

# THE AFTERMATH OF IRENE: ORGANIC FARMING, CONSUMER PROTECTION AND REVISING FEDERAL POLICIES

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*Patricia Rob ert*<sup>\*</sup>

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## INTRODUCTION

On August 28, 2011, the State of Vermont endured one of the worst natural disasters it has ever seen—Tropical Storm Irene (Irene). Many areas in Vermont were devastated because of the flooding, and citizens suffered millions of dollars worth of damage as a result. Floodwaters covered several farm fields, including organic fields, causing inundation of soils with pollutants, foreign materials, and pesticides from upstream areas. While the crops that directly came into contact with floodwaters are

forbidden to reach the marketplace because of their contamination, consumers still need to be assured that food grown in that same soil in the future continues to meet the required standards for an organic label.<sup>1</sup> Therefore, it is important to ensure the federal government is properly regulating this “field” of the organic growth process. However, if the federal regulations do not adequately protect future organic crops from being grown in previously inundated and contaminated soils, then this raises important consumer protection issues for organic buyers. Are the crops producing truly organic foods or, alternatively, producing crops that have a measurable level of pesticides or lead?

This recent flooding from Irene has raised questions about organic standards not only pertaining to consumer protection issues, but also in regards to ensuring that farmers’ investments are adequately protected under the regulations. Organically grown foods have become a staple to many Americans’ diets.<sup>2</sup> The United States Department of Agriculture (USDA) and the Food and Drug Administration (FDA) are the agencies responsible for establishing the organic certification requirements and enforcing compliance with those standards, including after natural disasters, such as flooding.<sup>3</sup>

Furthermore, the federal government, through the Federal Emergency Management Agency (FEMA) and USDA programs, provides funding for those affected during natural disasters, such as flooding.<sup>4</sup> Many Vermont farmers recently sought relief after Irene destroyed their crops. This raises the question of whether the federal government should provide more relief to organic farmers than nonorganic farmers because of the cost differential between the production methods. Granting more relief to organic farmers will protect the organic marketplace and its consumers by financially cushioning the organic farmers enough to prevent them from otherwise

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\* Patricia Robért is a 2013 J.D. candidate at Vermont Law School. She received an M.A. from Western Washington University in 2007 and a B.A. from Western Washington University in 2005. The author would like to thank the staff editors of the *Vermont Journal of Environmental Law* for their work in preparing this article for publication. Additional thanks to Professor Janet Milne for sparking an interest in this topic and providing feedback throughout the writing process.

1. OFFICE OF COMM’N, U.S. DEP’T OF AGRIC., USDA, FDA WORKING TO PROVIDE AID FOR FARMERS WITH FLOOD-DAMAGED CROPS, Release No. 0399.11 (Sept. 12, 2011) [hereinafter USDA Release], available at <http://content.govdelivery.com/bulletins/gd/USDAOC-124d37>.

2. Chenglin Liu, *Is USDA Organic A Seal of Deceit?: The Pitfalls of USDA Certified Organics Produced in the United States, China and Beyond*, 47 STAN. J. INT’L L. 333, 335 (2011).

3. *Id.*

4. U.S. DEP’T OF AGRIC.—RISK MANAGEMENT AGENCY, ORGANIC FARMING PRACTICES (January 2011), available at <http://www.rma.usda.gov/pubs/rme/organics.pdf>.

having to abandon their practice during the three-year interim required to gain organic certification.

This Note argues that the federal regulations in place to deal with flooded organic cropland are inadequate for two reasons. First, the current regulations do not adequately protect organic farmers' livelihoods. Second, current regulations do not adequately ensure that organic foods in the marketplace were not grown in contaminated soil, giving rise to consumer protection issues. Part I provides a description of the organic marketplace and the damage suffered as a result of Tropical Storm Irene. Part II examines the National Organic Certification program as well as the Northeast Organic Farming Association (NOFA), which is responsible for certification of Vermont's organic farms. This section demonstrates that, while other states may benefit from adopting a State Organic Program, Vermont should continue certification through NOFA because the state program would serve no greater benefits than the system currently in place. Part III analyzes the rules and guidance that the FDA provides for industry (including organic farms) with regards to minimizing food safety hazards in situations such as floods. This portion also analyzes published FDA drafts to determine if changes should be made to the current regulations to better protect organic croplands and consumers of organic foods. Finally, Part IV includes a description of how FEMA assists farmers that have lost their crops, provides an analysis of the current FEMA regulations, and argues that organic farmers at risk of losing certification should be provided with more relief than nonorganic farmers.

## I. IRENE AND THE ORGANIC MARKETPLACE

Tropical Storm Irene hit Vermont at the end of August 2011. Farms along the Connecticut River, Lamoille River, Otter Creek, and White River "had water come up to the 100-year flood level and in some cases the 500-year flood level."<sup>5</sup> Almost 20,000 acres of Vermont's farmland flooded as a result of Irene.<sup>6</sup> The flooding caused heartbreak and widespread devastation, and washed away homes, roadways, and crops. Home-videos captured historic covered bridges, cars, propane tanks, and downed trees

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5. Press Release, Univ. of Vt. Extension, Many Vegetable Farms Flooded but Plenty of Safe Local Produce Available (Sept. 2, 2011), *available at* <http://www.uvm.edu/vtvegandberry/Pubs/PressReleaseVegetableFarmFlooding9-2-11.pdf>.

6. Dave Gram, *Vt. Agency Says Irene had Lessons for New Climate*, DESERT NEWS (Feb. 13, 2012, 2:25 PM), <http://www.deseretnews.com/article/print/765550441/Vt-agency-says-Irene-had-lessons-for-new-climate.html>.

floating down the overflowing rivers.<sup>7</sup> Pictures posted all over the Internet displayed images of water covered roadways and the tops of greenhouses barely above the risen waters.<sup>8</sup> Damage to farms in the area, such as the ones with flooded greenhouses, surpassed two million dollars in the first few weeks post-Irene.<sup>9</sup> A survey of Vermont's farms by the Vermont office of the USDA's Farm Service Agency found that Irene affected 476 farms.<sup>10</sup> Moreover, farms across the State suffered approximately twenty million dollars in economic losses.<sup>11</sup>

The organic consumer marketplace has increased dramatically in America since Congress passed the Organic Foods Production Act (OFPA) in 1990.<sup>12</sup> This is evinced by the fact that the organic marketplace has grown steadily over the past twenty-plus years, averaging annual growth rates between seventeen to twenty percent.<sup>13</sup> "More than half of all U.S. consumers have tried organic food. . . . [T]he United States is the single largest market for organic products."<sup>14</sup> In the United States, organic food sales for 2008 were \$21.1 billion—more than five times the organic food sales from 1997.<sup>15</sup> Further, more than seventy percent of grocery stores carry organic foods, which typically are priced twenty to thirty percent more than their conventionally produced counterparts.<sup>16</sup>

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7. *Lower Bartonsville Covered Bridge Collapses into the Williams River in Vermont*, YOUTUBE, [http://www.youtube.com/watch?feature=player\\_embedded&v=WyO18one8fU](http://www.youtube.com/watch?feature=player_embedded&v=WyO18one8fU) (last visited Nov. 4, 2012) (showing historic bridge collapse (contains some explicit language)); *Car going down river*, YOUTUBE, <http://www.youtube.com/watch?v=-sP88s2WDyA&feature=related> (last visited Nov. 4, 2012) (showing car swept down river); *Hurricane Irene, Ottaquechee River Flood, Woodstock VT*, YOUTUBE, [http://www.youtube.com/watch?v=jcJFyUQr\\_ml](http://www.youtube.com/watch?v=jcJFyUQr_ml) (last visited Nov. 4, 2012) (showing propane tanks floating down river) (contains some explicit language); *Irene Flooding—Sharon, VT*, YOUTUBE, <http://www.youtube.com/watch?v=pKXQ-1bXEok&feature=fvwrel> (last visited Nov. 4, 2012) (collapsing road due to flood waters).

8. *Reader Photos: Irene in Vermont*, BURLINGTON FREE PRESS.COM (Aug. 28, 2011), <http://www.burlingtonfreepress.com/apps/pbcs.dll/gallery?Avis=BT&Dato=20110828&Kategori=NEWS07&Lopen=828001&Ref=PH>.

9. Press Release, *supra* note 5.

10. Vern Grubinger et al., *Impact of Irene on Vermont Agriculture*, UNIV. OF VT. EXTENSION, 3 (Jan. 5, 2012), <http://www.uvm.edu/vtvegandberry/Pubs/ImpactIreneVermontAgriculture.pdf>.

11. *Id.*

12. Liu, *supra* note 2, at 335.

13. William J. Friedman, *The Framework for Global Organic Food Trade Circa 2005: Accomplishments and Challenges*, 60 FOOD & DRUG L.J. 361, 365 (2005) (citing Elaine Lipson, *The US Market for Organic Foods and Beverages: The Mainstreaming of a Trend* 4–8 (Don Montuori ed., Packaged Facts 3d ed. 2004)).

14. *Id.* at 364–65.

15. Liu, *supra* note 3, at 335.

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

Naturally, as a result of increased demand in the organic marketplace, the nation's organic farmland tripled between 1997 and 2005.<sup>17</sup> According to the USDA, organic farmland encompassed 4.1 million acres as of 2005.<sup>18</sup> As of 2010, Vermont had a total of 102,637 acres of certified organic cropland.<sup>19</sup> While only seventy-eight organic producers existed in Vermont in 1993, the State now has 580 certified organic producers.<sup>20</sup> Additionally, in 2010, the total gross sales for Vermont certified organic farmers were over seventy-six million dollars.<sup>21</sup>

Studies have shown that consumers choose to buy organic foods over conventionally produced foods for numerous reasons, with health being identified as the primary reason.<sup>22</sup> Consumers seek organic foods to avoid pesticides, additives, hormones, antibiotics, toxins, and genetically modified ingredients.<sup>23</sup> Consumers' confidence in organic produce is buoyed by federal government regulations.<sup>24</sup> Therefore, as the organic marketplace continues to expand, it is imperative that consumers, "who pay a premium for those products," also have faith in those regulations which govern whether an "organic" sticker can be placed on the item in the first place.<sup>25</sup>

## II. CERTIFICATION AND COMPLIANCE WITH THE ORGANIC STANDARDS

### *A. The Regulatory Structure of Organic Standards at the Federal and State Level*

The Organic Foods Production Act (OFPA) was passed in 1990, creating the first major regulatory scheme for organic food in the United

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17. Andrew Martin & Kim Severson, *Sticker Shock in the Organic Aisles*, N.Y. TIMES, Apr. 18, 2008, at B8.

18. *Id.*

19. NE. ORGANIC FARMING ASSOC., 2010 STATISTICS ON CERTIFIED ORGANIC AGRICULTURE IN VERMONT (2010), available at <http://nofavt.org/sites/default/files/December%202010%20Statistics.pdf> (identifying the number of producers includes organically certified producers of dairy, maple syrup, vegetable, field crop, livestock, mushroom, honey, and processors (on and off farm)).

20. *Id.*

21. *Id.*

22. Margot J. Pollans, Note, *Bundling Public and Private Goods: The Market for Sustainable Organics*, 85 N.Y.U. L. REV. 621, 646 (2010).

23. Kimberly Ong, *A New Standard: Finding a Way to Go Beyond Organic*, 17 N.Y.U. ENVTL. L. J. 883, 884–85 (2008).

24. *Id.*

25. Daren A. Stemwedel, Comment, *A Fundamental Flaw in the National Organic Program: The Case for National Regulation of Organic Input Materials*, 19 SAN JOAQUIN AGRIC. L. REV. 199, 199 (2010).

States.<sup>26</sup> Congress enacted the OFPA to establish uniform standards pertaining to organics, thus protecting consumers and allowing for market expansion.<sup>27</sup> The USDA was delegated the authority under this statutory scheme to regulate the production and handling of organic goods.<sup>28</sup> In 2002, the USDA implemented the National Organic Program (NOP).<sup>29</sup> Unlike the OFPA, which is mainly procedural, the NOP is a set of substantive regulations.<sup>30</sup> Under the NOP, organic farms are monitored and certified if they meet the required standards set forth in the NOP pertaining to the method of production and permissible ingredients.<sup>31</sup>

Although the USDA implemented the program, the certification process is carried out on the local level by state and independent certifiers.<sup>32</sup> Under the NOP, Congress allowed each state to implement its own State Certification Program pursuant to 7 U.S.C. § 6503.<sup>33</sup> As of 2005, only nineteen states and counties created certifying bodies, while the remaining organic certifiers in the country are private entities.<sup>34</sup> “Although certifying agents essentially play the role of federal regulators in that they monitor compliance with the federal organic regulations, certifying agents are paid by the producers and processors that use their certification services, not by the USDA or any other governmental entity.”<sup>35</sup> Presently, according to the Environmental Protection Agency (EPA), “[m]ore than 40 private organizations and state agencies (certifiers) currently certify organic food, but their standards for growing and labeling organic food may differ.”<sup>36</sup> For example, certifying agencies may differ on which pesticides or fertilizers can be used to grow crops, and in regards to the information placed on

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26. Organic Foods Production Act of 1990, Pub. L. No. 101-624, 104 Stat. 3935 (codified as amended at 7 U.S.C. §§ 6501-6523 (2006)); Liu, *supra* note 2, at 335.

27. Pollans, *supra* note 22, at 652.

28. Liu, *supra* note 2, at 335.

29. Vermont Organic Farmers, LLC.—Organic Certification Program, <http://nofavt.org/programs/organic-certification> (last visited Nov. 18, 2011). See National Organic Program, 7 C.F.R. §§ 205.1-205.669 (2011) (establishing the National Organic Program as a provision of the Organic Foods Production Act).

30. Ong, *supra* note 23, at 887.

31. *Id.*

32. Vermont Organic Farmers, LLC., *supra* note 29; see 7 C.F.R. §§ 205.400-205.499 for the general requirements for certification.

33. Vermont Organic Farmers, LLC., *supra* note 29; 7 C.F.R. § 205.620(a).

34. Michelle T. Friedland, *You Call That Organic?—The USDA’s Misleading Food Regulations*, 13 N.Y.U. ENVTL. L.J. 379, 390 (2005) (certifying agents permitted under NOP to be private or government entities, both of which must be accredited by the Department of Agriculture).

35. *Id.* The conflict of interest this presents is further discussed in Part IIIA.

36. *Organic Farming—Background*, ENVTL. PROT. AGENCY, <http://www.epa.gov/agriculture/torg.html#Background> (last updated June 27, 2012).

logos and seals for organic products.<sup>37</sup> Currently, California and Utah are the only two states in the country that have approved state organic certification programs.<sup>38</sup> However, these two states have not implemented regulations that substantially differ from the current regulations under the NOP.<sup>39</sup>

Vermont has taken a somewhat different path to regulate its organic farms—a path taken at a notably earlier date than that of the nationwide program. The Northeast Organic Farming Association of Vermont (NOFA-VT) was established in 1971.<sup>40</sup> In 1985, NOFA-VT set up the Vermont Organic Farmers (VOF), serving as their certification branch in order to “help growers and concerned consumers define what it meant to farm organically.”<sup>41</sup> The farmers of Vermont collectively decided—at a time prior to any nationwide regulatory scheme—on standards for organic production using a “holistic approach” to deal with pest control, health of crops and animals, and soil fertility.<sup>42</sup> After the passage of the NOP in 2002, the USDA accredited the already established VOF as a certifying agent.<sup>43</sup>

#### *B. Requirements for Organic Certification under the NOP*

To obtain organic certification under the NOP, the land cannot have any “prohibited substances . . . applied to it for a period of 3 years immediately preceding harvest of the crop.”<sup>44</sup> Further, the land must have “distinct, defined boundaries and buffer zones 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.”<sup>45</sup> Other general requirements for certification require that a farmer: (1) implement an organic production plan and update it annually; (2) allow for annual on-site inspections by the certifying agent (but also at the agent’s or the Administrator’s reasonable request); (3) maintain five years worth of records regarding the organic operation and allow the certifying agent access to the records; and (4) immediately notify the certifying agent

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37. *Id.*

38. Ong, *supra* note 23, at 892.

39. *Id.*

40. *About NOFA Vermont*, NE. ORGANIC FARMING ASS’N OF VT., <http://nofavt.org/about> (last visited Nov. 4, 2012); 7 C.F.R. §§ 205.1–205.669.

41. Vermont Organic Farmers, LLC., *supra* note 29.

42. *Id.*

43. *Id.*

44. 7 C.F.R. § 205.202(b).

45. *Id.* § 205.202(c).

regarding any application, including drift, of a prohibited substance to any field.<sup>46</sup>

More specifically, regarding the on-site inspections by the certifying agent, the certification process requires annual inspections that are conducted for each certified operation, in which the agent conducting the inspection receives updates of information prior to performing the inspection.<sup>47</sup> Under the NOP, the Administrator or state equivalent retains the power to require additional inspections to determine compliance with the Act and regulations.<sup>48</sup> Furthermore, “[c]ertifying agents must be notified by a producer or handler immediately of any changes affecting an operation’s compliance with the regulations.”<sup>49</sup> Therefore, in the case of flooding, such as during Irene, certified organic farmers are required to notify the certifying agent if their fields had been inundated. Following this notification, the certifying agent will likely perform an on-site inspection, requiring tests of previously inundated fields to determine whether prohibited substances are present in the soil.

### *C. Maintaining Certification under the NOP after Irene’s Flooding*

Considering the above requirements, this sub-section analyzes the effects that a flood may have on a farmer’s ability to maintain organic certification.<sup>50</sup> To reiterate, the USDA, under the NOP, requires that a farmer immediately notify the certifying agent regarding any application, including drift, of a prohibited substance to any field.<sup>51</sup> While a farmer is not technically “applying” prohibited substances to a field when it is flooded, prohibited substances nonetheless likely inundate the soils.<sup>52</sup> The act of not revoking certification after a flood because the farmer did not apply the prohibited substances to his fields still raises important consumer

46. *Id.* § 205.400.

47. U.S. DEP’T OF AGRIC., NAT’L ORGANIC PROGRAM, WHAT IS ORGANIC CERTIFICATION? (June 2012), *available at* <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3004346&acct=nopgeninfo>; *see* Organic Food Production Act of 1990, 7 U.S.C. § 6506 (2006) (detailing general federal requirements for organic certification).

48. 7 C.F.R. § 205.403(a)(2)(ii).

49. *Id.* § 205.400(f)(2).

50. Maintaining certification after a flood largely depends on the individual circumstances and effects of that particular flood (i.e. what toxins or pollutants affected the fields). Therefore, this Note is primarily concerned with the circumstances surrounding Irene and the flooding that resulted from that storm. However, the overarching analysis would generally be the same after any flood once the pollutants or damage to the farm have been determined.

51. 7 C.F.R. § 205.400(f)(1).

52. Telephone Interview with and email from Nicole Dehne, Vermont Organic Farming (VOF) Administrator, Northeast Organic Farming Association-Vermont (NOFA-VT) (Dec. 6, 2011).

protection issues pertaining to the safety of organic foods. Ethically, the farmer still has the responsibility of contacting the certifying agent regarding the possibility that prohibited substances and contaminants are present.

While the regulations technically provide the possibility of granting a temporary variance to a certified organic farm that suffered damage after a flood, the window for such a variance is extremely narrow and almost impractical.<sup>53</sup> The temporary variance cannot apply to the land requirement standards discussed earlier.<sup>54</sup> Therefore, in situations like Irene, temporary variances are not granted by certifying agents or the Administrator because of the varying pollutants, contaminants, and sewage sludge that inundated fields. To do otherwise would be in direct conflict with the regulations.<sup>55</sup>

After Irene, VOF requested all its certified farmers to submit information about the damage suffered to their fields, which VOF then further surveyed throughout the fall of 2011 in order to determine the total amount of damage.<sup>56</sup> As of December 2011, three farms had cited evidence of contamination in their fields, such as an empty propane tank or oily residue.<sup>57</sup> An additional sixteen certified organic farms indicated upstream contamination of their fields.<sup>58</sup> VOF decided not to preemptively revoke certification—noting the potential financial burden that would place on the farmers—but to conduct on-site inspections at the affected farms during the spring of 2012 to protect consumers from purchasing organic food produced in soils post-Irene.<sup>59</sup> Moreover, the Administrator of VOF also stated that between Irene's flooding and the spring testing results, "the farmers' certification is good unless the certification is suspended, revoked, or surrendered."<sup>60</sup>

However, other problems have been identified where time seems to be the only solution. Performing numerous residue tests to identify the presence of contaminants becomes impracticable when it is unclear what pollutants the tester should look for and the high costs of the test.<sup>61</sup>

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53. See generally 7 C.F.R. § 205.290(a)(2) (2011) (describing the variance process).

54. 7 C.F.R. § 205.290(a). Note also in this section of the C.F.R. that § 205.202 (land requirements) is not an enumerated section that will allow for a temporary variance.

55. See *id.* § 205.290 (requiring compliance with 7 C.F.R. § 205.203, which prohibits the contamination of crops by pathogenic organisms, heavy metals, or residues of prohibited substances, such as sewage-sludge); Telephone Interview with Nicole Dehne, *supra* note 52.

56. Grubinger et al., *supra* note 10, at 4.

57. Telephone Interview with Nicole Dehne, *supra* note 52.

58. *Id.*

59. Grubinger et al., *supra* note 10, at 3; E-mail from Nicole Dehne, *supra* note 52.

60. Email from Nicole Dehne, *supra* note 52.

61. Grubinger et al., *supra* note 10, at 3. Residue testing is defined as "[a]n official or validated analytical procedure that detects, identifies, and measures the presence of chemical substances,

Scientists, farmers, and organic certification specialists have been concerned about testing for pesticides, heavy metals, and microbial contamination in flooded farm soils.<sup>62</sup> Heavy metal testing is relatively straightforward, but both pesticides and microbial pathogens pose a challenge in terms of collecting meaningful data. The difficulties are both financial and technical, because of the wide range of pesticides and microbes that could be present and the variation that is possible across a farm field.<sup>63</sup> These factors require a large number of expensive tests using a rigorous sampling procedure to assure validity of the results.<sup>64</sup> Fortunately, research has demonstrated that the passage of time allows for degradation of organic pesticide compounds as well as microbial pathogens, although the rate of decay may vary considerably especially for different classes of pesticides.<sup>65</sup> Additionally, a hydrocarbon screen was performed on fourteen farms affected by flooding from Irene, the results of which did not show any elevated levels of a wide variety of fossil fuels.<sup>66</sup> The testing also demonstrated that unflooded fields had parts per million of pesticides present, but the amounts were not above EPA tolerance levels.<sup>67</sup> Tests were performed on 155 previously flooded fields, but did not detect evidence of elevated levels.<sup>68</sup> The timing of Irene was such that, by waiting until the following spring to plant new crops, any risk of contaminants rising to the top of the soil and drifting onto other certified organic farms during that time would be lowered significantly.<sup>69</sup>

Ultimately, the worst-case scenario for a Vermont certified organic farmer is that residue tests show unacceptable levels of contaminants resulting in the revocation of the organic certification. If a farmer loses his organic certification due to flooding, that farmer is prevented from placing the “certified organic” sticker on the farm’s crops for three years (and would have to reapply for certification after that three year period).<sup>70</sup>

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their metabolites, or degradations products in or on raw or processed agricultural products.” 7 C.F.R. § 205.2. If residue testing shows prohibited substances to be greater than 5 percent of EPA’s tolerance level, then products cannot be sold as organic under the National Organic Program. Grubinger et al., *supra* note 10, at 4.

62. Grubinger et al., *supra* note 10, at 3–4.

63. Telephone Interview with Dr. Vernon Grubinger, Extension Professor, Univ. of Vt. (UVM) (Dec. 8, 2011). Dr. Grubinger is the berry and vegetable specialist at UVM, and has expertise in commercial horticulture, soil health, organic and sustainable agriculture.

64. *Id.*

65. *Id.*

66. Grubinger et al., *supra* note 10, at 3.

67. *Id.*

68. *Id.*

69. Telephone Interview with Dr. Vernon Grubinger, *supra* note 63.

70. 7 C.F.R. § 205.202(b); Telephone Interview with Nicole Dehne, *supra* note 52.

Should the farmer choose to reapply for certification after three years, the farmer would be required to comply with the organic certification requirements during that three-year period.<sup>71</sup> Compliance includes performing the same organic farming practices that the farmer followed before the certification was revoked. However, the notable distinction is that the farmer would be receiving a significantly lower price for the crops produced in that three-year period<sup>72</sup>—solely because the crop does not bare the certified organic sticker. In other words, the farmer is not only incurring the higher costs associated with organic farming practices, but also bearing the burden of receiving lower prices for his crops for three years. This in effect is a “lose-lose” situation for the farmer due to the huge financial burden suffered on the production side and market side. Such a financial disincentive could force a farmer to abandon organic practices altogether and revert to conventional farming methods.

#### 1. Potential Solutions for Organic Farmers Who Lose Certification

One potential solution to this “lose-lose” situation is amending the current regulation that mandates the three-year time period.<sup>73</sup> Such an amendment could involve two possible scenarios. The first would allow a certifying agent to waive the remainder of the three-year period required for re-certification whenever the residue testing yielded acceptable levels of soil composition. The second would allow farmers during the three-year interim to brand their crops with a special label that denotes a difference somewhere between organic and conventionally produced foods.

##### *a. Waiver Upon Acceptable Residue Testing*

The first potential option, waiver of the remaining time period upon successful soil testing results, would allow a formerly certified organic farmer to regain his certification at an earlier time. When asked about the basis for the three-year time period under the NOP, a renowned environmental scientist stated that the three-year time period was a very conservative amount of time to wait.<sup>74</sup> He also said that such a determination was likely based on some science, but was more likely just

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71. 7 C.F.R. § 205.202; Telephone Interview with Nicole Dehne, *supra* note 52.

72. The farmer would likely receive twenty to thirty percent less than he had previously when certified. Harrison, *supra* note 16.

73. 7 C.F.R. § 205.202(b).

74. Telephone Interview with Dr. Vernon Grubinger, *supra* note 63.

an educated, conservative estimate.<sup>75</sup> Therefore, as long as the scientific residue testing yielded positive results regarding a farm's soil quality, the three-year requirement could be waived.

Thus, previously certified organic farmers who cannot afford to incur higher costs of organic farming for a three-year period without receiving the increased prices that an organic sticker brings could regain their certification when their soil passes muster. Such a solution would allow the farmer to again receive a higher price for his crops because he could resume placing the "certified organic" sticker on his crops.

This amendment could also help to protect the organic industry from losing organic farmers who may be financially forced to switch to cheaper conventional farming methods as opposed to bearing the additional financial burden of organic production for three years. Unlike the current requirement that certifying agents pay for soil testing, the regulation could be amended to shift the burden of that payment to the farmer who wants to regain certification at a prior time period. In turn, this shift of testing fees for that time period could also help to slightly reduce certification fees that the farmer must pay, as the agents would expend less money if they were not required to pay for the three-year interim tests. Additionally, this potential amendment would not pose any consumer protection issues because the soil quality would be accounted for by the results of the residue tests. Therefore, consumers would retain trust in the "organic" brand.

*b. The Interim Sticker*

The second potential amendment to the regulation, requiring a three-year period before recertification, would not abolish or modify the time, but would instead permit the farmer to place a sticker on the produced crop that denotes its status as being somewhere between the quality of conventional and organic crops. Keep in mind that conventionally grown crops after floods are not subject to the testing that the NOP suggests (or even to the NOP required annual on-site inspections<sup>76</sup>). Therefore, if a farmer who lost certification continues to produce crops using organic methods during the required three year interim, those crops could brand an interim sticker to distinguish them as being of superior quality to conventionally produced crops.

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75. *Id.*

76. *See supra* notes 46, 47 and accompanying text.

Such a food labeled with an interim sticker could likely be sold for slightly higher prices than conventionally grown foods, but would not reach the twenty to thirty percent markup that certified organic foods fetch. The little bump in price could greatly benefit the farmer hoping to regain the certified status while expending the same costs as the certified organic farmer. Such a sticker would require consumer education, as to not scare consumers off from the product. With education, the consumer may be more likely to buy these goods knowing they are better off than buying conventionally produced crops which are not subject to the NOP testing requirements.

### III. FEDERAL AGENCY REGULATION OF ORGANIC CROPS AFTER FLOODING, OR LACK THEREOF

Under the NOP, no regulations exist that specifically provide standards or procedures to follow after certified organic farms have been inundated by floodwaters. While it may be difficult to establish standards for post-flooded certified farms due to the varying circumstances with each flood, uniform standards may better protect consumers and farmers from the unknown. Consumers would benefit by knowing that uniform standards are in place to ensure that organic foods are not contaminated in a way that violated the organic standard. Farmers, on the other hand, would also benefit from set standards and procedures because they could better assess or predict the likelihood their certification may be revoked.

The FDA considers crops inundated by floodwaters as “adulterated,” and sellers of such crops risk the penalty of criminal sanctions and fines.<sup>77</sup> This applies to both organic and conventional farms.<sup>78</sup> Crops that came into contact with floodwaters were likely exposed to “sewage, animal waste, heavy metals, pathogenic microorganisms or other contaminants . . . [and] there is no known method of reconditioning such crops that would provide a reasonable assurance of safety for human food use.”<sup>79</sup> Furthermore, the “disposition of crops in proximity to, or exposed to a lesser degree of

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77. USDA Release, *supra* note 1. Food is defined as adulterated “[i]f it bears or contains any poisonous or deleterious substance which may render it injurious to health.” Federal Food, Drug, and Cosmetic Act of 1906, 21 U.S.C. § 342 (2006).

78. *Id.*

79. *Sop Soil: Have the Recent Record Floods Compromised the Safety of Organic Farm Produce?*, SCI. AM. (June 4, 2011), <http://www.scientificamerican.com/article.cfm?id=mississippi-river-floods-and-organic-farms> (internal quotation marks omitted).

flooding, where the edible portion of the crop has not come in contact with flood waters, may need to be evaluated on a case-by-case basis.”<sup>80</sup>

### *A. Resolving the Residue Testing Issue*

The current rules under the NOP require that certifying agents pay for the residue tests.<sup>81</sup> The FDA states that, “[t]he cost of such testing will be borne by the applicable certifying agent and is considered a cost of doing business. Accordingly, certifying agents should make provisions for the cost of preharvest or postharvest residue testing when structuring certification fees.”<sup>82</sup> This creates a potential regulatory flaw leaving room for potential abuse. Organic foods that have not gone through postharvest residue testing may reach the marketplace because certification agents did not want to bear the cost of soil testing.<sup>83</sup>

Congress specified in the OFPA that periodic residue testing by certifying agents should be performed to determine whether the organic products “contain any pesticides or other non-organic residue or natural toxicants.”<sup>84</sup> However, aside from the annual on-site inspection required by regulation,<sup>85</sup> the regulations are void of any requirement for certifying agents to conduct on-site inspections, even after a natural disaster, such as Irene. Instead, the language indicates that a certifying agent “may” conduct tests or on-site inspections.<sup>86</sup> Leaving this discretion to the certifying agents, who operate as private businesses, is risky considering the agents may also take the cost of tests into account. Similarly, because the certified agents are hired by the producers/farmers themselves—as opposed to being paid employees of the government—the certifying agents may account for

80. *Safety of Food Affected by Hurricanes, Flooding and Power Outages: A Notice from the FDA to Growers, Food Manufacturers, Food Warehouse Managers, and Transporters of Food Products*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/food/fooddefense/emergencies/floodshurricanespoweroutages/ucm112723.htm> (last updated Sept. 28, 2012).

81. 7 C.F.R. § 205.670(b) (“The Administrator, applicable State organic program’s governing State official, or the certifying agent may require preharvest or postharvest testing . . . when there is reason to believe that the agricultural input or product has come into contact with a prohibited substance. . . . Such tests must be conducted by the applicable State organic program’s governing State official or the certifying agent at the official’s or certifying agent’s own expense.”).

82. U.S. DEP’T OF AGRIC., NOP STANDARD RESIDUE TESTING PREAMBLE, *available at* <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELDEV3003539&acct=noprulmaking>.

83. This Note in no way intends to assert that Vermont’s organic farmers, scientists, and the certifying agents at VOF are taking advantage of the possible regulatory loophole. All parties involved with resolving the devastation caused by Irene are deeply concerned in protecting the integrity of the organic seal as well as in protecting consumers.

84. 7 U.S.C. § 6506(a)(6).

85. *Id.* § 205.403(a)(1).

86. *Id.*

their own financial stake as well as take steps to ensure that farmers do not switch to another certifier.<sup>87</sup>

One local Vermont organic farmer acknowledged these flaws in the regulatory scheme, calling it a “breakdown in the system.”<sup>88</sup> Unless random sampling is required under the federal regulatory scheme, “there is no way to verify what [a farmer] is doing.”<sup>89</sup> Instead, the organic certification system, involving farmers and certifying agents, inherently relies on a “trust process.”<sup>90</sup>

Finally, another point worth considering is that certifiers are not required by the USDA to have any specific scientific knowledge or technical skills.<sup>91</sup> Therefore, in situations similar to post-Irene, the certifying agents may need to consult scientists to gain information necessary for interpreting and understanding the situation at hand. This may be time consuming and comes with the potential for misinformation to be given to farmers in the interim. Others have noted this as being “ironic . . . when within the USDA there is a huge body of scientists and inspectors with all of the skills necessary to execute an effective program.”<sup>92</sup>

The combination of these considerations illuminate two points of concern: (1) a potential loophole or disincentive exists for the certifying agent to conduct necessary soil tests to protect organic quality; and (2) proper soil testing after a flood may not occur because the agents lack the necessary scientific knowledge. This ultimately creates a risk that organic foods are reaching consumers at a quality less than the consumers may expect. The potential for this to undermine consumer confidence in the organic industry could be catastrophic to certified organic farmers’ livelihoods.

After consideration of the grand scheme of organic certification, Vermont should continue to use VOF as the certifying agent. The obvious downside to this recommendation is that private agents are not governmental workers, but instead are paid by farmers, which could create conflicts about doing “the right thing” in a time of disaster. On the other hand, Vermont’s creation of a state organic program and having it

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87. Harrison, *supra* note 16, at 223 (citing 7 C.F.R. § 205.400(e)).

88. Interview with Geo Honigford, Owner/Operator, Hurricane Flats Organic Farm, South Royalton, VT (Dec. 12, 2011).

89. *Id.*

90. *Id.*

91. Stemwedel, *supra* note 25, at 215. However, the certifiers must be accredited by the USDA. See 7 C.F.R. §§ 205.500–205.510 for the accreditation requirements.

92. Stemwedel, *supra* note 25, at 215–16.

accredited by the USDA would involve an enormous overhaul of the State's resources and agencies, which ultimately may not be a realistic endeavor for the State. Further, this recommendation comes after not only examining NOFA's good faith efforts and hard work to ensure that the organic crops in the State maintain safe levels of possible pollutants after Irene, but also with the acknowledgement that should the FDA make the regulatory changes discussed below, organic certification as a whole would become stronger.

*B. FDA, Stop Guiding and Start Requiring*

The FDA has not promulgated any specific regulations governing the steps certifying agents and certified organic farmers should take after flooding has affected farmland.<sup>93</sup> Rather, the FDA published numerous drafts for guidance pertaining to the food safety of various crops.<sup>94</sup> Those drafts for guidance, along with other information, have been compiled into a report that contains nonbinding recommendations for industry to evaluate the safety of flood-affected food crops.<sup>95</sup> Again, these "nonbinding recommendations" are not specifically directed at certified organic farmers.

An exploration of the FDA's "nonbinding recommendations" for flood-affected food crops quickly raises the question of why some suggestions are not established binding regulations. For example, the FDA states that "research on plant uptake of contaminants from soil suggests that uptake is likely," but then only recommends that "growers *consider* testing any one or more of the following contaminants, as needed, to determine the suitability for human food use."<sup>96</sup> The following are some of the contaminants for which they suggest testing: mycotoxins, mercury, lead, arsenic, salmonella, E. Coli, parasites, pesticides, and polychlorinated biphenyls.<sup>97</sup> The report later states that "State, industry, and university extension specialists have recommended a 30–60 day waiting period and/or

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93. 21 U.S.C. § 342 (defining food that comes into contact with floodwaters as adulterated and requiring that it be safely discarded).

94. See, e.g., U.S. FOOD & DRUG ADMIN., DRAFT GUIDANCE FOR INDUSTRY: GUIDE TO MINIMIZE MICROBIAL FOOD SAFETY HAZARDS OF LEAFY GREENS (July 2009) (providing preventative measures to promote food safety for leafy greens), available at <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/ProduceandPlanProducts/ucm174200.htm>.

95. U.S. FOOD & DRUG ADMIN., GUIDANCE FOR INDUSTRY: EVALUATING THE SAFETY OF FLOOD-AFFECTED FOOD CROPS FOR HUMAN CONSUMPTION (Oct. 2011), available at <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodDefenseandEmergencyResponse/ucm274683.htm>.

96. *Id.* (emphasis added).

97. *Id.*

soil testing prior to replanting. While this time period is generally considered sufficient for fecal contamination to decline, chemical contaminations may continue to remain in the flood-affected soil.<sup>98</sup> Finally, the report concludes by mentioning one last questionable nonbinding recommendation—if a well head was under flood water, the FDA *suggests* it be tested because of the potential that the water is contaminated.<sup>99</sup>

Regardless of the fact the FDA has not distinguished between organic and conventional crops, many of these “suggestions” should be promulgated into regulations. For example, the FDA should require wells to be tested for water contamination before the well water is permitted for use. Secondly, the FDA should set a minimum amount of time before crops can be replanted, such as the 30–60 day recommendation the agency provided.<sup>100</sup> Furthermore, the suggestions above serve as all the more reason for the FDA to amend their current regulations to require that certifying agents “shall” test for contaminants after floodwaters inundate certified organic fields. This would effectively close the current loophole that certifying agents “may” periodically test.

Flooding occurs every year in some part of the country. Having regulations to protect food safety and consumer health are a necessary part of the FDA’s responsibility. Therefore, the FDA should promulgate regulations that go beyond requiring adulterated food to be discarded. For example, the FDA’s regulations should require testing to determine plant uptake of contaminants, testing for water quality for those wells submerged in floodwaters, and the establishment of a minimum time requirement before replanting can occur after flooding.

#### IV. REFORMULATING FEDERAL RELIEF TO ORGANIC FARMERS AFTER FLOODING

Health and safety are the primary reasons consumers choose organic food.<sup>101</sup> It is unlikely that consumers would conclude that an organically grown apple is the same as a conventionally grown apple because of the different growing processes and chemicals involved. Certainly, the prices of the two are not the same. The labor intensity involved in growing the two

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98. *Id.*

99. *Id.*

100. *Id.* (citing the Wisconsin Department of Agriculture, the Western Growers Trade Association, and the University of Vermont Extension).

101. Pollans, *supra* note 22 at 646.

certainly is not the same. So why does the federal government consider them the same thing when it comes to distributing federal relief after an emergency or in most instances when providing insurance coverage? The fact that organic farmers receive the same monetary amount for crops as conventional farmers places an unfair financial burden on organic farmers after a natural disaster, given the differing costs of production.

In regards to farmer relief and insurance, the Risk Management Agency (RMA) within the USDA provides coverage for certified organic acreage, transitional acreage, and buffer zone acreage.<sup>102</sup> Another requirement of the RMA pertains to reporting acreage, for which a farmer must have:

- (1) for certified organic acreage, a current organic plan and recent written certification (certificate) in effect from a certifying agent; or
- (2) for transitional acreage, a certificate or written documentation from a certifying agent showing that an organic plan is in effect; and
- (3) for both, records from the certifying agent showing the specific location of each field of certified organic, transitional, buffer zone, and acreage maintained and not maintained under organic farming practices.<sup>103</sup>

Once a farmer has met these requirements, the RMA will likely provide them with crop insurance coverage. However, the current rules attach many strings to obtain this insurance. First, organic farmers pay higher costs for crop insurance.<sup>104</sup> Federal crop insurance charges a five percent surcharge for certified organic farmers (and farmers in transition to certified organic) but not for “their chemical-reliant counterparts.”<sup>105</sup> Secondly, most crop insurance policies will cover losses due to natural disasters, but specifically with regards to certified organic farms, the RMA may take a closer look to determine if the surrounding area has the same type of loss before they are quick to hand out an insurance check.<sup>106</sup> Third, a tiny note at the bottom of a RMA fact sheet provides that “[c]ontamination by application or drift of

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102. RISK MANAGEMENT AGENCY, *supra* note 4.

103. *Id.*

104. Shannon Mullen, *Organic Farmers Face Higher Insurance Costs*, NAT'L PUB. RADIO (Aug. 7, 2007), <http://www.npr.org/templates/story/story.php?storyId=12555892>.

105. *Id.*; see also RISK MGMT. AGENCY, *supra* note 4 (describing the requirements to obtain federal crop insurance).

106. Telephone Interview with anonymous RMA employee (Dec. 9, 2011).

prohibited substances onto organic, transitional, or buffer zone acreage is not an insured peril.”<sup>107</sup>

Lack of coverage should drift or application occur could potentially affect certified organic crops after a field is flooded. Recall the FDA regulation that requires a farmer to immediately notify the certifying agent regarding any application, including drift, of a prohibited substance to any field.<sup>108</sup> This is the same language interpreted to require a farmer to notify a certifying agent after flooding because the floodwaters arguably applied contaminants to the field. Therefore, the RMA’s interpretation of this language—to include a flooding situation—makes it possible for a certified farmer to be denied relief.

However, it is inappropriate and unfair for the RMA to consider drift an uninsured peril. It is certainly not the fault of the certified organic farmer if the wind carrying contaminants from neighboring areas contaminated his crops, especially if flooding originally deposited those contaminants. In light of these considerations, the RMA should reevaluate not insuring drift.

Beginning in 2011, the RMA did not extend the five-percent surcharge to ten crops: figs, Florida citrus fruit, Florida fruit trees, macadamia trees, nursery, pears, peppers, prunes, Texas citrus trees, and Texas citrus fruit.<sup>109</sup> Further, the RMA began assigning separate organic price elections for four crops: cotton, corn, soybeans, and tomatoes (for processing).<sup>110</sup> But for all other crops, the price elections for certified organic crops and transitional crops are the same as those for conventional crops.<sup>111</sup> The annual price elections are based on farming and harvest data collected and analyzed by various reputable and reliable sources—such data has been collected for conventional farms for approximately thirty years, while only for the last five to ten years for organic crops.<sup>112</sup> Therefore, “because of the lack of data,” organic crops are largely assigned the same price elections as conventionally grown crops.<sup>113</sup>

While it is notable that the RMA is beginning to include different price elections for certified organically grown crops, much progress needs to be

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107. See also RISK MGMT. AGENCY, *supra* note 4 (describing the requirements to obtain federal crop insurance). Compare USDA Release, *supra* note 1 (stating that the FDA stated post-Irene that: “Crops insured by federal crop insurance or by the Noninsured Disaster Assistance Program (NAP) are covered when floodwaters have rendered them valueless”) with the RMA qualification for organic farm coverage.

108. 7 C.F.R. § 205.400(f)(1).

109. See RISK MGMT. AGENCY, *supra* note 4 (noting that the ten crops are tree crops).

110. *Id.*

111. *Id.*

112. Telephone Interview with anonymous RMA employee, *supra* note 106.

113. *Id.*

made. As the data pertaining to the harvesting of organic crops increases, more organic crops might acquire price distinctions from conventional crops. This may lead to the elimination of the five-percent surcharge. However, in the meantime, organic farmers are paying more money to insure their crops and would only receive conventional prices should a natural disaster devastate the crops. Perhaps that explains why only nine percent of certified organic cropland was insured as of 2007.<sup>114</sup> Appropriately stated, “[a]necdotally, they do not have a higher loss rate than other farmers. . . . They don’t have a different flooding problem. They learn how to manage insects, just in a different way. And so of course they feel that they are being penalized by the additional premium.”<sup>115</sup>

Another reason for the lack of federally insured certified organic cropland is attributable to the overbearing process and information requirement.<sup>116</sup> As a Vermont certified organic farmer explained, the process to obtain federal crop insurance is only set up for the “big boys.”<sup>117</sup> The information needed to obtain crop insurance requires vast amounts of data that spans years of crop production and crop yields.<sup>118</sup> Therefore, the process is realistically only set up for large-acre farms that possess the capacity to catalogue annual crop yields—not smaller farms that lack the resources, or employees, to work long farming hours and log data into the computer to create the required spreadsheets that track crop production.<sup>119</sup>

A second problem regarding relief to organic farmers after natural disasters, such as flooding from Irene, pertains to federal disaster assistance relief. If the vast majority of certified organic farmers do not carry crop insurance, which the statistics above seem to indicate, then certified organic farmers most likely must resort to obtaining federal relief to avoid

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114. Mullen, *supra* note 104.

115. *Id.* See also U.S. DEP’T OF AGRIC., NEWS RELEASE NO. 0431.10, THE USDA RISK MANAGEMENT AGENCY RELEASES REPORTS OUTLINING IMPROVEMENTS TO CROP INSURANCE PROGRAMS FOR ORGANIC CROPS (Aug. 30, 2010), available at <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2010/08/0431.xml> (describing how the RMA has been compiling research that provides a comparative analysis of loss rates for conventionally grown crops and certified organic crops grown in the same counties).

116. See RISK MGMT. AGENCY, *supra* note 4 (describing the requirements to obtain federal crop insurance).

117. Interview with Geo Honigford, *supra* note 88. Geo Honigford is a local Vermont certified organic farmer who suffered \$40,000 in crop losses as a result of flooding caused by Tropical Storm Irene—none of which was federally insured. See also Melody Bodette, *Vegetable Growers Try to Recover from Irene Floods*, VT. PUB. RADIO (Sept. 30, 2011, 5:50 PM), [http://www.vpr.net/news\\_detail/92141/vegetable-growers-try-to-recover-from-irene-floods/](http://www.vpr.net/news_detail/92141/vegetable-growers-try-to-recover-from-irene-floods/) (displaying images of damage to Honigford’s farm from Irene).

118. Interview with Geo Honigford, *supra* note 88; see RISK MGMT. AGENCY, *supra* note 4 (describing the requirements to obtain federal crop insurance).

119. Interview with Geo Honigford, *supra* note 88.

destitution if the crops have been entirely wiped out. However, somewhat unsurprisingly, federal relief does not distinguish between certified organic farmers and conventional farmers. This may be due to the same reasons as the RMA—the data has not been in existence long enough. Regardless, this again is another financial burden the certified organic farmer must bear after a natural disaster.

Little case law exists that pertains to this topic. However, a couple cases were tried on the same issue of differing relief between organic and conventional farmers. Their weight should only be stronger in this day and age of organic regulation.

The cases demonstrated that certified organic crops were more valuable per bushel in the marketplace than the payment rate that was provided under the Crop Loss Disaster Assistance Program (CLDAP) and that the labor hours and inputs into organic crops were far different from conventionally produced crops.<sup>120</sup> CLDAP established separate rates and yields for different “end uses” of the same crop, which was enacted by Congress in 1995.<sup>121</sup> “End uses” were defined as “the purpose for which the harvested crop is used.”<sup>122</sup> For example, an apple that would have been used for apple juice would receive a different price than an apple sold whole in a grocery store.<sup>123</sup> Two early cases involved certified organic farmers who lost crops due to a natural disaster, and who subsequently received relief from the USDA, but were not satisfied with the amounts. Both argued that they should have received higher end rate for their certified organic crops.<sup>124</sup> Seibel and Pringle, the plaintiffs in the two cases, demonstrated that the certified organic crops were more valuable per bushel in the marketplace than the payment rate that was provided under the CLDAP, and, further, that the labor hours and inputs into organic crops were far different from conventionally produced crops.<sup>125</sup> Pringle also argued that the sole willingness of customers to contract for his crop at a rate significantly higher than those conventionally produced was evidence

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120. Karen Champion, *A Tough Row to Hoe: What Partlo v. Johanns Means for the Organic Food Industry*, 21 J. NAT. RESOURCES & ENVTL. L. 121, 122 (2007); see *Pringle v. United States*, No. 97-CV-60342-AA, 1998 U.S. Dist. LEXIS 19378 (E.D. Mich. Dec. 9, 1998) (explaining that growing organic crops is more expensive and labor intensive than conventional crops); see also *Seibel v. Farm Serv. Agency*, NAD Log No. 95001879W, 1996 WL 34385210, at \*1–3 (USDA Nat’l Appeals Div., Jan. 23, 1996).

121. Champion, *supra* note 120, at 122.

122. *Id.*

123. *Id.*

124. *Id.* at 122–24

125. *Id.* See, Pringle, 1998 U.S. Dist. LEXIS 19378, at \* 21–22; Seibel, 1996 WL 34385210, at

enough that his crop constituted a different end use than conventional counterparts.<sup>126</sup>

Despite initial resistance by the agency, Siebel won his case according to the USDA National Appeals Division and Pringle won his in the Eastern District of Michigan.<sup>127</sup> While a later case, *Partlo v. Johanns*, may have overruled these cases due to a change in the CLDAP wording, the reasoning in *Siebel* and *Pringle* ring evermore true today.<sup>128</sup> The court held in *Partlo* that organic and conventional crops were not entitled separate relief.<sup>129</sup> The court reasoned that the CLDAP was for immediate relief and the agency lacked both the resources and ability to calculate the price differences between organic crops and conventional crops.<sup>130</sup> This reasoning clearly does not apply today because the USDA—unlike when *Partlo* was decided—has recorded data concerning the price differences between conventionally-produced crops and certified organic crops dating back almost ten years.<sup>131</sup> Therefore, because the USDA is capable of calculating market price differences between organic crops and conventional crops, and has been recording that data for years, the rulings in *Siebel* and *Pringle* should stand. These rulings provide ample rationale for the USDA to provide a higher amount of relief to organic farmers that reflects the differences in market price between organic and conventional foods after a natural disaster.

#### CONCLUSION

Flooding caused by Tropical Storm Irene raised important questions about consumer protection and food safety, but more specifically about how the federal government regulates the organic industry after flooding. In examining the current regulatory regime regarding organic certification, this Note concludes that although parties involved in organic certification likely intend to do “the right thing”—to protect consumer health and the integrity of the organic label—the federal government still has significant work to do in this area.<sup>132</sup>

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126. Champion, *supra* note 120, at 123.

127. *Seibel*, 1996 WL 34385210, at \*4.

128. *Partlo v. Johanns*, No. Civ. A. 04-1462 CKK, 2006 WL 1663380, \*3 (D.D.C. June 11, 2006).

129. *Id.* at \*4.

130. *Id.* at \*5.

131. Mullen, *supra* note 104.

132. During the production process of this Note, Hurricane Sandy struck the Northeast region, causing billions of dollars in damage and significant damage to farms, particularly to organic coffee farms in Haiti. Forecasts suggest that damaging hurricanes and flooding will occur annually, which only

As the organic marketplace has grown tremendously in the past two decades, the laws governing “what is organic” must react to that growth and become more specific. The USDA needs to consider amending current regulations to better protect soil quality for organic crops. First, the USDA should promulgate specific overarching regulations governing methods used to address flooding issues affecting certified organic farms. At a minimum, this would involve closing current testing loopholes. Second, the USDA should amend the regulation requiring a three-year period before a farmer can be recertified as organic. The amendment would include a waiver provision allowing farmers to be recertified should the soil and residue tests meet the standards before that three-year period. Alternatively, the USDA could create an interim-organic sticker that can be placed on foods produced using organic methods in the three-year interim period before recertification. Finally, the federal government should provide relief to organic farms adversely affected by floods at a rate higher than that of conventionally grown crops. Ultimately, this analysis and recommendations were made in the hopes to protect the organic marketplace, its consumers, and its farmers’ livelihoods.

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strengthens the need for the analysis that this Note suggests to be done nationwide—not just in Vermont in response to Hurricane Irene.



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