

# **Floods and Organic Producers: Steps to Recovery after a Natural Disaster**

**Farmers' Legal Action Group, Inc.**

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These materials are intended to provide general legal information. Farmers with specific questions should consult an attorney for advice regarding their particular situation.

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## **Floods and Organic Producers: Steps to Recovery after a Natural Disaster**

### **I. Floods and Organic Producers: Introduction**

During a flood or other natural disaster there will be a series of challenges facing every farmer. For an organic farmer, the flood or other natural disaster will have results that can be unique to organic production.

This booklet presents a short summary of some of the issues that organic producers may face during a natural disaster – and in particular with a flood.<sup>1</sup>

### **II. Before the Flood**

One of the merits of organic agriculture is greater resilience in the face of a natural disaster. Soils on organic farms, for example, seem better able to hold moisture during drought years and are more productive during extremely wet years.<sup>2</sup>

The organic plan that farmers adopt, and the records that organic farmers are required to keep, may help farmers after a natural disaster strikes.<sup>3</sup> This is especially true for the records kept along with the plan.<sup>4</sup> Successful use of disaster assistance programs often requires detailed records of crop yields and prices, of livestock harmed in the disaster or sold earlier than planned due to feed shortages, and other information. An organic farm is likely to have the records required for disaster programs. Disaster assistance for farmers sometimes comes in the form of programs created or funded by Congress long after the disaster. Well-maintained records can help farmers document losses from previous years and establish eligibility for late-enacted programs.

### **III. After the Flood: Some Early Steps**

In the early stages of flood recovery, several steps may be helpful for organic farmers.

#### **A. Document the Damage**

Almost every form of assistance for recovery for a disaster will require documentation of the effects on the farm of the disaster. One of the first steps a farmer should take in recovering from

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<sup>1</sup> An earlier FLAG publication, *Natural Disaster and Organic Certification* (2007), covered some of the same topics, but is now generally outdated.

<sup>2</sup> See, for example, D.W. Lotter et al., *The Performance of Organic and Conventional Cropping System in an Extreme Climate Year*, 18(3) *American Journal of Alternative Agriculture* 146 (2003).

<sup>3</sup> 7 C.F.R. § 205.2, “Organic system plan” (2016); 7 C.F.R. § 205.201(a) (2016).

<sup>4</sup> See National Organic Program, *Instruction: Recordkeeping*, NOP 2602 (July 22, 2011).

a disaster is to document the damage to the farm. Pictures and descriptions of facilities or land damaged, animals harmed, information on crops lost and plantings prevented, and other records of what happened will be helpful down the road.

## **B. Make Important Contacts**

Recovery from a farm flood will be slow and hard. Among the first steps in a recovery from the flood is to contact some people about the flood.

Those to contact should include the following.

### **(1) Organic Certifier**

Organic farmers must submit updated information to the certifying agent each year.<sup>5</sup> An organic farmer affected by natural disaster should immediately notify the certifying agent of any change in the farming operation that may affect the farmer's compliance with organic requirements.<sup>6</sup>

In particular, organic farmers should notify their certifiers right away if a natural disaster leads to application of a "prohibited substance" to the operation.<sup>7</sup>

### **(2) Insurers**

Many organic farmers will have crop insurance. If so, farmers should contact that insurance provider right away. There may be important decisions and actions to take to preserve an insurance claim.

The same is true for hazard, flood, or other forms of insurance. The sooner insurance companies are notified about claims that the farmer may have the better.

### **(3) USDA**

Some organic farmers have significant and longstanding contacts with local USDA offices. For example, some growers will have signed up for Noninsured Crop Assistance Program (NAP). These farmers should contact USDA about NAP benefits right away.

Other farmers will not have had much contact with USDA. These producers may still be in position to benefit from USDA disaster programs over the medium and longer term. Farmers should make sure they know about the programs that may help. The various forms of assistance possibly available from USDA -- cost-sharing, loans, livestock disaster benefits, and others -- can only be applied for if the producer knows about them.

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<sup>5</sup> 7 C.F.R. § 205.406 (2016).

<sup>6</sup> 7 C.F.R. § 205.400(f)(2) (2016).

<sup>7</sup> 7 C.F.R. § 205.400(f)(1) (2016).

Whether the grower has had much contact with USDA in the past or not, after a disaster strikes it makes sense for the farmer to contact USDA, let USDA know that the farm has been hit by the disaster, and explain that the farmer is interested in knowing about any program that might be able to help in the disaster recover.

#### **(4) Other Programs May Be Available**

After flooding there will be a number of programs likely available that are not especially designed for farmers. These programs, such as Disaster Unemployment Benefits, Federal Emergency Management Agency (FEMA) benefits, and others may be available for farmers. These benefits are only available to those that apply.

### **IV. Organic Certification Issues**

#### **A. The Organic Plan: Changes May be Needed**

Every organic producer has a detailed “Organic System Plan (OSP).”<sup>8</sup> These plans concern almost all aspects of agricultural production, recordkeeping, and management practices.

##### **(1) Yearly Update**

Organic plans are updated every year.<sup>9</sup> Flooding may mean that the farmer needs to change the plan at the annual review.

##### **(2) Mid-Year Changes**

Organic regulations allow a farmer to change the plan in the middle of the year as long as the plan still meets organic requirements.<sup>10</sup> If there are changes in the operation that are not called for in the organic plan – and the changes may affect the farms compliance with organic regulations -- the farmer must notify the organic certifier.<sup>11</sup> The certifier must agree to changes in the plan.

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<sup>8</sup> 7 C.F.R. § 205.201 (2016). Plans are described in detail in National Organic Program, Instruction: Organic System Plans, Organic System Plan Updates, and Notification of Changes, NOP 2615 (December 16, 2013).

<sup>9</sup> 7 C.F.R. § 205.406 (2016); National Organic Program, Instruction: Organic System Plans, Organic System Plan Updates, and Notification of Changes, NOP 2615 § 3.3 (December 16, 2013).

<sup>10</sup> 7 C.F.R. § 205.201(b) (2016); National Organic Program, Instruction: Organic System Plans, Organic System Plan Updates, and Notification of Changes, NOP 2615 § 3.4 (December 16, 2013).

<sup>11</sup> National Organic Program, Instruction: Organic System Plans, Organic System Plan Updates, and Notification of Changes, NOP 2615 § 3.4 (December 16, 2013).

Similarly, if the farmer adds acres or a new facility to the operation, this must be reported to the certifier. Organic rules are written to suggest that even changes that seem small need to be reported. As the rules say, “any changes that may affect compliance with the regulations” should be reported to the certifier.<sup>12</sup> The farmer can report changes to the certifier either verbally or in writing.<sup>13</sup> It is probably wise, however, for the farmer to do both.

### **(3) Report Prohibited Substances**

If a “prohibited substance” is applied to the organic cropland, the farmer must report this to the certifier.<sup>14</sup> This is true even if the application of the prohibited substance was an accident.

## **B. “Temporary Variance” from Some Organic Requirements Possible**

A natural disaster, such as a flood, may make some parts of the organic program impossible to maintain. USDA’s Agricultural Marketing Service (AMS) is allowed to grant “temporary variances” from some organic rules during a flood or other natural disaster.

### **(1) Temporary Variances Can Provide Some Relief**

AMS is allowed to grant what are called “temporary variances” from some organic rules when there is a natural disaster declared by USDA.<sup>15</sup> AMS may also do so for an undeclared disaster if there is damage caused by “drought, wind, flood, excessive moisture, hail, tornado, earthquake, fire, or other business interruption.”

### **(2) Temporary Variances are Granted**

AMS grants temporary variances with some regularity and natural disasters – especially droughts – have been a common trigger for the variances.<sup>16</sup> At times AMS has approved a waiver for broad areas. One variance in 2011, for example, applied to the entire state of Texas. In 2012, AMS granted a variance relating to dry matter pasture requirements for hundreds of counties.

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<sup>12</sup> National Organic Program, Instruction: Organic System Plans, Organic System Plan Updates, and Notification of Changes, NOP 2615 § 3.4 (December 16, 2013).

<sup>13</sup> National Organic Program, Instruction: Organic System Plans, Organic System Plan Updates, and Notification of Changes, NOP 2615 § 3.4 (December 16, 2013).

<sup>14</sup> National Organic Program, Instruction: Organic System Plans, Organic System Plan Updates, and Notification of Changes, NOP 2615 § 3.4 (December 16, 2013).

<sup>15</sup> 7 C.F.R. § 205.290(a) (2016).

<sup>16</sup> Current and past temporary variances are listed in the USDA website. See <https://www.ams.usda.gov/sites/default/files/media/NOP-TemporaryVariances.pdf> and <https://www.ams.usda.gov/sites/default/files/media/NOP-ExpiredVariances.pdf>.

### **(3) Some Rules CAN Be Temporarily Waived**

The following areas of organic requirements CAN be changed in a temporary variance.<sup>17</sup>

#### **a. Soil Fertility**

Organic rules set out the tillage and cultivation practices that may be used.<sup>18</sup> In general, these rules improve the condition of the soil and prevent erosion, require use of cover crops and rotations, and farming in way that does not contribute to the contamination of crops soil or water by residues of prohibited substances.

#### **b. Crop Practices, Rotations, Pest Management**

Organic rules require farmers to use organically grown seeds, annual seedlings, and planting stock.<sup>19</sup> Organic rules also require producers to use crop rotations in order to benefit soil organic matter, manage pests, manage plant nutrients, and provide erosion control.<sup>20</sup> Organic producers also must use certain practices to manage pests, weeds and disease.<sup>21</sup> These include for example, crop rotation, nutrient management practices, and cultural practices to prevent pest's weeds, and disease.

#### **c. Origin of Livestock**

Organically certified livestock must meet origin and management rules that vary depending on whether the animals are poultry, dairy, breeder stock, and so forth.<sup>22</sup> The rules say that livestock or edible livestock product may not be removed from an organic operation to a nonorganic operation and still be certified as organic. Similarly, breeder or dairy stock that must be been managed under continuous organic management since the last third of gestation.

#### **d. Confinement of Livestock**

An organic livestock producer must establish and maintain livestock living conditions that accommodate the health and natural behavior of animals. Specific rules govern confinement of

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<sup>17</sup> 7 C.F.R. § 205.290(a) (2016). Temporary variances may be granted for requirements found in 7 C.F.R. §§ 205.203 to 205.207, for §§ 205.236 to 205.240, and for §§ 205.270 to 205.272 (2016).

<sup>18</sup> 7 C.F.R. § 205.203 (2016).

<sup>19</sup> 7 C.F.R. § 205.204 (2016).

<sup>20</sup> 7 C.F.R. § 205.205 (2016).

<sup>21</sup> 7 C.F.R. § 205.206 (2016).

<sup>22</sup> 7 C.F.R. § 205.236 (2016); Linda Coffey and Ann H. Baier, National Center for Appropriate Technology (NCAT), Guide for Organic Livestock Producers 45-46 (November 2012).

animals, access to the outdoors, and other aspects of livestock management.<sup>23</sup> The rules say that animals may be temporarily confined due to “inclement weather.”<sup>24</sup> A temporary waiver might allow for animals to be confined in addition to this consideration.

**e. Pasture Access for Ruminants**

Ruminant livestock -- including sheep, goats, dairy, beef cattle, and some other animals -- are required by organic rules to have a certain level of access to pasture.<sup>25</sup> Organic rules also govern the feed that may be fed to livestock.<sup>26</sup>

**(4) Prohibited Substances, Methods, and Ingredients CANNOT be the Subject of a Temporary Waiver**

As organic farmers know well, organic rules strictly ban the use of a number of “prohibited substances, methods, and ingredients” in organic production.<sup>27</sup> A temporary variance is NOT possible for prohibited substances, methods, and ingredients.<sup>28</sup>

**(5) Feeding of Livestock --- AMS Says They Will Not Approve**

Organic rules require organic feed to be fed to organic livestock.<sup>29</sup> Organic regulations allow this aspect of the organic rules to be waived by a temporary variance.<sup>30</sup> AMS, however, says that it will not approve temporary variances for this purpose.<sup>31</sup>

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<sup>23</sup> 7 C.F.R. § 205.239 (2016).

<sup>24</sup> 7 C.F.R. § 205.239(b) (1) (2016). Inclement weather is defined as weather that is “violent, or characterized by temperatures (high or low), or characterized by excessive precipitation” that can result in “physical harm to a given species of livestock.” If the weather limits yield or growth rates below the maximum that is possible, that does not count as inclement weather for this purpose. 7 C.F.R. § 205.2 (2016).

<sup>25</sup> 7 C.F.R. § 205.240 (2016); Lee Reinhart and Ann H. Baier, National Center for Appropriate Technology (NCAT), Pasture for Organic Ruminant Livestock: Understanding and Implementing the National Organic Program (NOP) Pasture Rule (May 2011).

<sup>26</sup> 7 C.F.R. § 205.237 (2016).

<sup>27</sup> 7 C.F.R. § 205.105 (2016).

<sup>28</sup> 7 C.F.R. § 205.290(e) (2016).

<sup>29</sup> 7 C.F.R. § 205.237 (2016).

<sup>30</sup> According to 7 C.F.R. § 205.290(a) (2016), temporary variances may be granted for requirements found in 7 C.F.R. §§ 205.203 to 205.207, for §§ 205.236 to 205.240, and for §§ 205.270 to 205.272. Feed rules are at 7 C.F.R. § 205.237 (2016).

<sup>31</sup> National Organic Program, Instruction: Temporary Variance, NOP 2606 § 3 (November 20, 2015).



## **(6) How a Temporary Variance Application is Created**

For a temporary variance to be put in place, the following steps must take place.<sup>32</sup>

### **a. Farmers can Request Variance**

Farmers can ask for a temporary variance.<sup>33</sup> Farmers should send the request to their certifier. The request must be in writing and must include “supporting documentation” that explains why the variance is needed.

### **b. Certifiers – Review Request**

The certifier reviews requests for temporary variances from farmers.<sup>34</sup> Certifiers then forward the request on to AMS along with a recommendation of whether the temporary waiver should be granted.

### **c. AMS Makes Decision**

At AMS the request is first reviewed by the National Organic Program (NOP).<sup>35</sup> NOP then recommends to the AMS Administrator whether to grant or deny the temporary variance.

If the AMS Administrator grants the temporary variance a “Notice of Temporary Variance Approval” will be issued by the National Organic Program. It will include the scope, restrictions, duration of the temporary variance.

If the temporary variance is denied, a notice of denial will be issued. It will include the reason for the denial.

## **(7) If Temporary Variance is Granted**

If AMS grants a temporary variance, AMS will give written notification to certifying agents and set out the period of time in which the variance will be in effect.<sup>36</sup> AMS has the power to extend the temporary variance period as AMS thinks is necessary.

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<sup>32</sup> National Organic Program, Instruction: Temporary Variance, NOP 2606 (November 20, 2015).

<sup>33</sup> National Organic Program, Instruction: Temporary Variance, NOP 2606 § 4.1 (November 20, 2015).

<sup>34</sup> National Organic Program, Instruction: Temporary Variance, NOP 2606 § 4.2 (November 20, 2015).

<sup>35</sup> National Organic Program, Instruction: Temporary Variance, NOP 2606 § 4.3 (November 20, 2015).

<sup>36</sup> 7 C.F.R. § 205.290(c) (2016).

Once certifiers are notified by AMS of the establishment of a temporary variance, the certifiers must notify the operations that would be affected by the temporary variance.<sup>37</sup>

Other than requirements specifically granted a temporary variance, all other organic certification requirements continue to apply.

If it is granted the variance will only be temporary. Farmers must keep records on the practices or procedures that were affected by the variances.<sup>38</sup>

### **C. Prohibited Substances on an Organic Farm During Flooding**

One concern that arises with floods is that contamination is carried by flood water and deposited on farms.

#### **(1) Prohibited Substances and Organic Farming**

Prohibited substance rules are well known to organic farmers. Any field or farm parcel from which harvested crops are intended to be sold, labeled, or represented as organic must have had no prohibited substances applied to it for a period of three years immediately preceding harvest of the crop.<sup>39</sup>

#### **(2) Notify Certifier of Drift or Unintended Application**

Organic farmers must notify the certifier concerning any application of a prohibited substance to an organic operation.<sup>40</sup> Application, for this purpose, includes drift, and drift is defined as the physical movement of prohibited substances from the intended target site onto an organic farm. As a result, farmers must notify certifiers of any possible contamination which occurs as a result of natural disaster.

#### **(3) Certifiers Will Inspect and May Test**

When there is reason to believe that an organic product has come into contact with a prohibited substance, the certifier or USDA may require testing of a sample of the agricultural product.<sup>41</sup> A natural disaster may provide the basis for a belief that contamination has occurred.

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<sup>37</sup> 7 C.F.R. § 205.290(d) (2016).

<sup>38</sup> National Organic Program, Instruction: Temporary Variance, NOP 2606 § 4.1 (November 20, 2015).

<sup>39</sup> 7 C.F.R. § 205.202(b) (2016).

<sup>40</sup> 7 C.F.R. § 205.400(f)(1) (2016). Drift is defined as the physical movement of prohibited substances from the intended target site onto an organic farm or field. 7 C.F.R. § 205.2 (2016).

<sup>41</sup> 7 C.F.R. § 205.670(b) (2016).

Certifiers are likely to inspect the flooded farm and look for signs of prohibited substances – for example oil residues. They may also collect samples for testing. Certifiers doing testing must follow certain procedures.<sup>42</sup>

#### **(4) Possible Exclusion from Sale as Organic**

If a prohibited substance is found on an agricultural product at levels that exceed the organic standard limits, the agricultural product must not be sold as organic.<sup>43</sup> It may be sold in conventional markets if it does not violate any other generally applicable laws.

In theory, therefore, a flood could end up causing an organic farm to be unable to sell some products as organic.

#### **(5) Appeal Rights**

Producers have the right to appeal adverse decisions under the National Organic Program.<sup>44</sup> If a farmer has goods that are ruled by the certifier to not qualify as organic the farmer has a right to appeal.

### **V. FDA and Food Safety Issues**

Flood water, it is important to remember, can be contaminated by any number of sources – such as overflow from septic systems, animal manure, chemicals, fuel, heavy metals, bacteria, viruses, and parasites.

As a result, the Food and Drug Administration (FDA), which along with a number of other government agencies, regulates food safety, has created a set of rules that apply when a farm has been flooded. The following discussion applies to all farms, not just organic farms.

#### **A. Flood Waters “Adulterate” Food**

FDA has strict rules regarding what it calls “adulterated” food. It has concluded that flooded crops should be considered “adulterated.” Adulterated crops may not enter the human food chain.

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<sup>42</sup> 7 C.F.R. § 205.670 (2016).

<sup>43</sup> 7 C.F.R. § 205.671 (2016).

<sup>44</sup> 7 C.F.R. § 205.681 (2016). Appeal rights are explained in Agricultural Marketing Service, Office of Administrator, Adverse Action Appeal Process for the National Organic Program, NAP 40011 (December 23, 2014).

FDA has issued formal guidance for the safety of flood-affected food. The following describes that guidance.<sup>45</sup> The guidance can be confusing in the sense that FDA believes some practices are required, and recommends other practices, but does not require them.

## **B. Farmers Must Discard Crops in Contact With Flood Waters**

If the edible portion of a crop was in contact with flood waters, the crop must be discarded, destroyed, or tilled into the soil. It may not be sold as food. It also may not be fed to livestock. FDA also believes there is no practical way to clean crops that have been exposed to flooding.

### **(1) Both Ground Crops and Root Crops**

This rule applies to both ground crops and, because flood waters are assumed to seep underground, root crops. This means that surface crops, such as green tomatoes, beans, and corn, and underground crops, such as peanuts, potatoes, and carrots are all considered adulterated by FDA if the edible portion of the crop has been in contact with flood water.

This rule applies even if the plant was immature during the flood, and even if the crop has a hard outer shell or skin, such as watermelon.

FDA has concluded that even if the crop is not completely submerged there could still be contamination of the edible part of the crop.

### **(2) If Flood Waters do NOT contact the Edible Portion of the Crop**

FDA recommends that crops should be evaluated on a case by case basis for contamination even if the flood water did not contact the edible part of the crop.

### **(3) Penalties Possible**

Under FDA's interpretation of the law if a farmer sells food adulterated by flood water that makes people sick, criminal liability is possible.<sup>46</sup>

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<sup>45</sup> Food and Drug Administration, Guidance for Industry Evaluation the Safety of Flood-Affected Food Crops for Human Consumption (October 2011). <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/EmergencyResponse/ucm287808.htm>. Another useful summary is University of Vermont Extension, Frequently Asked Questions About Handling Flooded Produce (July 10, 2013) at [https://www.uvm.edu/vtvegandberry/factsheets/Flooded\\_Produce\\_FAQ.pdf](https://www.uvm.edu/vtvegandberry/factsheets/Flooded_Produce_FAQ.pdf) and in a slightly updated version released by Missouri Extension and Kansas State Research and Extension, here: [https://www.k-state.edu/foodsafety/topics/doc/Flooded\\_Produce\\_FAQ%20UVM%20\\_KSMO.pdf](https://www.k-state.edu/foodsafety/topics/doc/Flooded_Produce_FAQ%20UVM%20_KSMO.pdf).

<sup>46</sup> 21 U.S.C. §§ 331, 333.

## **VI. Conclusion**

The challenges for an organic farmer in the midst of a natural disaster will be many. Some of those challenges are legal. This booklet is intended to assist producers as they negotiate the legal implications of flooding on an organic farm.