

# Monsanto Challenging Oakhurst's Free Speech Rights

by John Bunting

On July 3, 2003, Monsanto Company filed suit against a Portland, Maine-based fluid processor—Oakhurst Dairy, Inc. This lawsuit, which seeks no monetary damages, targets claims by Oakhurst that “Our farmers use no artificial growth hormones” in the production of milk processed by the dairy. About 70 Maine dairy producers supply Oakhurst’s milk.

Monsanto is the only firm in the U.S. marketing rbGH—a synthetic growth hormone produced by genetic engineering that, when injected, causes most milking cows to produce more milk.

At issue: corporate free speech. Monsanto’s legal complaint cites federal Food and Drug Administration (FDA) *guidelines* for labeling of milk not produced by cows injected with recombinant bovine growth hormone (rbGH).

Technically, the rbGH-Free milk labeling guidelines are just that—*guidelines*, not binding regulations. Yet shortly after Posilac was marketed, attorneys for Monsanto sent out hundreds of letters warning dairy processors against labeling their products “rbGH-Free.” Monsanto used FDA’s rbGH-Free guidelines as a bludgeon. In early 1994, Monsanto sued two fluid milk processors, hoping to stop their use of rbGH-Free labels. Those legal actions were settled out of court and the files sealed.



Monsanto sued vs. Oakhurst Dairy's label claim.

## Corporate free speech First Amendment issue

The First Amendment of the U.S. Constitution reads:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

Thomas Jefferson insisted upon the Bill of Rights, which begins with the First Amendment. Jefferson wrote:

The legal concept of commercial free speech arrived in 1980, when the U.S. Supreme Court ruled in the *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*. That finding developed a four-part test for “Commercial Free Speech,” which exists as the law of the land to this day. Those four parts are:

- Because government may ban false and misleading communications or commercial speech related to illegal activity, the first question is whether the ban prohibits truthful speech about lawful activity.
- If so, the Court proceeds to the second prong of the test, wherein the state must assert a substantial interest to be achieved by the restrictions on commercial speech. The State’s asserted interest sets the stage for the last two prongs of the analysis because, “limitations on expression must be designed carefully to achieve the State’s goal.”
- The third prong addresses whether the restriction directly advances the state interest involved. A regulation will not be sustained if it provides only ineffective or remote support for the government’s purpose.
- The fourth prong involves the inquiry into whether,



“... the government interest could be served as well by a more limited restriction on commercial speech.” If the answer is yes, then the excessive restrictions will be struck down.

## Oakhurst selling what consumers want

Does Monsanto’s challenge to Oakhurst’s “no artificial growth hormones” consumer product claims meet these tests of corporate free speech?

The specific claim by Oakhurst states: “Our Farmers Pledge: No Artificial Growth Hormones.” Oakhurst’s dairy producers sign written pledges that they will not use artificial growth hormones in the production of their milk.

Consumers were skeptical of injecting cows with synthetic growth hormones long before Oakhurst Dairy commenced its advertising claims. In the late 1980s and early 1990s, even before FDA approved sale of Posilac, surveys of consumer attitudes consistently showed that at least 75% disagreed with the practice of injecting cows with artificial growth hormones to boost milk production.

A recent USDA report on rbST use interviewed U.S. dairy farmers who were not using Posilac to describe their reasons for not using the drug, finding: “... public health concerns were twice as prominent in the Northeast region as in any other region.” Well over three-quarters of all fluid milk sold in New England is marketed as “rbGH-Free,” in the estimate of *The Milkweed*.

But Monsanto’s lawsuit claims, “Oakhurst is engaging in a comprehensive advertising campaign to convince consumers that milk from cows not supplemented with POSILAC® is safer, fresher, healthier and better in quality than milk from supplemented cows.”

## FDA guidelines: attempted prior restraint?

Except for jurisdictional technicalities, Monsanto’s case basically rests as paragraph 16 of Monsanto’s complaint, under “FACTS.” That paragraph cites FDA’s labeling guideline “59 Fed. Reg. 6179-6280 (Feb. 10, 1994).” Authored by Michael Taylor.

That document places a burden upon firms claiming their products do not contain artificial hormones. In other words, the FDA guideline on labeling milk products derived from dairy herds not treated with Posilac seems to limit free speech.

If the FDA labeling guideline were a regulation instead of a guideline, the document might very well be considered “prior restraint.” The U.S. Supreme Court has labeled “prior restraint” as the “least tolerable infringement[s] on First Amendment rights.”

## “False and misleading,” or “truthful speech”?

As noted earlier, the first test of commercial free speech specified in 1980 by the U.S. Supreme Court is whether the ban prohibits truthful speech about a legal activity.

Paragraphs 6 and 7 in Monsanto’s complaint against Oakhurst state, in part:

“6. ... the statements in Oakhurst’s television and radio advertisements, mislead and confuse consumers that there is a difference between milk from cows supplemented with Monsanto’s POSILAC® and milk from cows now supplemented with POSILAC®.

“7. The scientific facts are that there is no difference in milk from cows supplemented with POSILAC® and milk from other cows, and there is no analytical test that can distinguish milk from cows supplemented with POSILAC® from any other milk.”

FDA has stated that milk from Posilac-injected cows is not significantly different from normal cows’ milk. That statement, whatever it means, does not mean “no difference”—as Monsanto claims without substantiation in its court filing against Oakhurst Dairy. Is paragraph 7 of Monsanto’s legal complaint against Oakhurst Dairy “false and misleading?”

Terms such as “virtually no” and “no significant” are subjective value judgments—not scientific facts.

## What is Monsanto’s long-term goal?

Nearly a decade after commercial sale of Posilac started, why is Monsanto is back on the warpath against a small dairy processor claiming that it farmers use no artificial growth hormones?

Monsanto is but a shell of its former self, struggling to cope with tremendous research investments and acquisition costs during a two-decade period of pursuing dominion over plant and food biotechnology. It has had many corporate restructurings, and operated for months recently without a CEO.

What are Monsanto’s possible longer-range goals of revived legal action against “rbGH-Free” dairy product claims? The company may be developing a wider legal campaign against *any* claims that food products contain no genetically modified foods.

If so, Monsanto’s targets include USDA’s organic food standards, which specify no genetically modified foods content.

## Michael Taylor: Monsanto’s (Former) Main Man at FDA

Michael R. Taylor is a former partner of King & Spaulding, a powerful Washington, D.C. law firm that has brought lawsuits on behalf of its client, Monsanto, including the current legal action against Oakhurst Dairy of Portland, Maine.

The basis of Monsanto’s complaint against Oakhurst Dairy is Taylor’s 1994 “Interim Guidance on the Voluntary Labeling of Milk and Milk Products from Cows That Have Not Been Treated With Recombinant Bovine Somatotropin.” Taylor crafted that document at the time he was FDA’s assistant commissioner for policy.

Michael Taylor is an example of there being little or no difference between the government’s business and the business’ government. Starting in 1980 he worked at FDA for four years as executive assistant to the commissioner. In 1984, he moved to King & Spaulding, where he remained until 1994. That law firm (and Taylor) represented Monsanto while the company was seeking approval for commercial sale of rbGH/rbST.

But in 1991, it was back to FDA in the key role of assistant commissioner for policy. Surviving the political changeover from the first Bush to the Clinton administration, Taylor wrote in early 1994 the aforementioned FDA guidelines on what marketers of non-rbGH dairy products could say.

Then it was out FDA’s door again, directly to Monsanto, where Taylor became head of the firm’s Governmental Affairs Division. He then shifted to USDA, where he became Administrator of USDA’s Food Safety and Inspection Service from 1994 to 1996. Presently, he is with Resources for the Future, located in Washington, D.C.

# The Best University Research Monsanto Could Buy

by John Bunting

"The prospect of domination of the nation's scholars by Federal employment, project allocations, and the power of money is ever present and is gravely to be regarded. Yet, in holding scientific research and discovery in respect, as we should, we must also be alert to the equal and opposite danger that public policy could itself become the captive of a scientific technological elite."

— President Dwight D. Eisenhower, January 17, 1961

World War II ended literally with a bang. The nuclear explosions that destroyed the Japanese cities of Hiroshima and Nagasaki not only ended WWII, but also symbolically marked a change in basic American philosophy. This nation mustered its resources—human, manufacturing, research, engineering, capital—to create many superior technologies that helped win that long war. This free society unleashed human talent for researching and applying many technologies. And along the way, the end of WWII shifted our nation's philosophy from rewarding those who worked hard and produced something useful to worshipping those who merely thought up things new and clever.

Universities moved from being centers of contemplation to being incubators of inventions for widespread use. Science was elevated to a religion with the power to see all and know all. More importantly, some would have science (or their vision of science) override human choice. WWII's technological accomplishments helped pave the way for acceptance of "science based" decisions ... which leads to today's attitudes of implicit trust when persons with advanced degrees assert their version of facts. In the 1950s experts claimed that energy generated by nuclear power plants would be "too cheap to monitor." Nuclear power is a powerful symbol of WWII technologies gone public ... for better or worse.

## Completing agriculture's post-WWII modernization

WWII technologies dramatically changed U.S. agriculture. For example, the Ford Motor Company stopped producing tanks and bombers, shifting production back to cars, trucks and tractors. WWII pulled U.S. agriculture out of an economic depression that began with an across-the-board collapse of farm commodities' prices in 1920-21. High U.S. farm product prices during the war restored farmers' equity and gave them pent-up spending power to modernize, once production of civilian goods resumed. By golly, keeping them down on the farm, after they'd seen "Paree," was easier in the seat of a new Ford tractor than walking behind a team of draft horses.

The post-war transformation of U.S. agriculture from animal to tractor power was paralleled by another technology shift: farm chemicals. The Ford Motor Company shifted to non-military output, knowing the pent-up demand for civilian vehicles and tractors would sustain output.

But for vast industries developed to manufacture explosives, pesticides and other chemicals during WWII, the shift to "civilian" output was a greater stretch. Post-war, farming witnessed a dramatic shift away from manure-based soil fertility to chemical fertilizers. This same transition also caused a move away from smaller, diversified U.S. farms to larger, specialized operations that were far more dependent upon outside inputs—fertilizer, energy, capital and labor—not to mention "expert advice."

The first major transition of U.S. agriculture during the 20th century, from horse to tractors and manure to manufactured fertilizers, was driven by the application of WWII technologies.

## Genetic engineering: Eisenhower's "Scientific technological elite"?

Unfortunately for the U.S. dairy industry, recombinant bovine growth hormone (rbGH) was the lead-off batter in the application of the 20<sup>th</sup> Century's second agricultural revolution—food biotechnology. Why was rbGH the first major applied food biotech product?

Intense scientific research into mammalian growth hormones had taken place in the late 1940s through the early or mid-1960s. For a while, scientists had a grand time, pulling growth hormones from species as diverse of humans, cows ... and even whales. But scarcity of materials and their impurities basically halted that field of research. Before biotechnology, growth hormone research relied upon pituitary extracts from cadavers. Much early growth hormone work focused on cows.

In the 1970s, Columbia University biochemist Richard Axel, microbiologist Saul J. Silverstein, and geneticist Michael H. Wigler conducted research funded by the (federal) National Institutes of Health (NIH). Beginning in 1980 they patented gene-splicing research and assigned the patents to Columbia University. Known as the "Axel patents," they involved "cotransformation"—inserting foreign DNA into a host cell to produce certain proteins. This work pioneered the patented recombinant DNA technology necessary to develop rbGH. The Axel patents have brought some \$300 to \$400 million into Columbia University—a fact widely recognized by other major public educational institutions.

Advent of technologies (and patents) for transferring genes opened the doors to what researchers (and their sponsors) hoped would be vast amounts of cheap growth hormones.

Trouble was, in selecting rbGH as the "poster-child" for genetic engineering of foods, FDA and developers selected a food product about which many consumers feel very strongly. The word "hormone" conjured up consumer worries, due in part to a then-recent scandal in Puerto Rico where farmers had loaded up their cows and chickens with large amounts of DES (Diethylstilbestrol), to



produce bigger farm animals. But this also transferred the hormone's effects to infants eating the meat products from DES-infused animals. Several thousand female Puerto Rican infants and children prematurely developed full sexual maturity due to consuming DES-laden meat products.

## Enter Cornell University (accompanied by Monsanto)

In a patent granted June 4, 1985 to Cornell University's Dale Bauman (and assigned to the Cornell Research Foundation), we learned: "The growth hormone can be a naturally occurring growth hormone, for example isolated from animal tissues or a body fluid (for example bovine growth hormone isolated from pituitary glands,) or can be a synthetic equivalent of a naturally occurring growth hormone, for example a growth hormone produced by recombinant DNA techniques."

"Bauman is internationally recognized for his studies on the stimulation of milk production and other physiological processes by growth hormone," according to the prestigious and influential National Academy of Science, where Bauman has been a member since 1988.

Monsanto's research millions flowed to Bauman, Cornell University, and many other Land Grant universities. Such infusions of private research funds came at a time when Land Grant universities were finding public monies less available. Writing about this situation in the October 1998 *Atlantic Monthly*, Johns Hopkins University professor of geography David Harvey noted: "Money is now the measure of all things, and a crude cost-benefit logic pervades administrative decisions. University presidents pontificate about the excellence while the bean counters in the back rooms call the shots. The traditional university culture, with its odd sense of community, has been penetrated, disrupted, and reconfigured by raw money power."

## Critics pounded, consumers very skeptical

Repeated surveys consistently indicated that at least three-quarters of consumers thought injecting cows with a synthetic hormone was a bad idea. In 1989, a high-level FDA official, Dr. Richard Teske, admitted that the rbGH controversy was the biggest human health issue FDA had ever confronted. And that statement came more than four years before rbGH was finally available for commercial sale! (Sometime about 1986-87, Monsanto changed the moniker for rbGH to "rbST"—recombinant bovine somatotrophin. The jargon avoided use of the controversial word "hormone." The rbGH issue was so volatile that critics and promoters couldn't even agree what to call it.)

The path to commercialization of Monsanto's rbGH (sold to farmers under the name Posilac) has been an unnatural act. FDA obviously looked the other way on key animal and human health considerations. Key government employees were pushed out of jobs for asking too many questions. Critics were vilified. Journalists pursuing human health questions were pilloried. And in early 1994, when Posilac was finally offered for sale, Monsanto filed lawsuits against two fluid milk processors (one based in Iowa, another in Michigan) for advertising that their products were made from milk of cows NOT treated with rbGH.

Monsanto's money kept talking. At the time rbGH was about to be approved, Wayne Knoblauch, a Cornell agricultural economist, was quoted advising: "research showed a significant reduction in net farm income if BST (rbGH) was not adopted for all levels of milk sold per cow." Another stunning piece of research done at Texas A&M "found that if adoption is delayed two years after the introduction of BST (rbGH), the probability of survival for the smaller farms in the Upper Midwest and Northeast, as well as the 350 cow farm in the Southwest, drops dramatically."

If managers waited four years to adopt [Monsanto's synthetic hormone] the probability of survival for the small farms was very low, but remains at 100% for large farms in the Northeast and Southeast and the large and small farms in the Southeast," Texas A&M "experts" determined.

Few Land Grant university professors dared antagonize Monsanto by questioning rbGH. Meanwhile, Monsanto research dollars in other areas of genetic engineering, such as potatoes, were becoming predominant available funding for certain other public agricultural institutions. Eisenhower was right.

## "...merge of state and corporate power."

This article began with a quote from one WWII leader and will conclude with another.

**"Fascism should rightfully be called corporatism as it is the merge of state and corporate power."**

The source of that wisdom? Benito Mussolini, Italy's fascist dictator.

For almost 20 years, Monsanto has attacked critics of recombinant bovine growth hormone—aided by its cohorts in government. Posilac is one giant step towards biotech food fascism.

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# Monsanto's Friends in High FDA Places

by John Bunting

Monsanto is the only firm marketing rbGH in the U.S. Posilac is not plain and simple bovine growth hormone. To produce recombinant growth hormone, a portion of bovine DNA that produces the code for bovine growth hormone is spliced to the DNA of *E. coli* bacteria grown in vats. From this bacteria, rbGH is "harvested." Posilac's amino acid sequence is not structurally identical to natural bovine growth hormone.

Posilac has a different amino acid sequence than normal cow growth hormone, that makes the drug more potent than its natural counter part. The molecular weight of the recombinant version is also different.

Since the intended result of rbGH is more milk, the federal Food and Drug Administration was given oversight for approval of the experimental drug. Posilac was the first "production drug" that FDA reviewed. No problem: Monsanto's connections to FDA were secure, and FDA's ultimate approval of rbGH was pre-ordained.

**Margaret Miller**, who became deputy director of FDA's Office of New Animal Drugs, was previously employed as a Monsanto research scientist who had worked on rbGH safety studies up until 1989. Miller co-authored journal articles about her rbGH work at Monsanto after she joined FDA.

**Suzanne Sechen** was a graduate student at Cornell whose research involved rbGH. She obtained her doctorate degree in 1988 and went directly to FDA, where she was the primary reviewer of Monsanto's rbGH. Posilac was approved for commercial sale in fall 1993 and actual commercial sales began in early February 1994.

Monsanto's biggest "plant" inside FDA was **Michael Taylor**, a lawyer who had earlier worked for FDA as executive assistant to the commissioner. In 1984, Taylor joined the law firm King & Spaulding, remaining there until 1991. His duties included representing Monsanto as the firm sought FDA approval of rbGH. Taylor then rotated back to FDA, where as Deputy Director, he formulated the rbGH labeling "guidelines." (Note: The labeling "guidelines" Taylor crafted are the core of the lawsuit by Monsanto against Maine's Oakhurst Dairy.)

Those rbGH labeling guidelines, titled, "*Interim guidance on the Voluntary Labeling of Milk and Milk Products from Cows That Have Not Been Treated with Recombinant Bovine Somatotropin*" [Docket No. 94D-0025], comprise is an interesting document. On page 2, it states:

"... the agency found that there was no significant difference between milk from treated and untreated cows and, therefore, concluded that under the Federal Food, Drug and Cosmetic Act (the act), the agency did not have the authority in this situation to require special labeling for milk from rbST treated cows."

Key phrase: "no significant difference." That is **not** the same as reporting "No difference." Furthermore, there was never any hint that FDA wanted to label milk as being from cows injected with Posilac. Quite the opposite: Taylor's guidelines curiously burden those firms that claim their milk is from untreated cows.

Page 4 of the labeling guidelines states: "FDA is concerned that the term 'rbST-free' may imply a compositional difference between milk from treated and untreated cows ..." Back on page 2, Taylor had written, "no significant difference." Technically, even a slight, statistically insignificant difference is still a difference.

Taylor's labeling guidelines then claim, "... [milk] from cows not treated with rbST ... has the potential to be misunderstood by consumers." He continues: "Such unqualified statements may imply that milk from untreated cows is safer or of higher quality than milk from treated cows. Such an implication would be false or misleading."

Then on page 5 of Taylor's guidelines, "There is currently no way to differentiate analytically, between naturally occurring bST and recombinant bST in milk."

The reason for there being no assay for rbGH residues in milk is simple: FDA violated its own laws by failing to develop, and failing to require Monsanto to develop, a system that can distinguish the difference between Monsanto's rbGH product and natural cow hormones.

This failure is a violation of FDA law. Section 512 of the 1968 Animal Drug Amendments to the 1938 Federal Food, Drug and Cosmetic Act requires that manufacturers submitting new animal drug applications provide "a description of practical methods" for analysis and monitoring of drug residues in food.

FDA's failure, back in the mid-1980s, to require Monsanto to develop a test for Posilac residues in milk of treated cows, contaminates the entire debate over labeling of 'rbGH-Free' consumer dairy products.

## FDA puts undue burden on 'no rbGH' claims

The net impact of FDA's labeling guidelines for milk from Posilac-injected cows is that the entire burden is shifted to the dairy processor making the "rbGH-Free" claim. "The producer of a product labeled with rbST claims should be able to demonstrate that all milk-derived ingredients in the product are from cows not treated with rbST. Failure to maintain records would make it difficult for a firm to defend itself in the face of circumstantial evidence that it is using milk from rbST treated cows." Guilty until proven innocent?

Another federal agency—USDA—technically owns the term "organic." During most of the Clinton presidency, USDA conducted an effort to define federal standards for organic foods. Suspiciously, high-level political appointees tried to sneak through the "organic" approval process three loathed elements—



genetically modified foods, application of sludge to organic farmland, and food irradiation. These proposals drew more than 100,000 angry comments from concerned consumers. "Organic" foods imply higher quality consumers who pay a handsome premium for them. Since USDA specifies that organic foods may not contain genetically modified components, what's next? A Monsanto lawsuit against USDA's organic guidelines?

## Monsanto/FDA connivance on "rbGH-Free" labeling continues

In the months prior to Monsanto's July 3, 2003 lawsuit against Maine's Oakhurst Dairy, there was a flurry of meetings and correspondence between FDA and Monsanto about labeling of consumer products as "rbGH-Free." A key figure at FDA in these meetings and communications was Deputy Director Lester Crawford, DVM.

Crawford's position at FDA may be much like vice-president Richard Cheney's role in the present Bush administration: the power behind the throne.

## FDA's Crawford: Monsanto's Best Ally on rbGH Labeling?

During the past eight months, Dr. Lester Crawford's role as deputy commissioner of the federal Food and Drug Administration has become increasingly suspicious.

At the web site of the International Dairy Foods Assn. (the main dairy processor lobby) is found, "*FDA Reaffirms its rBST Labeling Policy; Enforcement Could Result.*" The discussion commences by describing Maine's "Quality Seal" for milk, which includes only milk from cows not treated with rbGH or rbST.

The IDFA web site analyzes a December 13, 2002 letter written by FDA's Dr. Crawford to Monsanto on milk labeling. The IDFA web site entry summarized Crawford's letter to Monsanto this way:

"... claims must be made within a 'proper context with accompanying information.' This can be achieved by including such wording as: "*no significant difference has been shown between milk derived from rBST-treated and non-rBST treated cows.*" He notes that these claims should be placed on the label so that they are 'likely to be read and understood by the ordinary individual under the usual conditions of purchase and use.' He concludes his letter by stating that 'claims that milk and milk products are from cows not treated with rbST should also be substantiated.'"

In November 2002, Maine officials had received a letter from a law firm representing Monsanto, demanding that the state's "Quality Milk" seal stop requiring no rbGH/rbST use.

Crawford's letter proposed to make any rbST claims by dairy processors more difficult. In late January 2003, he addressed a breakfast meeting at IDFA's Winter Forum, a dairy gathering at La Quinta, California. At the beginning of his comments (a copy of which is not available), Crawford claimed one of the two purposes of FDA was to promote food biotechnology!

On March 24, 2003, the subject of rbST-labeling was on the agenda at a meeting at FDA headquarters in Rockville, Maryland. Besides an array of FDA employees (including Crawford), other attendees included representatives from two law firms: Covington & Burling, and King & Spaulding. Also attending were representatives of Monsanto Animal Agriculture, Monsanto Government Affairs, Monsanto Industry Affairs, Safeway HQ, Dairy Management, Inc. (funded by dairy farmer promotion dollars!), a California dairy producer, and IDFA.

On June 4, 2003, Dr. Crawford also sent a letter on the subject of rbGH/rbST labeling to Brian Robert Lowery of Monsanto. On July 3, 2003, Monsanto sued Oakhurst Dairy in federal district court in Boston.

(Crawford headed FDA's Center for Veterinary Medicine in the late 1980s and early 1990s, when FDA ignored potential human and animal dangers while approving Monsanto's rbGH.)

Crawford's agenda includes eliminating manufactured dairy product standards. In fact, for dairy farmers, consumers, and those who believe in safe and high quality dairy products, Dr. Lester Crawford may be just about the most dangerous man in the nation.

# Monsanto Fighting rbGH Labeling Coast to Coast

by John Bunting

Documents reveal that Monsanto's recent lawsuit against Maine's Oakhurst Dairy is just part of a strategy by Monsanto (and its allies) to poison the regulatory climate against dairy processors selling consumer products as "free" of artificial growth hormones. "Artificial growth hormones" is the dairy buzz-phrase for recombinant bovine growth hormone (rbGH).

Monsanto is the sole U.S. marketer of rbGH—trademarked Posilac. Directly and indirectly, Monsanto's complex tentacles have been preparing for this lawsuit since at least late 2002.

## Steven Milloy: Monsanto wind-up

One key Monsanto tentacle is the web site, "*Stop Labeling Lies*," run by Steven Milloy. The site's introduction states:

"False and misleading information on product labels and the foods we eat harms consumers. The purpose of this web site is to challenge companies to act responsibly and to help consumers by publicizing examples of false and misleading food and other product labels and their associated marketing campaigns."

Milloy, whose network of high-sounding organizations receives financial backing from Monsanto, attacks dairy processors who claim their products are "rbGH-Free." Milloy has even launched a "Milk is Milk" campaign. "Milk is Milk" lobbies against labeling of "rbGH-Free" milk, claiming, "The simple truth is, Milk is Milk."

Under Milloy's "Guidelines on How to Detect False and Misleading Dairy Labels and Marketing," one learns: "rbST, also called rbGH, stands for 'recombinant bovine somatotropin.' rbST is a protein supplement which farmers administer to cows in order to increase milk production. The FDA has determined that milk from such cows is the same as milk from cows which have not received these supplements."

(Editor's note: Correction—FDA stated there was no significant difference between milk from treated and untreated cows. That is not to say that milk from rbGH-injected cows is the same as milk from untreated cows.)

Twists of truth—indeed, false and misleading statements—are woven throughout the web site. Milloy is an aggressive *player* crusading for consumer food product labeling "truth" – sponsored by Monsanto.

The document trail generated by Milloy, and other Monsanto hirelings, is craftily interwoven. Let's review some of their efforts:

## Washington State

In a **May 16, 2002** letter to the state of Washington Department of Agriculture, Steven Milloy cites on page 3 the state Regulatory Code section that specifies Washington must adopt any FDA regulation published in the *Federal Register*. Milloy's letter mentions the FDA "guidelines" on labeling milk not produced by cows treated with rbGH/rbST, published in the *Federal Register* on February 10, 1994. (This guideline was authored by FDA's Michael Taylor, a lawyer previously and subsequently linked to Monsanto's efforts labeling genetically modified foods.)

Milloy's letter to Washington state officials worked. On June 11, 2002, the Washington Department of Agriculture sent a letter to Jerry Teel of Vitamilk Dairy, Inc. This letter, written by Claudia Coles, parroted points raised by Milloy's letter of four weeks prior.

Coles sent six copies to other officials, including Alice Blado, an Assistant Attorney General.

On June 27, 2002, Daryl Vander Pol, executive vice president of Vitamilk, responded. His letter indicates a serious response, including two telephone calls to Ms. Coles. Vander Pol's June 27, 2002 letter stated, in part: "...we do hold that most of our products are 'different' from our competitors." He indicated that Vitamilk was the only processor in the Northwest certifying "Free Farmed" milk.

Significantly, Vander Pol's letter also stated:



"We note that one of our chief competitors has had in its web site the expression, '...superior quality'. Can that claim be scientifically documented?"

## California

On **August 1, 2001**, Kent McClure, DVM, JD (a vet and a lawyer—there's a combo) sent a letter to the California Department of Food and Agriculture (CDFA). He asked that CDFA, "... look into this situation and stop these misleading practices." His concern, of course, was labeling of milk from cows not treated with rbGH/rbST.

On October 5, 2001, Steven Milloy write Kathleen Hamilton of the California Department of Consumer Affairs. He mentioned the letter from Kent McClure. Milloy also noted, although it required three pages to get to the point, the only slender legal thread persons of his persuasion have to stand upon: the FDA labeling guideline written in 1994 by Michael Taylor. An assistant director of California's Department of Consumer Affairs wrote back to Milloy, referring him back to CDFA.

*CDFA's response stated that FDA "guidelines" do not provide CDFA officials with legal authority to compel compliance.*

On **January 8, 2002**, Michael Marsh, CEO of Western United Dairymen (a California dairy trade group) wrote to CDFA about the FDA "guidelines."

Then, on **October 16, 2002**, Alex Avery of the Center for Global Food Issues wrote a letter to CDFA, mentioning Steve Milloy's letter of October 5, 2001. Avery's letter requested action on the issue, and, "... your prompt response detailing the results of your investigation and related enforcement actions can be reported back to our growing coalition of agriculture, consumer, science and public policy groups concerned about these harmful, false and misleading marketing practices."

Avery's employer is part of the Hudson Institute, which reportedly receives financial support from Monsanto. Avery is the son of Dennis Avery, a long-time promoter of biotechnology and agri-chemicals at the Hudson Institute.

Finally, on December 20, 2002, CDFA began responding to Alex Avery. Following a series of telephone calls, John C. Dyer, CDFA's supervising staff counsel (lawyer), wrote to Avery Feb. 27, 2003.

CDFA's response stated that FDA "guidelines" do not provide CDFA officials with legal authority to *compel* compliance. Dyer further stated: "Compliance is perhaps not the correct word at all, since a guideline is not a requirement." Bull's-eye!

Dyer then rubbed salt in Avery's fresh wound, stating: "In an enforcement action in California a forensically valid testing procedure which established some level of rBST in the milk would be necessary for the department to successfully conclude even in an administrative action before the independent administrative courts unless the court accepted the argument that any claim about rBST content is misleading because it implies that other milk has it."

Dyer's letter concluded: "Without clear statutory requirement and a forensically valid testing pro-

gram, it would be difficult to achieve the goals you have outlined."

On **April 4, 2003**, Avery again wrote to CDFA, saying:

"Apparently, your staff also disagrees with the U.S. Food and Drug Administration on this matter as we were informed at this meeting that FDA guidelines regarding dairy labeling written to ensure compliance with federal law established under the U.S. Food, Drug and Cosmetic Act were not relevant or enforceable in the State of California."

Perhaps hoping for salvage value, Avery also wrote CDFA attorney Dyer on **April 29, 2003**. Avery's letter claimed: "The Washington State Department of Agriculture has a well-written enforcement recently sent to a dairy making hormone and antibiotic claims. It spells out the clear problems with such claims and may be helpful to your office in better understanding the problems with such labeling and marketing claims. I will fax a copy of that letter to your office."

(Editor's note: In June 2003, Alex Avery turned his bile against organic fluid milk. He claimed that there was no difference between organic milk and regular milk, and that higher consumer prices paid for organic milk were unjustified. Avery's true motives are showing through: the ultimate target of the anti-rbGH/rbST labeling campaign is USDA's rule that organic food products must not contain genetically modified organisms.)

## New York, New Jersey and Massachusetts, too

Altogether, five states were contacted about rbGH/rbST-Free labeling by law firms representing Monsanto ... or minions like Milloy and Avery, in the past year. Other states include New York, New Jersey and Massachusetts.

SWR Worldwide, an opinion research firm, conducted a survey of consumers in southern New York. Survey participants were shown milk cartons from Farmland Dairies (Wallington, New Jersey) that made statements such as "No Hormones" and "No Antibiotics."

The SWR survey concluded that more than two out of five consumers believe statements about no added hormones, no pesticides and no antibiotics in milk were false.

That is the survey Alex Avery's April 4, 2003 letter to CDFA referenced, when he wrote:

"CDFA has also chosen to ignore provided focus group data from an independent, respected consumer research firm which clearly demonstrates that consumers are misled ..."

## Offensive against rbGH/rbST-Free labeling

Without a doubt, complaints by the likes of Alex Avery and Steven Milloy to state regulatory agencies about "rbGH-Free" or "rbST-Free" dairy products are part of a coordinated, Monsanto-funded attacks against the rights of consumers to know how their milk is produced. Monsanto's latest move was the lawsuit against Maine's Oakhurst Dairy.

rbGH was the "lead-off" batter for FDA approval of biotech-derived foods and food production technologies. Roughly a decade later, Monsanto again is bringing out the heavy legal cannons to attack the concept that consumers have the right to know that their milk was not be produced from dairy herds injected with Monsanto's Posilac.

Dairy's "rbGH-Free" labeling issues could be merely the beginning of concerted actions against U.S. food labeling practices that specify certain consumer foods contain no genetically modified food products.