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Perpetual Twilight

HOW THE USDA'S CHANGE TO THE SUNSET PROCESS VIOLATES THE ORGANIC FOODS PRODUCTION ACT OF 1990

“The birthright of all living things is health. This law is true for soil, plant, animal and man: the health of these four is one connected chain. Any weakness or defect in the health of any earlier link in the chain is carried on to the next and succeeding links, until it reaches the last, namely, man.”¹

INTRODUCTION

On April 29, 2014, as Miles McEvoy, the Deputy Administrator of the National Organic Program (NOP),² prepared to address the National Organic Standards Board (the Board or

¹ SAMUEL FROMARTZ, ORGANIC, INC. 1 (2006) (quoting Sir Albert Howard). Sir Albert Howard is credited as the founder and pioneer of the organic movement. Joseph Heckman, *A History of Organic Farming: Transitions from Sir Albert Howard's War in the Soil to the USDA National Organic Program*, WESTON A. PRICE FOUND. (July 21, 2007), <http://www.westonaprice.org/health-topics/a-history-of-organic-farming-transitions-from-sir-albert-howards-war-in-the-soil-to-the-usda-national-organic-program/> [http://perma.cc/W45Y-SZWU]. He wrote many popular books, such as *An Agricultural Testament*, setting forth his ideas about composting, soil fertility, and health and disease. *Id.* In his book, *Soil and Health*, he introduced the idea that unhealthy soil causes diseases and that a movement towards organic farming techniques would eradicate diseases in humans, plants, and animals. *Id.*

² *Statement on Arrest of Organic Consumers Association Political Director at National Organic Meeting in San Antonio*, ORGANIC CONSUMERS ASS'N (Apr. 30, 2014) [hereinafter *Statement on Arrest*], <https://www.organicconsumers.org/press/statement-arrest-organic-consumers-association-political-director-national-organic-meeting-san> [http://perma.cc/TS7V-VKWG]. At the April 29, 2014, NOSB meeting, McEvoy described his position as follows: “I’m the deputy administrator in the Agricultural Marketing Service, I’m the Program Manager of the National Organic Program, and I’m the Designated Federal officer of the National Organic Standards Board.” Miles McEvoy, Address at the Meeting of the NOSB (Apr. 29, 2014) [hereinafter McEvoy Address to NOSB], <https://www.ams.usda.gov/sites/default/files/media/transcripttx.pdf> [http://perma.cc/6U2U-DQA4]. The National Organic Program is a regulatory program existing within the USDA Agricultural Marketing Service. *National Organic Program*, USDA AGRIC. MKTG. SERV., <http://www.ams.usda.gov/about-ams/programs-offices/national-organic-program> [http://perma.cc/248D-DU8M] (last visited June 27, 2016). It was created by the OFPA under section 6503 to implement national standards for organically produced agricultural products. *See id.*; 7 U.S.C. § 6503 (2012). These regulations ensure that products affixed with the USDA organic label are produced under “consistent, uniform standards.” *National Organic Program, supra*.

NOSB) at its annual spring meeting, he was disrupted by protestors waving “Safeguard Organic Standards” banners while chanting “Don’t Change Sunset.”³ The protestors presented McEvoy with a petition signed by over 75,000 organic consumers.⁴ The petition demanded that the NOP restore the Sunset Process of the Organic Foods Production Act of 1990 (OFPA),⁵ which required review every five years of exemptions for nonorganic substances used in USDA-certified organic foods.⁶ The seriousness of the protestors’ message was made clear when Alexis Baden-Mayer, the political director of the Organic Consumers Association (OCA),⁷ who demanded that the activists’ concerns be addressed before the meeting could commence,⁸ was arrested after refusing to comply with police efforts to suppress the protest.⁹ Consumer interest groups commenting on Baden-Mayer’s arrest asserted that she was carried off by police and denied the opportunity to participate in the meeting for “simply . . . believing that foods with the organic label should meet high standards of not having synthetic ingredients,” a belief most organic consumers share.¹⁰ The consumer interest groups expressed strong discontent towards the amended Sunset Process, which allows for an exempted substance to remain on the National List of Approved and Prohibited Substances (the National List or the List)¹¹ indefinitely unless a two-thirds

³ *Statement on Arrest*, *supra* note 2; Lauren McCauley, *Food Defenders Protest Corporate Takeover of ‘Organic’ Standards*, COMMON DREAMS (Apr. 29, 2014), <http://www.commondreams.org/news/2014/04/29/food-defenders-protest-corporate-takeover-organic-standards> [<http://perma.cc/8WCA-7N8G>].

⁴ *Statement on Arrest*, *supra* note 2.

⁵ Organic Foods Production Act of 1990, 7 U.S.C. §§ 6501-6522 (2012).

⁶ *Id.*

⁷ The OCA is the only U.S. nonprofit organization “focused exclusively on promoting the views and interests of the nation’s estimated 50 million organic and socially responsible consumers.” *About OCA*, ORGANIC CONSUMERS ASS’N, <https://www.organicconsumers.org/about-oca> [<http://perma.cc/WL75-A882>] (last visited June 27, 2016). One aspect of OCA’s platform is the “phas[ing]-out of the most dangerous industrial agriculture and factory farming practices.” *Id.*

⁸ *Id.*

⁹ McCauley, *supra* note 3.

¹⁰ *Stop Organic Tyranny at the USDA! Arrest at USDA NOSB Meeting in Texas*, FOOD DEMOCRACY NOW (May 2, 2014, 12:42 PM), http://www.fooddemocracynow.org/blog/2014/may/2/stop_organic_tyranny_at_the_usda_nop [<http://perma.cc/HAB4-984B>] (stating that Baden-Meyer was arrested and “carried . . . off in handcuffs for daring to stand up against the USDA’s watering down of organic standards”); *see also Statement on Arrest*, *supra* note 2 (arguing that Baden-Meyer’s arrest is indicative of the “need [for] a new balance of power between the organic community and the organic industry”); McCauley, *supra* note 3 (referring to a Consumer Reports survey finding that seven out of ten Americans desire fewer exemptions for nonorganic ingredients in organic foods).

¹¹ The National List contains both exemptions for nonorganic substances that are approved for use in organic production and prohibitions of organic or naturally occurring substances such as arsenic. 7 U.S.C. § 6517(e); S. REP. NO. 101-357, at 297 (1990) (“The Committee recognizes that certain natural materials present environmental

majority of the Board votes affirmatively on a motion to remove the substance from the List,¹² condemning it as the “last straw” in the corporate-backed erosion of organic standards.”¹³ Now that an exception or prohibition does not automatically phase out after five years without two-thirds of the Board’s approval, consumer advocacy groups predict that the new Sunset Process will not result in the removal of many sunseting substances, due to the overwhelming representation of corporate interests on the Board.¹⁴

The annual spring Board meeting was the appropriate setting for the protest, as a number of exemptions for synthetic materials permitted for use in organic production were due for reconsideration and review,¹⁵ including the antibiotic streptomycin, used on apples and pears; methionine, used in poultry feed;¹⁶ sausage casings from nonorganic livestock; and synthetic vitamins.¹⁷ Congress delegated the task of determining which synthetic substances are suitable for recommendation to the National List to the 15-member Board.¹⁸ In McEvoy’s address to the Board following the protests, however, he stated that the Board simply served an “advisory” role to justify the USDA’s change to the Sunset Process.¹⁹ Consumer advocacy groups perceived McEvoy’s recharacterization of the Board’s role as not only an attack on the democratic nature of the NOSB but also a diminishment of the organic label.²⁰

and health hazards. An example would be the use of arsenic which, although natural, is known to be extremely toxic, and which is therefore explicitly prohibited from use in organic production under this title.”). The process by which materials are approved or prohibited is the same. 7 U.S.C. § 6517(e). This note focuses solely on exemptions for nonorganic substances.

¹² 7 C.F.R. § 205 (2013); *Organic Stakeholders Sue USDA over Alleged ‘Power Grab.’* AGRI-PULSE (Apr. 8, 2015), <http://www.agri-pulse.com/Organic-stakeholders-sue-USDA-over-alleged-power-grab-04082015.asp> [<http://perma.cc/M2E8-N53T>].

¹³ McCauley, *supra* note 3.

¹⁴ See, e.g., *Statement on Arrest*, *supra* note 2.

¹⁵ *Deliberations Begin on Approving Artificial Ingredients in Organic Production: Consumer Reports Survey Show 7 Out of 10 Americans Want as Few Approved as Possible*, DIGITAL J. (Apr. 29, 2014) [hereinafter *Deliberations Begin on Approving Artificial Ingredients in Organic Production*], <http://www.digitaljournal.com/pr/1879911> [<http://perma.cc/3HJ7-6YP3>].

¹⁶ *Id.*

¹⁷ McCauley, *supra* note 3.

¹⁸ *Deliberations Begin on Approving Artificial Ingredients in Organic Production*, *supra* note 15; see 7 U.S.C. § 6517(d)(1)-(2) (2012).

¹⁹ See McEvoy Address to NOSB, *supra* note 2, at 56, 63; see also *Stop Organic Tyranny at the USDA! Arrest at USDA NOSB Meeting in Texas*, *supra* note 10 (stating that McEvoy’s position that the NOSB serves only an “advisory” role empowered the USDA to make unilateral changes to the Sunset Process).

²⁰ *Stop Organic Tyranny at the USDA! Arrest at USDA NOSB Meeting in Texas*, *supra* note 10 (asserting that the USDA’s “power grab” undermined “the democratic nature of NOSB/NOP process [that is] at the crux of the vigorous debate in the organic community” and was “one of the biggest assaults on the integrity of organic foods ever conceived”); see McCauley, *supra* note 3 (quoting Mark A. Kastel, Codirector of

The NOSB protest illuminated the tenuous connection between consumers, who are willing to pay on average 47% more for organic foods they believe are grown in a safe and environmentally friendly manner,²¹ and organic food producers, largely influenced by “Big Food.”²² In 1995, there were 81 independent organic food producers.²³ By 2014, 66 of those were acquired by major corporations, such as General Mills, Kellogg, Purdue, and Coca-Cola.²⁴ Big Food’s consolidation of organic processing has given these corporations immense clout in shaping national organic standards to be more conducive to their financial interests.²⁵ This is evidenced by the correlation between increased corporate membership on the Board and the increase in exemptions for nonorganic substances on the National List; in 2002, there were 77 exemptions, and by 2012, there were

the Cornucopia Institute, as explaining that “agribusiness’ and corporate food companies ‘had their minions at the [USDA] change the rules in order to push ‘gimmicky synthetics and nutraceuticals in organic food’”).

²¹ *The Cost of Organic Food: A New Consumer Reports Study Reveals How Much More You’ll Pay. Hint: Don’t Assume Organic Is Always Pricier*, CONSUMER REP. (Mar. 19, 2015, 12:00 PM) [hereinafter *The Cost of Organic Food*], <http://www.consumerreports.org/cro/news/2015/03/cost-of-organic-food/index.htm> [<http://perma.cc/PTR9-36DW>]. This estimate comes from a Consumer Reports survey that compared the price of over 100 organic food products to that of their conventional counterparts and found that sometimes an organic product was either cheaper or the same price as its conventionally grown equivalent, though that was largely influenced by the store where the items were purchased. *Id.*

²² See Peter Whoriskey, *Your Favorite Organic Brand Is Actually Owned by a Multinational Food Company*, WASH. POST (May 6, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/05/06/your-favorite-organic-brand-is-actually-owned-by-a-multinational-food-company/> [<http://perma.cc/TT4U-DZCH>] (discussing how the rise of organic sales has led some of the nation’s largest food companies to buy smaller organic companies); see also James Greiff, *Buy Organic, Help Big Food*, BLOOMBERG VIEW (June 13, 2014, 12:02 PM), [http://perma.cc/GWS3-5HVM](http://www.bloombergview.com/articles/2014-06-13/buy-organic-help-big-food)] (“[I]f you buy organic, it’s possible you are helping a small, independent food producer engaged in sustainable and ethical agriculture. But odds are your dollars are going to Big Food.”); A. Christine Green, *The Cost of Low-Price Organics: How Corporate Organics Have Weakened Organic Food Production Standards*, 59 ALA. L. REV. 799, 820 (2008) (“The number of corporate mammoths acquiring or creating their own organic brands has risen exponentially and will only gain speed . . .”).

²³ *Who Owns Organic Now?: New Info Graphic Tracks the Corporate Takeover of Organics . . .*, CORNUCOPIA INST. (Feb. 13, 2014), <http://www.cornucopia.org/2014/02/owns-organic-now-new-info-graphic-tracks-corporate-takeover-organics/> [<http://perma.cc/78B7-3R9L>].

²⁴ *Id.*

²⁵ Stephanie Strom, *Has ‘Organic’ Been Oversized?*, N.Y. TIMES (July 7, 2012), http://www.nytimes.com/2012/07/08/business/organic-food-purists-worry-about-big-companies-influence.html?_r=0 [<http://perma.cc/5NA3-YF53>] (discussing the tremendous influence of Big Food on setting the standards for organic foods); Whoriskey, *supra* note 22 (quoting Arjan Stephens, Vice President of Nature’s Path, an organic company that has remained independently owned, as stating that while Big Food has helped foster the growth of the organic industry, it “often comes with a diluted product line . . . and decisions based solely on profits not people”).

more than 250.²⁶ The 2013 change to the Sunset Process effectively ensures that the list of approved nonorganic materials will not remain limited as the OFPA intended,²⁷ shedding further light on Big Food's tremendous influence over defining organic standards.²⁸ With Big Food yielding such great power, consumers' interests are severely undercut.

The reconciliation of consumer and corporate interests was a central concern of the Organic Foods Production Act of 1990. Two important compromises resulted: the National List²⁹ and the National Organic Standards Board.³⁰ According to the OFPA, the general rule is that organic products must be grown and processed without the use of synthetic substances unless the Act otherwise provides for an exception on the National List.³¹ The NOSB reviews petitions for the National List utilizing specific criteria, taking into account the organic industry's need for the synthetic substance and its effects on human health and the environment.³² Upon completion of the NOSB's review, it develops a Proposed National List or proposes amendments to the List for review by the Secretary of Agriculture (the Secretary).³³ The Secretary then has the sole authority to establish the National List based on the NOSB's recommendations.³⁴ In creating the National List, the Secretary must consider whether the substance is detrimental to human health or the environment, the availability of a natural substitute, and whether the substance is in conformity with organic handling and farming.³⁵ The procedure for establishing the National List reflects the careful balance of upholding the interests of the

²⁶ Strom, *supra* note 25.

²⁷ See S. REP. NO. 101-357, at 298 (2012).

²⁸ See 7 U.S.C. § 6504(1) (2012) (requiring agricultural products labeled or sold as organic under the OFPA to "have been produced and handled without the use of synthetic chemicals, except as otherwise provided in this chapter"); Beth Hoffman, *Who Owns Organic Brands and Why You Should Care*, FORBES (May 25, 2013, 9:03 AM), <http://www.forbes.com/sites/bethhoffman/2013/05/25/who-owns-organic-brands-and-why-you-should-care/#22a3a7951c59> [<http://perma.cc/QZR5-H6P2>] (quoting Dr. Phillip H. Howard of Michigan University, explaining how "[i]t's very common that when an organic food brand is acquired . . . the new parent corporation reduces its commitment to organic ingredients and seeks out cheaper substitutes").

²⁹ 7 U.S.C. § 6518(k)(2).

³⁰ *Id.* § 6518(a).

³¹ See *id.* § 6504; see also § 6517(c); Green, *supra* note 22, at 803.

³² Miles McEvoy, *Organic 101: Allowed and Prohibited Substances*, USDA BLOG (Jan. 25, 2012, 5:36 PM), <http://blogs.usda.gov/2012/01/25/organic-101-allowed-and-prohibited-substances/> [<http://perma.cc/MAY3-VHE9>]; see 7 U.S.C. § 6518 (l)-(m). The National List contains both exemptions for synthetic materials and prohibitions of natural substances. 7 U.S.C. § 6517(b). Therefore, the NOSB may review petitions to the National List for exceptions for synthetic materials and prohibitions of natural substances.

³³ 7 U.S.C. § 6517(d)(1).

³⁴ *Id.*

³⁵ *Id.* § 6517(e)(1)(A).

organic industry without compromising the integrity of the organic label.³⁶

The OFPA further works to balance corporate and consumer interests through the National Organic Standards Board.³⁷ The OFPA authorizes the Secretary, who is appointed by the President as the head of the USDA, to nominate the Board.³⁸ The Secretary is to consult with the Board regarding “the development of standards for substances to be used in organic production” and other aspects of the OFPA’s implementation.³⁹ The Secretary must elect a Board with a composition that reflects the varying interests at stake in the organic industry.⁴⁰ For instance, three Board seats are reserved for public interest or consumer interest groups⁴¹ to ensure that consumers are represented in developing organic production standards.⁴² While the Secretary retains the ultimate authority to approve a substance for the National List,⁴³ the Secretary is prohibited

³⁶ See S. REP. NO. 101-357, at 298 (1990) (discussing the NOSB’s review of substances for the National List in order to highlight the “basic tenet” of the OFPA that “there are few limited exceptions to the non-synthetic rule”).

³⁷ See *id.* at 296 (“The membership of this Board was carefully selected to provide a balance of interests.”).

³⁸ 7 U.S.C. § 6518(a); USDA ORGANIZATION CHART, USDA, <http://www.usda.gov/documents/usda-organization-chart.pdf> [<http://perma.cc/UFK8-Q4K3>] (last visited June 27, 2016); see *Secretary’s Page*, USDA, http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=secretarys_page.xml [<http://perma.cc/5QDL-Q37W>] (last updated May 14, 2015) (The current Secretary of Agriculture, Tom Vilsack, was appointed by President Obama in 2009).

³⁹ 7 U.S.C. § 6518(a).

⁴⁰ *Id.* § 6518(b) sets forth the composition of the 15-member Board:

- (1) four shall be individuals who own or operate an organic farming operation;
- (2) two shall be individuals who own or operate an organic handling operation;
- (3) one shall be an individual who owns or operates a retail establishment with significant trade in organic products;
- (4) three shall be individuals with expertise in areas of environmental protection and resource conservation;
- (5) three shall be individuals who represent public interest or consumer interest groups;
- (6) one shall be an individual with expertise in the fields of toxicology, ecology, or biochemistry; and
- (7) one shall be an individual who is a certifying agent as identified under section 6515 of this title.

Id.

⁴¹ *Id.*

⁴² § 6518(a); see also McEvoy Address to NOSB, *supra* note 2, at 53 (remarking that the USDA is “responsible for controlling the undue influence of special interests by balancing [NOSB] membership”).

⁴³ 7 U.S.C. § 6517(a).

from adding exemptions that have not been approved by a two-thirds majority of the Board.⁴⁴ The OFPA's rigorous review process and allocation of shared responsibility to the Board and the Secretary for developing the National List indicates that the drafters intended to recognize few exemptions for nonorganic substances and sought to avoid unlimited exceptions or "loopholes" in organic standards.⁴⁵

This note argues that the amended Sunset Process violates the intent and plain letter of the Organic Foods Production Act. Part I provides background information on the OFPA and describes how the growth of the organic movement and the need for uniformity motivated Congress to enact a federal scheme to develop and regulate organic standards, recognizing that failure to do so would cripple the expansion of the organic sector. Additionally, it describes the Board, its composition, and its roles and authority, and argues that at the core of the Board's statutorily granted responsibilities and power is the notion that it functions as the collective voice of the whole organic community. Part I also explains the National List, outlines the process by which it is created, with a specific focus on the Sunset Process, and criticizes the 2013 USDA action for creating the very loopholes in organic standards that the drafters sought to prevent and that have watered down USDA standards and diminished organic labels' integrity.

Part II analyzes the USDA's change to the Sunset Process through the intent and statutory language of the Act and further assesses the Board's diminished role and responsibility under the amended Sunset Process. Given the corporate influence on the organic industry and the Board, this part argues that the amended process eliminates an essential self-check in the form of the Board's authority to review its prior exception decisions. Part II concludes that the amended Sunset Process violates the intent and plain letter of the OFPA.

Finally, Part III proposes that the USDA reinstate the Sunset Provision as it stood prior to the 2013 amendment to restore the "basic tenet"⁴⁶ of organic standards—that consumers do not want artificial ingredients in their organic food.⁴⁷ If the

⁴⁴ *Id.* §§ 6517(d)(2), 6518(i).

⁴⁵ S. REP. NO. 101-357, at 298, 546-47.

⁴⁶ S. REP. NO. 101-357, at 298. Consumer belief that there are no synthetics in organic foods is "the basic tenet" of the OFPA, notwithstanding a "few limited exceptions." *Id.*

⁴⁷ *Deliberations Begin on Approving Artificial Ingredients in Organic Production*, *supra* note 15 (quoting Dr. Urvashi Rangan, Executive Director of Consumer Reports Food Safety and Sustainability Center, discussing the tension between consumers, who want as

USDA and NOP continue to expand the National List through maneuvers like the amended Sunset Process, the integrity of the organic label will deteriorate and cause consumers to rethink their decision to pay higher premiums for organic food.⁴⁸ As a consequence, the unprecedented growth the organic foods industry has realized will be stunted.⁴⁹

I. HISTORY OF THE ORGANIC FOODS PRODUCTION ACT OF 1990

By the time Congress enacted the Organic Foods Production Act of 1990, there was already an overwhelming demand for organic products in the United States.⁵⁰ Harris polls in 1988 and 1989 revealed that 84% of Americans wanted to buy organic produce, and at least half were willing to pay more for those products.⁵¹ Although consumers expressed a willingness to consume organically produced foods, the growth of the organic food industry was hindered due to the absence of consistent production standards.⁵² At the time the OFPA was enacted, 22 states had implemented varying organic certification systems, leaving consumers with the impossible task of construing what each state's organic label meant.⁵³ In 1990, Congress decided that it was the right time to implement national organic standards "so that farmers know the rules, so that consumers are sure to get what they pay for, and so that national and international trade in organic foods may prosper."⁵⁴

The transparency of the organic label was one of the central concerns underlying Congress's decision to enact federal organic certification standards.⁵⁵ The OFPA was enacted at a time when the organic industry was gaining popularity and the only obstacle in the way of its expansion was the confusion caused by

few exceptions as possible, and NOP advisors and decision-makers, who want to increase the exemptions on the National List to expand the organic market).

⁴⁸ See, e.g., Jay Feldman & Terry Shistar, *The "Age of Organics": Advocates Want the Public to Take Back Organic and Build Trust in the Organic Label*, 33 PESTICIDES & YOU 19, 19 (2013-2014), <http://www.beyondpesticides.org/assets/media/documents/AgeofOrganic.pdf> [<http://perma.cc/9Y7W-BU2A>] (stating that exponential demand for organic foods is not proof of "long-term trust in the organic label" and that "[e]nsuring trust in the process by which standards are developed is central to sustained growth of the organic brand").

⁴⁹ See *id.*

⁵⁰ S. REP. NO. 101-357, at 289.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

state certification systems.⁵⁶ The state labeling schemes left consumers wary of buying organic due to the lack of consistency and transparency.

The importance of transparency in the organic label is embodied in the OFPA's implementation of a National List and the democratic process for creating it. Pursuant to the OFPA, the Secretary is authorized to nominate the Board, which advises the Secretary in creating standards for the National Organic Program.⁵⁷ The Board reviews petitions for exceptions for synthetic ingredients and prohibitions of natural substances, hears public comment on the petitioned substances, and then develops a Proposed National List or proposed amendments to the National List for the Secretary's review and approval.⁵⁸ The Secretary then establishes the National List based on the Board's proposals.⁵⁹ The import of the general bar on synthetics is further evidenced by the pre-2013 Sunset Provision, which required that any approved substance on the National List phase out after five years of its approval unless the Board voted to renew the substance.⁶⁰

The National List procedures set out in the OFPA require the Secretary and the Board to collaborate in creating the National List. The 2013 USDA action, however, has undermined this mutual participation. The change to the Sunset Process strips the Board of much of its power to participate in establishing the National List. Prior to 2013, the Secretary did not have the authority to add an exception to the National List unless two-thirds of the Board voted to recommend it. The 2013 USDA action allows the Secretary to relist an exception even though a majority of the Board has not recommended it or even reviewed the proposal. To understand how the amended Sunset Provision is contrary to the OFPA, it is critical to consider the rise of the organic movement and what prompted the federal government to intervene in the organic industry.

⁵⁶ *Id.*

⁵⁷ See generally 7 U.S.C. § 6518 (2012) (requires the Secretary to appoint the Board "to assist in . . . develop[ing] standards for substances . . . used in organic production and to advise the Secretary on any other aspects of the implementation of" the OFPA). The NOP is a regulatory program within the USDA and is "responsible for developing national standards for organically-produced agricultural products," assuring "consumers that products with the USDA organic seal meet consistent, uniform standards." *National Organic Program*, USDA, <https://www.ams.usda.gov/about-ams/programs-offices/national-organic-program> [<http://perma.cc/2FL3-TKF4>] (last visited July 5, 2016).

⁵⁸ See 7 U.S.C. § 6517(d); see also Notification of Sunset Process, 78 Fed. Reg. 56811 (Sept. 16, 2013).

⁵⁹ See 7 U.S.C. § 6517(d); see also Notification of Sunset Process, 78 Fed. Reg. 56811 (Sept. 16, 2013).

⁶⁰ See 7 U.S.C. § 6517(e).

A. *The Organic Movement*

“Organic” was not always the buzzword it is today. In fact, “organic” was a reaction to the industrial farming that emerged to address food shortages during World War II.⁶¹ Industrialized farming replaced manual labor with machines and introduced synthetic fertilizers, but this productivity came at the expense of the environment and society’s health.⁶² “Organic farming” emerged based on the belief that the benefits of increased production should not outweigh industrial farming’s risks to the environment and human health.⁶³

In the ensuing years, mainstream culture was exposed to the famous writings of organic farming’s proponents, who brought the values underlying the movement into the public consciousness. In 1940, J. I. Rodale started *Organic Gardening and Farming* magazine to advance the ideas of Sir Albert Howard, the father of the organic movement.⁶⁴ Sir Albert Howard taught “that using compost to enhance soil fertility instead of chemical fertilizers resulted in a healthier soil structure, more nutritious food, and subsequently, healthier human beings.”⁶⁵ Rodale’s magazine reached its high mark of popularity following the emergence of the environmental movement, introduced by Rachel Carson’s book, *Silent Spring*.⁶⁶

Carson wrote extensively about DDT, a pesticide introduced during World War II, that was capable of killing hundreds of different kinds of insects.⁶⁷ Carson revealed her findings that DDT, when in “the food chain . . . accumulated in the fatty tissues of animals, including human beings, and caused cancer and genetic damage.”⁶⁸ She further evidenced that “a single application [of

⁶¹ TRACY WONG, OCCIDENTAL COLL., THE ORIGIN OF ORGANIC FOOD: RISING OF ORGANIC MOVEMENT IN THE U.S. 1 (2013), http://www.oxy.edu/sites/default/files/assets/UEP/Summer_Research/Tracy%20research%20Organic.pdf [<http://perma.cc/7YDC-TUWY>].

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Sir Albert Howard Biography*, IFOAM, <http://www.ifoam.bio/en/sir-albert-howard> [<http://perma.cc/2G5U-FDCU>] (last visited June 27, 2016).

⁶⁵ Kate L. Harrison, *Organic Plus: Regulating Beyond the Current Organic Standards*, 25 PACE ENVTL. L. REV. 211, 213-14 (2008).

⁶⁶ *Id.* at 214; see generally RACHEL CARSON, *SILENT SPRING* (1962) (Carson warned of the dangers of exposure to synthetic pesticides, such as DDT, for plants, animals, and humans, leading to the rise of the 1960s environmentalist movement.).

⁶⁷ *The Story of Silent Spring*, NAT’L RES. DEF. COUNCIL (Dec. 5, 2013), <http://www.nrdc.org/health/pesticides/hcarsonasp> [<http://perma.cc/UQM9-ET32>]; see CARSON, *supra* note 66, at 16.

⁶⁸ *The Story of Silent Spring*, *supra* note 67; see CARSON, *supra* note 66, at 16, 22-23 (explaining how synthetic pesticides such as DDT “are passed on from one organism to another through all the links of the food chains,” including from a breastfeeding mother to her child, and “may initiate in certain cells the slow and irreversible change that leads to malignancy”).

DDT] on a crop . . . killed insects for weeks and months, and not only the targeted insects but countless more, and remained toxic in the environment even after it was diluted by rainwater.”⁶⁹ Carson’s book raised awareness among the American public of the dangers of chemical contamination of the food supply to the human species in the form of deadly diseases like cancer.⁷⁰ Even more frightening was the revelation that such chemicals, once introduced into the food supply, could affect generations.⁷¹ Consequently, “organic agriculture has become a philosophical reaction to technology, striving to eliminate all ‘chemicals’ except those that are ‘natural’ or ‘organic.’”⁷² This ideal has become imbued into the modern organic movement.⁷³

In 1989, the Natural Resources Defense Council⁷⁴ published “Intolerable Risk,” a study setting forth evidence that legally permissible pesticides exacerbate the risk of cancer in children.⁷⁵ Following the study, CBS’s *60 Minutes* featured a story on Alar, a pesticide used to artificially manipulate the size and color of apples, emphasizing its risks as a carcinogen.⁷⁶ This caused an uproar among American consumers—supermarkets took apples off the shelves and schools took them out of cafeterias, causing apple producers to lose millions in sales.⁷⁷

These pesticide scandals were instrumental in defining “organic” as an alternative method of food production.⁷⁸ While a

⁶⁹ *The Story of Silent Spring*, *supra* note 67.

⁷⁰ *Id.*; see CARSON, *supra* note 66, at 22-23.

⁷¹ See *The Story of Silent Spring*, *supra* note 67 (stating that Carson’s book brought to light the threats posed by the use of pesticides, including “the contamination of the food chain, cancer, genetic damage, [and] the deaths of entire species”).

⁷² See Lauren Zeichner, *Product vs. Process: Two Labeling Regimes for Genetically Engineered Foods and How They Relate to Consumer Preference*, ENVIRONS ENVTL. L. & POL’Y J. 467, 469 (2004).

⁷³ *Id.*

⁷⁴ The Natural Resources Defense Council (NRDC) works to influence corporations and the federal government to eliminate dangerous chemicals in our food supply. *Food*, NRDC, <https://www.nrdc.org/issues/food> [<http://perma.cc/SC64-8MCE>] (last visited June 27, 2016). The NRDC focuses on efforts to reduce the use of pesticides because of their devastating effects on human health, such as “cancers, birth defects, and learning disabilities.” *Ban Dangerous Pesticides*, NRDC, <https://www.nrdc.org/issues/ban-dangerous-pesticides> [<http://perma.cc/3Q5R-EM2R>] (last visited June 27, 2016).

⁷⁵ BRADFORD H. SEWELL ET AL., NRDC, INTOLERABLE RISK: PESTICIDES IN OUR CHILDREN’S FOOD 1 (Feb. 27, 1989), https://www.nrdc.org/sites/default/files/hea_11052401a.pdf [<http://perma.cc/GH9M-DJTJ>]; see also Steve Lustgarten, *Organics Take Root*, VEGETARIAN TIMES, June 1993, at 75.

⁷⁶ See Elliott Negin, *The Alar “Scare” Was for Real; and So Is That “Veggie Hate-Crime” Movement*, COLUM. JOURNALISM REV. (1996), <http://www.pbs.org/tradesecrets/docs/alarscarenegin.html> [<http://perma.cc/3CEX-TYTJ>].

⁷⁷ *Id.* Alar became a potential carcinogen when apples underwent heat processing to make juice and applesauce, products primarily consumed by children. FROMARTZ, *supra* note 1, at 4.

⁷⁸ See Aubrey Parlet, *Organic Foods Production: What Consumers May Not Know About the Use of Synthetic Substances*, 21 LOY. CONSUMER L. REV. 392, 394 (2009).

federal definition of “organic” did not yet exist, by the 1990s it meant foods grown without harmful pesticides like DDT and Alar.⁷⁹ This definition reflected society’s sensitivity to the risks that pesticides and other synthetics used in food production posed for humans and the environment.⁸⁰ Consequently, a heightened awareness of food production methods emerged, and it was evident that a national regulatory scheme was necessary to facilitate the burgeoning organic market.⁸¹

The origin of the organic movement is rooted in emerging public awareness of the dangers of industrial agricultural productivity and concerns about how agribusiness’s practices affect environmental sustainability and human viability. As the public became increasingly aware of the detrimental effects of pesticides and other synthetic chemicals on their health and the environment, they sought out alternatives to conventionally⁸² grown foods. The prevailing consensus on the dangers of synthetics and consumers’ concerns about finding safer, alternative foods undoubtedly influenced the OFPA’s organic standards.⁸³ The drafters of the OFPA placed consumer expectations for synthetic-free organics at the forefront of many of the Act’s provisions.⁸⁴ In fact, the National List and the Sunset Provision are two explicit examples. While the National List does not entirely eradicate the use of synthetic ingredients in organic production, its rigorous review reflects the ideology that organic food should contain as few synthetic materials as possible.⁸⁵ Since the pre-2013 interpretation of the Sunset Provision exempted a synthetic material for only five years, it left organic food producers uncertain of whether the Board would renew the substance, thus encouraging discovery of organic alternatives in production methods.⁸⁶

⁷⁹ *See id.*

⁸⁰ *See id.*

⁸¹ *See* Kenneth C. Amaditz, *The Organic Foods Production Act of 1990 and Its Impending Regulations: A Big Zero for Organic Food?*, 52 *FOOD & DRUG L.J.* 537, 540 (1997); *see also* S. REP. NO. 101-357, at 293 (1990). The drafters of the OFPA explicitly stated that they were not suggesting that organically grown foods were “health[ier], [more] nutritious, or flavorful” than nonorganic foods. *Id.*

⁸² For purposes of this note, “conventional” means foods that are nonorganic.

⁸³ *See* S. REP. NO. 101-357, at 297-99.

⁸⁴ *See id.*

⁸⁵ *See id.* at 298 (“The Committee does not intend to allow the use of many synthetic substances.”).

⁸⁶ McCauley, *supra* note 3 (quoting Katherine Paul, OCA Communications Director, explaining that the Sunset Process “was designed to ensure that these non-organic materials would only be temporarily allowed in organic foods until a better, organic option was found”).

B. *It's About Time—Congress Enacts Rules for Organic Food*

In the 1990s, organic farming was no longer a grassroots movement led by organic farmers.⁸⁷ Instead, it became one of the fastest growing segments of the U.S. agricultural sector.⁸⁸ Between 1990 and 2000, organic sales increased by more than 20% annually, reaching \$3.3 billion in 1996.⁸⁹ In 2014, consumers bought \$5.5 billion worth of organic food.⁹⁰ Much of the organic food industry's success can be attributed to Congress's enactment of the OFPA.⁹¹ Prior to Congress's implementation of a federal scheme for organic certification, consumers were faced with the impossible task of deciphering what state and private organic labels meant.⁹² Under the state regulations, the organic label could be affixed to a product containing anywhere between 20% to 100% organic ingredients.⁹³ Slight variations in organic standards in dairy cow feed caused "havoc" in the organic milk industry, as some states required that dairy cows' diets consist of organic feed, while some states required unmedicated feed and others prescribed a particular feed to be used during certain time periods.⁹⁴ Some producers exploited the lack of government oversight, the disarray of organic standards, and consumers' willingness to pay higher premiums for organic foods by fraudulently labeling and selling conventionally grown products as organic.⁹⁵ This led to misgivings about the authenticity of the organic label and caused large food retailers and distributors to refrain from carrying organic foods.⁹⁶ This

⁸⁷ Zeichner, *supra* note 72, at 471.

⁸⁸ *Id.*

⁸⁹ *Id.* (by 2000, organic sales grew to an estimated \$7.8 billion).

⁹⁰ News Release, USDA Census of Agric., Sales from U.S. Organic Farms Up 72 Percent, USDA Reports (Sept. 17, 2015), http://www.agcensus.usda.gov/Newsroom/2015/09_17_2015.php [<http://perma.cc/SW6Q-V6ZW>] (reporting that \$5.5 billion in sales accounts for sales of organic products by "14,093 certified and exempt organic farms"). Exempted organic farms are those that sell less than \$5,000 a year in agricultural products, and therefore, the OFPA does not apply to them. 7 U.S.C. § 6505(d) (2012).

⁹¹ See generally ELISE GOLAN ET AL., ECON. RESEARCH SERV., USDA, AER-793, ECONOMICS OF FOOD LABELING iv (2000), <http://www.ers.usda.gov/media/532216/aer793.pdf> [<http://perma.cc/S2U9-W2AG>] (discussing the economics of food labeling and how the government's decision to regulate a particular label usually occurs "when the market does not supply enough information to allow consumers to make consumption choices mirroring their preferences").

⁹² Zeichner, *supra* note 72, at 472; see S. REP. NO. 101-357, at 289 (1990).

⁹³ S. REP. NO. 101-357, at 289.

⁹⁴ *Id.*

⁹⁵ *Id.* at 289-90.

⁹⁶ *Id.* at 290.

meant that even if consumers wanted to purchase organic foods, their access to these foods was limited.⁹⁷

In response to the practice of fraudulent labeling and the resulting illegitimacy of the organic label, major organic-industry trade associations, consumer interest groups, the National Association of State Departments of Agriculture, and the American Farm Bureau Federation called on Congress to devise a national organic labeling program to alleviate these issues.⁹⁸ Congress responded with the Organic Foods Production Act of 1990.⁹⁹ While the OFPA did not provide an explicit definition of “organic,” it delegated that task to the USDA through the National Organic Program.¹⁰⁰ The OFPA set guidelines for the NOP in creating organic standards, requiring that products sold and marketed as organic

- (1) have been produced and handled without the use of synthetic chemicals, except as otherwise provided in this chapter;
- (2) except as otherwise provided in this chapter and excluding livestock, not be produced on land to which any prohibited substances, including synthetic chemicals, have been applied during the 3 years immediately preceding the harvest of the agricultural products; and
- (3) be produced and handled in compliance with an organic plan agreed to by the producer and handler of such product and the certifying agent.¹⁰¹

This framework reflected the OFPA’s focus on regulating the means of organic production rather than regulating the end product.¹⁰² In other words, organic food is food that is grown using prescribed materials and production methods.¹⁰³

While the OFPA was enacted in 1990, the NOP did not promulgate standards until September 1992.¹⁰⁴ The delayed implementation was the result of Congress’s recognition that its regulation of the organic industry was “break[ing] new ground for the Federal government and [would] require the development of a unique regulatory scheme.”¹⁰⁵ Additionally, Congress

⁹⁷ *Id.*

⁹⁸ Valerie J. Watnick, *The Organic Foods Production Act, the Process/Product Distinction, and a Case for More End Product Regulation in the Organics Foods Market*, 32 UCLA J. ENVTL. L. & POL’Y 40, 45-46 (2014).

⁹⁹ *Id.* at 46.

¹⁰⁰ *Id.*; see 7 U.S.C. § 6502 (2012) (containing no definition of “organic”).

¹⁰¹ 7 U.S.C. § 6504.

¹⁰² S. REP. NO. 101-357, at 292-93; see generally Zeichner, *supra* note 72, at 480 (discussing the OFPA’s emphasis on the methods implemented in producing organic foods).

¹⁰³ S. REP. NO. 101-357, at 293.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

wanted to ensure there was sufficient time for the Board to create a Proposed National List and for the public to debate and comment on the proposed materials.¹⁰⁶

C. *The National List*

The prevailing consumer belief is that foods labeled “USDA certified organic” are produced without the use of synthetics.¹⁰⁷ This belief is unfounded. While Congress recognized this general ban on synthetics, stating “organic food is produced using no synthetic materials other than a small list of less than 10 exceptions described in the legislation,”¹⁰⁸ the List has since grown to over 250 exemptions.¹⁰⁹

Pursuant to the OFPA, there are two ways a synthetic substance can be included on the National List. First, an individual or organization may request to add a substance through the a petition process.¹¹⁰ The petitions are evaluated by the Board, which then decides whether it will recommend the substance to the Secretary for inclusion onto (or removal from) the National List.¹¹¹ The second alternative, and the focus of this note, is the Sunset Process, set forth in the Sunset Provision.¹¹² The Sunset Provision provides that

No exemption or prohibition contained in the National List shall be valid unless the National Organic Standards Board has reviewed such exemption or prohibition as provided in this section within 5 years of such exemption or prohibition being adopted or reviewed and the Secretary has renewed such exemption or prohibition.¹¹³

Prior to the amended Sunset Process, the Board would review an approved exemption five years after its approval and would vote whether to recommend renewal of the exemption for five more years.¹¹⁴ If a two-thirds majority voted affirmatively for renewal, the substance was recommended to the Secretary for approval; however, if less than two-thirds of the Board’s votes were secured, the sunseting substance phased off of the National List.¹¹⁵ If the Board declined to recommend the substance for renewal, the Secretary did not have the authority

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 298.

¹⁰⁸ *Id.* at 292.

¹⁰⁹ Strom, *supra* note 25.

¹¹⁰ 7 U.S.C. § 6518(n) (2012).

¹¹¹ *Id.* § 6518(k)(2).

¹¹² *See id.* § 6517(e).

¹¹³ *Id.*

¹¹⁴ *See infra* Sections II.A-B.

¹¹⁵ *See infra* Sections II.A-B.

to unilaterally take such action.¹¹⁶ The amended Sunset Process reversed the substance of the Board's vote by requiring an *affirmative* two-thirds vote to remove the sunseting substance.¹¹⁷ Now, if two-thirds of the Board does not vote for removal, then the substance *automatically* renews for another five years.¹¹⁸

Both the process of petitioning to exempt a substance and the Sunset Process require specific procedures for developing the National List.¹¹⁹ The NOSB meets twice a year to consider petitions and to conduct its Sunset Review.¹²⁰ The OFPA mandates that the Secretary's finalized National List contain only the Proposed National List or proposed amendments to the National List developed by the Board.¹²¹ The Secretary does not have the authority to make exemptions to the National List that a two-thirds majority of the Board has not voted to recommend.¹²² The Senate Committee on the OFPA explicitly conveyed this check on the Secretary's power, stating, "The Proposed National List represents the universe of synthetic materials from which the Secretary may choose."¹²³ Once the Secretary has received the Proposed National List, he or she must publish it in the Federal Register for public comment.¹²⁴ Public comment is an essential component of the Sunset Process, as it accounts for 30% of the NOSB's meeting time.¹²⁵ The Secretary must also review all comments regarding the

¹¹⁶ The OFPA sets forth a specific procedure for establishing the National List, part of which reads:

(1) In general

The National List established by the Secretary shall be based upon a proposed national list or proposed amendments to the National List developed by the National Organic Standards Board.

(2) No additions

The Secretary may not include exemptions for the use of specific synthetic substance in the National List other than those exemptions contained in the Proposed National List or Proposed Amendments to the National List.

7 U.S.C. § 6517(d)(1)-(2).

¹¹⁷ See *infra* Section II.B.

¹¹⁸ See *infra* Section II.B.

¹¹⁹ 7 U.S.C. § 6517(d).

¹²⁰ See *generally* NOSB Meetings, USDA, <https://www.ams.usda.gov/rules-regulations/organic/nosb/meetings> [<http://perma.cc/S3JJ-W938>] (last visited June 27, 2016) (providing the schedule of NOSB meetings).

¹²¹ 7 U.S.C. § 6517(d)(1).

¹²² S. REP. NO. 101-357, at 299 (1990).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ McEvoy Address to NOSB, *supra* note 2, at 23.

Proposed National List and include a discussion of the comments in the published, final National List.¹²⁶

D. The National Organic Standards Board

The OFPA established the National Organic Standards Board to help the Secretary establish criteria for substances used in organic production and to advise the Secretary on executing the Act.¹²⁷ The Secretary is required to appoint 15 members to the Board¹²⁸ from the following groups: (1) four organic farm owners or operators, (2) two organic handling owners or operators, (3) an owner or operator of an organic retail establishment, (4) three experts in environmental protection and resource conservation, (5) three representatives of public interest or consumer interest groups, (6) one toxicology, ecology, or biochemistry expert, and (7) one certifying agent.¹²⁹

During Senate hearings, representation on the Board was a hotly contested issue because of the Board's significant power in setting standards for organic production.¹³⁰ Some argued that the Board should be industry dominated to maintain the "high quality standards associated with organic farming and which make sense from a production viewpoint."¹³¹ The other side of the debate argued that allowing the Board to be dominated by industry interests would create a conflict of interest.¹³² The ensuing debate resulted in a Board with a composition that reflected Congress's intent to provide a voice for each of the stakeholders in the organic industry.¹³³

The varied interests of the Board members is further evidenced by the Board's Policy and Procedures Manual, which requires that Board members avoid conflicts of interest stemming from personal or commercial contacts.¹³⁴ Board members are required to fulfill their roles and responsibilities in a manner outside of financial or personal incentives.¹³⁵ If a commercial or familial interest arises that may create a conflict of interest,

¹²⁶ 7 U.S.C. § 6517(d)(5).

¹²⁷ *Id.* § 6518(a).

¹²⁸ *Id.* § 6518(b)-(c).

¹²⁹ *Id.* § 6518(b)(1)-(7).

¹³⁰ S. REP. NO. 101-357, at 296-97 (1990).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *See id.*; *see also* NAT'L ORGANIC STANDARDS BD., POLICY AND PROCEDURES MANUAL 10 (2012), <http://www.ams.usda.gov/sites/default/files/media/NOSB-PolicyManual.pdf> [<http://perma.cc/F82X-NYK4>] (listing the three roles of the NOSB, one of which is "serv[ing] as the primary linkage to the organic community").

¹³⁴ NAT'L ORGANIC STANDARDS BD., *supra* note 133, at 7, 9.

¹³⁵ *Id.*

members must disclose the conflict to the Board.¹³⁶ To further prevent any conflicts, members receive no compensation for their five-year service on the Board.¹³⁷

In order to maintain a balance of interests on the Board, a two-thirds vote is required for any motion to pass.¹³⁸ The Board has the authority to vote on the recommendations for exemptions and prohibitions on the National List¹³⁹ and to select a chairperson.¹⁴⁰ The Board also has the more general authority to vote on any recommendations that assist the Secretary in implementing the OFPA,¹⁴¹ such as research priorities and strategies for preventing unintentional contamination of prohibited production methods.¹⁴² The OFPA imposes a quorum requirement for Board decisions,¹⁴³ which means that when all members are present and voting, nine votes are required for a motion to pass muster.¹⁴⁴ The two-thirds majority was implemented to protect against “any one interest from controlling the Board.”¹⁴⁵

The OFPA delegates to the Board the general responsibility of advising the Secretary “on all aspects of the implementation”¹⁴⁶ of the Act.¹⁴⁷ The OFPA, however, is more specific in conferring on the Board the power to develop proposals or amendments to the National List, which includes the approved synthetic substances that may be used in organic production, to be submitted to the Secretary for review.¹⁴⁸ While the Secretary is given the ultimate authority to approve and issue the final National List,¹⁴⁹ the Board’s authority to submit a Proposed National List plays a crucial role in determining which substances make it onto the List.¹⁵⁰

In evaluating substances for the Proposed National List, the Board must gather recommendations from the Board’s Technical Advisory Panels, which are made up of “agronomists,

¹³⁶ *Id.*

¹³⁷ 7 U.S.C. § 6518(d) (2012).

¹³⁸ S. REP. NO. 101-357, at 296 (1990).

¹³⁹ 7 U.S.C. § 6518(k)(2).

¹⁴⁰ *Id.* § 6518(g).

¹⁴¹ *See id.* § 6518(a).

¹⁴² *See Update from National Organic Standards Board Meeting*, ORGANIC INTEGRITY Q., Nov. 2015, at 12, <https://www.ams.usda.gov/sites/default/files/media/2015-Organic-November-Newsletter.pdf> [<http://perma.cc/HZF6-X5UA>].

¹⁴³ 7 U.S.C. § 6518(h).

¹⁴⁴ S. REP. NO. 101-357, at 296 (1990).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 297.

¹⁴⁷ 7 U.S.C. § 6518(a).

¹⁴⁸ *Id.* § 6518(k)(2).

¹⁴⁹ *Id.* § 6517(a).

¹⁵⁰ S. REP. NO. 101-357, at 297.

entomologists, toxicologists, soil scientists,” and other scientists.¹⁵¹ These scientists evaluate the substances being considered for the Proposed National List.¹⁵² The Board and its Technical Advisory Panels must also consider any available information from the Environmental Protection Agency, the National Institute of Environmental Health Studies, and other relevant sources “concerning the human and environmental toxicity of substances considered for inclusion in the Proposed National List.”¹⁵³ This thorough scientific evaluation of proposed substances was established due to the recognition that as science advances, its use in organic production will need to be analyzed.¹⁵⁴ The Senate Committee on the OFPA sought to ensure that organic substances and methods reflected emerging insight into production systems.¹⁵⁵ Further, the Committee recognized that as knowledge and science evolved about production systems, the Board might someday decide that the National List is unnecessary.¹⁵⁶ Thus, the Board’s recommendations to the National List are made with “a reasonable amount of scientific information” in conjunction with the OFPA’s guidelines.¹⁵⁷

II. THE USDA’S UNILATERAL ACTION—THE SUN NEVER SETS ON THE NATIONAL LIST

The OFPA explicitly requires that the Board review all substances on the National List and that the Secretary renew substances within five years of their addition to or renewal on the National List.¹⁵⁸ This procedure of Board review and USDA renewal is called the Sunset Process.¹⁵⁹ It is crucial that this process be completed within the required five-year time frame because failure to do so could result in “disruption of well-established and accepted organic production, handling, and processing systems.”¹⁶⁰ In 2013, the USDA materially altered the Sunset Process. While the amended Sunset Process maintained the Board’s responsibility to review approved substances on the

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* The Committee stated that if in the future the Board finds the National List “outdated,” part of its duties would be to recommend its abolishment “to the Secretary, the Administrator of the EPA, and the appropriate Committees of the Congress.” *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See 7 U.S.C. § 6517(e) (2012) (the Sunset Provision).

¹⁵⁹ Notification of Sunset Process, 78 Fed. Reg. 56811, 56813 (Sept. 16, 2013) (fig. 1).

¹⁶⁰ *Id.*

National List following the five years of its adoption, it changed the effect of the Board's vote.¹⁶¹ Prior to 2013, Sunset Review required that a two-thirds majority of the Board vote for a sunsetting substance's *renewal*, but the amendment requires a two-thirds majority of the Board to vote for a sunsetting substance's *removal*. This part describes the Sunset Process as it stood in 2002 until the change in 2013, explains the amended Sunset Process, and evaluates how it violates the intent and plain letter of the OFPA.

A. *The Sunset Process: 2002–2013*

Before the 2013 amendment to the Sunset Process, the OFPA required that the Board review the exemptions on the National List and consider whether renewal of a sunsetting substance should be recommended to the Secretary.¹⁶² This requirement was critical because if the Board did not vote for renewal, the exemption would expire and would no longer be authorized for use in organic production.¹⁶³ Consequently, the Secretary would not have the authority to renew the exemption unilaterally.¹⁶⁴

When an exemption was up for Sunset Review under the Sunset Process in effect from 2002 to 2013, the first step required that the public was notified of the substances that were designated for Sunset Review.¹⁶⁵ Public comments from individuals and organizations representing farmers, environmentalists, consumers, and other organic industry stakeholders were then heard by the Board as part of its review.¹⁶⁶ The Board, at that stage, could determine that in order to reach a decision more information was needed about the substance, such as research on emerging

¹⁶¹ See *infra* Sections II.A-B.

¹⁶² See 7 U.S.C. § 6517(e).

¹⁶³ National Organic Program (NOP), Sunset Review (2008), 73 Fed. Reg. 59479 (Oct. 9, 2008) (codified at 7 C.F.R. pts. 205.601, 205.602, 205.605).

¹⁶⁴ S. REP. NO. 101-357, at 299 (1990) (stating that “[t]he Secretary may not include exemptions for synthetic substances other than those exemptions recommended by” the Board).

¹⁶⁵ See 7 U.S.C. § 6517(d)(4).

¹⁶⁶ At the October 28, 2014, NOSB meeting, the policy director of the National Organic Coalition participated in public comment and stated that the NOP's amendment to the Sunset Process essentially redefined what “sunset” meant. *NOSB Meeting*, 139-40 ¶¶ 1-16, 22 (Oct. 28, 2014). The National Organic Coalition is an organizational alliance of “farmers, ranchers, environmentalists, consumers, and industry members” that advocates for strong organic standards to protect organic integrity. *About Us*, NOC, <http://www.nationalorganiccoalition.org/about> [<http://perma.cc/J5P7-H7HG>] (last visited June 27, 2016). At the NOSB October 2014 meeting, public comment was also heard from members of the Cornucopia Institute and Beyond Pesticides and organic certifiers. *NOSB Meeting*, 144, 151, 290 (Oct. 28, 2014).

scientific knowledge and technological or market progress.¹⁶⁷ At the conclusion of the Board's review, a recommendation could be sent to the Secretary to renew an exemption to the National List, but if such a recommendation did not garner two-thirds of the Board's vote, the substance was removed from the National List.¹⁶⁸ If the Secretary decided to approve a substance based on the Board's Proposed National List, the National Organic Program¹⁶⁹ published a proposed rule to give the public another opportunity to comment.¹⁷⁰ Finally, the Secretary considered the comments in his or her decision whether to renew the substance,¹⁷¹ which would mark the completion of Sunset Review.

The most important aspect of the 2002–2013 Sunset Process, especially in light of the 2013 change, is that the Board's recommendation to renew was required to include a sunseting substance on the National List for another five years. It is important to reiterate that without a two-thirds vote to recommend renewal to the Secretary, the sunseting substance would expire. This meant that an exception would no longer be included on the National List and thus the substance could no longer be used in the production of organic food.

B. *The Sunset Process: 2013–Present*

On September 16, 2013, the USDA published a notice on the Federal Register for a change to the Sunset Process.¹⁷² The USDA's action was implemented without an opportunity for public notice and comment because the NOSB's October 2013 meeting was canceled¹⁷³ due the federal government shutdown.¹⁷⁴

¹⁶⁷ S. REP. NO. 101-357, at 297 (1990) ("As time goes on, various scientific breakthroughs, including biotechnology techniques, will require scrutiny for their application to organic production. The Committee is concerned that production materials and practices keep pace with our evolving knowledge of production systems."); *see supra* Section I.D.

¹⁶⁸ 7 U.S.C. §§ 6517(e), 6518(e).

¹⁶⁹ *See supra* note 3 and accompanying text.

¹⁷⁰ National Organic Program (NOP), Sunset Review (2008), 73 Fed. Reg. 59479 (Oct. 9, 2008) (codified at 7 C.F.R. pts. 205.601, 205.602, 205.605).

¹⁷¹ *Id.*

¹⁷² Notification of Sunset Process, 78 Fed. Reg. 56811, 56813 (Sept. 16, 2013) (fig. 1).

¹⁷³ *See Fed Shutdown Forces Cease-Fire in Organic War: USDA Louisville Meeting Canceled*, CORNUCOPIA INST. (Oct. 10, 2013), <http://www.cornucopia.org/2013/10/fed-shutdown-forces-cess-fire-organic-war-usda-louisville-meeting-canceled/> [<http://perma.cc/9LXM-SSWC>]; *see also NOSB Meetings, supra* note 120 (indicating that the NOSB October 2013 meeting in Louisville, Kentucky, was cancelled).

¹⁷⁴ The government shutdown occurred on October 1, 2013, when Congress could not reach a decision on the budget. Kristen Appleton & Veronica Stracqualursi, *Here's What Happened Last Time the Government Shutdown*, ABC NEWS (Nov. 18, 2014, 1:34 PM), <http://abcnews.go.com/Politics/heres-happened-time-government-shut/story?id=26997023> [<http://perma.cc/3GFY-DDFU>].

At the April 2013 NOSB meeting, Miles McEvoy, director of the USDA National Organic Program, stated that the amended Sunset Process not only was more in compliance with the OFPA, but it also guaranteed an improved process, increased public comment, and guarded organic standards from the influence of minority interests.¹⁷⁵

While the amended Sunset Process maintains many of the steps in the pre-2013 review, there are a number of significant changes. The first of those changes altered the basis of the Board's vote. Instead of voting for renewal, the Board votes whether to remove a sunseting substance from the National List. Thus, instead of needing two-thirds of the Board's vote for renewal of a sunseting substance, the substance can be renewed even if half of the Board members vote for removal.¹⁷⁶ In response to such drastic, unilateral action on behalf of the USDA, Senator Patrick Leahy and Representative Peter DeFazio, the principal authors of the OFPA, wrote to the Secretary of the Department of Agriculture, Thomas J. Vilsack, raising their concerns:

In addition to establishing a very high hurdle for allowing the short-term (5-year) exemption to the synthetic chemical prohibition, the law also establishes a sunset process under Section 2118(e) whereby all materials on the National List become invalid unless the material is re-reviewed under the same statutory review procedures within 5 years of its previous adoption, and renewed by the Secretary of Agriculture. As with the initial listing, two-thirds of the full Board must vote in favor of that recommendation for it to be valid. This long-standing interpretation of this crucial aspect of OFPA is not only in keeping with our intent in writing OFPA, but is also in keeping with the plain reading of the statute.¹⁷⁷

Senators Leahy and DeFazio's concerns about the amended Sunset Process raise serious doubts about McEvoy's assertion that the USDA's action in fact is better reflective of the OFPA. The Senators' letter lends support for the notion that the Sunset Process is a fundamental part of the OFPA's purpose.

The effect of the amended Sunset Process was illustrated at the October 28, 2014, meeting in Louisville, Kentucky,¹⁷⁸ when the Board was called upon to vote on the removal of aqueous

¹⁷⁵ McEvoy Address to NOSB, *supra* note 3, at 21.

¹⁷⁶ See generally 7 U.S.C. § 6518(i) (2012) (providing that a two-thirds majority is required for any decisive motion of the NOSB).

¹⁷⁷ Letter from U.S. Sen. Patrick Leahy and Rep. Peter DeFazio to Hon. Thomas J. Vilsack, Sec'y of the Dep't of Agric. (Apr. 24, 2014) [hereinafter Leahy and DeFazio Letter to Sec'y Vilsack], <http://www.cornucopia.org/USDA/LeahyDeFazioSunset.pdf> [<http://perma.cc/7WRT-6WC5>].

¹⁷⁸ See *NOSB Meetings*, *supra* note 120.

potassium silicate, a synthetic substance “on the National List for use as a treatment of plant disease and an insecticide.”¹⁷⁹ Aqueous potassium silicate was due to expire from the National List in 2015; thus, according to the Sunset Provision, the Board was required to vote on a motion to remove the substance.¹⁸⁰ Nine members of the Board voted against the motion, while six voted in support.¹⁸¹ In effect, the Board voted to renew the substance on the National List with only six votes since, according to the amended Sunset Process, a two-thirds vote to secure a recommendation to remove a sunseting substance was not obtained.¹⁸² The renewal of aqueous potassium silicate is an illustration of the Board’s diluted voting power under the amended Sunset Process.

Under the 2002–2013 Sunset Process, six votes to remove a sunseting substance would have resulted in the substance phasing off of the National List. This action begs the question: How could the Board approve a synthetic substance for inclusion onto the National List without a two-thirds majority as required by the OFPA for any decisive motion?¹⁸³

C. Center for Food Safety v. U.S. Department of Agriculture—*A Challenge to the USDA’s Rule Change*

In April 2015, food producers and consumer advocate groups filed suit against the USDA in the U.S. District Court for the Northern District of California, alleging that the USDA’s change to the Sunset Process violated the OFPA and eroded the process by which synthetic substances are allowed or prohibited in organic production and handling.¹⁸⁴ The USDA filed a motion to dismiss the claims on grounds that the action was within its authority and had violated neither the OFPA nor the Administrative Procedure Act. U.S. District Judge Haywood S. Gilliam Jr. granted the USDA’s motion, holding that “Plaintiffs’

¹⁷⁹ AGRIC. MKTG. SERV., U.S. DEPT OF AGRIC., AQUEOUS POTASSIUM SILICATE: TECHNICAL EVALUATION REPORT 5 (2014), <http://www.ams.usda.gov/sites/default/files/media/Pot%20sil%20technical%20evaluation%20report%202014.pdf> [http://perma.cc/VKS2-7XUT].

¹⁸⁰ Jay Feldman, Board Member, Remarks at the Board Meeting of the NOSB 120-24 (Oct. 28, 2014) [hereinafter Feldman, Remarks at NOSB Meeting], <http://www.ams.usda.gov/sites/default/files/media/transcriptky.pdf> [http://perma.cc/5X5V-WH78].

¹⁸¹ *Id.* at 126-27.

¹⁸² *See id.*

¹⁸³ 7 U.S.C. § 6518(h)-(i) (2012).

¹⁸⁴ *See* Center for Food Safety v. Vilsack, No. 15-cv-01590-HSG, 2015 WL 5915409, (N.D. Cal. Oct. 9, 2015); Emily Field, *Food, Consumer Groups Fight USDA Organic Rule Change*, LAW360 (Apr. 8, 2015, 4:03 PM), <http://www.law360.com/articles/640730/food-consumer-groups-fight-usda-organic-rule-change> [http://perma.cc/XWN3-34G3].

generalized concern that the USDA's new sunset review procedures, when applied in the future, will 'weaken[] organic integrity, creat[e] inconsistent organic production standards and demonstrat[e] arbitrary and capricious application of administrative functions' . . . is simply not sufficient."¹⁸⁵ Judge Gilliam further stated that plaintiffs had been unsuccessful in pleading an "injury in fact," thus ruling that plaintiffs had no standing to challenge the USDA action.¹⁸⁶ Although the plaintiffs argued that their case was similar to a First Circuit case, *Harvey v. Veneman*,¹⁸⁷ involving an organic blueberry farmer who successfully challenged a USDA final rule that the farmer said "degrad[ed] the quality of organically labeled foods,"¹⁸⁸ Judge Gilliam distinguished *Harvey* from the plaintiffs' case because they had not pled an ongoing harm, but rather their claims centered on a perceived future harm.¹⁸⁹

Due to the dismissal of the plaintiffs' claims, the court did not reach the merits of whether the USDA action was in compliance with the OFPA. Despite the lack of judicial review, it is undeniable that the USDA's action has effectively changed the Sunset Process, and challenges to this action should be expected in the future.

III. THE USDA ACTION VIOLATES THE OFPA

The OFPA provides that for an agricultural product to be labeled organic, it must "have been produced and handled without the use of synthetic chemicals, except as otherwise provided in this chapter."¹⁹⁰ The statute further requires that any exception to the general principle that organic food be produced without the addition of synthetic substances must be included on the National List.¹⁹¹ It is clear from the text of the statute and the 2002–2013 Sunset Process that synthetic substances for use in organic agriculture are the exceptions and not the rule. The USDA's recent rule change violates the clear language of the OFPA because it effectively allows these

¹⁸⁵ *Center for Food Safety*, 2015 WL 5915409, at *2.

¹⁸⁶ *Id.*; Joe Van Acker, *USDA Beats Organic Advocates' Challenge to Synthetic Rules*, LAW360 (Oct. 13, 2015), <http://www.law360.com/articles/713484/usda-beats-organic-advocates-challenge-to-synthetic-rules> [<http://perma.cc/4HXW-25WJ>]. ("Judge Gilliam said this case raised a similar question of standing as *Summers v. Earth Island Institute*, in which the U.S. Supreme Court said environmental organizations lacked standing to sue the U.S. Forest Service over its post-decisional appeals process.").

¹⁸⁷ *Harvey v. Veneman*, 396 F.3d 28 (1st Cir. 2005).

¹⁸⁸ *Id.* at 34.

¹⁸⁹ *Center for Food Safety*, 2015 WL 5915409, at *3.

¹⁹⁰ 7 U.S.C. § 6504(1) (2012).

¹⁹¹ *Id.* § 6517.

substances to remain on the list indefinitely, unless the Board independently recommends a substance's removal. On its face, the rule does not entirely strip the Board of its ability to remove substances from the National List, but it does significantly diminish that authority.

Prior to the 2013 rule change, the Board was tasked with voting to renew a substance following five years of its inclusion on the National List.¹⁹² At such time, the Board and Secretary of Agriculture had to follow the same procedures as the first time the substance was added to the List; this included notice and comment, publication of the National List, and a two-thirds majority vote of the Board to recommend the substance's renewal.¹⁹³ Under the amended Sunset Process, these procedures are turned on their heads.¹⁹⁴

It is undeniable that the statutory creation of the Board reflects one of the most important underlying themes of the OFPA: to represent the interests of all those involved in the organic industry when faced with critical issues like the use and prohibition of synthetic chemicals in the growing of organic food.¹⁹⁵ The adverse effects of pesticides on the environment and human health were one of the major concerns that spurred the modern organic movement.¹⁹⁶ Board member Jay Feldman expressed the undermining of this intent at the October 28, 2014, Board meeting as follows:

We've learned since September 16th that this isn't a democratic process. We had collaboration built into the procedures. Not everybody has grown up in a part of society where they can trust that they have access to people in positions of power and can have meetings and closed doors, change policies overnight, rewrite them. Not everybody is on the positive end of the receiving of those types of power relationships that undermine process, which is intended to protect all of us rather than some of us.¹⁹⁷

The change to the Sunset Process directly alters the Board's role and responsibilities. The 1990 Senate Agricultural Committee report concluded that the Board was an essential advisor to the Secretary of Agriculture on all issues concerning the OFPA. It also anticipated that many key organic standards

¹⁹² *Id.* § 6517(e).

¹⁹³ *Id.* § 6517(d).

¹⁹⁴ Leahy and DeFazio Letter to Sec'y Vilsack, *supra* note 177.

¹⁹⁵ *See supra* Section I.A; 7 U.S.C. § 6504(1); *id.* § 6518(b).

¹⁹⁶ *See Sir Albert Howard Biography*, *supra* note 64; Harrison, *supra* note 65, at 213-14; Negin, *supra* note 76; *The Story of Silent Spring*, *supra* note 67.

¹⁹⁷ Feldman, Remarks at NOSB Meeting, *supra* note 180, at 339.

would come from Board recommendations, including review of substances to be included on the National List.¹⁹⁸

The 2013 action parted with the Senate Committee's intent that the Board serve a vital role in promoting confidence in the organic label through its extensive review process for recommendations to the National List. The changes to the Sunset Process came without input from the Board, organic stakeholders, or the public.¹⁹⁹ The amended Sunset Process diminishes the Board's advisory role.²⁰⁰ Additionally, the USDA's unilateral action ignores the Board's pivotal role in establishing the National List—a role that is central to upholding the transparency and integrity of the organic label and encouraging public involvement.²⁰¹

Sunset Provisions are a relatively new phenomenon in federal legislation, but statutes with expiration dates have been around since the Founding.²⁰² In the 1980s, Sunset Provisions were adopted in federal legislation in response to concerns that “government agencies were pawns of corporations.”²⁰³ It is plausible that one of the justifications for implementing the OFPA's Sunset Provision was to ensure that the interests of consumers and small farmers, represented through the Board, were not trumped by Big Food. This is compromised by the suspension of the Sunset Provision.²⁰⁴ The authors of the OFPA addressed the amended Sunset Process as a violation of “a critical step to allow the public to provide scientific and market information to aid the Secretary and the NOSB in fulfilling its statutory review duties.”²⁰⁵

Arguably the most troublesome implication of the altered Sunset Process is that substances on the National List will be automatically renewed after the five-year expiration, as provided in the Sunset Provision.²⁰⁶ The OFPA explicitly requires that every substance be subjected to vigorous review every five years in order to qualify for use in organic agriculture; there is no doubt that inclusion on the National List was

¹⁹⁸ Barry Flamm, *Demise of the National Organic Standards Board?*, CORNUCOPIA INST. (Aug. 4, 2014), <http://www.cornucopia.org/2014/08/demise-national-organic-standards-board/> [<http://perma.cc/F5ME-WH6B>].

¹⁹⁹ *Id.*

²⁰⁰ 7 U.S.C. § 6518(a).

²⁰¹ *See, e.g., Id.* § 6517(d)(4)-(5).

²⁰² *The Federalist Society 2011 National Lawyers Convention*, 16 TEX. REV. L. & POL. 339, 340 (2012) (“The [Alien and] Sedition Act of 1798 contained a clause terminating the Act in 1801 . . .”).

²⁰³ *Id.* at 342.

²⁰⁴ Leahy and DeFazio Letter to Sec'y Vilsack, *supra* note 177.

²⁰⁵ *Id.*

²⁰⁶ 7 U.S.C. § 6517(e).

intended to be a “temporary exemption.”²⁰⁷ This interpretation of the statute is consistent with the drafters’ intent. Senator Leahy and Representative DeFazio emphasized in their letter to the Secretary of Agriculture that “[t]his long-standing interpretation of this crucial aspect of OFPA is . . . in keeping with our intent in writing OFPA.”²⁰⁸

The Sunset Process for developing the National List is integral to maintaining the integrity of the organic industry. The USDA’s unilateral suspension of the provision violates one of the most fundamental bedrocks of the organic movement—organic food as an alternative to the chemical-laden, industrial agricultural process. Allowing synthetic chemicals to occupy a place on the National List diminishes the goal of obtaining a synthetic-free food supply aimed at subverting the risks chemicals pose for humans and the environment.²⁰⁹ The suspension of the Sunset Provision reduces incentives to find natural alternatives to approved chemicals, because the five-year expiration is no longer in effect. The action utterly disregards the purpose underlying the OFPA. The Senate Committee on the OFPA stated,

The Committee does not intend to allow the use of many synthetic substances. This legislation has been carefully written to prevent widespread exceptions or “loopholes” in the organic standards which would circumvent the intent of this legislation. The few synthetic substances that are widely recognized as safe and traditionally used in organic production are explicitly cited in the bill as potential items to be included on the National List if the Board and the Secretary approve of their use.²¹⁰

The USDA’s alteration of the Sunset Process greatly undermines Congress’s intent that the National List contain few synthetic exceptions in order to avoid “loopholes” in organic standards. In fact, the USDA has found such a loophole by diminishing the Board’s role in establishing the National List.

IV. RESETTING THE CLOCK TO SUNSET

The Board plays a vital role in the organic federal regulatory scheme. It provides a forum for all organic stakeholder interests and assures the public, through its notice and comment procedures, that decisions to approve substances for the National List are made after careful review of the effects

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *See supra* Section I.A.

²¹⁰ S. REP. NO. 101-357, at 298 (1990).

that the chemicals have on humans and the environment.²¹¹ The 2013 suspension of the Sunset Provision, however, strips the OFPA of these crucial functions, violating both the act's intent and plain letter.²¹²

The USDA should restore the Sunset Process as it stood prior to the 2013 rule change in order to reflect the purpose and plain letter of the OFPA. Organic consumers pay premium prices for organic goods because of their belief in a "correlation between what [they] eat and [their] health, and that knowledge is spurring heightened consumer interest in organic products."²¹³ In 2013, the organic food industry raked in \$32.3 billion in sales.²¹⁴ The organic industry has realized exponential growth, but the amended Sunset Process threatens its future.

The organic industry has faced much criticism about the dominance of corporate interests and how that has come at the expense of transparency for consumers.²¹⁵ Senator Leahy and Representative DeFazio expressed concerns about the impact the amended Sunset Process stands to have on the organic industry: "It is counter to the key principals of public involvement and oversight in the organic certification process as well as adhering to the highest standards possible for organic food production."²¹⁶ The Board plays a fundamental role in upholding the integrity of the National Organic Program. It is paramount that the USDA reinstate the Sunset Provision and restore the "basic tenet" of the OFPA in order to restore consumers' belief and trust that organic food is produced with few to no synthetics.²¹⁷

CONCLUSION

The organic market is still fairly new, and the USDA has struggled to balance the competing stakeholder interests, which often appear to be incompatible. The organic movement emerged as an antithesis to industrial agricultural processes after a series of famous writings swept the media and brought to the American public's attention that chemicals used in conventional food production could have detrimental effects on the environment

²¹¹ 7 U.S.C. § 6517(c)-(d).

²¹² Leahy and DeFazio Letter to Sec'y Vilsack, *supra* note 177.

²¹³ *American Appetite for Organic Products Breaks Through \$35 Billion Mark*, PR NEWswire (May 15, 2015, 12:01 AM), <http://www.prnewswire.com/news-releases/american-appetite-for-organic-products-breaks-through-35-billion-mark-259327061.html> [<http://perma.cc/8FEN-DAJQ>] (quoting Laura Batcha, Executive Director and CEO of the Organic Trade Association).

²¹⁴ *Id.*

²¹⁵ McCauley, *supra* note 3.

²¹⁶ Leahy and DeFazio Letter to Sec'y Vilsack, *supra* note 177.

²¹⁷ S. REP. NO. 101-357, at 298.

and human health. Congress enacted the OFPA in 1990, but it took 10 years for the USDA to issue national standards for organic food production.²¹⁸ This significant delay was in large part due to the various interests, including those of Big Food and consumers, within the organic industry and the National Organic Program's struggle to harmonize them with organic standards.

The recent suspension of the Sunset Provision has elicited the backlash of consumers and consumer and food advocacy groups.²¹⁹ Consumer interest groups interpret the amended Sunset Process to mean a win for Big Food in setting organic standards. The amended Sunset Process undermines consumers' expectation that their organic food contains no synthetics. Cornucopia Institute Cofounder²²⁰ Mark Kastel²²¹ stated quite forcefully at the April 2014 Board meeting that "whichever side of the fence you're on, this is a black-eye to organics, and is deleterious to our credibility in the eyes of consumers."²²²

The USDA's action will affect the entire organic industry—consumers, farmers, agribusiness, certifiers, and handlers. The integrity of the organic label is paramount to the organic industry; without it, the organic industry would not have seen such unprecedented growth in the past several decades.²²³ The USDA should restore the Board's role in the Sunset Process as it stood prior to 2013 in order to preserve trust and transparency in the organic label and reinstate the democratic process that the OFPA's drafters intended. As the amended Sunset Process now stands, it is in direct violation of the purpose and plain letter of the OFPA.

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²¹⁸ Watnick, *supra* note 97, at 46.

²¹⁹ See, e.g., Mark Kastel, Public Comment at the Meeting of the NOSB 301 (Apr. 29, 2014), <https://www.ams.usda.gov/sites/default/files/media/transcripttx.pdf> [http://perma.cc/HGQ3-SNGS].

²²⁰ The Cornucopia Institute is an influential organic-industry watchdog "whose core constituencies are the family farmers across the U.S." and consumers concerned about the availability and quality of organic foods. Dr. Joseph Mercola, *Beware of These Organic Brands*, MERCOLA.COM (Nov. 19, 2011), <http://articles.mercola.com/sites/articles/archive/2011/11/19/mark-kastel-cornucopia-good-food-movement.aspx> [http://perma.cc/YJ2Q-HSAP].

²²¹ *About Us*, CORNUCOPIA INST., <http://www.cornucopia.org/about-us/> [http://perma.cc/JPJ8-XFD7] (last visited June 27, 2016).

²²² Mark Kastel, Public Comment at the Meeting of the NOSB 301 (Apr. 29, 2014).

²²³ See S. REP. NO. 101-357, at 299 (1990).

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