

Q&A's on Harvey v. Johanns (Harvey) Final Regulation

1. What does this final regulation do?

- This final regulation does the following:
 - a. Eliminates the so-called “80-20” feed exemption for dairy animal conversion to organic; but any farmer who is using this exemption up to the date before this regulation is published in the Federal Register may continue to complete the remainder of the 12 months of conversion under this old rule, provided that no milk may be labeled as organic after June 9, 2007;
 - b. Provides an alternative means of converting to organic dairy production by allowing dairy animals to be fed forage and feed from land, included in an organic systems plan, that is in its 3rd year of transition to organic;
 - c. Restores to the pre-lawsuit status the synthetics on the National List and criteria by which those synthetics are evaluated for use in processed products labeled as “organic;” and
 - d. Makes it clear that only the listed agricultural materials on 205.606 are commercially unavailable in organic form; and that National List procedures must be used to have an agricultural product listed on 205.606 as commercially unavailable in order to substitute a nonorganic form of the agricultural product in a final product if it is to be labeled as “organic.”

2. How did the Congressional amendment to the OFPA restore the National List?

- Congress made two changes to the OFPA that restored the National List to its pre-lawsuit status:
 - a. The phrase “not appearing on the National List” was added after the word “ingredient” in the subparagraph of section 2111 (6510) which now provides that operations may not “add any synthetic ingredient not appearing on the National List”; and
 - b. The phrase “in organic production and handling operations” was added after “substances” in the subheading of section 2118 (6517) which now provides for an “Exemption for prohibited substances in organic production and handling operations.”
- Together, these two amendments, along with the existing language in the Act allows the current National List of synthetics to be used in processed products that are labeled as “organic,” as they had been prior to the lawsuit.
- It was not necessary to “re-activate” the criteria in 205.600(b), either by statutory or regulatory action, since the National List was re-activated by Congress’ amendments to the OFPA.

- This is also why Congress did not need to enumerate each material allowed on the National List. The amendments were sufficient to address the concerns over the loss of the 38 synthetics on the National List.

3. Why are there different effective dates for some parts of the regulation?

- The court final order and judgment provided that “in order to minimize consumer confusion and market disruption,” some products could continue to enter the stream of commerce until June 9, 2007. Thus, the effective date for products labeled as organic that could contain nonorganic agricultural products that do not appear on 205.606 is delayed until June 9, 2007.
- The court also provided for a stream of commerce and delayed implementation for products labeled as organic containing synthetic substances. However, it is not necessary to provide a delayed effective date for products containing synthetics, since the National List was restored to its pre-lawsuit status. This part of the final regulation is effective immediately.
- Last, the amendment by Congress permitting an alternative means for transitioning dairy animals also is effective immediately, to offer producers this opportunity as soon as possible.

4. Are there still two different methods for the replacement of dairy animals?

- Yes. For producers who convert an entire distinct herd, the final regulation requires all dairy replacement animals to be organic from the last third of gestation. But producers who convert less than an entire herd are required to manage dairy animals for not less than 12 months.
- USDA recognizes this is a concern for many in the organic community and will introduce an Advanced Notice of Proposed Rulemaking to address this issue.

5. Does this complete the rulemaking needed to address the court final order and judgment as a result of *Harvey v. Johanns*?

Yes. This completes the rulemaking needed to comply with the Circuit court final order and judgment.

6. Why didn't USDA include the emergency petition procedures in this rulemaking?

The emergency petition procedures were part of the November 10, 2005 amendment to the OFPA. They were not required to be completed by June 4, 2006—the date of the court final order and judgment. These procedures will take more time to develop, along with consultation with the NOSB, and were not considered part of the rulemaking needed to comply with court final order and judgment.

7. How will USDA address the emergency petition procedures for commercially unavailable organic agricultural products?

USDA will engage in notice and comment rulemaking and consult with the National Organic Standards Board.