

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

MASSACHUSETTS INDEPENDENT CERTIFICATION, INC.,)	OFFPA Docket No. _____
Complainant,)	
v.)	<u>COMPLAINT</u>
ANN VENEMAN, Secretary, United States Department of Agriculture, and A. J. YATES, Administrator, Agricultural Marketing Service)	

I. NATURE OF PROCEEDING

This complaint is brought under the Organic Foods Production Act. It is an appeal of a decision by the Administrator of the Agricultural Marketing Service overturning a denial of organic certification issued by Massachusetts Independent Certifiers, Inc. The National Organic Program is a public-private partnership in which the federal government accredits private and state certifying agents to certify farming operations, as well as food processing and handling operations, as being in compliance with requirements for the use of the term “organic” in marketing and labeling. At issue in the case is the authority of the United States Department of Agriculture to compel accredited certifying agents to issue an organic certificate. Also at issue in the case is the proper interpretation of regulations governing production of organic poultry and poultry products.

II. COMPLAINANT

1. The complainant in the appeal is Massachusetts Independent Certification, Inc. (MICI), a Massachusetts nonprofit corporation.

2. MICI operates the NOFA/Mass Organic Certification Program, which was accredited as a certifying agent for the National Organic Program, under 7 U.S.C. § 6514 and 7 C.F.R. § 205.500 *et. seq.* on April 29, 2002.

3. MICI and its NOFA/Mass Organic Certification Program grew out of, but are a separate entity from, NOFA/Mass, Inc. NOFA stands for Northeast Organic Farming Association, a membership organization with state chapters throughout the northeastern United States. MICI has a short-term agreement with NOFA/Mass, Inc. to use the “NOFA/Mass Organic Certification Program” name and seal.

III. RESPONDENT

4. The respondents in the appeal are Ann Veneman, United States Secretary of Agriculture (Secretary); and A.J. Yates, Administrator of the Agricultural Marketing Service (Administrator).

5. The Agricultural Marketing Service (AMS) is responsible for carrying out the United States Department of Agriculture’s (USDA’s) role in the administration of the Organic Food Production Act.

IV. JURISDICTION

6. This appeal is brought under the authority of the Organic Foods Production Act, 7 U.S. Code §§ 6501 *et. seq.*, and the National Organic Program final rule, 7 C.F.R. §§ 205.1 *et. seq.*

7. The National Organic Program rule provides for formal administrative proceedings pursuant to the Uniform Rules of Practice, 7 C.F.R. §§ 1.130 *et. seq.*

8. Jurisdiction lies with the Office of Administrative Law Judges pursuant to the prefatory comments to the final organic rule, which state that: “Appeals of decisions made by the Administrator will be heard by an Administrative Law Judge.” 65 Fed. Reg. 80,548, 80,636 (2000).

9. The Administrator made the decision at issue in this case on October 25, 2002.

10. MICI appeals the decision at issue pursuant to 7 U.S. Code § 6520(a), which requires the Secretary to establish an appeals procedure under which persons may appeal any action of the Secretary that “adversely affects such person;” or “is inconsistent with the organic certification program”

11. MICI appeals because it has been and will be adversely affected by the Administrator’s decision. These adverse effects include violations of MICI’s substantive and procedural rights, actual and potential damage to the good will associated with the “NOFA/Mass Organic Certification Program” name, and actual and potential economic costs associated with being compelled to enter into a certifying agent relationship with an applicant that its certification committee had concluded was not in compliance with the organic program requirements.

12. MICI also appeals the Administrator’s October 25, 2002, decision because it is inconsistent with the national organic program established under the Organic Food Production Act.

V. FACTUAL ALLEGATIONS

13. The application for certification that gave rise to the present dispute between MICI and USDA was submitted on July 15, 2002, by The Country Hen, an egg producer based in Hubbardston, Massachusetts (hereinafter referred to as “applicant” or “The Country Hen.”) The owner of The Country Hen is George Bass.

14. At the time of the events giving rise to this appeal, The Country Hen housed approximately 67,000 laying hens in eleven barns on about thirteen acres of land in five locations. The Country Hen also had contractual relations with growers that supplied it with pullets. A pullet is a hen that has not yet begun to lay eggs.

15. On February 13, 2002, Mr. Bass wrote a letter to MICI’s certification administrator, Don Franczyk, expressing interest in being certified by MICI.

16. On February 15, 2002, Mr. Franczyk wrote a letter to Mr. Bass expressing some doubts about whether The Country Hen would qualify for organic certification, because its poultry did not have access to the outdoors, as required for all animals under the National Organic regulations. Mr. Franczyk closed the letter by inviting Mr. Bass to contact him to discuss the matter further if he wished.

17. The NOFA/Mass Organic Certification Program was accredited as a certifying agent under the National Organic Program on April 29, 2002.

18. On May 6, 2002, Mr. Bass testified at a meeting of the National Organic Standards Board (NOSB), arguing that the National Organic standards should not require outdoor access for organic chickens. The NOSB is a citizen advisory board appointed pursuant to the Organic Food Production Act.

19. According to the meeting transcript, Mr. Bass argued that it would be impracticable for him to provide outdoor access, in part because it would be cost prohibitive for him to obtain sufficient land to provide access to the outdoors at the historically recommended number of birds per acre.

20. At the NOSB meeting, Mr. Bass indicated that he had no plans to change his operations in order to provide outdoor access because he hoped to receive a variance from the NOSB or a change in the requirements.

21. Upon information and belief, The Country Hen requested an application from MICI at some time during the week of May 15, 2002.

22. Upon information and belief, MICI mailed an application and a copy of its NOFA/Mass Organic Certification Program's 2002 Program Manual to The Country Hen at some time during the week of May 22, 2002.

23. Upon information and belief, on July 11, 2002, or at some later date, The Country Hen submitted for approval a proposed egg carton bearing the USDA Organic seal and a seal and/or language stating that The Country Hen was "certified organic by NOFA/Mass" and that The Country Hen's "feed and eggs are certified organic by NOFA/Mass" to Richard Mathews, the Program Manager of USDA's National Organic Program (NOP).

24. Upon information and belief, Mr. Mathews personally reviewed and approved The Country Hen's label at some time prior to October 9, 2002.

25. MICI's NOFA/Mass Organic Certification Program's 2002 Program Manual ("Program Manual") includes separate sections on use of the "USDA Organic" seal and the "NOFA/Mass Organic Certification Program" seal, and states that: "Use of the NOFA/Mass

Organic Certification seal is reserved for certified operations that meet all requirements of the standards in this program manual.”

26. On or about July 15, 2002, The Country Hen filed an application for organic certification as an egg producer with MICI.

27. The application noted in bold type that, “Upon receipt of notification of certification, crops and products produced on-farm under the NOFA/Mass certification program may be sold as certified organic. When products are sold as certified organically produced, the farm name, farm address, the crop being sold, and the name of the certifying agent (the NOFA/Mass Organic Certification Program) or the NOFA/Mass seal must be identified or attached to the shipping or retail container. Privately printed labels which make reference to the NOFA/Mass Organic Certification Program may be used if pre-approval is given by the certification committee.”

28. The application submitted by The Country Hen included an affidavit sheet signed by George Bass.

29. The affidavit sheet noted that failure to disclose previous certification decisions could be grounds for denial of certification.

30. On or about July 25, 2002, MICI wrote a letter advising the applicant that it would need to “submit a completed plan detailing how you plan on fulfilling the access to the outdoors provisions for poultry of the National Organic Program.”

31. MICI’s inspector conducted an on-site inspection of the Country Hen on September 11 and 13, 2002, pursuant to 7 C.F.R. § 205.403(a)(1).

32. MICI's inspector reported that The Country Hen had locations with hen houses, as well as locations that supplied pullets on a contractual basis for The Country Hen, that had not been identified in the application.

33. The Country Hen prepared a report dated September 16, 2002, for a visit from members of the MICI certification committee.

34. The September 16, 2002, report included one page with a diagram of the barns at the Hubbardston "Main Farm" location.

35. The diagram included areas labeled "Outdoor Access," "Patio Access," and "Outdoor Patio Access," but did not include the narrative required for an organic production and handling system plan.

36. The September 16, 2002, report included several representations of The Country Hen's proposed label.

37. Some of the proposed labels in the September 16, 2002 report included the statement, "Certified Organic by NOFA Mass."

38. On October 4, 2002, MICI's NOFA/Mass Organic Certification Program issued a notice of noncompliance to the applicant.

39. The cover letter accompanying the notice of noncompliance advised the applicant that it was not authorized to "use any packaging stating that you are certified by the NOFA/Mass Organic Certification Program until you have been granted certification by the program."

40. The notice of noncompliance cited four areas of noncompliance: (1) feed rations were not 100 percent organic as required by § 205.237 of the National Standards; (2) none of the inspected facilities allowed the animals to have access to the outdoors as required by § 205.239 of the National Organic Program regulations; (3) the compost produced by the applicant could

not be approved for use on organic farms because the applicant's records did not demonstrate a ratio of carbon to nitrogen that met the requirements of § 205.203 of the National Organic Program regulations; and (4) on-site inspections of two of the pullet houses had not been completed. Those sites thus could not be approved as part of the application, and hens raised at those sites could not be approved for organic production.

41. The notice of noncompliance gave The Country Hen until December 31, 2002, to take corrective action and submit supporting documentation showing the corrective actions taken.

42. In an October 4, 2002, e-mail to Don Franczyk, MICI's certification administrator, George Bass stated, "We will be in real trouble if we cannot get inspected and approved by 21 October. New cartons have already been printed with the USDA-Organic button and with the NOFA Mass statement."

43. The certification committee had not pre-approved The Country Hen's label.

44. Upon information and belief, Mr. Bass personally met with National Organic Program Program Manager, Richard Mathews, and Arthur Neal of the NOP staff on October 9, 2002, to discuss how The Country Hen could obtain certification despite the deficiencies noted by MICI. Mr. Bass sent Don Franczyk a "trip report" describing the meeting in an October 10, 2002, e-mail.

45. Upon information and belief, Mr. Mathews advised the applicant of steps that could be taken to correct or rebut each of the four areas of noncompliance.

46. Upon information and belief, Mr. Mathews advised Mr. Bass that USDA could take action only after MICI had issued a formal denial.

47. Upon information and belief, Mr. Mathews advised Mr. Bass with respect to access to the outdoors, “There is no square foot per bird requirement. A roof can be used. This does not have to be met immediately but can be solved over time. Any surface is ok. If non-dirt, must have something like shavings or sawdust.”

48. Upon information and belief, Mr. Mathews advised Mr. Bass that the pullet houses could be put in the certificate as an issue that must be clarified in the future.

49. MICI had not inspected all of the pullet houses which supplied the Country Hen under contractual relationships.

50. Upon information and belief, the applicant had previously received notice of one or more major noncompliances from another certifying agent, Quality Assurance International (QAI), that it failed to disclose on the affidavit sheet of the application.

51. Upon information and belief, the NOP was provided with a copy of the notice(s) of noncompliance by QAI.

52. Upon information and belief, The Country Hen never corrected the noncompliance(s) to the satisfaction of QAI.

53. Upon information and belief, The Country Hen voluntarily surrendered its organic certificate from QAI on or about October 10, 2002.

54. On October 11, 2002, Mr. Franczyk called the NOP office to clarify what had transpired at the October 9 meeting between Mr. Bass and NOP staff. He was told that Mr. Mathews was out of the office, so Mr. Franczyk spoke with Arthur Neal, a member of the NOP staff.

55. Mr. Neal advised Mr. Franczyk to use the recommendations passed by the National Organic Standards Board in May 2002 for guidance in making certification decisions with respect to access to the outdoors.

56. Mr. Neal further stated that certifying agents had the power to issue “conditional certification,” and allow applicants to come into compliance with the rule over time, or revoke the certificate if the applicant failed to come into compliance within a set time.

57. Messrs. Franczyk and Bass met to discuss the noncompliances on October 15, 2002.

58. At the October 15, 2002 meeting, Mr. Bass presented The Country Hen’s plan for providing outdoor access to its hens at the Hubbardston, Westminster, and Royalston locations. The plan also included a sketch of the barns at the Tom Sweet Farm. Tom Sweet produces pullets for The Country Hen on a contractual basis.

59. As of the date of the October 15, 2002 meeting, The Country Hen had not implemented its proposed plan.

60. The plan called for each barn to be outfitted with one or more fully enclosed porches, including, in some cases, second story porches. Varying dimensions for the proposed porches were given, ranging from 100 square feet to 420 square feet.

61. Each barn housed approximately 6,000 birds.

62. The sketches noted that, “details may change after work begins.”

According to the proposal, the hens would be allowed outside in June, July, and August on days with no high winds or heavy rain, and only between the hours of 12:30 p.m. and 5 p.m.

63. At the October 15, 2002, meeting, Mr. Bass requested that the certification committee either grant or deny certification immediately, rather than wait until December 31, 2002, to make a final decision.

64. In a letter to Mr. Franczyk dated October 17, 2002, The Country Hen attached copies of the organic certificates issued by the previous certifier, QAI. The Country Hen did not disclose any previous noncompliances issued by QAI.

65. Upon information and belief, The Country Hen had already voluntarily surrendered the QAI certificate.

66. On or about October 16, 2002, The Country Hen sent a letter to MICI that appeared to be inconsistent with the proposal presented by The Country Hen on October 15, 2002. The October 16, 2002, letter stated that The Country Hen “will also agree” to open the barns at any time during the year when the temperature is above 60 degrees between the hours of 11:00 a.m. and 5:00 p.m.

67. On October 21, 2002, MICI’s certification committee voted to deny certification.

68. MICI’s certification committee concluded that, even when fully implemented, the plan would not allow the birds to engage in natural chicken behavior, due to limitations on access to the doors, access to the ground for birds on the second or third floors, and the high stocking density.

69. MICI’s certification committee concluded that, even when fully implemented, the plan would not allow the birds to choose to go outside.

70. MICI’s certification committee further concluded that the proposed periods of confinement seemed arbitrary, and designed to accommodate The Country Hen, rather than the health of the chickens.

71. MICI's certification committee concluded that, based on its knowledge and experience, hens in Massachusetts can go outside in all but the coldest weather and are able to choose for themselves when it is too cold to go outside.

72. MICI further concluded that The Country Hen would be unable to provide the required access to the outdoors to the chickens at its Hubbardston Main Farm site without contributing to degradation in the quality of the drinking water supply in the local watershed.

73. As a courtesy, MICI notified Mr. Bass of the certification committee's decision by e-mail late the night of October 21, 2002, noting that a formal decision would be issued in a matter of days.

74. In the e-mail, MICI again advised Mr. Bass that The Country Hen could not use any egg cartons bearing its program name on them.

75. On October 22, The Country Hen e-mailed and mailed what it called an appeal to the Administrator, though MICI had not yet sent it the formal notice of denial of certification. Mr. Mathews was copied on The Country Hen's letter.

76. The Country Hen's "appeal" noted that MICI's official denial would be sent later in the week and stated that, "We do not know the reason for the denial, but since all issues were discussed and approved except access to the outdoors, we must suppose the access to the outdoors is the problem."

77. Mr. Mathews called Mr. Franczyk on October 23, 2002, and stated that MICI could and should certify The Country Hen and give it from seven to nine months to come into compliance with the rule.

78. MICI also e-mailed and mailed (return receipt requested) the notice of denial of certification to The Country Hen.

79. The notice of denial of certification stated that MICI was denying certification to the applicant because the applicant had failed to provide access to the outdoors for the hens and pullets as specified in 7 C.F.R. § 205.239.

80. The notice of denial of certification further stated that the plan to provide access to the outdoors submitted by the applicant did not provide adequate access to exercise areas, fresh air, and direct sunlight as required by 7 C.F.R. § 205.239.

81. The notice of denial of certification also stated that The Country Hen's limitations on what months of the year and what hours of day the chickens could be allowed outside were far too restrictive, based on the experiences and knowledge of MICI's certification committee in certifying organic laying hens in Massachusetts.

82. On October 24, MICI mailed and e-mailed a copy of the notice of denial of certification to Richard Mathews, pursuant to 7 C.F.R. § 205.501(a)(15)(i).

83. Mr. Mathews replied with an October 24 e-mail stating, "We will be in touch when we complete our review of this matter."

84. On October 24, 2002, The Country Hen wrote Mr. Franczyk a letter with minor revisions to its proposal for providing outdoor access.

85. The revised proposal in the October 24, 2002, letter was for the access areas to be provided in permanent structures with corrugated metal roofs, two-by-four framing, and plywood floors. The sides and fronts of all structures would be covered with a plastic or nylon mesh. The Country Hen's October 24, 2002, letter proposed that these access areas would be either 300 or 448 square feet.

86. On October 25, 2002, Barbara Robinson, Deputy Administrator of AMS, told Judith Gillan, a MICI Board member, that any accredited certifying agent would be informed of

any appeal brought by an applicant for certification and allowed to respond as a part of due process.

87. On October 25, 2002, at the very same time Ms. Gillan was speaking to the Deputy Administrator, Mr. Franczyk received a communication from the AMS Administrator via e-mail, sent by a Katherine E. Benham.

88. The Administrator's October 25, 2002, communication purported to provide formal notice of The Country Hen's October 22 "appeal" and to communicate the Administrator's decision regarding that appeal. The Administrator's October 25, 2002, communication stated that it sustained the applicant's appeal.

89. The Administrator stated that the appeal was sustained because the applicant had provided a plan to address access to the outdoors for his poultry flocks, in accordance with 7 C.F.R. § 205.201.

90. The Administrator further stated that 7 C.F.R. §§ 205, *et. seq.*, do not establish space requirements for livestock production.

91. The Administrator further stated that MICI "has provided no evidence demonstrating that Mr. Bass's assessment of weather conditions at Hubbardston, Massachusetts, is not in keeping with Mr. Bass's ability to protect the animal's health, safety, or well being under 7 C.F.R. § 205.239(b)(3)."

92. The Administrator did not invite MICI to submit any evidence pursuant to the applicant's appeal.

93. The Administrator directed MICI to grant certification to the applicant retroactive to October 21, 2002, the date for full implementation of the organic regulations.

94. The Administrator's decision stated, "The NOP acknowledges that the plan submitted by Mr. Bass lacks clarity. This lack of clarity, however, does not preclude certification."

95. The Administrator further directed MICI to "continue to cooperate with Mr. Bass in development of a production plan which clearly and verifiably demonstrates Mr. Bass's compliance with the access to the outdoors requirement."

96. On October 28, 2002, MICI sent a letter to Administrator Yates, objecting to the procedure followed in deciding the organic certification applicant's appeal and the conclusions reached in his October 25 decision.

97. As of the date of this complaint, Administrator Yates has not provided any written response to MICI's October 28, 2002, letter.

98. On October 29, 2002, the NOP published a one-page policy statement on access to the outdoors for livestock on its web site, www.ams.usda.gov/nop.

99. Upon information and belief, following the Administrator's October 25, 2002, decision, the applicant released eggs on the market bearing the USDA Organic seal and claiming that the applicant was "certified organic by NOFA/Mass" and that the applicant's "feed and eggs are certified organic by NOFA/Mass."

100. NOFA/Mass, Inc. is not an accredited certifying agent under the National Organic Program.

101. Upon information and belief, the applicant relied upon the personal review of the carton conducted by Richard Mathews as well as the Administrator's decision for its use of the USDA seal and the NOFA/Mass name.

102. MICI's NOFA/Mass Organic Certification Program has not issued an organic certificate to The Country Hen.

VI. ALLEGATIONS OF LAW

COUNT ONE

USDA Unlawfully Interfered With MICI's Control Over the Use of its Own Seal and Name

103. Complainant incorporates the allegations contained in paragraphs 1-102.

104. The term "organic" may only be used on labels for agricultural products that have been produced and handled in accordance with the Organic Food Production Act and National Organic Program regulations.

105. In order to use the USDA organic seal, non-exempt producers must develop an organic production system plan that is agreed to by the producer and the certifying agent.

106. Agricultural products sold in packages and labeled "organic" must indicate that they are "certified organic by . . ." and identify the name of the certifying agent that certified the handler of the finished product. 7 C.F.R. § 205.303(b)(2).

107. Neither the Act nor the rule gives USDA the authority to "approve" a producer's or handler's use of a certifying agent's seal or name.

108. USDA does not perform organic certification activities.

109. Mr. Mathews, the NOP Program Manager, did not have the authority to approve the applicant's use of the NOFA/Mass Organic Certification Program name or seal.

110. USDA behaved in a manner that was arbitrary, capricious, and contrary to law when it allowed the producer to function "as if" it were certified by MICI's NOFA/Mass Organic Certification Program.

111. NOFA/Mass, Inc. objects to the use of its name, “NOFA/Mass,” rather than the name “NOFA/Mass Organic Certification Program” on the label, particularly on cartons of eggs that its members believe were not produced in the manner required by the organic regulations, and were not certified by the NOFA/Mass Organic Certification Program.

112. MICI’s reputation among organic farmers in Massachusetts and nearby states will be adversely affected if producers and consumers believe that it has certified a producer who is not in compliance with the organic laws and regulations, causing it to lose its primary source of funding, which is certification fees.

COUNT TWO

USDA’s Interference With the Noncompliance Procedures was Arbitrary, Capricious, and Contrary to Law

113. Complainant incorporates the allegations contained in paragraphs 1-112.

114. Accredited certifying agents are required to avoid conflicts of interest by not giving advice or providing consultancy services to certification applicants on how to overcome identified barriers to certification. 7 C.F.R. § 205.501(a)(11)(iv).

115. USDA has no role in the noncompliance procedures. See 7 C.F.R. § 205.662.

116. The regulations do not authorize USDA to assist individual certification applicants in how to overcome identified barriers to certification.

117. Mr. Mathews’ meeting with the applicant and the applicant’s report of the advice he had received from Mr. Mathews are contrary to the letter and spirit of the organic program which states that “compliance procedures” are to be “completed at the certifying agent level.” See 65 Fed. Reg. 80,548, 80,636 (2000).

118. The meeting between Mr. Bass and Mr. Mathews creates at the very least an appearance of impropriety, if not an actual conflict of interest.

119. When issuing an organic certificate, a certifying agent may include requirements for the correction of minor noncompliances within a specified time period as a condition of continued certification. 7 C.F.R. § 205.404(a). The certifying agent determines whether or not a violation is minor. 65 Fed. Reg. 80,548, 80,592-80,593 (2000).

120. It was arbitrary, capricious, and contrary to law for USDA to direct MICI to issue a conditional certificate.

121. The harm to MICI caused by the Administrator's arbitrary, capricious, and unlawful conduct includes violations of MICI's substantive and procedural rights, actual and potential damage to the good will associated with the "NOFA/Mass Organic Certification Program" name, and actual and potential economic costs associated with being compelled to enter into a certifying agent relationship with an applicant that its certification committee had concluded was not in compliance with the organic program requirements.

COUNT THREE

The Administrator's Failure to Consider or Make Available to MICI All Relevant Information in His Possession Was Arbitrary, Capricious, and Contrary to Law

122. Complainant incorporates the allegations contained in paragraphs 1-121.

123. Upon information and belief, the Administrator had information regarding one or more previous, uncorrected major noncompliances on the part of the applicant.

124. USDA has a duty to make information relating to noncompliances and denials in its possession available to all certifying agents.

125. USDA did not advise MICI of any of The Country Hen's previous, uncorrected noncompliances.

126. MICI believed that the applicant was a certified operation in good standing with another accredited certifying agent at the time of its application. As a result, MICI believed itself

to be compelled to “accept” certain of the applicant’s practices, such as routine debeaking of chicks and routine administration of vaccines.

127. The Administrator directed MICI to certify the applicant, despite its failure to provide the information regarding any prior uncorrected noncompliance(s) to MICI.

128. The Administrator’s direction to MICI to certify the applicant, despite the fact that he knew or should have known that MICI did not have information regarding any prior uncorrected noncompliance(s) was arbitrary, capricious, and contrary to law.

129. The harm to MICI caused by the Administrator’s arbitrary, capricious, and unlawful conduct includes violations of MICI’s substantive and procedural rights, actual and potential damage to the good will associated with the “NOFA/Mass Organic Certification Program” name, and actual and potential economic costs associated with being compelled to enter into a certifying agent relationship with an applicant that its certification committee had concluded was not in compliance with the organic program requirements.

COUNT FOUR
USDA’s Administration of the Appeals Process
Was Been Arbitrary, Capricious and Contrary to Law and the
Administrator’s Decision is Unsupported by Substantial Evidence

130. Complainant incorporates the allegations contained in paragraphs 1-129.

131. All appeals to the Administrator are to be reviewed, heard, and decided by persons not involved with the decision being appealed. 7 C.F.R. § 205.680(e).

132. Upon information and belief, Richard Mathews took an active role in USDA’s investigation of the applicant’s appeal, even though he was “involved” with the decision being appealed.

133. All appeals must include a copy of the adverse decision and a statement of the appellant's reasons for believing that the decision was not proper or made in accordance with applicable program regulations, policies, or procedures. 7 C.F.R. § 205.681(d)(3).

134. Upon information and belief, the applicant's October 22, 2002, appeal did not include either of these required components.

135. USDA is responsible for notifying the certifying agent of an appeal filed by an applicant for certification. 65 Fed. Reg. 80,548, 80,636 (2000).

136. The Administrator did not provide a reasonable time for MICI to submit a response to the applicant's appeal.

137. The Administrator's decision sustaining the applicant's appeal was unsupported by substantial evidence.

138. Despite the fact that accredited certifying agents are required to avoid conflicts of interest by not giving advice or providing consultancy services to certification applicants on how to overcome identified barriers to certification, the Administrator directed MICI to "continue to cooperate with Mr. Bass in development of a production plan which clearly and verifiably demonstrates Mr. Bass's compliance with the access to the outdoors requirement."

139. The Administrator did not advise MICI of its right under the Organic Foods Production Act to appeal the decision.

140. The Administrator's direction to issue a certificate despite the applicant's failure to provide its poultry with adequate access to the outdoors is arbitrary, capricious, and contrary to law, and not supported by substantial evidence.

141. The Administrator's direction to issue a certificate despite the conceded lack of clarity in the applicant's organic system plan is arbitrary, capricious, and contrary to law, and not supported by substantial evidence.

142. The Administrator's direction to issue a certificate despite the fact that MICI had not agreed to the producer's organic system plan is arbitrary, capricious and contrary to law, and not supported by substantial evidence.

143. The Administrator's decision is arbitrary, capricious, and contrary to law, and unsupported by substantial evidence even under the policy statement issued by USDA four days after the decision, on October 29, 2002.

COUNT FIVE

The Administrator's Decision Violated Due Process Requirements

144. Complainant incorporates the allegations contained in paragraphs 1-143.

145. The Administrator has a duty to administer the informal appeals process in a way that is consistent with the requirements of due process.

146. The Administrator failed to conduct the applicant's appeal of MICI's denial of certification in a manner consistent with the requirements of due process.

The Administrator directed MICI to certify the applicant, despite the fact that MICI was never afforded an opportunity to present evidence or be heard.

147. The harm to MICI caused by the Administrator's denial of due process includes violations of MICI's substantive and procedural rights, actual and potential damage to the good will associated with the "NOFA/Mass Organic Certification Program" name, and actual and potential economic costs associated with being compelled to enter into a certifying agent relationship with an applicant that its certification committee had concluded was not in compliance with the organic program requirements.

COUNT SIX

USDA Has Exceeded its Authority and Interfered With the Certifier's Authority to Deny Certification in a Manner that is Arbitrary, Capricious, and Contrary to Law

148. Complainant incorporates the allegations contained in paragraphs 1-147.

149. A “certified organic farm” is “a farm, or portion of a farm, or site where agricultural products or livestock are produced, that is certified by the certifying agent under this title as utilizing a system of organic farming as described by this title.” 7 U.S.C. § 6502(4).

150. Under 7 C.F.R. § 205.201, a producer “must develop an organic production or handling system plan that is agreed to by the producer or handler and an accredited certifying agent.”

151. An organic system plan is defined as: “A plan of management of an organic production or handling operation that has been agreed to by the producer or handler and the certifying agent and that includes written plans concerning all aspects of agricultural production or handling”

152. The prefatory comments also state, “These provisions provide ample discretion for producers, handlers, and certifying agents to perform their duties while recognizing that mutual consent is a prerequisite for them to meet their responsibilities.” 65 Fed. Reg. 80,548, 80,564 (2000).

153. “Certification” is defined as, “A determination made by a certifying agent that a production or handling operation is in compliance with the Act and regulations in [part 205], which is documented by a certificate of organic operation.” 7 C.F.R. § 205.2.

154. The Country Hen is not a certified organic farm, because MICI has not agreed to its organic system plan, nor has it issued an organic certificate.

155. The organic program does not give the Administrator authority to direct an accredited certifying agent to issue a certificate.

156. The Administrator has no authority to direct MICI to issue a certificate that would include pullet houses which MICI had not inspected.

157. The regulations do not give the Administrator authority or put the certifying agent on notice that an organic certificate may be deemed to have been issued under its name and authority, if it has not agreed to the applicant's organic system plan.

158. In a telephone conversation on November 1, 2002, Richard Mathews told Judith Gillan, an MICI Board member, that the NOFA/Mass Organic Certification Program's accreditation could be revoked if it did not immediately grant a certificate to The Country Hen.

159. A certifying agent that falsely or negligently certifies any farming operation that does not meet the terms and conditions of the National Organic Program places its own accreditation at risk. 7 U.S.C. § 6519(e).

160. By directing the certifying agent to issue an organic certificate to the applicant, the Administrator, in effect, attempted to act as the certifying agent, contrary to the provisions of the organic regulations.

161. USDA does not perform organic certification activities under any circumstance. 65 Fed. Reg. 80,548, 80,595 (2000).

162. The harm to MICI caused by the Administrator's arbitrary, capricious and unlawful conduct includes violations of MICI's substantive and procedural rights, actual and potential damage to the good will associated with the "NOFA/Mass Organic Certification Program" name, and actual and potential economic costs associated with being compelled to enter into a

certifying agent relationship with an applicant that its certification committee had concluded was not in compliance with the organic program requirements.

COUNT SEVEN

USDA's Interpretation of Outdoor Access Is Contrary to Law

163. Complainant incorporates the allegations contained in paragraphs 1-162.

164. With the exception of day old poultry, all poultry from which eggs will be sold or labeled as organically produced shall be raised and handled in accordance with the OFPA prior to and during the period in which the eggs are sold. 7 U.S.C. § 6509(e)(1).

165. Congress directed the Secretary to hold public hearings and develop detailed regulations, with notice and public comment, to guide the implementation of the standards for livestock products. 7 U.S.C. § 6509(g).

166. The phrase "access to the outdoors" was added to the final rule in response to public comments on the proposed rules.

167. In the prefatory comments to the final rule, USDA reported, "Commenters were virtually unanimous that, except for the limited exceptions for temporary confinement, all animals of all species must be afforded access to the outdoors." 65 Fed. Reg. 80,548, 80,571 (2000).

168. In the final rule, 7 C.F.R. § 205.239(a)(1) provides that the producer must establish and maintain livestock living conditions which accommodate the health and natural behavior of animals, including access to the outdoors, shade, shelter, exercise areas, fresh air and direct sunlight suitable to the species, its stage of production, the climate, and the environment.

169. In the final rule, 7 C.F.R. § 205.238(a)(4), the livestock health care practice standard, states that the producer must establish and maintain preventive livestock health care

practices, including provision of conditions which allow for exercise, freedom of movement, and reduction of stress appropriate to the species.

170. In its 2002 Program Manual, MICI stated, “The goal of certified animal production is to raise healthy animals pastured or free ranging on organic feed.”

171. MICI submitted its Program Manual to USDA during the accreditation process, as required under 7 C.F.R. § 205.504(b).

172. The interpretation of the requirement for outdoor access advanced by the Administrator in his October 25, 2002, decision is arbitrary, capricious, and contrary to law.

173. The harm to MICI caused by the Administrator’s unlawful interpretation of the regulatory requirement of access to the outdoors includes violations of MICI’s substantive and procedural rights, actual and potential damage to the good will associated with the “NOFA/Mass Organic Certification Program” name, and actual and potential economic costs associated with being compelled to enter into a certifying agent relationship with an applicant that its certification committee had concluded was not in compliance with the organic program requirements.

COUNT EIGHT
**USDA’s October 29, 2002, Policy Statement Is Unenforceable to the
Extent it Is Inconsistent With the Regulations**

174. Complainant incorporates the allegations contained in paragraphs 1-173.

175. The Administrator is charged with enforcement of the Organic Food Production Act and National Organic Program regulations.

176. Congress directed the Secretary to hold public hearings and develop detailed regulations, with notice and public comment, to guide the implementation of the standards for livestock products. 7 U.S.C. § 6509(g).

177. The policy statement is an unreasonable interpretation of the regulation.

178. The policy statement was issued four days after the Administrator's decision in this case.

179. The policy statement was promulgated without notice to the public or opportunity to comment, and is unenforceable.

180. To the extent that the one-page policy statement of October 29, 2002, on "Access to the Outdoors for Livestock" is inconsistent with the regulations, it is unenforceable.

181. The harm to MICI caused by the Administrator's arbitrary, capricious, and unlawful conduct includes violations of MICI's substantive and procedural rights, actual and potential damage to the good will associated with the "NOFA/Mass Organic Certification Program" name, and actual and potential economic costs associated with being compelled to enter into a certifying agent relationship with an applicant that its certification committee had concluded was not in compliance with the organic program requirements.

VII. NATURE OF THE RELIEF SOUGHT

Based on the foregoing, MICI prays that:

A. The Administrator's decision be reversed, and MICI's NOFA/Mass Organic Certification Program's denial of certification be reinstated.

B. The Administrator be directed to notify the producer that MICI's denial of certification has been reinstated, and instruct the producer to immediately discontinue use of the USDA organic seal and language indicating it has been certified organic by MICI, NOFA/Mass, or the NOFA/Mass Organic Certification Program.

C. MICI be awarded reasonable costs and attorney fees incurred in bringing this appeal.

Dated: February 25, 2003.

Respectfully submitted,

s/ Jill E. Krueger

Jill E. Krueger

Susan E. Stokes

FARMERS' LEGAL ACTION GROUP, INC.

1301 Minnesota Building

46 East Fourth Street

St. Paul, Minnesota 55101

Phone: 651-223-5400

Fax: 651-223-5335

ATTORNEYS FOR COMPLAINANTS

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of February, 2003, four copies of the foregoing complaint were served by United States mail upon the Hearing Clerk of the Office of Administrative Law Judge:

Joyce A. Dawson, Hearing Clerk
Office of Administrative Law Judges
United States Department of Agriculture
Room 1081, South Building
Washington, D.C. 20250-9202

s/ Jill E. Krueger

Jill E. Krueger
Farmers' Legal Action Group, Inc.
46 East 4th Street, Suite 1301
St. Paul, MN 55101
Phone: 651-223-5400