

June 29, 2009

**SUBMITTED ELECTRONICALLY**

Regulatory Analysis and Development, PPD  
APHIS, Station 3A-03.8  
4700 River Road  
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**Re: Proposed Rule and Programmatic Environmental Impact Statement for the  
Introduction of Genetically Engineered Organisms, APHIS Docket 2008-0023**

cc: USDA Secretary Vilsack  
USDA Deputy Merrigan

We, the undersigned members of the U.S. organic community, are writing to express our serious concerns about the proposed USDA regulations for genetically engineered (GE) crops. The current proposed regulations fail to address long-standing gaps in oversight, and in fact create new ones that endanger the livelihoods of organic farmers and the health of the organic foods industry.

This rulemaking process is an important opportunity for the Department of Agriculture to develop and implement an effective strategy to prevent further GE contamination of the organic seed and food supply. Inaction will decrease public confidence in the USDA certified organic label, may lead to erosion of markets for organic food both in the U.S. and abroad, and will harm American organic farmers as organic production is increasingly “offshored” to countries better able to provide GE-free supplies, such as Argentina and China. Continued inaction may also undercut the potential contributions of organic agriculture to the mitigation of climate change impacts, conservation of topsoil and biodiversity, and reduction of toxic agrochemical inputs to the land, air and soil.

We applaud USDA for extending its public comment period on these rules and request the Secretary to revise the proposed rules to provide new safeguards for organic farmers and others who wish to plant seeds or eat foods that are free of genetically engineered materials. Below, we describe how unregulated cultivation of GE crops harms the organic community and propose some principles and changes to the rule needed to preserve organic integrity.

**Transgenic Contamination of Organic Threatens Livelihoods, Markets and Loss of Trust  
in the Organic Label**

The public’s trust in the integrity of the organic label is essential to the continued vitality of the organic foods industry. The organic community earns that trust by strict adherence to the letter and the spirit of the National Organic Standards (NOS), which, among other requirements, prohibit the use of synthetic pesticides and genetically engineered seeds. The National Organic Program’s prohibition on use of GE seeds was the outcome of massive public opposition to preliminary rules that would have permitted them, a strong sign of the importance of this issue to

organic consumers.<sup>1</sup> More than 75% of consumers believe that they are purchasing products without GE ingredients when they buy organic.<sup>2</sup>

Through no fault of their own, however, organic farmers and food companies are finding it increasingly difficult to meet their customers' demands and expectations for products that are free of GE contaminants. This is due to the widespread cultivation of GE crops in the complete absence of any regulation to prevent/mitigate their cross-pollination or admixture with organic crops. The result – pervasive contamination of the organic/non-GE food, feed and seed supply with GE materials – threatens to undermine trust in the integrity of the organic label and cause lasting harm to this vibrant industry. Indeed, there is already ample evidence of harm.

Contamination of organic and conventional seeds and crops is widespread and has been documented around the world.<sup>3</sup> A recent report documented 39 cases in 2007 and more than 200 in the last decade.<sup>4</sup> The harms incurred by organic farmers and food companies from transgenic contamination are myriad, and include: lost markets, lost sales, lower prices, negative publicity, withdrawal of organic certification, expensive testing and prevention measures, and product recalls.<sup>5</sup>

In at least one case, pervasive transgenic contamination has eliminated an entire organic sector. According to an article in the journal *Nature Biotechnology*:

“[T]he introduction of transgenic herbicide-tolerant canola in Western Canada destroyed the growing, albeit limited, market for organic canola.”<sup>6</sup>

There are literally hundreds of instances of U.S. organic and non-GE farmers being adversely affected by contamination from genetically engineered crops.<sup>7</sup> A few of many examples are cited below:

- \* Organic grain elevators in Minnesota (Earthwise) and North Dakota (SK Foods International) have reported rejection of 2% to 5% of incoming loads due to GE contaminants.<sup>8</sup>
- \* In the year 2000, North Dakota farmer Tom Wiley lost \$10,000 on a contract to supply non-GE, food grade soybeans to a Japanese buyer when his agent tested his load and detected 1.37% transgenic contamination.<sup>9</sup>
- \* Organic dairy farmer, Albert Straus, started testing corn fed to his 300-head dairy herd in 2007, and found that about one-third had GE contaminants. He now tests every lot of grain he buys. According to Straus: “I started to test our products to see if there was an issue or not. It turned out there was an issue. There is so much contamination.” Straus is now adding a label to his dairy products to alert his customers to the GE contaminants,<sup>10</sup> though doing so puts him at risk of losing markets.

Widespread contamination of U.S. corn, soybeans, canola, and other crops prevents many American farmers from meeting the demands and reaping the rewards of the organic marketplace. The result? Organic production is “offshored” to countries better able to provide GE-free supplies.

- \* Organic grain supplier Clarkson Grain Company of Cerro Gordo, Illinois, obtains organic seed corn from Argentina, where it is possible to isolate the seed field with a three-mile buffer zone. According to president Lynn Clarkson: “I would be happy to do it in Illinois, Indiana, or Iowa, but I can’t find that degree of segregation with any reliability.”<sup>11</sup>

USDA should not continue to ignore the reality of contamination, which can occur at many stages of the farming, grain-handling and seed production process.<sup>12</sup> The U.S. government can ill afford to jeopardize one of the most promising sectors of our agricultural economy.

### **Prevention of GE Contamination is Vital to the Continued Growth and Success of the Organic Industry**

The contamination threat to organic is not the fault of organic farmers. It is the result of the adoption of genetically engineered crops without rules in place to prevent the spread of GE traits. Organic farmers are doing what they can. They often conduct expensive testing to confirm the purity even of reputedly GE-free seeds.<sup>13</sup> Others use buffer zones and practice “temporal isolation,” or plant earlier or later than GE crop-growing neighbors to mitigate contamination risk, though often to no avail.<sup>14</sup> Without rules requiring GE crop developers and growers, rather than non-adopters like organic farmers, to shoulder the burden of preventing contamination, the threat of contamination will only worsen.

As noted above, this is more than a theoretical concern – the organic canola industry has already been “destroyed” in Canada thanks to pervasive transgenic contamination. U.S. organic alfalfa growers could very well suffer a similar fate if Roundup Ready or other GE alfalfa is introduced under the “anything goes” system that prevails at present.

In our view, the regulation of GE crops must be based on the principles of:

- Fairness,
- Transparency, and
- Accountability

The present system is:

**Unfair**, since the entire burden of preventing transgenic contamination falls squarely on the shoulders of organic producers, and on organic consumers *caveat emptor*. This is not only unfair, but completely unworkable.

**Non-transparent**, since the complete lack of required testing for transgenic contamination (e.g. of seed stocks) makes it certain that many contamination episodes go undetected, at least until *ad hoc* testing leads to unanticipated “discoveries” of contamination that disrupt the marketplace, harm organic producers, and undermine confidence in the organic label; and

**Unaccountable**, since there is no assignment of liability for the financial consequences of transgenic contamination episodes, resulting in litigation that seldom fairly compensates the injured parties.

## **Suggested Revisions to the Proposed Rules**

### *Eliminate “Non-Regulated Status” and Adopt Commercial Permitting Instead*

APHIS should end its practice of unconditionally removing GE crops and their progeny from its oversight through a “determination of non-regulated status.” This deregulation decision is normally sought by companies prior to commercial introduction of a GE crop. Instead, APHIS should retain authority to monitor and regulate GE crops under commercial permits whenever and wherever their commercialization presents the risk of contaminating sexually-compatible non-GE/organic crops. This step is in line with a recommendation made by the Government Accountability Office (GAO) in a recent report.<sup>15</sup> Commercial permits should be issued only with conditions requiring the GE crop developer and/or grower to employ scientifically sound isolation measures to prevent contamination of surrounding (organic) crops; to pay for third-party, independent testing for transgenic contamination upon the request of neighboring (organic) growers; and to enact other needed measures, such as geographic restrictions on GE crop cultivation, to prevent contamination.

### *Eliminate the Low Level Presence Policy:*

In its revised regulations implementing the Plant Protection Act, USDA has proposed to codify its existing “Low Level Presence” policy (LLP). The LLP policy allows APHIS to take no recall or similar action when unapproved, experimental GE crops grown in field trials are found contaminating commercial (including organic) food, feed or seed. Exposure to experimental GE crops contaminating food may pose health risks, yet the LLP policy contains no protocols for assessing such potential harms. Despite its appellation, the LLP policy proposes no quantitative, maximum threshold for contamination, so “low level” means whatever level of contamination in fact occurs.

Most importantly, by making such contamination “non-actionable,” the LLP policy will greatly reduce the incentive of biotech companies to strive for 100% containment. Under LLP, biotech companies testing new GE crops (sometimes on thousands of acres) will have little incentive to assume the expense of adequately isolating their experimental plots to prevent transgenic contamination in the first place. USDA should eliminate this unscientific policy, and instead make “zero tolerance” of contamination its management goal by mandating recalls whenever experimental GE crops are found contaminating the organic food, feed or seed supply. While “zero tolerance” may not always be achievable in practice, setting the bar lower, as the LLP policy does, will undoubtedly lead to more frequent contamination episodes.

### *Fully implement the Congressional mandates in the 2008 Farm Bill*

With the adoption of the 2008 Farm Bill, Congress mandated that APHIS “improve the management and oversight” of GE crop field trials (§ 10204), implement measures outlined in the agency’s “Lessons Learned” document prepared in the wake of the 2006 ‘Liberty Link’ rice contamination debacle, and adopt a series of other new measures to mitigate transgenic contamination. The proposed rules, however, fail to comply with many of the Farm Bill mandates, such as requiring representative samples of GE crops to be retained by GE crop field trial permit holders, submission of contingency and corrective action plans to address contamination episodes, and use of cutting edge science and technology to ensure effective isolation of GE crops grown in field trials from commercial supplies, among several others.

APHIS must revise its proposed rules to comply with these Congressional mandates.

## **Conclusion**

The organic industry provides many benefits to society: healthy foods for consumers, economic opportunities for family farmers, and a farming system that improves the quality of the environment. However, the continued vitality of this sector is imperiled by the complete absence of measures to protect organic production systems from contamination and subsequent environmental, consumer, and economic losses. The USDA's revision of its agricultural biotechnology regulations under the Plant Protection Act offers an important opportunity to develop measures to ensure a fair, transparent and workable regime.

We respectfully request that you give our recommendations to this end serious consideration as you move forward with this important process. We would be happy to discuss these matters further with you at your convenience.

Respectfully submitted,

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<sup>1</sup> 65 Fed. Reg. 13513-14 (proposed Mar. 13, 2000).

<sup>2</sup> Kiki Hubbard, *Organic Industry to Address Contamination*, *Envirovore*. Mar. 14, 2008, at <http://envirovore.com/content/view/69/1/>.

<sup>3</sup> See, e.g., *New Study Finds GM Genes in Wild Mexican Maize*, *New Scientist*, Feb. 21, 2009; Rex Dalton (2008) *Modified genes spread to local maize: findings reignite debate over genetically modified crops*, *Nature*, 456 (7219), 2000, at 149; The Institute for Nutrition and Food Technology (INTA), *Chile enters the list of countries contaminated with GMOs: A report from INTA has detected transgenic contamination of maize in the fields of central Chile*, Oct. 22, 2008; Graeme Smith, *Illegal GM Crops Found In Scotland*, *Herald*, Sept. 13, 2008; Elizabeth Rosenthal, *Questions on Biotech Crops with No Clear Answers*, *N.Y. Times*, June 6, 2006; *Gene Flow underscores growing concern over biotech crops*, *Associated Press*, Sept. 22, 2004; Andrew Pollack, *Can Biotech Crops be Good Neighbors?*, *N.Y. Times*, Sept. 26, 2004; Lyle F. Friesen et al., *Evidence of contamination of pedigreed canola (Brassica napus) seedlots in Western Canada with genetically engineered herbicide resistance traits*, 95 *Agron. J.*, 1342-1347 (2003); Simon Jeffery, *Rogue genes: An unauthorised strain of GM crops has been found across England and Scotland.*, *Guardian*, Aug. 16, 2002; Alex Roslin, *Modified Pollen hits organic farms: Genetically altered strains spread by wind*, *Toronto Star*, Sept. 30, 2002; Fred Pearce, *The Great Mexican Maize Scandal*, *New Scientist* 2347, June 15, 2002.

<sup>4</sup> Greenpeace International. *GM Contamination Register Report 2007*, February 28, 2008, at <http://www.greenpeace.org/international/press/reports/gm-contamination-register-2007>.

<sup>5</sup> See, e.g., K.L. Hewett, *The Economic Impacts of GM Contamination Incidents on the Organic Sector*, 16th IFOAM Organic World Congress, Modena, Italy, June 16-20, 2008.

<sup>6</sup> Smyth et al. (2002). *Liabilities and Economics of Transgenic Crops*, 20 *Nature Biotechnology*, June 2002, at 537-541.

<sup>7</sup> See, e.g., Bennett Hall, *Battle over Beets*, *Corvallis-Gazette-Times*, May 30, 2009; *UM Researcher Cites GE Contamination; Genetic Herbicide Resistance Found in Seeds*, *Bangor Daily News*, Jan. 13, 2006; Scott Miller & Scott Kilman, *Biotech-Crop Battle Heats Up as Strains Mix With Others*, *Wall St. J.*, Nov. 5, 2005; Paul Elias, *New 'Gene Flow' Problems Concern Crop Producers*, *Associated Press*, Sept. 23, 2004; Erica Walz, *Fourth National Organic Farmers' Survey: Sustaining Organic Farms in a Changing Organic Marketplace*, *Organic Farming Research Foundation*, 2004; David Barboza, *As Biotech Crops Multiply, Consumers Get Little Choice*, *N.Y. Times*, June 10, 2001; Anthony Shadid, *Blown profits -- Genetic drift affects more than biology - US farmers stand to lose millions*, *Boston Globe*, Apr. 8, 2001.

<sup>8</sup> Hugh Warwick & Gundula Meziani, *Seeds of Doubt: North American farmers' experiences of GM crops*, 27, *Soil Association* 2002, at [http://www.soilassociation.org/Web/SA/saweb.nsf/9f788a2d1160a9e580256a71002a3d2b/9ce8a24d75d3f65980256c370031a2d0/\\$FILE/SeedsOfDoubt.pdf](http://www.soilassociation.org/Web/SA/saweb.nsf/9f788a2d1160a9e580256a71002a3d2b/9ce8a24d75d3f65980256c370031a2d0/$FILE/SeedsOfDoubt.pdf) (follow "GM" hyperlink under Why Organic? at bottom of page; then follow "Reports" hyperlink under GM on the left side of the screen; then follow hyperlink to the report).



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<sup>9</sup> *Id.* at 28.

<sup>10</sup> Carey Gillam., *U.S. organic food industry fears GMO contamination*, Reuters, Mar. 12, 2008, available at <http://www.reuters.com/article/domesticNews/idUSN1216250820080312>.

<sup>11</sup> *Testing Methodologies in Tracing, Segregating and Labeling Foods Derived from Modern Biotechnology: Proceedings*, Center for Food and Nutrition Policy, Feb. 25, 2003 at 54, available at [http://cfnap.umd.edu/Outreach/Conference%20Proceedings/pdfs/Biotech\\_Proceedings.pdf](http://cfnap.umd.edu/Outreach/Conference%20Proceedings/pdfs/Biotech_Proceedings.pdf).

<sup>12</sup> Margaret Mellon & Jane Rissler, *Gone to Seed: Transgenic Contaminants in the Traditional Food Supply*, Union of Concerned Scientists, 2004, available at [http://www.ucsusa.org/assets/documents/food\\_and\\_agriculture/seedreport\\_fullreport.pdf](http://www.ucsusa.org/assets/documents/food_and_agriculture/seedreport_fullreport.pdf).

<sup>13</sup> Warwick, *supra* note 9, at 30 (story of Iowa farmers Roger and Amy Lansink).

<sup>14</sup> Jerry Perkins, *Genetically modified mystery*, Des Moines Reg., Aug. 10, 2003, available at <http://www.cropchoice.com/leadstry8dc3.html?recid=1968>.

<sup>15</sup> *Genetically engineered crops: Agencies are proposing changes to improve oversight, but could take additional steps to enhance coordination and monitoring*, Report to the Committee on Agriculture, Nutrition, and Forestry, U.S. Senate, U.S. Government Accountability Office, GAO 09-060, Nov. 2008, at 30-32.