a state of formation, as the auditors were still becoming familiar with the various manufacturing processes and accounting procedures in place

¹¹⁰ Fraud and False Statements, 18 U.S.C. § 1001 (2009).

¹¹¹ Interview with ASCO, *supra* note 15.

¹¹² ORGANIC MATERIALS REVIEW INSTITUTE, LIQUID FERTILIZER INSPECTION UPDATE, Sept. 30, 2009, *available at* http://www.omri.org/liquid_fertilizer_inspection_update.pdf [hereinafter OMRI Liquid Fertilizer Update].

¹¹³ *Id.*; Letter from Barbara C. Robinson, *supra* note 17.

¹¹⁴ OMRI Liquid Fertilizer Update, Sept. 30, 2009, *supra* note 110.

¹¹⁵ *See* Interview with ASCO, *supra* note 15.

at different manufacturing companies.¹¹⁶ In an environment where manufacturers did not know the exact procedures by which they would be audited, it is understandable that some may innocently fail to meet some specific requirements. Nevertheless, as of December 2009, ten months after the audits were announced by the NOP, there were still at least seven of twenty-one manufacturers who had not yet successfully completed their NOP-mandated audits.¹¹⁷ These NOP-mandated audits only covered liquid nitrogen fertilizers above three percent nitrogen;¹¹⁸ given these results, a review of all liquid and dry organic fertilizers would be certainly be warranted.

D. Questions of NOP Legal Authority

One can certainly understand the NOP's need to take steps to enforce its authority on organic input producers, but there are potential legal issues with this course of action. Through the National List, the NOP may allow or restrict specific ingredients for use in organic production, and there is a statutory process laid out for making amendments to the National List.¹¹⁹ In spite of this statutory process, the NOP has banned several fertilizer products from use with little more than a letter from the interim executive director of the NOP to its certifiers.¹²⁰

The OFPA and NOP do not provide statutory or regulatory authority for the certification of input materials used in organic production.¹²¹ Specifically, the OFPA provides that the purpose of the act is "to establish national standards governing the marketing of certain

¹¹⁶ *Id.*

¹¹⁷ OMRI Liquid Fertilizer Inspection Update, Dec. 23, 2009, http://www.omri.org/liquid_fertilizer_inspection_update.pdf.

¹¹⁸ Letter from Barbara C. Robinson, *supra* note 17.

¹¹⁹ 7 C.F.R. § 205.600.

¹²⁰ Letter from Barbara C. Robinson, Acting Director, National Organic Program to All USDA Certifying Agents (July 27, 2009) available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5078510>; Letter from Barbara C. Robinson, *supra* note 17; OTA Task Force Aug. 10, *supra* note 51.

¹²¹ OMRI FAQ, *supra* note 8.

agricultural products as organically produced products.”¹²² The term “agricultural products” is defined in the OFPA and NOP as being restricted to agricultural commodities or products that are marketed for human consumption.¹²³

While the OFPA and NOP do not provide for the certification of input materials such as fertilizers, which are not intended for human consumption, they do provide regulation over what is or is not allowed in organic production.¹²⁴ These items are defined in the National List,¹²⁵ which is specifically limited to permitted synthetic substances and prohibited natural substances.¹²⁶ The OFPA goes on to provide the specific circumstances under which synthetic substances may be allowed and natural substances may be restricted in organic production.¹²⁷ There is no rule anywhere in the OFPA or NOP that allows the USDA to affirm which natural substances are allowed in organic production, only which ones are prohibited.¹²⁸

The only authority the USDA has over any substance used in organic production is to include it on the National List,¹²⁹ according to the process described in 7 U.S.C. § 6517.¹³⁰ It states that specific natural substances may only be prohibited if the Secretary of Agriculture, in consultation with the Secretary of Health and Human Services and the Administrator of the EPA, determines that the use of the substance “would be harmful to human health or the environment;

¹²² 7 U.S.C. § 6501(1).

¹²³ The term “agricultural product” means any agricultural commodity or product, whether raw or processed, including any commodity or product derived from livestock that is marketed in the United States for human consumption. Organic Foods Production Act, 7 U.S.C. § 6502(1); 7 C.F.R. § 205.2 (emphasis added).

¹²⁴ See discussion *supra* Part III.A.

¹²⁵ “The term ‘national list’ means a list of approved and prohibited substances as provided for in section 2118 [7 U.S.C. § 6517].” 7 U.S.C. § 6502(12).

¹²⁶ “Content of List – The list . . . shall contain an itemization, by specific use or application, of each synthetic substance permitted under subsection (c)(1) or each natural substance prohibited under subsection (c)(2).” 7 U.S.C. § 6517(b).

¹²⁷ *Id.* § 6517(c).

¹²⁸ Interview with ASCO, *supra* note 15; interview with Timothy Stemwedel, *supra* note 15; see 7 U.S.C. § 6517(b) (the National List is specifically defined to apply to prohibited natural substances and allowed synthetic substances, there is no provision for specifically allowing a natural substance).

¹²⁹ 7 U.S.C. § 6517.

¹³⁰ *Id.*

and is inconsistent with organic farming or handling, and the purposes of this title; and the specific prohibition is developed using the procedures specified in subsection (d).”¹³¹ Subsection (d)(4) states that “before making any amendments to the National List, the Secretary shall publish . . . any Proposed Amendments to the National List in the Federal Register and seek public comment on such proposals.”¹³²

By placing regulatory restrictions on, for example, liquid organic fertilizer products with nitrogen levels over three percent, the USDA is essentially declaring that certain natural substances may not be allowed in organic production, completely sidestepping the statutory process requiring such prohibited natural materials to be placed on the National List and the legal process by which such an amendment to the list may be made.¹³³ These unprecedented regulatory actions are not being taken against all organic fertilizer manufacturers, only a certain class.¹³⁴ As a result, some Certifiers have advised their growers that they must be wary of using any liquid products.¹³⁵ This unfairly prejudices honest manufacturers of high-nitrogen liquid fertilizers against lower quality liquid and dry fertilizer products.

V. STAKEHOLDER PERSPECTIVES

A. *Fertilizer Manufacturers*

The unprecedented regulatory action by the NOP in 2009, which eliminated a major organic fertilizer manufacturer from the marketplace, has shaken up the organic fertilizer industry.¹³⁶ To make matters worse, it seemed there was no formal process behind the banning

¹³¹ *Id.* § 6517(c).

¹³² *Id.* § 6517(d)(4).

¹³³ *Id.* § 6517(d).

¹³⁴ Letter from Barbara C. Robinson, *supra* note 17.

¹³⁵ Friend or Foe, *supra* note 100.

¹³⁶ Controversy Over Liquid Fertilizers, WSDA ORGANIC QUARTERLY (Apr. 15, 2009), available at <http://agr.wa.gov/FoodAnimal/Organic/Certificate/2009/QuarterlyReports/qrapril09web.pdf>; COPAC Meeting Jan. 22, 2009, *supra* note 51.

of these products by the NOP.¹³⁷ For manufacturers, the prospect of having major products banned without the benefit of any transparent and established procedures for such action presents a great risk to doing business.¹³⁸ This is exaggerated by unclear regulations interpreted by multiple authorities, and no set standards for minor impurities that inherently exist in most of the raw materials that manufacturers use.¹³⁹ Furthermore, honest manufacturers are harmed when competitors are able to offer lower prices by cheating with low cost chemical substitutes; it is difficult to do business with a competitor who is using illegal raw materials at a ninety percent cost advantage.¹⁴⁰ It is no surprise that manufacturers have been at the forefront of legislative efforts to expand regulation over the inputs they produce.¹⁴¹

B. Growers

Growers have much to lose when it comes to shortcomings in the regulation of inputs.¹⁴² Any grower who decides to grow organically must invest more money in fertilizers and nutrients for his crops,¹⁴³ and an organic field must be free of synthetic materials for three years before it can be certified.¹⁴⁴ This represents a substantial investment in return for a premium price paid for organic produce.¹⁴⁵ If an input that does not comply with the NOP is applied to organic crops, a farmer could lose organic certification, and the ability to sell his crop with an organic label, for three years.¹⁴⁶ The grower is in a risky situation; the same regulatory body that could decertify him for using a prohibited input does not provide definitive guidance on whether or not

¹³⁷ OTA Task Force Aug. 10, *supra* note 51.

¹³⁸ *See id.*

¹³⁹ Interview with Timothy Stemwedel, *supra* note 15.

¹⁴⁰ *Id.*

¹⁴¹ Organic Fertilizer Association of California, *supra* note 1.

¹⁴² *Liquid Organic Fertilizers: Friend or Foe?*, *supra* note 100.

¹⁴³ VanTine, *supra* note 23.

¹⁴⁴ National Organic Program, 7 C.F.R. § 205.202 (2009).

¹⁴⁵ Oberholtzer, *supra* note 3.

¹⁴⁶ 7 C.F.R. § 205.660; 7 C.F.R. § 205.202.

a particular input is allowed.¹⁴⁷ It is therefore not surprising that former customers of Port Organics are now exercising extra vigilance when it comes to the testing and verification of the organic input materials they use.¹⁴⁸

C. Accredited Certifying Agencies

The responsibility of certifying organic growers and their crops falls directly on the Certifiers.¹⁴⁹ It is their job to interpret the NOP regulations with respect to inputs and to advise their growers of what is and what is not permitted.¹⁵⁰ The vast majority of Certifiers do not have the scientific skill or technology necessary to evaluate and audit fertilizer manufacturing to ensure that it complies with NOP regulations.¹⁵¹ Instead, they must rely on a few private groups such as OMRI and state fertilizer departments such as the WSDA who have been authorized by the NOP to handle input approvals.¹⁵² It is ironic that the evaluation and auditing of inputs is left to Certifiers, who are often not capable of such advanced science,¹⁵³ when within the USDA there is a huge body of scientists and inspectors with all of the skills necessary to execute an effective program.¹⁵⁴

¹⁴⁷ Interview with Timothy Stemwedel, *supra* note 15.

¹⁴⁸ Dee, *supra* note 27.

¹⁴⁹ 7 C.F.R. § 205.501.

¹⁵⁰ *Id.*

¹⁵¹ Horwath, *supra* note 92; Letter from Barbara C. Robinson, *supra* note 24.

¹⁵² Letter from Barbara C. Robinson, *supra* note 24; CCOF Announcement: 2009 Liquid Fertilizer Approval Policy, http://www.ccof.org/pdf/Cert_News_Resources/2009_Liquid_Fert_Policy.pdf (last visited Nov. 1, 2009).

¹⁵³ Interview with ASCO, *supra* note 15; Letter from Barbara C. Robinson, *supra* note 24 (permitting ACA's to defer to other, more knowledgeable ACA's and OMRI to verify products).

¹⁵⁴ About FSIS, USDA, http://fsis.usda.gov/About_FSIS/index.asp (last visited Sept. 6, 2009); FOOD SAFETY INSPECTION SERVICE, USDA, ORGANIZATIONAL CHART, <http://www.fsis.usda.gov/OM/orgcharts/fsis.pdf> (last visited Nov. 1, 2009).

D. Consumers

Consumer trust in the organic label is absolutely vital to the industry.¹⁵⁵ Recent news reports of synthetic materials used in organic fertilizers have received widespread coverage in the media.¹⁵⁶ Consumers have thus been made painfully aware of the possibility that the organic products they have paid a premium for over the past several years may have been adulterated with chemicals.¹⁵⁷ While the effects of this are difficult to measure, it is likely that on some level this has contributed to the erosion of the organic brand.¹⁵⁸ It is critical that the industry is able to reassure consumers that an effective system of regulation is in place to protect the integrity of organic products.

E. Organic Conglomerates: Earthbound Farms

In response to the current state of affairs, some producers, such as Earthbound Farms, have begun to take matters into their own hands.¹⁵⁹ Earthbound is one of the largest players in the organic industry.¹⁶⁰ Their farms encompass over 150 farmers on 33,000 crop acres, and Earthbound ships produce under their own brand name to supermarkets across the nation.¹⁶¹ For Earthbound, as one of the largest stakeholders in the industry, purity of organic inputs is paramount.¹⁶²

¹⁵⁵ ConsumerReports.org, Fighting for a Strong Organic Label, <http://www.consumerreports.org/cro/aboutus/mission/viewpoint/fightingforastrongorganiclabel0602/index.htm> (last visited Sept. 6, 2009); ORGANIC LABEL REMAINS TRUSTWORTHY AND RELEVANT, *supra* note 26.

¹⁵⁶ Patricia Eddy, *Earthbound Farms Responds to Non-Organic Fertilizer News*, SEATTLE SUSTAINABLE FOODS EXAM'R, Feb. 10, 2009, <http://www.examiner.com/x-235-Seattle-Sustainable-Foods-Examiner~y2009m2d10-Meet-big-organic-Earthbound-Farms?cid=exrss-Seattle-Sustainable-Foods-Examiner>; Jeff Fairchild, *What's the Deal with Organic Fertilizer?*, NEW SEASONS MARKET BLOG, Nov. 20, 2008, <http://newseasonsmarket.blogspot.com/2009/01/by-jeff-fairchild-director-of-produce.html>.

¹⁵⁷ Downing, *supra* note 16.

¹⁵⁸ Editorial, *Give Meaning to 'Organic' Label*, SACRAMENTO BEE, Jan. 07, 2009.

¹⁵⁹ Dee, *supra* note 27.

¹⁶⁰ *Id.*; Earthbound Farm Facts, Earthbound Farm 2009 Media Kit, <http://www.ebfarm.com/aboutus/EarthboundFarm-2009MediaKit.pdf> (last visited Nov. 1, 2009).

¹⁶¹ Earthbound Farm Facts, *supra* note 157.

¹⁶² Dee, *supra* note 27.

To reduce the risks and liabilities from potentially fraudulent fertilizers, Earthbound has established its own proprietary auditing process that it requires fertilizer manufacturers to undergo if they wish to sell fertilizers to Earthbound farmers.¹⁶³ This is a fearful proposition for many fertilizer manufacturers, as it would allow Earthbound complete access to confidential internal production processes.¹⁶⁴ Thus, some manufacturers have chosen not to cooperate with Earthbound's program.¹⁶⁵ As a result, farmers who rely on Earthbound to purchase their produce have fewer choices of fertilizer products, potentially reducing input availability and increasing production costs for the farmer.¹⁶⁶ Another problem with such proprietary forms of regulation is an increased possibility that biased and/or unknowledgeable sources are placed into the regulatory process without the benefit of public scrutiny.¹⁶⁷ Unfortunately, in the absence of proper government regulations, companies like Earthbound have few alternatives.

F. Organic Trade Association

The organic industry is represented by the Organic Trade Association, whose priorities include protecting the integrity of the organic brand and promoting the overall expansion of the industry.¹⁶⁸ The association has taken action on this issue by creating a Fertilizer Verification Task Force to evaluate developments in this area and form a recommendation to the NOP and other stakeholders.¹⁶⁹ The task force hopes to work with the NOP to establish an official process for the verification of organic inputs, including guidance and a notification process to protect input manufacturers and keep them informed of the rules.¹⁷⁰

¹⁶³ *Id.*

¹⁶⁴ See Interview with Timothy Stemwedel, *supra* note 15.

¹⁶⁵ See *id.*

¹⁶⁶ See *id.*

¹⁶⁷ See *id.*

¹⁶⁸ ORGANIC TRADE ASSOCIATION, OVERVIEW, <http://www.ota.com/about/accomplishments.html> (last visited Sept. 6, 2009).

¹⁶⁹ PUBLIC STATEMENT ON LIQUID FERTILIZER, *supra* note 29.

¹⁷⁰ *Id.*

VI. RECOMMENDED SOLUTIONS

A. *Improved USDA Regulation of Organics*

Currently, the National Organic Program, which administrates the OFPA, is part of the USDA Agricultural Marketing Service, whose mission it is to “facilitate the efficient, fair marketing of U.S. agricultural products.”¹⁷¹ While marketing is certainly an important component of expanding the organic industry, it has nothing to do with actually regulating organic production, which is really the key focus of the OFPA and the need for organic regulation in general. Perhaps it would be beneficial to give oversight of the NOP to a department that specializes in things directly related to agricultural production. For example, the Agricultural Research Service pursues “scientific discoveries that help solve problems in crop and livestock production and protection, human nutrition, and the interaction of agriculture and the environment.”¹⁷² The service conducts many different research projects to learn how to improve agricultural yields, promote sustainability and to protect the environment.¹⁷³ It is this type of scientific research that should be guiding regulatory groups such as the National Organic Standards Board and NOP.

The USDA also has the Food Safety and Inspection Services, which is the division “responsible for ensuring that the nation's commercial supply of meat, poultry, and egg products is safe, wholesome, and correctly labeled and packaged”¹⁷⁴ in accordance with federal statutes

¹⁷¹ AGRICULTURAL MARKETING SERVICE, USDA, HOME PAGE, <http://www.ams.usda.gov/AMSV1.0/> (last visited Nov. 2, 2009); National Organic Program, *supra* note 5.

¹⁷² AGRICULTURAL RESEARCH SERVICE, USDA, OVERVIEW, http://www.usda.gov/wps/portal/!ut/p/_s.7_0_A/7_0_1OB?contentidonly=true&contentid=ARS_Agency_Splash.xml&x=14&y=9 (last visited Nov. 2, 2009).

¹⁷³ AGRICULTURAL RESEARCH SERVICE, USDA, RESEARCH PROGRAMS, <http://www.ars.usda.gov/research/programs.htm> (last visited Nov. 2, 2009).

¹⁷⁴ FOOD SAFETY AND INSPECTION SERVICE, USDA, OVERVIEW, http://www.usda.gov/wps/portal/!ut/p/_s.7_0_A/7_0_1OB?contentidonly=true&contentid=FSIS_Agency_Splash.xml&x=19&y=12 (last visited Nov. 2, 2009).

governing meat, poultry, and egg inspection.¹⁷⁵ The purpose of this division is to facilitate inspections to ensure nationwide compliance with federal agriculture and labeling statutes.¹⁷⁶ Inspectors, working with the EPA and Food and Drug Administration, collect thousands of samples from meat, poultry, and egg products to analyze them for chemical residues.¹⁷⁷ Certainly they would be better capable of regulating the inspection requirements of organic production than either the Agricultural Marketing Service or private groups such as OMRI and the Certifiers.

B. The EPA Pesticide Registration Model

A federal product registration and certification program is the best solution for the regulation of organic input materials. An excellent model for this already exists within the federal regulatory system: that used by the EPA's Pesticide Registration Program.¹⁷⁸ The EPA is authorized to regulate pesticides under the Federal Insecticide, Fungicide and Rodenticide Act.¹⁷⁹ The basis for this authority is found in 7 USCS § 136(a), and provides what could be an excellent basis for organic input legislation.¹⁸⁰

Under the EPA program, pesticides must be properly registered and labeled to be sold in the United States.¹⁸¹ These federal regulations preempt any state requirements for pesticide

¹⁷⁵ This refers to the Federal Meat Inspection Act, the Poultry Products Inspection Act, and the Egg Products Inspection Act. *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ FOOD SAFETY INSPECTION SERVICE, USDA, NATIONAL RESIDUE PROGRAM DATA – 2007 (Oct. 2008), http://www.fsis.usda.gov/PDF/2007_Red_Book_Complete.pdf.

¹⁷⁸ *See*, ENVIRONMENTAL PROTECTION AGENCY, ABOUT EPA'S PESTICIDES PROGRAM, <http://www.epa.gov/pesticides/about/aboutus.htm> (last visited Sept. 6, 2009).

¹⁷⁹ *Id.*

¹⁸⁰ "Requirement of registration. Except as provided by this Act, no person in any State may distribute or sell to any person any pesticide that is not registered under this Act. To the extent necessary to prevent unreasonable adverse effects on the environment, the Administrator may by regulation limit the distribution, sale, or use in any State of any pesticide that is not registered under this Act and that is not the subject of an experimental use permit under section 5 or an emergency exemption under section 18." Environmental Pesticide Control, 7 U.S.C. § 136a (2009).

¹⁸¹ *Id.*

use,¹⁸² and provide nationally regulated guidelines.¹⁸³ It also includes flexibility for things such as minor use permits for products used on a small scale where permanent registration is not economically practicable; experimental use registrations; local use registrations; and registrations for emergency use products.¹⁸⁴ The scope and depth of this regulatory framework eliminates a lot of uncertainty in the use of pesticides, and thus allows the grower greater freedom of choice in products without the risk of violating standards.

There are indeed many parallels between the EPA pesticide program and one that would effectively regulate organic input materials. First and foremost, both deal with products that are applied to agricultural crops.¹⁸⁵ Also, the EPA program does what the NOP National List does not do – it positively affirms exactly which products are permitted for use,¹⁸⁶ as opposed to the National List’s exception-based system.¹⁸⁷ Furthermore, the EPA program includes established provisions for enforcement against manufacturers,¹⁸⁸ which the NOP currently lacks.

Such a registration program for organic input materials could be implemented by amending the current OFPA regulation, and making the related provisions in the framework of the NOP. Much of the technical ability and regional resources required to regulate and enforce such a program already exists within the various divisions of the USDA.¹⁸⁹ Alternatively, Certifiers such as ASCO, who are qualified to conduct materials evaluation and verification,¹⁹⁰ could be given accreditation for input materials in the same manner that they are currently

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*; United States Environmental Protection Agency, Pesticides: Regulating Pesticides, <http://www.epa.gov/pesticides/regulating/index.htm> (last visited Sept. 6, 2009).

¹⁸⁵ The EPA program applies to pesticides, which are applied to crops. Organic fertilizers are also applied to crops. *See id.*

¹⁸⁶ 7 U.S.C. § 136a.

¹⁸⁷ 7 C.F.R. § 205.105.

¹⁸⁸ 7 U.S.C. §§ 136j, 136k, 136l.

¹⁸⁹ ORGANIZATIONAL CHART, *supra* note 151.

¹⁹⁰ Interview with ASCO, *supra* note 15.

accredited to monitor crop production. This would provide for a more privatized form of regulation similar to the system of certifying agencies currently in place under the OFPA. Also, there are Certifiers already in the field doing these inspections,¹⁹¹ but instead of doing so under their federal authority as a Certifier of organic production, they are working under a private contract with OMRI, who has been deemed to be one of the few de facto authorities in the field by the NOP.¹⁹²

C. Uniform State Programs

Fertilizers, as opposed to pesticides, have generally been an area of state regulatory jurisdiction.¹⁹³ In deference to that tradition, another possible solution to better regulate organic inputs would be to develop a set of standards for the Uniform Law Commission. This organization has developed many uniform state codes which act as models for state legislatures to develop state programs that are in harmony with the laws of other states.¹⁹⁴ Another organization that might be helpful with this is the Association of American Plant Food Control Officials, which works with state fertilizer officials to establish uniform laws and practices.¹⁹⁵ Such model codes help to facilitate commerce and reduce conflicting laws that can create an inequitable environment between states.¹⁹⁶ However, development and adoption of such uniform regulations nationwide would not have the benefits of the relative speed at which a federal program could be implemented, nor would the same level of uniformity be achieved. For these reasons, a federally mandated program remains the better proposition.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ THE FERTILIZER INSTITUTE, FERTILIZER REGULATIONS - FERTILIZER FACTS AND STATS, <http://www.tfi.org/factsandstats/regulations.cfm> (last visited Sept. 6, 2009); ASSOCIATION OF AMERICAN PLANT FOOD CONTROL OFFICIALS, MODEL FOR FERTILIZER REGULATION IN NORTH AMERICA, <http://www.aapfco.org> (last visited Sept. 6, 2009).

¹⁹⁴ Uniform Law Commission, *supra* note 30.

¹⁹⁵ THE FERTILIZER INSTITUTE, *supra* note 190.

¹⁹⁶ UNIFORM LAW COMMISSION, ABOUT NCCUSL, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=9> (last visited Sept. 6, 2009).

VII. BENEFITS OF IMPROVED REGULATION

A program under which organic input materials may gain federally-recognized approval would be of great benefit to the growing organics industry. A federal program would not have a problem with jurisdiction across state lines as a state program would. Certifiers would have a much easier time advising their growers as to which products are safe to use without the burden of multiple independent auditing processes or reliance on a third party such as OMRI.¹⁹⁷ Established standards would also ensure that inputs are reviewed by appropriately qualified, unbiased parties and are subject to public scrutiny, and would be able to reliably protect trade secrets.

This would create a much friendlier operating environment for fertilizer manufacturers, as they would be well-informed as to the rules of the game and would have some assurance of the legal process of enforcement actions. For example, the NOP would have a framework under which to issue rulings and decisions regarding inputs, rather than issuing broad and unpredictable directives such as their recent letter to Certifiers regarding high nitrogen liquid products.¹⁹⁸ Legitimate manufacturers would operate on a more level playing field with less chance of unfair competition from fraudulent manufacturers.¹⁹⁹ With nationalized standards, there is also greater opportunity for input manufacturers to sell their products nationally or internationally without additional product registrations.²⁰⁰

Consumers would also benefit with the knowledge that an active regulatory framework helps to ensure that only organic inputs were used in the products they pay a premium for. This,

¹⁹⁷ See Organic Trade Association Fertilizer Verification Task Force Conference Call Minutes, Mar. 13, 2009 (on file with author).

¹⁹⁸ See Letter from Barbara C. Robinson, *supra* note 17.

¹⁹⁹ See Downing, *supra* note 67.

²⁰⁰ See INTERNATIONAL FEDERATION OF ORGANIC AGRICULTURE MOVEMENTS, ORGANIC STANDARDS AND CERTIFICATION, http://www.ifoam.org/about_ifoam/standards/index.html (last visited Nov. 1, 2009).

in turn, benefits the industry as a whole, as greater consumer confidence in the organic brand translates into growth for all parties involved.

VIII. CONCLUSION

The current state of organic fertilizer regulation is most reflected in the fact that the NOP is part of the Agricultural Marketing Service.²⁰¹ While marketing is certainly important to expand sales of organic products, the key regulatory issues in the organic industry go far beyond marketing. The focus must be on the actual production of crops and the organic inputs that are used, so that when a consumer purchases an organic product they can be confident that the product they receive is truly organic.

Increasing the federal regulatory oversight for organic fertilizers will not create a perfect system of protection from organic fertilizer fraud. However, it would provide many benefits for the industry that are necessary for its continued expansion, and for the integrity of the organic brand in the eyes of the consumer. It is vital that the industry is able to move beyond the very basic system of regulation that exists today into a more comprehensive environment where the USDA can approve individual input products. Organic input manufacturers must be audited and inspected under the direct authority of the NOP, in the same manner as the organic agricultural products they are used to produce. To do otherwise results in a fatally flawed system that undercuts the valuable integrity and trustworthiness of the organic brand.

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²⁰¹ NATIONAL ORGANIC PROGRAM, *supra* note 5.