

Potential, Failures, and Pitfalls of the National Organic Program
in Getting Control of Organic Grain Fraud

A Report for Dialogue and Discussion in the Organic Community

By John Bobbe and Anne Ross, J.D. LL.M.

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About the Authors

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Foreword

“If something doesn’t work, try more of the same.”

- An adage from a Door County, Wisconsin farmer.

“They [USDA’s National Organic Program] always promise change is coming and change never comes. The truth is the only way that they ever do act at all is when there’s tremendous public pressure. It behooves us to make a ruckus.”

- Dave Chapman, Real Organic Project Executive Director, as quoted in the *Minneapolis StarTribune*, Friday, August 16, 2019

"U.S. Agriculture Secretary Sonny Perdue isn't hiding his disdain for the concerns among small American organic food producers that the interests of larger corporate operations are eroding the integrity of the USDA's organic seal. Asked by Bloomberg News recently about those concerns, Perdue said with a chuckle, 'If you believe in socialism, you probably ought to export your operation somewhere.'"

- *Sustainable Food News*, July 2018

I. Introduction

The USDA's National Organic Program (NOP) is the regulatory body charged with enforcing the Organic Foods Production Act. Take a walk around organic trade shows or peruse their literature, and you'll find the NOP touting the slogan, "Protecting Organic Integrity." Although the phrase "protecting organic integrity" aptly describes what the NOP *should be doing*, U.S. organic grain producers are experiencing a far different reality.

At the outset, let's be clear that the U.S demand for organic grain currently exceeds domestic production. The U.S. imports about 40% of its organic corn and 70% of its organic soybeans.

No organic grain producer is opposed to fair competition. Organic grain producers in the U.S. simply want a level playing field. The travesty is that NOP's failed enforcement efforts have left many organic farmers in dire straits with seemingly nowhere to turn, except off the farm. U.S. organic grain producers have lost hundreds of millions of dollars to cheaper imports. This imported grain, which is purportedly "organic," arrives at U.S. shores from regions where documented fraud has been established.

Consumers who've placed their trust in the USDA organic seal are also defrauded when enforcement efforts fail. While the monetary costs to consumers are extraordinary - potentially running into billions of dollars - the cost of diminished confidence in the organic label can't be quantified. Consumers buy organic because it is healthier for both people and the planet. But consumers know this is true only if they get what they pay for.

Since organic grain fraud surfaced in 2015, the NOP has gone from denial that a problem existed to thinking they had things under control. Most recently, the NOP has extolled their own fraud-fighting efforts and enforcement successes. Unfortunately, ongoing problems show that these actions are either hollow words intended to give the public unfounded assurances that import fraud is no longer a problem, or the bar for measuring success has been set way too low.

A review of the current state of affairs illustrates the fallacy that organic grain import fraud is under control.

II. NOP Failures and Fumbles

Those who have followed organic grain import fraud are undoubtedly aware of the investigative reporting of the Washington Post's Peter Whoriskey. In May of 2017, he authored "The labels said 'organic.' But these massive imports of corn and soybeans weren't."

The article confirmed what U.S. organic producers already knew had to be the case – massive loads of imported grain arriving at U.S. ports were fraudulently labeled "organic." Shipping documents revealed that the corn and soybeans aboard three vessels were conventional. All total 92 million pounds of corn and 46 million pounds of soybeans were fraudulently labeled organic, some of which made its way into the U.S. market.

A NOP official has since stated that the agency was aware of the shipments before the Post broke the story. If that is the case, why did the shipments get into the U.S. organic supply chain in the first place?

In fact, three weeks before the story was published, NOP officials reportedly told an organic grain marketer, “All the paperwork is in order.” Only one conclusion can be drawn: if these shipments were under investigation, NOP protocols failed to detect and stop the fraud that Whoriskey was able to establish.

Almost two years after the Post’s story, the M.V. Andalucia arrived in Moorhead, N.C. in May of 2019. The vessel, en route from the Black Sea region, was loaded with “organic” grain.

A formal complaint filed with the NOP notified the agency of the suspicious cargo well in advance of its arrival at the port. On July 7, 2019, the Minneapolis StarTribune reported as follows: “The ship unloaded and despite pleas from organic groups, was not inspected by Customs and Border Protection or the U.S. Department of Agriculture. Two days after its grain was unloaded, the certifier for the company that owned the shipment lost its accreditation.”

The NOP’s suspension of the certifier’s accreditation two days after the vessel had unloaded is two days too late. At that point the vessel’s cargo was making its way into the U.S. market.

Certainly, it would seem, that the NOP either was or should have been investigating the certifier prior to the Andalucia reaching U.S. shores. The E.U. had already limited the same certifier’s authority two months prior for issuing organic certificates for products that had previously been downgraded to conventional.

Did the NOP strategically withhold the suspension decision until the cargo was unloaded?

Or did the NOP actually consider the evidence insufficient to launch an on-vessel inspection? It is difficult to conceive of a case more deserving of an on-vessel inspection than when a certifier, suspended for issuing organic certificates for conventional products, actually certified the owner of the cargo.

NOP enforcement efforts are troubling not only for imported grain, but in detecting domestic fraud. Late last year three Nebraska farmers, along with a farmer/organic broker from Missouri, were caught in an organic grain fraud scheme that amounted to over \$140M over a 10-year period. Recently a federal judge sentenced the co-conspirators to prison sentences of various lengths, including a ten-year term for the ring leader.

According to a federal attorney familiar with the case, a customer alerted law enforcement authorities of the group’s suspicious business practices. When asked if the fraud was reported by the NOP, the attorney’s response was “no.”

On August 6, 2019, another example of reported organic grain fraud was brought to light. The StarTribune reported: “A company in Argentina is accused of deliberately using prohibited fertilizers and herbicides to produce grain that it passed off as organic.” The company, which denies any wrongdoing, has shipped 6.1 million bushels of corn and 3.7 million bushels of soybeans into the U.S over the past three years.

The Pennsylvania attorney who filed the formal complaint over six months ago has not received a response from the NOP, presumably on the basis that an investigation is ongoing. If the NOP follows past practices, the investigation will focus only on a single shipment and not those prior.

NOP's standard response to criticisms is to recite the number of organic certificates they've revoked and how many complaints they've handled. However, the standard by which enforcement success is measured must take in to account both the scale and impact of the actions taken.

Just one vessel containing thousands of metric tons of fraudulent organic grain has an extraordinary impact on the organic market, in terms of both price for domestic grain and the extent to which fraud permeates the entire supply chain. Simply put, the number of revocations and suspensions does not tell the whole story.

III. NOP Inaction: Where there is no will, there is no way

The NOP has been slower to take actions against foreign certifiers than other international enforcement authorities.

A prime example is the Turkish certifier, ETKO. The E.U. and Canada de-accredited ETKO for its failure to comply with applicable organic standards. ETKO was barred from issuing organic certificates under Canadian and European Union regulations. While the NOP's investigation of ETKO's activities dragged on, it maintained its accreditation. Ultimately the NOP did not de-accredit ETKO and instead reached a settlement agreement with the company in 2016.

In March 2019, the E.U. limited the authority of the multi-national certifier Control Union to certify organic products originating in Turkey, Russia, Moldova, Kazakhstan, and the United Arab Emirates. The decision was based on Control Union's failure to demonstrate traceability and the organic status of products it certified.

Two months later, the NOP followed suit, suspending Control Union's office in Turkey. According to the NOP, the suspension followed a 2018 audit where it was found that Control Union's personnel lacked knowledge of USDA organic regulations and requirements. The decision should call into question not only the certification activities of Control Union, but the business practices of the operations in those countries that it certified.

In cases where the NOP has sanctioned foreign certifiers, the companies they certify often appear to go on to conduct business as usual. On the one hand, the NOP abdicates its enforcement duties to certifiers. On the other, the NOP sanctions certifiers when certified operations run afoul of the rules and then claims victory.

When it comes to the actual companies with questionable import practices, it appears the NOP has taken little, if any, action. A culture of not "rocking the boats," or should we say "vessels" of major multi-million and -billion dollar companies has become endemic within the agency.

The NOP has been exceedingly cautious in investigating the supply chains of certain foreign corporations. When journalists and citizens seek information about entities of interest, the NOP

states that ongoing investigations prevent disclosure. While withholding information is justifiable in some circumstances, exceedingly long investigations without explanation deny the public information about the effectiveness of agency actions.

In some cases, organic fraud has gone undetected for years. Lengthy investigations of seemingly unlimited duration allow bad actors to continue to perpetrate fraud while damages to farmers and consumers mount.

The recent case of domestic grain fraud went undetected for ten years. If it takes ten years or more to bring home-grown fraudsters to justice, the NOP's current enforcement practices provide little assurance that international actors will be penalized.

IV. Tackling New Fraud Schemes: Thinking Outside the Box

Fraud does not exist in one-size-fits-all scenarios. How will the NOP address new fraudulent schemes as they arise? Or will months of inaction and indecision ensue?

As anyone knows, copy machines and printers can make up organic certificates faster than the NOP can uncover them. Now, the fraudulent actors are using more than copy machines. Schemes to avoid detection are becoming more sophisticated.

A case in point: (It should be pointed out that this has not been proven but is a plausible scenario.) A concerned organic grain farmer in Minnesota relayed the following. His relatives work on a farm that is selling non-GMO corn. The corn was allegedly loaded on barges on the Mississippi River, then barged to the Gulf of Mexico in international waters, then off-loaded to another ship. At that point, the paperwork was redone to designate the grain as "organic." The grain subsequently re-entered the U.S. as organic grain.

Other schemes include falsely designating ports of origin and ports of arrival before the vessel leaves for the U.S. Changing ports of origin and ports of arrival to E.U. ports is done to minimize scrutiny when the grain actually originated from a high-risk region.

Sophisticated companies also create networks of inter-related companies from which they import and export, essentially creating a closed supply chain that controls the grain from point of origin to distribution. How will the NOP or certifiers track the grain? Once it has arrived in the U.S., distribution channels make it almost impossible to track.

Fact or fiction? These tactics and others can be used to circumvent the organic rules. Are NOP fraud detection capacities nimble enough to cope with increasingly devious fraud schemes? It is a question that remains to be answered.

V. Urgent Actions to Protect Organic Integrity

- A certified entity that is under investigation must be prohibited from changing certifiers while an investigation initiated by its current certifier is pending.

- Reports indicate that seawater is being used to flood and clean the holds of some ships. Sea water often contains contaminants like industrial waste, heavy metals, plastics, and chemicals. Use of seawater to clean holds used to ship organic grain should never be allowed. Rules like those that apply to carriers shipping by land should be required. An affidavit similar to what is required for trucks hauling organic grain must be required as should proof of actual invoicing by the ship's owner.
- A move to electronic certificates and faster transmission of data would be an improvement. However, without additional requirements, the potential for fraud still exists. Importing entities should be required, as part of Organic System Plans, to provide certifiers copies of instructions to the Captain or First Mate of any ship regarding how the cargo is handled. Electronic certificates alone will not capture fumigation orders.
- Proof of insurance of the ship's cargo should be mandatory. The ship's owner only takes responsibility for transporting the cargo from loading to unloading. The cargo ownership remains with the shipper. No insurer is going to insure a conventional grain cargo at an organic rate. If the cargo is not insured, the certifier should ask for clarification.
- Upon arrival at a U.S. port, the destination of the ship's cargo, handlers and ultimate buyers should to be transmitted to the NOP and the certifier to enable tracking within the U.S. Currently, this is not the case. Once the cargo arrives in the U.S., traceability is extremely difficult.

VI. Organic Producers and Consumers are Entitled to “Organic Integrity”

This paper is not meant to be an exhaustive list of problems and remedial measures. There are other ideas being discussed in the organic community that should receive attention as well, such as risk-based assessments of when and where inspections occur.

Organic producers are asking that foreign entities be subject to the same scrutiny and protocols as they are. So far, this has not been the case. NOP's credibility among U.S. organic grain producers has been compromised and could take years to repair. This has compelled producers to take additional steps. Farmer-led labels are increasingly seen as the only way to designate organic products that comply with the law and with consumer expectations of what “organic” means. The Real Organic Project and OFARM's “Grown in the U.S.” add-on labels are two examples.

Other total failures include condoning hydroponic production and failing to enforce regulations requiring access to grazing for dairy cattle.

Meanwhile, organic producers and consumers continue to suffer the consequences and pay for regulatory ineptness.

Dave Chapman's statement is worth repeating:

“They [USDA's National Organic Program] always promise change is coming and change never comes. The truth is the only way that they ever do act at all is when there's tremendous public pressure. It behooves us to make a ruckus.”

In conclusion, we offer the following two pieces as additional reasons why every organic advocate must continue to make that ruckus. The noise won't stop, the complaints won't end, and the investigations will go on until organic grain farmers and consumers have the fair market they deserve.

The Farm Bill, Funding, and the NOP's Misplaced Priorities

John Bobbe

Senator Tammy Baldwin (WI) along with Senator Jon Tester (MT), an organic farmer, successfully got the language of the Organic Farmer and Consumer Protection Act of 2018 inserted into the signed bill (S2927). The bill not only gives USDA-NOP more funding but stipulates specifically what USDA-NOP must do to insure organic integrity throughout the supply chain, especially for imports. The following are some of the specific provisions:

- Documentation of imported grain should include: “(i) the origin; (ii) the destination; (iii) the certifying agent issuing the national organic program certificate; (iv) the harmonized 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.
- Require the imported agricultural product to be accompanied by a complete and valid national organic program import certificate, which shall be available as an electronic record, including development of a system to track import certificates.
- Tracking systems shall be modernized under requirements of the Farm Bill including full traceability.
- Issue a report to Congress to be submitted annually with information regarding imports, amounts and country of origin.
- As part of the accreditation of certifying agents, the NOP shall oversee any certifying agent operating in a foreign country including satellite offices.
- Import fraud investigations: All parties conducting an active investigation (including certifying agents, state organic certification programs, and the National Organic Program) shall share confidential business information with Federal and State government officers and employees and certifying agents involved in the investigation as necessary to fully investigate and enforce potential violations of this title.
- Establish expedited investigative procedures to review the accreditation of a certifying agent operating in a foreign country under any the circumstances such as revocations of a certifier by a foreign government, or import quantities suddenly rise in a specific country.
- Collect data and share it with appropriate certifiers and others.
- Set up a formal working relationship with U.S. Customs and Border Patrol and FDA to monitor imports and potential fraud.
- Report the various actions taken regarding enforcement and number and types of actions taken by officials at various ports.
- Provide data on fumigation and other potential violations of the Organic Food Production Act of imports.

The Bill provides additional funding to the NOP as follows; “(1) \$15,000,000 for fiscal year 2018; “(2) \$16,500,000 for fiscal year 2019; and increases funding through 2023 to \$24,000,000. It also provided a special one-time appropriation of \$5,000,000 for modernization of trade tracking and data collection systems.

What has NOP done with this new authority and funding?

Farmers feel that an institutionalized culture within the NOP means nothing will be done, or it won't be done in time.

The NOP was appropriated \$5M to upgrade the USDA Organic Integrity Database. No one disagrees that this needs to be done and that data should be entered in a timelier manner. In the past, a \$5M appropriation for the collection of organic data was spent for personnel unrelated to organic. This is a documented case of lip service. It is hoped that after that fiasco, NOP gets this done right.

So often those inside the Washington D.C. Beltway sit at a desk, pull up numbers on a computer, and if things are approximate, call it good enough. NOP would also like to shove off most of its investigative work on the certifiers and appears to only look at complaints if they have a shut tight case handed to them before acting.

In early 2019, NOP was touting again the number of certificate revocations. According to the NOP, imports from the Black Sea Region were down.

However, industry data shows imports from this region were up 150%. These imports are attributable primarily to one major company that exports from the region to a North American company that it owns. The NOP was presented with this data including the type of grain, tonnage, and cargo owners. The information also included ports of arrival in U.S. The data came from a source in Europe, not from USDA. The NOP has not publicly commented on the wide discrepancy.

Numerous cases make the point. Black Sea Region countries including Ukraine and Russia are under special rules as “high risk countries” for any shipments into the European Union.

In filing complaints about potentially fraudulent grain shipments originating in the Black Sea Region, especially Ukraine and Turkey, the amusing question asked of me as the one filing the complaint was, “What makes you think this shipment is suspicious?” Shouldn't the response have been, “NOP will investigate?” What doesn't the NOP get about the rampant fraud from shipments in the region?

Upgrading the Organic Integrity Database is one of the easier parts to implementing the Farm Bill. Most of the provisions require the NOP to take specific actions. The actions that would help prevent organic farmers and their markets from being flooded with fraudulent grain has been put on the back burner until later in 2019. Those provisions are going to require people to get off their chairs at USDA and do some actual on-the-ground investigative work. This will probably take another 18 months or more while farmers bear the brunt of NOP's no-hurry attitude.

**It has been said that “each time history repeats itself, the price goes up.”
Or is it “down” if you’re a U.S. organic grain farmer?**

Anne Ross, J.D. LL.M.

If history is a reliable indicator, the situation for North American organic grain farmers could become increasingly dire in coming months. A historical review of market trends and price data shows a predictable pattern of how diminished demand, coinciding with increased organic acreage and production, wreak havoc on the domestic organic grain market.

Current market conditions suggest that the effect on domestic organic producers could be more severe than seen before.

In 2007, organic acreage and organic grain production in North America were strong. At that time, market signals suggested that a high demand for organic grains would continue. But, as events a year later would tell, a financial crisis and recession hit the American economy hard – organic grain farmers felt these effects all too much. Prices for organic grain dropped right as organic acreage and production were high.

Market analysts have reported that between 2008 and 2010, North America lost approximately 20-25% of its organic field crop acreage.

By 2011, the market for organic grain was rebounding again at consumer level growth, but organic acreage was not growing in kind. As a result of rising consumer demand and stagnant acreage growth during these years, an imbalance was created, causing shortages in the market for many organic grains and higher prices for producers.

Then in 2013, the conventional market started to drop sharply. After several years of depressed conventional values, many conventional producers were incentivized to transition conventional land to organic.

However, American organic grain farmers, including those who had recently begun transitioning conventional land to organic, wouldn’t get a break. Another crisis was lurking. This time the crisis reducing the demand for North American organic grains would come not in the form of a faltering economy, but fraudulent organic grain imports.

By 2015, ethical U.S. organic grain producers felt the proverbial rug being ripped out from under them again – and the USDA-NOP laid out the welcome mat, by way of weak enforcement, for crooked importers.

Prices for domestic organic grain began to fall even though demand for organic feed grains increased two to three fold.

As chronicled in Cornucopia’s paper, *The Turkish Infiltration of the U.S. Organic Grain Market: How Failed Enforcement and Ineffective Regulations Made the U.S. Ripe for Fraud and Organized Crime*, the influx of fraudulent organic grain into the U.S. corresponded with stricter regulations imposed by the E.U.

When the E.U. took prompt action to curtail cross-border flow of organic grain into its territory from high-risk regions, bad actors were free to exploit the U.S. market. A lack of effective monitoring protocols and vigilant enforcement made the U.S. a prime target for unscrupulous traders.

Despite continued calls for the USDA-NOP to act expeditiously, the anticipated proposed rule to close loopholes has been delayed and has yet to be released. Organic grain farmers remain despondent, as vessels continue to offload grain of unverified authenticity and calls for vessel inspections are refused.

Unfortunately, the situation for North American grain farmers is likely to get worse before it gets better, unless federal regulators act now. A look at current and future market conditions suggests history will be repeated, albeit with more severe consequences.

Fall harvests in 2018 and 2019 include acreage that began organic transition in 2014 and before the effects of fraudulent imports had been fully realized. Organic field crop acreage is growing for the first time in many years. Now, with the grain production from the converted acreage entering the market, the threat of cheaper fraudulent imports from high-risk regions compounds the U.S. market situation and further threatens prices to producers. Cheaper imports of unverified authenticity continue to distort domestic markets. More supply coupled with an unabated risk of fraud threatens to depress prices for domestic organic grain even further.

To complicate matters, foreign organic acreage and grain production have also increased. While U.S. regulators floundered and failed, several European countries positioned themselves to meet their country's organic grain demands without relying on imports from high-risk regions.

When the E.U. acted to identify and prevent the cross-border flow of fraudulent organic grain in member countries, those countries fostered conditions that minimized the risk of transitioning conventional land to organic. For many European growers, this meant production could flourish amid a reduced threat of unfair competition.

For example, recent data shows Austrian organic arable land grew to a record level in 2019, with wheat and soy showing significant increases. This means that the area has increased more than twice as much this year as in the previous year.

Since 2015, organic acres in Germany have increased by 40%. The number of organic farms has increased by 28%.

In 2018, a record number of French farms switched to organic production. France added 5,000 organic farms last year, surpassing a prior high of 4,200 seen in both 2016 and 2017. The organic farmland area expanded by 17% to 2 million hectares, or 7.5% of all farmland.

What does this mean for the North American organic grain market?

Because Europe is increasingly self-sufficient and less reliant on grain from high-risk regions, unscrupulous grain traders will continue to aggressively push dubious grain into the U.S. market as markets overseas are increasingly satisfied with domestic production. U.S. producers will be

disproportionately affected by abundant supplies of feed grain because unblocked inroads leave U.S. markets vulnerable to fraud.

Increasing supplies of domestically produced organic grain will remain unsold if cheaper, fraudulent imports continue to infiltrate the market.

In 2008, the recession caused a drop in demand around the same time that an increase in organic acreage increased supply.

Today, little has changed – except fraudulent grain, not an economic recession, is reducing demand and forcing prices down. A reduced demand coinciding with increased acreage and supply proved disastrous in 2008.

In the months ahead, the abundant global supply of organic grain in a market distorted by fraud leaves the North American organic grain market especially vulnerable.

These factors added to the worldwide scenario have the potential to make the U.S. even more dependent on imported grains to meet demand.

In an economic climate where talks of a recession also loom on the periphery, the results could prove far worse than in years past. While there is never room for fraud in a fair market, there are times when its impacts could cause irreparable harm. That time is now. U.S. regulators need to act.