Case No. 21-15883

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR FOOD SAFETY, SWANTON BERRY FARMS, INC., FULL BELLY FARM, INC., DURST ORGANIC GROWERS, INC., JACOBS FARM DEL CABO, INC., LONG WIND FARM, INC., ONECERT, INC., MAINE ORGANIC FARMERS AND GARDERNERS ASSOCIATION,

Plaintiffs-Appellants,

v.

THOMAS J. VILSACK, *et al.*,

Defendants-Appellees,

On Appeal from the United States District Court, Northern District of California
Case No. 20-cv-01537 (Hon. Judge Richard Seeborg)

CENTER FOR FOOD SAFETY, *ET AL.* PLAINTIFFS-APPELLANTS' OPENING BRIEF

CENTER FOR FOOD SAFETY
George A. Kimbrell
Sylvia Shih-Yau Wu
Meredith Stevenson
303 Sacramento Street, 2nd Floor
San Francisco, CA 94111
T: (415) 826-2770
gkimbrell@centerforfoodsafety.org
swu@centerforfoodsafety.org
mstevenson@centerforfoodsafety.org
Counsel for Plaintiffs-Appellants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Center for Food Safety, Swanton Berry Farms, Inc.; Full Belly Farm, Inc.; Durst Organic Growers, Inc.; Jacobs Farm Del Cabo, Inc.; Long Wind Farm, Inc.; OneCert, Inc.; and Maine Organic Farmers and Gardners Association certify that they have no parent corporations and that no publicly held corporation owns more than ten percent of the Plaintiffs-Appellants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Cases (Cont'd) **Page(s)**

Federal Cases (Cont'd) **Page(s)**

Federal Cases (Cont'd) **Page(s)**

Federal Statutes

Federal Statutes (Cont'd) **Page(s)**

Rules

Regulations

Regulations (Cont'd) **Page(s)**

Other Authorities

GLOSSARY OF ACRONYMS

APA	Administrative Procedure Act
NOP	National Organic Program
NOSB	National Organic Standards Board
OFPA	Organic Foods Production Act
USDA	United States Department of Agriculture

INTRODUCTION

This case is about dirt, also known as soil. It is about why soil matters in environmentally beneficial farming. It is about whether consumers get what they pay for when they spend extra for food products they think are grown in a way that benefits the soil. And it is about whether farmers who farm with integrity will be undercut by others growing the exact same fruit or vegetable but who do not have to play by the same rules.

Legally, this appeal involves a specialized regime (federal organic farming regulation) but presents familiar administrative law and statutory interpretation questions: when and how statutes are unambiguous on a particular question; and when, if, and how agencies should be entitled to any deference.

Specifically, this appeal asks whether the district court erred in deferring to the United States Department of Agriculture (USDA)'s denial of Appellants' rulemaking petition requesting prohibition on organic certification of hydroponic systems. The Organic Foods Production Act (OFPA)'s language is plain and mandatory: organic crop producers "shall . . . foster soil fertility, primarily through the management of the organic content of the soil through proper tillage, crop rotation, and manuring." 7 U.S.C. § 6513(b). In contrast, hydroponic production systems operate in indoor warehouses, using prepared mineral nutrient solutions,

not soil, ER-159; ER-128; ER-43, and more generally "without the need for any biology." AR565. Thus, as one might imagine, and by Appellee USDA's own admissions, hydroponic systems simply cannot "foster soil fertility." Defs.' Cross-Mot. Summ. J. 12, *Ctr. for Food Safety v. Perdue*, No. 3:20-cv-1537-RS (N.D. Cal. Oct. 30, 2020), ECF No. 23.

Appellant Center for Food Safety filed a rulemaking petition (the Petition) on this issue in January 2019 following decades of USDA inaction, inaction that had allowed "organic" hydroponic producers to undersell organic soil-based farmers in the marketplace. Only soil-based organic tomato farmers were required to take the extra care, time, and money to produce soil benefits from their operations; indoor, warehouse-based "organic" tomato farmers who do none of this were nonetheless still certified. The Petition asked that USDA prohibit hydroponic systems to level the organic playing field for crop producers and provide the consistency Congress intended in organic standards.

But in response, USDA denied the Petition in full (the Petition Denial). ER-20-23. Instead of addressing how hydroponic systems might "foster soil fertility" as required, USDA created, for the first time, an extra-statutory exemption for hydroponic production. Under this exemption, USDA claimed OFPA's mandatory

statutory soil management practices only selectively apply to some organic crop farmers, namely those "that *do* use soil," without citing any statutory basis. ER-22.

Accordingly, Appellants—including several of the nation's oldest and most decorated organic farms, organic certifiers, and organic nonprofits—filed this challenge to USDA's Petition Denial in district court. Appellants' arguments focused on: OFPA's plain text and its implementing rules, which unambiguously mandate soil-based production practices for all organic crop producers; the overarching statutory scheme and purpose; OFPA's legislative history; and the opinions of the congressionally created expert body, all of which supported that hydroponic systems, whatever their other merit, are simply not organic farming. But on cross-motions for summary judgment the district court nonetheless agreed with USDA.

The district court made three errors requiring reversal. First, it improperly delegated to USDA the court's first-order duty to interpret OFPA's mandatory soil provisions and say what the law is. The Supreme Court's instruction is well established (and increasing) that before raising the white flag of deference to an agency's interpretation, courts have a duty to exhaust all statutory construction tools. There was none of that here. After recounting the positions of the parties, the court's own application and analysis was basically a little over a paragraph. Indeed,

the district court failed to make the necessary determination that the statute was ambiguous as applied to the question of hydroponic operations before deferring. It held only that USDA "reasonably defend[ed]" its interpretation of the text. ER-17-18.

Second, the lower court assumed that, just because OFPA does not say the word "hydroponics" that there was no way the statutory scheme could be clear on its face that hydroponic production is not organic farming. ER-16. Again, the Supreme Court, this Court, and other courts have repeatedly instructed otherwise: a statutory scheme can be clear and unambiguous on a question that is not spelled out in its text expressly. To hold otherwise would allow agencies to expand their jurisdiction in an *ultra vires* fashion to cover every possible situation that Congress did not specifically mention. Instead, courts have a duty to examine the text, entire statutory scheme and purpose, and apply the canons of construction to the question. The answer can and often is clear, as here, without express text prohibiting the activity. The district court erred in assuming otherwise.

Third and in the alternative, even if OFPA was ambiguous on the question, the district court erred in deferring to USDA's unreasonable interpretation of OFPA and its own regulations in a manner contrary to statute, legislative history, and expert opinion.

Accordingly, Appellants ask this Court to reverse the district court, hold that OFPA is unambiguous as applied to the question of hydroponic production, vacate the USDA's Petition Denial, and remand to the agency to conduct further proceedings consistent with this Court's decision.

JURISDICTIONAL STATEMENT

This appeal follows the district court's final judgment issued March 19, 2021. Appellants timely filed their notice of appeal on May 19, 2021. 28 U.S.C. § 2107(b)(2); Fed. R. App. P. 4(a)(1)(B)(ii).

The district court had jurisdiction under 5 U.S.C. § 702, 28 U.S.C. § 1331, and 28 U.S.C. § 1346. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Did the district court err in upholding USDA's interpretation as reasonable without first analyzing if the statute is clear as to whether hydroponic crop farming can be organic farming, where the statute and rules repeatedly emphasize the vital nature of holistic, soil-beneficial practices to organic crop farming, and where soil-less, isolated hydroponic operations provide no soil benefits?

2. Did the district court err in assuming that a statute was necessarily ambiguous because its text did not expressly prohibit an activity, and that it could then automatically skip to whether an agency's interpretation was reasonable and deserved deference?

3. Did the district court err in holding reasonable USDA's interpretation that the mandatory soil-based provisions of OFPA and its implementing rules only apply to production systems that use soil, and that hydroponic crop production is properly exempted from those requirements, where that conclusion is belied by the statute, its implementing regulations, and the Congressionally-charged expert body's opinions?

STATEMENT OF THE CASE

I. HYDROPONIC SYSTEMS ARE INCOMPATIBLE WITH ORGANIC FARMING PRINCIPLES.

Dirt. Soil. Earth. Soil is and always has been the *sin qua non* of organic crop farming, stretching back to the birth of the organic farming movement in the 1960s. ER-100. The second half of the twentieth century brought the so-called "Green Revolution," which promoted many new chemical inputs in farming, including synthetic fertilizers, insecticides, and herbicides, as well as mechanization and other technological changes. ER-97-98. Its start coincided with World War II, when a litany of new chemicals were developed as poisons intended for chemical warfare. After the war ended, the chemical manufacturing industry needed a new purpose for these chemicals and ultimately found one in our food system. Government policies subsidized broad-scale commodity crops for animal feed, and farmers were encouraged to "get big or get out."[1] Propped up by this heavy reliance on pesticides

[1] Heather H. Scholar, *Federal Farm Policies Hit*, Reading Eagle (Oct. 23, 1973), https://news.google.com/newspapers?nid=1955&dat=19731023&id=iQ9XAAAAIB

and fertilizers, farms grew larger and more specialized, with steadily expanding monocultures displacing farm animals, which were consigned to confined animal feeding operations.[2]

This industrial system of farming caused dramatic harm to the environment and specifically to the soil. And the organic movement was part of the environmental movement's backlash, indeed, central to its origin story: At the same time that Rachel Carson's *Silent Spring* awakened the public to the harms of then-new agricultural pesticides like DDT and started the environmental movement, more and more people began to demand a different, sustainable form of farming: organic farming. ER-97. Organic farming adhered to soil-based principles as a counter to the industrial agricultural paradigm. *Id.* Early organic farmers believed that "[h]ealthy plants, animals, and humans result from balanced, biologically active soil," and that the goal of organic farming is to "[f]eed the soil, not the plant." ER-109. These founding principles led to a consensus in the following decades among

---

AJ&pg=2654,2153427&hl=en; *see also* A. Bryan Endres, *An Evolutionary Approach to Agricultural Biotechnology: Litigation Challenges to the Regulatory and Common Law Regimes for Genetically Engineered Plants*, 4 Ne. U.L.J. 59 (2012).

[2] Melanie J. Wender, *Goodbye Family Farms and Hello Agribusiness: The Story of How Agricultural Policy Is Destroying the Family Farm and the Environment*, 22 Vill. Env't L.J. 141, 148 (2011).

organic producers that a core principle of organic farming is the "sound management of soil biology and ecology." ER-155. As such, organic farmers decades ago and still today use practices such as integrated farming, crop rotation, cover crops, and compost application to build soil fertility and disrupt pest cycles. ER-79.

Accordingly, OFPA, the first-ever federal organic law, established production standards that adhere to the sustainable, soil-based principles embedded in organic farming. S. Rep. No. 101-357, at 291 (1990) reprinted in 1990 U.S.C.C.A.N. 4656, 4946 ("The 'organically produced' label authorized under this bill therefore pertains to the production methods used to produce the food rather than to the content of the food."). Congress outlined three baseline production standards that foods must satisfy to be labeled and sold as organic. 7 U.S.C. § 6504. Production must be done: (1) "without the use of synthetic chemicals, except as otherwise provided [by the Act]"; (2) on land where synthetic chemicals have not been applied in the previous three years; and (3) in compliance with an organic production plan. *Id.* § 6504(1)-(3). The last of these, the organic production plan, "is a key element" necessary to "ensure that the 'organically produced' label indeed signifies that the product has been produced in accordance with the requirements of this title." 1990 U.S.C.C.A.N. at 4946; *id.* ("But defining organically grown food based on production materials and a three-year transition period alone is not sufficient.

Organically grown food is produced using farming and handling systems that include site-specific farm plans.").

Organic production plans for crops require soil. In passing OFPA, Congress avoided "reinvent[ing] the wheel" by mandating soil-based requirements based on the organic community's consensus input. 1990 U.S.C.C.A.N. at 4945; *id.* at 4946 ("[A] crop production farm plan must detail the procedures that the farmer will follow in order to foster soil fertility, provide for crop rotations, and prohibit certain manuring practices inappropriate to the crop being raised and the land in use."). Indeed, the primacy of soil was one of the things Congress was surest about, as shown by the great detail given: OFPA has "[m]ore detailed" crop farming standards "than for livestock production" due to the "extent of knowledge and *consensus* on appropriate organic crop production methods" Congress gleaned from the organic community. 1990 U.S.C.C.A.N. at 4952 (emphasis added).

In turn, USDA's implementing regulations mention soil *fifty* times. Consistent with OFPA, the regulations require organic crop producers to meet OFPA's soil fertility requirements through cover cropping, 7 C.F.R. § 205.203(b), crop rotation, *id.* § 205.205, and managing plant and animal materials. *Id.* § 205.203(c). Compliance with these sections is mandatory for "*any* agricultural

product" to be labeled organic. 7 C.F.R. § 205.102 (emphasis added) (mandating compliance with §§ 205.202 through 205.207 for crops).

This fundamental soil component is missing from hydroponic production. While organic farmers use cover crops, compost and other natural manure, tilling, and other activities to "focus on soil building" and "continually improve soil productivity," ER-79, in hydroponic systems, none of these efforts are required. Rather, hydroponic producers grow crops in various container systems,[3] fed with prepared solutions instead of natural soil organic matter. ER-159; ER-128 (common hydroponic systems); ER-43. Commercial hydroponic operations today are typically housed in large warehouses, requiring none of the soil management methods envisioned by Congress and/or organic pioneers. ER-108 (typical hydroponic operation). And most importantly, amputated from the earth and dirt on which their warehouses sit, hydroponic operations cannot "foster soil fertility." 7 U.S.C. § 6513(b)(1).

[3] Hydroponics is a catch-all term that covers many different types of soil-less production systems, such as aeroponics (systems where plants are suspended in air), aquaponics (systems involving plants and aquatic species), and bioponics (systems where plants are grown in some other non-soil media). ER-129-32.

A. USDA Ignored Growing Concerns Over Inconsistencies in Organic Production.

This lack of a soil-beneficial component has spurred fierce debate over whether hydroponic systems meet organic requirements. ER-20; ER-62-63. Most of that debate occurred before the National Organic Standards Board (NOSB), the expert body Congress created to "assist in the development of standards for substances to be used in organic production" and "advise [USDA] on any other aspects of the implementation of [OFPA]." 7 U.S.C. § 6518(a). USDA is required to consult with the NOSB in developing standards for the National Organic Program (NOP), including for example, when it revises its regulations and when it determines what processes and substances can or cannot be used in organic. *Id*. §6503(c).

As far back as 1995, NOSB members expressed the "general feeling that the provisions of OFPA could not be met" while discussing "specialized standards" for particular production systems, including then-nascent hydroponic operations. ER-81; ER-170-71[4]. The NOSB left open the vague possibility of hydroponic certification in its 1995 Recommendation, but only if hydroponic systems comply with *all* provisions of OFPA. ER-173. But USDA chose not to address this NOSB

[4] The NOSB is a fifteen-member board, made up of stakeholders from all aspects of the organic community, including farmers, handlers, retailers, certifiers, scientists, and conservationist members. 7 U.S.C. § 6518(b).

recommendation in creating the first OFPA implementing rules in 2000. ER-167; National Organic Program; Final Rule, 65 Fed. Reg. 80548 (Dec. 21, 2000).

This omission did not stop the debate. From 2000-2010, the organic community continued to discuss the fundamental conflict between soil-less hydroponic systems and OFPA's soil fertility requirements in NOSB bi-annual meetings. *See, e.g.*, ER-168 (NOSB member explaining that hydroponics are "'[n]ot compatible with organic principles' right off the bat" because they feed plants through water rather than the soil); ER-162 (NOSB testimony explaining that if you "really look at the regulation as it exists, talking about soils and the ecology of soils, and what makes organic farming organic farming," hydroponics "do not have a soil ecology for plants, to grow plants that normally should be grown in a soil with its accompanying ecology"); ER-160 (noting that NOSB received "an overwhelming response from the public that they did not want organic hydroponics").

During this time, USDA itself also gave mixed signals as to whether hydroponic systems could meet the soil fertility requirements of OFPA and its regulations. *See, e.g.*, ER-165 (Agricultural Marketing Services Deputy Administrator, Barbara Robinson, stating in May 2009: "I told Canada that although we do not specifically prohibit hydroponic production, that it was my understanding that we don't approve hydroponic what I referred to as crops in a bucket in this country.").

In early 2010, the NOSB issued its long-anticipated recommendation following the years of discussion and expert analysis at NOSB meetings and assigned NOSB subcommittee reports. It formally concluded that USDA should prohibit the organic certification of hydroponic systems and so recommended to USDA. *See* ER-154-58; ER-93 ("This recommendation was the culmination of more than a decade of work by the NOSB, and was the final recommendation of the Board on this topic."). The NOSB stated:

> Observing the framework of organic farming based on its foundation of sound management of soil biology and ecology, it becomes clear that systems of crop production that eliminate soil from the system, such as hydroponics or aeroponics, cannot be considered as examples of acceptable organic farming practices.

ER-155-56 (underline in original). According to the NOSB, hydroponic systems would be required to meet OFPA's core soil fertility mandate along with the corresponding USDA soil-based regulations, and could not comply with them. *Id.*

Yet USDA refused to follow the NOSB's recommendation. Instead of taking action (as Congress intended) and clarifying that hydroponic systems cannot qualify for certification, USDA instead confusingly told the organic community in a 2012 guide that hydroponic systems could be certified organic (without explaining how). *See* ER-153. USDA reiterated this again in May 2014: "[O]rganic hydroponic

production is allowed *as long as* the producer can demonstrate compliance with the USDA organic regulations." ER-73 (emphasis added).

Then, in 2015—with the NOSB's 2010 formal recommendation still on the books but unacted upon—USDA responded to increasing pressure from food sectors now favoring hydroponics, convening a new 16-member taskforce. The Hydroponic and Aquaponic Task Force consisted of representatives from both the soil-based organic farming community and the hydroponic sector, "to examine hydroponic and aquaponics practices and their alignment with the USDA organic regulations and [OFPA]." ER-149. While reaching different conclusions, the two subcommittees that formed from the Hydroponic Task Force agreed on two things (both of which are contrary to USDA's Petition Denial at issue here): First, any organically certified hydroponic system must nonetheless still meet OFPA's core statutory mandate to "foster soil fertility." ER-103, ER-140. And second, the current OFPA regulations, without significant revisions, were insufficient to cover hydroponic systems. ER-104-5, ER-135-57.

Specifically, the first subcommittee affirmed the NOSB's 2010 conclusion that OFPA does not allow for hydroponics. Specifically, this subcommittee found that "[b]y using the word 'shall' rather than 'may,'" in both the statute, ER-103, *and* the regulations, ER-105, OFPA "implicitly require[s] that production takes place in

the soil." ER-103. Hydroponics "cannot be considered as acceptable organic farming practices" because they "eliminate soil from the system" ER-93.

The second subcommittee agreed that hydroponic systems must comply with OFPA's soil-based mandate, yet reached a different conclusion. It agreed with the 2010 NOSB Recommendation that "sterile and inert" hydroponic operations are not eligible for certification, but suggested that some new, highly sophisticated "organic bioponic" systems might be certified organic to the extent they "require and contain rich, diverse and complete soil-plant ecology that symbiotically work with plants to biologically process animal, plant and mineral inputs." ER-123-24.

Still, this subcommittee also did not ignore OFPA's plain text. Instead, it went to great lengths to explain how bioponic systems would nonetheless have to (and could) comply with OFPA's mandate to "foster soil fertility." ER-140. And this subcommittee also suggested any such allowance would require new regulatory revisions, agreeing that these systems cannot fit into the organic rules as currently written. ER-135-37.

B. As Calls for Action from the NOSB, Consumers, Farmers, and Certifiers Increased, USDA Took None.

USDA again still took no action. USDA was well-aware that its inaction was causing inconsistent and confusing certification results for hydroponic systems. *See* ER-142 (summarizing survey responses from certifiers showing inconsistent

certification of hydroponics); ER-88 (letter from Senator Sanders describing "lack of consistency in the certification process" and asking for clarification). This ongoing certification deviated from numerous U.S. trade partner countries with otherwise equivalent organic farming standards—including Mexico, Canada, Japan, New Zealand, and 24 European countries (including Holland, England, Germany, Italy, France, and Spain)—all which flatly prohibit hydroponic vegetable production to be labeled and sold as "organic" in their own countries. ER-148. Yet rather than providing clarification or taking any formal agency action on it (which would be subject to judicial review), USDA simply posted a website bulletin that "[c]ertification of hydroponic, aquaponic, and aeroponic operations is allowed under the USDA organic regulations" as long as hydroponics "maintain compliance with the USDA organic regulations." ER-60.

USDA's disregard for OFPA's soil requirements was met with outcry. Founding NOSB expert members, organic farming associations, consumer advocacy groups, and other organic stakeholders urged USDA to put a moratorium on hydroponic certification. ER-110-121. Their plea was echoed by Senator Patrick Leahy, one of the co-authors of OFPA. ER-146. Organic stakeholders told USDA that its failure to prohibit hydroponic certification caused confusion and

inconsistency, with some certifiers certifying hydroponics and others refusing. ER-75-76.

Soil-based organic farmers also reminded USDA that they invest time and resources on soil-building and management as part of their certification, practices not required nor conducted in hydroponic operations. ER-79; ER-64 (practices for soil-based farming not required for hydroponic operations); ER-76-77 ("[S]oil-based farmers say that their market is being damaged by hydroponic growing, which is not equivalent to their growing."); ER-84 (significant challenges of organic soil farmers compared to hydroponic).

In 2016, the NOSB again stressed the need for USDA action in a resolution stating that "it is the will of the majority of the current members of the NOSB to prohibit hydroponic systems that have an entirely water-based substrate." ER-86. Yet USDA still refused to act.

II. APPELLANT CENTER FOR FOOD SAFETY SOUGHT ACTION ON HYDROPONICS.

A. Appellants Submitted a Petition Urging USDA To Follow the NOSB's Recommendations.

After nearly a decade of USDA's disregard of the NOSB and organic stakeholders, on January 16, 2019, Appellant Center for Food Safety submitted a formal rulemaking petition. The Petition, endorsed by more than a dozen other

organic stakeholders, including organic farmers, retailers, certifiers, and public interest groups, ER-57-58, requested that USDA prohibit organic certification of hydroponic systems. ER-36-58.

The Petition highlighted OFPA's plain text and implementing regulations requiring soil-based practices as well as the historical importance of soil in organic production. ER-40, 42, 44-45. It explained that a plain reading of OFPA's structure and scheme for crop farming ruled out hydroponic operations for several reasons. First, hydroponic systems are not organic because they do not accomplish OFPA's mandate to foster soil fertility and improve its biological matter content. ER-46-47. Second and relatedly, hydroponics violate OFPA's core market consistency purpose and requirements because hydroponic operations do not follow OFPA's soil fertility requirements: a hydroponic "organic" tomato producer is not required to follow the same rules as an organic tomato farmer who farms traditionally. ER-55. Third, hydroponic systems violate OFPA's many implementing rules requiring soil quality improvement, soil fertility management, crop rotation practices, biodiversity conservation, use of other soil management practices, and use of soil samples to measure OFPA compliance. ER-47-48.

For all these reasons the Petition requested that USDA conduct a rulemaking to prohibit the certification of hydroponic systems. ER-36-58. It also asked USDA to

revoke existing organic certifications previously issued to hydroponic operations, and to take other steps as deemed necessary to ensure that ecologically-integrated organic production practices are required for all organic certification, as defined by OFPA and its regulations. ER-40.

B. USDA Denied the Petition Based on Its Position That Hydroponic Crop Producers Are Exempt from OFPA's Crop Producer Soil Requirements.

Less than six months later USDA summarily denied the petition, without holding any public notice and comment (as agencies often do before answering rulemaking petitions). *See* ER-20-23. In the four-page Denial, USDA acknowledged that "[o]rganic hydroponic systems have been controversial," ER-20, and that the NOSB had recommended USDA prohibit hydroponic certification. ER-21. However, after years of USDA statements agreeing that, to be certified hydroponic, producers must still meet *all* OFPA's statutory and regulatory requirements for crop production, the Denial reversed course. USDA stated for the first time that OFPA's mandatory soil-centric requirements are only "applicable to production systems that *do* use soil," ER-22, without citing any OFPA basis. As such, USDA exempted hydroponic systems, and Appellants then brought this lawsuit challenging the Denial.

III. THE DISTRICT COURT RULED IN USDA'S FAVOR.

In the U.S. District Court for the Northern District of California, Appellants' summary judgment motion underscored the ways in which USDA's decision violated OFPA and the APA. *See* Pls.' Mot. for Summ. J. 14–30, *Ctr. for Food Safety v. Perdue*, No. 3:20-cv-1537-RS (N.D. Cal. Sept. 16, 2020), ECF No. 22. First, USDA's decision to exempt hydroponic operations from OFPA's soil-based statutory and regulatory requirements for crop production violated the plain text of OFPA and its regulations. *Id.* at 15–19. Second, USDA's rationale that the generalized benefits of hydroponic operations satisfied OFPA's specific requirements to maintain and improve natural resource and biodiversity contradict the plain text of OFPA, the regulations, as well as the Agency's own recommendation, and the record. *Id.* at 20–24. Third, USDA's decision caused inconsistent organic standards, in violation of OFPA. *Id.* at 25–28. Finally, Appellants also filed a motion to complete the record, to include meeting transcripts, comment letters, and USDA documents referenced in the Petition. Pls.' Mot. Complete, *Ctr. for Food Safety v. Perdue*, No. 3:20-cv-1537-RS (N.D. Cal. Sept. 16, 2020), ECF No. 20.

In response, USDA urged the district court to give "extreme deference" to its statutory interpretation. Defs.' Cross-Mot. 8, ECF No. 23. USDA supported its "reasonable" interpretation by violating numerous canons of statutory construction:

isolating provisions of the statute, inserting extra-statutory terms, and rendering OFPA's soil-based mandates superfluous, as discussed *infra*. *Id.* at 8–9.

On March 19, 2021 and after an oral argument, the district court ruled in USDA's favor. ER-5-18.[5] But in doing so, the district court did not apply its statutory construction toolbox to find that USDA's interpretation was correct. In fact, nowhere in the opinion did the court complete its own statutory interpretation at all. Instead, the opinion mainly recounted the parties' arguments, with a single paragraph analysis rubberstamping USDA's decision at the end. ER-17-18.

This single paragraph characterized two of USDA's flawed statutory interpretation arguments as "reasonable." First, that OFPA does not explicitly prohibit hydroponic systems, and thus they are allowed. ER-16, 17-18. And second, that section 6512 provides an "escape hatch provision," allowing USDA to approve any production method not prohibited in section 6508, irrespective of restrictions in other sections of OFPA. ER-18.

Missing from this opinion was any conclusion that USDA's two "reasonable" interpretations were correct based on the court's own statutory interpretation. Instead, the court weighed the parties' interpretations to determine which "equally

[5] The first half of the decision denied the Appellants' motion to complete and/or supplement the record, a decision not at issue on appeal. ER-9.

persuasive" interpretation to which it should defer. ER-18. And the court did not even decide which level of deference was correct. Instead, it created a new, "*Chevron*-esque" standard of deference to apply to USDA's "strained" and "granular" reading. ER-13; ER-18. In the end, the court concluded that "USDA reasonably defend[ed] its determination that OFPA does not compel the prohibition of hydroponics," despite the "logical appeal" of Appellants' interpretation. ER-18.

SUMMARY OF ARGUMENT

Both the district court's approach, and its conclusion that USDA "reasonably defend[ed]" its statutory interpretation, are contrary to the APA and controlling Supreme Court precedent. *See* 5 U.S.C. § 706(2)(C); *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007). APA § 706 provides that "the reviewing court shall . . . interpret constitutional and statutory provisions" to determine if an agency's action—here the denial of a rulemaking petition—is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(C). Courts have a core duty to start with the statute's plain text and analyze the statutory interpretation question themselves, before considering whether to defer to an agency's views.

As such, the district court erred in three ways. First, it improperly delegated to USDA the court's fundamental duty to interpret the mandatory soil provisions of OFPA by its own lights. Well-established case law asserts that courts have a duty to

exhaust all statutory construction tools before raising the white flag of deference to an agency's interpretation. The district court failed to do that. Instead of making the necessary determination that the statute was ambiguous before deferring, it held only that USDA "reasonably defend[ed]" its interpretation of the text.

Second, the district court concluded that OFPA's lack of an express prohibition on hydroponic systems rendered it impossible for the statutory scheme to be clear on its face that hydroponic production is not organic farming. The Supreme Court, this Court, and other courts have repeatedly instructed otherwise: Congress can make its intent clear and unambiguous through a statutory scheme, even if it provides no express prohibition. To hold otherwise would grant unfettered discretion to agencies to cover every possible scenario that Congress did not explicitly prohibit.

Third and in the alternative, even if OFPA was ambiguous on the question, the district court erred in deferring to USDA's unreasonable interpretation in a manner contrary to statute, legislative history, regulations, and expert opinion.

STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed *de novo*. *Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir. 2002).

Judicial review of agency action proceeds according to the APA's standards, under which reviewing courts "decide all relevant questions of law [and] interpret . . . statutory provisions," as well as "set aside" agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(a).

Under the APA, this Court must undertake its own review of the relevant statutory authority. *Bear Lake Watch, Inc.* v. F.E.R.C., 324 F.3d 1071, 1073 (9th Cir. 2003) (agency's understanding of its statutory mandate is reviewed *de novo*); *Am. Rivers v. F.E.R.C.*, 201 F.3d 1186, 1194 (9th Cir.1999). This review begins "with the language of the statute," and when that language is clear, "ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999); *Massachusetts v. EPA*, 549 U.S. at 532 (refusing to defer to EPA's interpretation of the Clean Air Act in a rulemaking petition denial following the Supreme Court's own statutory interpretation). A court will invalidate an agency's interpretation contrary to the clear intent of Congress. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842- 43 (1984). A court discerns congressional intent by reviewing the plain language of the statute and regulations while "exhaust[ing] all the 'traditional tools' of construction," including "text, structure, history, and purpose." *Kisor v. Wilkie*,

139 S. Ct. 2400, 2415 (2019) (quoting *Chevron*, 467 U.S. at 843 n.9); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

Courts defer to agency interpretations of statutes with *Chevron* deference when an agency's interpretation is promulgated with the force of law, and *Skidmore* deference when it is promulgated informally. *Nat'l Parks Conservation Ass'n v. Fed. Energy Regul. Comm'n*, 6 F.4th 1044, 1058 (9th Cir. 2021).

Under the APA, a reviewing court "shall . . . hold unlawful and set aside agency actions, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). In reviewing claims brought under the APA, a court evaluates whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). Specific to rulemaking petition denials, this Court has stated that "[i]n denying a petition for rulemaking, an agency must, at a minimum, clearly indicate that it has considered the potential problem identified in the petition and provide a 'reasonable explanation as to why it cannot or will not exercise discretion' to initiate rulemaking." *Compassion Over Killing v. FDA*, 849 F.3d 849, 857 (9th Cir. 2017). Judicial review should be "searching and

careful," and a court "must not rubber-stamp administrative decisions that . . . [are] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Bureau of Alcohol, Tobacco & Firearms v. Fed. Labor Rels. Auth.*, 464 U.S. 89, 97 (1983) (internal quotation marks omitted).

ARGUMENT

I. THE DISTRICT COURT RUBBERSTAMPED USDA'S PETITION DENIAL.

It is the cardinal duty of the judiciary "to say what the law is." *U.S. v. Windsor*, 570 U.S. 744, 762 (2013) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). As such, it is axiomatic that courts must respect the intent of Congress by "exhaust[ing] *all* the 'traditional tools' of construction" before deferring to agencies. *Kisor*, 139 S. Ct. at 2415 (citing *Chevron,* 467 U.S. at 843 n.9, noting this applies to statutes) (emphasis added). This is because "the best evidence of Congress's intent is the statutory text." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012). Anything less than a full examination of statutory text runs the risk of a court "amending statutes outside the legislative process reserved for the people's representatives." *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020). The Supreme Court has emphasized time and time again that bypassing statutory language in favor of "proceed[ing] without the law's guidance to do what [the court]

thinks best," such as deferring to an agency right off the bat, is "an invitation no court should ever take up." *Id.* at 1753.

But the district court took up that invitation here. This case turns on statutory interpretation of OFPA's soil-based requirements for crop production. ER-11. Yet the district court did not even open its statutory construction toolbox, skipping instead to two subordinate inquiries: 1) which standard of deference applied to USDA's statutory interpretation, and 2) whether USDA's statutory interpretation was "reasonably defend[ed]." ER-11-13, 17-18. In doing so, the court recited USDA's statutory interpretation in its effort to weigh both Appellants' and Appellees' "equally persuasive" interpretations before ultimately deferring to USDA. ER-16-17.

This is not how statutory interpretation should be done. The APA's "unqualified command requires the *court* to determine legal questions—including questions about a regulation's meaning—by its own lights, not by those of political appointees or bureaucrats." *Kisor,* 139 S. Ct. at 2432 (Gorsuch, J. concurring) (emphasis added). In fact, courts should not even consider an agency's interpretation when the text is plain. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("If the words of a statute are unambiguous, this first step of the interpretive inquiry is our last."). Courts must instead inquire into the plain language of the text, including delegations, to ascertain the intent of Congress. *Lamie v. U.S. Tr.*, 540 U.S.

526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the test is not absurd—is to enforce it according to its terms.").

Courts generally make this inquiry at step one of the familiar two-step *Chevron* procedure. First, reviewing courts must examine the text of the statute and ask "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If it has, then the "inquiry is at an end," and the agency must follow Congress's command. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 132. If a court determines that the statute is ambiguous, however, the inquiry moves to step two of *Chevron's* test. At step two, a court defers to the agency's interpretation of an ambiguous provision so long as it represents "a reasonable policy choice for the agency to make," *Chevron*, 467 U.S. at 845, and is thus a "permissible" construction of the statute. *Id.* at 843.[6]

[6] Even at step two, an agency is not automatically entitled to *Chevron*-level deference. Instead, any deference would be assigned based on the form in which the agency is acting. Here for example, where USDA did not hold notice and comment, USDA receives only *Skidmore* deference. *U.S. v. Mead*, 533 U.S. 218, 234-35 (2001). Under *Skidmore*, the amount of deference accorded "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking the power to control." *Id.* at 228.

The district court did not hide that it skipped straight to USDA's interpretation. It readily admitted "this review [was] 'extremely limited' and 'highly deferential' to the agency's *reading of the statute*," ER-18 (emphasis added). The district court even spent several paragraphs attempting to "reconcile . . . many applicable, overlapping standards" of deference to apply to USDA's interpretation of the text itself. ER-12. Regarding its core duty to look to the plain text, it paid only lip service. ER-12.

In the end, the district court decided on using "a deferential, *Chevron*-esque analysis," ER-12, to assess *USDA's* use of statutory construction tools, ER-16-17. The district court recanted each of USDA's arguments, ER-16-17, describing them as "granular" and "strained," but "reasonable." ER-18. In the end, the district court's analysis, ER-17-18, did not even determine that USDA's statutory interpretation was correct, only that USDA "reasonably defend[ed]" its interpretation over Appellants' "logical" one. ER-18.

As such, the district court's approach put the deference cart before the statutory interpretation horse. A court cannot defer to any agency's "reasonable" statutory interpretation before first determining whether the statute scheme is plain or ambiguous; only after finding the latter can a court determine if an agency's *interpretation* of *ambiguous* text may be "reasonable." *Chevron*, 467 U.S. at 843. Courts

have explained time and time again that deference to an agency's "reasonable" interpretation does not even come into play until a "court, employing traditional tools of statutory construction," is left with an unresolved ambiguity in the plain text. *Id.* at 843 n.9. That required, precursor analysis is simply missing. In undertaking it, the district court should have carefully analyzed the statutory and regulatory text and scheme, and employed the numerous applicable canons of construction, including, among others discussed *infra*, the whole-text canon, *see* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 167-69 (2012), the prefatory materials canon, *id.* at 217-220, and harmonious-reading canon, *id.* at 180-82. But the district court did not.

Finally, the fact that this case challenges a certain type of a final agency action, a rulemaking petition denial, changes none of this. The Supreme Court's conclusion in *Massachusetts v. EPA*, the seminal case concerning judicial review of agency petition denials, turned on the Supreme Court's analysis of the plain text and statutory construction of the Clean Air Act. 549 U.S. at 532 (rejecting EPA's petition denial). The Supreme Court rejected one of EPA's rationales—that it would be unwise to regulate greenhouse gas emissions under the Clean Air Act due to other agency priorities—as "divorced from the statutory text." *Id.* Because the agency "must ground its reasons for action or inaction in the statute," *id.* at 535, EPA's

petition denial was "arbitrary, capricious, . . . or otherwise not in accordance with the law" under the APA. *Id.* at 534 (internal quotation mark omitted).

The present case is no different. Just like EPA's petition denial, USDA's denial here was largely based on the Agency's (mis)interpretation of its statutory authority under the operative statute and regulations. There, it was EPA's misinterpretation of the Clean Air Act's definition of "pollutant" as not including greenhouse gas emissions that the Supreme Court held made the petition denial arbitrary and capricious. Here, it is USDA's misinterpretation of the relevant crop production soil standards as categorically excluding hydroponic crop operations that makes the denial arbitrary and capricious. Accordingly, as in *Massachusetts v. EPA* and numerous other decisions of this Court, judicial review under the APA required the district court to examine USDA's legal basis for denying Appellants' petition. 5 U.S.C. § 706(2)(C); *Compassion Over Killing*, 849 F.3d at 855; *Adams v. U.S. Forest Serv.*, 671 F.3d 1138, 1144 (9th Cir. 2012); *Amalgamated Sugar Co. LLC v. Vilsack*, 563 F.3d 822, 832 (9th Cir. 2009).

The district court's rubberstamping of USDA's statutory interpretation is thus contrary to precedent and cannot be reconciled with basic administrative law and separation of power principles. *See, e.g.*, *Latino Issues Forum v. EPA*, 558 F.3d 936, 941 (9th Cir. 2009) (A court "may not rubberstamp . . . administrative decisions that

[are] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.") (quoting *Friends of Yosemite Valley v. Norton,* 348 F.3d 789, 793 (9th Cir.2003)); *accord Nat. Res. Def. Council v. EPA*, 779 F.3d 1119, 1126 (9th Cir. 2015); *Valeant Pharms. Int'l v. Sebelius*, 2009 WL 10674128, at *4 (C.D. Cal. Sept. 14, 2009) ("[C]ourts do not rubberstamp agency actions, as doing so would be tantamount to abdicating the judiciary's responsibility under the Administrative Procedures Act.") (internal quotation marks omitted).

II. OFPA'S PLAIN TEXT AND STATUTORY SCHEME UNAMBIGUOUSLY REQUIRE SOIL-BENEFICIAL CROP PRODUCTION.

Next, setting aside the district court's improper and overly deferential approach, when one looks at the statutory interpretation question itself, it is actually quite simple: First, OFPA mandates that crop producers must provide in their mandatory organic plans provisions to "foster soil fertility, primarily through the management of the organic content of the soil through proper tillage, crop rotation, and manuring." 7 U.S.C. § 6513(b). Second, crop producers may not use any production method "inconsistent" with the measures enumerated in the crop production category or "otherwise restricted." 7 U.S.C. § 6513(g); *see also* 7 U.S.C. § 6512. And third, they "must" follow USDA's corresponding regulations designed to

foster soil fertility. 7 C.F.R. § 200.00; C.F.R. §§ 205.202, 205.203, 205.205. Hydroponic production does none of these things.

Overall, the district court erred in four major ways. First, it nullified OFPA's soil-based crop production requirements simply because OFPA does not expressly prohibit hydroponic systems. Second, it overlooked OFPA's plain, unambiguous text prohibiting hydroponic systems in favor of USDA's "reasonably defend[ed]" interpretation. ER-18. Third, it defied numerous canons of statutory construction in adopting USDA's statutory interpretation. ER-17-18. And fourth, it failed to consider legislative history, USDA's interpretation of OFPA in its regulations, and USDA's experts' opinions of OFPA and its regulations to ascertain legislative intent.

A. OFPA's Omission of Hydroponic Production Does Not Allow the Court to Automatically Proceed to Step Two.

The district court avoided Appellants' logical reading in favor of USDA's "strained" and "granular" reading, ER-18, due to its misconception it should defer to USDA in the absence of an *express* prohibition in OFPA of hydroponic systems. ER-17. This was clear legal error. Firmly rooted principles of administrative law teach that Congress's intent can be clear based on plain text, legislative history, and the "design and structure of the statute as a whole." *Util. Air Regul. Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) (citation omitted). Crucially, "*Chevron* Step 2 is not implicated . . . merely because 'a statute does not expressly negate the existence of a

claimed administrative power.'" *Gulf Fisherman's Ass'n v. NMFS*, 968 F.3d 454, 461 (5th Cir. 2020) (quoting *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995)); *accord Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 805 (D.C. Cir. 2002) (rejecting as "entirely untenable" agency position that adopting certain rules "is permissible because Congress did not expressly foreclose the possibility").

To the contrary, courts "do *not* presume a delegation of power simply from the absence of an express withholding of power[.]" *Chamber of Com. of U.S. v. NLRB*, 721 F.3d 152, 160 (4th Cir. 2013) (emphasis added); *see also Sierra Club v. EPA*, 311 F.3d 853, 861 (7th Cir. 2002); *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1174–75 (D.C. Cir. 2003). Rather, courts may only find delegations in "textual commitment[s] of authority." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

Indeed, it is axiomatic that "an agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Thus, here it should go without saying that USDA "may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion," such as 6513(b)'s requirement to foster soil fertility. *Am. Trucking*, 531 U.S. at 485; *see also* Scalia & Garner, at 66-68 ("The presumption of validity disfavors interpretations that would nullify the provision.").

The Fifth Circuit's analysis in *Gulf Fisherman's Ass'n* provides a great counter example of what the district court failed to do here. 968 F.3d 454. There, the Fifth Circuit held that the Department of Commerce could not define aquaculture as "fishing" simply because the Magnusson Stevens Act did not expressly preclude it, and it rejected the agency's argument that, absent a textual negation by Congress, the court should move to step two and apply deference. *Id.* at 460-62; *id.* at 456 ("The agency interprets this silence as an invitation, but our precedent says the opposite: Congress does not delegate authority merely by not withholding it."). Instead, the court held that based on Magnusson's related text, overall statutory scheme, implementing regulations, and canons of construction, the statute was unambiguous and clear: the agency could not do what it was proposing. *Id.* at 462-69.

Here, as in *Gulf Fisherman's Ass'n*, the language is plain. 7 U.S.C. § 6513(b) mandates that crop producers "foster soil fertility," and 7 U.S.C. § 6513(g) prohibits crop production practices "inconsistent" with 7 U.S.C. § 6513(b). In turn, 7 U.S.C. § 6512 prohibits practices "otherwise restricted" in OFPA, such as crop production practices inconsistent with 7 U.S.C. § 6513(b). Simply put, Congress intended to control, not to delegate, which crop production practices may be organic. And there can be no question that USDA has no authority to extend the statute beyond its

stopping point. As the Supreme Court has consistently warned, "an administrative agency's power to regulate . . . must always be grounded in a valid grant of authority from Congress." *FDA*, 529 U.S. at 161. "And . . . to effectuate the congressional purpose . . . , [the court] must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *Id.* (citation omitted).

For these reasons, among others, this Court should not affirm the district court's nullification of OFPA's soil-based requirements simply because OFPA does not expressly prohibit hydroponic systems. ER-17 ("the absence of hydroponics from the § 6508 list suggests permission"); *id.* (finding an "absence of any language indicating resistance to soil-less systems" in OFPA). This was glaring error requiring reversal.

B. OFPA's Plain Language Supports Reversal.

The district court also violated the cardinal rule that statutory analysis should begin "as always, with the text." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017). All parties agree that hydroponically produced crops are "crops." And the OFPA section pertaining to crop production, 7 U.S.C. § 6513(b), mandates: "An organic plan *shall* contain provisions designed to foster soil fertility, primarily through the management of the organic content of the soil through proper tillage, crop rotation, and manuring." 7 U.S.C. § 6513(b)(1) (emphasis added). Yet

hydroponic crop operations do not "foster soil fertility," nor would it be possible for them to do so "primarily through proper tillage, crop rotation, and manuring." The district court did not question this undisputed fact, which places hydroponic operations squarely outside of USDA's authority to certify organic.

Organic crops "shall" benefit the soil. "Shall" is an intentionally mandatory term, *e.g., Ctr. for Biological Diversity v. Norton*, 254 F.3d 833, 837 (9th Cir. 2001) (quoting *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir.1999) ("shall means shall"), which Congress does not use without meaning what it says, especially compared to the numerous OFPA provisions that alternatively use "may" instead.[7] *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *see also* Scalia & Garner, at 174-79 (the surplusage canon: "If possible, every word and every provision is to be given effect."); *id.* at 56-58 (the supremacy of text principle: "The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.").

[7] *See, e.g.,* 7 U.S.C. § 6507 (state organic certification programs "*may* contain more restrictive requirements" than OFPA) (emphasis added); ER-393 (Hydroponic Task Force report stating "OFPA and the NOP regulatory text did an excellent job of representing this heart of the early certification programs by using the word 'must' or 'shall' (rather than 'may') in the sections regulating soil management.").

Further, if any doubt remained as to whether hydroponic crop systems can "foster soil fertility," Congress put an end to it by specifying "primarily through the management of the organic content of the soil through proper tillage, crop rotation, and manuring." 7 U.S.C. § 6513(b). Again, it is undisputed that hydroponic systems (which are indoor and soil-less) cannot incorporate any of these practices, let alone all three. *See* Scalia & Garner, at 116 (the conjunctive canon: "*And* joins a conjunctive list") (emphasis added).

Crop producers who wish to be certified and sell their products in the market labeled as "organic" cannot get around these mandatory soil-based requirements. All crop producers "shall contain provisions designed to foster soil fertility" in their organic plan, which in this case is the "crop production farm plan." 7 U.S.C. § 6513(b).[8] OFPA mandates these organic plans; an organic certifier could not certify an operation without one. 7 U.S.C. § 6504(3) (mandating organic plans for all "agricultural products"); 7 U.S.C. § 6506(a)(2).

[8] USDA may argue, as they did below, that soil fertility requirements for a "crop production farm plan" only apply to "*traditional* farms," a term not found anywhere in OFPA. But OFPA's definition of a "certified organic farm" is plainly broad enough to include hydroponic operations. 7 U.S.C. § 6502(4) (definition of "certified organic farm" is "a farm, or portion of a farm, *or site where agricultural products* or livestock *are produced*.") (emphases added).

Finally, Congress reiterated this soil-based requirement by prohibiting practices "inconsistent" with this mandate. 7 U.S.C. § 6513(g) (organic plans "shall not include any production or handling practices that are *inconsistent* with this title.") (emphasis added). For crops, "this title" requires "foster[ing] soil fertility." Read together, the plain language of these provisions unambiguously prohibits any crop producer from including provisions in a "crop production farm plan" inconsistent with the unambiguous mandate to "foster soil fertility" through soil management methods. Soil-less hydroponic production is simply inconsistent with OFPA's mandate to improve soil fertility.

C. The District Court's Arguments in Support of USDA's Reasoning Ignore Statutory Context.

Far from disputing it, the district court called Appellants' statutory construction "logical." ER-18. But the court instead adopted USDA's two other efforts to explain it away. Neither explanation withstands scrutiny.

1. 7 U.S.C. § 6512 Does Not Allow USDA to Violate the Plain Language of 7 U.S.C. § 6513(b).

The lower court adopted USDA's flawed premise that sections 7 U.S.C. § 6512 and 6508 must be read "congruently" to allow for hydroponic systems. ER-18. This interpretation required the district court to isolate one clause of 7 U.S.C. § 6512, which states in full: "If a production or handling practice is not prohibited *or*

otherwise restricted under this title, such practice shall be permitted *unless* it is determined that such practice would be inconsistent with the applicable organic certification program." 7 U.S.C. § 6512 (emphases added). According to USDA (and relied upon by the lower court), since hydroponics are "consistent" with 7 U.S.C. § 6513(b), presto, they are allowed because 7 U.S.C. § 6508's short list of "prohibited crop production practices" does not specifically prohibit them.[9] ER-17.

There are several problems with this interpretation. First, USDA fixated on production practices "not prohibited" in § 6508 and ignored the rest of § 6512, which also specifies "*otherwise* restricted." *Id.* (emphasis added); *In re W. States Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 731 (9th Cir. 2013) ("[S]tatutory provisions should not be read in isolation."); Scalia & Garner, at 168 (the whole-text canon: "[T]he meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view.") (citation omitted). And the district court's view that USDA "reasonably" interpreted 7 U.S.C. § 6512 as "firm[ing] up the boundaries of 7 U.S.C. § 6508 and mak[ing] it an exhaustive list" of prohibited practices for purposes of 7 U.S.C. § 6512, ER-18, has no basis in

[9] This short list includes synthetic fertilizers, sources of nitrogen, natural poisons, plastic mulches, transplants treated with prohibited materials, and seed or seedlings produced in a manner "contrary to, or inconsistent with, the applicable organic certification program." 7 U.S.C. § 6508.

the statutory text. *See* Scalia & Garner, at 93 (omitted case canon: "Nothing is to be added to what the text states or reasonably implies.").[10]

As described above, soil-less production is at the very *least* "otherwise restricted" under OFPA. 7 U.S.C. § 6512. Organic crop producers cannot accomplish 7 U.S.C. § 6513(b)'s requirement to "foster soil fertility" without soil, nor can they even engage in "proper tillage, crop rotation, and manuring" in hydroponic systems. Soil-less production is thus "restricted" to only wild crops in subsection (f), which requires none of these soil management practices. 7 U.S.C. § 6513(f). Given this restriction, USDA's reading of 7 U.S.C. § 6512 as permitting hydroponic crop systems is plainly incorrect.

Second, USDA's argument co-signed by the district court proves far too much: Such an interpretation nullifies *every other* express prohibition *and* restriction on production and handling practices in OFPA outside of 7 U.S.C. § 6508, of which there are *many*. *See, e.g.*, 7 U.S.C. § 6513(b)(2)(C) (prohibiting application of

[10] The district court's determination that the "prohibited crop production practices and materials" in 7 U.S.C. § 6508 apply to hydroponic systems actually supports Appellants because it shows that OFPA's crop production requirements *do* apply to hydroponically produced crops, not just "traditional" farms. Where the district court erred was in not also consistently interpreting mandatory "crop production" practices as applying to hydroponic crops. *See* Scalia & Garner, at 170-73 (the presumption of consistent usage: "A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning.").

raw manure such that it would contribute to water contamination by nitrates or bacteria); 7 U.S.C. § 6504(2) (prohibiting production on land treated with prohibited substances during the three years immediately preceding the harvest); 7 U.S.C. § 6509(d) (prohibited practices for livestock production).

None of the other restrictions on the production of crops, livestock, or wild crops provided in 7 U.S.C. § 6513 are mentioned in 7 U.S.C. § 6508, except for provisions that apply to seeds or seedlings in 7 U.S.C. § 6508(a).[11] Using the logic the district court signed off on, USDA could, for example, decide that wild crop producers need not "designate the area from which the wild crop will be gathered or harvested," 7 U.S.C. § 6513(f)(1), simply because 7 U.S.C. § 6508 does not specify that gathering outside the designated zone is restricted or prohibited. 7 U.S.C. § 6513(f)(2).

Third, USDA's claim that "what is inconsistent is only what I say it is" is a classic case of bootstrapping, bringing to mind the famous Lewis Carroll claim of Humpty Dumpty: "When I use a word, it means just what I choose it to mean—

[11] Tellingly, the only practices in 7 U.S.C. § 6508 that 7 U.S.C. § 6513 also restricts are "practices on . . . seeds or seedlings that are contrary to, or inconsistent with, the applicable organic certification program." 7 U.S.C. § 6508 (a). Thus even 7 U.S.C. § 6508 prohibits practices inconsistent with the soil fertility requirements of 7 U.S.C. § 6513(b) for crop production involving seeds and seedlings.

neither more nor less."[12] It strains the imagination to think of a production system for crops more "inconsistent" with OFPA's mandate to "foster soil fertility" than a soil-less one. A reading that allows USDA to nonetheless assert consistency here could allow it to approve *any* practice not specifically prohibited in 7 U.S.C. § 6508, irrespective of mandates in 7 U.S.C. § 6513 and in direct defiance of the presumption against superfluities. *See* Scalia & Garner, at 174-79 (the surplusage canon: "If possible, every word and every provision is to be given effect. . . . [n]one should be ignored.").

And make no mistake, such a reading would render superfluous *all restrictions* on organic production except for *one* in 7 U.S.C. § 6513. This is because it would allow for USDA to determine that any practice inconsistent with mandatory practices in 7 U.S.C. § 6513 is permissible *anyway* if not listed in 7 U.S.C. § 6508. At the end of the day, it is Congress (and this Court's) power to say what is inconsistent with organic production, not USDA's alone *carte blanche*.

Fourth, the district court's strained interpretation of 7 U.S.C. § 6512 also upends the firmly rooted principle that, when possible, provisions of a statute should be read to be consistent with each other. *See* Scalia & Garner, at 180-182

[12] Lewis Carroll, *Through the Looking-Glass, and What Alice Found There* (Macmillan 1872).

(the harmonious-reading canon: "The provisions of a text should be interpreted in a way that renders them compatible, not contradictory."). Here, construing 7 U.S.C. §§ 6508, 6512, and 6513 to be consistent is simple: 7 U.S.C. § 6512 prohibits *both* (1) prohibited practices in 7 U.S.C. § 6508 *and* (2) elsewhere in the statute, like practices restricted through 7 U.S.C. § 6513, such as hydroponic production. That reading gives effect to each segment of § 6512, *see* Scalia & Garner, at 174-79 (surplusage canon), and prevents USDA from nullifying mandatory practices in § 6513 using the discretionary language in § 6512. *See* Scalia & Garner, at 66-68 (the presumption of validity: "An interpretation that validates outweighs one that invalidates.").

Finally, OFPA's statement of purpose in 7 U.S.C. § 6501(2) further supports Appellants. Congress enacted OFPA "to assure consumers that organically produced products meet a consistent standard." 7 U.S.C. § 6501 (2). It would be highly unusual for Congress to pass an Act specifically to set *uniform* standards, yet grant USDA authority to selectively apply mandatory requirements to only certain production systems. Scalia & Garner, at 217-220 (the prefatory-materials canon: "A preamble, purpose clause, or recital is a permissible indicator of meaning."). The rules for growing organic tomatoes should be the same for *all* organic tomatoes, for the growers and for the consumers. The district court's view that USDA

"reasonably" concluded it does not require consistent production methods for the exact same crops, ER-18, is completely at odds with the concern for uniform standards of production, explicit in this provision.

2. OFPA Requires the Same Production Standard for All Cultivated Crops, Separate from Wild Harvested Crops.

The district court also accepted USDA's invitation to ignore the structure of 7 U.S.C. § 6513 in assessing USDA's claim that hydroponic systems are "consistent" with the "applicable organic program" under 7 U.S.C. § 6512. In so doing the court recounted USDA's flawed assertion that the soil fertility requirements cannot apply to *all* crops, such as hydroponic crops, because that would result in conflicting requirements for crops and wild-harvested crops. ER-17. This came directly from USDA's argument that crop production requirements located in subsection (b) titled "crop production farm plan," 7 U.S.C. § 6513(f), would also apply to wild crops, located under subsection (f) titled "management of wild crops." 7 U.S.C. § 6513(f). This is incorrect in two ways.

First, most glaringly, the structure of 7 U.S.C. § 6513 makes plain that crop production requirements located in subsection (b) do *not* apply to wild crops in subsection (f). The scope-of-subparts canon explains that "Material within an indented subpart relates only to that subpart." Scalia & Garner, at 156; *see also id.* at 221-24 (title and headings canon: "The title and headings are permissible indicators

of meaning."); *see also Fl. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) (explaining that subchapter headings "expressly limited" matters discussed under each subchapter heading to the subject matter of the heading).

Here, each indented subsection heading for each different organic plan defines the scope of that subsection. As such, each indented requirement under a subsection only applies to the organic plan in the heading. For example, subsection (b) titled "Crop production farm plan," 7 U.S.C. § 6513(b), defines the scope of that subsection and requires the "application of manure," 7 U.S.C. § 6513(b)(2), for *only* crop production. And the requirement in subsection (f) to "designate the area from which the wild crop will be gathered or harvested" applies *only* to wild crop production. 7 U.S.C. § 6513(f)(1).[13]

Appellants' interpretation is the only one that honors the fundamental statutory canon that the "words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Gundy v. U.S.*, 139 S. Ct. 2116, 2126 (2019); *see also* Scalia & Garner, at 167-69 (the whole-text canon: "The text

[13] No dispute exists as to whether hydroponically produced crops are cultivated crops, not wild crops. USDA's definition of "wild crop" makes plain that wild crops are *not cultivated*, while hydroponic crops are. *See* 7 C.F.R. § 205.2. (defining wild crops as "[a]ny plant or portion of a plant that is collected or harvested from a site that is not maintained under cultivation or other agricultural management.").

must be construed as a whole."). Without these headings, 7 U.S.C. § 6513 could just as soon require a wild crop producer from subsection (f) to "foster the organic production of livestock" from the livestock subsection (c) as it could require the "application of manure" from the crop subsection (b). Surely this is not what Congress had in mind.

Second, the district court's reasoning as to why crop production requirements in subsection (b) conflict with wild crop requirements in subsection (f) has no basis in the statutory text.[14] The lower court stated that subsection (b)'s manure requirements for crops could not apply to wild crops in subsection (f) because "wild crop harvesting . . . definitionally excludes crops from sites which have been cultivated with fertilizer" such as manure. ER-17.

But it is unclear where the district court found this purported requirement for wild crops. OFPA and its regulations state nowhere that wild crop production *specifically* may not use fertilizer. *See* 7 U.S.C. § 6513(f). A prohibition on *synthetic* fertilizers applies to all organic production, including crops *and* wild crops. 7 U.S.C.

[14] Even if it did, the harmonious-reading canon would require a reading in which subsection (b) and subsection (f) were read as consistent with each other. *See* Scalia & Garner, at 180-82 ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory."). This reading is easily achieved by reading each requirement as only applying to the organic plan in its subsection heading.

§ 6504. Specific to wild crops in subsection (f), numerous other requirements for "harvesting or gathering" apply, which the district court could have found in 7 U.S.C. § 6513(f)(1)-(4). In short, practices for harvesting and gathering wild crops like mushrooms are plainly different from crop cultivation practices. And OFPA requires that each category adhere to its separate set of consistent requirements. And unlike wild crops, Congress did not set out a different subsection for hydroponic cultivated crops; thus, the crop production requirements apply to them.

D. The District Court Failed to Give Effect to Legislative History, USDA's Interpretation of OFPA, and USDA's Experts' Opinions in Ascertaining Legislative Intent.

The district court also overlooked legislative history and other "traditional aids" of statutory interpretation in its initial inquiry into the plain text. *See, e.g.*, *Altera Crop. & Subsidiaries v. Comm'r of Internal Revenue*, 926 F.3d 1061, 1075 (9th Cir. 2019) (explaining that under *Chevron* Step One, "[courts] examine the legislative history, the statutory structure, and 'other traditional aids' of statutory interpretation in order to ascertain congressional intent"). Specifically, it failed to even mention legislative history, USDA's interpretation of OFPA, and USDA's experts' opinions in its analysis of USDA's statutory interpretation, all of which supports Appellants.

1. Legislative History Supports Appellants' Interpretation.

In OFPA's Senate Report, Congress explained "a crop production farm plan must detail the procedures that the farmer will follow in order to foster soil fertility, provide for crop rotations, and prohibit certain manuring practices inappropriate to the crop being raised and the land in use." 1990 U.S.C.C.A.N. 4656, 4946. To that end, Senator Leahy, the main drafter of OFPA, clarified Congress intended OFPA to support "farmers who protect the soil and water." ER-44.

Legislative history support is also shown in the specific details included in OFPA's crop production standards. Congress acknowledged that the soil-based crop production standards were "[m]ore detailed . . . than for livestock production" due to the "extent of knowledge and *consensus* on appropriate organic crop production methods and materials." 1990 U.S.C.C.A.N. 4656, 4946 (emphasis added). This is why crop production lists specific practices such as tillage, crop rotation, and manuring, while livestock production specifies only practices "designed to foster the organic production of livestock consistent with the purposes of this chapter." 7 U.S.C. § 6513(c). Congress intentionally added these soil management practices agreed upon by the organic community at large. *See supra* pp. 8-9.

Notably Congress nowhere suggested USDA may selectively apply these "detailed" crop production requirements to only soil-based crop production systems.

To the contrary, Congress made clear that "organically produced food is food produced using certain *defined* . . . production methods." 1990 U.S.C.C.A.N. 4656, 4947 (emphasis added). The defined methods for crop production are soil-based; no other methods are enumerated.

Congress further clarified it did not seek to "disrupt unnecessarily the organic industry that now exists." 1990 U.S.C.C.A.N. 4656, 4947. That organic industry required *soil* benefiting practices. The Hydroponic Task Force noted that "[t]he basic premise of organic farming was that agricultural soil needs continuous restoration by means of adding manure and/or compost, managing cover crops and crop residue, and adding natural rock powders. The earliest organic certification programs based their standards on this premise." ER-93, ER-101; ER-145 (chart showing timeline of organic farming that led to the development of OFPA).

The legislative history also clears up any misconception as to whether Congress intended for the word, "farm" in "crop production farm plan" to apply only to soil-based, "traditional" farms, as USDA may attempt to argue. Congress's first definition of "certified organic farm" included only "a farm, or portion of a farm, that is certified by the governing State official under this title as utilizing a system of organic farming as described by this title." *See* S. 1896, 101st Cong. § 101 (11) (1989). But its second definition expanded to include "site[s] where agricultural

products . . . are produced." 7 U.S.C. § 6502(4). This addition indicates congressional intent for "crop production farm plans" to include *all* "sites" of agricultural production, including hydroponic operations.

2. USDA's Regulations and Expert Opinions Support Appellants.

The soil-based mandates in USDA's own OFPA regulations further belie its arguments—and the corresponding decision below—that hydroponic systems need not "foster soil fertility." Because the relevant provision of "this chapter," 7 U.S.C. § 6513(b), unambiguously requires organic crop production to "foster soil fertility," and specifically identifies proper tillage, crop rotation, and application of manure as practices to meet that goal, OFPA limited USDA to those crop production practices. And USDA understood. USDA has stated numerous times that hydroponic systems must adhere to its organic regulations. ER-149; ER-91; ER-22.

First, the regulations list soil no less than *fifty* times. This consistent usage alone shows its vital importance to the whole statutory scheme, in sharp contrast to the district court's characterization of section 6513(b) as an "ancillary provision" that "cannot alter the character of the entire statute." ER-17. USDA carried out OFPA's mandatory soil-based requirements with mandatory regulations, repeatedly requiring *soil*.

Second, USDA's soil-based regulations delineate mandatory soil management practices directly aligning with each practice in section 6513(b) without fail. The regulations (7 C.F.R. §§ 205.203(a)-(c)) even align with the *order* in which section 6513 lists them: "proper tillage, crop rotation, and manuring." 7 U.S.C. § 6513(b); *accord* 7 C.F.R. § 205.203(a) ("The producer must select and implement tillage and cultivation practices that maintain or improve the physical, chemical, and biological condition of soil and minimize soil erosion."); 7 C.F.R. § 205.203(b) ("The producer must manage crop nutrients and soil fertility through rotations, cover crops, and the application of plant and animal materials."); *see also* 7 C.F.R. § 205.205 ("The producer must implement a crop rotation."); 7 C.F.R. § 205.203(c) ("The producer must manage plant and animal materials to maintain or improve soil organic matter content," such as using manure). Section 205.203 also implements the same limitations on the application of raw animal manure on crops spelled out under section 6513(b)(2). *Compare* 7 C.F.R. § 205.203(c)(1) (prohibiting raw animal manure application unless certain conditions are met) *with* 7 U.S.C. § 6513(b)(2)(B)(i)-(iv) (detailing same conditions when raw manure may be used).

Third and crucially, nowhere do the regulations limit the "soil fertility and crop nutrient management practice standard" in 7 C.F.R. § 205.203 to only soil-based crop production. To the contrary, OFPA's regulations mandate

> *Any* agricultural product that is sold, labeled, or represented as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))" *must* be: . . . [p]roduced in accordance with the requirements specified in § 205.101 *or* §§ 205.202 through 205.207 *or* §§ 205.236 through 205.240 *and* all other applicable requirements of part 205.

7 C.F.R. § 205.102 (emphases added); *see* Scalia & Garner at 116 (the conjunctive canon: "*And* joins a conjunctive list").[15]

USDA has even admitted that § 205.202 applies to hydroponic systems. *See* ER-24. In a letter to certifiers on May 13, 2019, USDA confirmed that accredited certifying agents must verify that hydroponic systems have had no prohibited substances applied to them for a period of three years before harvest under 205.202(b). ER-24. But § 205.202 lays out a list of three requirements, one of which also mandates compliance with the soil-based standards in §§ 205.203 through § 205.206. *See* § 205.202(a). It would violate the conjunctive canon to interpret *only* 205.202(b) as applying to hydroponic systems and § 205.202(a) as not. *See* Scalia & Garner at 116.

[15] From this list, the only production requirements that make sense are "§§ 205.202 through 205.207" providing soil-based standards for crops. *See* § 205.101 (exempting only certain production operations whose gross agricultural income from organic sales totals $5,000 or less annually); §§ 205.236 through 205.240 (describing livestock standards).

Fourth, USDA's experts shared the understanding that all crop producers must adhere to soil fertility mandates. Central to the 2010 NOSB Recommendation was OFPA's mandate that all crop producers "foster soil fertility." ER-156. The NOSB stressed the improvement of soil as a central theme under OFPA and concluded that "systems of crop production that eliminate soil from the system, such as hydroponics or aeroponics, cannot be considered as examples of acceptable organic farming practices." ER-55-56.

The first subcommittee report of the Hydroponic and Aquaponic Task Force agreed. ER-93. The committee asserted that Congress's use of "shall" instead of "may" unambiguously requires organic crop production to take place in the soil. ER-103. Additionally, it interpreted the word, "primarily," as requiring soil fertility to come "primarily through management of the organic content of soil" and through "proper tillage, crop rotation, and manuring." *Id.*

This OFPA provision led the committee to conclude that "when other sources become the primary source of fertility, then that operation is violating this mandatory part of OFPA." ER-104. And it further confirmed its position that 7 U.S.C. § 6512 does not allow for hydroponics: "Some people point to §6512 of OFPA as justification for certification of hydroponics, but other sections of OFPA preclude such certification because it is not consistent with the fundamental

requirement for fertility to come primarily from management of organic content of the soil." ER-106.

Even the second subcommittee of the Hydroponic Task Force, which supported organic certification of *some* forms of hydroponic production, went to great lengths to explain exactly *how* hydroponic systems could comply with 7 U.S.C. § 6513(b). *See* ER-140. And at best, this subcommittee admitted USDA would need to *significantly amend* the current regulations to allow for some hydroponics, which USDA has not done. *See, e.g.*, ER-134 (recommending that USDA require "recirculating systems or [systems that] account for any water runoff"); ER-135-36 (recommending that USDA adopt regulations that would require hydroponic operations to compost or reuse growing media and capture and reuse nutrient solution).

In sum, none of USDA's experts endorsed the position the district court affirmed below: that USDA may exempt wholesale hydroponic systems from OFPA's statutory mandate or that hydroponic systems fit into current regulations.

III. THE DISTRICT COURT ERRED GIVING "EXTREME DEFERENCE" TO USDA'S UNREASONABLE INTERPRETATION OF OFPA AND ITS REGULATIONS.

A. The District Court Erred in Deferring to USDA's Unreasonable Interpretation of OFPA.

Deference to USDA's interpretation would have only been appropriate if the statutory text were ambiguous and the interpretation reasonable. *Chevron*, 467 U.S. at 842-844. As explained, the statute is clear on the issue and that should have been the end of the matter. *See supra* pp. 36-39. But even if OFPA was not clear, USDA's interpretation did not deserve the "*Chevron*-esque," ER-13, deference afforded to it by the district court, for two reasons.

First, the interpretation is arbitrary and capricious. *Chevron*, 467 U.S. at 844. Ignoring canons of statutory interpretation, writing new concepts into the law, and tearing down the structure and context of a statute is the essence of arbitrariness. If this is how statutory interpretation is done, USDA could violate any OFPA mandate, if USDA "reasonably" explained that the mandate only applies to certain systems. USDA could, for example, nullify the prohibited practices in 7 U.S.C. § 6508(b), to allow phosphorus, lime, and potash in hydroponic crop production because the heading, "soil amendments," means this section only applies to soil-based systems. It could even allow use of arsenic or lead salts prohibited under 7

U.S.C. § 6508(c) in hydroponic production because these substances are only prohibited on "farms," which USDA believes can *sometimes* mean soil-based. Once an agency's interpretation is no longer anchored in the statute and its context, an agency has unlimited authority.

Second, the district court's "*Chevron*-esque" deference, ER-13, was unwarranted, since the interpretation was not given in a formal rulemaking with public notice and comment. *Montana Sulphur & Chemical Co. v. EPA*, 666 F.3d 1174, 1183 n.2 (9th Cir. 2012). USDA could have amended its regulations to allow for hydroponic systems, as the second Task Force report suggested was possible. Its views then would be entitled to *Chevron* deference. But it did not. USDA instead studiously avoided taking any final agency action on the issue and through its inaction simply allowed hydroponic use to increase, until Appellants' legal petition forced them to address the issue. But when they did it was still without notice and comment or any rulemaking, meaning that any deference at step two is limited to USDA's power to persuade only. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (explaining that any deference to such an agency interpretation instead depends on "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those

factors which give it power to persuade"). As such, the lower court erred in affording the Denial anything more than *Skidmore* deference.

And USDA's "strained" and "granular" explanation (and without citing any statutory authority) fell far short of carrying the "power to persuade" under *Skidmore* review: It was cursory, not thorough; its reasons were unsupported rather than valid; and its decision was inconsistent with its earlier positions. It not only contradicts OFPA's mandatory requirements, but also reverses the Agency's own prior position that hydroponic operations must meet all the requirements of OFPA. ER-149; ER-91; ER-22.

Further, the Supreme Court has underscored that when agencies make a policy position reversal, they have an additional burden of explanation. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (stating that agencies must provide more "detailed justification" when reversing prior positions). USDA would have needed to provide far more details than its one-paragraph, extra-statutory exemption, lacking any citations to OFPA or its regulations.

B. The District Court Erred in Deferring to USDA's Unreasonable Interpretation of Its Regulations.

For these same reasons, the district court also erred in deferring to USDA's interpretation of its regulations in a manner that runs counter to OFPA. *Mines v. Sullivan*, 981 F.2d 1068, 1070 (9th Cir. 1992) ("[A] court need not accept an

agency's interpretation of its own regulations if that interpretation is . . . inconsistent with the statute under which the regulations were promulgated."); ER-16. The district court owed no deference to USDA's interpretation of its unambiguous regulations, and especially to USDA's unreasonable interpretation.

As the Supreme Court recently reminded, "before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Kisor*,139 S. Ct. 2415 (2019); *Amazon.com, Inc. v. Comm'r*, 934 F.3d 976, 984 (9th Cir. 2019) (quoting *Minnick v. Comm'r*, 796 F.3d 1156, 1159 (9th Cir. 2015) ("Regulations are interpreted according to the same rules as statutes, applying traditional rules of construction."). Only when the "legal toolkit is empty and the interpretative question still has no single right answer" can a court "wave the ambiguity flag." *Kisor*, 139 S. Ct at 2415.

As with the statute, the regulations are unambiguous. Subpart C of the regulations enumerates requirements not only for soil-based crop producers, but for *all* producers of cultivated crops. As explained *supra*, provisions of subsection C directly correlate to OFPA's mandatory soil fertility requirements by mandating all organic crop producers to engage in soil management practices—including proper tillage, crop rotations, cover crops, and "application of plant and animal materials," 7 C.F.R. §§ 205.203, 205.205—to maintain or improve soil health. *See* 7 C.F.R. §

205.200 ("[O]rganic producer or handler . . . must comply with the applicable provisions of this subpart."); 7 C.F.R. § 205.102 ("*Any* agricultural product that is sold, labeled, or represented as '100 percent organic,' 'organic,' or 'made with organic (specified ingredients or food group(s))' *must* be: . . . [p]roduced in accordance with the requirements specified in § 205.101 *or* §§ 205.202 through 205.207 *or* §§ 205.236 through 205.240 *and* all other applicable requirements of part 205.") (emphasis added).

But the district court erroneously deferred to USDA's attempt to avoid its own regulations by zeroing in on the word "applicable" in 7 C.F.R. § 205.200. ER-16 ("USDA's interpretation, as set forth in its regulations at 7 C.F.R. § 205.200, that soil fertility provisions apply only to production systems using soil is necessarily a permissible reading."). The district court adopted USDA's argument that hydroponic producers do not need to comply with the subsection C for crop producers because soil-based regulations are not "applicable," ER-18, to hydroponic producers, and regulatory requirements should be applied on a site-specific basis. ER-17.

Nothing in the regulations indicate that the crop production requirements in subpart C apply to only soil-based crop producers. To the contrary 7. C.F.R. § 205.200, the sole basis for USDA's interpretation, states in full:

> The producer or handler of a production or handling operation intending to sell, label, or represent agricultural products as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))" *must* comply with the applicable provisions of this subpart. Production practices implemented in accordance with this subpart *must* maintain or improve the natural resources of the operation, *including soil* and water quality.

Id. (emphases added) The latter requirements, that production practices "maintain or improve . . . soil and water quality" are without qualification, and thus apply to *all* producers seeking organic certification, including hydroponic producers. *Id*

The district court's approval of USDA's strained reading of the term "applicable" in its regulations still improperly assumes that a lack of express prohibition of hydroponic production equals permission. ER-17. But as explained above, *see supra* pp. 33-36, this argument is unsound. If USDA's reading were correct, producers could choose any production method for crops, completely irrespective of the "crop production farm plan" section of OFPA, and pick and choose which mandatory regulations are "applicable" to their illegal crop production system. It would render meaningless the agency's own regulations, not to mention the soil fertility provision of OFPA. *See* Scalia & Garner at 174-79 (surplusage canon).

It would further render meaningless the agency's distinctions between "may" and "must" throughout the regulations. *See, e.g.*, 7 C.F.R. § 205.203(a) ("The producer must select and implement tillage"); *id.* § 205.203(b) ("The producer must manage crop nutrients and soil fertility"); *id.* § 205.205 ("The producer must implement a crop rotation"); Scalia & Garner at 112-115 (mandatory/permissive canon). Where a practice standard is not required, USDA indicated so expressly in the Regulations by using the word "may." *See, e.g.*, 7 C.F.R. § 205.206(b) ("Pest problems may be controlled through mechanical or physical methods."); *see* Scalia & B. Garner, at 112 ("[M]ay is permissive.").

Finally, even if the regulatory language were ambiguous—which it is not—the off-the-cuff interpretation USDA has offered deserves no deference. The Supreme Court recently emphasized that "as under *Chevron*, the agency's reading must fall 'within the bounds of reasonable interpretation.' []. And let there be no mistake: That is a requirement an agency can fail." *Kisor*, 139 S. Ct. at 2416 (citation omitted). Here, USDA failed for at least two reasons.

First, USDA's interpretation of § 205.200 relied upon by the district court conflicts with its experts' opinions. As *Kisor* explains, "deference is 'unwarranted' . . . when a court concludes that an interpretation does not reflect an agency's authoritative, expertise-based, 'fair[, or] considered judgment.' " *Id.* at 2414 (citations

omitted). Here, USDA's experts, the NOSB, made explicit that all crop production systems must adhere to USDA's mandatory soil-based regulations, not only those regulations the agency deems "applicable" under § 205.200. *See supra* pp. 53-55; ER-155-56 ("Hydroponics . . . cannot be classified as certified organic growing methods due to . . . USDA/NOP regulations governing them."); ER-156 (stating that the soil-based requirements of § 205.203 are applicable to hydroponic systems).

Second, USDA's interpretation would also result in "unfair surprise" to regulated entities, undeserving of deference. *Kisor*, 139 S. Ct. at 2417-18 ("[A] court may not defer to a new interpretation, whether or not introduced in litigation, that creates 'unfair surprise' to regulated parties."). Here, USDA's changed position, not only that hydroponic systems may be certified organic but also that they do not even need to comply with mandatory provisions of OFPA and its regulations, provides a textbook example of "unfair surprise" to the regulated entities. ER-149; ER-91; ER-20; ER-165 (USDA's prior mixed interpretations). This change subjected non-hydroponic producers to different, more labor-intensive standards overnight for certification under the same label. It further altered the applicable standards for hydroponic producers and certifiers, unrooted from both regulation and statutory text.

CONCLUSION

The district court rubberstamped an unlawful loophole in organic crop production deeply undermining its integrity. Left standing, the decision creates not only a slippery slope towards inconsistent organic standards, but a dangerous administrative law precedent. "[O]nly the words on the page," *not* an agency's interpretation, "constitute the law adopted by Congress and approved by the President." *Bostock*, 140 S. Ct. at 1738. Affirming the district court's decision to nullify core provisions of OFPA without first looking to the plain text would blur the fundamental separation of powers upon which our constitutional design depends. Because OFPA unambiguously requires soil-based crop production, Appellants respectfully request this Court vacate the USDA's Petition Denial, and remand to the agency to conduct further proceedings consistent with this Court's decision.

Respectfully submitted this 1st day of October, 2021.

/s/ George Kimbrell
George A. Kimbrell
Sylvia Shih-Yau Wu
Meredith Stevenson
CENTER FOR FOOD SAFETY
303 Sacramento Street, 2nd Floor
San Francisco, CA 94111
T: (415) 826-2770
gkimbrell@centerforfoodsafety.org
swu@centerforfoodsafety.org
mstevenson@centerforfoodsafety.org

Counsel for Plaintiffs-Appellants

ADDENDUM OF STATUTES, REGULATIONS, AND RULES

TABLE OF CONTENTS

PAGE(S)

FEDERAL STATUTES

FEDERAL REGULATIONS

FEDERAL RULES

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 702

§ 702. Right of review

Currentness

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

Notes of Decisions (1338)

5 U.S.C.A. § 702, 5 USCA § 702
Current through PL 117-39.

End of Document

5 U.S.C.A. § 706

§ 706. Scope of review

Currentness

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

Notes of Decisions (5035)

5 U.S.C.A. § 706, 5 USCA § 706
Current through PL 117-39.

End of Document

United States Code Annotated
Title 7. Agriculture (Refs & Annos)
Chapter 94. Organic Certification (Refs & Annos)

7 U.S.C.A. § 6501

§ 6501. Purposes

Currentness

It is the purpose of this chapter--

(1) to establish national standards governing the marketing of certain agricultural products as organically produced products;

(2) to assure consumers that organically produced products meet a consistent standard; and

(3) to facilitate interstate commerce in fresh and processed food that is organically produced.

CREDIT(S)

(Pub.L. 101-624, Title XXI, § 2102, Nov. 28, 1990, 104 Stat. 3935.)

7 U.S.C.A. § 6501, 7 USCA § 6501
Current through PL 117-39.

End of Document

United States Code Annotated
Title 7. Agriculture (Refs & Annos)
Chapter 94. Organic Certification (Refs & Annos)

7 U.S.C.A. § 6502

§ 6502. Definitions

Effective: December 20, 2018
Currentness

As used in this chapter:

(1) Agricultural product

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 or livestock consumption.

(2) Botanical pesticides

The term "botanical pesticides" means natural pesticides derived from plants.

(3) Certifying agent

(A) In general

The term "certifying agent" means the chief executive officer of a State or, in the case of a State that provides for the Statewide election of an official to be responsible solely for the administration of the agricultural operations of the State, such official, and any person (including private entities) who is accredited by the Secretary as a certifying agent for the purpose of certifying a farm or handling operation as a certified organic farm or handling operation in accordance with this chapter.

(B) Foreign operations

When used in the context of a certifying agent operating in a foreign country, the term "certifying agent" includes any person (including a private entity)--

(i) accredited in accordance with section 6514(d) of this title; or

(ii) accredited by a foreign government that acted under an equivalency agreement negotiated between the United States and the foreign government from which the agricultural product is imported.

(4) Certified organic farm

The term "certified organic farm" means a farm, or portion of a farm, or site where agricultural products or livestock are produced, that is certified by the certifying agent under this chapter as utilizing a system of organic farming as described by this chapter.

(5) Certified organic handling operation

The term "certified organic handling operation" means any operation, or portion of any handling operation, that is certified by the certifying agent under this chapter as utilizing a system of organic handling as described under this chapter.

(6) Crop year

The term "crop year" means the normal growing season for a crop as determined by the Secretary.

(7) Governing State official

The term "governing State official" means the chief executive official of a State or, in the case of a State that provides for the Statewide election of an official to be responsible solely for the administration of the agricultural operations of the State, such official, who administers an organic certification program under this chapter.

(8) Handle

The term "handle" means to sell, process or package agricultural products.

(9) Handler

The term "handler" means any person engaged in the business of handling agricultural products, except such term shall not include final retailers of agricultural products that do not process agricultural products.

(10) Handling operation

The term "handling operation" means any operation or portion of an operation (except final retailers of agricultural products that do not process agricultural products) that--

(A) receives or otherwise acquires agricultural products; and

(B) processes, packages, or stores such products.

(11) Livestock

The term "livestock" means any cattle, sheep, goats, swine, poultry, equine animals used for food or in the production of food, fish used for food, wild or domesticated game, or other nonplant life.

(12) National List

The term "National List" means a list of approved and prohibited substances as provided for in section 6517 of this title.

(13) National organic program import certificate

The term "national organic program import certificate" means a form developed for purposes of the program under this chapter--

(A) to provide documentation sufficient to verify that an agricultural product imported for sale in the United States satisfies the requirement under section 6514(c) of this title;

(B) which shall include, at a minimum, information sufficient to indicate, with respect to the agricultural product--

(i) the origin;

(ii) the destination;

(iii) the certifying agent issuing the national organic program import certificate;

(iv) the harmonized tariff code, if a harmonized tariff code exists for the agricultural product;

(v) the total weight; and

(vi) the organic standard to which the agricultural product is certified; and

(C) that is not more than otherwise required under an equivalency agreement negotiated between the United States and the foreign government.

(14) Organic plan

The term "organic plan" means a plan of management of an organic farming or handling operation that has been agreed to by the producer or handler and the certifying agent and that includes written plans concerning all aspects of agricultural production or handling described in this chapter including crop rotation and other practices as required under this chapter.

(15) Organically produced

The term "organically produced" means an agricultural product that is produced and handled in accordance with this chapter.

(16) Person

The term "person" means an individual, group of individuals, corporation, association, organization, cooperative, or other entity.

(17) Pesticide

The term "pesticide" means any substance which alone, in chemical combination, or in any formulation with one or more substances, is defined as a pesticide in the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 et seq.).

(18) Processing

The term "processing" means cooking, baking, heating, drying, mixing, grinding, churning, separating, extracting, cutting, fermenting, eviscerating, preserving, dehydrating, freezing, or otherwise manufacturing, and includes the packaging, canning, jarring, or otherwise enclosing food in a container.

(19) Producer

The term "producer" means a person who engages in the business of growing or producing food or feed.

(20) Secretary

The term "Secretary" means the Secretary of Agriculture.

(21) State organic certification program

The term "State organic certification program" means a program that meets the requirements of section 6506 of this title, is approved by the Secretary, and that is designed to ensure that a product that is sold or labeled as "organically produced" under this chapter is produced and handled using organic methods.

(22) Synthetic

The term "synthetic" means a substance that is formulated or manufactured by a chemical process or by a process that chemically changes a substance extracted from naturally occurring plant, animal, or mineral sources, except that such term shall not apply to substances created by naturally occurring biological processes.

CREDIT(S)

(Pub.L. 101-624, Title XXI, § 2103, Nov. 28, 1990, 104 Stat. 3935; Pub.L. 115-334, Title X, § 10104(b), Dec. 20, 2018, 132 Stat. 4899.)

7 U.S.C.A. § 6502, 7 USCA § 6502
Current through PL 117-39.

End of Document

United States Code Annotated
Title 7. Agriculture (Refs & Annos)
Chapter 94. Organic Certification (Refs & Annos)

7 U.S.C.A. § 6503

§ 6503. National organic production program

Currentness

(a) In general

The Secretary shall establish an organic certification program for producers and handlers of agricultural products that have been produced using organic methods as provided for in this chapter.

(b) State program

In establishing the program under subsection (a), the Secretary shall permit each State to implement a State organic certification program for producers and handlers of agricultural products that have been produced using organic methods as provided for in this chapter.

(c) Consultation

In developing the program under subsection (a), and the National List under section 6517 of this title, the Secretary shall consult with the National Organic Standards Board established under section 6518 of this title.

(d) Certification

The Secretary shall implement the program established under subsection (a) through certifying agents. Such certifying agents may certify a farm or handling operation that meets the requirements of this chapter and the requirements of the organic certification program of the State (if applicable) as an organically certified farm or handling operation.

CREDIT(S)

(Pub.L. 101-624, Title XXI, § 2104, Nov. 28, 1990, 104 Stat. 3937.)

7 U.S.C.A. § 6503, 7 USCA § 6503
Current through PL 117-39.

End of Document

United States Code Annotated
Title 7. Agriculture (Refs & Annos)
Chapter 94. Organic Certification (Refs & Annos)

7 U.S.C.A. § 6504

§ 6504. National standards for organic production

Currentness

To be sold or labeled as an organically produced agricultural product under this chapter, an agricultural product shall--

(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.

CREDIT(S)

(Pub.L. 101-624, Title XXI, § 2105, Nov. 28, 1990, 104 Stat. 3937; Pub.L. 102-237, Title X, § 1001(1), Dec. 13, 1991, 105 Stat. 1893.)

Notes of Decisions (3)

7 U.S.C.A. § 6504, 7 USCA § 6504
Current through PL 117-39.

End of Document

United States Code Annotated
Title 7. Agriculture (Refs & Annos)
Chapter 94. Organic Certification (Refs & Annos)

7 U.S.C.A. § 6507

§ 6507. State organic certification program

Currentness

(a) In general

The governing State official may prepare and submit a plan for the establishment of a State organic certification program to the Secretary for approval. A State organic certification program must meet the requirements of this chapter to be approved by the Secretary.

(b) Additional requirements

(1) Authority

A State organic certification program established under subsection (a) may contain more restrictive requirements governing the organic certification of farms and handling operations and the production and handling of agricultural products that are to be sold or labeled as organically produced under this chapter than are contained in the program established by the Secretary.

(2) Content

Any additional requirements established under paragraph (1) shall--

(A) further the purposes of this chapter;

(B) not be inconsistent with this chapter;

(C) not be discriminatory towards agricultural commodities organically produced in other States in accordance with this chapter; and

(D) not become effective until approved by the Secretary.

(c) Review and other determinations

(1) Subsequent review

The Secretary shall review State organic certification programs not less than once during each 5-year period following the date of the approval of such programs.

(2) Changes in program

The governing State official, prior to implementing any substantive change to programs approved under this subsection, shall submit such change to the Secretary for approval.

(3) Time for determination

The Secretary shall make a determination concerning any plan, proposed change to a program, or a review of a program not later than 6 months after receipt of such plan, such proposed change, or the initiation of such review.

CREDIT(S)

(Pub.L. 101-624, Title XXI, § 2108, Nov. 28, 1990, 104 Stat. 3939.)

7 U.S.C.A. § 6507, 7 USCA § 6507
Current through PL 117-39.

End of Document

United States Code Annotated
Title 7. Agriculture (Refs & Annos)
Chapter 94. Organic Certification (Refs & Annos)

7 U.S.C.A. § 6508

§ 6508. Prohibited crop production practices and materials

Currentness

(a) Seed, seedlings and planting practices

For a farm to be certified under this chapter, producers on such farm shall not apply materials to, or engage in practices on, seeds or seedlings that are contrary to, or inconsistent with, the applicable organic certification program.

(b) Soil amendments

For a farm to be certified under this chapter, producers on such farm shall not--

(1) use any fertilizers containing synthetic ingredients or any commercially blended fertilizers containing materials prohibited under this chapter or under the applicable State organic certification program; or

(2) use as a source of nitrogen: phosphorous, lime, potash, or any materials that are inconsistent with the applicable organic certification program.

(c) Crop management

For a farm to be certified under this chapter, producers on such farm shall not--

(1) use natural poisons such as arsenic or lead salts that have long-term effects and persist in the environment, as determined by the applicable governing State official or the Secretary;

(2) use plastic mulches, unless such mulches are removed at the end of each growing or harvest season; or

(3) use transplants that are treated with any synthetic or prohibited material.

CREDIT(S)

(Pub.L. 101-624, Title XXI, § 2109, Nov. 28, 1990, 104 Stat. 3940.)

Notes of Decisions (1)

7 U.S.C.A. § 6508, 7 USCA § 6508
Current through PL 117-39.

End of Document

United States Code Annotated
Title 7. Agriculture (Refs & Annos)
Chapter 94. Organic Certification (Refs & Annos)

7 U.S.C.A. § 6509

§ 6509. Animal production practices and materials

Effective: November 10, 2005
Currentness

(a) In general

Any livestock that is to be slaughtered and sold or labeled as organically produced shall be raised in accordance with this chapter.

(b) Breeder stock

Breeder stock may be purchased from any source if such stock is not in the last third of gestation.

(c) Practices

For a farm to be certified under this chapter as an organic farm with respect to the livestock produced by such farm, producers on such farm--

(1) shall feed such livestock organically produced feed that meets the requirements of this chapter;

(2) shall not use the following feed--

(A) plastic pellets for roughage;

(B) manure refeeding; or

(C) feed formulas containing urea; and

(3) shall not use growth promoters and hormones on such livestock, whether implanted, ingested, or injected, including antibiotics and synthetic trace elements used to stimulate growth or production of such livestock.

(d) Health care

(1) Prohibited practices

For a farm to be certified under this chapter as an organic farm with respect to the livestock produced by such farm, producers on such farm shall not--

(A) use subtherapeutic doses of antibiotics;

(B) use synthetic internal parasiticides on a routine basis; or

(C) administer medication, other than vaccinations, in the absence of illness.

(2) Standards

The National Organic Standards Board shall recommend to the Secretary standards in addition to those in paragraph (1) for the care of livestock to ensure that such livestock is organically produced.

(e) Additional guidelines

(1) Poultry

With the exception of day old poultry, all poultry from which meat or eggs will be sold or labeled as organically produced shall be raised and handled in accordance with this chapter prior to and during the period in which such meat or eggs are sold.

(2) Dairy livestock

(A) In general

Except as provided in subparagraph (B), a dairy animal from which milk or milk products will be sold or labeled as organically produced shall be raised and handled in accordance with this chapter for not less than the 12-month period immediately prior to the sale of such milk and milk products.

(B) Transition guideline

Crops and forage from land included in the organic system plan of a dairy farm that is in the third year of organic management may be consumed by the dairy animals of the farm during the 12-month period immediately prior to the sale of organic milk and milk products.

(f) Livestock identification

(1) In general

For a farm to be certified under this chapter as an organic farm with respect to the livestock produced by such farm, producers on such farm shall keep adequate records and maintain a detailed, verifiable audit trail so that each animal (or in the case of poultry, each flock) can be traced back to such farm.

(2) Records

In order to carry out paragraph (1), each producer shall keep accurate records on each animal (or in the case of poultry, each flock) including--

(A) amounts and sources of all medications administered; and

(B) all feeds and feed supplements bought and fed.

(g) Notice and public comment

The Secretary shall hold public hearings and shall develop detailed regulations, with notice and public comment, to guide the implementation of the standards for livestock products provided under this section.

CREDIT(S)

(Pub.L. 101-624, Title XXI, § 2110, Nov. 28, 1990, 104 Stat. 3940; Pub.L. 102-237, Title X, § 1001(2), Dec. 13, 1991, 105 Stat. 1893; Pub.L. 109-97, Title VII, § 797(c), Nov. 10, 2005, 119 Stat. 2165.)

Notes of Decisions (1)

7 U.S.C.A. § 6509, 7 USCA § 6509
Current through PL 117-39.

End of Document

United States Code Annotated
Title 7. Agriculture (Refs & Annos)
Chapter 94. Organic Certification (Refs & Annos)

7 U.S.C.A. § 6512

§ 6512. Other production and handling practices

Currentness

If a production or handling practice is not prohibited or otherwise restricted under this chapter, such practice shall be permitted unless it is determined that such practice would be inconsistent with the applicable organic certification program.

CREDIT(S)

(Pub.L. 101-624, Title XXI, § 2113, Nov. 28, 1990, 104 Stat. 3943.)

Notes of Decisions (1)

7 U.S.C.A. § 6512, 7 USCA § 6512
Current through PL 117-39.

End of Document

United States Code Annotated
Title 7. Agriculture (Refs & Annos)
Chapter 94. Organic Certification (Refs & Annos)

7 U.S.C.A. § 6513

§ 6513. Organic plan

Currentness

(a) In general

A producer or handler seeking certification under this chapter shall submit an organic plan to the certifying agent and the State organic certification program (if applicable), and such plan shall be reviewed by the certifying agent who shall determine if such plan meets the requirements of the programs.

(b) Crop production farm plan

(1) Soil fertility

An organic plan shall contain provisions designed to foster soil fertility, primarily through the management of the organic content of the soil through proper tillage, crop rotation, and manuring.

(2) Manuring

(A) Inclusion in organic plan

An organic plan shall contain terms and conditions that regulate the application of manure to crops.

(B) Application of manure

Such organic plan may provide for the application of raw manure only to--

(i) any green manure crop;

(ii) any perennial crop;

(iii) any crop not for human consumption; and

(iv) any crop for human consumption, if such crop is harvested after a reasonable period of time determined by the certifying agent to ensure the safety of such crop, after the most recent application of raw manure, but in no event shall such period be less than 60 days after such application.

(C) Contamination by manure

Such organic plan shall prohibit raw manure from being applied to any crop in a way that significantly contributes to water contamination by nitrates or bacteria.

(c) Livestock plan

An organic livestock plan shall contain provisions designed to foster the organic production of livestock consistent with the purposes of this chapter.

(d) Mixed crop livestock production

An organic plan may encompass both the crop production and livestock production requirements in subsections (b) and (c) if both activities are conducted by the same producer.

(e) Handling plan

An organic handling plan shall contain provisions designed to ensure that agricultural products that are sold or labeled as organically produced are produced and handled in a manner that is consistent with the purposes of this chapter.

(f) Management of wild crops

An organic plan for the harvesting of wild crops shall--

(1) designate the area from which the wild crop will be gathered or harvested;

(2) include a 3 year history of the management of the area showing that no prohibited substances have been applied;

(3) include a plan for the harvesting or gathering of the wild crops assuring that such harvesting or gathering will not be destructive to the environment and will sustain the growth and production of the wild crop; and

(4) include provisions that no prohibited substances will be applied by the producer.

(g) Limitation on content of plan

An organic plan shall not include any production or handling practices that are inconsistent with this chapter.

CREDIT(S)

(Pub.L. 101-624, Title XXI, § 2114, Nov. 28, 1990, 104 Stat. 3943.)

Notes of Decisions (2)

7 U.S.C.A. § 6513, 7 USCA § 6513
Current through PL 117-39.

End of Document

United States Code Annotated
Title 7. Agriculture (Refs & Annos)
Chapter 94. Organic Certification (Refs & Annos)

7 U.S.C.A. § 6518

§ 6518. National Organic Standards Board

Effective: December 20, 2018
Currentness

(a) In general

The Secretary shall establish a National Organic Standards Board (in accordance with the Federal Advisory Committee Act) (hereafter referred to in this section as the "Board") to assist in the development of standards for substances to be used in organic production and to advise the Secretary on any other aspects of the implementation of this chapter.

(b) Composition of Board

The Board shall be composed of 15 members, of which--

(1) four shall be individuals who own or operate an organic farming operation, or employees of such individuals;

(2) two shall be individuals who own or operate an organic handling operation, or employees of such individuals;

(3) one shall be an individual who owns or operates a retail establishment with significant trade in organic products, or an employee of such individual;

(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.

(c) Appointment

Not later than 180 days after November 28, 1990, the Secretary shall appoint the members of the Board under paragraph (1) through (6) of subsection (b) (and under subsection (b)(7) at an appropriate date after the certification of individuals as certifying

agents under section 6515 of this title) from nominations received from organic certifying organizations, States, and other interested persons and organizations.

(d) Term

A member of the Board shall serve for a term of 5 years, except that the Secretary shall appoint the original members of the Board for staggered terms. A member cannot serve consecutive terms unless such member served an original term that was less than 5 years.

(e) Meetings

The Secretary shall convene a meeting of the Board not later than 60 days after the appointment of its members and shall convene subsequent meetings on a periodic basis.

(f) Compensation and expenses

A member of the Board shall serve without compensation. While away from their homes or regular places of business on the business of the Board, members of the Board may be allowed travel expenses, including per diem in lieu of subsistence, as is authorized under section 5703 of Title 5 for persons employed intermittently in the Government service.

(g) Chairperson

The Board shall select a Chairperson for the Board.

(h) Quorum

A majority of the members of the Board shall constitute a quorum for the purpose of conducting business.

(i) Decisive votes

(1) In general

$^{2}/_{3}$ of the votes cast at a meeting of the Board at which a quorum is present shall be decisive of any motion.

(2) National list

Any vote on a motion proposing to amend the national list shall be considered to be a decisive vote that requires $^{2}/_{3}$ of the votes cast at a meeting of the Board at which a quorum is present to prevail.

(j) Other terms and conditions

The Secretary shall authorize the Board to hire a staff director and shall detail staff of the Department of Agriculture or allow for the hiring of staff and may, subject to necessary appropriations, pay necessary expenses incurred by such Board in carrying out the provisions of this chapter, as determined appropriate by the Secretary.

(k) Responsibilities of Board

(1) In general

The Board shall provide recommendations to the Secretary regarding the implementation of this chapter.

(2) National List

The Board shall develop the proposed National List or proposed amendments to the National List for submission to the Secretary in accordance with section 6517 of this title.

(3) Technical advisory panels

The Board shall convene technical advisory panels to provide scientific evaluation of the materials considered for inclusion in the National List. Such panels may include experts in agronomy, entomology, health sciences and other relevant disciplines.

(4) Special review of botanical pesticides

The Board shall, prior to the establishment of the National List, review all botanical pesticides used in agricultural production and consider whether any such botanical pesticide should be included in the list of prohibited natural substances.

(5) Product residue testing

The Board shall advise the Secretary concerning the testing of organically produced agricultural products for residues caused by unavoidable residual environmental contamination.

(6) Emergency spray programs

The Board shall advise the Secretary concerning rules for exemptions from specific requirements of this chapter (except the provisions of section 6511 of this title) with respect to agricultural products produced on certified organic farms if such farms are subject to a Federal or State emergency pest or disease treatment program.

(l) Requirements

In establishing the proposed National List or proposed amendments to the National List, the Board shall--

(1) review available information from the Environmental Protection Agency, the National Institute of Environmental Health Studies, and such other sources as appropriate, concerning the potential for adverse human and environmental effects of substances considered for inclusion in the proposed National List;

(2) work with manufacturers of substances considered for inclusion in the proposed National List to obtain a complete list of ingredients and determine whether such substances contain inert materials that are synthetically produced; and

(3) submit to the Secretary, along with the proposed National List or any proposed amendments to such list, the results of the Board's evaluation and the evaluation of the technical advisory panel of all substances considered for inclusion in the National List.

(m) Evaluation

In evaluating substances considered for inclusion in the proposed National List or proposed amendment to the National List, the Board shall consider--

(1) the potential of such substances for detrimental chemical interactions with other materials used in organic farming systems;

(2) the toxicity and mode of action of the substance and of its breakdown products or any contaminants, and their persistence and areas of concentration in the environment;

(3) the probability of environmental contamination during manufacture, use, misuse or disposal of such substance;

(4) the effect of the substance on human health;

(5) the effects of the substance on biological and chemical interactions in the agroecosystem, including the physiological effects of the substance on soil organisms (including the salt index and solubility of the soil), crops and livestock;

(6) the alternatives to using the substance in terms of practices or other available materials; and

(7) its compatibility with a system of sustainable agriculture.

(n) Petitions

The Board shall establish procedures under which persons may petition the Board for the purpose of evaluating substances for inclusion on the National List.

(o) Confidentiality

Any confidential business information obtained by the Board in carrying out this section shall not be released to the public.

CREDIT(S)

(Pub.L. 101-624, Title XXI, § 2119, Nov. 28, 1990, 104 Stat. 3947; Pub.L. 102-237, Title X, § 1001(7), Dec. 13, 1991, 105 Stat. 1893; Pub.L. 115-334, Title X, § 10104(e), (f), Dec. 20, 2018, 132 Stat. 4901.)

Notes of Decisions (1)

7 U.S.C.A. § 6518, 7 USCA § 6518
Current through PL 117-39.

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 83. Courts of Appeals (Refs & Annos)

28 U.S.C.A. § 1291

§ 1291. Final decisions of district courts

Currentness

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; Pub.L. 85-508, § 12(e), July 7, 1958, 72 Stat. 348; Pub.L. 97-164, Title I, § 124, Apr. 2, 1982, 96 Stat. 36.)

Notes of Decisions (3498)

28 U.S.C.A. § 1291, 28 USCA § 1291
Current through PL 117-39.

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 85. District Courts; Jurisdiction (Refs & Annos)

28 U.S.C.A. § 1331

§ 1331. Federal question

Currentness

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 930; Pub.L. 85-554, § 1, July 25, 1958, 72 Stat. 415; Pub.L. 94-574, § 2, Oct. 21, 1976, 90 Stat. 2721; Pub.L. 96-486, § 2(a), Dec. 1, 1980, 94 Stat. 2369.)

Notes of Decisions (3153)

28 U.S.C.A. § 1331, 28 USCA § 1331
Current through PL 117-39.

End of Document

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedLimitation Recognized by United States v. Jonas, 5th Cir.(Tex.), Aug. 14, 2020

KeyCite Yellow Flag - Negative TreatmentProposed Legislation

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 85. District Courts; Jurisdiction (Refs & Annos)

28 U.S.C.A. § 1346

§ 1346. United States as defendant

Effective: March 7, 2013
Currentness

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18).

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179, the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453(2) of title 3, by a covered employee under chapter 5 of such title.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 933; Apr. 25, 1949, c. 92, § 2(a), 63 Stat. 62; May 24, 1949, c. 139, § 80(a), (b), 63 Stat. 101; Oct. 31, 1951, c. 655, § 50(b), 65 Stat. 727; July 30, 1954, c. 648, § 1, 68 Stat. 589; Pub.L. 85-508, § 12(e), July 7, 1958, 72 Stat. 348; Pub.L. 88-519, Aug. 30, 1964, 78 Stat. 699; Pub.L. 89-719, Title II, § 202(a), Nov. 2, 1966, 80 Stat. 1148; Pub.L. 91-350, § 1(a), July 23, 1970, 84 Stat. 449; Pub.L. 92-562, § 1, Oct. 25, 1972, 86 Stat. 1176; Pub.L. 94-455, Title XII, § 1204(c)(1), Title XIII, § 1306(b)(7), Oct. 4, 1976, 90 Stat. 1697, 1719; Pub.L. 95-563, § 14(a), Nov. 1, 1978, 92 Stat. 2389; Pub.L. 97-164, Title I, § 129, Apr. 2, 1982, 96 Stat. 39; Pub.L. 97-248, Title IV, § 402(c)(17), Sept. 3, 1982, 96 Stat. 669; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub.L. 102-572, Title IX, § 902(b)(1), Oct. 29, 1992, 106 Stat. 4516; Pub.L. 104-134, Title I, § 101[(a)][Title VIII, § 806], Apr. 26, 1996, 110 Stat. 1321-75; renumbered Title I, Pub.L. 104-140, § 1(a), May 2, 1996, 110 Stat. 1327; amended Pub.L. 104-331, § 3(b)(1), Oct. 26, 1996, 110 Stat. 4069; Pub.L. 111-350, § 5(g)(6), Jan. 4, 2011, 124 Stat. 3848; Pub.L. 113-4, Title XI, § 1101(b), Mar. 7, 2013, 127 Stat. 134.)

Notes of Decisions (4108)

28 U.S.C.A. § 1346, 28 USCA § 1346
Current through PL 117-39.

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part V. Procedure
Chapter 133. Review--Miscellaneous Provisions

28 U.S.C.A. § 2107

§ 2107. Time for appeal to court of appeals

Effective: December 1, 2011
Currentness

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit, or proceeding, the time as to all parties shall be 60 days from such entry if one of the parties is--

(1) the United States;

(2) a United States agency;

(3) a United States officer or employee sued in an official capacity; or

(4) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States, including all instances in which the United States represents that officer or employee when the judgment, order, or decree is entered or files the appeal for that officer or employee.

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds--

(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

(2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 963; May 24, 1949, c. 139, §§ 107, 108, 63 Stat. 104; Pub.L. 95-598, Title II, § 248, Nov. 6, 1978, 92 Stat. 2672; Pub.L. 102-198, § 12, Dec. 9, 1991, 105 Stat. 1627; Pub.L. 111-16, § 6(3), May 7, 2009, 123 Stat. 1608; Pub.L. 112-62, § 3, Nov. 29, 2011, 125 Stat. 757.)

Notes of Decisions (210)

28 U.S.C.A. § 2107, 28 USCA § 2107
Current through PL 117-39.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Regulation

Code of Federal Regulations
Title 7. Agriculture
Subtitle B. Regulations of the Department of Agriculture
Chapter I. Agricultural Marketing Service[1] (Standards, Inspections, Marketing Practices)
Subchapter M. Organic Foods Production Act Provisions (Refs & Annos)
Part 205. National Organic Program (Refs & Annos)
Subpart A. Definitions

7 C.F.R. § 205.2

§ 205.2 Terms defined.

Effective: February 5, 2015
Currentness

Accreditation. A determination made by the Secretary that authorizes a private, foreign, or State entity to conduct certification activities as a certifying agent under this part.

Act. The Organic Foods Production Act of 1990, as amended (7 U.S.C. 6501 et seq.).

Action level. The limit at or above which the Food and Drug Administration will take legal action against a product to remove it from the market. Action levels are based on unavoidability of the poisonous or deleterious substances and do not represent permissible levels of contamination where it is avoidable.

Administrator. The Administrator for the Agricultural Marketing Service, United States Departure of Agriculture, or the representative to whom authority has been delegated to act in the stead of the Administrator.

Agricultural inputs. All substances or materials used in the production or handling of organic agricultural products.

Agricultural product. 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 or livestock consumption.

Agricultural Marketing Service (AMS). The Agricultural Marketing Service of the United States Department of Agriculture.

Allowed synthetic. A substance that is included on the National List of synthetic substances allowed for use in organic production or handling.

AMDUCA. The Animal Medicinal Drug Use Clarification Act of 1994 (Pub.L. 103–396).

Animal drug. Any drug as defined in section 201 of the Federal Food, Drug, and Cosmetic Act, as amended (21 U.S.C. 321), that is intended for use in livestock, including any drug intended for use in livestock feed but not including such livestock feed.

Annual seedling. A plant grown from seed that will complete its life cycle or produce a harvestable yield within the same crop year or season in which it was planted.

Area of operation. The types of operations: crops, livestock, wild-crop harvesting or handling, or any combination thereof that a certifying agent may be accredited to certify under this part.

Audit trail. Documentation that is sufficient to determine the source, transfer of ownership, and transportation of any agricultural product labeled as "100 percent organic," the organic ingredients of any agricultural product labeled as "organic" or "made with organic (specified ingredients)" or the organic ingredients of any agricultural product containing less than 70 percent organic ingredients identified as organic in an ingredients statement.

Biodegradable. Subject to biological decomposition into simpler biochemical or chemical components.

Biodegradable biobased mulch film. A synthetic mulch film that meets the following criteria:

(1) Meets the compostability specifications of one of the following standards: ASTM D6400, ASTM D6868, EN 13432, EN 14995, or ISO 17088 (all incorporated by reference; see § 205.3);

(2) Demonstrates at least 90% biodegradation absolute or relative to microcrystalline cellulose in less than two years, in soil, according to one of the following test methods: ISO 17556 or ASTM D5988 (both incorporated by reference; see § 205.3); and

(3) Must be biobased with content determined using ASTM D6866 (incorporated by reference; see § 205.3).

Biologics. All viruses, serums, toxins, and analogous products of natural or synthetic origin, such as diagnostics, antitoxins, vaccines, live microorganisms, killed microorganisms, and the antigenic or immunizing components of microorganisms intended for use in the diagnosis, treatment, or prevention of diseases of animals.

Breeder stock. Female livestock whose offspring may be incorporated into an organic operation at the time of their birth.

Buffer zone. An area located between a certified production operation or portion of a production operation and an adjacent land area that is not maintained under organic management. A buffer zone must be sufficient in size or other features (e.g., windbreaks or a diversion ditch) to prevent the possibility of unintended contact by prohibited substances applied to adjacent land areas with an area that is part of a certified operation.

Bulk. The presentation to consumers at retail sale of an agricultural product in unpackaged, loose form, enabling the consumer to determine the individual pieces, amount, or volume of the product purchased.

Certification or certified. A determination made by a certifying agent that a production or handling operation is in compliance with the Act and the regulations in this part, which is documented by a certificate of organic operation.

Certified operation. A crop or livestock production, wild-crop harvesting or handling operation, or portion of such operation that is certified by an accredited certifying agent as utilizing a system of organic production or handling as described by the Act and the regulations in this part.

Certifying agent. Any entity accredited by the Secretary as a certifying agent for the purpose of certifying a production or handling operation as a certified production or handling operation.

Certifying agent's operation. All sites, facilities, personnel, and records used by a certifying agent to conduct certification activities under the Act and the regulations in this part.

Claims. Oral, written, implied, or symbolic representations, statements, or advertising or other forms of communication presented to the public or buyers of agricultural products that relate to the organic certification process or the term, "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))," or, in the case of agricultural products containing less than 70 percent organic ingredients, the term, "organic," on the ingredients panel.

Class of animal. A group of livestock that shares a similar stage of life or production. The classes of animals are those that are commonly listed on feed labels.

Commercially available. The ability to obtain a production input in an appropriate form, quality, or quantity to fulfill an essential function in a system of organic production or handling, as determined by the certifying agent in the course of reviewing the organic plan.

Commingling. Physical contact between unpackaged organically produced and nonorganically produced agricultural products during production, processing, transportation, storage or handling, other than during the manufacture of a multiingredient product containing both types of ingredients.

Compost. The product of a managed process through which microorganisms break down plant and animal materials into more available forms suitable for application to the soil. Compost must be produced through a process that combines plant and animal materials with an initial C:N ratio of between 25:1 and 40:1. Producers using an in-vessel or static aerated pile system must maintain the composting materials at a temperature between 131° F and 170° F for 3 days. Producers using a windrow system must maintain the composting materials at a temperature between 131° F and 170° F for 15 days, during which time, the materials must be turned a minimum of five times.

Control. Any method that reduces or limits damage by populations of pests, weeds, or diseases to levels that do not significantly reduce productivity.

Crop. Pastures, cover crops, green manure crops, catch crops, or any plant or part of a plant intended to be marketed as an agricultural product, fed to livestock, or used in the field to manage nutrients and soil fertility.

Crop residues. The plant parts remaining in a field after the harvest of a crop, which include stalks, stems, leaves, roots, and weeds.

Crop rotation. The practice of alternating the annual crops grown on a specific field in a planned pattern or sequence in successive crop years so that crops of the same species or family are not grown repeatedly without interruption on the same field. Perennial cropping systems employ means such as alley cropping, intercropping, and hedgerows to introduce biological diversity in lieu of crop rotation.

Crop year. That normal growing season for a crop as determined by the Secretary.

Cultivation. Digging up or cutting the soil to prepare a seed bed; control weeds; aerate the soil; or work organic matter, crop residues, or fertilizers into the soil.

Cultural methods. Methods used to enhance crop health and prevent weed, pest, or disease problems without the use of substances; examples include the selection of appropriate varieties and planting sites; proper timing and density of plantings; irrigation; and extending a growing season by manipulating the microclimate with green houses, cold frames, or wind breaks.

Detectable residue. The amount or presence of chemical residue or sample component that can be reliably observed or found in the sample matrix by current approved analytical methodology.

Disease vectors. Plants or animals that harbor or transmit disease organisms or pathogens which may attack crops or livestock.

Drift. The physical movement of prohibited substances from the intended target site onto an organic operation or portion thereof.

Dry lot. A fenced area that may be covered with concrete, but that has little or no vegetative cover.

Dry matter. The amount of a feedstuff remaining after all the free moisture is evaporated out.

Dry matter demand. The expected dry matter intake for a class of animal.

Dry matter intake. Total pounds of all feed, devoid of all moisture, consumed by a class of animals over a given period of time.

Emergency pest or disease treatment program. A mandatory program authorized by a Federal, State, or local agency for the purpose of controlling or eradicating a pest or disease.

Employee. Any person providing paid or volunteer services for a certifying agent.

Excipients. Any ingredients that are intentionally added to livestock medications but do not exert therapeutic or diagnostic effects at the intended dosage, although they may act to improve product delivery (e.g., enhancing absorption or controlling release of the drug substance). Examples of such ingredients include fillers, extenders, diluents, wetting agents, solvents, emulsifiers, preservatives, flavors, absorption enhancers, sustained-release matrices, and coloring agents.

Excluded methods. A variety of methods used to genetically modify organisms or influence their growth and development by means that are not possible under natural conditions or processes and are not considered compatible with organic production. Such methods include cell fusion, microencapsulation and macroencapsulation, and recombinant DNA technology (including gene deletion, gene doubling, introducing a foreign gene, and changing the positions of genes when achieved by recombinant DNA technology). Such methods do not include the use of traditional breeding, conjugation, fermentation, hybridization, in vitro fertilization, or tissue culture.

Feed. Edible materials which are consumed by livestock for their nutritional value. Feed may be concentrates (grains) or roughages (hay, silage, fodder). The term, “feed,” encompasses all agricultural commodities, including pasture ingested by livestock for nutritional purposes.

Feed additive. A substance added to feed in micro quantities to fulfill a specific nutritional need; i.e., essential nutrients in the form of amino acids, vitamins, and minerals.

Feedlot. A dry lot for the controlled feeding of livestock.

Feed supplement. A combination of feed nutrients added to livestock feed to improve the nutrient balance or performance of the total ration and intended to be:

(1) Diluted with other feeds when fed to livestock;

(2) Offered free choice with other parts of the ration if separately available; or

(3) Further diluted and mixed to produce a complete feed.

Fertilizer. A single or blended substance containing one or more recognized plant nutrient(s) which is used primarily for its plant nutrient content and which is designed for use or claimed to have value in promoting plant growth.

Field. An area of land identified as a discrete unit within a production operation.

Forage. Vegetative material in a fresh, dried, or ensiled state (pasture, hay, or silage), which is fed to livestock.

Governmental entity. Any domestic government, tribal government, or foreign governmental subdivision providing certification services.

Graze. (1) The consumption of standing or residual forage by livestock.

(2) To put livestock to feed on standing or residual forage.

Grazing. To graze.

Grazing season. The period of time when pasture is available for grazing, due to natural precipitation or irrigation. Grazing season dates may vary because of mid-summer heat/humidity, significant precipitation events, floods, hurricanes, droughts or winter weather events. Grazing season may be extended by the grazing of residual forage as agreed in the operation's organic system plan. Due to weather, season, or climate, the grazing season may or may not be continuous. Grazing season may range from 120 days to 365 days, but not less than 120 days per year.

Handle. To sell, process, or package agricultural products, except such term shall not include the sale, transportation, or delivery of crops or livestock by the producer thereof to a handler.

Handler. Any person engaged in the business of handling agricultural products, including producers who handle crops or livestock of their own production, except such term shall not include final retailers of agricultural products that do not process agricultural products.

Handling operation. Any operation or portion of an operation (except final retailers of agricultural products that do not process agricultural products) that receives or otherwise acquires agricultural products and processes, packages, or stores such products.

Immediate family. The spouse, minor children, or blood relatives who reside in the immediate household of a certifying agent or an employee, inspector, contractor, or other personnel of the certifying agent. For the purpose of this part, the interest of a spouse, minor child, or blood relative who is a resident of the immediate household of a certifying agent or an employee, inspector, contractor, or other personnel of the certifying agent shall be considered to be an interest of the certifying agent or an employee, inspector, contractor, or other personnel of the certifying agent.

Inclement weather. Weather that is violent, or characterized by temperatures (high or low), or characterized by excessive precipitation that can cause physical harm to a given species of livestock. Production yields or growth rates of livestock lower than the maximum achievable do not qualify as physical harm.

Inert ingredient. Any substance (or group of substances with similar chemical structures if designated by the Environmental Protection Agency) other than an active ingredient which is intentionally included in any pesticide product (40 CFR 152.3(m)).

Information panel. That part of the label of a packaged product that is immediately contiguous to and to the right of the principal display panel as observed by an individual facing the principal display panel, unless another section of the label is designated as the information panel because of package size or other package attributes (e.g., irregular shape with one usable surface).

Ingredient. Any substance used in the preparation of an agricultural product that is still present in the final commercial product as consumed.

Ingredients statement. The list of ingredients contained in a product shown in their common and usual names in the descending order of predominance.

Inspection. The act of examining and evaluating the production or handling operation of an applicant for certification or certified operation to determine compliance with the Act and the regulations in this part.

Inspector. Any person retained or used by a certifying agent to conduct inspections of certification applicants or certified production or handling operations.

Label. A display of written, printed, or graphic material on the immediate container of an agricultural product or any such material affixed to any agricultural product or affixed to a bulk container containing an agricultural product, except for package liners or a display of written, printed, or graphic material which contains only information about the weight of the product.

Labeling. All written, printed, or graphic material accompanying an agricultural product at any time or written, printed, or graphic material about the agricultural product displayed at retail stores about the product.

Livestock. Any cattle, sheep, goats, swine, poultry, or equine animals used for food or in the production of food, fiber, feed, or other agricultural-based consumer products; wild or domesticated game; or other nonplant life, except such term shall not include aquatic animals for the production of food, fiber, feed, or other agricultural-based consumer products.

Lot. Any number of containers which contain an agricultural product of the same kind located in the same conveyance, warehouse, or packing house and which are available for inspection at the same time.

Manure. Feces, urine, other excrement, and bedding produced by livestock that has not been composted.

Market information. Any written, printed, audiovisual, or graphic information, including advertising, pamphlets, flyers, catalogues, posters, and signs, distributed, broadcast, or made available outside of retail outlets that are used to assist in the sale or promotion of a product.

Mulch. Any nonsynthetic material, such as wood chips, leaves, or straw, or any synthetic material included on the National List for such use, such as newspaper or plastic that serves to suppress weed growth, moderate soil temperature, or conserve soil moisture.

Narrow range oils. Petroleum derivatives, predominately of paraffinic and napthenic fractions with 50 percent boiling point (10 mm Hg) between 415° F and 440° F.

National List. A list of allowed and prohibited substances as provided for in the Act.

National Organic Program (NOP). The program authorized by the Act for the purpose of implementing its provisions.

National Organic Standards Board (NOSB). A board established by the Secretary under 7 U.S.C. 6518 to assist in the development of standards for substances to be used in organic production and to advise the Secretary on any other aspects of the implementation of the National Organic Program.

Natural resources of the operation. The physical, hydrological, and biological features of a production operation, including soil, water, wetlands, woodlands, and wildlife.

Nonagricultural substance. A substance that is not a product of agriculture, such as a mineral or a bacterial culture, that is used as an ingredient in an agricultural product. For the purposes of this part, a nonagricultural ingredient also includes any substance, such as gums, citric acid, or pectin, that is extracted from, isolated from, or a fraction of an agricultural product so that the identity of the agricultural product is unrecognizable in the extract, isolate, or fraction.

Nonsynthetic (natural). A substance that is derived from mineral, plant, or animal matter and does not undergo a synthetic process as defined in section 6502(21) of the Act (7 U.S.C. 6502(21)). For the purposes of this part, nonsynthetic is used as a synonym for natural as the term is used in the Act.

Nonretail container. Any container used for shipping or storage of an agricultural product that is not used in the retail display or sale of the product.

Nontoxic. Not known to cause any adverse physiological effects in animals, plants, humans, or the environment.

Organic. A labeling term that refers to an agricultural product produced in accordance with the Act and the regulations in this part.

Organic matter. The remains, residues, or waste products of any organism.

Organic production. A production system that is managed in accordance with the Act and regulations in this part to respond to site-specific conditions by integrating cultural, biological, and mechanical practices that foster cycling of resources, promote ecological balance, and conserve biodiversity.

Organic system plan. A plan of management of an organic production or handling operation that has been agreed to by the producer or handler and the certifying agent and that includes written plans concerning all aspects of agricultural production or handling described in the Act and the regulations in subpart C of this part.

Pasture. Land used for livestock grazing that is managed to provide feed value and maintain or improve soil, water, and vegetative resources.

Peer review panel. A panel of individuals who have expertise in organic production and handling methods and certification procedures and who are appointed by the Administrator to assist in evaluating applicants for accreditation as certifying agents.

Person. An individual, partnership, corporation, association, cooperative, or other entity.

Pesticide. Any substance which alone, in chemical combination, or in any formulation with one or more substances is defined as a pesticide in section 2(u) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136(u) et seq).

Petition. A request to amend the National List that is submitted by any person in accordance with this part.

Planting stock. Any plant or plant tissue other than annual seedlings but including rhizomes, shoots, leaf or stem cuttings, roots, or tubers, used in plant production or propagation.

Practice standard. The guidelines and requirements through which a production or handling operation implements a required component of its production or handling organic system plan. A practice standard includes a series of allowed and prohibited actions, materials, and conditions to establish a minimum level performance for planning, conducting, and maintaining a function, such as livestock health care or facility pest management, essential to an organic operation.

Principal display panel. That part of a label that is most likely to be displayed, presented, shown, or examined under customary conditions of display for sale.

Private entity. Any domestic or foreign nongovernmental for-profit or not-for-profit organization providing certification services.

Processing. Cooking, baking, curing, heating, drying, mixing, grinding, churning, separating, extracting, slaughtering, cutting, fermenting, distilling, eviscerating, preserving, dehydrating, freezing, chilling, or otherwise manufacturing and includes the packaging, canning, jarring, or otherwise enclosing food in a container.

Processing aid. (1) Substance that is added to a food during the processing of such food but is removed in some manner from the food before it is packaged in its finished form;

(2) a substance that is added to a food during processing, is converted into constituents normally present in the food, and does not significantly increase the amount of the constituents naturally found in the food; and

(3) a substance that is added to a food for its technical or functional effect in the processing but is present in the finished food at insignificant levels and does not have any technical or functional effect in that food.

Producer. A person who engages in the business of growing or producing food, fiber, feed, and other agricultural-based consumer products.

Production lot number/identifier. Identification of a product based on the production sequence of the product showing the date, time, and place of production used for quality control purposes.

Prohibited substance. A substance the use of which in any aspect of organic production or handling is prohibited or not provided for in the Act or the regulations of this part.

Records. Any information in written, visual, or electronic form that documents the activities undertaken by a producer, handler, or certifying agent to comply with the Act and regulations in this part.

Residual forage. Forage cut and left to lie, or windrowed and left to lie, in place in the pasture.

Residue testing. An official or validated analytical procedure that detects, identifies, and measures the presence of chemical substances, their metabolites, or degradation products in or on raw or processed agricultural products.

Responsibly connected. Any person who is a partner, officer, director, holder, manager, or owner of 10 percent or more of the voting stock of an applicant or a recipient of certification or accreditation.

Retail food establishment. A restaurant; delicatessen; bakery; grocery store; or any retail outlet with an in-store restaurant, delicatessen, bakery, salad bar, or other eat-in or carry-out service of processed or prepared raw and ready-to-eat-food.

Routine use of parasiticide. The regular, planned, or periodic use of parasiticides.

Secretary. The Secretary of Agriculture or a representative to whom authority has been delegated to act in the Secretary's stead.

Sewage sludge. A solid, semisolid, or liquid residue generated during the treatment of domestic sewage in a treatment works. Sewage sludge includes but is not limited to: domestic septage; scum or solids removed in primary, secondary, or advanced wastewater treatment processes; and a material derived from sewage sludge. Sewage sludge does not include ash generated

during the firing of sewage sludge in a sewage sludge incinerator or grit and screenings generated during preliminary treatment of domestic sewage in a treatment works.

Shelter. Structures such as barns, sheds, or windbreaks; or natural areas such as woods, tree lines, large hedge rows, or geographic land features, that are designed or selected to provide physical protection or housing to all animals.

Slaughter stock. Any animal that is intended to be slaughtered for consumption by humans or other animals.

Soil and water quality. Observable indicators of the physical, chemical, or biological condition of soil and water, including the presence of environmental contaminants.

Split operation. An operation that produces or handles both organic and nonorganic agricultural products.

Stage of life. A discrete time period in an animal's life which requires specific management practices different than during other periods (e.g., poultry during feathering). Breeding, freshening, lactation and other recurring events are not a stage of life.

State. Any of the several States of the United States of America, its territories, the District of Columbia, and the Commonwealth of Puerto Rico.

State certifying agent. A certifying agent accredited by the Secretary under the National Organic Program and operated by the State for the purposes of certifying organic production and handling operations in the State.

State organic program (SOP). A State program that meets the requirements of section 6506 of the Act, is approved by the Secretary, and is designed to ensure that a product that is sold or labeled as organically produced under the Act is produced and handled using organic methods.

State organic program's governing State official. The chief executive official of a State or, in the case of a State that provides for the statewide election of an official to be responsible solely for the administration of the agricultural operations of the State, such official who administers a State organic certification program.

Synthetic. A substance that is formulated or manufactured by a chemical process or by a process that chemically changes a substance extracted from naturally occurring plant, animal, or mineral sources, except that such term shall not apply to substances created by naturally occurring biological processes.

Temporary and Temporarily. Occurring for a limited time only (e.g., overnight, throughout a storm, during a period of illness, the period of time specified by the Administrator when granting a temporary variance), not permanent or lasting.

Tolerance. The maximum legal level of a pesticide chemical residue in or on a raw or processed agricultural commodity or processed food.

Transplant. A seedling which has been removed from its original place of production, transported, and replanted.

Unavoidable residual environmental contamination (UREC). Background levels of naturally occurring or synthetic chemicals that are present in the soil or present in organically produced agricultural products that are below established tolerances.

Wild crop. Any plant or portion of a plant that is collected or harvested from a site that is not maintained under cultivation or other agricultural management.

Yards/Feeding pad. An area for feeding, exercising, and outdoor access for livestock during the non-grazing season and a high traffic area where animals may receive supplemental feeding during the grazing season.

Credits

[72 FR 70484, Dec. 12, 2007; 75 FR 7192, Feb. 17, 2010; 79 FR 58662, Sept. 30, 2014; 80 FR 6429, Feb. 5, 2015; 82 FR 7088, Jan. 19, 2017; 82 FR 9967, Feb. 9, 2017; 82 FR 21677, May 10, 2017; 82 FR 52643, Nov. 14, 2017; 83 FR 10775, March 13, 2018]

SOURCE: 65 FR 80637, Dec. 21, 2000; 66 FR 15619, March 20, 2001; 85 FR 70435, Nov. 5, 2020; 86 FR 33484, June 25, 2021, unless otherwise noted.

AUTHORITY: 7 U.S.C. 6501–6524.

Current through September 9, 2021; 86 FR 50483.

Footnotes

1 Includes matters within the responsibility of the Federal Grain Inspection Service.

End of Document

Code of Federal Regulations
Title 7. Agriculture
Subtitle B. Regulations of the Department of Agriculture
Chapter I. Agricultural Marketing Service[1] (Standards, Inspections, Marketing Practices)
Subchapter M. Organic Foods Production Act Provisions (Refs & Annos)
Part 205. National Organic Program (Refs & Annos)
Subpart B. Applicability

7 C.F.R. § 205.101

§ 205.101 Exemptions and exclusions from certification.

Currentness

(a) Exemptions.

(1) A production or handling operation that sells agricultural products as "organic" but whose gross agricultural income from organic sales totals $5,000 or less annually is exempt from certification under subpart E of this part and from submitting an organic system plan for acceptance or approval under § 205.201 but must comply with the applicable organic production and handling requirements of subpart C of this part and the labeling requirements of § 205.310. The products from such operations shall not be used as ingredients identified as organic in processed products produced by another handling operation.

(2) A handling operation that is a retail food establishment or portion of a retail food establishment that handles organically produced agricultural products but does not process them is exempt from the requirements in this part.

(3) A handling operation or portion of a handling operation that only handles agricultural products that contain less than 70 percent organic ingredients by total weight of the finished product (excluding water and salt) is exempt from the requirements in this part, except:

(i) The provisions for prevention of contact of organic products with prohibited substances set forth in § 205.272 with respect to any organically produced ingredients used in an agricultural product;

(ii) The labeling provisions of §§ 205.305 and 205.310; and

(iii) The recordkeeping provisions in paragraph (c) of this section.

(4) A handling operation or portion of a handling operation that only identifies organic ingredients on the information panel is exempt from the requirements in this part, except:

(i) The provisions for prevention of contact of organic products with prohibited substances set forth in § 205.272 with respect to any organically produced ingredients used in an agricultural product;

(ii) The labeling provisions of §§ 205.305 and 205.310; and

(iii) The recordkeeping provisions in paragraph (c) of this section.

(b) Exclusions.

(1) A handling operation or portion of a handling operation is excluded from the requirements of this part, except for the requirements for the prevention of commingling and contact with prohibited substances as set forth in § 205.272 with respect to any organically produced products, if such operation or portion of the operation only sells organic agricultural products labeled as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))" that:

(i) Are packaged or otherwise enclosed in a container prior to being received or acquired by the operation; and

(ii) Remain in the same package or container and are not otherwise processed while in the control of the handling operation.

(2) A handling operation that is a retail food establishment or portion of a retail food establishment that processes, on the premises of the retail food establishment, raw and ready-to-eat food from agricultural products that were previously labeled as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))" is excluded from the requirements in this part, except:

(i) The requirements for the prevention of contact with prohibited substances as set forth in § 205.272; and

(ii) The labeling provisions of § 205.310.

(c) Records to be maintained by exempt operations.

(1) Any handling operation exempt from certification pursuant to paragraph (a)(3) or (a)(4) of this section must maintain records sufficient to:

(i) Prove that ingredients identified as organic were organically produced and handled; and

(ii) Verify quantities produced from such ingredients.

(2) Records must be maintained for no less than 3 years beyond their creation and the operations must allow representatives of the Secretary and the applicable State organic programs' governing State official access to these records for inspection and copying during normal business hours to determine compliance with the applicable regulations set forth in this part.

SOURCE: 65 FR 80637, Dec. 21, 2000; 66 FR 15619, March 20, 2001; 85 FR 70435, Nov. 5, 2020; 86 FR 33484, June 25, 2021, unless otherwise noted.

AUTHORITY: 7 U.S.C. 6501–6524.

Notes of Decisions (2)

Current through September 9, 2021; 86 FR 50483.

Footnotes

1 Includes matters within the responsibility of the Federal Grain Inspection Service.

End of Document

Code of Federal Regulations
Title 7. Agriculture
Subtitle B. Regulations of the Department of Agriculture
Chapter I. Agricultural Marketing Service[1] (Standards, Inspections, Marketing Practices)
Subchapter M. Organic Foods Production Act Provisions (Refs & Annos)
Part 205. National Organic Program (Refs & Annos)
Subpart B. Applicability

7 C.F.R. § 205.102

§ 205.102 Use of the term, “organic.”

Effective: June 17, 2010
Currentness

Any agricultural product that is sold, labeled, or represented as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s))” must be:

(a) Produced in accordance with the requirements specified in § 205.101 or §§ 205.202 through 205.207 or §§ 205.236 through 205.240 and all other applicable requirements of part 205; and

(b) Handled in accordance with the requirements specified in § 205.101 or §§ 205.270 through 205.272 and all other applicable requirements of this part 205.

Credits
[75 FR 7193, Feb. 17, 2010]

SOURCE: 65 FR 80637, Dec. 21, 2000; 66 FR 15619, March 20, 2001; 85 FR 70435, Nov. 5, 2020; 86 FR 33484, June 25, 2021, unless otherwise noted.

AUTHORITY: 7 U.S.C. 6501–6524.

Current through September 9, 2021; 86 FR 50483.

Footnotes
1 Includes matters within the responsibility of the Federal Grain Inspection Service.

End of Document

Code of Federal Regulations
Title 7. Agriculture
Subtitle B. Regulations of the Department of Agriculture
Chapter I. Agricultural Marketing Service[1] (Standards, Inspections, Marketing Practices)
Subchapter M. Organic Foods Production Act Provisions (Refs & Annos)
Part 205. National Organic Program (Refs & Annos)
Subpart C. Organic Production and Handling Requirements

7 C.F.R. § 205.200

§ 205.200 General.

Currentness

The producer or handler of a production or handling operation intending to sell, label, or represent agricultural products as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))" must comply with the applicable provisions of this subpart. Production practices implemented in accordance with this subpart must maintain or improve the natural resources of the operation, including soil and water quality.

SOURCE: 65 FR 80637, Dec. 21, 2000; 66 FR 15619, March 20, 2001; 85 FR 70435, Nov. 5, 2020; 86 FR 33484, June 25, 2021, unless otherwise noted.

AUTHORITY: 7 U.S.C. 6501–6524.

Current through September 9, 2021; 86 FR 50483.

Footnotes
1 Includes matters within the responsibility of the Federal Grain Inspection Service.

End of Document

Code of Federal Regulations
Title 7. Agriculture
Subtitle B. Regulations of the Department of Agriculture
Chapter I. Agricultural Marketing Service[1] (Standards, Inspections, Marketing Practices)
Subchapter M. Organic Foods Production Act Provisions (Refs & Annos)
Part 205. National Organic Program (Refs & Annos)
Subpart C. Organic Production and Handling Requirements

7 C.F.R. § 205.202

§ 205.202 Land requirements.

Currentness

Any field or farm parcel from which harvested crops are intended to be sold, labeled, or represented as "organic," must:

(a) Have been managed in accordance with the provisions of §§ 205.203 through 205.206;

(b) Have had no prohibited substances, as listed in § 205.105, applied to it for a period of 3 years immediately preceding harvest of the crop; and

(c) Have distinct, defined boundaries and buffer zones such as runoff diversions to prevent the unintended application of a prohibited substance to the crop or contact with a prohibited substance applied to adjoining land that is not under organic management.

SOURCE: 65 FR 80637, Dec. 21, 2000; 66 FR 15619, March 20, 2001; 85 FR 70435, Nov. 5, 2020; 86 FR 33484, June 25, 2021, unless otherwise noted.

AUTHORITY: 7 U.S.C. 6501–6524.

Current through September 9, 2021; 86 FR 50483.

Footnotes

1 Includes matters within the responsibility of the Federal Grain Inspection Service.

End of Document

7 C.F.R. § 205.203

§ 205.203 Soil fertility and crop nutrient management practice standard.

Currentness

(a) The producer must select and implement tillage and cultivation practices that maintain or improve the physical, chemical, and biological condition of soil and minimize soil erosion.

(b) The producer must manage crop nutrients and soil fertility through rotations, cover crops, and the application of plant and animal materials.

(c) The producer must manage plant and animal materials to maintain or improve soil organic matter content in a manner that does not contribute to contamination of crops, soil, or water by plant nutrients, pathogenic organisms, heavy metals, or residues of prohibited substances. Animal and plant materials include:

(1) Raw animal manure, which must be composted unless it is:

(i) Applied to land used for a crop not intended for human consumption;

(ii) Incorporated into the soil not less than 120 days prior to the harvest of a product whose edible portion has direct contact with the soil surface or soil particles; or

(iii) Incorporated into the soil not less than 90 days prior to the harvest of a product whose edible portion does not have direct contact with the soil surface or soil particles;

(2) Composted plant and animal materials produced though a process that:

(i) Established an initial C:N ratio of between 25:1 and 40:1; and

(ii) Maintained a temperature of between 131° F and 170° F for 3 days using an in-vessel or static aerated pile system; or

(iii) Maintained a temperature of between 131° F and 170° F for 15 days using a windrow composting system, during which period, the materials must be turned a minimum of five times.

(3) Uncomposted plant materials.

(d) A producer may manage crop nutrients and soil fertility to maintain or improve soil organic matter content in a manner that does not contribute to contamination of crops, soil, or water by plant nutrients, pathogenic organisms, heavy metals, or residues of prohibited substances by applying:

(1) A crop nutrient or soil amendment included on the National List of synthetic substances allowed for use in organic crop production;

(2) A mined substance of low solubility;

(3) A mined substance of high solubility: Provided, That, the substance is used in compliance with the conditions established on the National List of nonsynthetic materials prohibited for crop production;

(4) Ash obtained from the burning of a plant or animal material, except as prohibited in paragraph (e) of this section: Provided, That, the material burned has not been treated or combined with a prohibited substance or the ash is not included on the National List of nonsynthetic substances prohibited for use in organic crop production; and

(5) A plant or animal material that has been chemically altered by a manufacturing process: Provided, That, the material is included on the National List of synthetic substances allowed for use in organic crop production established in § 205.601.

(e) The producer must not use:

(1) Any fertilizer or composted plant and animal material that contains a synthetic substance not included on the National List of synthetic substances allowed for use in organic crop production;

(2) Sewage sludge (biosolids) as defined in 40 CFR part 503; and

(3) Burning as a means of disposal for crop residues produced on the operation: Except, That, burning may be used to suppress the spread of disease or to stimulate seed germination.

SOURCE: 65 FR 80637, Dec. 21, 2000; 66 FR 15619, March 20, 2001; 85 FR 70435, Nov. 5, 2020; 86 FR 33484, June 25, 2021, unless otherwise noted.

AUTHORITY: 7 U.S.C. 6501–6524.

Current through September 9, 2021; 86 FR 50483.

Footnotes

1 Includes matters within the responsibility of the Federal Grain Inspection Service.

Code of Federal Regulations
Title 7. Agriculture
Subtitle B. Regulations of the Department of Agriculture
Chapter I. Agricultural Marketing Service[1] (Standards, Inspections, Marketing Practices)
Subchapter M. Organic Foods Production Act Provisions (Refs & Annos)
Part 205. National Organic Program (Refs & Annos)
Subpart C. Organic Production and Handling Requirements

7 C.F.R. § 205.204

§ 205.204 Seeds and planting stock practice standard.

Currentness

(a) The producer must use organically grown seeds, annual seedlings, and planting stock: Except, That,

(1) Nonorganically produced, untreated seeds and planting stock may be used to produce an organic crop when an equivalent organically produced variety is not commercially available: Except, That, organically produced seed must be used for the production of edible sprouts;

(2) Nonorganically produced seeds and planting stock that have been treated with a substance included on the National List of synthetic substances allowed for use in organic crop production may be used to produce an organic crop when an equivalent organically produced or untreated variety is not commercially available;

(3) Nonorganically produced annual seedlings may be used to produce an organic crop when a temporary variance has been granted in accordance with § 205.290(a)(2);

(4) Nonorganically produced planting stock to be used to produce a perennial crop may be sold, labeled, or represented as organically produced only after the planting stock has been maintained under a system of organic management for a period of no less than 1 year; and

(5) Seeds, annual seedlings, and planting stock treated with prohibited substances may be used to produce an organic crop when the application of the materials is a requirement of Federal or State phytosanitary regulations.

(b) [Reserved]

SOURCE: 65 FR 80637, Dec. 21, 2000; 66 FR 15619, March 20, 2001; 85 FR 70435, Nov. 5, 2020; 86 FR 33484, June 25, 2021, unless otherwise noted.

AUTHORITY: 7 U.S.C. 6501–6524.

Current through September 9, 2021; 86 FR 50483.

Footnotes

1 Includes matters within the responsibility of the Federal Grain Inspection Service.

End of Document

Code of Federal Regulations
Title 7. Agriculture
Subtitle B. Regulations of the Department of Agriculture
Chapter I. Agricultural Marketing Service[1] (Standards, Inspections, Marketing Practices)
Subchapter M. Organic Foods Production Act Provisions (Refs & Annos)
Part 205. National Organic Program (Refs & Annos)
Subpart C. Organic Production and Handling Requirements

7 C.F.R. § 205.205

§ 205.205 Crop rotation practice standard.

Currentness

The producer must implement a crop rotation including but not limited to sod, cover crops, green manure crops, and catch crops that provide the following functions that are applicable to the operation:

(a) Maintain or improve soil organic matter content;

(b) Provide for pest management in annual and perennial crops;

(c) Manage deficient or excess plant nutrients; and

(d) Provide erosion control.

SOURCE: 65 FR 80637, Dec. 21, 2000; 66 FR 15619, March 20, 2001; 85 FR 70435, Nov. 5, 2020; 86 FR 33484, June 25, 2021, unless otherwise noted.

AUTHORITY: 7 U.S.C. 6501–6524.

Current through September 9, 2021; 86 FR 50483.

Footnotes

1 Includes matters within the responsibility of the Federal Grain Inspection Service.

End of Document

Code of Federal Regulations
Title 7. Agriculture
Subtitle B. Regulations of the Department of Agriculture
Chapter I. Agricultural Marketing Service[1] (Standards, Inspections, Marketing Practices)
Subchapter M. Organic Foods Production Act Provisions (Refs & Annos)
Part 205. National Organic Program (Refs & Annos)
Subpart C. Organic Production and Handling Requirements

7 C.F.R. § 205.206

§ 205.206 Crop pest, weed, and disease management practice standard.

Currentness

(a) The producer must use management practices to prevent crop pests, weeds, and diseases including but not limited to:

(1) Crop rotation and soil and crop nutrient management practices, as provided for in §§ 205.203 and 205.205;

(2) Sanitation measures to remove disease vectors, weed seeds, and habitat for pest organisms; and

(3) Cultural practices that enhance crop health, including selection of plant species and varieties with regard to suitability to site-specific conditions and resistance to prevalent pests, weeds, and diseases.

(b) Pest problems may be controlled through mechanical or physical methods including but not limited to:

(1) Augmentation or introduction of predators or parasites of the pest species;

(2) Development of habitat for natural enemies of pests;

(3) Nonsynthetic controls such as lures, traps, and repellents.

(c) Weed problems may be controlled through:

(1) Mulching with fully biodegradable materials;

(2) Mowing;

(3) Livestock grazing;

(4) Hand weeding and mechanical cultivation;

(5) Flame, heat, or electrical means; or

(6) Plastic or other synthetic mulches: Provided, That, they are removed from the field at the end of the growing or harvest season.

(d) Disease problems may be controlled through:

(1) Management practices which suppress the spread of disease organisms; or

(2) Application of nonsynthetic biological, botanical, or mineral inputs.

(e) When the practices provided for in paragraphs (a) through (d) of this section are insufficient to prevent or control crop pests, weeds, and diseases, a biological or botanical substance or a substance included on the National List of synthetic substances allowed for use in organic crop production may be applied to prevent, suppress, or control pests, weeds, or diseases: Provided, That, the conditions for using the substance are documented in the organic system plan.

(f) The producer must not use lumber treated with arsenate or other prohibited materials for new installations or replacement purposes in contact with soil or livestock.

SOURCE: 65 FR 80637, Dec. 21, 2000; 66 FR 15619, March 20, 2001; 85 FR 70435, Nov. 5, 2020; 86 FR 33484, June 25, 2021, unless otherwise noted.

AUTHORITY: 7 U.S.C. 6501–6524.

Current through September 9, 2021; 86 FR 50483.

Footnotes

1 Includes matters within the responsibility of the Federal Grain Inspection Service.

Code of Federal Regulations
Title 7. Agriculture
Subtitle B. Regulations of the Department of Agriculture
Chapter I. Agricultural Marketing Service[1] (Standards, Inspections, Marketing Practices)
Subchapter M. Organic Foods Production Act Provisions (Refs & Annos)
Part 205. National Organic Program (Refs & Annos)
Subpart C. Organic Production and Handling Requirements

7 C.F.R. § 205.207

§ 205.207 Wild-crop harvesting practice standard.

Currentness

(a) A wild crop that is intended to be sold, labeled, or represented as organic must be harvested from a designated area that has had no prohibited substance, as set forth in § 205.105, applied to it for a period of 3 years immediately preceding the harvest of the wild crop.

(b) A wild crop must be harvested in a manner that ensures that such harvesting or gathering will not be destructive to the environment and will sustain the growth and production of the wild crop.

SOURCE: 65 FR 80637, Dec. 21, 2000; 66 FR 15619, March 20, 2001; 85 FR 70435, Nov. 5, 2020; 86 FR 33484, June 25, 2021, unless otherwise noted.

AUTHORITY: 7 U.S.C. 6501–6524.

Notes of Decisions (1)

Current through September 9, 2021; 86 FR 50483.

Footnotes

1 Includes matters within the responsibility of the Federal Grain Inspection Service.

End of Document

7 C.F.R. § 205.236

§ 205.236 Origin of livestock.

Effective: June 8, 2006
Currentness

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

(1) Poultry. Poultry or edible poultry products must be from poultry that has been under continuous organic management beginning no later than the second day of life;

(2) Dairy animals. Milk or milk products must be from animals that have been under continuous organic management beginning no later than 1 year prior to the production of the milk or milk products that are to be sold, labeled, or represented as organic, Except,

(i) That, crops and forage from land, included in the organic system plan of a dairy farm, that is in the third year of organic management may be consumed by the dairy animals of the farm during the 12–month period immediately prior to the sale of organic milk and milk products; and

(ii) That, when an entire, distinct herd is converted to organic production, the producer may, provided no milk produced under this subparagraph enters the stream of commerce labeled as organic after June 9, 2007: (a) For the first 9 months of the year, provide a minimum of 80–percent feed that is either organic or raised from land included in the organic system plan and managed in compliance with organic crop requirements; and (b) Provide feed in compliance with § 205.237 for the final 3 months.

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

(3) Breeder stock. Livestock used as breeder stock may be brought from a nonorganic operation onto an organic operation at any time: Provided, That, if such livestock are gestating and the offspring are to be raised as organic livestock, the breeder stock must be brought onto the facility no later than the last third of gestation.

(b) The following are prohibited:

(1) Livestock or edible livestock products that are removed from an organic operation and subsequently managed on a nonorganic operation may be not sold, labeled, or represented as organically produced.

(2) Breeder or dairy stock that has not been under continuous organic management since the last third of gestation may not be sold, labeled, or represented as organic slaughter stock.

(c) The producer of an organic livestock operation must maintain records sufficient to preserve the identity of all organically managed animals and edible and nonedible animal products produced on the operation.

Credits

[71 FR 32807, June 7, 2006]

SOURCE: 65 FR 80637, Dec. 21, 2000; 66 FR 15619, March 20, 2001; 85 FR 70435, Nov. 5, 2020; 86 FR 33484, June 25, 2021, unless otherwise noted.

AUTHORITY: 7 U.S.C. 6501–6524.

Notes of Decisions (2)

Current through September 9, 2021; 86 FR 50483.

Footnotes

1 Includes matters within the responsibility of the Federal Grain Inspection Service.

KeyCite Yellow Flag - Negative Treatment
Proposed Regulation

Code of Federal Regulations
Title 7. Agriculture
Subtitle B. Regulations of the Department of Agriculture
Chapter I. Agricultural Marketing Service[1] (Standards, Inspections, Marketing Practices)
Subchapter M. Organic Foods Production Act Provisions (Refs & Annos)
Part 205. National Organic Program (Refs & Annos)
Subpart C. Organic Production and Handling Requirements

7 C.F.R. § 205.237

§ 205.237 Livestock feed.

Effective: June 17, 2010
Currentness

(a) The producer of an organic livestock operation must provide livestock with a total feed ration composed of agricultural products, including pasture and forage, that are organically produced and handled by operations certified to the NOP, except as provided in § 205.236(a)(2)(i), except, that, synthetic substances allowed under § 205.603 and nonsynthetic substances not prohibited under § 205.604 may be used as feed additives and feed supplements, *Provided*, That, all agricultural ingredients included in the ingredients list, for such additives and supplements, shall have been produced and handled organically.

(b) The producer of an organic operation must not:

(1) Use animal drugs, including hormones, to promote growth;

(2) Provide feed supplements or additives in amounts above those needed for adequate nutrition and health maintenance for the species at its specific stage of life;

(3) Feed plastic pellets for roughage;

(4) Feed formulas containing urea or manure;

(5) Feed mammalian or poultry slaughter by-products to mammals or poultry;

(6) Use feed, feed additives, and feed supplements in violation of the Federal Food, Drug, and Cosmetic Act;

(7) Provide feed or forage to which any antibiotic including ionophores has been added; or

(8) Prevent, withhold, restrain, or otherwise restrict ruminant animals from actively obtaining feed grazed from pasture during the grazing season, except for conditions as described under § 205.239(b) and (c).

(c) During the grazing season, producers shall:

(1) Provide not more than an average of 70 percent of a ruminant's dry matter demand from dry matter fed (dry matter fed does not include dry matter grazed from residual forage or vegetation rooted in pasture). This shall be calculated as an average over the entire grazing season for each type and class of animal. Ruminant animals must be grazed throughout the entire grazing season for the geographical region, which shall be not less than 120 days per calendar year. Due to weather, season, and/or climate, the grazing season may or may not be continuous.

(2) Provide pasture of a sufficient quality and quantity to graze throughout the grazing season and to provide all ruminants under the organic system plan with an average of not less than 30 percent of their dry matter intake from grazing throughout the grazing season: Except, That,

(i) Ruminant animals denied pasture in accordance with § 205.239(b)(1) through (8), and § 205.239(c)(1) through (3), shall be provided with an average of not less than 30 percent of their dry matter intake from grazing throughout the periods that they are on pasture during the grazing season;

(ii) Breeding bulls shall be exempt from the 30 percent dry matter intake from grazing requirement of this section and management on pasture requirement of § 205.239(c)(2); *Provided*, That, any animal maintained under this exemption shall not be sold, labeled, used, or represented as organic slaughter stock.

(d) Ruminant livestock producers shall:

(1) Describe the total feed ration for each type and class of animal. The description must include:

(i) All feed produced on-farm;

(ii) All feed purchased from off-farm sources;

(iii) The percentage of each feed type, including pasture, in the total ration; and

(iv) A list of all feed supplements and additives.

(2) Document the amount of each type of feed actually fed to each type and class of animal.

(3) Document changes that are made to all rations throughout the year in response to seasonal grazing changes.

(4) Provide the method for calculating dry matter demand and dry matter intake.

Credits

[75 FR 7193, Feb. 17, 2010]

SOURCE: 65 FR 80637, Dec. 21, 2000; 66 FR 15619, March 20, 2001; 85 FR 70435, Nov. 5, 2020; 86 FR 33484, June 25, 2021, unless otherwise noted.

AUTHORITY: 7 U.S.C. 6501–6524.

Current through September 9, 2021; 86 FR 50483.

Footnotes

1 Includes matters within the responsibility of the Federal Grain Inspection Service.

Code of Federal Regulations
Title 7. Agriculture
Subtitle B. Regulations of the Department of Agriculture
Chapter I. Agricultural Marketing Service[1] (Standards, Inspections, Marketing Practices)
Subchapter M. Organic Foods Production Act Provisions (Refs & Annos)
Part 205. National Organic Program (Refs & Annos)
Subpart C. Organic Production and Handling Requirements

7 C.F.R. § 205.238

§ 205.238 Livestock health care practice standard.

Effective: January 28, 2019
Currentness

(a) The producer must establish and maintain preventive livestock health care practices, including:

(1) Selection of species and types of livestock with regard to suitability for site-specific conditions and resistance to prevalent diseases and parasites;

(2) Provision of a feed ration sufficient to meet nutritional requirements, including vitamins, minerals, protein and/or amino acids, fatty acids, energy sources, and fiber (ruminants);

(3) Establishment of appropriate housing, pasture conditions, and sanitation practices to minimize the occurrence and spread of diseases and parasites;

(4) Provision of conditions which allow for exercise, freedom of movement, and reduction of stress appropriate to the species;

(5) Performance of physical alterations as needed to promote the animal's welfare and in a manner that minimizes pain and stress; and

(6) Administration of vaccines and other veterinary biologics.

(b) When preventive practices and veterinary biologics are inadequate to prevent sickness, a producer may administer synthetic medications: Provided, That, such medications are allowed under § 205.603. Parasiticides allowed under § 205.603 may be used on:

(1) Breeder stock, when used prior to the last third of gestation but not during lactation for progeny that are to be sold, labeled, or represented as organically produced; and

(2) Dairy animals, as allowed under § 205.603.

(3) Fiber bearing animals, as allowed under § 205.603.

(c) The producer of an organic livestock operation must not:

(1) Sell, label, or represent as organic any animal or edible product derived from any animal treated with antibiotics, any substance that contains a synthetic substance not allowed under § 205.603, or any substance that contains a nonsynthetic substance prohibited in § 205.604.

(2) Administer any animal drug, other than vaccinations, in the absence of illness;

(3) Administer hormones for growth promotion;

(4) Administer synthetic parasiticides on a routine basis;

(5) Administer synthetic parasiticides to slaughter stock;

(6) Administer animal drugs in violation of the Federal Food, Drug, and Cosmetic Act; or

(7) Withhold medical treatment from a sick animal in an effort to preserve its organic status. All appropriate medications must be used to restore an animal to health when methods acceptable to organic production fail. Livestock treated with a prohibited substance must be clearly identified and shall not be sold, labeled, or represented as organically produced.

Credits

[82 FR 7089, Jan. 19, 2017; 82 FR 9967, Feb. 9, 2017; 82 FR 21677, May 10, 2017; 82 FR 52643, Nov. 14, 2017; 83 FR 10775, March 13, 2018; 83 FR 66571, Dec. 27, 2018]

SOURCE: 65 FR 80637, Dec. 21, 2000; 66 FR 15619, March 20, 2001; 85 FR 70435, Nov. 5, 2020; 86 FR 33484, June 25, 2021, unless otherwise noted.

AUTHORITY: 7 U.S.C. 6501–6524.

Current through September 9, 2021; 86 FR 50483.

Footnotes

1 Includes matters within the responsibility of the Federal Grain Inspection Service.

KeyCite Yellow Flag - Negative Treatment
Proposed Regulation

Code of Federal Regulations
Title 7. Agriculture
Subtitle B. Regulations of the Department of Agriculture
Chapter I. Agricultural Marketing Service[1] (Standards, Inspections, Marketing Practices)
Subchapter M. Organic Foods Production Act Provisions (Refs & Annos)
Part 205. National Organic Program (Refs & Annos)
Subpart C. Organic Production and Handling Requirements

7 C.F.R. § 205.239

§ 205.239 Livestock living conditions.

Effective: June 17, 2010
Currentness

(a) The producer of an organic livestock operation must establish and maintain year-round livestock living conditions which accommodate the health and natural behavior of animals, including:

(1) Year-round access for all animals to the outdoors, shade, shelter, exercise areas, fresh air, clean water for drinking, and direct sunlight, suitable to the species, its stage of life, the climate, and the environment: Except, that, animals may be temporarily denied access to the outdoors in accordance with §§ 205.239(b) and (c). Yards, feeding pads, and feedlots may be used to provide ruminants with access to the outdoors during the non-grazing season and supplemental feeding during the grazing season. Yards, feeding pads, and feedlots shall be large enough to allow all ruminant livestock occupying the yard, feeding pad, or feedlot to feed simultaneously without crowding and without competition for food. Continuous total confinement of any animal indoors is prohibited. Continuous total confinement of ruminants in yards, feeding pads, and feedlots is prohibited.

(2) For all ruminants, management on pasture and daily grazing throughout the grazing season(s) to meet the requirements of § 205.237, except as provided for in paragraphs (b), (c), and (d) of this section.

(3) Appropriate clean, dry bedding. When roughages are used as bedding, they shall have been organically produced in accordance with this part by an operation certified under this part, except as provided in § 205.236(a)(2)(i), and, if applicable, organically handled by operations certified to the NOP.

(4) Shelter designed to allow for:

(i) Natural maintenance, comfort behaviors, and opportunity to exercise;

(ii) Temperature level, ventilation, and air circulation suitable to the species; and

(iii) Reduction of potential for livestock injury;

(5) The use of yards, feeding pads, feedlots and laneways that shall be well-drained, kept in good condition (including frequent removal of wastes), and managed to prevent runoff of wastes and contaminated waters to adjoining or nearby surface water and across property boundaries.

(b) The producer of an organic livestock operation may provide temporary confinement or shelter for an animal because of:

(1) Inclement weather;

(2) The animal's stage of life: Except, that lactation is not a stage of life that would exempt ruminants from any of the mandates set forth in this regulation;

(3) Conditions under which the health, safety, or well-being of the animal could be jeopardized;

(4) Risk to soil or water quality;

(5) Preventive healthcare procedures or for the treatment of illness or injury (neither the various life stages nor lactation is an illness or injury);

(6) Sorting or shipping animals and livestock sales: *Provided*, that, the animals shall be maintained under continuous organic management, including organic feed, throughout the extent of their allowed confinement;

(7) Breeding: Except, that, bred animals shall not be denied access to the outdoors and, once bred, ruminants shall not be denied access to pasture during the grazing season; or

(8) 4–H, Future Farmers of America and other youth projects, for no more than one week prior to a fair or other demonstration, through the event and up to 24 hours after the animals have arrived home at the conclusion of the event. These animals must have been maintained under continuous organic management, including organic feed, during the extent of their allowed confinement for the event.

(c) The producer of an organic livestock operation may, in addition to the times permitted under § 205.239(b), temporarily deny a ruminant animal pasture or outdoor access under the following conditions:

(1) One week at the end of a lactation for dry off (for denial of access to pasture only), three weeks prior to parturition (birthing), parturition, and up to one week after parturition;

(2) In the case of newborn dairy cattle for up to six months, after which they must be on pasture during the grazing season and may no longer be individually housed: *Provided*, That, an animal shall not be confined or tethered in a way that prevents the animal from lying down, standing up, fully extending its limbs, and moving about freely;

(3) In the case of fiber bearing animals, for short periods for shearing; and

(4) In the case of dairy animals, for short periods daily for milking. Milking must be scheduled in a manner to ensure sufficient grazing time to provide each animal with an average of at least 30 percent DMI from grazing throughout the grazing season. Milking frequencies or duration practices cannot be used to deny dairy animals pasture.

(d) Ruminant slaughter stock, typically grain finished, shall be maintained on pasture for each day that the finishing period corresponds with the grazing season for the geographical location: Except, that, yards, feeding pads, or feedlots may be used to provide finish feeding rations. During the finishing period, ruminant slaughter stock shall be exempt from the minimum 30 percent DMI requirement from grazing. Yards, feeding pads, or feedlots used to provide finish feeding rations shall be large enough to allow all ruminant slaughter stock occupying the yard, feeding pad, or feed lot to feed simultaneously without crowding and without competition for food. The finishing period shall not exceed one-fifth ($^{1}/_{5}$) of the animal's total life or 120 days, whichever is shorter.

(e) The producer of an organic livestock operation must manage manure in a manner that does not contribute to contamination of crops, soil, or water by plant nutrients, heavy metals, or pathogenic organisms and optimizes recycling of nutrients and must manage pastures and other outdoor access areas in a manner that does not put soil or water quality at risk.

Credits

[75 FR 7193, Feb. 17, 2010; 82 FR 7090, Jan. 19, 2017; 82 FR 9967, Feb. 9, 2017; 82 FR 21677, May 10, 2017; 82 FR 52643, Nov. 14, 2017; 83 FR 10775, March 13, 2018]

SOURCE: 65 FR 80637, Dec. 21, 2000; 66 FR 15619, March 20, 2001; 85 FR 70435, Nov. 5, 2020; 86 FR 33484, June 25, 2021, unless otherwise noted.

AUTHORITY: 7 U.S.C. 6501–6524.

Current through September 9, 2021; 86 FR 50483.

Footnotes

1 Includes matters within the responsibility of the Federal Grain Inspection Service.

End of Document

Code of Federal Regulations
Title 7. Agriculture
Subtitle B. Regulations of the Department of Agriculture
Chapter I. Agricultural Marketing Service[1] (Standards, Inspections, Marketing Practices)
Subchapter M. Organic Foods Production Act Provisions (Refs & Annos)
Part 205. National Organic Program (Refs & Annos)
Subpart C. Organic Production and Handling Requirements

7 C.F.R. § 205.240

§ 205.240 Pasture practice standard.

Effective: June 17, 2010
Currentness

The producer of an organic livestock operation must, for all ruminant livestock on the operation, demonstrate through auditable records in the organic system plan, a functioning management plan for pasture.

(a) Pasture must be managed as a crop in full compliance with §§ 205.202, 205.203(d) and (e), 205.204, and 205.206(b) through (f). Land used for the production of annual crops for ruminant grazing must be managed in full compliance with §§ 205.202 through 205.206. Irrigation shall be used, as needed, to promote pasture growth when the operation has irrigation available for use on pasture.

(b) Producers must provide pasture in compliance with § 205.239(a)(2) and manage pasture to comply with the requirements of: § 205.237(c)(2), to annually provide a minimum of 30 percent of a ruminant's dry matter intake (DMI), on average, over the course of the grazing season(s); § 205.238(a)(3), to minimize the occurrence and spread of diseases and parasites; and § 205.239(e) to refrain from putting soil or water quality at risk.

(c) A pasture plan must be included in the producer's organic system plan, and be updated annually in accordance with § 205.406(a). The producer may resubmit the previous year's pasture plan when no change has occurred in the plan. The pasture plan may consist of a pasture/rangeland plan developed in cooperation with a Federal, State, or local conservation office: *Provided*, that, the submitted plan addresses all of the requirements of § 205.240(c)(1) through (8). When a change to an approved pasture plan is contemplated, which may affect the operation's compliance with the Act or the regulations in this part, the producer shall seek the certifying agent's agreement on the change prior to implementation. The pasture plan shall include a description of the:

(1) Types of pasture provided to ensure that the feed requirements of § 205.237 are being met.

(2) Cultural and management practices to be used to ensure pasture of a sufficient quality and quantity is available to graze throughout the grazing season and to provide all ruminants under the organic system plan, except exempted classes identified in § 205.239(c)(1) through (3), with an average of not less than 30 percent of their dry matter intake from grazing throughout the grazing season.

(3) Grazing season for the livestock operation's regional location.

(4) Location and size of pastures, including maps giving each pasture its own identification.

(5) The types of grazing methods to be used in the pasture system.

(6) Location and types of fences, except for temporary fences, and the location and source of shade and the location and source of water.

(7) Soil fertility and seeding systems.

(8) Erosion control and protection of natural wetlands and riparian areas practices.

Credits
[75 FR 7194, Feb. 17, 2010]

SOURCE: 65 FR 80637, Dec. 21, 2000; 66 FR 15619, March 20, 2001; 85 FR 70435, Nov. 5, 2020; 86 FR 33484, June 25, 2021, unless otherwise noted.

AUTHORITY: 7 U.S.C. 6501–6524.

Current through September 9, 2021; 86 FR 50483.

Footnotes
1 Includes matters within the responsibility of the Federal Grain Inspection Service.

United States Code Annotated
Federal Rules of Appellate Procedure (Refs & Annos)
Title II. Appeal from a Judgment or Order of a District Court

Federal Rules of Appellate Procedure Rule 4, 28 U.S.C.A.

Rule 4. Appeal as of Right--When Taken

Currentness

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf--including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order--but before the entry of the judgment or order--is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure--and does so within the time allowed by those rules--the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment--but before it disposes of any motion listed in Rule 4(a)(4)(A)--the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal--in compliance with Rule 3(c)--within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a) does not affect the validity of an appeal from that judgment or order.

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision, sentence, or order--but before the entry of the judgment or order--is treated as filed on the date of and after the entry.

(3) Effect of a Motion on a Notice of Appeal.

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 14 days after the entry of the order disposing of the last such remaining motion, or within 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 14 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order--but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)--becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective--without amendment--to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) Motion for Extension of Time. Upon a finding of excusable neglect or good cause, the district court may--before or after the time has expired, with or without motion and notice--extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) Jurisdiction. The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) Entry Defined. A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1). If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U.S.C. § 1746--or a notarized statement--setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(i).

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

CREDIT(S)

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7111, 102 Stat. 4419; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 28, 2010, eff. Dec. 1, 2010; Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 28, 2016, eff. Dec. 1, 2016; Apr. 27, 2017, eff. Dec. 1, 2017.)

ADVISORY COMMITTEE NOTES

1967 Adoption

Subdivision (a). This subdivision is derived from FRCP 73(a) [rule 73(a), Federal Rules of Civil Procedure, this title] without any change of substance. The requirement that a request for an extension of time for filing the notice of appeal made after expiration of the time be made by motion and on notice codifies the result reached under the present provisions of FRCP 73(a) and 6(b) [rules 73(a) and 6(b), Federal Rules of Civil Procedure]. *North Umberland Mining Co. v. Standard Accident Ins. Co.*, 193 F.2d 951 (9th Cir., 1952); *Cohen v. Plateau Natural Gas Co.*, 303 F.2d 273 (10th Cir., 1962); *Plant Economy, Inc. v. Mirror Insulation Co.*, 308 F.2d 275 (3d Cir., 1962).

Since this subdivision governs appeals in all civil cases, it supersedes the provisions of § 25 of the Bankruptcy Act (11 U.S.C. § 48). Except in cases to which the United States or an officer or agency thereof is a party, the change is a minor one, since a successful litigant in a bankruptcy proceeding may, under § 25, oblige an aggrieved party to appeal within 30 days after entry of judgment--the time fixed by this subdivision in cases involving private parties only--by serving him with notice of entry on the day thereof, and by the terms of § 25 and aggrieved party must in any event appeal within 40 days after entry of judgment. No reason appears why the time for appeal in bankruptcy should not be the same as that in civil cases generally. Furthermore, § 25 is a potential trap for the uninitiated. The time for appeal which it provides is not applicable to all appeals which may fairly be termed appeals in bankruptcy. Section 25 governs only those cause referred to in § 24 as "proceedings in bankruptcy" and "controversies arising in proceedings in bankruptcy." *Lowenstein v. Reikes*, 54 F.2d 481 (2d Cir., 1931), cert. den., 285 U.S. 539, 52 S.Ct. 311, 76 L.Ed. 932 (1932). The distinction between such cases and other cases which arise out of bankruptcy is often difficult to determine. See 2 Moore's Collier on Bankruptcy ¶24.12 through ¶24.36 (1962). As a result it is not always clear whether an appeal is governed by § 25 or by FRCP 73(a) [rule 73(a), Federal Rules of Civil Procedure, this title], which is applicable to such appeals in bankruptcy as are not governed by § 25.

In view of the unification of the civil and admiralty procedure accomplished by the amendments of the Federal Rules of Civil Procedure effective July 1, 1966, this subdivision governs appeals in those civil actions which involve admiralty or maritime claims and which prior to that date were known as suits in admiralty.

The only other change possibly effected by this subdivision is in the time for appeal from a decision of a district court on a petition for impeachment of an award of a board of arbitration under the Act of May 20, 1926, c. 347, § 9 (44 Stat. 585), 45 U.S.C. § 159. The act provides that a notice of appeal from such a decision shall be filed within 10 days of the decision. This singular provision was apparently repealed by the enactment in 1948 of 28 U.S.C. § 2107, which fixed 30 days from the date of entry of judgment as the time for appeal in all actions a civil nature except actions in admiralty or bankruptcy matters or those in which the United States is a party. But it was not expressly repealed, and its status is in doubt. See 7 Moore's Federal Practice ¶73.09[2] (1966). The doubt should be resolved, and no reason appears why appeals in such cases should not be taken within the time provided for civil cases generally.

Subdivision (b). This subdivision is derived from FRCrP 37(a)(2) [rule 37(a)(2), Federal Rules of Criminal Procedure] without change of substance.

1979 Amendment

Subdivision (a)(1). The words "(including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein)," which appear in the present rule are struck out as unnecessary and perhaps misleading in suggesting that there may be other categories that are not either civil or criminal within the meaning of Rule 4(a) and (b).

The phrases "within 30 days of such entry" and "within 60 days of such entry" have been changed to read "after" instead of "or." The change is for clarity only, since the word "of" in the present rule appears to be used to mean "after." Since the proposed amended rule deals directly with the premature filing of a notice of appeal, it was thought useful to emphasize the fact that except as provided, the period during which a notice of appeal may be filed is the 30 days, or 60 days as the case may be, following the entry of the judgment or order appealed from. See Notes to Rule 4(a)(2) and (4), below.

Subdivision (a)(2). The proposed amendment to Rule 4(a)(2) would extend to civil cases the provisions of Rule 4(b), dealing with criminal cases, designed to avoid the loss of the right to appeal by filing the notice of appeal prematurely. Despite the absence of such a provision in Rule 4(a) the courts of appeals quite generally have held premature appeals effective. See, e.g., *Matter of Grand Jury Empanelled Jan. 21, 1975*, 541 F.2d 373 (3d Cir. 1976); *Hodge v. Hodge*, 507 F.2d 87 (3d Cir. 1976); *Song Jook Suh v. Rosenberg*, 437 F.2d 1098 (9th Cir. 1971); *Ruby v. Secretary of the Navy*, 365 F.2d 385 (9th Cir. 1966); *Firchau v. Diamond Nat'l Corp.*, 345 F.2d 269 (9th Cir. 1965).

The proposed amended rule would recognize this practice but make an exception in cases in which a post trial motion has destroyed the finality of the judgment. See Note to Rule 4(a)(4) below.

Subdivision (a)(4). The proposed amendment would make it clear that after the filing of the specified post trial motions, a notice of appeal should await disposition of the motion. Since the proposed amendments to Rules 3, 10, and 12 contemplate that immediately upon the filing of the notice of appeal the fees will be paid and the case docketed in the court of appeals, and the steps toward its disposition set in motion, it would be undesirable to proceed with the appeal while the district court has before it a motion the granting of which would vacate or alter the judgment appealed from. See, e.g., *Keith v. Newcourt*, 530 F.2d 826 (8th Cir. 1976). Under the present rule, since docketing may not take place until the record is transmitted, premature filing is much less likely to involve waste effort. See, e.g. *Stockes v. Peyton's Inc.*, 508 F.2d 1287 (5th Cir. 1975). Further, since a notice of appeal filed before the disposition of a post trial motion, even if it were treated as valid for purposes of jurisdiction, would not embrace objections to the denial of the motion, it is obviously preferable to postpone the notice of appeal until after the motion is disposed of.

The present rule, since it provides for the "termination" of the "running" of the appeal time, is ambiguous in its application to a notice of appeal filed prior to a post trial motion filed within the 10 day limit. The amendment would make it clear that in such circumstances the appellant should not proceed with the appeal during pendency of the motion but should file a new notice of appeal after the motion is disposed of.

Subdivision (a)(5). Under the present rule it is provided that upon a showing of excusable neglect the district court at any time may extend the time for the filing of a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by the rule, but that if the application is made after the original time has run, the order may be made only on motion with such notice as the court deems appropriate.

A literal reading of this provision would require that the extension be ordered and the notice of appeal filed within the 30 day period, but despite the surface clarity of the rule, it has produced considerable confusion. See the discussion by Judge Friendly in In re Orbitek, 520 F.2d 358 (2d Cir. 1975). The proposed amendment would make it clear that a motion to extend the time must be filed no later than 30 days after the expiration of the original appeal time, and that if the motion is timely filed the district court may act upon the motion at a later date, and may extend the time not in excess of 10 days measured from the date on which the order granting the motion is entered.

Under the present rule there is a possible implication that prior to the time the initial appeal time has run, the district court may extend the time on the basis of an informal application. The amendment would require that the application must be made by motion, though the motion may be made *ex parte*. After the expiration of the initial time a motion for the extension of the time must be made in compliance with the F.R.C.P. [Federal Rules of Civil Procedure] and local rules of the district court. See Note to proposed amended Rule 1, *supra*. And see Rules 6(d), 7(b) of the F.R.C.P. [rules 6(d) and 7(b), Federal Rules of Civil Procedure].

The proposed amended rule expands to some extent the standard for the grant of an extension of time. The present rule requires a "showing of excusable neglect." While this was an appropriate standard in cases in which the motion is made after the time for filing the notice of appeal has run, and remains so, it has never fit exactly the situation in which the appellant seeks an extension before the expiration of the initial time. In such a case "good cause," which is the standard that is applied in the granting of other extensions of time under Rule 26(b) seems to be more appropriate.

Subdivision (a)(6). The proposed amendment would call attention to the requirement of Rule 58 of the F.R.C.P. [Federal Rules of Civil Procedure] that the judgment constitute a separate document. See *United States v. Indrelunas*, 411 U.S. 216 (1973). When a notice of appeal is filed, the clerk should ascertain whether any judgment designated therein has been entered in compliance with Rules 58 and 79(a) and if not, so advise all parties and the district judge. While the requirement of Rule 58 is not jurisdictional, (see *Bankers Trust Co. v. Mallis*, 431 U.S. 928 (1977)), compliance is important since the time for the filing of a notice of appeal by other parties is measured by the time at which the judgment is properly entered.

1991 Amendment

The amendment provides a limited opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the district court pursuant to Rule 77(d) of the Federal Rules of Civil Procedure, is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal. The amendment adds a new subdivision (6) allowing a district court to reopen for a brief period the time for appeal upon a finding that notice of entry of a judgment or order was not received from the clerk or a party within 21 days of its entry and that no party would be prejudiced. By "prejudice" the Committee means some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal, consequences that are present in every appeal. Prejudice might arise, for example, if the appellee had taken some action in reliance on the expiration of the normal time period for filing a notice of appeal.

Reopening may be ordered only upon a motion filed within 180 days of the entry of a judgment or order or within 7 days of receipt of notice of such entry, whichever is earlier. This provision establishes an outer time limit of 180 days for a party who fails to receive timely notice of entry of a judgment to seek additional time to appeal and enables any winning party to shorten the 180-day period by sending (and establishing proof of receipt of) its own notice of entry of a judgment, as authorized by Fed.R.Civ.P. 77(d). Winning parties are encouraged to send their own notice in order to lessen the chance that a judge will accept a claim of non-receipt in the face of evidence that notices were sent by both the clerk and the winning party. Receipt of a winning party's notice will shorten only the time for reopening the time for appeal under this subdivision, leaving the normal time periods for appeal unaffected.

If the motion is granted, the district court may reopen the time for filing a notice of appeal only for a period of 14 days from the date of entry of the order reopening the time for appeal.

Transmittal Note: Upon transmittal of this rule to Congress, the Advisory Committee recommends that the attention of Congress be called to the fact that language in the fourth paragraph of 28 U.S.C. § 2107 might appropriately be revised in light of this proposed rule.

1993 Amendment

Note to Paragraph (a)(1). The amendment is intended to alert readers to the fact that paragraph (a)(4) extends the time for filing an appeal when certain posttrial motions are filed. The Committee hopes that awareness of the provisions of paragraph (a)(4) will prevent the filing of a notice of appeal when a posttrial tolling motion is pending.

Note to Paragraph (a)(2). The amendment treats a notice of appeal filed after the announcement of a decision or order, but before its formal entry, as if the notice had been filed after entry. The amendment deletes the language that made paragraph (a)(2) inapplicable to a notice of appeal filed after announcement of the disposition of a posttrial motion enumerated in paragraph (a)(4) but before the entry of the order, see *Acosta v. Louisiana Dep't of Health & Human Resources*, 478 U.S. 251 (1986) (per curiam); *Alerte v. McGinnis*, 898 F.2d 69 (7th Cir.1990). Because the amendment of paragraph (a)(4) recognizes all notices of appeal filed after announcement or entry of judgment--even those that are filed while the posttrial motions enumerated in paragraph (a)(4) are pending--the amendment of this paragraph is consistent with the amendment of paragraph (a)(4).

Note to Paragraph (a)(3). The amendment is technical in nature; no substantive change is intended.

Note to Paragraph (a)(4). The 1979 amendment of this paragraph created a trap for an unsuspecting litigant who files a notice of appeal before a posttrial motion, or while a posttrial motion is pending. The 1979 amendment requires a party to file a new notice of appeal after the motion's disposition. Unless a new notice is filed, the court of appeals lacks jurisdiction to hear the appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982). Many litigants, especially pro se litigants, fail to file the second notice of appeal, and several courts have expressed dissatisfaction with the rule. See, e.g., *Averhart v. Arrendondo*, 773 F.2d 919 (7th Cir.1985); *Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 746 F.2d 278 (5th Cir.1984), cert. denied, 479 U.S. 930 (1986).

The amendment provides that a notice of appeal filed before the disposition of a specified posttrial motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals.

Because a notice of appeal will ripen into an effective appeal upon disposition of a posttrial motion, in some instances there will be an appeal from a judgment that has been altered substantially because the motion was granted in whole or in part. Many such appeals will be dismissed for want of prosecution when the appellant fails to meet the briefing schedule. But, the appellee may also move to strike the appeal. When responding to such a motion, the appellant would have an opportunity to state that, even though some relief sought in a posttrial motion was granted, the appellant still plans to pursue the appeal. Because the appellant's response would provide the appellee with sufficient notice of the appellant's intentions, the Committee does not believe that an additional notice of appeal is needed.

The amendment provides that a notice of appeal filed before the disposition of a posttrial tolling motion is sufficient to bring the underlying case, as well as any orders specified in the original notice, to the court of appeals. If the judgment is altered upon disposition of a posttrial motion, however, and if a party wishes to appeal from the disposition of the motion, the party must amend the notice to so indicate. When a party files an amended notice, no additional fees are required because the notice is an amendment of the original and not a new notice of appeal.

Paragraph (a)(4) is also amended to include, among motions that extend the time for filing a notice of appeal, a Rule 60 motion that is served within 10 days after entry of judgment. This eliminates the difficulty of determining whether a posttrial motion made within 10 days after entry of a judgment is a Rule 59(e) motion, which tolls the time for filing an appeal, or a Rule 60 motion, which historically has not tolled the time. The amendment comports with the practice in several circuits of treating all motions to alter or amend judgments that are made within 10 days after entry of judgment as Rule 59(e) motions for purposes of Rule 4(a)(4). See, e.g., *Finch v. City of Vernon*, 845 F.2d 256 (11th Cir.1988); *Rados v. Celotex Corp.*, 809 F.2d 170 (2d Cir.1986); *Skagerberg v. Oklahoma*, 797 F.2d 881 (10th Cir.1986). To conform to a recent Supreme Court decision, however--*Budinich v.*

Becton Dickinson and Co., 486 U.S. 196 (1988)--the amendment excludes motions for attorney's fees from the class of motions that extend the filing time unless a district court, acting under Rule 58, enters an order extending the time for appeal. This amendment is to be read in conjunction with the amendment of Fed.R.Civ.P. 58.

Note to subdivision (b). The amendment grammatically restructures the portion of this subdivision that lists the types of motions that toll the time for filing an appeal. This restructuring is intended to make the rule easier to read. No substantive change is intended other than to add a motion for judgment of acquittal under Criminal Rule 29 to the list of tolling motions. Such a motion is the equivalent of a Fed.R.Civ.P. 50(b) motion for judgment notwithstanding the verdict, which tolls the running of time for an appeal in a civil case.

The proposed amendment also eliminates an ambiguity from the third sentence of this subdivision. Prior to this amendment, the third sentence provided that if one of the specified motions was filed, the time for filing an appeal would run from the entry of an order denying the motion. That sentence, like the parallel provision in Rule 4(a)(4), was intended to toll the running of time for appeal if one of the posttrial motions is timely filed. In a criminal case, however, the time for filing the motions runs not from entry of judgment (as it does in civil cases), but from the verdict or finding of guilt. Thus, in a criminal case, a posttrial motion may be disposed of more than 10 days before sentence is imposed, i.e. before the entry of judgment. *United States v. Hashagen*, 816 F.2d 899, 902 n. 5 (3d Cir.1987). To make it clear that a notice of appeal need not be filed before entry of judgment, the amendment states that an appeal may be taken within 10 days after the entry of an order disposing of the motion, or within 10 days after the entry of judgment, whichever is later. The amendment also changes the language in the third sentence providing that an appeal may be taken within 10 days after the entry of an order *denying* the motion; the amendment says instead that an appeal may be taken within 10 days after the entry of an order *disposing* of the last such motion outstanding. (Emphasis added) The change recognizes that there may be multiple posttrial motions filed and that, although one or more motions may be granted in whole or in part, a defendant may still wish to pursue an appeal.

The amendment also states that a notice of appeal filed before the disposition of any of the posttrial tolling motions becomes effective upon disposition of the motions. In most circuits this language simply restates the current practice. See *United States v. Cortes*, 895 F.2d 1245 (9th Cir.), cert. denied, 495 U.S. 939 (1990). Two circuits, however, have questioned that practice in light of the language of the rule, see *United States v. Gargano*, 826 F.2d 610 (7th Cir.1987), and *United States v. Jones*, 669 F.2d 559 (8th Cir.1982), and the Committee wishes to clarify the rule. The amendment is consistent with the proposed amendment of Rule 4(a)(4).

Subdivision (b) is further amended in light of new Fed.R.Crim.P. 35(c), which authorizes a sentencing court to correct any arithmetical, technical, or other clear errors in sentencing within 7 days after imposing the sentence. The Committee believes that a sentencing court should be able to act under Criminal Rule 35(c) even if a notice of appeal has already been filed; and that a notice of appeal should not be affected by the filing of a Rule 35(c) motion or by correction of a sentence under Rule 35(c).

Note to subdivision (c). In *Houston v. Lack*, 487 U.S. 266 (1988), the Supreme Court held that a *pro se* prisoner's notice of appeal is "filed" at the moment of delivery to prison authorities for forwarding to the district court. The amendment reflects that decision. The language of the amendment is similar to that in Supreme Court Rule 29.2.

Permitting an inmate to file a notice of appeal by depositing it in an institutional mail system requires adjustment of the rules governing the filing of cross-appeals. In a civil case, the time for filing a cross-appeal ordinarily runs from the date when the first notice of appeal is filed. If an inmate's notice of appeal is filed by depositing it in an institution's mail system, it is possible that the notice of appeal will not arrive in the district court until several days after the "filing" date and perhaps even after the time for filing a cross-appeal has expired. To avoid that problem, subdivision (c) provides that in a civil case when an institutionalized person files a notice of appeal by depositing it in the institution's mail system, the time for filing a cross-appeal runs from the district court's receipt of the notice. The amendment makes a parallel change regarding the time for the government to appeal in a criminal case.

1995 Amendment

Subdivision (a). Fed.R.Civ.P. 50, 52, and 59 were previously inconsistent with respect to whether certain postjudgment motions had to be filed or merely served no later than 10 days after entry of judgment. As a consequence Rule 4(a)(4) spoke of making or serving such motions rather than filing them. Civil Rules 50, 52, and 59, are being revised to require filing before the end of the 10-day period. As a consequence, this rule is being amended to provide that 'filing' must occur within the 10 day period in order to affect the finality of the judgment and extend the period for filing a notice of appeal.

The Civil Rules require the filing of postjudgment motions 'no later than 10 days after entry of judgment'--rather than 'within' 10 days--to include postjudgment motions that are filed before actual entry of the judgment by the clerk. This rule is amended, therefore, to use the same terminology.

The rule is further amended to clarify the fact that a party who wants to obtain review of an alteration or amendment of a judgment must file a notice of appeal or amend a previously filed notice to indicate intent to appeal from the altered judgment.

1998 Amendments

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; in this rule, however, substantive changes are made in paragraphs (a)(6) and (b)(4), and in subdivision (c).

Subdivision (a), paragraph (1). Although the Advisory Committee does not intend to make any substantive changes in this paragraph, cross-references to Rules 4(a)(1)(B) and (4)(c) have been added to subparagraph (a)(1)(A).

Subdivision (a), paragraph (4). Item (iv) in subparagraph (A) of Rule 4(a)(4) provides that filing a motion for relief under Fed.R.Civ.P. 60 will extend the time for filing a notice of appeal if the Rule 60 motion is filed no later than 10 days after judgment is entered. Again, the Advisory Committee does not intend to make any substantive change in this paragraph. But because Fed.R.Civ.P. 6(a) and Fed.R.App.P. 26(a) have different methods for computing time, one might be uncertain whether the 10-day period referred to in Rule 4(a)(4) is computed using Civil Rule 6(a) or Appellate Rule 26(a). Because the Rule 60 motion is filed in the district court, and because Fed.R.App.P. 1(a)(2) says that when the appellate rules provide for filing a motion in the district court, "the procedure must comply with the practice of the district court," the rule provides that the 10-day period is computed using Fed.R.Civ.P. 6(a)

Subdivision (a), paragraph (6). Paragraph (6) permits a district court to reopen the time for appeal if a party has not received notice of the entry of judgment and no party would be prejudiced by the reopening. Before reopening the time for appeal, the existing rule requires the district court to find that the moving party was entitled to notice of the entry of judgment and did not receive it "from the clerk or any party within 21 days of its entry." The Advisory Committee makes a substantive change. The finding must be that the movant did not receive notice "from the district court or any party within 21 days after entry." This change broadens the type of notice that can preclude reopening the time for appeal. The existing rule provides that only notice from a party or from the clerk bars reopening. The new language precludes reopening if the movant has received notice from "the court."

Subdivision (b). Two substantive changes are made in what will be paragraph (b)(4). The current rule permits an extension of time to file a notice of appeal if there is a "showing of excusable neglect." First, the rule is amended to permit a court to extend the time for "good cause" as well as for excusable neglect. Rule 4(a) permits extensions for both reasons in civil cases and the Advisory Committee believes that "good cause" should be sufficient in criminal cases as well. The amendment does not limit extensions for good cause to instances in which the motion for extension of time is filed before the original time has expired. The rule gives the district court discretion to grant extensions for good cause whenever the court believes it appropriate to do

so provided that the extended period does not exceed 30 days after the expiration of the time otherwise prescribed by Rule 4(b). Second, paragraph (b)(4) is amended to require only a "finding" of excusable neglect or good cause and not a "showing" of them. Because the rule authorizes the court to provide an extension without a motion, a "showing" is obviously not required; a "finding" is sufficient.

Subdivision (c). Substantive amendments are made in this subdivision. The current rule provides that if an inmate confined in an institution files a notice of appeal by depositing it in the institution's internal mail system, the notice is timely filed if deposited on or before the last day for filing. Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc. The Advisory Committee amends the rule to require an inmate to use the system designed for legal mail, if there is one, in order to receive the benefit of this subdivision.

When an inmate uses the filing method authorized by subdivision (c), the current rule provides that the time for other parties to appeal begins to run from the date the district court "receives" the inmate's notice of appeal. The rule is amended so that the time for other parties begins to run when the district court "dockets" the inmates appeal. A court may "receive" a paper when its mail is delivered to it even if the mail is not processed for a day or two, making the date of receipt uncertain. "Docketing" is an easily identified event. The change eliminates uncertainty. Paragraph (c)(3) is further amended to make it clear that the time for the government to file its appeal runs from the later of the entry of the judgment or order appealed from or the district court's docketing of a defendant's notice filed under this paragraph (c).

2002 Amendments

Subdivision (a)(1)(C). The federal courts of appeals have reached conflicting conclusions about whether an appeal from an order granting or denying an application for a writ of error *coram nobis* is governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations of Rule 4(b) (which apply in criminal cases). *Compare* *United States v. Craig*, 907 F.2d 653, 655-57, *amended* 919 F.2d 57 (7th Cir. 1990); *United States v. Cooper*, 876 F.2d 1192, 1193-94 (5th Cir. 1989); and *United States v. Keogh*, 391 F.2d 138, 140 (2d Cir. 1968) (applying the time limitations of Rule 4(a)); *with* *Yasui v. United States*, 772 F.2d 1496, 1498-99 (9th Cir. 1985); and *United States v. Mills*, 430 F.2d 526, 527-28 (8th Cir. 1970) (applying the time limitations of Rule 4(b)). A new part (C) has been added to Rule 4(a)(1) to resolve this conflict by providing that the time limitations of Rule 4(a) will apply.

Subsequent to the enactment of Fed. R. Civ. P. 60(b) and 28 U.S.C. § 2255, the Supreme Court has recognized the continued availability of a writ of error *coram nobis* in at least one narrow circumstance. In 1954, the Court permitted a litigant who had been convicted of a crime, served his full sentence, and been released from prison, but who was continuing to suffer a legal disability on account of the conviction, to seek a writ of error *coram nobis* to set aside the conviction. *United States v. Morgan*, 346 U.S. 502 (1954). As the Court recognized, in the *Morgan* situation an application for a writ of error *coram nobis* "is of the same general character as [a motion] under 28 U.S.C. § 2255." *Id.* at 506 n.4. Thus, it seems appropriate that the time limitations of Rule 4(a), which apply when a district court grants or denies relief under 28 U.S.C. § 2255, should also apply when a district court grants or denies a writ of error *coram nobis*. In addition, the strong public interest in the speedy resolution of criminal appeals that is reflected in the shortened deadlines of Rule 4(b) is not present in the *Morgan* situation, as the party seeking the writ of error *coram nobis* has already served his or her full sentence.

Notwithstanding *Morgan*, it is not clear whether the Supreme Court continues to believe that the writ of error *coram nobis* is available in federal court. In civil cases, the writ has been expressly abolished by Fed. R. Civ. P. 60(b). In criminal cases, the Supreme Court has recently stated that it has become " 'difficult to conceive of a situation' " in which the writ " 'would be necessary or appropriate.' " *Carlisle v. United States*, 517 U.S. 416, 429 (1996) (quoting *United States v. Smith*, 331 U.S. 469, 475 n.4 (1947)). The amendment to Rule 4(a)(1) is not intended to express any view on this issue; rather, it is merely meant to specify time limitations for appeals.

Rule 4(a)(1)(C) applies only to motions that are in substance, and not merely in form, applications for writs of error *coram nobis*. Litigants may bring and label as applications for a writ of error *coram nobis* what are in reality motions for a new trial under Fed. R. Crim. P. 33 or motions for correction or reduction of a sentence under Fed. R. Crim. P. 35. In such cases, the time limitations of Rule 4(b), and not those of Rule 4(a), should be enforced.

Changes Made After Publication and Comments No changes were made to the text of the proposed amendment or to the Committee Note.

Subdivision (a)(4)(A)(vi). Rule 4(a)(4)(A)(vi) has been amended to remove a parenthetical that directed that the 10-day deadline be "computed using Federal Rule of Civil Procedure 6(a)." That parenthetical has become superfluous because Rule 26(a)(2) has been amended to require that all deadlines under 11 days be calculated as they are under Fed. R. Civ. P. 6(a).

Changes Made After Publication and Comments No changes were made to the text of the proposed amendment or to the Committee Note.

Subdivision (a)(5)(A)(ii). Rule 4(a)(5)(A) permits the district court to extend the time to file a notice of appeal if two conditions are met. First, the party seeking the extension must file its motion no later than 30 days after the expiration of the time originally prescribed by Rule 4(a). Second, the party seeking the extension must show either excusable neglect or good cause. The text of Rule 4(a)(5)(A) does not distinguish between motions filed prior to the expiration of the original deadline and those filed after the expiration of the original deadline. Regardless of whether the motion is filed before or during the 30 days after the original deadline expires, the district court may grant an extension if a party shows either excusable neglect or good cause.

Despite the text of Rule 4(a)(5)(A), most of the courts of appeals have held that the good cause standard applies only to motions brought prior to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought during the 30 days following the expiration of the original deadline. *See Pontarelli v. Stone*, 930 F.2d 104, 109-10 (1st Cir. 1991) (collecting cases from the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits). These courts have relied heavily upon the Advisory Committee Note to the 1979 amendment to Rule 4(a)(5). But the Advisory Committee Note refers to a draft of the 1979 amendment that was ultimately rejected. The rejected draft directed that the good cause standard apply only to motions filed prior to the expiration of the original deadline. Rule 4(a)(5), as actually amended, did not. *See* 16A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3950.3, at 148-49 (2d ed. 1996).

The failure of the courts of appeals to apply Rule 4(a)(5)(A) as written has also created tension between that rule and Rule 4(b)(4). As amended in 1998, Rule 4(b)(4) permits the district court to extend the time for filing a notice of appeal in a *criminal* case for an additional 30 days upon a finding of excusable neglect or good cause. Both Rule 4(b)(4) and the Advisory Committee Note to the 1998 amendment make it clear that an extension can be granted for either excusable neglect or good cause, regardless of whether a motion for an extension is filed before or during the 30 days following the expiration of the original deadline.

Rule 4(a)(5)(A)(ii) has been amended to correct this misunderstanding and to bring the rule in harmony in this respect with Rule 4(b)(4). A motion for an extension filed prior to the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause. Likewise, a motion for an extension filed during the 30 days following the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause.

The good cause and excusable neglect standards have "different domains." *Lorenzen v. Employees Retirement Plan*, 896 F.2d 228, 232 (7th Cir. 1990). They are not interchangeable, and one is not inclusive of the other. The excusable neglect standard applies in situations in which there is fault; in such situations, the need for an extension is usually occasioned by something within the control of the movant. The good cause standard applies in situations in which there is no fault--excusable or otherwise. In such situations, the need for an extension is usually occasioned by something that is not within the control of the movant.

Thus, the good cause standard can apply to motions brought during the 30 days following the expiration of the original deadline. If, for example, the Postal Service fails to deliver a notice of appeal, a movant might have good cause to seek a post-expiration extension. It may be unfair to make such a movant prove that its "neglect" was excusable, given that the movant may not have been neglectful at all. Similarly, the excusable neglect standard can apply to motions brought prior to the expiration of the original deadline. For example, a movant may bring a pre-expiration motion for an extension of time when an error committed by the movant makes it unlikely that the movant will be able to meet the original deadline.

Changes Made After Publication and Comments No changes were made to the text of the proposed amendment. The stylistic changes to the Committee Note suggested by Judge Newman were adopted. In addition, two paragraphs were added at the end of the Committee Note to clarify the difference between the good cause and excusable neglect standards.

Subdivision (a)(7). Several circuit splits have arisen out of uncertainties about how Rule 4(a)(7)'s definition of when a judgment or order is "entered" interacts with the requirement in Fed. R. Civ. P. 58 that, to be "effective," a judgment must be set forth on a separate document. Rule 4(a)(7) and Fed. R. Civ. P. 58 have been amended to resolve those splits.

1. The first circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the extent to which orders that dispose of post-judgment motions must be set forth on separate documents. Under Rule 4(a)(4)(A), the filing of certain post-judgment motions tolls the time to appeal the underlying judgment until the "entry" of the order disposing of the last such remaining motion. Courts have disagreed about whether such an order must be set forth on a separate document before it is treated as "entered." This disagreement reflects a broader dispute among courts about whether Rule 4(a)(7) independently imposes a separate document requirement (a requirement that is distinct from the separate document requirement that is imposed by the Federal Rules of Civil Procedure ("FRCP")) or whether Rule 4(a)(7) instead incorporates the separate document requirement as it exists in the FRCP. Further complicating the matter, courts in the former "camp" disagree among themselves about the scope of the separate document requirement that they interpret Rule 4(a)(7) as imposing, and courts in the latter "camp" disagree among themselves about the scope of the separate document requirement imposed by the FRCP.

Rule 4(a)(7) has been amended to make clear that it simply incorporates the separate document requirement as it exists in Fed. R. Civ. P. 58. If Fed. R. Civ. P. 58 does not require that a judgment or order be set forth on a separate document, then neither does Rule 4(a)(7); the judgment or order will be deemed entered for purposes of Rule 4(a) when it is entered in the civil docket. If Fed. R. Civ. P. 58 requires that a judgment or order be set forth on a separate document, then so does Rule 4(a)(7); the judgment or order will not be deemed entered for purposes of Rule 4(a) until it is so set forth and entered in the civil docket (with one important exception, described below).

In conjunction with the amendment to Rule 4(a)(7), Fed. R. Civ. P. 58 has been amended to provide that orders disposing of the postjudgment motions listed in new Fed. R. Civ. P. 58(a)(1) (which postjudgment motions include, but are not limited to, the post-judgment motions that can toll the time to appeal under Rule 4(a)(4)(A)) do not have to be set forth on separate documents. *See* Fed. R. Civ. P. 58(a)(1). Thus, such orders are entered for purposes of Rule 4(a) when they are entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). *See* Rule 4(a)(7)(A)(1).

2. The second circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the following question: When a judgment or order is required to be set forth on a separate document under Fed. R. Civ. P. 58 but is not, does the time to appeal the judgment or order--or the time to bring post-judgment motions, such as a motion for a new trial under Fed. R. Civ. P. 59--ever begin to run? According to every circuit except the First Circuit, the answer is "no." The First Circuit alone holds that parties will be deemed to have waived their right to have a judgment or order entered on a separate document three months after the judgment or order is entered in the civil docket. *See Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 236 (1st Cir. 1992) (en banc). Other circuits have rejected this cap as contrary to the relevant rules. *See, e.g.*, *United States v. Haynes*, 158 F.3d 1327, 1331 (D.C. Cir. 1998); *Hammack v. Baroid Corp.*, 142 F.3d 266, 269-70 (5th Cir. 1998); *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), *vacated on other grounds*, 143 F.3d 263 (6th Cir. 1998) (en banc). However, no court has questioned the wisdom of imposing such a cap as a matter of policy.

Both Rule 4(a)(7)(A) and Fed. R. Civ. P. 58 have been amended to impose such a cap. Under the amendments, a judgment or order is generally treated as entered when it is entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). There is one exception: When Fed. R. Civ. P. 58(a)(1) requires the judgment or order to be set forth on a separate document, that judgment or order is not treated as entered until it is set forth on a separate document (in addition to being entered in the civil docket) or until the expiration of 150 days after its entry in the civil docket, whichever occurs first. This cap will ensure that parties will not be given forever to appeal (or to bring a postjudgment motion) when a court fails to set forth a judgment or order on a separate document in violation of Fed. R. Civ. P. 58(a)(1).

3. The third circuit split--this split addressed only by the amendment to Rule 4(a)(7)--concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the "parties to an appeal may waive the separate-judgment requirement of Rule 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its intent that the ... order ... represent[s] the final decision in the case," the order is a "final decision" for purposes of 28 U.S.C. § 1291, even if the order has not been set forth on a separate document for purposes of Fed. R. Civ. P. 58. *Id.* Thus, the parties can choose to appeal without waiting for the order to be set forth on a separate document.

Courts have disagreed about whether the consent of all parties is necessary to waive the separate document requirement. Some circuits permit appellees to object to attempted *Mallis* waivers and to force appellants to return to the trial court, request that judgment be set forth on a separate document, and appeal a second time. *See, e.g.*, *Selletti v. Carey*, 173 F.3d 104, 109-10 (2d Cir. 1999); *Williams v. Borg*, 139 F.3d 737, 739-40 (9th Cir. 1998); *Silver Star Enters., Inc. v. M/V Saramacca*, 19 F.3d 1008, 1013 (5th Cir. 1994). Other courts disagree and permit *Mallis* waivers even if the appellee objects. *See, e.g.*, *Haynes*, 158 F.3d at 1331; *Miller v. Artistic Cleaners*, 153 F.3d 781, 783-84 (7th Cir. 1998); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1006 n.8 (3d Cir. 1994).

New Rule 4(a)(7)(B) is intended both to codify the Supreme Court's holding in *Mallis* and to make clear that the decision whether to waive the requirement that the judgment or order be set forth on a separate document is the appellant's alone. It is, after all, the appellant who needs a clear signal as to when the time to file a notice of appeal has begun to run. If the appellant chooses to bring an appeal without waiting for the judgment or order to be set forth on a separate document, then there is no reason why the appellee should be able to object. All that would result from honoring the appellee's objection would be delay.

4. The final circuit split addressed by the amendment to Rule 4(a)(7) concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days (60 days if the government is a party) from the entry in the civil docket of the judgment or order that should have been set forth on a separate document but was not. In *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984), the district court dismissed a 28 U.S.C. § 2254 action on May 6, 1983, but failed to set forth the judgment on a separate document. The plaintiff appealed on January 10, 1984. The Fifth Circuit dismissed the appeal, reasoning that, if the plaintiff waived the separate document requirement, then his appeal would be from the May 6 order, and if his appeal was from the May 6 order, then it was untimely under Rule 4(a)(1). The Fifth Circuit stressed that the plaintiff could return to the district court, move that the judgment be set forth on a separate document, and appeal from that judgment within 30 days. *Id.* at 934. Several other cases have embraced the *Townsend* approach. *See, e.g.*, *Armstrong v. Ahitow*, 36 F.3d 574, 575 (7th Cir. 1994) (per curiam); *Hughes v. Halifax County Sch. Bd.*, 823 F.2d 832, 835-36 (4th Cir. 1987); *Harris v. McCarthy*, 790 F.2d 753, 756 n.1 (9th Cir. 1986).

Those cases are in the distinct minority. There are numerous cases in which courts have heard appeals that were not filed within 30 days (60 days if the government was a party) from the judgment or order that should have been set forth on a separate document but was not. *See, e.g.*, *Haynes*, 158 F.3d at 1330-31; *Clough v. Rush*, 959 F.2d 182, 186 (10th Cir. 1992); *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1218-19 (9th Cir. 1990). In the view of these courts, the remand in *Townsend* was "precisely the purposeless spinning of wheels abjured by the Court in the [*Mallis*] case." 15B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3915, at 259 n.8 (3d ed. 1992).

The Committee agrees with the majority of courts that have rejected the *Townsend* approach. In drafting new Rule 4(a)(7)(B), the Committee has been careful to avoid phrases such as "otherwise timely appeal" that might imply an endorsement of *Townsend*.

Changes Made After Publication and Comments No changes were made to the text of proposed Rule 4(a)(7)(B) or to the third or fourth numbered sections of the Committee Note, except that, in several places, references to a judgment being "entered" on a separate document were changed to references to a judgment being "set forth" on a separate document. This was to maintain stylistic consistency. The appellate rules and the civil rules consistently refer to "entering" judgments on the civil docket and to "setting forth" judgments on separate documents.

Two major changes were made to the text of proposed Rule 4(a)(7)(A)--one substantive and one stylistic. The substantive change was to increase the "cap" from 60 days to 150 days. The Appellate Rules Committee and the Civil Rules Committee had to balance two concerns that are implicated whenever a court fails to enter its final decision on a separate document. On the one hand, potential appellants need a clear signal that the time to appeal has begun to run, so that they do not unknowingly forfeit their rights. On the other hand, the time to appeal cannot be allowed to run forever. A party who receives no notice whatsoever of a judgment has only 180 days to move to reopen the time to appeal from that judgment. *See* Rule 4(a)(6)(A). It hardly seems fair to give a party who *does* receive notice of a judgment an unlimited amount of time to appeal, merely because that judgment was not set forth on a separate piece of paper. Potential appellees and the judicial system need *some* limit on the time within which appeals can be brought.

The 150-day cap properly balances these two concerns. When an order is not set forth on a separate document, what signals litigants that the order is final and appealable is a lack of further activity from the court. A 60-day period of inactivity is not sufficiently rare to signal to litigants that the court has entered its last order. By contrast, 150 days of inactivity is much less common and thus more clearly signals to litigants that the court is done with their case.

The major stylistic change to Rule 4(a)(7) requires some explanation. In the published draft, proposed Rule 4(a)(7)(A) provided that "[a] judgment or order is entered for purposes of this Rule 4(a) when it is entered for purposes of Rule 58(b) of the Federal Rules of Civil Procedure." In other words, Rule 4(a)(7)(A) told readers to look to FRCP 58(b) to ascertain when a judgment is entered for purposes of starting the running of the time to appeal. Sending appellate lawyers to the civil rules to discover when time began to run for purposes of the appellate rules was itself somewhat awkward, but it was made more confusing by the fact that, when readers went to proposed FRCP 58(b), they found this introductory clause: "Judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62 when.... "

This introductory clause was confusing for both appellate lawyers and trial lawyers. It was confusing for appellate lawyers because Rule 4(a)(7) informed them that FRCP 58(b) would tell them when the time begins to run for purposes of the *appellate* rules, but when they got to FRCP 58(b) they found a rule that, by its terms, dictated only when the time begins to run for purposes of certain *civil* rules. The introductory clause was confusing for trial lawyers because FRCP 58(b) described when judgment is entered for some purposes under the civil rules, but then was completely silent about when judgment is entered for other purposes.

To avoid this confusion, the Civil Rules Committee, on the recommendation of the Appellate Rules Committee, changed the introductory clause in FRCP 58(b) to read simply: "Judgment is entered for purposes of *these Rules* when.... " In addition, Rule 4(a)(7)(A) was redrafted[1] so that the triggering events for the running of the time to appeal (entry in the civil docket, and being set forth on a separate document or passage of 150 days) were incorporated directly into Rule 4(a)(7), rather than indirectly through a reference to FRCP 58(b). This eliminates the need for appellate lawyers to examine Rule 58(b) and any chance that Rule 58(b)'s introductory clause (even as modified) might confuse them.

We do not believe that republication of Rule 4(a)(7) or FRCP 58 is necessary. In *substance*, rewritten Rule 4(a)(7)(A) and FRCP 58(b) operate identically to the published versions, except that the 60-day cap has been replaced with a 150-day cap--a change that was suggested by some of the commentators and that makes the cap more forgiving.

Subdivision (b)(5). Federal Rule of Criminal Procedure 35(a) permits a district court, acting within 7 days after the imposition of sentence, to correct an erroneous sentence in a criminal case. Some courts have held that the filing of a motion for correction of a sentence suspends the time for filing a notice of appeal from the judgment of conviction. *See, e.g.*, *United States v. Carmouche*, 138 F.3d 1014, 1016 (5th Cir. 1998) (per curiam); *United States v. Morillo*, 8 F.3d 864, 869 (1st Cir. 1993). Those courts establish conflicting timetables for appealing a judgment of conviction after the filing of a motion to correct a sentence. In the First Circuit, the time to appeal is suspended only for the period provided by Fed. R. Crim. P. 35(a) for the district court to correct a sentence; the time to appeal begins to run again once 7 days have passed after sentencing, even if the motion is still pending. By contrast, in the Fifth Circuit, the time to appeal does not begin to run again until the district court actually issues an order disposing of the motion.

Rule 4(b)(5) has been amended to eliminate the inconsistency concerning the effect of a motion to correct a sentence on the time for filing a notice of appeal. The amended rule makes clear that the time to appeal continues to run, even if a motion to correct a sentence is filed. The amendment is consistent with Rule 4(b)(3)(A), which lists the motions that toll the time to appeal, and notably omits any mention of a Fed. R. Crim. P. 35(a) motion. The amendment also should promote certainty and minimize the likelihood of confusion concerning the time to appeal a judgment of conviction.

If a district court corrects a sentence pursuant to Fed. R. Crim. P. 35(a), the time for filing a notice of appeal of the corrected sentence under Rule 4(b)(1) would begin to run when the court enters a new judgment reflecting the corrected sentence.

Changes Made After Publication and Comments The reference to Federal Rule of Criminal Procedure 35(c) was changed to Rule 35(a) to reflect the pending amendment of Rule 35. The proposed amendment to Criminal Rule 35, if approved, will take effect at the same time that the proposed amendment to Appellate Rule 4 will take effect, if approved.

2005 Amendments

Rule 4(a)(6) has permitted a district court to reopen the time to appeal a judgment or order upon finding that four conditions were satisfied. First, the district court had to find that the appellant did not receive notice of the entry of the judgment or order from the district court or any party within 21 days after the judgment or order was entered. Second, the district court had to find that the appellant moved to reopen the time to appeal within 7 days after the appellant received notice of the entry of the judgment or order. Third, the district court had to find that the appellant moved to reopen the time to appeal within 180 days after the judgment or order was entered. Finally, the district court had to find that no party would be prejudiced by the reopening of the time to appeal.

Rule 4(a)(6) has been amended to specify more clearly what type of "notice" of the entry of a judgment or order precludes a party from later moving to reopen the time to appeal. In addition, Rule 4(a)(6) has been amended to address confusion about what type of "notice" triggers the 7-day period to bring a motion to reopen. Finally, Rule 4(a)(6) has been reorganized to set forth more logically the conditions that must be met before a district court may reopen the time to appeal.

Subdivision (a)(6)(A). Former subdivision (a)(6)(B) has been redesignated as subdivision (a)(6)(A), and one substantive change has been made. As amended, the subdivision will preclude a party from moving to reopen the time to appeal a judgment or order only if the party receives (within 21 days) formal notice of the entry of that judgment or order under Civil Rule 77(d). No other type of notice will preclude a party.

The reasons for this change take some explanation. Prior to 1998, former subdivision (a)(6)(B) permitted a district court to reopen the time to appeal if it found "that a party entitled to notice of the entry of a judgment or order did not receive such

notice from the clerk or any party within 21 days of its entry." The rule was clear that the "notice" to which it referred was the notice required under Civil Rule 77(d), which must be served by the clerk pursuant to Civil Rule 5(b) and may also be served by a party pursuant to that same rule. In other words, prior to 1998, former subdivision (a)(6)(B) was clear that, if a party did not receive formal notice of the entry of a judgment or order under Civil Rule 77(d), that party could later move to reopen the time to appeal (assuming that the other requirements of subdivision (a)(6) were met).

In 1998, former subdivision (a)(6)(B) was amended to change the description of the type of notice that would preclude a party from moving to reopen. As a result of the amendment, former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive "*such* notice"--that is, the notice required by Civil Rule 77(d)--but instead referred to the failure of the moving party to receive "*the* notice." And former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive notice from "the *clerk* or any party," both of whom are explicitly mentioned in Civil Rule 77(d). Rather, former subdivision (a)(6)(B) referred to the failure of the moving party to receive notice from "the *district court* or any party."

The 1998 amendment meant, then, that the type of notice that precluded a party from moving to reopen the time to appeal was no longer limited to Civil Rule 77(d) notice. Under the 1998 amendment, *some* type of notice, in addition to Civil Rule 77(d) notice, precluded a party. But the text of the amended rule did not make clear what type of notice qualified. This was an invitation for litigation, confusion, and possible circuit splits.

To avoid such problems, former subdivision (a)(6)(B)--new subdivision (a)(6)(A)--has been amended to restore its pre-1998 simplicity. Under new subdivision (a)(6)(A), if the court finds that the moving party was not notified under Civil Rule 77(d) of the entry of the judgment or order that the party seeks to appeal within 21 days after that judgment or order was entered, then the court is authorized to reopen the time to appeal (if all of the other requirements of subdivision (a)(6) are met). Because Civil Rule 77(d) requires that notice of the entry of a judgment or order be formally served under Civil Rule 5(b), any notice that is not so served will not operate to preclude the reopening of the time to appeal under new subdivision (a)(6)(A).

Subdivision (a)(6)(B). Former subdivision (a)(6)(A) required a party to move to reopen the time to appeal "within 7 days after the moving party receives notice of the entry [of the judgment or order sought to be appealed]." Former subdivision (a)(6)(A) has been redesignated as subdivision (a)(6)(B), and one important substantive change has been made: The subdivision now makes clear that only formal notice of the entry of a judgment or order under Civil Rule 77(d) will trigger the 7-day period to move to reopen the time to appeal.

The circuits have been split over what type of "notice" is sufficient to trigger the 7-day period. The majority of circuits that addressed the question held that only *written* notice was sufficient, although nothing in the text of the rule suggested such a limitation. *See, e.g.*, *Bass v. United States Dep't of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit held that while former subdivision (a)(6)(A) did not require written notice, "the quality of the communication [had to] rise to the functional equivalent of written notice." *Nguyen v. Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). Other circuits suggested in dicta that former subdivision (a)(6)(A) required only "actual notice," which, presumably, could have included oral notice that was not "the functional equivalent of written notice." *See, e.g.*, *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits read into former subdivision (a)(6)(A) restrictions that appeared only in former subdivision (a)(6)(B) (such as the requirement that notice be received "from the district court or any party," *see Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that appeared in neither former subdivision (a)(6)(A) nor former subdivision (a)(6)(B) (such as the requirement that notice be served in the manner prescribed by Civil Rule 5, *see Ryan v. First Unum Life Ins. Co.*, 174 F.3d 302, 304-05 (2d Cir. 1999)).

Former subdivision (a)(6)(A)--new subdivision (a)(6)(B)--has been amended to resolve this circuit split by providing that only formal notice of the entry of a judgment or order under Civil Rule 77(d) will trigger the 7-day period. Using Civil Rule 77(d) notice as the trigger has two advantages: First, because Civil Rule 77(d) is clear and familiar, circuit splits are unlikely to develop over its meaning. Second, because Civil Rule 77(d) notice must be served under Civil Rule 5(b), establishing whether and when such notice was provided should generally not be difficult.

Using Civil Rule 77(d) notice to trigger the 7-day period will not unduly delay appellate proceedings. Rule 4(a)(6) applies to only a small number of cases--cases in which a party was not notified of a judgment or order by either the clerk or another party within 21 days after entry. Even with respect to those cases, an appeal cannot be brought more than 180 days after entry, no matter what the circumstances. In addition, Civil Rule 77(d) permits parties to serve notice of the entry of a judgment or order. The winning party can prevent Rule 4(a)(6) from even coming into play simply by serving notice of entry within 21 days. Failing that, the winning party can always trigger the 7-day deadline to move to reopen by serving belated notice.

2009 Amendments

Subdivision (a)(4)(A)(vi). Subdivision (a)(4) provides that certain timely post-trial motions extend the time for filing an appeal. Lawyers sometimes move under Civil Rule 60 for relief that is still available under another rule such as Civil Rule 59. Subdivision (a)(4)(A)(vi) provides for such eventualities by extending the time for filing an appeal so long as the Rule 60 motion is filed within a limited time. Formerly, the time limit under subdivision (a)(4)(A)(vi) was 10 days, reflecting the 10-day limits for making motions under Civil Rules 50(b), 52(b), and 59. Subdivision (a)(4)(A)(vi) now contains a 28-day limit to match the revisions to the time limits in the Civil Rules.

Subdivision (a)(4)(B)(ii). Subdivision (a)(4)(B)(ii) is amended to address problems that stemmed from the adoption--during the 1998 restyling project--of language referring to "a judgment altered or amended upon" a post-trial motion.

Prior to the restyling, subdivision (a)(4) instructed that "[a]ppellate review of an order disposing of any of [the post-trial motions listed in subdivision (a)(4)] requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding." After the restyling, subdivision (a)(4)(B)(ii) provided: "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal--in compliance with Rule 3(c)--within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion."

One court has explained that the 1998 amendment introduced ambiguity into the Rule: "The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment." *Sorensen v. City of New York*, 413 F.3d 292, 296 n.2 (2d Cir. 2005). The current amendment removes that ambiguous reference to "a judgment altered or amended upon" a post-trial motion, and refers instead to "a judgment's alteration or amendment" upon such a motion. Thus, subdivision (a)(4)(B)(ii) requires a new or amended notice of appeal when an appellant wishes to challenge an order disposing of a motion listed in Rule 4(a)(4)(A) or a judgment's alteration or amendment upon such a motion.

Subdivision (a)(5)(C). The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

Subdivision (a)(6)(B). The time set in the former rule at 7 days has been revised to 14 days. Under the time-computation approach set by former Rule 26(a), "7 days" always meant at least 9 days and could mean as many as 11 or even 13 days. Under current Rule 26(a), intermediate weekends and holidays are counted. Changing the period from 7 to 14 days offsets the change in computation approach. See the Note to Rule 26.

Subdivisions (b)(1)(A) and (b)(3)(A). The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

2010 Amendments

Subdivision (a)(7). Subdivision (a)(7) is amended to reflect the renumbering of Civil Rule 58 as part of the 2007 restyling of the Civil Rules. References to Civil Rule "58(a)(1)" are revised to refer to Civil Rule "58(a)." No substantive change is intended.

2011 Amendments

Subdivision (a)(1)(B). Rule 4(a)(1)(B) has been amended to make clear that the 60-day appeal period applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 40(a)(1) makes clear that the 45-day period to file a petition for panel rehearing also applies in such cases.)

The amendment to Rule 4(a)(1)(B) is consistent with a 2000 amendment to Civil Rule 12(a)(3), which specified an extended 60-day period to respond to complaints when "[a] United States officer or employee [is] sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf." The Committee Note to the 2000 amendment explained: "Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity." The same reasons justify providing additional time to the Solicitor General to decide whether to file an appeal.

However, because of the greater need for clarity of application when appeal rights are at stake, the amendment to Rule 4(a)(1)(B), and the corresponding legislative amendment to 28 U.S.C. § 2107 that is simultaneously proposed, include safe harbor provisions that parties can readily apply and rely upon. Under new subdivision 4(a)(1)(B)(iv), a case automatically qualifies for the 60-day appeal period if (1) a legal officer of the United States has appeared in the case, in an official capacity, as counsel for the current or former officer or employee and has not withdrawn the appearance at the time of the entry of the judgment or order appealed from or (2) a legal officer of the United States appears on the notice of appeal as counsel, in an official capacity, for the current or former officer or employee. There will be cases that do not fall within either safe harbor but that qualify for the longer appeal period. An example would be a case in which a federal employee is sued in an individual capacity for an act occurring in connection with federal duties and the United States does not represent the employee either when the judgment is entered or when the appeal is filed but the United States pays for private counsel for the employee.

2016 Amendments

A clarifying amendment is made to subdivision (a)(4). Former Rule 4(a)(4) provided that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Responding to a circuit split concerning the meaning of "timely" in this provision, the amendment adopts the majority approach and rejects the approach taken in *National Ecological Foundation v. Alexander*, 496 F.3d 466 (6th Cir. 2007). A motion made after the time allowed by the Civil Rules will not qualify as a motion that, under Rule 4(a)(4)(A), re-starts the appeal time--and that fact is not altered by, for example, a court order that sets a due date that is later than permitted by the Civil Rules, another party's consent or failure to object to the motion's lateness, or the court's disposition of the motion without explicit reliance on untimeliness.

Rule 4(c)(1) is revised to streamline and clarify the operation of the inmate-filing rule.

The Rule requires the inmate to show timely deposit and prepayment of postage. The Rule is amended to specify that a notice is timely if it is accompanied by a declaration or notarized statement stating the date the notice was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former Rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution's mail system. New Form 7 in the Appendix of Forms sets out a suggested form of the declaration.

The amended rule also provides that a notice is timely without a declaration or notarized statement if other evidence accompanying the notice shows that the notice was deposited on or before the due date and that postage was prepaid. If the notice is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the court of appeals has discretion to accept a declaration or notarized statement at a later date. The Rule uses the phrase "exercises its discretion to permit"--rather than simply "permits"--to help ensure that pro se inmate litigants are aware that a court will not necessarily forgive a failure to provide the declaration initially.

2017 Amendments

Subdivision (a)(4)(B)(iii). This technical amendment restores the former subdivision (a)(4)(B)(iii) that was inadvertently deleted in 2009.

Notes of Decisions (2077)

Footnotes

1 A redraft of Rule 4(a)(7) was faxed to members of the Appellate Rules Committee two weeks after our meeting in New Orleans. The Committee consented to the redraft without objection.

F. R. A. P. Rule 4, 28 U.S.C.A., FRAP Rule 4

Including Amendments Received Through 9-1-21

End of Document

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 21-15883

I am the attorney or self-represented party.

This brief contains 13,939 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ◉ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ○ is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ○ it is a joint brief submitted by separately represented parties;
  - ○ a party or parties are filing a single brief in response to multiple briefs; or
  - ○ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated _____.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/George Kimbrell **Date** Oct 1, 2021

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 15. Certificate of Service for Electronic Filing

Instructions for this form: http://www.ca9.uscourts.gov/forms/form15instructions.pdf

9th Cir. Case Number(s) 21-15883

I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Service on Case Participants Who Are Registered for Electronic Filing:

☐ I certify that I served the foregoing/attached document(s) via email to all registered case participants on this date because it is a sealed filing or is submitted as an original petition or other original proceeding and therefore cannot be served via the Appellate Electronic Filing system.

Service on Case Participants Who Are NOT Registered for Electronic Filing:

☐ I certify that I served the foregoing/attached document(s) on this date by hand delivery, mail, third party commercial carrier for delivery within 3 calendar days, or, having obtained prior consent, by email to the following unregistered case participants *(list each name and mailing/email address)*:

Description of Document(s) *(required for all documents)*:

Center for Food Safety, Et Al. Plaintiffs-Appellants' Opening Brief

Signature s/George Kimbrell **Date** Oct 1, 2021

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov