

April 5, 2021

Michelle Arsenault
National Organic Standards Board
USDA-AMS-NOP
1400 Independent Ave., SW
Room 2648-S, Mail Stop 0268
Washington, D.C. 20250-0268

Docket # AMS-NOP-20-0089

Re: Eliminating the Incentive to Convert Native Ecosystems to Organic Production

The Cornucopia Institute continues to support the National Organic Standards Board (NOSB) proposal to add both a definition of “native ecosystems” to §205.2 and a clause to §205.200 preventing the conversion of those ecosystems into organic production [native ecosystems regulation]. Our support is not in a vacuum: the majority of consumers, organic farmers, and other non-governmental organizations support this regulation.

The Cornucopia Institute also supports the Wild Farm Alliance’s (WFA) efforts and commentary on this issue. We hope both the NOSB and the National Organic Program (NOP) will look to WFA for future guidance on the implementation.

However, Cornucopia has found that the NOSB’s recommendation and support for regulatory change has not been enough to prompt action. The NOSB recommended the native ecosystems regulation in 2018. Since that time, there has been no apparent movement to promulgate these regulations.

The NOP has expressed concerns that it will face legal action or that they “don’t have the authority” to enact regulation concerning native ecosystems.

The following comment makes the argument that it is not only allowable for the NOP to enact regulation concerning native ecosystems, but that it is *required* by the Organic Foods Production Act of 1990 (OFPA)¹, the existing organic regulations (7 CFR Part 205), and surrounding law and policy.

1. OFPA requires the establishment of standards and assurance for consumers that organic products meet a consistent standard

The stated purpose of OFPA is to *establish national standards* that will then be used to govern the marketing of organic products, to assure consumers that organic products meet a *consistent standard*, and to facilitate commerce in organic food.² The rest of the law lays out how to go about doing these three tasks, with some additional guidelines.

¹ Organic Foods Production Act of 1990, as amended (7 U.S.C. 6501-6524).

² 7 USC § 6501

Despite OFPA’s stated purpose, in recent years the NOP has denied having authority to create regulations that fulfill these purposes.

The existing set of organic rules and regulations show that the incentive to convert native ecosystems was unintended because the incentive is incompatible with those existing standards. As discussed by the NOSB in their 2018 recommendation on native ecosystems,³ OFPA and its surrounding law and policy include a clear bias toward protection of the natural resources present on an organic operation.

If the United States Department of Agriculture (USDA) fails to enact the native ecosystems regulation, they fail to establish uniform standards to govern marketing of organic products, and fail to assure consumers that organic products meet a consistent standard.

A. OFPA and surrounding legislative material are consistent with adding regulation to protect native ecosystems

While OFPA doesn’t use the term “native ecosystem” explicitly, the law and the surrounding regulatory materials do reference environmental protection and resource conservation throughout. The recommendation to eliminate the incentive to convert native ecosystems is consistent with the rest of the statute—and allowing organic farming to cause destruction of native ecosystems is incompatible.

First, OFPA requires that three members of the NOSB have “...expertise in areas of environmental protection and resource conservation” and that the NOSB as a whole “...advise the Secretary on any other aspects of the implementation of [OFPA].”⁴ The NOSB has advised the NOP by recommending that regulations be updated to get rid of the unintended incentive to destroy native ecosystems.

OFPA’s Preamble to the Final Rule establishing the NOP states: “[t]he use of ‘conserve’ [in the definition of organic production] establishes that the producer must initiate practices to support biodiversity and *avoid, to the extent practicable, any activities that would diminish it.* Compliance with the requirement to conserve biodiversity requires that a producer incorporate practices in his or her organic system plan that are *beneficial to biodiversity* on his or her operation” [emphasis added].⁵ Since destruction of native ecosystems is universally bad for biodiversity, the activity of destroying native ecosystems is anathema to the base definition of “organic production.”

Other areas of OFPA continue with a consistent theme of protecting the environment and conserving or improving the natural resources of an operation. For example, OFPA requires that wild crop harvesting “not be destructive to the environment.”⁶ Evaluation of a substance for the

³ National Organic Standard Board. Formal recommendation: Eliminating the Incentive to Convert Native Ecosystems to Organic Production, 2018.

<https://www.ams.usda.gov/sites/default/files/media/CACSNativeEcosystems.pdf>

⁴ 7 USC § 6518

⁵ 76 FR 80563

⁶ 7 USC § 6513(f)

National List also requires a determination that the substance would not be harmful to human health or the environment.⁷

B. The existing organic regulations and guidance are consistent with protecting native ecosystems

When the NOP was established in 2001, they were tasked with “...facilitating domestic and international marketing of fresh and processed food that is organically produced and assure consumers that such products meet consistent, uniform standards.”⁸

Consistent and uniform standards require that unintended consequences, misalignment, and “holes” in rulemaking be cured as soon as possible.

Allowing native ecosystems to be destroyed to produce organic products is a mistake when read in the context of the existing organic regulations and guidance. While, like OFPA, the organic regulations do not directly use the term “native ecosystems,” they directly reference qualities and resources that concern native ecosystems throughout.

The definition of “organic production” in the regulations requires that the production system “...foster cycling of resources, promote ecological balance, and conserve biodiversity.”⁹ Organic producers *cannot* destroy a native ecosystems’ character and still foster cycling of resources, promotion of ecological balance, and conservation of biodiversity. Even the most careful and considerate cropping systems cannot replicate the value (in terms of biodiversity and other ecological benefits) provided by native ecosystems.

The definition of “natural resources of the operation” in the regulations is “the physical, hydrological, and biological features of a production operation, including soil, water, wetlands, woodlands, and wildlife.”¹⁰ These natural resources must either be maintained or improved by organic producers.¹¹ Destroying native ecosystems on-farm decreases soil¹² and water quality and historically leads to concerns like erosion and contamination that are directly addressed in the soil fertility and crop nutrient management practice standard.¹³ Eradicating wetlands and woodlands, which are types of native ecosystems, also harm wildlife.

The wild-crop harvesting practice standard also speaks to maintaining the natural environment. Wild crops must be harvested such that that activity “...will not be destructive to the

⁷ See 7 USC § 6517

⁸ Summary of the Final Rule Establishing the National Organic Program National Organic Program. Docket Number: TMD-00-02-FR, Effective: February 20, 2001. <https://www.ams.usda.gov/rules-regulations/establishing-national-organic-program>

⁹ 7 CFR § 205.2. 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.

¹⁰ 7 CFR § 205.2.

¹¹ § 205.200

¹² “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 CFR § 205.203(a)

¹³ § 205.203

environment and will sustain the growth and production of the wild crop.”¹⁴ (Note that wild harvest could still occur in native ecosystems.)

Finally, the NOP’s Guidance on Natural Resources and Biodiversity clarifies the importance of conservation in organic systems, stating “[t]he conservation of natural resources and biodiversity is a primary tenet of organic production.”¹⁵ It also allows organic operations to count management of native ecosystems which provide benefits to their nearby certified lands as part of their compliance with the natural resources standard.

As laid out in WFA’s native ecosystem guidance, toolkit, and discussion surrounding the native ecosystem regulation, some agricultural activities can still be performed without harming the characteristics of a native ecosystem (e.g., low intensity grazing). The language of the NOSB recommendation to eliminate the incentive to convert native ecosystems to organic farmland also accounts for these allowances as well.

2. OFPA requires that consumers are assured that organic products meet a consistent standard

One of the stated purposes of OFPA is to assure consumers that organic products meet a *consistent standard*.¹⁶ Consumers have a reasonable expectation of ecosystem preservation and land stewardship within the organic marketplace.

Messaging throughout the USDA’s marketing of organic products and practices emphasizes the environmental benefits of organic production. Part of this marketing strategy is to frequently use the phrases “promote ecological balance” and “conserve biodiversity” on the website.¹⁷ To then argue that removing the incentive to convert native ecosystems is somehow incompatible with OFPA goes against the established system and marketing already in place.

The conversion of native ecosystems destroys ecological balance and decreases biodiversity. Any reasonable consumer would expect that destruction of native ecosystems would *already be disallowed* under organic production systems.

The USDA’s own Consumer Brochure from 2007 describes organic food as “...produced by farmers who emphasize the use of renewable resources and the conservation of soil and water to enhance environmental quality for future generations.”¹⁸ There is ample scientific evidence being shared with the NOP to show that the destruction of native ecosystems is unsustainable and is a

¹⁴ § 205.207(b)

¹⁵ NOP 5020 Guidance on Natural Resources and Biodiversity.

<https://www.ams.usda.gov/sites/default/files/media/NOP%205020%20Biodiversity%20Guidance%20Rev01%20%28Final%29.pdf>

¹⁶ 7 USC § 6501

¹⁷ When searching the [ams.usda.gov](https://www.ams.usda.gov) site for the phrases "conserve biodiversity" + "organic" in conjunction, there are 148 page results. When searching the [ams.usda.gov](https://www.ams.usda.gov) site for the phrases "ecological balance" + "organic" in conjunction, there are 189 page results. These results show these phrases are used throughout the marketing of organic products and practices, and are familiar terms in the industry. Google search results, March 16, 2021.

¹⁸ “Organic Food Standards and Labels: The Facts.” Accessed March 16, 2021.

<https://www.nal.usda.gov/afsic/organic-productionorganic-food-information-access-tools>

serious contributor to global problems including climate change, mass extinction, pollinator loss, and food insecurity.

Climate change will worsen with the destruction of native ecosystems. Carbon is stored in woody plants, such as those found in forest and woodlands. It is stored in wetland vegetation, peats, and sediments that have built up, in some instances, over thousands of years. Carbon is also stored in soils. When a natural ecosystem is converted to cropland, 30 to 50 percent of soil carbon is lost to the atmosphere over a 50-year period.¹⁹

If consumers perceived that organic farming contributed to rainforest or tallgrass prairie destruction, it would likely cause deep harm to public trust in the organic label. If the NOP means to facilitate organic commerce, the program must meet the expectations established by their own marketing materials and the existing law and policy.

Given these marketing materials and language used throughout the law and policies in organic agriculture, allowing this perverse incentive to persist is equivalent to marketing fraud.

3. The USDA has the legal authority to enact native ecosystems regulations

All federal agencies are granted broad powers to enact regulations. In the U.S., “enabling legislation” refers to a law by which Congress grants an entity which depends on it (for authorization or legitimacy) the power to take certain actions. OFPA is a classic example of enabling legislation.

A. Case law stands for agency authority

The Supreme Court case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*²⁰ led to the principle of “Chevron deference” in administrative law. Chevron deference is a legal principle that compels federal courts to defer to a federal agency's interpretation of an ambiguous or unclear statute that Congress delegated to the agency to administer. In later cases, the Supreme Court narrowed the scope of Chevron deference.²¹ The limitations imposed were that only the agency interpretations reached through formal proceedings, including notice-and-comment rulemaking, qualify for Chevron deference.

That case law in general shows that courts are incredibly deferential to agencies when they are operating within their purview. It is well within the authority of the NOP to create regulation to protect native ecosystems from being destroyed by a producer.

B. Authority for looking back in time

Some have argued that the reach of the organic label cannot extend to activities concerning the natural resources that existed *before* the farm was established. However, the organic marketplace

¹⁹ National Sustainable Agriculture Coalition. 2019. “Agriculture and Climate Change: Policy Imperatives and Opportunities to Help Producers Meet the Challenge.” Washington D.C.

²⁰ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

²¹ Skidmore deference developed from the 2000 U.S. Supreme Court case *Christensen v. Harris County* and named for the 1944 U.S. Supreme Court decision in *Skidmore v. Swift & Co.* See https://ballotpedia.org/Skidmore_deference

is a voluntary program. Farmers are not required to participate, meaning any requirements for entering the program are also voluntarily undertaken by the producer. Timeframes for organic certification that can extend beyond a producer's control of land are already in place. For example, if a farmer were to buy a plot of land that had been farmed conventionally but lain fallow for two years (without prohibited substances applied to it), that farmer could still "look back in time" to begin selling their produce after a subsequent year.

In fact, allowing producers to convert pristine lands directly to organic farming shows that accredited certifiers are already "looking back" at the state of the land before the farm was established. Sustainability cannot be achieved while native ecosystems are being destroyed to produce crops.

The NOSB has received substantial public comment describing loss of native ecosystems when farmers transition to organic production. The broad support in the industry and among consumers for the NOSB's recommendation should assure the NOP that organic production needs this regulation.

Conclusions

From a legal and policy standpoint, the native ecosystem recommendation, as proposed, is consistent with the intent of OFPA²², the organic regulations and guidance, and the USDA's own marketing materials.

When pristine and imperiled ecosystems are destroyed, time and concerted effort are required to even give the land a chance at returning to its natural character. These lands provide valuable ecosystem services to human populations and habitat for native plant and animal species, along with many other benefits. As WFA has emphasized, "these areas, that were once delivering critical ecosystem services and providing essential habitat for wildlife, are no longer performing the same functions and [it] would take hundreds of years to reverse the damage."²³

Without a regulatory change, the organic standards incentivize farmers to destroy wild and important native ecosystems instead of converting conventionally farmed land to organic production. Allowing native ecosystems to be destroyed by farmers is contrary to the basic tenets of organic production.

As the NOP states in its guide for organic crop producers: "Sustainability can be defined as meeting the needs of the present without compromising the ability of future generations to meet their own needs."²⁴ The destruction of our environment carries similar concerns: threats of climate change, habitat destruction, and trophic collapse. It is imperative that we protect and conserve as much wild land as possible.

²² As amended (7 U.S.C. 6501-6524),

²³ Wild Farm Alliance website. Accessed March 18, 2021.

https://www.wildfarmalliance.org/protecting_native_ecosystems

²⁴ Pamela Coleman, *Agriculture Specialist*. November 2012. "Guide For Organic Crop Producers." *National Center for Appropriate Technology (NCAT)*. <https://www.ams.usda.gov/sites/default/files/media/Guide-OrganicCropProducers.pdf>

