ATTACHMENT # 7

LEGAL ANALYSIS IN SUPPORT OF THE ORGANIC TRADE ASSOCIATION'S COMMENTS ON THE DEPARTMENT OF AGRICULTURE'S PROPOSED NATIONAL ORGANIC PROGRAM

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I.
INTRODUCTION

This part of OTA's comment presents the Legal Analysis in Support of The Organic Trade Association's Comments On the Department of Agriculture's Proposed National Organic Program. The Legal Analysis addresses in more detail OTA's position on three legal issues. They are:

I. The Proposed Rule Violates The OFPA Because It Places Synthetics On The National List Which Are Not On The NOSB's Proposed List.

II. The Proposed Rule Does Not Give Proper Deference To The NOSB's Recommendations.

III. The OFPA Does Not Require The Department To Collect Fees To Cover All Of Its Costs And It Should Not Do So As A Matter Of Policy.

II.
THE PROPOSED NOP RULE VIOLATES THE OFPA BECAUSE IT PLACES SYNTHETICS ON THE NATIONAL LIST WHICH ARE NOT ON THE NOSB's PROPOSED LIST

OTA objects to the Department's claim that it can place otherwise banned synthetics on the National List of substances approved for use in organic production and handling even though the National Organic Standards Board ("NOSB") has not included the synthetic substance on the Proposed National List, hi OTA's view, the OFPA requires the NOSB to screen synthetics for the National List.

The Secretary may not place a synthetic substance on the National List unless NOSB has first decided that the specific synthetic substance should be exempt and has included that synthetic substance on the NOSB's proposed National List. The Department's claim of such authority and its application of that authority in the NOP is inconsistent with the OFPA. Specifically, the Department may not place sewage sludge, ionizing radiation, genetically engineered organisms or other items on the National List in the absence of an NOSB recommendation.

A. The Department Must Follow the Law.

A federal administrative agency only has those powers that the Congress delegated to it; the power to adopt rules is not the power to make law. Ernst and Ernst v. Hochfelder. 425 U.S. 185, 213-14 (1976). Agency action that is not consistent with the authorizing federal law is void. United States v. Larinoff. 431 U.S. 864, 873 (1977); Dixon v. United States. 381 U.S. 68, 75 (1965); Manhattan General Equipment Co. v. Commissioner. 297 U.S. 129, 134 (1936). The Supreme Court has repeatedly held that the primary guide to interpreting a law is to begin with the language of the statute. United States v. Ron Pair Enterprises. Inc. 489 U.S. 235, 241 (1989); Landreth Timber Co. v. Landreth. 471 U.S. 681, 685 (1985). If the Congress has spoken to an issue and its intent is clear, "that is the end of the matter; for the court as well as the agency must give effect to the unambiguously expressed intent of

Congress." Chevron. U.S.A. v. Natural Resources Defense Council. 467 U.S. 837, 842-43 (1984). The Congress has directly and clearly addressed the issue of the relative roles of the Secretary and the NOSB in deciding how and which types of synthetics would be regulated under the OFPA. The Department must follow the Congress' direction.

The Congress passed the OFPA to establish national standards for organically produced products, to assure consumers that organically produced products meet consistent standards and to facilitate interstate commerce. 7 U.S.C. § 6501. OFPA's basic requirement is that to be organic, a product must be "produced and handled without the use of synthetic chemicals except as otherwise provided" in the OFPA. 7 U.S.C. § 6504(1). (Emphasis added.) "Otherwise provided" principally refers to 7 U.S.C. § 6517 which allows the Secretary of Agriculture to establish a "National List" of "exempt" or allowable synthetics. This section also allows the Secretary to ban harmful natural substances. See 7 U.S.C. § 6502(12) ("National List means a list of approved and prohibited substances as provided in section 6517").

B. The QFPA Allows Only Limited Exemptions from the Ban on Synthetics.

The Congress decided that the exemption process for synthetics needed to be tightly constrained. During its consideration of OFPA, the Senate Committee on

Agriculture, Nutrition and Forestry in Senate Report No. 101-357 (101st Cong, 2d. Sess. (July 6, 1990)) ("Senate Report") noted:

> Most consumers believe that absolutely no synthetic substances are used in organic production. For the most part they are correct and this is the basic tenet of this legislation. But there are a few limited exceptions to the no-synthetic rule and the National List is designed to handle these exceptions.
>
> The Committee does not intend to allow the use of many synthetic substances. This legislation has been carefully written to prevent widespread exceptions or "loopholes" in the organic standards which would circumvent the intent of this legislation.

To help achieve this goal of limited loopholes, the OFPA allows a synthetic to be used only when the synthetic (1) does not harm health or the environment; (2) is needed because wholly natural products are unavailable; (3) is consistent with organic farming; (4) conies within a specifically enumerated category of exceptions; and (5) is developed using the procedures in the OFPA. 7 U.S.C. §6517(c).

The procedures referenced in U.S.C. § 6517(c) chiefly concern the role and responsibility of the NOSB. The OFPA requires the Secretary to establish the NOSB "to assist in the development of standards for substances to be used in organic production and to advise the Secretary on any other aspects of implementation" of the

OFPA. 7 U.S.C. § 6518. The NOSB has fifteen members: four must own or operate an organic farming operation; two must own or operate an organic handling operation; one must own or operate a retail establishment with significant trade in organic products; three must have expertise in environmental protection and resource conservation; three must represent the public interest or consumer interest; one must have expertise in toxicology, ecology or biochemistry; and one must be a certifying agent. 7 U.S.C. § 6518(b).

The NOSB has a number of duties that are generally consistent with its advisory role. This includes general recommendations on implementing OFPA, convening technical advisory panels, reviewing botanical pesticides, advising on pesticide residues caused by unavoidable residual environmental contamination, and advising on emergency spray programs. 7 U.S.C.§ 6518(k)(l), (3)-(6). In these instances, the Secretary must consider, but strictly speaking is not bound by what the NOSB recommends. As we explain in Section II, the Department should defer to the NOSB's recommendations even in this advisory area, but OTA recognizes that the Department has some discretion to choose a different path for these items. This is not the case for the National List.

C. OFPA Clearly Gives The NOSB The Role of Determining Which Synthetics May Be Included on the National List.

In addition to NOSB's advisory duties, the OFPA says the NOSB "shall develop the proposed National List or proposed amendments to the National List for submission to the Secretary in accordance with section 6517 of this title," 7 U.S.C.§ 6518(k)(2), and "shall" follow an elaborate set of requirements of review and evaluation steps in doing so. 7 U.S.C.§ 6518(1), (m). The Congress uses the term "shall" to establish a mandatory duty. As part of its mandatory duty to develop the proposed National List, the NOSB reviews information from the Environmental Protection Agency (EPA"), the National Institute of Environmental Health Science and other sources of information on the effect of synthetics, and works with manufacturers and technical advisory panels. Id. The NOSB also evaluates the potential of synthetics to interact with other chemicals, looks at the potential for environmental contamination and adverse effects on human health, alternatives to synthetics, and compatibility of synthetics with sustainable agriculture. 7 U.S.C. § 6518(m).

After the NOSB conducts these reviews and evaluations, it develops the proposed National List and submits it to the Secretary. 7 U.S.C. § 6518(k)(2). The Secretary then establishes the National List by publishing it in the Federal Register, seeking public comment, and subsequently publishing a final rule.

7 U.S.C. § 6517(d)(4). The Secretary's National List is to be "based on" the NOSB's proposed National List, 7 U.S.C. § 6517(d)(l) and "may not include exemptions for the use of specific synthetic substances in the National List other than the exemptions contained in the [NOSB's] proposed National List". 7 U.S.C. § 6517(d)(2)(Emphasis added).

The statutory scheme the Congress established in OFPA does not require much interpretation. It is clear and unambiguous. It works as follows: (l)theUSDA establishes the NOSB; (2) the NOSB develops a proposed National List and submits the list to the USDA for further action; and (3) the USDA must base the National List on the NOSB's recommendations in the proposed National List. The Congress clearly and unambiguously barred the Secretary from placing a synthetic substance on the list other than those exemptions contained in the NOSB's proposed National List. ("The Secretary may not include exemptions for the use of a specific synthetic substance in the National List other than those exemptions contained in the proposed National List.")

The OFPA's clear and unambiguous language requires the NOSB to screen synthetics for the National List, and the Secretary of Agriculture may not place any synthetic substance on the National List of substances approved for use in organic

production unless NOSB has first decided that the specific synthetic substance should be exempt and has included that synthetic substance on its proposed National List.-

D. The Legislative History Supports the Plain Language of the OFPA.

The OFPA's legislative history supports the conclusion that the NOSB's action is a prerequisite to the Secretary's placing a synthetic substance on the National List. The Congress considered the OFPA as part of the 1990 Farm Bill in the form of S. 2830 in the Senate and H.R. 3950 in the House. The Senate Agriculture, Nutrition and Forestry Committee reported S. 2830 on July 6, 1990. As reported, S. 2830 required the NOSB to develop the proposed National List and barred the Secretary from including any synthetics on the National List unless the NOSB had included them on the proposed National List. S. 2830, Sections 1625(d)(2), (d) and 1626(k)(2). The Senate passed S. 2830 on August 6, 1990 without changing these requirements.

The Senate Report on S. 2830 extensively discusses the issue of NOSB's role in developing the National List. It says:

- While the Secretary may not add synthetics, nothing in OFPA prevents the Secretary from deciding to omit from the National List a synthetic that the NOSB has recommend be allowed for use; thereby giving the Secretary a "veto" power over items on the proposed National List.

> Several steps must be taken before an item appears on the National List. . . . First, the Organic Standards Board must review the substances in question based upon criteria cited in the bill and with the aid of the Board's technical panels. The Board may decide what substances require review . . . . The Board then constructs a Proposed National List which is submitted to the Secretary as a recommendation for the composition of the final National list.
>
> <u>The Secretary may not include exemptions for synthetic substances other than those exemptions recommended by the National Organic Standards Board</u> . . . . The [NOSB's] Proposed National List represents the universe of synthetic materials from which the Secretary may choose.

Senate Report at 299. (Emphasis added). <u>See also</u> the Section-by-Section Analysis, Senate Report No. 101-357 (101st Cong.2d Sess. (1990)) ("The Secretary may not include exemptions for synthetic substances other than those exemptions recommended by the National Organic Standards Board").

Neither the original version of H.R. 3950, nor the version reported out of the House Agriculture Committee established an organic regulatory program. On August 1, 1990, Congressman Stenholm proposed an amendment to the H.R. 3950 to establish a study of an organic program. 136 Cong. Rec. H 6617 (Aug. 1, 1990). Congressman DeFazio then offered a substitute in the nature of an amendment to the Stenholm amendment. 136 Cong. Rec. H 6617-18 (Aug. 1, 1990). Mr. DeFazio stated his amendment closely followed S. 2830. For the language related to NOSB's

authority, DeFazio's amendment was largely identical to S. 2830 except that it contained a subsection said that no synthetics could be included on the National List that were barred by other Federal action. As Congressman DeFazio has said in his comments on USDA's proposed rule, "The intent of the law was to give the NOSB sole authority to place items on the National List. . . ."

The Conference Report confirms that the Congress fully understood the NOSB's role in allowing synthetics to be placed on the National List. The Conference Report, House Conf. Rep. No. 101-916 (101st Cong., 2d Sess. (1990)) ("Conference Report"), addresses the role of the NOSB and the National List and says:

> The Senate Bill requires the Secretary to establish a National List based upon a proposed National List developed by the National Organic Standards Board. The Secretary may not include exemptions for synthetic substances other than those recommended by the National Organic Standards Board . . . . The House amendment contains the same provision with an additional requirement that no substance be listed which has been prohibited by Federal regulatory action (Section 1495Q). The Conference substitute adopts the House provision.

Conference Report at 1179. (Emphasis added.) As finally adopted, the OFPA says:

> (1) In general, the National List established by the Secretary shall be based upon a proposed national list or proposed amendments to the National List developed by the National Organic Standards Board.
>
> (2) No additions. The Secretary may not include exemptions for the use of specific synthetic substances in the National List other than those exemptions contained in

> the Proposed National List or Proposed Amendments to the National List.
>
> (3) Prohibited substances. In no instance shall the National List include any substance, the presence of which in food has been prohibited by Federal regulatory action.
>
> (4) Notice and comment. Before establishing the National List or before making any amendments to the National List, the Secretary shall publish the Proposed National List or any Proposed Amendments to the National List in the Federal Register and seek public comment on such proposals. The Secretary shall include in such Notice any changes to such proposed list or amendments recommended by the Secretary.
>
> (5) Publication of National List. After evaluating all comments received concerning the Proposed National List or Proposed Amendments to the National List, the Secretary shall publish the final National List in the Federal Register, along with a discussion of comments received.

7 U.S.C. § 6517(d). See also 7 U.S.C. § 6518(k)(2) which says: "The Board shall develop the proposed National List or proposed amendments to the National List for submission to the Secretary in accordance with section 6517 of this title."

Comparing the language of H.R. 3950 and S. 2830 to the final bill shows that the Congress kept the same basic scheme in all bills. The NOSB develops the proposed National List and the Secretary acts on those items the NOSB proposes.

E. Minor Differences in Capitalization Do Not Change the Meaning of the OFF A.

As passed, 7 U.S.C. § 6517(d) and 6518(k)(2) contain minor variations in how the phrase "proposed national list" is capitalized. Compare 7 U.S.C. § 6517(d)(l) ("proposed national list"), with 7 U.S.C. § 6517(d)(2), (4) ("Proposed National List") and 7 U.S.C. § 6518(k)(l) ("proposed National List").

Although the preamble to the proposed NOP rule does not cite these differences as being significant, staff has told OTA that the differences in capitalization form the basis for the Department's conclusion that an NOSB recommendation is not a prerequisite to placing a synthetic on the National List. They argue that the "Proposed National List" in 7 U.S.C. § 6517(d)(2) and (4) is a different list from the "proposed National List" in 7 U.S.C. § 6517(d)(l) or the "proposed National List" NOSB develops in 7 U.S.C. § 6518(k)(2). In OTA's view, using capitalization differences as a basis of statutory interpretation here is baseless.

The normal rule of statutory construction is that when the Congress uses identical words in more than one section of a law, those words are presumed to have the same meaning each time they are used. E.g.. CIR v. Lundy. 516 U.S. 235 (1996); Barnson v. United States. 816 F.2d 549 (10th Cir. 1987), cert, denied. 484 U.S. 890 (1987). Here, Congress has used identical words in these two sections. They should

have the same meaning. The Congress clearly intended the term "proposed national list" to have the same meaning even if it was inconsistent in its use of capitalization.

To the extent the minor differences in capitalization cause a possible ambiguity about whether the Congress intended some different meaning, the proper way to proceed is to consult the legislative history to determine congressional intent. Cass v. United States. 417 U.S. 72 (1974). As previously discussed, the OFPA's legislative history shows no basis to support the claim that the change in punctuation was intended to create a change in meaning.

The likely explanation for the difference in capitalization is sheer inadvertence. The OFPA is part of the larger, massive farm bill. In the press of business, the Congress from time to time makes errors in spelling, punctuation or capitalization. Clerical and typographical errors are to be disregarded when the meaning is otherwise clear. See LaBauve v. Louisiana Wildlife Commission. 444 F.Supp. 1370 (E.D. La. 1978). In interpreting a law, it is necessary at times to allow for sheer inadvertence. Zambadino v. Schneiker. 668 F.2d 194 (3rd Cir. 1981). Certainly that is the case here with the Congress using three different "styles" for the identical phrase. The OFPA does contain minor changes in capitalization for the words proposed for the national list, but these changes are not the basis for changes in meaning of the words the Congress used.

F. Other Parts of 7 U.S.C. § 6517((D Are Consistent with OTA's Understanding of the NOSB's Authority.

USD A staff has also suggested that there are two provisions in section 6517(d) which potentially undermine NOSB's authority over synthetics. OTA has reviewed these provisions; they are fully consistent with our view of the limits on the Secretary's authority. USDA staff notes that 7 U.S.C. § 6517(d)(l) says that: "The National List established by the Secretary shall be based on" the NOSB list. (Emphasis added). Staff argues that this means that the Secretary's National List does not have be identical to the NOSB's list. Consequently, the Congress must have intended to allow the Secretary to add additional synthetics to the National List despite the clear direction to the contrary in 7 U.S.C. § 6517(d)(2). In effect, USDA staff is suggesting that the language in section 6517(d)(l) and section 6517(d)(2) are somehow inconsistent with each other or create an ambiguity that USDA must resolve.

Similarly, the staff argues that 7 U.S.C. § 6517(d)(4) says that when the Secretary publishes the proposed National List for comment, he must note "changes " to the NOSB's proposed List. The staff argues that this also implies the Secretary has the authority to add synthetics to the National List without an NOSB recommendation.

We do not agree. It is a basic principle of statutory construction that a statute's provisions should be read to be consistent with one another rather than contrary to one another. Alabama Power Co. v. United States. 40 F.3d 450 (D.C. Cir. 1994); United Steelworker's v. North Star Steel Co.. Inc. 5 F.3d 39 (3d Cir. 1993), cert, denied. 511 U.S. 1048 (1994). A statutory interpretation which yields an internal inconsistency or renders some part of the text superfluous is to be avoided. Gustafson v. Allovd Co.. Inc. 513 U.S. 561 (1995); Smith v. Babcock. 19 F.3d 257 (6th Cir. 1994). The staffs suggestions violate these basic principles. The suggestions would make the "no additions" language in 7 U.S.C. § 6517(d)(2) ("The Secretary may not include exemptions . . . other than the exemptions contained in the [NOSB's] proposed list.") superfluous. They would create an internal inconsistency in Section 6517(d). They do not properly interpret the law. By contrast, OTA believes there is a clear, simple reading of the OFPA that gives full effect to all three sections and assures a consistent, harmonious reading of the law.

First, the "shall be based on " language in 6517(d)(l) is not superfluous because for some items, the Secretary's proposed National List and the NOSB's proposed National List do not have be identical. For those items, the NOSB recommendations are a starting point or a "basis" for the Secretary's action. Specifically, under the OFPA, the National List has three components: (1) a list of allowed synthetics to be used in production; (2) a list of allowed non-organic, non-synthetics used in

handling; and (3) a list of prohibited natural substances. 7 U.S.C. § 6517(c)(l)-(2). For category 1, the Secretary can delete synthetics from the NOSB's proposed list. For categories 2 and 3, while the Secretary should, as a matter of policy follow the NOSB determinations, nothing in the OFPA prohibits the Secretary from adding to or deleting from NOSB recommendations on the use of non-organic materials for handling or on prohibiting the use of natural substances. These items are permitted or allowed changes "based" on the NOSB's proposed National List.

Second, the "change" language in 6517(d)(4) is not superfluous. It applies where the Secretary does makes one of these permitted changes to an NOSB recommendation. In that instance, the Secretary must note the "change" as specified in 6517(d)(4) and publish the proposed change in the Federal Register.

These three provisions do not conflict with each other. They are not ambiguous or internally inconsistent. There is no need to ignore them or make any of them superfluous. All three sections form a harmonious and clear path for the USDA to follow. The final rules should reflect this interpretation and the NOSB's critical role in providing exemptions for synthetics.

G. The NOSB's Authority Is Constitutional.

OTA also notes that the statutory scheme does not pose any constitutional problems and the OFPA does not improperly delegate legislative authority to NOSB. First, as the USDA must know, private entities frequently play a key role in agricultural issues. E.g.. 7 U.S.C. §§ 2102-18 (cotton); 7 U.S.C. §§ 2611-27 (potatoes); 7 U.S.C. §§ 2701-18 (eggs); 7 U.S.C. §§ 4501-38 (dairy). Second, the Supreme Court has consistently upheld the constitutionality of delegations which subordinated the power of the USDA to the interest of private entities. See Wickard v. Filburn. 317 U.S. I11 *(1942Y* United States v. Roval Rock Coop.. 307 U.S. 533. 577-78 (1939); see also United States v. Frame. 885 F.2d 119 (3d Cir. 1989), cert, denied. 493 U.S. 1094 (1990) (Role of beef and cattle industry in Beef Promotion Act is constitutional).

Other cases reach the same conclusion about permissible roles for private entities. See, e.g.. Thomas Cusack Co. v. Chicago. 242 U.S. 526 (1917); New Motor Vehicle Board of California v. Orrin W. Fox Co.. 439 U.S. 96 (1978). Under these cases, two criteria must be satisfied to support the NOSB's role in deciding what synthetics are allowed on the National List. First, the Congress's underlying exercise of authority must be a reasonable regulation within the power of government. Cusack. 242 U.S. at 528. Second, the Congress's restriction must be in the form of a general

prohibition, and the role given to private citizens must be in the form of permitting private citizens to waive the protection of that prohibition. Id. at 531 (upholding the regulation that absolutely prohibits the erection of any billboards on the blocks designated, but permits this prohibition to be modified with the consent of the persons who are most likely to be affected by such a modification); see also Eastlake v. Forest City Enterprises. Inc.. 426 U.S. 668, 678 n. 12 (1976) (stating that since a property owner could simply waive an otherwise applicable legislative limitation, the provision did not delegate legislative power). As the Supreme Court has stated, an "otherwise valid regulation is not rendered invalid simply because those whom the regulation is designed to safeguard may elect to forgo its protection." New Motor Vehicle Board. 439 U.S. at 109.

Here, the basic statutory scheme is a reasonable regulation within the Congress's authority. The Congress properly gave the NOSB a role in screening substances to be placed on the National List. This power to list substances to be excluded from regulation does not amount to an improper delegation of legislative authority. Even if there is some question on this issue, it is a matter for the courts and not the Department.

The plain and unambiguous language of the OFF A and its legislative history confirms and corroborates that the OFPA requires the NOSB to screen

synthetics for the National List and the Secretary of Agriculture may not place a synthetic substance on the National List of substances approved for use in organic production and handling unless the NOSB has first decided that the specific synthetic substance should be exempt and has included that synthetic substance on its proposed National List. The final NOP rule must conform to the OFPA and recognize the role of the NOSB in determining whether the National List should contain exemptions from the general prohibition of synthetics.

H. The Proposed Rule Has a Number of Procedural Flaws.

Three other points merit a brief discussion. OTA notes that no substance can be placed on the National List unless the Department has consulted with the Secretary of Health and Human Services ("HHS") and the Administrator of the EPA on the issues described in 7 U.S.C. § 6517(c)(l)(A). The preamble to the NOP rule says that this consultation occurred, 62 Fed.Reg. 65886, but the preamble provides no information about when the consultation occurred, whether it was oral or in writing, what issues were considered or whether the views of EPA and HHS were in agreement or disagreement with the Department's views. The Department's failure to include this information in the preamble effectively precludes the OTA and other members of the public from having a fair opportunity to comment on the basis for the Department's conclusions as required by 5 U.S.C. § 553(b). Home Box Office. Inc. v. FCC.

567 F.2d 9 (D.C. Cir.), cert, denied. 434 U.S. 829 (1977) (Notice of proposed rule must give sufficient factual details and rationale). In effect, this consultation, although a key part of the OFPA's requirements, has been kept secret in violation of the basic APA requirements. The Department's future efforts must disclose the nature and extent of the consultation and fully reveal, on the record, any and all differences that may exist between the agencies and the basis upon which such differences may have been resolved. All correspondence and meeting notes related to these consultations must be placed in the record for the public to review.

OTA further notes that the USDA must make three findings for each permitted substance — that there is no harm to human health or the environment, that use of the material is necessary due to the unavailability of "wholly natural substitute products" and its use is consistent with organic fanning and handling. 7 U.S.C. § 6517(c)(l)(A)(i)-(ii). The Department has not consistently applied these standards, particularly for sewage sludge, irradiation or genetically engineered organisms. Any final rule must do so.

We also believe the USDA should follow the NOSB's practice of annotating the National List to restrict, when appropriate, the use of exempt items. In OTA's view, the USDA clearly has the authority to place a substance on the National List with conditions.

Nothing hi the OFPA compels the conclusion that the National List may contain the name of the allowed substance and nothing more. If the Congress intended this limitation to be placed on the USDA's authority, it could have and should have done so expressly. There is no such express limitation, and there is no reason to read that limitation into the OFPA by implication. It is much more reasonable to interpret OFPA to allow conditioning.

First, the language of 7 U.S.C. § 6517 is directed to determining whether to allow the "use" of a particular material. The issue of use is considered in the context of a number of factors, including human health, the environment, need in production, availability and consistency with organic fanning. It seems obvious that the Congress must have anticipated that the use of a particular substance would be unacceptable under one set of conditions but not under another, and that the USDA might find it necessary to condition the list in some manner.

The Congress gave the USDA specific authority to adopt a necessary regulation in that circumstance. In 7 U.S.C. § 6506(a)(l 1), the Congress gave the Secretary the authority to place in the NOP "such other terms and conditions as may be determined by the Secretary to be necessary." The Congress commonly grants administrative agencies this kind of general authority to fill in gaps in statutory language, as it is difficult for the Congress to anticipate all of the issues that may arise in a rulemaking. Rahim v. McNary. 24 F.3d 440 (2d Cir. 1994) (an agency has the authority to fill any gap left by the Congress).

This kind of an agency regulation is proper so long as it is reasonably related to the purposes of the enabling legislation, is adopted in accordance with statutory procedures and is not arbitrary and capricious. E.g.. Mourning v. Family Publications Service. Inc.. 411 U.S. 356, 369 (1973) (where the empowering law says that an agency may make such rules as may be necessary, a rule will be upheld so long as it is reasonably related to the purposes of the law); Compton v. Tennessee Dep't of Public Welfare. 532 F.2d 561 (6th Cir. 1976); Production Tool Corp. v. Employment and Training Admin.. 688 F.2d 1161 (7th Cir. 1982).

In this instance, there is clearly a rational basis upon which the USDA can conclude that it would further the purposes of the OFPA to place a substance on the National List with a condition on its use. Indeed, since the NOSB made exactly

that recommendation in a number of cases. These kind of limitations are consistent with and serve a key function in organic production. NOSB's recommendation was supported by a careful consideration of the facts and was based on their extensive expertise. It would be arbitrary for the USDA to list a substance without also including the NOSB's limiting language.

The proposed NOP rule also solicits public comment on a number of other synthetics for possible inclusion on the National List. This includes the use of sewage sludge, genetically engineered organisms and ionizing radiation. The Department cannot legally proceed to place any of these items on the National List without the positive recommendation of the NOSB. To the extent the Department believes any or all of these substances should be added to the National List, the proper course under the OFPA is for the Department to ask the NOSB to reconsider the recommendations and provide the NOSB with supporting information why the materials should be placed on the National List. Any effort by the Department to ignore the role of the Board or to supervene its authority is clearly inconsistent with the OFPA and is not authorized by law. There is no basis to delay or defer a decision on these items. This absence of an NOSB recommendation serves as an absolute barrier to a present exemption.

To summarize, the plain and unambiguous language of the OFF A and its legislative history confirms and corroborates that the OFPA requires the NOSB to screen synthetics for the National List. The Secretary of Agriculture may not place a synthetic substance on the National List of substances approved for use in organic production and handling unless the NOSB has first decided that the specific synthetic substance should be exempt and has included that synthetic substance on its proposed National List. The part of the proposed rule that addresses the National List is badly flawed. The final NOP rule must conform to the OFPA and recognize and respect the role of the NOSB in determining whether the National List should contain exemptions from the general prohibition of synthetics.

III.
THE PROPOSED NOP RULE DOES NOT GIVE PROPER DEFERENCE TO THE NOSB's RECOMMENDATIONS

Under most federal regulatory programs, the Congress adopts a legislative framework and give the federal agency the authority to establish regulations to fill in gaps and to administer the new requirements. Typically, when an agency proposes federal regulations, it develops the proposal internally, then publishes a Notice of Proposed Rule Making in the Federal Register and completes the rule making process by responding to public comments.

Here, the Congress intentionally departed from the normal standard it uses to establish a regulatory program; it took the special step of establishing an advisory board, the National Organic Standards Board, to provide advice and recommendations to the Department as part of the process of establishing the regulatory program. Under 7 U.S.C. § 6518, the Secretary is required to establish a National Organic Standards Board to assist the Department of Agriculture in the development of standards for substances to be used in the organic program and to advise the Secretary on other aspects of the implementation of the program. Under 7 U.S.C. § 6503(a), "the Secretary shall establish an organic certification program for producers and handlers of agriculture products that have been produced using organic methods as provided in this chapter." The Congress specifically directed the Secretary in developing this program, to consult with the National Organic Standards Board. 7 U.S.C. § 6505(c). While the Act is silent on the degree of deference the Secretary is required to give to the NOSB's general advice on the program, the legislative history is illuminating. The Senate Report notes, for example, that the organic trade industry, consumer groups and others were major factors in calling for a national organic program. The Senate Report also notes that

> expertise in organic farming is found at the grass roots level. . . in the private farmers and advocates who have working on their own for years. They argued for the need to severely limit the government's discretionary authority and involvement in this industry since the government has little experience in this industry. Some groups even argued that the industry should be self-regulating.

Senate Report at 291. In response to these concerns, the bill which Senator Leahy introduced on February 9, 1990 "proposed a partnership between the government and private organizations in standards setting and certification." The NOSB is a key player in this partnership along with organizations like the OTA.

The Senate Report notes that the Act requires the Secretary to appoint a National Organic Standards Board to generally assist in the development of standards and that the Senate committee "regards this board as an essential advisor to the Secretary on all issues concerning this bill and anticipates that many of the key decisions concerning standards will result from recommendations by this board." Senate Report at 296. The Senate Report notes that the membership of the board was "carefully selected to provide a balance of interests" and requires a two-thirds vote of the board for effective action. Senate Report at 296-97. The House counterpart is identical to the Senate bill except that it requires a fifteen person rather than a thirteen person board. The Congress required a fifteen-person board, adding two more members: a certifying agent and a scientist. As noted elsewhere in OTA's comment, the NOSB met extensively in public meetings, obtained public input and formed a consensus recommendation of the critical issues involved in the National Organic Program rulemaking.

Despite this legislative history and despite the intensive public participation process accompanying the NOSB's efforts, the USDA's proposed rule does not chart a consistent course in deciding whether to follow or not to follow the NOSB's recommendations. In some instances the Department accepts the NOSB recommendations; in others, it rejects it. In doing so, the Department does not appear to apply a consistent standard in deciding whether or not to accept a particular standard. It is purely a "hit or miss" proposition. This failure to set a consistent standard for accepting or rejecting NOSB recommendations arbitrary and capricious. It lies at the heart of the Department's failure to promulgate an acceptable proposed NOP rule.

At the present time, the NOSB's recommendations represent a consensus of the views of the organic industry and the consumer and the environmental interests which have been so concerned with the organic food industry for many years. The OTA participated extensively in the NOSB process with the full expectation that the USDA would closely follow the NOSB's recommendations. The OTA supports the NOSB's recommendations. The consensus that the NOSB reached represents the high integrity and quality standards that the organic industry desired when it asked the Congress to pass the Organic Foods Production Act. OTA believes that a policy of deferring to the current set of NOSB recommendations is both good law and good policy. The Department should give substantial deference to the current

recommendations of the NOSB and should not substitute its judgment for the collective judgment and wisdom of the NOSB.

IV.
THE OFPA DOES NOT REQUIRE THE DEPARTMENT OF AGRICULTURE TO COLLECT FEES THAT COVER ALL OF ITS COSTS AND IT SHOULD NOT DO SO AS A MATTER OF POLICY

A. The OFPA Only Requires That The Fees Be Reasonable.

The Organic Foods Production Act of 1999 ("OFPA") does not require the Department to collect fees to cover all of its costs; it only requires that the National Organic Program ("NOP") "provide for the collection of reasonable fees from producers, certifying agents and handlers who participate in such program." (Emphasis added.) 7 U.S.C. Section 6506(a)(10). As explained more fully below, the OFPA does not require the Department to set fees at level that recovers all or even a significant part of its costs.

The NOP rule proposes to set fees at a level which will require farmers, handlers and certifying agents to pay for the Department's full cost of administering the NOP program. 7 CFR § 205.421-205.424. Some examples of fees are: a $640 fee for applying to be a certified agent, including an additional $160 fee for each chapter or subsidiary office of the applicant, a fee to allow the Department of Agriculture to make

an on-site visit to an applicant seeking accreditation or to on approved certifying agent, an annual administrative fee of $2,000, plus an additional fee of $300 for each chapter or subsidiary belonging to a certifying agent, 7 CFR § 205.421; a $50 nonrefundable annual fee for each farm or wild crop harvesting operation and a $500 annual non-refundable fee for each handling operation, 7 CFR § 205.422. Foreign certification programs are also required to pay a fees. 7 CFR § 205.423.

The preamble to the proposed NOP rule explains that the Department of has set these fees "to reflect the cost of services provided by the U.S.D.A." 62 Fed. Reg. 65927. The Department's calculation of costs includes general administrative overhead, operating costs, printing, travel, training, attending NOSB meetings, equipment, supplies, rent, heat and communications.

B. <u>The Preamble Does Not Provide a Rational Basis for the Department's Decision to Set Fees at a Level to Defray All Costs and the Decision to Do So Is Arbitrary.</u>

The Department does not argue in the preamble that the OFF A requires it to set fees at a level that results in the collection of all of its costs. It does not do so because the OFPA does not contain that requirement. OFPA's only requirement is for "reasonable" fees. Neither the House nor Senate versions of the OFPA ever required

that the organic industry defray all costs of this program. The legislative history shows that language included in some versions of the OFPA required that fees be set to defray some program costs. This standard was deleted in favor of the more general standard that fees be set a "reasonable" levels. For example, S. 2830 as passed by the Senate allowed, but did not mandate, collection of "reasonable fees from producers and handlers who participate in the program," S. 2830, Section 1630(b)(l), and separately authorized collection of "reasonable fees from certifying agents seeking accreditation or re-accreditation under this Section to assist in defraying the cost of the program established under the Subtitle." S. 2830. The House version, H.R. 3950 had different requirements. The Conference Committee resolved the differences by placing all of the fee authority in a single section and by deleting the requirement that fees for certifying agents be set to assist in defraying program costs, hi view of the plain language of OFPA and the legislative history, the Department's decision to set fees at a level to defray all costs cannot be based on a legal requirement that it do so.

Since there is no legal requirement to support the proposed fees, the issue is whether the preamble provides a reasoned basis why the fees should defray all costs as a matter of policy. There is no such reasoned basis expressed in the preamble. The preamble contains only an unsupported assertion fees should defray costs. In fact, the decision to collect fees to defray all costs is arbitrary and should be dropped.

As the preamble acknowledges, the fees the Department will collect are not segregated and placed in an account to serve the needs of the Organic industry; the funds will be deposited into the general fund of the United States Treasury. The Department will still need to obtain appropriated funds to operate this program. 62 Fed. Reg. 65927. In other words, there is no direct link between the fees being paid and the service being provided. Rather than actually defraying the costs of the program, the money collected from organic farmers, handlers and certifiers will be used to reduce the budget deficit or otherwise make spending available in other programs. It will not be used to benefit organic farmers. Even if there were a direct link, there is still no basis upon which to conclude that all costs must be defrayed. The Congress can speak clearly to an issue. If the Congress wanted the program to be fully self-supporting, it could have done so expressly. It did not choose to do so. Neither the OFPA nor the preamble supports the proposed regulation as an exercise of discretion.