



producer's or handler's organic system plan is not in compliance with the requirements of the Act and the regulations, the certifying agent must notify the applicant which aspects of its plan do not comply with the Act or regulations and provide the applicant with an opportunity to rebut or correct the certifying agent's findings, by issuing a notice of noncompliance. 7 C.F.R. § 205.405(a). If the applicant does not correct all areas of major noncompliance, the certifying agent must deny organic certification.

On October 4, 2002, MICI issued a notice of noncompliance to an egg producer, The Country Hen, which had applied for organic certification. The notice of noncompliance identified four areas of noncompliance, and gave the producer until December 31, 2002 to come into compliance. On October 15, 2002, the applicant asked MICI to make a final decision on its application for certification, rather than waiting until December 31, 2002, as set forth in the notice of noncompliance. MICI's certification committee met on the evening of October 21, 2002. The certification committee concluded that The Country Hen was not in compliance with the requirements of 7 C.F.R. § 205.239, particularly with the requirement that producers of organic livestock must establish and maintain living conditions which accommodate the health and natural behavior of livestock, including access to the outdoors. Late on the night of October 21, 2002, as a courtesy, MICI's certification manager e-mailed George Bass, owner of The Country Hen, that the certification committee had voted to deny certification. In the e-mail, MICI advised The Country Hen that the notice of denial of certification would be issued in a few days.

On October 22, 2002, The Country Hen e-mailed a letter to the Administrator that purported to appeal MICI's decision. The Country Hen's appeal did not include a copy of the notice of denial of certification, nor a statement of The Country Hen's reasons for believing that

the decision was not proper or made in accordance with applicable program regulations, as required by 7 C.F.R. § 205.681(d)(3). MICI had actual notice of the appeal from the applicant. The Administrator gave MICI notice of the applicant's appeal when he issued his decision. The Administrator did not provide MICI with an opportunity to respond to the applicant's appeal.

On October 24, 2002, MICI issued its notice of denial of certification to The Country Hen. MICI also sent a copy of the notice of denial of certification to the Administrator. On October 25, 2002, the Administrator issued a decision sustaining the applicant's appeal and directing MICI to issue an organic certificate to the applicant, retroactive to October 21, 2002. Respondent's motion to dismiss indicates that the Administrator considered submissions revising the applicant's organic system plan that had not been previously submitted to MICI.

On October 28, 2002, MICI objected in writing to the procedure followed and the substantive decision reached in the applicant's appeal. MICI has not issued an organic certificate to The Country Hen. The Country Hen has released egg cartons in the market bearing the claim that "Our feed and eggs are certified organic by NOFA/Mass."

Having received no reply to its October 28, 2002, objection, MICI filed a complaint on February 26, 2003. The Administrator filed a motion to dismiss on March 14, 2003.

### **ARGUMENT**

The Organic Foods Production Act (OFPA or "the Act") was enacted in 1990. *See* 7 U.S. Code §§ 6501 *et. seq.* The National Organic Program regulations enacted pursuant to the OFPA took full effect on October 21, 2002. *See* 7 C.F.R. §§ 205.1 *et. seq.* Together, the OFPA and the National Organic Program regulations demonstrate that: (1) the Secretary has a duty to provide for administrative appeals by any person adversely affected by a decision under the Act and regulations, and by any person who believes that a decision under the Act is inconsistent with the

requirements of the National Organic Program established under the Act, and (2) the Secretary has provided that appeals under the Act and regulations will be made to an Administrative Law Judge.

**A. The Organic Foods Production Act, Together with the Secretary’s Actions, Provide the Office of Administrative Law Judges with Jurisdiction Over This Appeal**

The OFPA requires, under 7 U.S.C. § 6520(a), that:

The Secretary shall establish an expedited administrative appeals procedure under which persons may appeal an action of the Secretary, the applicable governing State official, or a certifying agent under this title that—

- (1) adversely affects such person; or
- (2) is inconsistent with the organic certification program established under this title.

The OFPA defines “person” as “an individual, group of individuals, corporation, association, organization, cooperative, or other entity.” 7 U.S. Code § 6502(15). MICI is a Massachusetts nonprofit corporation, and a person within the meaning of the OFPA. The plain language of the statute demonstrates that the appeal procedures must be made available to any person adversely affected by a decision under the OFPA, as well as to any person who believes that a decision regarding organic certification is inconsistent with the organic certification program. USDA must “give effect to the unambiguously expressed intent of Congress.” *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

The National Organic Program regulations grant subject matter jurisdiction over matters under the OFPA and organic regulations to the Office of Administrative Law Judges. At 7 C.F.R. § 205.681(a)(2), the organic regulations provide for formal administrative proceedings pursuant to the Uniform Rules of Practice, 7 C.F.R. §§ 1.130 *et. seq.* The prefatory comments to the organic regulations 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). The Administrator made the decision that is at issue in this case.

1. MICI has been adversely affected by the Administrator’s decision, and its claims are within the jurisdiction of the Office of Administrative Law Judges.

MICI’s complaint is within the jurisdiction for administrative appeals under the OFPA because MICI has been and will be adversely affected by the Administrator’s decision. One adverse effect is the violation of MICI’s substantive and procedural rights. The Administrator has interfered with MICI’s right to control the use of its own name, and failed to provide due process before infringing on that right. A second adverse effect is actual and potential damage to the good will associated with the “NOFA/Mass Organic Certification Program” name. With the apparent approval of the Administrator, The Country Hen is selling eggs bearing the claim “Our feed and eggs are certified organic by NOFA/Mass.” This reference to “NOFA/Mass” has triggered objections from NOFA/Mass, a separate nonprofit organization that is not an accredited certifying agent. The Country Hen’s labeling claim has brought actual or potential harm to MICI’s reputation among organic farmers in Massachusetts and other northeastern states. A third adverse effect includes actual and potential economic costs as a result of being compelled to enter into a certifying agent relationship with an applicant whom its certification committee had concluded was not in compliance with the organic program requirements.

The Office of Administrative Law Judges has the power to decide this case. MICI has complied with the requirements of the Uniform Rules of Procedure. MICI filed its complaint in accordance with 7 C.F.R. §§ 1.133(b) and 1.135(a).

2. The Office of Administrative Law Judges has jurisdiction over complaints filed by a person who alleges that the Administrator has taken action that is inconsistent with the National Organic Program established under the Act.

The National Organic Program regulations are silent as to appeals under 7 U.S. Code § 6520(a)(2), that is, appeals alleging that an official act under the OFPA is inconsistent with the organic certification program established under the Act. However, the Uniform Rules of Practice provide ample authority for an Administrative Law Judge to decide all appeals under the OFPA. The Uniform Rules of Practice provide that, “If there is reason to believe that a person has violated or is violating any provision [of a statute or related regulations, standards, instructions, or orders over which the Office of Administrative Law Judges has jurisdiction] a complaint may be filed with the Hearing Clerk pursuant to these rules.”<sup>1</sup> 7 C.F.R. § 1.133(b)(1).

Thus, the National Organic Program regulations and the Uniform Rules of Practice together provide the Office of Administrative Law Judges with authority to take jurisdiction over both types of administrative appeals required to be made available under the OFPA.<sup>2</sup> MICI has complied with the requirements of the Uniform Rules of Procedure. MICI filed its complaint in accordance with 7 C.F.R. §§ 1.133(b) and 1.135(a).

MICI’s complaint raises eight counts alleging that the Administrator’s actions were inconsistent with the requirements of the organic certification program established under the OFPA. In Count One, MICI alleged that the Administrator interfered with MICI’s control over

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<sup>1</sup> While the OFPA has not yet been added to the list of statutes set forth in 7 C.F.R. § 1.131, the Secretary placing proceedings to deny, suspend, or revoke organic certification and proceedings to deny, revoke, or suspend accreditation within the ambit of the Uniform Rules of Practice is clear and unambiguous. 7 C.F.R. §§ 205.681(a)(2) and 205.681(b)(2).

<sup>2</sup> The provisions of the OFPA override any provision of either set of regulations that would deny appeal rights that are required to be made available under the statute, as discussed *infra* pages 8-11.

its own seal and label by a producer that had applied to it for certification in a manner that was inconsistent with the OFPA and the National Organic Program regulations. In Count Two, MICI alleged that USDA's interference with the noncompliance procedures between MICI and the applicant was inconsistent with the OFPA and the National Organic Program regulations. In Count Three, MICI alleged that the Administrator's failure to consider or make available to MICI information concerning past noncompliances of the applicant was inconsistent with the OFPA and the National Organic Program regulations. In Count Four, MICI alleged that the Administrator's administration of the appeals process—including an apparent failure to observe the required separation of functions—was inconsistent with the OFPA and the National Organic Program regulations.

In Count Five, MICI alleged that the Administrator's administration of the appeals process and the Administrator's decision violated due process requirements. In Count Six, MICI alleged that USDA exceeded its authority, and interfered with MICI's authority to deny certification in a manner that was inconsistent with the OFPA and the National Organic Program regulations. In Count Seven, MICI alleged that the Administrator's interpretation of the regulatory requirement that organic livestock have access to the outdoors was inconsistent with the OFPA and the National Organic Program regulations. In Count Eight, MICI alleged that the policy statement issued by USDA relating to access to the outdoors for organic livestock is unenforceable because it is inconsistent with the OFPA and the National Organic Program regulations.

**B. The Unambiguous Requirements of the Statute Override Any Provision of the National Organic Program Regulations That Would Preclude an Appeal by MICI.**

The OFPA’s requirements for administrative appeals are unambiguous. They require the Secretary to establish “an expedited administrative appeals procedure under which persons may appeal an action of the Secretary, the applicable governing State official, or a certifying agent under this title that—(1) adversely affects such person; or (2) is inconsistent with the organic certification program established under this title.” 7 U.S. Code § 6520(a).

The Administrator apparently relies upon one portion of the regulations as authority for its motion to dismiss.<sup>3</sup> With respect to appeals regarding applications for certification, the provision in question states that, “The act of sustaining the appeal shall not be an adverse action subject to appeal by the affected certifying agent.” 7 C.F.R. § 205.681(a)(1). To the extent that this regulatory provision is inconsistent with the clear requirements of the statute, it is unenforceable. *Brown v. Gardner*, 513 U.S. 115, 120 (1994).

The OFPA imposes a duty upon the Secretary to create an administrative appeals procedure in which any person may appeal an action by the Secretary that adversely affects the person. 7 U.S. Code section 6520(a)(1). The regulation would deny access to that administrative appeals process for certifying agents who are adversely affected by the Secretary’s or Administrator’s action upholding an applicant for certification’s appeal. 7 C.F.R. § 205.681(a)(1). The organic regulations create a categorical rule that no certifying agent is

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<sup>3</sup> Arguably, the Administrator’s motion to dismiss on the pleadings is barred by 7 C.F.R. § 1.143(b)(1), which states that, “Any motion will be entertained other than a motion to dismiss on the pleading.”

adversely affected by the Administrator's decision to sustain an applicant's appeal, which is contrary to the statute itself.

The Administrator's direction to MICI to issue a certificate to the applicant has an adverse effect upon MICI within the meaning of the OFPA, as found in 7 U.S. Code § 6520(a)(1). The mere assertion in the regulations that sustaining an applicant's appeal will not be an adverse action as to the certifying agent may not preclude MICI from exercising rights granted to all persons by the OFPA.

A simple comparison of the effects of decisions by the Administrator upon producers, handlers, and certifying agents demonstrates that the adverse effects for each are comparable, and that the provisions in the National Organic Program regulations affording an administrative appeals process to producers and handlers, but not to certifying agents, is inconsistent with the OFPA. Indeed, the adverse effects upon the certifying agent are more serious than those upon the producer or handler. In a case where the Administrator denies an applicant's appeal, the applicant is being denied the right to use the USDA Organic seal—a right that has never been granted to that applicant. The property right at stake for the accredited certifying agent is greater than the property right at stake for the applicant. An accredited certifying agent has already demonstrated its expertise and ability to comply with the OFPA and the regulations. Once accredited, the certifying agent is entitled to grant or deny organic certificates to particular applicants.

An applicant that has received an organic certificate from an accredited certifying agent must include the name of the certifying agent on its label if it uses the USDA Organic seal. 7 C.F.R. section 205.303(b)(2). If a certifying agent's denial of certification is upheld during the administrative appeals process, the certifying agent is able to decide the parties to which it gives

an organic certificate and its own imprimatur. However, if a certifying agent's denial of certification is overturned during the administrative appeals process, the certifying agent loses control over the use of its name if USDA is permitted to compel a certifying agent to issue an organic certificate and the certifying agent has no ability to appeal. Nothing in the OFPA suggests that USDA is authorized to infringe on the certifying agent's control over the use of its own name.

Being compelled to associate with a producer when it has not agreed to its organic plan does adversely affect the certifying agent, and the Secretary must provide an appeals procedure to the certifying agent. If MICI's right to appeal is not upheld, the Administrator's decision will force MICI to choose between allowing the use of its name by a producer whose organic system plan it has not agreed to because it has found that it is not in compliance with the Act and regulations, and declining to issue a certificate and perhaps risking its own accreditation.

The adverse effects of the Administrator's decision upon a certifying agent are at least as cognizable as those upon the producer or handler. A producer or handler that is denied organic certification may still sell its products without the USDA Organic seal, but a certifying agent that loses its accreditation can no longer serve its mission of organic certification. This would be the case for MICI's NOFA/Mass Organic Certification Program. A certifying agent's stock in trade is in its expertise and in its reputation. Moreover, if organic farmers and consumers perceive that a certifying agent compromised the national organic certification standards, the certifying agent's credibility will sustain a serious adverse effect, even if its accreditation is retained.

Under the National Organic Program regulations, the only circumstances in which a case could come before an Administrative Law Judge would be at the initiative of the Administrator. *See, e.g.* 7 C.F.R. § 205.681(a)(2) (providing that, "If the Administrator . . . denies an appeal, a

formal administrative proceeding will be initiated to deny, suspend, or revoke the certification”).

The regulations do not provide any circumstance under which a person other than the Administrator may initiate a formal administrative proceeding before an Administrative Law Judge. This is contrary to the statute, and the statute itself must control.

The OFPA also imposes a duty upon the Secretary to establish an administrative appeals procedure in which any person may appeal an action of the Secretary that the person believes is inconsistent with the organic certification program established under the Act. 7 U.S. Code § 6520(a)(2). MICI’s assertion that USDA’s interference in the certification process, its conduct of the applicant’s appeal, and the Administrator’s decision itself were inconsistent with the Act and regulations is sufficient to invest the Office of Administrative Law Judges with jurisdiction over its complaint. *See* 7 C.F.R. § 1.133(b). The absence of provisions within the National Organic Program regulations themselves for appeals of agency actions that are inconsistent with the organic certification program may not be permitted to prevent persons from exercising rights secured to them by statute.

Congress has directly spoken to the precise question at issue, its intent is clear, and “that is the end of the matter.” *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). The National Organic Program regulations may not deprive the Office of Administrative Law Judges of jurisdiction over the claims of certifying agents pursuant to the OFPA and the Uniform Rules of Practice. The Secretary may not insulate from review decisions that the Congress intended to be subject to review.

**C. Statutory Appeal Rights Must be Honored to Preserve the Integrity of the National Organic Program.**

As set forth above, Congress clearly intended that persons affected by violations of the Act should have a remedy. MICI has alleged numerous respects in which the agency’s

involvement in this matter were inconsistent with the requirements of the Act and regulations. The Administrator's motion to dismiss revealed other potential violations of the Act and regulations. These violations of the OFPA need to be exposed to the light of day in an administrative forum, as Congress intended.

MICI's complaint alleged that The Country Hen is using the USDA organic seal and the NOFA/Mass name, with the apparent approval of the Administrator, despite the fact that MICI's NOFA/Mass Organic Certification Program has not issued an organic certificate to The Country Hen, and despite the fact that NOFA/Mass is not an accredited certifying agent.

MICI's complaint alleged that the Administrator decided the appeal that was filed by The Country Hen, despite the fact that it was not accompanied by a copy of the adverse decision and a statement of the appellant's reasons for appealing, as required by the regulations. 7 C.F.R. § 205.681(d)(3).

The Administrator's motion to dismiss revealed a new category of official action inconsistent with the Act and the regulations. The Administrator's motion asserts that The Country Hen submitted new information to the Administrator, pursuant to 7 C.F.R. § 205.405(b), and that the Administrator relied upon this information in sustaining The Country Hen's appeal. However, 7 C.F.R. § 205.405(b) provides no authority for applicants for certification to submit new information to the Administrator. The situation addressed by 7 C.F.R. § 205.405(b) is the first stage of informal negotiations between the applicant and the certifying agent, not the Administrator. The regulations make no provision for applicants for certification to submit revisions to its organic system plan after the noncompliance stage has ended and a notice of denial of certification has been issued.

The Administrator had no authority to consider this new information, both because the regulations require that all information be considered first by the certifying agent, and because the opportunity to submit revised information is only available at the noncompliance stage. By looking at new information, and exercising his own judgment about that information, the Administrator acted as if he were a certifying agent. The Administrator is not authorized to act as a certifying agent under the OFPA or the regulations.

As the United States Supreme Court has noted in the context of cases involving procedural due process rights of government employment, “[S]ome opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision” and “effective notice and informal hearing permitting the [employee] to give his version of the events will provide a meaningful hedge against erroneous action.” *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532,543 (1985) (*internal citations omitted*). The vital role of certifying agents in ensuring the accuracy of certification decisions and the integrity of the National Organic Program would be undermined, and Congress’ intent thwarted, if they were deprived of the right to have these types of violations addressed in the first instance by the Office of Administrative Law Judges.

**D. Due Process of Law Requires that USDA Honor MICI’S Right to Appeal.**

If AMS is correct, and certifying agents have no avenues to redress violations of the statute, that raises serious due process concerns. As set forth in MICI’s complaint, the Administrator’s actions adversely affected MICI by violating MICI’s substantive and procedural rights, causing actual and potential damage to the good will associated with the “NOFA/Mass Organic Certification Program” name, and imposing actual and potential economic costs associated with being compelled to enter into a certifying agent relationship with an applicant

whom its certification committee had concluded was not in compliance with the organic program requirements.

Assuming *arguendo* that the Administrator may compel a certifying agent to issue an organic certificate, certifying agents must be accorded their procedural rights before they lose their right to withhold authorization to use their name on a product label. When the government acts to take away a property right, the party that would lose the property right is entitled to an administrative appeals process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985). This is well-settled law, Justice Jackson having written over fifty years ago, “Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

The OFPA creates a right of the certifying agent to grant or withhold agreement to a producer’s or handler’s organic system plan. 7 U.S. Code § 6504(3). The certifying agent’s right to agree with or to withhold agreement from an organic system plan corresponds to its right to control the use of its name. Control over the use of one’s name is an important property right in the state of Massachusetts, MICI’s home state. Massachusetts state law recognizes claims for unfair and deceptive trade practices, trademark infringement, libel, and misrepresentation. Certifying agents have an important property right at stake in their certification decisions, and they are entitled to due process before the agency infringes on that right.

MICI must be provided with notice and an opportunity to be heard before it may be compelled to comply with the Administrator’s decision, if it may be compelled to issue an

organic certificate at all. Congress has clearly required the Secretary to provide administrative appeal procedures for the claims raised by MICI, and USDA must comply.

**CONCLUSION**

For the foregoing reasons, Complainant prays that the Respondent's motion to dismiss be denied.

Dated: April 2, 2003.

Respectfully submitted,

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