

# Calif.'s Organic Cannabis Program: Issues And Opportunities

By **Omar Figueroa, Lauren Mendelsohn and Andrew Kingsdale** (August 26, 2022)

Health- and eco-conscious consumers are driving up demand for so-called clean cannabis — natural, pesticide-free and sustainable — as recently reported in the Los Angeles Times.[1]

Organic is perhaps the most widely recognized designation for such products, but if you go to a cannabis dispensary you won't see any items with that label. This is because of the current legal status of cannabis under federal law.

The U.S. Department of Agriculture, the federal agency that grants companies the right to use the term "organic," does not permit the use of the term in conjunction with cannabis products because retail sales of cannabis remain federally illegal.

To solve this problem, the state of California has created a pioneering comparable-to-organic program for cannabis.

The OCal Program, as it is called, allows cannabis products that have met certain rigorous standards — similar to the criteria used by the USDA when certifying organic products — to be marketed with the OCal label.[2]

Authority over the OCal Program is shared by the California Department of Food and Agriculture, or CFDA, which enforces comparable-to-organic standards for cannabis cultivators, and the California Department of Public Health, or CDPH, which enforces comparable-to-organic standards for cannabis manufacturers.

Actual approvals to use OCal labels will come from third-party accredited certifying agents. The OCal Program is currently accepting applications for registration and accreditation of certifying agents.[3]

So far, very few cultivators and manufacturers have become OCal-certified, but widespread adoption seems likely.

Below, we discuss the OCal Program in further detail and touch on its broader implications for cannabis businesses and consumers.

## About the National Organic Program

To better understand California's OCal Program, we start with a quick overview of the USDA's National Organic Program.

The NOP is run by the federal government and exists to develop and enforce consistent standards related to organically produced agricultural products. The NOP works with third-party organizations to certify organic operations and enforce organic standards.

Participation in the NOP is limited to products that are federally legal.[4] Because of this limitation, California law explicitly prohibits advertising, selling or offering to sell cannabis



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goods as organic unless it is done in accordance with the NOP.

In other words, until federal law changes, the term "organic," by itself, may not legally be used to describe cannabis in California — or any other state, for that matter.[5]

By contrast, hemp can be certified organic by the USDA because it is federally legal.

For this and other reasons, cannabis producers have been operating at a relative disadvantage to hemp producers, despite marketing what is essentially the same plant — *Cannabis sativa* L. — to consumers.

### **A Closer Look at the OCal Program**

According to the program's website, "the OCal Program will ensure that cannabis products bearing the OCal seal have been certified to consistent, uniform standards comparable to the National Organic Program." [6]

The OCal regulations were finalized and adopted in 2021, and certification of cannabis licensees began last year.[7]

To gain approval to use the OCal name and seal, a licensed cultivator or manufacturer must comply with the relevant regulations and submit an application to one of the registered certifying agents, which may have its own additional requirements.[8]

The OCal Program is currently accepting applications for registration and accreditation of certifying agents.[9] The CDFA has already approved two certifying agents for cultivators, Envirocann and California Certified Organic Farmers,[10] and the CDPH has approved three certifying agents for manufacturers: California Certified Organic Farmers, Pro-Cert Organic Systems Ltd. and JS Audit Group Inc.[11]

Only 12 licensed cannabis cultivators in California have been OCal-approved so far.[12]

Sonoma Hills Farm, one of the first licensed cultivators to be OCal-approved, suggested that the OCal program could serve as a "model for other farms in what will hopefully be a national program in the near future," noting that it's "not only good for the industry, it's important for consumers to know how their cannabis is grown."

As for manufacturers, the CDPH recently confirmed that none have been certified as OCal-approved, but two manufacturers have been approved to identify OCal and organic ingredients in the ingredient statement on the information panel of their products, i.e., the back panel.[13]

Unless an entire manufacturing operation has been certified OCal, the manufacturer may not list "organic" or "OCal" in any other area of an OCal-manufactured cannabis product besides the ingredient statement.[14]

### **The OCal Seal**

Certified OCal operators can use the term "OCal" and the OCal seal below in connection with their approved products.



Any California-licensed cannabis business is prohibited by regulation from selling, labeling or representing as OCal any product that does not contain 100% OCal produced cannabis.[15]

Indeed, administrative fines up to \$17,952 per violation are authorized for knowingly labeling or selling a product as OCal, except in accordance with the regulations, as well as for labeling or selling a product as organic, except in accordance with the federal Organic Foods Production Act.[16]

The OCal seal functions like a certification mark by signifying that a product meets the OCal Program's certification standards; however, the seal is not an official certification mark registered with the U.S. Patent and Trademark Office. This complicates enforcement against infringement, as California does not offer registration of certification marks at the state level.

Thus, consumers might start to see goods bearing word, design or certification marks that are confusingly similar, but not identical, to the OCal seal, and could mistake these for the official OCal products.

### **Other Governmental Efforts**

So far, California is the only state to successfully create a program to establish and enforce organic-type standards for cannabis. No similar program exists outside of the U.S., either.

An attempt was made by the state of Washington, but rulemaking has not been completed "due to a lack of resources to develop and implement the service," according to Brenda Brook, organic program manager for the Washington State Department of Agriculture.[17]

Washington's recent budget includes funding to start up this process once again, and it is anticipated that in the coming months a preproposal statement of inquiry will be filed inviting the public to take part in the rulemaking process.

In the private and nonprofit sector, there are some certifying bodies that will confirm whether cannabis meets certain sustainability criteria, but these are not official government-sanctioned indicators like the OCal designation.

### **Implications and Opportunities**

More shoppers today are looking for healthy products that have been sustainably produced. Allowing cannabis goods that have been made following organic or comparable-to-organic methods to bear a label indicating this to consumers can help brands differentiate themselves in a crowded marketplace.

It will also help cannabis producers compete with other federally legal products, like hemp, that can currently bear an organic designation.

Additionally, California's OCal Program could serve as a model for other states. Although there are only a handful of OCal-approved producers at the moment, this is likely due to the

program being relatively new and still unknown by many.

Furthermore, there's no reason why such a comparable-to-organic program couldn't be expanded to include other products, such as psilocybin mushrooms, which may become legal at the state level before being legalized nationwide.

Of course, once cannabis is legalized at the federal level, programs such as OCal will likely become moot as products could then receive an organic designation from the USDA.

That said, it is unclear how much longer federal legalization will take, and it's possible that legal interstate cannabis commerce may precede full legalization, in which case state-level comparable-to-organic designations would still be valuable.

In the meantime, we look forward to continuing to monitor the rollout of California's OCal Program, and hope to see more products with an OCal seal at our local licensed cannabis retailers.

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[1] "'Clean weed' is about to be everywhere in California. Here's what you need to know," Los Angeles Times, <https://www.latimes.com/lifestyle/story/2022-08-18/what-is-clean-weed-live-rosin-california-los-angeles>.

[2] The CDFA website for the OCal Program can be found at <https://www.cdfa.ca.gov/is/ocal.html>. The CDPH website for the OCal Program can be found at <https://www.cdph.ca.gov/Programs/CEH/DFDCS/Pages/FDBPrograms/FoodSafetyProgram/OCal.aspx>.

[3] More information about OCal Certifying Agent is available at <https://www.cdfa.ca.gov/is/ocal/certifyingagent.html>.

[4] More information about the NOP is available at <https://www.ams.usda.gov/about-ams/programs-offices/national-organic-program>.

[5] See California Business and Professions Code § 26062.5.

[6] See footnote 2.

[7] The CDFA's OCal regulations are available at <https://www.cdfa.ca.gov/calcannabis/documents/OCalFinalRegText.pdf>. The CDPH's OCal regulations are available at [https://govt.westlaw.com/calregs/Browse/Home/California/CaliforniaCodeofRegulations?guid=IC89C32D9737245D29C15A08E58DBD06A&originationContext=documenttoc&transitionType=Default&contextData=\(sc.Default\)](https://govt.westlaw.com/calregs/Browse/Home/California/CaliforniaCodeofRegulations?guid=IC89C32D9737245D29C15A08E58DBD06A&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default)). Additional materials are available at <https://www.cdfa.ca.gov/is/ocal.html#reg> and <https://www.cdph.ca.gov/Programs/CEH/DFDCS/Pages/FDBPrograms/FoodSafetyProgram/OCal.aspx>, respectively.

[8] For example, CCOF's OCal certification process is available at <https://www.ccof.org/page/ocal-cannabis-certification>.

[9] More information, including the application materials, is available at <https://www.cdfa.ca.gov/is/ocal/certifyingagent.html>.

[10] A list is available at <https://www.cdfa.ca.gov/is/pdfs/ListofOCalRegisteredCertifyingAgents.pdf>.

[11] A list is available at <https://www.cdph.ca.gov/Programs/CEH/DFDCS/CDPH%20Document%20Library/FDB/FoodSafetyProgram/OCal/OCalCertifierList.pdf>.

[12] List available at <https://www.cdfa.ca.gov/is/pdfs/certifiedoperations.pdf>.

[13] List available at <https://www.cdph.ca.gov/Programs/CEH/DFDCS/CDPH%20Document%20Library/FDB/FoodSafetyProgram/OCal/OCalApprovedManufacturers.pdf>.

[14] See FAQ #11: <https://www.cdph.ca.gov/Programs/CEH/DFDCS/Pages/FDBPrograms/FoodSafetyProgram/OCalFAQsManufacturers.aspx>.

[15] 3 CCR § 10300(a): "Cannabis or a nonmanufactured cannabis product to be sold, labeled, or represented as OCal must contain 100 percent produced cannabis."

[16] 3 CCR § 10701(e)(1), available at <https://govt.westlaw.com/calregs/Document/IC5FD2A05E3FD48D194D6A482E1A0EC4C?originationContext=document&transitionType=StatuteNavigator&needToInjectTerms=False&viewType=FullText&contextData=%28sc.Default%29>.

[17] Previous WSDA rulemaking documents from 2017 are available at <https://agr.wa.gov/services/rulemaking/marijuana-certification-national-organic-program-100317>.