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STRENGTHENING THE NATIONAL ORGANIC PROGRAM
WITH STATE ORGANIC PROGRAMS
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Strengthening the National Organic Program with State Organic Programs

Kelly Damewood*

Introduction

Now, more than ever before, organic stakeholders must consider all options to strengthen the U.S. Department of Agriculture's (USDA) National Organic Program (NOP). Over the last 15 years, USDA-certified organic production significantly grew both domestically and abroad.¹ This growth is largely attributed to consumer trust in the integrity of the USDA-certified organic seal—NOP sets and enforces federal organic standards for all products sold or labeled as organic in the United States.²

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¹ See, e.g., U.S. DEP'T OF AGRIC., NAT'L AGRIC. STAT. SERV. HIGHLIGHTS, 2015 CERTIFIED ORGANIC SURVEY: FARMS, LAND, AND SALES UP 1 (2016), [HTTPS://WWW.NASS.USDA.GOV/PUBLICATIONS/HIGHLIGHTS/2015_CERTIFIED_ORGANICS/2015_CERTIFIED_ORGANIC_SURVEY_HIGHLIGHTS.PDF](https://www.nass.usda.gov/publications/highlights/2015_certified_organics/2015_certified_organic_survey_highlights.pdf); Documentation, U.S. DEP'T OF AGRIC., ECON. RESEARCH SERV., <https://www.ers.usda.gov/data-products/organic-production/documentation/> (last updated Sept. 22, 2016) ("Together, certified organic cropland and pasture accounted for about .6 percent of the U.S. total farmland in 2011"); *Organic Trade*, U.S. DEP'T OF AGRIC., ECON. RESEARSCH SERV., <https://www.ers.usda.gov/topics/natural-resources-environment/organic-agriculture/organic-trade/> (last updated Jan. 19, 2018) ("Growth in organic agricultural production is occurring in both developed and developing countries worldwide, and the competition for major consumer markets in developed countries, particularly the United States and Europe, is increasing."); U.S. DEP'T OF AGRIC., AGRICULTURAL MARKETING SERVICE, NAT'L ORGANIC PRO., STRATEGIC PLAN 2015-2018 2 (2015), <https://www.ams.usda.gov/sites/default/files/media/NOP-2015StrategicPlan.pdf> ("With an appropriated budget of approximately \$9 million in FY 2014 and 2015, the NOP oversees more than 80 certifying agents and 27,800 organic operations around the world. In the U.S., there are 19,474 certified organic operations; a new record of \$39.1 billion in U.S. organic sales was reached in 2014.") [hereinafter AMS STRATEGIC PLAN 2015-2018].

² *Robust organic sector stays on upward climb, posts new records in U.S. sales*, ORGANIC TRADE ASSOCIATION (May 24, 2017), <https://www.ota.com/resources/market-analysis/> ("The robust American organic sector stayed on its upward trajectory in 2016, gaining new market share and shattering records, as consumers across the United States ate and used more organic products than ever before. . . . Organic sales in the U.S. totaled around \$47 billion in 2016, reflecting new sales of almost \$3.7 billion from the previous year. The \$43 billion in organic food sales marked the first time the American organic food market has broken through the \$40-billion mark. Organic food now accounts for more than five percent -- 5.3 percent to be exact -- of total

But the continued success of organic depends on whether NOP can maintain strong oversight in a rapidly evolving marketplace with its current enforcement budget and authority.³ Therefore, organic stakeholders must work to strengthen NOP enforcement resources because it will protect consumer trust in the integrity of the USDA-certified organic seal.

At the federal level, efforts are well underway to strengthen NOP enforcement resources through the next farm bill.

food sales in this country, another significant first for organic.”); *The Cost of Organic Food*, CONSUMER REPORTS (Mar. 19, 2015, 12:00 PM), www.consumerreports.org/cro/news/2015/03/cost-of-organic-food/index.htm (finding that “[o]n average, organic foods were 47 percent more expensive” and describing reasons consumers are willing to pay more for organic).

³ See *Organic Trade Association Priorities for the Farm Bill*, ORGANIC TRADE ASSOCIATION <https://ota.com/advocacy/organic-trade-association-2018-farm-bill-priorities> (last visited May 2, 2018) (describing need for “support and adequate funding for the [NOP] to keep pace with industry growth, set uniform standards, and carry out compliance and enforcement actions in the U.S. and abroad.”); *Documentation*, *supra* note 1 (“Together, certified organic cropland and pasture accounted for about .6 percent of the U.S. total farmland in 2011.”); *Organic Trade*, U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV., <https://www.ers.usda.gov/topics/natural-resources-environment/organic-agriculture/organic-trade/> (last updated Jan. 19, 2018) (“Growth in organic agricultural production is occurring in both developed and developing countries worldwide, and the competition for major consumer markets in developed countries, particularly the United States and Europe, is increasing.”); Miles McEvoy, former Deputy Administrator of National Organic Program, U.S. Department of Agriculture, Presentation at Spring 2017 National Organic Standards Board Meeting (Apr. 19, 2017) (noting the amount of resources spent on tasks other than enforcement such as 2 full time FOIA staff and several contractors); Peter Whoriskey, *The labels said ‘organic.’ But these massive imports of corn and soybeans weren’t*, THE WASH. POST (May 12, 2017), https://www.washingtonpost.com/business/economy/the-labels-said-organic-but-these-massive-imports-of-corn-and-soybeans-werent/2017/05/12/6d165984-2b76-11e7-a616-d7c8a68c1a66_story.html?utm_term=.ae4e87fdb665 (describing a case of organic fraud in organic grains). AMS STRATEGIC PLAN 2015-2018, *supra* note 1, at 2 (“With an appropriated budget of approximately \$9 million in FY 2014 and 2015, the NOP oversees more than 80 certifying agents and 27,800 organic operations around the world. In the U.S., there are 19,474 certified organic operations; a new record of \$39.1 billion in U.S. organic sales was reached in 2014.”); Peter Whoriskey, “*Why the hell am I paying more for this?*” Major egg operation houses “USDA Organic” hens at three per square foot, THE WASH. POST (July 13, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/07/13/more-than-a-million-hens-filling-barns-at-three-per-square-foot-and-yes-theyre-usda-organic/?utm_term=.88178cb01d51; Peter Whoriskey, *Millions of pounds of apparently fake ‘organic’ grains convince the food industry there may be a problem*, THE WASH. POST (June 12, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/06/12/millions-of-pounds-of-apparently-fake-organic-grains-convince-the-food-industry-there-may-be-a-problem/?utm_term=.f3ceec314e97; Peter Whoriskey, *Why your ‘organic’ milk may not be organic*, THE WASH. POST (May 1, 2017), https://www.washingtonpost.com/business/economy/why-your-organic-milk-may-not-be-organic/2017/05/01/708ce5bc-ed76-11e6-9662-6eedf1627882_story.html?utm_term=.59baf3a57a28; *The Cost of Organic Food*, *supra* note 2.

Congress first authorized NOP when it passed the Organic Foods Production Act of 1990 (OFPA) as part of the 1990 Farm Bill, and Congress must reauthorize funding for NOP in the next farm bill as well as include any other changes to the program.⁴ So now is the time to make any changes to the program—such as shoring up NOP enforcement authority—and to advocate for increased authorized funding.⁵ Thus, organic stakeholders are prioritizing and advocating for increased NOP enforcement resources in the next farm bill.⁶

But in addition to their farm bill advocacy, organic stakeholders should also consider how state-level action can support their federal efforts. Precedent and other pressing federal issues indicate that Congress could likely delay the next farm bill, which should be reauthorized in September 2018 when the 2014 Farm Bill expires.⁷ Moreover, the Trump administration has already taken action to undermine new organic enforcement standards.⁸ And organic critics have also called for changes to NOP that could undermine its efficacy.⁹ So, given the current political climate, it is worth supplementing farm bill advocacy

⁴ Organic Foods Production Act of 1990, 7 U.S.C. §§ 6501-6524 (2012); *Faso Introduces Bill to Crack-Down on Fake Organics, Support Organic Farmers*, U.S. CONGRESSMAN JOHN J. FASO (Sept. 28, 2017), <https://faso.house.gov/news/documentsingle.aspx?DocumentID=582>.

⁵ See *Organic Trade Association Priorities for Farm Bill*, *supra* note 3 (describing need for “support and adequate funding for the [NOP] to keep pace with industry growth, set uniform standards, and carry out compliance and enforcement actions in the U.S. and abroad.”); *Faso Introduces Bill to Crack-Down on Fake Organics, Support Organic Farmers*, *supra* note 4.

⁶ See *Organic Trade Association Priorities for Farm Bill*, *supra* note 3.

⁷ Ed O’Keefe, *Farm bill passes after three years of talks*, THE WASH POST, POST POLITICS (Feb. 4, 2014) https://www.washingtonpost.com/news/post-politics/wp/2014/02/04/farm-bill-passes-after-three-years-of-talks/?utm_term=.bb0bc8a146f9. See *Appropriations for Fiscal Year 2017*, CONGRESS.GOV RESOURCES, <https://www.congress.gov/resources/display/content/Appropriations+for+Fiscal+Year+2017> (showing trend of continued resolutions and partisan voting rather than passing timely legislation).

⁸ Lynne Curry, *Years in the Making, Organic Animal Welfare Rules Killed by Trump’s USDA*, CIVIL EATS (Dec. 18, 2017), <https://civileats.com/2017/12/18/years-in-the-making-trumps-usda-kills-organic-animal-welfare-rules/>.

⁹ Peter B. Matz, *Organic Reform*, OLSSON FRANK WEEDA (Jan. 17, 2017), www.ofwlaw.com/2017/01/17/organic-reform/; Tom Philpott, “Dark Forces” Are Coming for your Organic Food, MOTHER JONES (Feb. 9, 2017, 6:30 PM), www.motherjones.com/politics/2017/02/dark-forces-organic/.

with state-level action.

Specifically, organic stakeholders should consider advocating for state organic programs at the state-level because they are unique, often overlooked enforcement tools. It may seem counterintuitive to consider state-level action to protect a federal program, but OFPA has a unique provision whereby NOP can authorize state departments of agriculture to enforce federal organic standards, e.g. states can create ‘state organic programs’.¹⁰ So far, California is the only state to establish a state organic program, the California State Organic Program (SOP).¹¹ NOP audits and oversees the program, but its program functions, funding, and structure are set forth in California state law.¹² While the SOP has some drawbacks for California’s organic producers, overall California has the most robust, efficient organic enforcement in the United States.¹³ Therefore, organic stakeholders should consider how advocating for additional state organic programs can strengthen organic enforcement, and in turn support their farm bill priorities.

Thus, this article examines how organic stakeholders can strengthen NOP with state organic programs. Section I reviews the authority, functions, and responsibilities of state organic programs. Section II weighs the costs and benefits of the SOP. Section III then applies the cost-benefit analysis of the SOP to describe key attributes of states with potential to establish state organic programs. Section IV recommends guiding principles for new state organic programs. Finally, this article concludes that some states should consider establishing carefully constructed

¹⁰ 7 C.F.R. §§205.620-205.622 (2017).

¹¹ *State Organic Programs*, U.S. DEP’T OF AGRIC., AGRICULTURAL MARKETING SERVICE, <https://www.ams.usda.gov/services/enforcement/organic/state-compliance> (last visited May 2, 2018).

¹² See generally KELLY DAMEWOOD & JANE SOOBY, CALIFORNIA CERTIFIED ORGANIC FARMERS, REVIEW OF THE CALIFORNIA STATE ORGANIC PROGRAM (2015), <https://www.ccof.org/sites/default/files/Review%20of%20the%20California%20State%20Organic%20Program%20-%20CCOF%202015%20web.pdf>

(describing SOP authority); *State Organic Programs*, *supra* note 11.

¹³ DAMEWOOD & SOOBY, *supra* note 12, at 29-30 (discussing challenges SOP creates for California producers).

state organic programs because additional state organic programs can support national efforts to strengthen NOP enforcement resources in the next farm bill.

I. Overview of State Organic Programs

State organic program are a commonly overlooked tool for organic enforcement. Although the NOP primarily works with organic certifiers to regulate the organic marketplace, OFPA also authorizes NOP to work with state organic programs to ensure local oversight and control over organic production in the state.¹⁴ California is the only state operating a state organic program.¹⁵ As a result, California has a different regulatory framework for organic production and certification than other states.¹⁶

A. The NOP works with Organic Certifiers to regulate the Organic Marketplace

Organic certification is the primary means of ensuring agricultural products sold as organic in the U.S. are produced and handled in compliance with federal organic standards.¹⁷ NOP accredits private and governmental entities, both domestically and abroad, to verify that products with organic claims have been produced and labeled in compliance with the organic standards.¹⁸ Operations who produce or handle agricultural products intended to be sold as organic with gross annual organic sales of more than \$5,000 must be certified by an accredited certifier.¹⁹ Thus, the NOP works with organic certifiers around the world to ensure products sold as organic are meeting the requirements of NOP's standards.²⁰

Organic certifiers have an important role in oversight and

¹⁴ 7 C.F.R. §§205.620-205.622.

¹⁵ *State Organic Programs*, *supra* note 11.

¹⁶ *Id.*

¹⁷ *See* 7 C.F.R. §§205.500-205.510 (2017).

¹⁸ *Id.* §§ 205.500-205.501(a).

¹⁹ *Id.* § 205.100.

²⁰ *Id.* § 205.400.

enforcement because they work directly with producers to ensure compliance with NOP standards. Certifiers review producers' organic system plans, annually inspect facilities, verify producers' record-keeping, and analyze residue samples of at least 5% of their certified clients annually.²¹ Producers must immediately notify their certifiers of any application, including drift, of a prohibited material or a change in production systems that may impact compliance with the organic standards.²² If a producer is not in compliance with NOP standards, then the certifier must alert NOP, issue a noncompliance, and evaluate actions taken to correct the noncompliance.²³ Therefore, the rigorous organic certification process ensures products labeled as organic are in compliance with NOP standards.

While organic certifiers play an important role, NOP is ultimately responsible for enforcement. NOP has authority to enforce the standards through legal action, including stopping the sale of a product and issuing civil penalties.²⁴ Any individual or operation who makes a false statement to NOP or to an organic certifier is subject to fines and even imprisonment of up to five years.²⁵ Additionally, NOP must audit organic certifiers and oversee compliance with accreditation requirements.²⁶ So NOP oversees all final enforcement actions and decisions.

In sum, NOP works with organic certifiers to monitor the organic marketplace. Through the organic certification process, accredited certifiers verify that agricultural products sold and labeled as organic are in compliance with the organic standards.²⁷ And NOP has authority to enforce the standards and oversee certifiers.²⁸

²¹ *Id.*; *Id.* §205.670.

²² 7 C.F.R. § 205.400(f) (2017).

²³ *Id.* § 205.405.

²⁴ *Id.* § 205.100(e)(1).

²⁵ *Id.* § 205.100(e)(2); *Id.* §3.91.

²⁶ *Id.* § 205.501.

²⁷ 7 C.F.R. §205.400 (2017).

²⁸ *Id.* § 205.661; *Id.* § 205.668.

B. In California, NOP works with certifiers and the California State Organic Program.

In California, the NOP not only works with certifiers, but it also works with the California State Organic Program (SOP) to oversee organic production and certification. The NOP can authorize state departments of agriculture to establish what are referred to as ‘state organic programs.’²⁹ State organic programs are enforcement programs that provide local oversight of certification, production, and handling in the state; they do not operate independently from the NOP.³⁰ So far, California is the only state operating a state organic program.³¹ So California is the only state enforcing NOP standards.³²

The SOP is a unique enforcement arm of the NOP. The SOP assumes activities conducted by NOP in other states such as working with certifiers to resolve non-compliances, stopping sale of noncompliant products, issuing civil penalties, or handling legal actions when a producer appeals the decision of a certifier.³³ The SOP even takes on some enforcement activities that NOP cannot provide for all states such as proactively monitoring the organic marketplace with unannounced inspections and residue testing beyond what certifiers are already required to perform.³⁴ Thus, the SOP handles all organic enforcement activities in California with approval and oversight from NOP.³⁵

If NOP suspects a noncompliance of a certified organic operation, then it will work with the operation’s certifier to investigate the complaint.³⁶ But in California NOP will direct

²⁹ *Id.* § 205.622.

³⁰ *Id.* § 205.620; *See also id.* §205.100 (requiring that all agricultural products sold as organic be in compliance with OFPA and federal organic standards, i.e., OFPA preempts any state organic law or standard).

³¹ *State Organic Programs, supra* note 11.

³² *Id.*

³³ 7 C.F.R. §§ 204.101(c)(2), 205.620(d), 205.668, 205.670 (2017).

³⁴ *Id.* § 205.670.

³⁵ *State Organic Programs, supra* note 11.

³⁶ 7 C.F.R. §205.661(a); *Id.* §205.668.

the SOP to work with the certifier.³⁷ California is the only state where a state department of agriculture is regularly working with certifiers to resolve non-compliances.

Another important area of enforcement handled by the SOP is investigations of potential fraud. Any member of the public may submit a complaint to NOP.³⁸ If the complaint regards a noncertified operation selling product as organic, then NOP must investigate the operation itself because certifiers only have jurisdiction over their clients.³⁹ But if the complaint concerns a noncertified operation in California, then NOP will direct the SOP to investigate the complaint.⁴⁰ The public may also submit complaints of fraud directly to the SOP.⁴¹ In other words, California is the only state with a state department of agriculture regularly receiving and investigating complaints of fraud in the organic marketplace.

In sum, the SOP is a unique enforcement arm of the NOP because it is the state-administered organic enforcement program in the U.S. As an enforcement arm, it enforces federal organic standards such as resolving non-compliances and investigating complaints of fraud within the state.⁴²

³⁷ *Id.* §205.661(b); *Id.* 205.668.

³⁸ *How to File a Complaint on Organic Regulations*, U.S. DEP'T OF AGRIC., AGRICULTURAL MARKETING SERVICE, <https://www.ams.usda.gov/services/enforcement/organic/file-complaint> (last visited May 2, 2018).

³⁹ 7 C.F.R. §205.661(a) (2017).

⁴⁰ *Id.* §205.661(b).

⁴¹ *CDFR Organic Complaints*, CAL. DEPT. OF FOOD & AGRIC., <https://organic.cdfa.ca.gov/complaints/> (last visited May 2, 2018).

⁴² *Id.*

C. State Organic Programs are different than State Organic Certifiers

An important yet often misunderstood distinction exists between state organic programs and state organic certifiers.⁴³ California is the only state operating a state organic program while some states have state departments of agriculture that are accredited certifiers such as the Washington State Department of Agriculture (WSDA).⁴⁴ An accredited state department of agriculture has the same requirements and functions as an accredited private company—they maintain records with their certified clients, notify clients of regulatory changes or compliance issues, and annually inspect their clients' farm or facilities.⁴⁵ In contrast, a state organic program takes on functions similar to the NOP—it works with certifiers to resolve non-compliances, investigates noncertified operations, and handles appeals or other legal actions.⁴⁶ Thus, state organic programs have different roles than state organic certifiers.

The difference between a state organic program and a state organic certifier is further highlighted by the impact of each on producers operating in the state. Producers may choose to certify with any certifier operating in the state.⁴⁷ So a producer in Washington could certify with the WSDA Organic Program, or it could choose to certify with another accredited certifier like Quality Insurance International (QAI), which is a private organization.⁴⁸ In contrast, producers must comply with a state

⁴³ Kelly Damewood, *California Certified Organic Farmers, Compilation of Interviews & Key Takeaways for SOP Report 2015-2016 (2016)* (on file with author) (noting that many interviewees do not understand the differences between state certifiers and state organic programs) [hereinafter Damewood, *Key Takeaways for SOP Report*].

⁴⁴ DAMEWOOD & SCOOPY, *supra* note 12, at 8.

⁴⁵ *Id.* at 27-37.

⁴⁶ *Id.* at 38-49.

⁴⁷ See 7 C.F.R. § 205.100 (mandating certification of applicable operations with any accredited certifying agent), *see also id.* § 205.401 (setting forth requirements for certification applications and not requiring producers certify with any specific certifier).

⁴⁸ *Id.*

organic program.⁴⁹ For example, in California producers choose a certifier but they must comply with SOP requirements *in addition* to certifying with their chosen certifier.⁵⁰ So the SOP impacts producers differently than a state organic certifier because it has authority over all organic producers in the state while certifiers only have authority over their clients.

D. State Organic Programs may create Additional Requirements.

Another unique feature of state organic programs is their ability to impose additional requirements for certification. The NOP may allow a state organic program to set more restrictive requirements than what is required under OFPA and the organic standards.⁵¹ The additional requirements should address the environmental conditions or the necessity of specific production or handling practices particular to the State or region.⁵² So producers selling agricultural product as organic in the U.S. must meet the requirements of OFPA, but they may also be required to meet state requirements if they operate in a state with a state organic program.

In California, the SOP has four additional requirements:

1. Organic producers and handlers must register with the SOP through the California Department of Food and Agriculture.⁵³
2. Organic processors must register with the SOP through the California Department of Public Health (CDPH).⁵⁴
3. Organic producers, processors, and handlers must

⁴⁹ See *id.* §§ 204.101 (c)(2), 205.620 (d), 205.668, 205.670 (requiring producers make records and facilities available to state organic programs).

⁵⁰ DAMEWOOD & SOOBY, *supra* note 12, at 9.

⁵¹ 7 C.F.R. § 206.620 (c) (2017).

⁵² *Id.*

⁵³ Policy Memorandum from Miles McEvoy to Stake Holders and Interested Parties on California State Organic Program, Additional Requirements Granted, (Jan. 21, 2011), <https://www.ams.usda.gov/sites/default/files/media/NOP-PM-11-8-CaliforniaRequirements.pdf>.

⁵⁴ *Id.*

provide verification of SOP registration to their accredited certifying agent prior to granting or continuing organic certification;⁵⁵ and

4. Accredited certifying agents must register with CDFA and pay registration fees.⁵⁶

As a result of these additional requirements, California producers must annually register and pay fees to the SOP in addition to annually renewing and paying fees to their certifier.

II. The Benefits of the SOP outweigh the Costs.

The costs and benefits of the SOP must be carefully evaluated before establishing more state organic programs because it is the only established state organic program from which to judge the merits of such a program on. Under its current structure, the benefits of the SOP outweigh the costs—the SOP had significant issues in the past, but these have largely been addressed or are being addressed through ongoing refinements to the program. But the SOP would not be easily replicated or suitable for all states; rather, state organic programs modeled after the SOP would only be appropriate in states where there is sufficient benefit to the state’s organic producers, high stakeholder engagement, and no conflict of interest issues with a state certifier.

A. *The Benefits of the SOP.*

The SOP benefits California producers by providing them with the most efficient, robust enforcement of national organic standards in the U.S. The primary benefits include: reliable funding, local staff, local legal authority, marketplace surveillance, and close oversight over noncertified operations. The SOP also has several ancillary benefits to enforcement such as reliable data, administration of cost share, and authority to further support organic production in the state. Additionally, the SOP benefits the entire organic sector, not just California.

⁵⁵ *Id.*

⁵⁶ *Id.*

i. The SOP has consistent funding independent of farm bill negotiations and federal appropriations and is entirely focused on enforcement.

One significant benefit of the SOP is that it allows California to have a consistent, independent source of funding dedicated entirely to enforcement activities. NOP's budget must fund a range of activities including enforcement actions, developing and implementing organic standards, auditing certifiers, responding to Freedom of Information Acts, and other administrative functions.⁵⁷ In contrast, the SOP's budget is almost entirely dedicated to enforcement activities—it has some administrative costs, but it does not write rules, conduct audits, or handle FOIA requests like NOP.⁵⁸ Thus, the SOP funding is focused solely on enforcement.

Additionally, the SOP budget is not subject to farm bill negotiations and federal appropriations. Upon reviewing its entire farm bill budget, Congress authorizes an annual budget for NOP—that is, Congress determines the maximum amount Congress may appropriate to NOP annually.⁵⁹ But Congress is not under an obligation to appropriate the full amount.⁶⁰ To date, Congress, has not appropriated NOP at its full authorized amount—the 2014 authorizes \$15 million a year for NOP but Congress has always appropriated \$9 million a year.⁶¹ But the SOP budget is

⁵⁷ AMS STRATEGIC PLAN 2015-2018, *supra* note 1, at 2 (“With an appropriated budget of approximately \$9 million in FY 2014 and 2015, the NOP oversees more than 80 certifying agents and 27,800 organic operations around the world. In the U.S., there are 19,474 certified organic operations; a new record of \$39.1 billion in U.S. organic sales was reached in 2014.”); 7 U.S.C. §§ 6519, 6505, 6514, 6581 (2012). *See also Key Activities*, U.S. DEP’T OF AGRIC., NATIONAL ORGANIC PROGRAM, [HTTPS://WWW.AMS.USDA.GOV/ABOUT-AMS/PROGRAMS-OFFICES/NATIONAL-ORGANIC-PROGRAM](https://www.ams.usda.gov/about-ams/programs-offices/national-organic-program) (last visited May 2, 2018) (listing the range of NOP responsibilities and activities).

⁵⁸ California Organic Food and Farming Act, CA AGRIC. CODE § 46000 (2017).

⁵⁹ *What are Appropriations?*, NAT’L SUSTAINABILITY AGRIC. COAL., <http://sustainableagriculture.net/our-work/campaigns/annual-appropriations/what-are-appropriations/> (last visited May 2, 2018).

⁶⁰ *Id.*

⁶¹ NAT’L SUSTAINABILITY AGRIC. COAL., HOUSE AND SENATE APPROPRIATIONS COMMITTEES, AGRICULTURAL APPROPRIATIONS CHART FISCAL YEAR 2018, <http://sustainableagriculture.net/wp-content/uploads/2008/09/>

completely independent of the NOP because it is funded almost entirely funded by registration fees paid by organic producers in the state.⁶² Therefore, SOP funding is consistent and independent of the political pressures faced by NOP.

Stable funding is increasingly important in today's political climate. Some organic critics have called on Congress to slash funding to the NOP.⁶³ While Congress so far seems unwilling to slash NOP funding altogether, there is ongoing uncertainty as Congress struggles to pass annual appropriations due to ongoing partisan disagreements.⁶⁴ If NOP were to lose its funding for enforcement, then the organic seal would lose the confidence of consumers.⁶⁵ Therefore, the consistent, independent funding stream is increasingly reassuring for organic producers during a time of heightened uncertainty.

Moreover, if Congress were to defund the NOP, either by cutting it from the 2018 farm bill or by not appropriating funds, then the SOP would become an important backstop for the organic marketplace. Before NOP implemented federal standards, the SOP had its own standards, which were the de facto standards for organic production nationwide because producers selling into California had to comply with the SOP.⁶⁶ Today, California state

[NSACFY2018AgAppropriationsChart-SComfull.pdf](#)

⁶² California Organic Food and Farming Act, CA AGRIC. CODE § 46013.1 (e)(1). California Department of Food & Agriculture, Organic Program Budget FY 2015-2016 (January 2016) (receiving no funding from the NOP but receiving proportionally small amounts of funding from other sources than registration fees). See also DAMEWOOD & SOOBY, *supra* note 12, at 16.

⁶³ Tom Philpott, "Dark Forces" Are Coming for your Organic Food, MOTHER JONES (Feb. 9, 2017, 6:30 PM), www.motherjones.com/politics/2017/02/dark-forces-organic/.

⁶⁴ See *Appropriations for Fiscal Year 2017*, CONGRESS.GOV RESOURCES, <https://www.congress.gov/resources/display/content/Appropriations+for+Fiscal+Year+2017> (last updated May 4, 2017). (showing continued resolutions and partisan voting but no cuts to NOP funding).

⁶⁵ See *Organic Trade Association Priorities for the Farm Bill*, *supra* note 3.

⁶⁶ Mark Lipson et. al., *Remarks at 2016 EocFarm Conference Panel: Campaign to End State Organic Program Fees* (2016), https://eco-farm.org/sites/default/files/session_audio/EFC16_Campaign_to_End_State_Organic_Program_Fees.mp3 ("In the 1990's California organic foods act of 1990 was the de facto national standard. It was the foundation on which consumer trust on a national level was built. I strongly believe that").

law mandates the SOP enforce federal organic standards.⁶⁷ So if Congress defunds the NOP, then the SOP would once again become the de facto assurance of organic enforcement because it would still have funding and enforcement authority.⁶⁸ Thus, under the worst case scenario of a defunded NOP, the SOP would serve as a back stop for enforcement.

ii. The SOP has local enforcement Staff.

A second benefit of the SOP is its local enforcement staff.⁶⁹ NOP investigative staff are primarily based in Washington, D.C.⁷⁰ To investigate complaints of fraud, the NOP must fund travel to the reported operation, handle the complaint from afar, or perhaps work with the local state department of agriculture, which may or may not have the expertise to track down the necessary information.⁷¹ In contrast, the SOP has trained organic investigators who immediately travel and respond to complaints in California.⁷² The SOP also contracts with county agricultural commissioners—county-based personnel who provide regulatory services for a variety of CDFR and USDA programs—to handle SOP enforcement activities in their region.⁷³ Therefore, the SOP provides boots on the ground enforcement to quickly investigate and resolve compliance issues or complaints of fraud.

⁶⁷ California Organic Food and Farming Act, CA AGRIC. CODE §§ 46000 (2017).

⁶⁸ *CCOF Priorities for the 2018 Farm Bill*, CALIFORNIA CERTIFIED ORGANIC FARMERS (2018), <https://www.ccof.org/sites/default/files/2018%20CCOF%20Farm%20Bill%20priorities.pdf>.

⁶⁹ See CAL. DEP. OF FOOD & AGRIC., STATE ORGANIC PROGRAM, COMPLIANCE & ENFORCEMENT/APPEALS SUMMARY: FY 2015/2016 & FY2016/2017 (2017), https://www.cdfa.ca.gov/is/i_&c/pdfs/SOP_EnforcementActivitiesSummary.pdf (citing 66 complaints investigated by SOP staff) [hereinafter CAL. DEP'T OF FOOD & AGRIC., COMPLIANCE SUMMARY].

⁷⁰ See Miles McEvoy, *supra* note 2 (citing eight compliance and enforcement staff in addition to NOP Compliance and Enforcement Director).

⁷¹ Interview with Miles McEvoy, former Deputy Administrator, U.S. Department of Agriculture, National Organic Program in Washington, D.C. September 30, 2015 (noting that NOP successfully contracted with state departments of agriculture to investigate fraud but NOP staff are primarily based in D.C.).

⁷² See CAL. DEP'T OF FOOD AND AGRIC., COMPLIANCE SUMMARY, *supra* note 69. See also, DAMEWOOD & SOOBY, *supra* note 12, at 12 (describing one supervising special investigator and three special investigators on SOP staff).

⁷³ California Organic Food and Farming Act, CA AGRIC. CODE §§ 46000 (b) (2017).

Local staff are especially important for investigating noncertified operations.⁷⁴ For complaints or issues with certified organic operations, NOP can often rely on the certifier to inspect the operation, take residue tests, or otherwise investigate the operation.⁷⁵ But if an operation is not certified, then the certifier has no authority to investigate the operation.⁷⁶ So NOP cannot rely on certifiers for investigating noncertified operations, which then requires NOP to travel to the region, contract with the state staff, or otherwise handle the investigation.⁷⁷ But as an enforcement arm of NOP, the SOP has authority over anyone selling agricultural product as organic in California so it can send staff to investigate noncertified operations.⁷⁸ Thus, the SOP's local enforcement staff ensure efficient resolution of issues with noncertified operations in California.

iii. The SOP has Local Legal Authority.

A third benefit is the SOP resolves issues that rise to legal action more efficiently than the NOP because it handles local appeals and mediations. NOP may suspend or revoke certification of an operation.⁷⁹ The operation may go through mediation with the NOP, appeal the suspension or revocation to the AMS Administrator, or, if the AMS Administrator denies the appeal, the operation may request a hearing with a USDA Administrative Law Judge.⁸⁰ NOP may settle an appeal, and mediation is common.⁸¹ But in California alone, organic operations go through

⁷⁴ See 7 C.F.R. § 205.101 (2017) (stating that operations exempt from certification “must comply with the applicable organic production and handling requirements”).

⁷⁵ *Id.*

⁷⁶ See *id.* § 205.661(a) (granting authority to certifying agents to investigate production and handling operations “certified as organic by the certifying agent.”).

⁷⁷ See *id.* § 205.101 (stating that operations exempt from certification “must comply with the applicable organic production and handling requirements”).

⁷⁸ See CA AGRIC. CODE §46002 (adopting by reference the NOP standards); 7.C.F.R. §205.661 (b) (stating authority of SOP over all organic operations in California).

⁷⁹ 7 C.F.R. § 205.660 (2017).

⁸⁰ *Id.* § 205.680(a)-(c).

⁸¹ *Id.* § 205.663.

a local legal system to appeal decisions.⁸² So California-based operations are not dependent on a backlogged federal system and do not have to work with a court from across the country.⁸³ So the SOP responds to and resolves noncompliance issues more efficiently than NOP.

iv. The SOP provides Marketplace Surveillance.

A fourth benefit is that the SOP proactively monitors the organic marketplace. The NOP has limited staff and financial resources, so its enforcement budget is almost entirely aimed at responding to noncompliances and investigating complaints.⁸⁴ The SOP, however, not only responds to noncompliances and investigates complaints, but it also monitors the organic marketplace through spot inspections and random pesticide residue sampling.⁸⁵ So unlike NOP, the SOP helps certifiers monitor the organic marketplace.

Spot inspections may help find bad actors who would not otherwise be identified by a complaint. For example, the SOP contracts with the county agricultural commissioners who go to farmers markets to make sure producers have the appropriate signage and adequately separate organic produce from their conventional produce.⁸⁶ So county agricultural commissioners

⁸² *Id.* § 205.681; *see generally* U.S. DEP'T OF AGRIC., AGRICULTURAL MARKETING SERVICE, NATIONAL ORGANIC PROGRAM, OFFICE OF THE ADMINISTRATOR ADVERSE ACTION APPEAL PROCESS FOR THE NATIONAL ORGANIC PROGRAM (2014), <https://www.ams.usda.gov/sites/default/files/media/4011.pdf>.

⁸³ *See* CAL. DEP'T OF FOOD AND AGRIC., COMPLIANCE SUMMARY, *supra* note 69; U.S. DEP'T OF AGRIC., AGRICULTURAL MARKETING SERVICE, NATIONAL ORGANIC PROGRAM, COMPLIANCE & ENFORCEMENT/APPEALS SUMMARY: FY 2016 (2017), www.ams.usda.gov/sites/default/files/media/NOPQtrlyEnforcementRptQ4FY16Summary.pdf. (closing one out of three appeals in process in FY2015/216 versus NOP closing 14 out of 32 appeals in FY 2016. 6 of the closed appeals were carried over from previous fiscal years).

⁸⁴ Interview with Miles McEvoy, former Deputy Administrator, U.S. Department of Agriculture, National Organic Program in Washington, D.C. September 30, 2015 (noting that NOP would like to do more random residue testing and marketplace surveillance, but it has limited capacity).

⁸⁵ California Organic Food and Farming Act, CA AGRIC. CODE § 46003.2 (2017).

⁸⁶ *Id.* § 46003.2 (6); CAL. DEP'T OF FOOD & AGRIC., CALIFORNIA'S STATE ORGANIC PROGRAM FACT SHEET 1, 2 (2017), <https://www.cdffa.ca.gov/is/>

are out in the field proactively looking for any issues.⁸⁷

Like spot inspections, pesticide residue sampling can be helpful in identifying any issues in the organic supply chain. SOP staff or county agriculture commissioners can go to farmers markets or retail establishments—from local grocers to large supermarkets—and sample produce for pesticide residues.⁸⁸ If a residue test is over the allowed amount in organic production or shows a residue of a prohibited material, then the SOP will initiate an investigation where it will trace the produce back to the handler and producer.⁸⁹

However, the value of marketplace monitoring should not be overly exaggerated. Some would argue that the SOP spot inspections and residue testing not only duplicate certification requirements but also duplicate other California regulations.⁹⁰ For example, the Certified Farmers Market program also inspects for organic compliance at farmers markets and the Department of Pesticide Regulation (DPR) also conducts periodic residue sampling.⁹¹ A recent stakeholder taskforce reviewed the SOP and concluded that spot inspections and residue testing benefit the organic sector when the SOP prioritizes enforcement actions and does not duplicate other areas of enforcement.⁹² So marketplace surveillance is a benefit when surveillance activities are properly conducted.

v. The SOP monitors Noncertified Operations.

A fifth benefit is the SOP monitors exempt operations. All producers selling agricultural products as organic must comply

[i & c/pdfs/CalOrganicPrgrmFactSheet.pdf](#).

⁸⁷ See CAL. DEP. OF FOOD & AGRIC., COMPLIANCE SUMMARY, *supra* note 69.

⁸⁸ DAMEWOOD & SOOBY, *supra* note 12, at 24-25.

⁸⁹ See CAL. DEP'T OF FOOD AND AGRIC., COMPLIANCE SUMMARY, *supra* note 69 (detecting 4 instances of residues in violation of tolerance levels in FY2015/106 as a result of sampling and conducting).

⁹⁰ DAMEWOOD & SOOBY, *supra* note 12, at 30.

⁹¹ *Id.*

⁹² CAL. DEP'T OF FOOD & AGRIC., CALIFORNIA STATE ORGANIC PROGRAM: RECOMMENDATIONS FROM THE ORGANIC STAKEHOLDER WORK GROUP 11, 13-14 (2017), WWW.CDEA.CA.GOV/IS/I_&_C/PDFS/OSWG_RECOMMENDATIONSREPORT.PDF.

with the federal organic standards.⁹³ However, organic producers with gross annual organic sales of \$5,000 or less are exempt from certification requirements.⁹⁴ There are two risks of fraud for these exempt producers: first, they may be surpassing the \$5,000 mark but they are avoiding the hassle of certification;⁹⁵ second, they may not be in compliance with the standards because they do not have a certifier annually inspecting and surveying their production practices.⁹⁶ Many certified producers who sell at farmers market or directly to consumers suspect this may be an area of significant fraud.⁹⁷

The SOP is better equipped to enforce organic standards for exempt operations than the NOP. While the NOP has authority to investigate any exempt operation when it receives a complaint or suspects fraud, the NOP does not have information on hand about noncertified entities because they have no obligation to report to NOP, and they are not undergoing the annual inspection or paperwork of certified operations.⁹⁸ In contrast, producers exempt from certification who operate in California must register with and provide production information to the SOP.⁹⁹ The SOP uses this information to conduct investigations as well as spot inspections or residue testing.¹⁰⁰ Thus, the SOP ensures robust oversight over exempt producers, which helps level the playing field at farmers markets and direct to consumer sales channels.

vi. The SOP has Authority to Create Additional Requirements.

A sixth benefit is the SOP has the unique authority to add requirements to organic certification. Its current additional

⁹³ 7 C.F.R. § 205.102 (2017).

⁹⁴ *Id.* § 205.101(a).

⁹⁵ *Id.*

⁹⁶ *Id.* § 205.102; *id.* §205.101(a).

⁹⁷ Damewood, Key Takeaways for SOP Report, *supra* note 43.

⁹⁸ 7 C.F.R. § 205.101(c) (2017).

⁹⁹ California Organic Food and Farming Act, CA AGRIC. CODE § 46013.1 (2017).

¹⁰⁰ *Id.*

requirements—registration and annual fees—provide for reliable funding, marketplace surveillance, and oversight over noncertified operations.¹⁰¹ However, the SOP could also leverage this unique authority to address enforcement issues when the federal rulemaking process is stalled or not making sufficient changes.

For example, the SOP could potentially strengthen the prohibition of the use of GMOs. Organic producers may not use inputs derived from GMOs and they must proactively prevent inadvertent contamination of their crops.¹⁰² Despite this requirement, testing shows that GMO contamination is occurring in organic grains.¹⁰³ Many suspect that contamination most likely occurs when producers use conventional seeds.¹⁰⁴ So one way to strengthen enforcement of the prohibition of GMOs is to add a requirement that producers growing crops at risk of GMO contamination keep records demonstrating the seed they plant has been tested to show no presence of GMOs.¹⁰⁵ Certifiers could then verify that producers have taken all precautions to prevent inadvertent contamination.¹⁰⁶ Thus, the SOP could add requirements to further strengthen enforcement.

But the authority of the SOP to strengthen enforcement through additional requirements—such as requiring increased

¹⁰¹ See *supra* text accompanying section II A (i)-(v).

¹⁰² See 7 C.F.R. § 205.2; *id.* § 205.105(3) (prohibiting the use of excluded methods and defining excluded methods as “[a] variety of methods used to genetically modify organisms”).

¹⁰³ Letter from Danny Lee, Supervising Special Investigator, California State Organic Program, to Industry Stakeholders (May 3, 2017). https://www.cdffa.ca.gov/is/i_&c/pdfs/Organic-Letter_IndustryStakeholders.pdf.

¹⁰⁴ NATIONAL ORGANIC STANDARDS BOARD, CROPS SUBCOMMITTEE PROPOSAL: STRENGTHENING THE ORGANIC SEED GUIDANCE 1 (2017) (“Since the mid-2000s, genetically engineered seeds have led to contamination of the seed supply, and organic seed companies are struggling to stay viable when the adoption of organic seed is not growing at the same rate as the organic products market.”).

¹⁰⁵ CALIFORNIA CERTIFIED ORGANIC FARMERS, PUBLIC COMMENT ON CROPS SUBCOMMITTEE’S PROPOSAL: STRENGTHENING THE ORGANIC SEED GUIDANCE 2 (2017), <https://www.ccof.org/sites/default/files/CCOF%20Comments%20on%20Crops%20Proposal%20-%20Strengthening%20the%20Organic%20Seed%20Guidance.pdf> (“Operations should demonstrate that seeds of at-risk crop have been produced without excluded methods.”).

¹⁰⁶ *Id.*

record keeping for at risk seed—is only theoretical at this time. The SOP's current additional requirements relate to fees and registration;¹⁰⁷ they do not substantively alter enforcement of the federal organic standards.¹⁰⁸ To date, an effort to strengthen standards at the state level have not been made in California; rather, organic stakeholders generally work to strengthen organic standards through the federal rulemaking or guidance process in which the National Organic Standards Board (NOSB) reviews public input and makes recommendations to the NOP for clarification, guidance, or new standards.¹⁰⁹ Thus, the full potential to leverage the authority to impose additional requirements remains untested.

Further, establishing more requirements for certification through the SOP could be quite challenging because CDFA or stakeholders would have to sponsor legislation to change the requirements and then the NOP would have to approve the requirements.¹¹⁰ On one hand, some producers may not support more additional requirements because it would put them at a competitive disadvantage to other producers who certify with fewer requirements.¹¹¹ On the other hand, some producers may welcome stronger enforcement and recognize the potential for California to pave the way for stronger standards as it leads by example. So it is not clear whether an effort to add requirements through the SOP would be successful.

Nonetheless, it is still important to consider the benefits of additional requirements because it could help strengthen enforcement when the federal NOSB and NOP process is stalled. For example, it took the NOSB at least three years before it finalized a recommendation to update the definition of GMOs in

¹⁰⁷ Policy Memorandum from Miles McEvoy, *supra* note 53.

¹⁰⁸ *Id.*

¹⁰⁹ 7 U.S.S. § 6518.

¹¹⁰ California Organic Food and Farming Act, CA AGRIC. § 46000; 7 C.F.R. § 206.620(c) (2017).

¹¹¹ *COFFA FAQs: Policy & Advocacy*, CALIFORNIA CERTIFIED ORGANIC FARMERS, <https://www.ccof.org/policy-advocacy/california-organic-food-and-farming-act/coffa-faqs> (last visited May 2, 2018).

the organic standards.¹¹² And the NOSB recommendation is not enforceable; rather the NOP must go through formal public notice and comment.¹¹³ It can take years before NOP pursues rulemaking on an NOSB recommendation.¹¹⁴ And even if the NOP acts on the recommendation, the rule can be stalled by political pressures or Congressional interference.¹¹⁵ Therefore, the SOP's authority to establish additional requirements is an untested but potentially potent benefit to California's organic producers.

vii. The SOP also has Benefits ancillary to Enforcement.

While the primary purpose of the SOP is enforcement, the program also provides ancillary benefits to the organic sector in California. The SOP provides unique data on organic production, it administers the National Organic Cost Share Program on behalf of California producers, and it has authority to support organic producers through education, outreach, and other programmatic activities.

¹¹² See Letter from Tracy Favre, Chair of National Organic Standards Board to Secretary of Agriculture, U.S. Department of Agriculture, Report to the USDA Secretary on Progress to Prevent GMO Incursion into Organic Agriculture (Nov. 18, 2016), <https://www.ams.usda.gov/sites/default/files/media/MSFall2016ReporttoSecy.pdf> (“To address public concerns, 5 years ago the NOSB established an ad hoc Committee on GMOs”); Letter from Tracy Favre, Chair of National Organic Standards Board to National Organic Program, Formal Recommendation regarding Excluded Methods Terminology (Nov. 18, 2016), <https://www.ams.usda.gov/sites/default/files/media/MSExcludedMethods.pdf> (recommending updates to definitions of GMOs).

¹¹³ Letter from Jeff Moyer, Chair of National Organic Standards Board to National Organic Program, Formal Recommendation regarding Animal Welfare (Nov. 5, 2009), <https://www.ams.usda.gov/sites/default/files/media/NOP%20Final%20Sunset%20Rec%20Animal%20Welfare.pdf> (passing livestock recommendation in 2009); National Organic Program (NOP); Organic Livestock and Poultry Practices—Withdrawal, 82 Fed. Reg. 59,988, 59,988 (Dec. 18, 2017) (to be codified at 7 C.F.R. pt. 205) (noting that NOP issued first publication of final rule for comment on Jan. 19, 2017).

¹¹⁴ See *Rulemaking*, U.S. DEP’T OF AGRIC., <https://www.ams.usda.gov/rules-regulations/rulemaking> (last visited Apr. 4, 2018).

¹¹⁵ *OTA submits comments on animal welfare rule*, AGNEWS FEED (June 9, 2017), <http://agnewsfeed.com/2017/09/11/ota-submits-comments-animal-welfare-rule/> (describing stalls in the implementation of the proposed Organic Livestock and Poultry Practices rule despite overwhelming support from the organic sector and a thorough NOSB process because a few egg companies do not like the rule's provisions).

1. *The SOP has unique data on California production.*

The information collected by the SOP at registration has several uses not related to enforcement. For example, production data may be useful for producers who may evaluate crop trends to make decisions about perennial crop plantings.¹¹⁶ Additionally, county agriculture commissioners report they use SOP registration data to ensure organic farms are not sprayed with prohibited materials when there is a federal or state-mandated pest treatment.¹¹⁷ Finally, organic advocates use data about organic production to make the case for increased public investment in organic research and other programmatic support.¹¹⁸ Thus, the SOP registration data has uses beyond enforcement.

In fact, the unique data collection in California through the SOP is the most reliable data on organic production in the state. Organic data is notoriously difficult to track because traditional agricultural data reporting has not called out organic in the past.¹¹⁹ And most organic data is collected through voluntary reporting while SOP registration reporting is mandatory.¹²⁰ Thus, historically California has had the most reliable farm production data on the organic farming sector because all organic producers are required to report to the SOP every year.

Moreover, California is the only state with reliable data on the organic processing industry.¹²¹ Organic farms and ranches voluntarily report production information to federal statistics and research agencies, but organic processors do not have analogous survey opportunities through federal agencies. In California, however, processors report production information, including gross organic sales, to the SOP.¹²² And the SOP annually reports

¹¹⁶ Kelly Damewood, Notes from COPAC Technical Subcommittee on Registration (Jan.-May 2017) (on file with author).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Interview with Jane Sooby, Senior Policy Specialist, California Certified Organic Farmers, in Santa Cruz, CA (Aug. 1, 2017).

¹²⁰ *Id.*; California Organic Food and Farming Act, CA AGRIC. CODE §§ 46013.1.

¹²¹ See CALIFORNIA STATE ORGANIC PROGRAM FACT SHEET, *supra* note 89.

¹²² DAMEWOOD & SOOBY, *supra* note 12, at 22.

this data back to the industry.¹²³ Reports show that organic food processing has grown to almost \$10 billion in 2016.¹²⁴ This impressive sales number helps organic advocates demonstrate the value of organic to the California economy and make the case for investment in organic.¹²⁵

Despite the benefits of SOP data, it is also important to note that this data is not being used to its fullest potential. Under state law, the SOP must report data on the processing sector annually, but it is not required to report data on farm production.¹²⁶ The SOP makes data available upon specific request, but it does not systematically report the data.¹²⁷ So while the SOP registration data may have many uses, it is currently underutilized because the general public does not have regular access to it.¹²⁸

2. *The SOP administers Cost Share*

Another ancillary benefit of the SOP is it administers the National Organic Cost Share Program (cost share) on behalf of organic farmers in the state.¹²⁹ First authorized in the 2002 Farm Bill, cost share is a federal program that reimburses organic producers 75% of their certification costs, up to \$750 per scope.¹³⁰ The USDA works with state departments of agriculture, and the Farm Service Agency (FSA) to administer cost share.¹³¹ Some state departments choose not to administer it, but the SOP has always been committed to administering it and strives to enroll as many producers as possible in the program.¹³² Due to recent

¹²³ *Id.*

¹²⁴ CDPH REPORT ON ORGANIC PROCESSING FY 2015-16 (on file with author).

¹²⁵ Interview with Jane Sooby, *supra* note 119.

¹²⁶ See CA HEALTH & SAFETY CODE §§110811-12 (requiring annual reporting); CA AGRIC. CODE § 46000, et seq. (not requiring annual reporting).

¹²⁷ Interview with Jane Sooby, *supra* note 119.

¹²⁸ DAMEWOOD & SOOBY, *supra* note 12, at 27-28.

¹²⁹ *Id.* at 27.

¹³⁰ Farm Security and Rural Investment Act of 2002, 7 U.S.C. 6523(d).

¹³¹ *Organic Certification Cost Share Programs*, U.S. DEP'T OF AGRIC., AGRICULTURAL MARKETING SERVICE, <https://www.ams.usda.gov/services/grants/occsdp>, (last visited May 2, 2018).

¹³² Interview with Jane Sooby, *supra* note 119; see also U.S. DEP'T OF AGRIC., REPORT

changes, California producers may also apply through their local FSA office; however, it is helpful for organic producers to apply through the SOP because they already register with the SOP annually.¹³³ Therefore, the SOP benefits the organic sector by administering cost share.

3. *The SOP can support Education, Outreach, and other Programmatic Activities.*

An important but unrealized ancillary benefit of the SOP is its authority to support education, outreach, and other programmatic activities for organic producers. In 2016, California updated and streamlined the SOP through the passage of the California Organic Food and Farming Act (COFFA).¹³⁴ These updates broadened the authority of CDFA and the SOP from solely enforcing federal organic standards to also incorporating education, outreach, and other programmatic activities for organic producers.¹³⁵ While CDFA has not yet acted on this new authority, it is expected that COPAC will consider advising the Secretary of CDFA on new opportunities for the SOP in the future.¹³⁶ Thus, the SOP could implement programs to support and grow organic production in the state.

TO CONGRESS FISCAL YEAR 2015, NATIONAL AND AGRICULTURAL MANAGEMENT ASSISTANCE ORGANIC CERTIFICATION COST SHARE PROGRAMS 4 (2015) (listing California has distributing 88% of cost share funds to 2384 participants), <https://www.ams.usda.gov/sites/default/files/media/FY2015OCCSReporttoCongress.pdf>.

¹³³ *USDA Provides New Cost Share Opportunities for Organic Producers and Handlers*, U.S. DEP'T OF AGRIC. (Dec. 21 2016), <https://www.usda.gov/media/press-releases/2016/12/21/usda-provides-new-cost-share-opportunities-organic-producers-and>.

¹³⁴ Kelly Damewood, *COFFA Signed into Law with your Help*, FROM FIELD TO FORUM (Sep. 26, 2016), <https://www.ccof.org/blog/coffa-signed-law-your-help>. [hereinafter Damewood, *COFFA Signed into Law with Your Help*].

¹³⁵ *Id.*

¹³⁶ Kelly Damewood, *A New Era of Organic Leadership in California*, ORGANIC REPORT (Aug. 17, 2017), <http://theorganicreport.com/new-era-organic-leadership-california> [hereinafter Damewood, *A New Era of Organic Leadership in California*].

viii. The SOP benefits the entire Organic Sector.

The full range of SOP benefits cannot be discussed without considering the impact on national enforcement and the organic marketplace as a whole. As the state with the highest volume of organic production, strong enforcement in California supports consumer confidence in the integrity of organic production and compliance.¹³⁷ Moreover, the SOP essentially subsidizes enforcement throughout the U.S.—by funding its own enforcement through fees, California’s SOP allows the NOP to direct its limited resources toward enforcement in other states.¹³⁸ As discussed below, many California producers resent subsidizing national enforcement.¹³⁹ Nonetheless, additional resources and support for the NOP benefits the entire organic sector because the success of the organic marketplace depends upon strong enforcement.¹⁴⁰ Therefore, the SOP benefits the entire organic sector by providing strong, self-funded enforcement.

B. The Costs of the SOP

While the SOP provides the strongest, most robust enforcement in the U.S., the SOP also has several disadvantages. California organic producers have the highest costs of certification because they pay more fees, comply with more paperwork, operate in a more confusing regulatory landscape, have more communications challenges, and have more need for engagement and advocacy. However, COFFA addresses many of these costs and stakeholders continue to work with CDFA to refine the program.

i. California’s Organic Producers pay more Fees for Organic Certification.

One SOP cost is the requirement that California producers pay an annual SOP registration fee in addition to their certification

¹³⁷ Damewood, Key Takeaways for SOP Report, *supra* note 43.

¹³⁸ *Id.*

¹³⁹ *See infra* text accompanying notes 130-40.

¹⁴⁰ *See supra* text accompanying notes 1-4.

fee.¹⁴¹ The NOP allows the SOP to collect an annual SOP registration fee as an additional requirement to organic certification.¹⁴² Many California producers resent paying an additional fee because they feel it puts them at an unfair advantage to organic producers outside the state who only pay a certification fee.¹⁴³

Many California producers also resent subsidizing national enforcement. The NOP does not spend enforcement dollars in California because the SOP is self-funded through its registration fees.¹⁴⁴ This allows the NOP to spend its enforcement dollars outside the state.¹⁴⁵ So, at the very least, California producers argue that they should receive their fair share of federal enforcement dollars from the NOP.¹⁴⁶

SOP fees also create an additional barrier to certification for small to mid-scale farmers. The fees are relatively low—they range from \$25 to \$3,000 depending on gross annual sales, with the majority paying in the range of \$250. However, farmers operate with thin margins.¹⁴⁷ And California farmers are arguably the most regulated farmers in the world with multiple layers of fees.¹⁴⁸ Small to mid-scale producers report that the fees are a barrier to the success of their business.¹⁴⁹ Therefore, even seemingly small SOP fees challenge producers, especially small to mid-scale farmers.

Organic stakeholders are also concerned that the SOP has an excess reserve fund of about three million dollars.¹⁵⁰ The SOP

¹⁴¹ *California Organic Program*, CAL. DEP'T OF FOOD & AGRIC., https://www.cdffa.ca.gov/is/i_&c/organic.html (last visited May 2, 2018).

¹⁴² Policy Memorandum from Miles McEvoy, *supra* note 53.

¹⁴³ DAMEWOOD & SOOBY, *supra* note 12, at 9.

¹⁴⁴ Interview with Miles McEvoy, *supra* note 84.

¹⁴⁵ *Id.*

¹⁴⁶ DAMEWOOD & SOOBY, *supra* note 12, at 9.

¹⁴⁷ Phil LaRocca, La Rocca Vineyards & Chair of California Certified Organic Farmers, Testimony before California State Board of Food and Agriculture (Feb. 2016).

¹⁴⁸ AMERICAN FARMLAND TRUST, CAL. DEP'T OF FOOD AND AGRIC., CALIFORNIA AGRICULTURAL VISION: STRATEGIES FOR SUSTAINABILITY 11 (2010), https://www.cdffa.ca.gov/agvision/docs/Ag_Vision_Final_Report_Dec_2010.pdf.

¹⁴⁹ *Id.* at 23.

¹⁵⁰ DAMEWOOD & SOOBY, *supra* note, 12 at 9.

first accumulated a large reserve of excess funds in 2009 when every state agency was ordered to freeze spending.¹⁵¹ During that time, the SOP collected fees without expending them on enforcement.¹⁵² Now the SOP reports that it operates at budget, yet the reserve fund continues to grow.¹⁵³ So some stakeholders are concerned about the legitimacy of the SOP growing a large reserve fund while small and mid-scale farmers struggle to pay their fees.

Fortunately, the burden of SOP fees has eased over the last year. In 2016, a new state organic law—the California Organic Food and Farming Act (COFFA)—streamlined SOP registration and updated the fee schedule.¹⁵⁴ It capped the current fee schedule so producers will not see higher fees, and it lowered fees for producers in the lowest category of gross organic sales.¹⁵⁵ Cdfa could also lower SOP fees further, especially given the cost savings of a more streamlined registration process.¹⁵⁶ Therefore, COFFA helped ease some concerns regarding fees.

Additionally, SOP fees are now eligible for cost share reimbursement as an additional scope of certification. California producers may receive up to \$750 in reimbursement for their SOP fees, which would cover the entire SOP fee for most small to mid-scale producers.¹⁵⁷ The downside is that producers must still pay their SOP fee and then apply for reimbursement.¹⁵⁸ And an even more important concern is that cost share is at high risk for defunding in the 2018 Farm Bill because Congress will

¹⁵¹ Interview with Rick Jensen, former Director of Inspection Services, California Department of Food and Agriculture, Sacramento, CA November 24, 2014.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ See California Organic Food and Farming Act, CA AGRIC. CODE § 46000 (2017).

¹⁵⁵ See *Historic Updates to California State Organic Program Becomes Law, Reducing Duplicative Paperwork and Fees*, CALIFORNIA CERTIFIED ORGANIC FARMERS (Sept. 21, 2016), [HTTPS://WWW.CCOF.ORG/PRESS/HISTORIC-UPDATE-CALIFORNIA-STATE-ORGANIC-PROGRAM-BECOMES-LAW-REDUCING-DUPLICATIVE-PAPERWORK](https://www.ccof.org/press/historic-update-california-state-organic-program-becomes-law-reducing-duplicative-paperwork).

¹⁵⁶ See *id.*

¹⁵⁷ *USDA provides new Cost Share Opportunities*, *supra* note 133.

¹⁵⁸ Interview with Jane Sooby, *supra* note 119.

be looking to cut programs that make direct payments such as cost share.¹⁵⁹ So, as long as cost share funds are available and producers make use of the program, the burden of SOP fees is greatly diminished.¹⁶⁰

Concerns regarding the excess reserve fund are also being addressed. COPAC may advise CDFA on the expenditure of the reserve fund; however, it must work through bureaucratic budgeting steps to access the funds.¹⁶¹ COPAC began the process to access the funds in May of 2017.¹⁶² Now it will consider how to best spend the funds, such as updating communications to organic stakeholders about the role and enforcement actions of the SOP.¹⁶³

ii. California organic producers have more paperwork.

Historically, the most significant SOP cost has been cumbersome paperwork and reporting requirements.¹⁶⁴ As part of their annual SOP registration, producers must report information about their crop production.¹⁶⁵ Before COFFA, producers were reporting highly detailed information including gross sales per crop per location¹⁶⁶. These reporting requirements were especially cumbersome for highly diversified operations who may grow over 50 crops.¹⁶⁷ And, just as California farmers pay multiple layers of fees, they also complete multiple layers of state paperwork requirements—they were reporting information to the SOP that they already reported to other state and federal agencies as well as

¹⁵⁹ *Organic Certification Cost-Share at Risk*, NATIONAL ORGANIC COALITION (Dec. 15, 2017), <http://www.nationalorganiccoalition.org/news-items/organic-certification-cost-share-at-risk>. CALIFORNIA ORGANIC PRODUCTS ADVISORY COMMITTEE, Minutes, Public Comment by Laura Batcha of the Organic Trade Association (Jan. 25, 2018), available at <https://www.cdfa.ca.gov/is/uploader/postings/hearings/#hide-fam2009>.

¹⁶⁰ Interview with Jane Sooby, *supra* note 119.

¹⁶¹ *See Inspection Service Minutes*, CALIFORNIA ORGANIC PRODUCTS ADVISORY COMMITTEE, <https://www.cdfa.ca.gov/is/uploader/postings/hearings/#hide-fam2009> (last visited May 4, 2018) (describing multi-step process to access reserve funds).

¹⁶² *See id.*

¹⁶³ *See id.*

¹⁶⁴ Damewood, Key Takeaways for SOP Report, *supra* note 43.

¹⁶⁵ DAMEWOOD & SOOBY, *supra* note 12, at 9.

¹⁶⁶ *Id.* at 29.

¹⁶⁷ *Id.*

their certifiers.¹⁶⁸ The additional and duplicative paperwork was extremely burdensome for producers.¹⁶⁹

However, the cost of excess paperwork has largely been addressed or is being addressed by ongoing refinements to the SOP. COFFA significantly reduced the information required at SOP registration.¹⁷⁰ And the SOP is working with CCOF, which certifies the majority of farms in the state, to develop a data sharing system whereby certifiers can report information on behalf of their clients.¹⁷¹ So the cost of additional paperwork has diminished.

iii. California producers operate in a more challenging regulatory landscape.

An unavoidable cost of the SOP is that it creates a more challenging regulatory landscape for California producers. Even with greatly improved fee and paperwork requirements, the SOP adds another layer of compliance on California producers who have seen significant rises in compliance costs over the last few years. For example, California producers must comply with a wide range of regulations not commonly required in other agricultural states such nutrient management reporting, comprehensive pesticide use reporting, and overtime and minimum wage requirements for farmworkers.¹⁷² Keeping up with regulations and state agencies is especially challenging for small and mid-scale producers who cannot afford staff to oversee compliance.¹⁷³ Therefore, even a streamlined SOP costs California producers

¹⁶⁸ *Id.* at 9.

¹⁶⁹ *Id.* at 29.

¹⁷⁰ Kelly Damewood, *Comment Period Open on State Organic Program Registration Requirements*, FROM FIELD TO FORUM (Aug. 7, 2017), <https://www.ccof.org/blog/comment-period-open-state-organic-program-registration-requirements> [hereinafter Damewood, *Comment Period Open on State Organic Program Registration Requirements*].

¹⁷¹ *Id.*

¹⁷² AMERICAN FARMLAND TRUST TO THE CALIFORNIA STATE BOARD OF FOOD AND AGRICULTURE, CALIFORNIA AGRICULTURAL VISION, (December 2010). https://www.cdfa.ca.gov/agvision/docs/Ag_Vision_Final_Report_Dec_2010.pdf.

¹⁷³ *Id.*

who are under significant regulatory pressures.

iv. SOP creates communication challenges around organic certification and compliance.

Another SOP cost is the communication challenges it creates for organic stakeholders. For many years, organic producers thought that they were paying fees and registering with the SOP for absolutely no reason—they were not aware of the extent of SOP enforcement activities.¹⁷⁴ Although CCOF's work to pass COFFA helped raise awareness about the program, many producers still struggle to understand the role of the SOP.¹⁷⁵ Certifiers must explain to their clients that they cannot finalize certification until their client registers with the SOP.¹⁷⁶ In other words, navigating the certification process is challenging enough for producers but in California they must also grasp the relationship between the SOP, the NOP, and certifiers.

COPAC and CDFA are slowly addressing the communication challenges. Historically, the SOP put out little to no communications about the program.¹⁷⁷ It did not attend industry events such as organic conferences or NOSB meetings.¹⁷⁸ As a result, organic stakeholders had no understanding of the program. Now, COPAC is working to recommend an updated website, newsletter, and other basic communication functions.¹⁷⁹ Additionally, SOP staff have begun engaging in industry events such as hosting a booth at an organic trade show. So some communication challenges are being addressed.

v. Additional need for advocacy and engagement

An important SOP cost is that it will require ongoing advocacy and engagement from organic stakeholders. Like

¹⁷⁴ Damewood, Key Takeaways for SOP Report, *supra* note 43.

¹⁷⁵ Kelly Damewood, notes on input after COFFA (on file with author).

¹⁷⁶ *Id.*

¹⁷⁷ CAL. DEP'T OF FOOD & AGRIC., *supra* note 92, at 9.

¹⁷⁸ *Id.* at 16.

¹⁷⁹ *Id.* at 16-17.

any industry, the organic stakeholders must ensure statewide officeholders and representatives are meeting the unique needs of organic producers and supporting the growth of organic production. But organic is especially challenged in arguing for their fair share of public funds and programs because they compete with powerful conventional lobby groups and critics of organic certification.¹⁸⁰ Moreover, organic advocates spend significant advocacy efforts on improving and protecting organic standards.¹⁸¹ Thus, the need to engage with an additional state program strains organic stakeholders who already struggle to represent the diverse needs of the organic sector.

The importance of stakeholder advocacy and engagement should not be underestimated. The most significant SOP costs were made worse when organic stakeholders failed to engage CDFA and COPAC. Stakeholders did not ask the state to update the fee schedule and other program requirements for over ten years while producers expressed grave concerns about and resentment towards the program.¹⁸² COPAC could have long ago recommended streamlined reporting requirements, better communications, and other improvements; however, the committee struggled to maintain active membership.¹⁸³ And stakeholders failed to go to committee members for help.¹⁸⁴ Now, with renewed engagement from CCOF, the largest organic advocacy group in California, advocacy and engagement have improved.¹⁸⁵ For example, COPAC has nearly a full roster and is working to further refine the program.¹⁸⁶ Nonetheless, organic stakeholders will have to continue to engage with the SOP to ensure it is an effective, not

¹⁸⁰ See *supra* text accompanying notes 19-20.

¹⁸¹ See *id.*

¹⁸² See DAMEWOOD & SOOBY, *supra* note 12; Minutes of January 2016 COPAC meeting (discussing long standing concerns not brought to COPAC's attention and not addressed by SOP).

¹⁸³ Damewood, *A New Era of Organic Leadership in California*, *supra* note 136.

¹⁸⁴ See Minutes of January 2016 COPAC meeting (discussing long standing concerns not brought to COPAC's attention and not addressed by SOP).

¹⁸⁵ Damewood, *COFFA Signed into Law with Your Help*, *supra* note 134.

¹⁸⁶ Damewood, *A New Era of Organic Leadership in California*, *supra* note 136.

overly burdensome program.

C. The Benefits outweigh the Costs.

Overall, the benefits of the SOP outweigh the costs. The SOP has numerous benefits for California's organic producers, which in turn benefits the organic sector as a whole.¹⁸⁷ Although the SOP had significant costs in the past, they have largely been addressed with the passage of COFFA or are being addressed through further refinements to the program.¹⁸⁸ Meanwhile, funding for the NOP and its ability to strengthen standards is increasingly uncertain under the current political climate.¹⁸⁹ Therefore, the SOP is a valuable program and a model for strengthening enforcement through state organic programs because the costs to organic producers in California are diminishing while the benefits are increasingly important.

III. Key Attributes of States with Potential for State Organic Programs.

The benefits of a new state organic program may not outweigh the costs for all states. The costs and benefits of the SOP are directly related to the unique regulatory landscape and the overall production value of organic in the state.¹⁹⁰ Therefore, the costs and benefits of establishing a new state organic program should be considered in the context of that state's own organic production and agricultural regulations.

Applying the SOP as a model, state organic programs are most likely viable in states with the following attributes: additional enforcement adds value to the state's organic sector, organic stakeholders are highly engaged with the state department of agriculture and other agencies, and the state department of agriculture does not have a conflict of interest.

¹⁸⁷ See *supra* text accompanying section II (A).

¹⁸⁸ See *supra* text accompanying section II (B).

¹⁸⁹ See *supra* text accompanying notes 16-18.

¹⁹⁰ See *supra* text accompanying notes 19-20.

A. Additional Enforcement adds Value to the State's Organic Sector.

To justify the costs, state organic programs should add value to the state's organic sector. For example, the SOP adds value because California produces the highest volume of organic products, which increases the risks of noncompliance and fraud.¹⁹¹ By contrast, additional enforcement would not add much value to a state like Mississippi where there is a small amount of organic production and, therefore, relatively low risks of fraud.¹⁹²

But the potential value of additional enforcement should not be judged on volume of organic production in the state alone. The SOP helps with oversight of farmers markets and direct to consumer sales because it has registration data and local staff.¹⁹³ Other states like Hawaii and Northeastern states have a strong direct to consumer market.¹⁹⁴ Therefore, they would likely benefit from more oversight of the use of the term organic at farmers markets and other direct to consumer sales channels.¹⁹⁵

Another factor impacting the value of additional enforcement would be risks associated with the types of crops grown in the state. The SOP's random testing and inspections help identify issues such as GMO contamination.¹⁹⁶ So state organic programs may be helpful in a state like Montana where grain is staple crop for organic producers.¹⁹⁷

Thus, states should consider the volume of organic production, the types of sales channels, risks associated with the state's main organic crops, and other factors when weighing the value of a state organic program.

¹⁹¹ See *supra* text accompanying notes 133-36.

¹⁹² U.S. DEP'T OF AGRIC., *supra* note 1, at 1.

¹⁹³ See *supra* text accompanying section II (A) (ii), (v).

¹⁹⁴ *Id.*

¹⁹⁵ U.S. DEP'T OF AGRIC., *supra* note 1, at 2.

¹⁹⁶ Letter from Danny Lee, *supra* note 103.

¹⁹⁷ U.S. DEP'T OF AGRIC., *supra* note 1, at 1-2.

B. Organic Stakeholders are Highly Engaged with the State Department of Agriculture and other Regulatory Agencies.

It is also important to consider the level of engagement and advocacy a state may expect from organic stakeholders. One of the long standing problems with the SOP was a lack of understanding about the program and engagement from the community to improve its outdated requirements.¹⁹⁸ If a state does not have existing organic organizations or trade associations, then it will be difficult for producers to understand state organic program developments or to advocate for changes to the program. But, for example, a state like Montana has an active organic farming association, which would presumably engage with a state organic program to represent the interests of its growers.¹⁹⁹ Therefore, the level of engagement a state may expect from organic stakeholders will determine whether a state organic program will have long lasting benefits without overly burdening the state's organic producers.²⁰⁰

C. The State Department of Agriculture does not have a Conflicts of Interest.

Finally, state organic programs may not be appropriate for states where the state department of agriculture operates an organic certification agency. State organic programs can overrule a certifier's decision and must work with all certifiers in the state.²⁰¹ So a state department of agriculture may have a real or perceived conflict of interest if it operates both a state organic program and a state certifier.²⁰² California has never operated an organic certification agency, and it is the only state that has applied for state organic program status.²⁰³ Therefore, the potential conflict

¹⁹⁸ See *supra* accompanying text for notes 164–169.

¹⁹⁹ *Montana Organic Association*, <http://montanaorganicassociation.org/> (last visited May 2, 2018).

²⁰⁰ See *supra* text accompanying notes 193–94.

²⁰¹ See *supra* accompanying text for notes 40–59.

²⁰² *Id.*

²⁰³ Interview with Miles McEvoy, *supra* note 84.

of interest issue has yet to be tested.

If a conflict of interest exists, then some state certifiers should consider becoming state organic programs. For example, Oregon has a long-established, well-respected private certifier—Oregon Tilth—as well as many other certifiers operating in the region while its state certifier is relatively new.²⁰⁴ Given the high amount of organic production in the state, a state organic program would make sense for Oregon’s department of agriculture.²⁰⁵ In contrast, WSDA has long certified producers in the state.²⁰⁶ So if a conflict of interest exists, then it may be more worthwhile to replace some state certifiers with state organic programs but it will depend upon the history and reputation of the certifier.

IV. Recommendations for Structuring State Organic Programs

Using the costs and benefits of the SOP as a model, a new state organic program should be structured under the following principles: high accountability, streamlined requirements, and fair funding sources.

A. State Organic Programs should have High Accountability to the State’s Organic Stakeholders.

New state organic programs can avoid the downfalls of the SOP by putting in place a program structure that ensures high accountability to the state’s organic sector. Prior to COFFA, one core issue with the SOP was lack of accountability—it had poor communications, outdated requirements, and low engagement with the organic community.²⁰⁷ Therefore, new state organic programs should be structured to ensure high accountability.

²⁰⁴ *Oregon Tilth*, <https://tilth.org/about/history/> (last visited May 3, 2018).

²⁰⁵ U.S. DEP’T OF AGRIC., *supra* note 1, at 1.

²⁰⁶ Heidi Peroni, *Organic Roots: Washington’s Extensive History of Organic Agriculture and Certification*, AG BRIEFS, (Sep. 14, 2016) <https://wastatedeptag.blogspot.com/2016/09/organic-roots-washingtons-extensive.html>.

²⁰⁷ *See supra* text accompanying notes 179-83.

To ensure high accountability, a state organic program should incorporate the following programmatic features: a concise advisory committee, staff attendance at industry trainings and events, state of the art communications, and a sunset date.

i. Establish a concise, meaningful advisory committee.

State organic programs should have advisory committees made up of a small, but representative number of committee members. COPAC advises the Secretary of CDFA on the SOP, but low participation in COPAC resulted in ongoing issues with the SOP.²⁰⁸ Some would argue that COPAC has too many seats to fill, including alternate seats, which requires ongoing outreach and support from NGOs and other stakeholders.²⁰⁹ A more effective committee would have a limited number of seats with no alternates—this would make selection more competitive and incentivize higher participation by sitting members. Another problem with COPAC is that it did not include a certifier seat, which made it difficult for the committee to address coordination with certifiers or complicated certification issues.²¹⁰ Therefore, new state organic programs should have concise advisory committees.

Additionally, the committee members must have authority to advise the program on meaningful recommendations. One reason for low COPAC participation was its limited authority to advise the Secretary CDFA on enforcement activities.²¹¹ COFFA broadened COPAC's authority, so it may now advise the Secretary of CDFA on a range of activities related to organic production.²¹² This broader authority is attracting more interest and participation from stakeholders.²¹³ Thus, state organic programs should have

²⁰⁸ Damewood, *A New Era of Organic Leadership in California*, *supra* note 136.

²⁰⁹ Damewood, Key Takeaways for SOP Report, *supra* note 43.

²¹⁰ Peter Nell, *CCOF Representation on COPAC Increases with Key Appointments, FROM FIELD TO FORUM* (May 1, 2017), <https://www.ccof.org/blog/ccof-representation-copac-increases-key-appointments>.

²¹¹ Damewood, Key Takeaways for SOP Report, *supra* note 43.

²¹² California Organic Food and Farming Act, CA AGRIC. § 46003(b) (2017).

²¹³ Damewood, *A New Era of Organic Leadership in California*, *supra* note

concise advisory committees who also advise on a range of topics related to organic production.

ii. Require staff attendance at Industry Trainings and Events

State organic programs should require staff to attend industry trainings and events. NOP hosts annual trainings for certifiers to ensure they are up to date on standards and enforcement activities as well as promote a consistent certification process among the certifiers.²¹⁴ However, SOP did not regularly attend these trainings until 2010 when NOP audited the SOP and directed the SOP to require attendance at NOP-hosted trainings.²¹⁵ SOP staff also did not frequent industry events such as organic conferences or NOSB meetings until work began to reform the SOP through the passage of COFFA.²¹⁶ Now, staff attend industry events such as organic conferences or NOSB meetings, which is improving communication with the industry.²¹⁷ Therefore, state organic program staff should attend industry trainings and events.

iii. Use State of the Art Communications

State organic programs should use state of the art communications. Perhaps one of the greatest downfalls of the SOP was its poor communications to the organic sector—the majority of organic producers in the state assume the SOP only collects fees;²¹⁸ they do not understand the SOP’s important enforcement functions.²¹⁹ By contrast, California’s new program to regulate cannabis production, CalCannabis, has a reader-friendly, regularly

136.

²¹⁴ See *Organic Training*, U.S. DEP’T OF AGRIC., AGRICULTURAL MARKETING SERVICE, [HTTPS://WWW.AMS.USDA.GOV/SERVICES/ORGANIC-CERTIFICATION/TRAINING](https://www.ams.usda.gov/services/organic-certification/training) (last visited May 3, 2018) (listing ongoing trainings for certifiers).

²¹⁵ Letter to David Carlson, Senior Special Investigator for CDFA’s SOP from U.S. Department of Agriculture, Agricultural Marketing Service, National Organic Program (on file with author) (regarding 2009 audit May 11, 2010).

²¹⁶ Interview with Jane Sooby, *supra* note 119.

²¹⁷ *Id.*

²¹⁸ Damewood, Key Takeaways for SOP Report, *supra* note 43.

²¹⁹ *Id.*

updated webpage, social media accounts, accessible flyers, and other useful communication tools.²²⁰ Producers regulated under CalCannabis already have much more public information available to them than producers regulated under the SOP.²²¹ Thus, new state organic programs should use state of the art communications from the outset.

iv. Establish a Sunset Date

State organic programs should have sunset dates. A sunset date is a date in the authorizing legislation when the program will expire unless renewed by legislation.²²² Although a sunset date is severe, it ensures accountability because organic stakeholders will have to weigh in with their state representatives when the state legislature votes on whether to renew the program. Organic stakeholders advocated for the original law establishing the SOP; however, when the NOP implemented the national standards, many stakeholders no longer supported the SOP.²²³ Rather, they wanted to be on the same regulatory playing field as producers in other states who were all subject to national standards and certification.²²⁴ But the SOP did not consult with stakeholders when it applied for state organic program status with the NOP.²²⁵ Thus, state organic programs should have sunset dates to ensure buy in from the state's organic stakeholders.

B. Streamline Paperwork

The second principle for new state organic programs is

²²⁰ See *CalCannabis: What We Do*, CAL. DEPT. FOOD & AGRIC., <http://calcannabis.cdfa.ca.gov/> (last visited May 3, 2018) (hosting a reader-friendly, modern webpage with resources, an events & activities paged, and photos).

²²¹ See California Organic Program, CAL. DEPT. OF FOOD & AGRIC. (last visited August 1, 2017) (listing details about the program but showing no branding or reader-friendly interface; hosting one fact sheet created in 2016; not hosting any details about COPAC meetings).

²²² BRIAN BAUGUS & FELER BOSE, MERCATUS CTR. AT GEORGE MASON UNIV., *SUNSET LEGISLATURE IN THE STATES: BALANCING THE LEGISLATURE AND THE EXECUTIVE* 3 (2015), <https://www.mercatus.org/system/files/Baugus-Sunset-Legislation.pdf>.

²²³ LaRocca, *supra* note 147.

²²⁴ *Id.*

²²⁵ CAL. DEP'T OF FOOD & AGRIC., *supra* note 92, at 17-18.

streamlined paperwork. State organic programs should collect data from certifiers rather than from producers. And they should share their data with state and federal agencies to avoid duplication of other reporting requirements.

i. State organic programs should collect data from certifiers rather than producers.

State organic programs should have as streamlined paperwork requirements as possible to ensure the program does not overly burden producers. COFFA helped ease the most significant cost of compliance for the SOP, excess paperwork, by greatly reducing the information producers must report at registration.²²⁶ And paperwork may be eliminated altogether when CDFA establishes a data sharing system with certifiers.²²⁷ While some certifiers may need to collect more information at certification to ensure they have all the information the SOP needs, it will be more efficient for the SOP to collect data from the 20 (give or take) certifiers operating in the state rather than the 3,000 plus individual farmers and ranchers.²²⁸ Thus, state organic programs can streamline paperwork at the outset by collecting registration information from certifiers rather than directly from individual producers.

ii. State organic programs should share data with other state and federal agencies.

State organic programs should share their data and registration information with other state and federal agencies because it could help ease the burden of duplicate reporting requirements. Organic producers report the same information in many different formats to many different agencies. For example, they complete annual production surveys for agencies like the Economic Research Service or the National Agriculture

²²⁶ See *supra* text accompanying notes 161-62.

²²⁷ CAL. DEP'T OF FOOD & AGRIC., *supra* note 92, at 11.

²²⁸ *Id.*

Statistics Service.²²⁹ They also report production information for programs under the Farm Services Agency, the National Resource Conservation Service, and crop insurance programs.²³⁰ And they may have to report to state agencies like departments of pesticide regulation or water quality control boards.²³¹ If state organic programs can share their information in such a way that it eliminates the need for producers to complete separate forms or reporting requirements, then the SOP would greatly benefit producers by streamlining paperwork across a variety of agencies and programs.

C. Establish a Fair Funding Source

The final principal for state organic programs is a fair funding source. A long-time concern of California producers is that they subsidize national enforcement by paying an unfair, additional fee in California. There are two complimentary solutions to establishing a fair funding source for a state organic program: NOP could allocate some funds to the program, and the state organic program can collect fees from certifiers rather than directly from individual producers.

i. NOP could allocate Funds to State Organic Programs.

The NOP could direct enforcement funds to state organic programs to ensure producers in those states receive their fair share of NOP resources. Arguably, the NOP should help fund investigations in California because it funds investigations in all other states.²³² But the SOP also takes on enforcement activities that the NOP cannot afford in other states, like spot inspections and residue testing.²³³ NOP could give SOP funds for investigations while the SOP continues to fund its additional enforcement activities through fees. Thus, NOP could ensure producers receive

²²⁹ Interview with Jane Sooby, *supra* note 119.

²³⁰ *Id.*

²³¹ *Id.*

²³² See *supra* text accompanying notes 140-42.

²³³ See *supra* text accompanying sections II (A)(i), (iv).

their fair share of enforcement resources by allocating funds to state organic programs for investigations.

ii. State organic programs should collect fees from certifiers rather than individual producers.

State organic programs should ensure they maintain a reliable funding source. NOP allocations should not be the sole income stream for state organic programs because the NOP has limited resources, and its funding is subject to Congressional discretion.²³⁴ By contrast, one of the benefits of the SOP is a consistent, abundant funding stream through registration fees.²³⁵ Therefore, state organic programs will need a locally generated funding source.

The most reliable way to ensure a funding source is fees not funds from the state general fund. Organic stakeholders would have to successfully pass legislation directing general funds to the program. This would be a challenging political lift for many states. Additionally, general funds are not as reliable as fees because they are subject to the discretion of the state legislature. So the most reliable funding source would be a fee-based program.

To be most cost effective and limit the burden on producers, state organic programs should collect fees from certifiers rather than individual producers. COFFA now allows certifiers to renew their clients' registration on their behalf.²³⁶ However, the only certifier pursuing this option, CCOF, cannot renew their members registration at this time because collecting and passing on the mandatory registration fee is too challenging.²³⁷ A more straightforward option would be to levy a fee on certifiers rather than directly on individual producers. The certifier would pass

²³⁴ See *supra* text accompanying notes 16-18.

²³⁵ See *supra* text accompanying section II (A)(i).

²³⁶ California Organic Food and Farming Act, CA AGRIC. CODE § 46014.1(c) (2017).

²³⁷ See Damewood, *A New Era of Organic Leadership in California*, *supra* note 136 (stating that CCOF would pursue the option to renew their members certification); Damewood, *Comment Period Open on State Organic Program Registration Requirements*, *supra* note 170 (stating CCOF would pursue data sharing with CDEA but no longer stating it would pursue option to renew registration).

that cost onto its clients; however, producers would have the benefit of only one billing for their certification a year. Moreover, collecting from certifiers may reduce the fee because there will be cost savings when the program collects fees from 25-30 certifiers rather than over 3,500 individual organic operations every year. Thus, collecting fees from certifiers would provide stable, consistent funding for state organic programs.

Conclusion

Organic stakeholders should consider how to better leverage state organic programs as they work to advance their farm bill priorities. While there are a number of options to shore up enforcement through the farm bill process, state organic programs offer a viable, often-overlooked solution to strengthening organic enforcement without further changes to OFPA. As demonstrated in California, state organic programs create a robust enforcement scheme at the state-level and add valuable support to NOP. Therefore, organic stakeholders should consider establishing state organic programs to support organic enforcement throughout the United States.

But new state organic programs should not simply replicate the SOP; rather, they should learn from the successes and failures of the SOP to ensure effective programs in the future. Specifically, state organic programs should be established in states where additional enforcement adds value to the organic sector, where organic stakeholders are highly engaged with the state department of agriculture and other regulatory agencies, and where no conflict of interest exists for the state department of agriculture. And new programs should be structured to include the following principles: accountability, streamlined paperwork, and fair funding sources. By using the SOP as a model, organic stakeholders are well poised to create effective state organic programs in new states.

Thus, organic stakeholders in some states should consider establishing state organic programs with the recommended guiding principles outlined in this article because additional state

organic programs would support national efforts to strengthen NOP enforcement resources in the next farm bill.