

**UNITED STATES DEPARTMENT OF AGRICULTURE**  
**BEFORE THE SECRETARY OF AGRICULTURE**

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In re:	)	OFPA Docket No. 03-0001
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MASSACHUSETTS INDEPENDENT	)	
CERTIFICATION, INC.,	)	<b>APPEAL BRIEF</b>
	)	
Petitioner.	)	

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Petitioner Massachusetts Independent Certification, Inc. submits the following brief to the Judicial Officer in support of its appeal petition. Under the Organic Food Production Act of 1990, the Secretary has a duty to provide appeal procedures for persons adversely affected by USDA actions in the national organic certification program, and for persons who believe USDA actions are inconsistent with the Act and its implementing regulations. Massachusetts Independent Certification, Inc. is a person who has been adversely affected by a USDA action that it believes violates the Act. Thus, the Secretary has a duty to provide Massachusetts Independent Certification, Inc. with appeal rights.

**BACKGROUND**

Parallel with the rise of the industrialized, chemical-intensive methods of farming now known as “conventional farming” in the early and mid 1900s was a growing interest in what is known as “organic farming.”<sup>1</sup> Mounting concerns about depleted soils and the persistent presence of agricultural pesticides on food and in the environment were epitomized and

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<sup>1</sup> See generally, Sir Albert Howard, An Agricultural Testament (1940); Lady Eve Balfour, The Living Soil (1948).

catalyzed by the publication in 1962 of Rachel Carson's Silent Spring.<sup>2</sup> As organic farming developed, the basic distinctions between organic and conventional crop farming were paralleled by distinctions in the role of animals in an overall farming operation. Where conventional farmers increasingly raised livestock with carefully bred characteristics in confined facilities, organic farming emphasized soil-based practices that enabled animals to engage in natural behaviors, provided animals with access to the outdoors, utilized animal wastes to enrich the soil, and fostered biodiversity.

At first, consumers who wanted to buy organic food and farmers who wanted to sell organic food conducted business through direct sales. In large part, consumers relied on trust and their own ability to visit local farms to know whether farmers were using the organic farming practices they expected.

As organic farming methods became more widely practiced, however, organic farmers and consumers wanted to trade through distributors such as cooperatives, supermarkets, and restaurants. The California Organic Foods Act of 1979 hit upon a system that would both expand the markets available to organic producers and allow consumers to have confidence in the organic produce they wished to buy—namely, third party certification. With third party certification, purchasers of organic food relied upon knowledgeable, experienced inspectors to verify that the food was produced on a farm using accepted organic farming practices.

Soon, organic certification agencies proliferated. Agencies' standards differed, however, and this made trade across state lines difficult. Seeking a uniform national standard that would facilitate trade across state and national boundaries, as well as enable enforcement against

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<sup>2</sup> Rachel Carson, Silent Spring (1962).

pretenders to the label, representatives from the organic industry approached Congress.<sup>3</sup>

### **The Organic Food Production Act of 1990**

Congress passed the Organic Food Production Act of 1990 in order to (1) establish national standards governing the marketing of certain agricultural products as organically produced products; (2) assure consumers that organically produced products meet a consistent standard; and (3) facilitate interstate commerce in fresh and processed food that is organically produced.<sup>4</sup> The OFPA was designed to build upon the private sector's success by launching a "public-private partnership." Rather than "reinventing the wheel," the OFPA was intended to achieve efficiencies by utilizing the strengths of both the organic industry and USDA.

Under the Act, USDA is authorized to accredit certifying agents who demonstrate expertise in organic food production and detailed recordkeeping systems. These accredited certifying agents are then authorized to grant or deny organic certification to food producers and handlers. Only producers and handlers who have been certified organic by an accredited certifying agent may sell or label their agricultural products as organic.<sup>5</sup> Under the regulations, packaged food products labeled as "organic" or "100% organic" must also bear the name of the accredited certifying agent that granted the organic certificate.<sup>6</sup>

The statutory design recognized that disputes might arise within the organic certification program. The Act directed 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—

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<sup>3</sup> Much of this history is reflected in appendices to the final National Organic Program regulations. See, e.g., 65 Fed. Reg. 80,548, 80,663 (2000).

<sup>4</sup> 7 U.S.C. § 6501.

<sup>5</sup> 7 U.S.C. § 6504.

<sup>6</sup> 7 C.F.R. § 205.303(b)(2)(2003).

- (1) adversely affects such person; or
- (2) is inconsistent with the organic certification program established under this title.<sup>7</sup>

After two proposed rules, and a series of “issue papers” on important topics, final rules for the National Organic Program were published in December 2000,<sup>8</sup> and were implemented on October 21, 2002. The regulations were the subject of intense public interest. The first proposed rule<sup>9</sup> garnered over 275,000 comments, the most for any proposed rule in USDA history.<sup>10</sup> Over 10,000 people responded to issue papers concerning livestock confinement, medications, and the authority of certifying agents.<sup>11</sup> Commenters observed that access to the outdoors for animals was a “fundamental tenet” of organic livestock production.”<sup>12</sup> The second proposed rule received over 40,000 comments.<sup>13</sup> Those who commented were nearly unanimous in their support of an explicit requirement for “access to the outdoors” for organic livestock.<sup>14</sup>

### **The Administrator Overturns Massachusetts Independent Certification’s Decision Regarding The Country Hen’s Application for an Organic Certificate**

The petitioner in the instant matter, Massachusetts Independent Certification, Inc. (Massachusetts Independent Certification or “MICI”), by and through its NOFA/Mass Organic Certification Program, became an accredited certifying agent in the National Organic Program on April 29, 2002.

In July 2002, The Country Hen applied to Massachusetts Independent Certification for organic certification. On October 4, 2002, after completing its review of The Country Hen’s

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<sup>7</sup> 7 U.S.C. § 6520.

<sup>8</sup> 65 Fed. Reg. 80,548 (2000).

<sup>9</sup> 62 Fed. Reg. 65,850 (1997).

<sup>10</sup> 65 Fed. Reg. 13,512 (2000).

<sup>11</sup> 63 Fed. Reg. 57,624 (1998); 65 Fed. Reg. 13,512 (2000).

<sup>12</sup> 65 Fed. Reg. 13,512, 13,547 (2000).

<sup>13</sup> 65 Fed. Reg. 80,548 (2000).

<sup>14</sup> 65 Fed. Reg. 80,548, 80,571 (2000).

operation, MICI issued a notice of noncompliance to The Country Hen.<sup>15</sup> The notice identified four areas of noncompliance, and gave The Country Hen until December 31, 2002, to come into compliance. On October 9, 2002, the president of The Country Hen met with USDA staff for the National Organic Program, where he learned that he could appeal to the Administrator of the Agricultural Marketing Service after MICI made its final decision.<sup>16</sup> On October 15, 2002, The Country Hen asked MICI to make a final decision on its application for certification.

MICI's certification committee met on the evening of October 21, 2002, and 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. The certification committee concluded that The Country Hen was not in compliance with the regulations because there was no outdoor access currently provided to the animals. The certification committee further concluded that the organic plan proposed by The Country Hen would not bring the producer into compliance, because the periods of confinement proposed were more restrictive than necessary to protect the health of the chickens and because all of the chickens would not have room to move around in the porch that would be provided.

As a courtesy, late on the evening of October 21, 2002, MICI's certification manager, Don Franczyk, sent an e-mail to George Bass, owner of The Country Hen, stating 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 A.J. Yates, the Administrator of the Agricultural

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<sup>15</sup> See Appendix, Tab 1, "Notice of Noncompliance, dated October 4, 2003.

<sup>16</sup> Appendix, Tab 2, pp. 2-3, The Country Hen Trip Report.

Marketing Service, asking him to review the decision.<sup>17</sup> The Country Hen's letter 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 nor made in accordance with applicable program regulations. The Country Hen copied MICI on the letter to Administrator Yates.

On October 24, 2002, MICI issued its Notice of Denial of Certification to The Country Hen.<sup>18</sup> 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 Country Hen's appeal and directing MICI to issue an organic certificate to The Country Hen, retroactive to October 21, 2002.<sup>19</sup> The Administrator did not provide MICI with an opportunity to respond to The Country Hen's appeal before issuing his decision.

On October 28, 2002, MICI objected in writing both to the procedure followed by the Administrator and the result reached in the applicant's appeal. MICI did not issue an organic certificate to The Country Hen. The Country Hen nonetheless released egg cartons in the marketplace advertising the claim that, "Our feed and eggs are certified organic by NOFA/Mass."

Having received no reply to its October 28, 2002, letter to Administrator Yates, MICI filed a complaint on February 26, 2003, seeking a hearing before the Administrative Law Judge ("ALJ") regarding the lawfulness of the Administrator Yates's actions. The Administrator filed a motion to dismiss on March 14, 2003. The ALJ granted Administrator Yates's motion to dismiss in a decision dated November 4, 2003, and received via U.S. mail by counsel for MICI on

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<sup>17</sup> Appendix, Tab 3, Letter from The Country Hen to Administrator Yates, dated October 22, 2002.

<sup>18</sup> Appendix, Tab 4, Notice of Denial, dated October 24, 2002.

<sup>19</sup> Appendix, Tab 5, Letter from Administrator Yates, dated October 25, 2002.

November 12, 2003.<sup>20</sup> The Administrative Law Judge held that she lacked subject matter jurisdiction over MICI's appeal under the regulations of the National Organic Program. MICI appeals that decision pursuant to 7 U.S.C. § 6520 and 7 C.F.R. § 1.145.

## **ARGUMENT**

### **I. The appeal regulations enacted for the National Organic Program are not in accordance with law because they are in conflict with the requirements of the Organic Food Production Act of 1990.**

The appeal regulations promulgated for the National Organic Program, if enforced according to the Administrative Law Judge's interpretation, would unlawfully restrict the appeal rights that USDA is required by the Organic Foods Production Act (OFPA or "the Act") to provide. The appeal regulations would also, if enforced as USDA argues they should be, fail to provide due process of law as required by the United States Constitution. The instant case concerns the unlawful restriction upon the appeal rights of accredited certifying agents, such as Massachusetts Independent Certification, but the regulations also fail to meet the statutory mandate for procedures for appeals by other concerned persons, including consumers and competitors of would-be organic producers, handlers, and certifiers.

#### **A. The rule that purports to bar accredited certifying agents from appealing certain decisions of the Administrator is inconsistent with the Act.**

The Organic Food Production Act mandates appeal rights. Specifically, the Act provides 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,

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<sup>20</sup> The ALJ relied, in part, upon a "Supplemental Memorandum to Clarify Issues" submitted by the Administrator. The Rules of Practice do not provide for such memoranda. Counsel for MICI was not afforded an opportunity to respond to the Supplemental Memorandum, dated October 28, 2003, and, in fact, received it from the Hearing Clerk at the same time and in the same envelope as the ALJ's decision.

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.<sup>21</sup>

“Person” is defined as, “an individual, group of individuals, corporation, association, organization, cooperative or other entity.”<sup>22</sup> This broad definition clearly includes certifying agents.

Appeal regulations for the National Organic Program impermissibly attempt to narrow this statutory mandate for broad appeal rights. Specifically, 7 C.F.R. § 205.681(a) provides that an applicant for certification may appeal a certifying agent's notice of denial of certification to the Administrator. The regulation further provides that:

If the Administrator or State organic program sustains a certification applicant's or certified operation's appeal of a certifying agent's decision, the applicant will be issued organic certification, or a certified operation will continue its certification, as applicable to the operation. The act of sustaining the appeal shall not be an adverse action subject to appeal by the affected certifying agent.<sup>23</sup>

This provision of the regulations is inconsistent with the Act.

The regulatory provision at 7 C.F.R. § 205.681(a)(1), which purports to deny appeal rights to certifying agents when the Administrator overturns their denials of certification, is inconsistent with the OFPA for four reasons. First, OFPA requires the Secretary to honor the appeal rights of adversely affected persons. Accredited certifying agents are “persons” who may be adversely affected by decisions of the Administrator overturning their denials of certification. Massachusetts Independent Certification alleged in its complaint that it had been and would continue to be adversely affected by the Administrator’s decision. MICI alleged that these

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<sup>21</sup> 7 U.S.C. § 6520.

<sup>22</sup> 7 U.S.C. § 6502(15).

<sup>23</sup> 7 C.F.R. § 205.681(a)(1) (2003).

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.<sup>24</sup> The regulation itself refers to certifying agents in these instances as “affected.”<sup>25</sup> The adjective is significant because the statute requires that persons who are adversely *affected* be allowed to appeal. Massachusetts Independent Certification is an adversely affected person. Thus, the Secretary has a statutory duty to provide Massachusetts Independent Certification, Inc. with the right to appeal USDA actions that have adversely affected it.

Second, the Secretary has a statutory duty to provide an administrative appeals process for all persons to object to actions of the Secretary and her delegates that are inconsistent with the national organic certification program established under the Act. Massachusetts Independent Certification, Inc. is a person within the meaning of the Act. Thus, the Secretary has a statutory duty to provide Massachusetts Independent Certification, Inc. with the right to appeal USDA actions that are inconsistent with the program.

Third, OFPA does not authorize the Secretary to order that an “applicant will be issued organic certification,” as provided in the National Organic Program appeal regulation cited above.<sup>26</sup> Under the statutory design of the program, the decision whether or not to grant an

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<sup>24</sup> Complaint, Docket Number OFPA 03-0001, para. 11.

<sup>25</sup> 7 C.F.R. § 205.681(a)(1) (2003). (stating that, “The act of sustaining the appeal shall not be an adverse action subject to appeal by the *affected* certifying agent.”) (*emphasis added*).

<sup>26</sup> 7 C.F.R. § 205.681(a)(1) (2003).

organic certificate belongs to the accredited certifying agent.<sup>27</sup> The Secretary has a duty to provide an administrative forum for resolving disputes related to the national organic program, but this duty does not confer the authority to direct that an organic certificate be issued.

Fourth, the regulation bases the right to review of certification decisions under the Uniform Rules of Practice upon the outcome of the Administrator's decision.<sup>28</sup> The OFPA requires that the right to administrative review be based upon whether the action adversely affects a person or is inconsistent with the laws governing the national organic certification program.

The adverse effects upon certifying agents of being directed to issue certification may bear further explanation. Arguably, 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 applicant may still sell its agricultural products, perhaps with label claims for some environmental practices.

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 authorized to grant or deny organic certificates to particular applicants. 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

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<sup>27</sup> 7 U.S.C. §§ 6513(a) and 6504(3); *See also* 7 U.S.C. §§ 6502(4) and (5) (defining "Certified organic farm" and "Certified organic handling operation" as a farm or operation that is certified by the certifying agent as utilizing a system of organic farming or organic handling as described by the Act).

imprimatur. However, if USDA is permitted to compel a certifying agent to issue an organic certificate with no right to the certifying agent to appeal, the certifying agent loses control over the use of its name. Nothing in the OFPA suggests that USDA is authorized to infringe on the certifying agent's control over the use of its own name.

The Act also includes provisions defining violations of the Act and requiring notice and the opportunity to be heard in the course of USDA enforcement actions against persons who make false statements; attempt to use an organic label on an agricultural product that such persons know, or should have reason to know, was not produced or handled in accordance with the Act; or otherwise violate the purposes of the organic certification program as determined by the Secretary.<sup>29</sup> The Act recognized that these violations were unfair trade practices that would undermine consumer confidence as well as jeopardize the level playing field sought by organic producers and handlers.

In contrast, the only dispute recognized by the appeal regulations of the National Organic Program is a proposed denial, suspension, or revocation of one's own certification or accreditation. However, the appeal provisions of OFPA are not designed exclusively to protect the rights of persons seeking certification or accreditation. The Act is designed to maximize appeal rights, so that consumers who feel they are being misled, producers and handlers who feel they are being subjected to unfair competition, persons accused of violating the Act, and any persons (including accredited certifying agents) who feel that the integrity of the organic label is being compromised, may be heard.<sup>30</sup> Only with the full statutorily mandated appeals process will the purposes and language of the Act be fulfilled.

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<sup>28</sup> 7 C.F.R. § 205.381(a) (2003).

<sup>29</sup> 7 U.S.C. § 6519(c).

**B. Accredited certifying agents are not in a principal-agent relationship with the Secretary, nor would such a relationship, if present, negate required appeal rights.**

The elements of agency are not present in the relationship between the Secretary and accredited certifying agents. The term “agency” refers to, “the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.” Restatement (Second) of Agency § 1 (1957); see also *Meyer v. Holley*, 123 S. Ct. 824, 829 (2003) (noting that an agency relationship requires the manifestation of consent by both parties that one party will act on the other party’s behalf).

Administrator Yates argued, and the ALJ found, that accredited certifying agents are agents of the Secretary and, as a result, need not be accorded appeal rights when the Administrator overturns their decisions. As support for this conclusion, the ALJ turned to the definition section of the OFPA. The ALJ noted that the Act defines "certifying agent" as “. . .any person (including private entities) who is accredited by the Secretary as a certifying agent for the purpose of certifying a farm or handling operation as a certified organic farm or handling operation in accordance with this title.”<sup>31</sup> Mere use of the word “agent” does not suffice to establish that the Secretary and an accredited certifying agent are in a principal/agent relationship in the legal sense. In this context, the term “agent” is not a description of a legal relationship, but is rather a convenient title.

The OFPA provides that the Secretary shall implement the national organic certification

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<sup>30</sup> 7 U.S.C. § 6520.

<sup>31</sup> 7 U.S.C. § 6502(3).

program through certifying agents.<sup>32</sup> The ALJ concluded that accredited certifying agents act on behalf of the Secretary, and not adverse to her. Far from being adverse to the Secretary, appeals by accredited certifying agents of USDA decisions that are inconsistent with the organic certification program may help her to see that the law is faithfully executed, as is her duty. One could argue that the Secretary acts on behalf of certifying agents. In fact, the OFPA provides that the Secretary may collect fees from certifying agents for expenses due to provision of “accreditation services.”<sup>33</sup> In any case, that the agent acts on behalf of the principal is only part of the principal/agent relationship. The agent must also be subject to the control of the principal.

It is in the element of control that the supposed principal/agent relationship founders. The OFPA provides that it is certifying agents, not the Secretary, that may issue or withhold organic certificates.<sup>34</sup> The OFPA provides the Secretary with neither the authority to issue or deny organic certification herself, nor to compel certifying agents to do so.<sup>35</sup> The OFPA provides that if the Secretary determines that a certifying agent is not properly adhering to the provisions of the Act, the Secretary may suspend the certifying agent’s accreditation.<sup>36</sup> The authority to suspend a certifying agent’s accreditation is a negative power—it gives the Secretary the power to stop a certifying agent from issuing any organic certificates, but not the power to compel a

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<sup>32</sup> 7 U.S.C. § 6503(d).

<sup>33</sup> 7 U.S.C. §§ 6506(a)(10) and (d)(2).

<sup>34</sup> 7 U.S.C. § 6513(a). This statutory authority gives certifying agents accredited by the Secretary an independent duty to act on behalf of the public—including producers, handlers, and consumers—to uphold the integrity of the national organic certification program.

<sup>35</sup> USDA acknowledged the limitations on its role in the prefatory comments to the final rule, when it stated, “USDA does not perform organic certification activities under any circumstance . . .” 65 Fed. Reg. 80,548, 80,595 (2000). In the same document, USDA readily acknowledges the authority of certifying agents under the organic program, stating that, “Certifying agents grant certification, deny certification, and take enforcement action against a certified operation’s certification.” 65 Fed. Reg. 80,548, 80,610 (2000) (Comment 13).

<sup>36</sup> 7 U.S.C. § 6515(j)(1).

certifying agent to issue a particular organic certificate.<sup>37</sup> Massachusetts Independent Certification is not subject to the control of the Secretary with respect to individual organic certification decisions, and as a result, is not in an agent/principal relationship with the Secretary.

Even if certifying agents were agents of the Secretary, the OFPA does not carve out any exceptions for decisions of the Secretary or the Administrator that would render certain of their decisions non-reviewable. Under OFPA, all USDA actions that adversely affect a person or that may be inconsistent the national organic certification program must be subject to administrative appeal and judicial review.<sup>38</sup> The OFPA provides an administrative remedy for producers and handlers who are adversely affected by actions of accredited certifying agents.<sup>39</sup> The OFPA reflects careful consideration of the respective roles of the Secretary and certifying agents. Had Congress intended to remove the Secretary's decisions upon review of certifying agent decisions from the administrative appeals process, it could have included a provision to that effect. It did not, and the plain language of the statute must govern. The Secretary must "give effect to the unambiguously expressed intent of Congress."<sup>40</sup>

**C. The rule that bars accredited certifying agents from appealing certain decisions of the Administrator is unconstitutional.**

*(1) Barring accredited certifying agents from appealing certain Administrator decisions is a denial of due process of law.*

Both the liberty and property interests of accredited certifying agents may be profoundly affected by USDA decisions. Massachusetts Independent Certification alleges that neither the

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<sup>37</sup> It is noteworthy that the National Organic Program regulations provide for administrative review of proposals to suspend or revoke a certifying agent's accreditation. 7 C.F.R. § 205.681(b) (2003).

<sup>38</sup> 7 U.S.C. § 6520.

<sup>39</sup> 7 U.S.C. § 6520.

<sup>40</sup> *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

Secretary nor the Administrator has the authority to compel a certifying agent to grant an organic certificate. The OFPA is clear that an accredited certifying agent must agree to an organic plan before an organic certificate may be issued.<sup>41</sup> Nowhere does the OFPA give the Secretary authority to compel a certifying agent to issue a certificate. 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 that, “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 gives the certifying agent the right to grant or withhold agreement with a producer’s or handler’s organic system plan.<sup>42</sup> Aside from a *de minimis* exemption, a person may sell or label an agricultural product as organic only if it has been certified by a certifying agent.<sup>43</sup> Under the OFPA, food that has been certified organic may incorporate the USDA organic seal.<sup>44</sup> The regulations require packaged agricultural products bearing the claim “organic” or “100 percent organic” to also bear the name of the certifying agent on the information panel of the

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<sup>41</sup> 7 U.S.C. §§ 6502(13) “Organic plan” and 6504(3).

<sup>42</sup> 7 U.S.C. § 6504(3).

<sup>43</sup> 7 U.S.C. § 6505.

<sup>44</sup> 7 U.S.C. § 6505(a)(2).

label.<sup>45</sup> This regulatory provision is not explicitly required by the OFPA, but it heightens the importance to certifying agents of the ability to deny certification when they find that the producer or handler is not in compliance with the requirements of the law.

The certifying agent's right to agree with or 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 Massachusetts, MICI's home state. Massachusetts state law recognizes claims for unfair and deceptive trade practices, trademark infringement, libel, and misrepresentation.<sup>46</sup> 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.

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 under the Uniform Rules of Practice.

(2) *Barring accredited certifying agents from appealing Administrator decisions directing them to grant organic certification is an infringement upon free*

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<sup>45</sup> 7 C.F.R. § 205.303(b)(2). Compare 7 U.S.C. § 6504.

<sup>46</sup> See, generally, Mass. Ann. Laws ch. 93A; Mass. Ann. Laws ch. 110B.

*speech and freedom of association.*

The National Organic Program regulations governing appeals indicate that when the Administrator sustains an applicant's appeal of a certifying agent's denial of certification, "the applicant will be issued organic certification."<sup>47</sup> While the regulation does not explicitly state who must issue the organic certification, one could infer from the context that it is to be issued by the certifying agent that had previously denied certification. Indeed, this seems to be the Administrator's interpretation.

In effect, the Administrator seeks to compel speech by requiring Massachusetts Independent Certification, and other accredited certifying agents in similar circumstances, to issue an organic certificate. The producer or handler would then be entitled, and indeed required, to print the certifying agent's name on its labels if the product is to be marketed as satisfying the standards for "100% organic" or "organic" products.<sup>48</sup> The regulation violates the First Amendment rights of certifying agents by compelling them to speak words that they believe are untrue and with which they do not agree as well as to associate themselves with producers and handlers they believe are not in compliance with program requirements.<sup>49</sup> The statutory scheme is clear that an organic plan must be "agreed" to by the certifying agent before an organic certificate will be issued; yet the regulation implements the Act through an ambiguous provision that the Administrator interprets to mean that a certifying agent may be compelled to agree. The Secretary attempts to use the appeals system to coerce "agreement" and compel speech in an unconstitutional manner.

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<sup>47</sup> 7 C.F.R. § 205.681(a)(1) (2003).

<sup>48</sup> 7 C.F.R. § 205.303(b)(2). (2003).

<sup>49</sup> *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Wooley v. Maynard*, 430 U.S. 705 (1977).

**II. The Judicial Officer should interpret the regulations in a way that assumes the Secretary has complied with her statutory and constitutional duty, and exercise subject matter jurisdiction over this appeal petition.**

The Secretary has a duty under the OFPA to provide administrative review of USDA actions that adversely affect a person and/or are inconsistent with the Act and its implementing regulations. The Secretary also has a constitutional duty to provide due process of law before taking certifying agents' property interests in the use of their name. In order to satisfy this duty, the Secretary must allow Massachusetts Independent Certification's appeal to be heard.

Accordingly, the Judicial Officer should exercise subject matter jurisdiction over this appeal petition because the matters raised in the complaint filed by Massachusetts Independent Certification and in this appeal petition fit squarely within the subject matter to be appealed under the OFPA, and the Secretary has delegated final decision-making authority over appeals within the National Organic Program to the Judicial Officer.

As noted above, the Act requires 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.<sup>50</sup>

In partial compliance with the mandate of the Act, USDA designated an administrative appeals procedure for appeals of some disputes under the organic certification program. As discussed earlier, these regulations unlawfully limit National Organic Program appeals to denials, suspensions, and revocations of one's own organic certification while making no provision for appeals relating to other adverse effects and violations of the law. While the National Organic Program regulations purport to withhold appeal rights from certifying agents whose denials of certification are overruled by the Administrator, the same regulations do provide for appeals of some organic certification and accreditation decisions to the Judicial Officer under the Uniform Rules of Practice.<sup>51</sup> The Secretary has delegated authority to the Judicial Officer to "act as the final deciding officer in adjudicatory proceedings which are or may be subject to the 'Rules of Practice Governing Formal Adjudicatory Proceedings. . .'"<sup>52</sup>

Massachusetts Independent Certification filed its complaint under the Uniform Rules of Practice, which allow for complaints to be filed with the Hearing Clerk if there is reason to believe that a person has violated or is violating any provision of a statute listed in 7 C.F.R. § 1.131, or of any implementing regulations.<sup>53</sup> MICI alleged that there was reason to believe the

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<sup>50</sup> 7 U.S.C. § 6520.

<sup>51</sup> See 7 C.F.R. § 205.681(a)(2) (2003). Appeals under the Uniform Rules of Practice are, of course, not the only administrative appeals procedure that the Secretary could have provided. During the public comment period, commenters urged the Secretary to ensure that appeals be decided by persons not responsible for implementing or administering the program, and recommended that appeals be heard before the National Appeals Division. 65 Fed. Reg. 80,548, 80,635 (2000).

<sup>52</sup> 7 C.F.R. § 2.35(a)(2) (2003).

<sup>53</sup> 7 C.F.R. § 1.133(b)(1) (2003). The Uniform Rules of Practice have not yet been amended to add OFPA to the list of statutes in § 1.131, but jurisdiction under the Uniform Rules of Practice over OFPA appeals is conferred upon the Judicial Officer by the National Organic

Administrator was violating the law. Massachusetts Independent Certification alleged that the Administrator exceeded the authority granted to the Secretary in the OFPA when he directed MICI to issue an organic certificate. MICI also alleged that the Administrator's order to issue an organic certificate was contrary to law because The Country Hen did not meet the standards for organic livestock production contained in the regulations. MICI alleged that the Secretary has unlawfully infringed upon the statutory and constitutional rights of accredited certifying agents.

The Judicial Officer has authority to decide appeal petitions alleging a deprivation of rights, and thus, the Judicial Officer should exercise subject matter jurisdiction over the claim of deprivation of rights raised by Massachusetts Independent Certification.<sup>54</sup> If the Secretary has established any administrative appeal procedure for MICI and other certifiers in these circumstances, surely it is under USDA's Uniform Rules of Practice. To the extent that the administrative appeal provisions of the program attempt to limit appeal rights in a manner inconsistent with the clear requirements of the statute, they are unenforceable.<sup>55</sup>

**III. The Administrator's decision that is the underlying subject of this appeal petition was arbitrary and capricious, unsupported by substantial evidence, and not in accordance with law.**

Massachusetts Independent Certification seeks to vindicate its right, and the right of other accredited certifying agents, to appeal decisions by the Administrator sustaining appeals of disappointed certification applicants. In this instance, MICI believes that the Judicial Officer could invalidate the Administrator's decision as a matter of law, without remanding to the ALJ for hearing.

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Program regulations. 7 C.F.R. § 205.681 (2003).

<sup>54</sup> 7 C.F.R. § 1.145(a)(2003).

<sup>55</sup> *Brown v. Gardner*, 513 U.S. 115, 120 (1994).

**A. The Administrator’s decision was not in accordance with law.**

The Administrator’s decision was contrary to law for five reasons.

- (1) *The “appeal” decided by the Administrator did not meet regulatory requirements.*

The National Organic Program regulations require all appeals to 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.<sup>56</sup> The letter from The Country Hen to Administrator Yates did not include a copy of the adverse decision (indeed, it was written before MICI’s decision was issued) and did not include a statement of reasons for objection to the decision. In fact, The Country Hen stated in its letter, “We do not know the reason for the denial, but . . .we must suppose the access to the outdoors is the problem.”<sup>57</sup>

- (2) *The Administrator lacks authority to compel certifying agents to issue an organic certificate.*

As noted above, the program regulations provide that “the applicant will be issued organic certification” when the Administrator sustains an applicant’s appeal of a certifying agent’s denial of certification application, but the regulations leave open the question of who is to issue the organic certificate. The Administrator has concluded that this means he has the authority to direct an accredited certifying agent to issue an organic certificate. However, this conclusion and the regulation itself are inconsistent with the statutory design, which mandates that, in order to be sold or labeled as organically produced, an agricultural product must be produced and handled in compliance with an organic plan agreed to by the producer and handler

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<sup>56</sup> 7 C.F.R. § 205.681(d)(3) (2003).

<sup>57</sup> Appendix, Tab 3, Letter from The Country Hen to Administrator Yates, dated

of the product and the certifying agent.<sup>58</sup>

The Secretary simply has no authority to certify organic farming or handling operations, and no authority to compel others to do so.<sup>59</sup> The Secretary may review individual certification decisions made by accredited certifying agents within the administrative appeals process, but if the accredited certifying agent believes that the Secretary's decision is inconsistent with the organic certification program, the Secretary has no authority under the Act to require the accredited certifying agent to issue a certificate. The accredited certifying agent may seek further administrative review, and it has the right to seek judicial review of the Secretary's final decision.<sup>60</sup> If the Secretary believes that an accredited certifying agent is violating the provisions of the Act or has falsely or negligently certified any farming or handling operation, the Secretary may initiate an appeal proceeding to suspend or revoke the certifying agent's accreditation.<sup>61</sup>

- (3) *The NOP Program Manager's apparent role as advisor to The Country Hen creates an appearance of impropriety, while his involvement in the Administrator's decision-making process, if it occurred, would violate the regulations .*

The Administrator's decision to rule based upon The Country Hen's appeal, despite its failure to comply with regulatory requirements, raises a significant legal issue. The letter from The Country Hen notes that, "All pertinent information has been previously sent to Mr. Richard Mathews."<sup>62</sup> Richard Mathews is the Program Manager for the National Organic Program

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October 22, 2002.

<sup>58</sup> 7 U.S.C. § 6504(3).

<sup>59</sup> 7 U.S.C. § 6503(d); USDA acknowledged the limitations on its role in the prefatory comments to the final rule, when it stated, "USDA does not perform organic certification activities under any circumstance . . ." 65 Fed. Reg. 80,548, 80,595 (2000).

<sup>60</sup> 7 U.S.C. § 6520(a) and (b).

<sup>61</sup> 7 U.S.C. § 6519.

<sup>62</sup> Appendix, Tab 3, Letter from The Country Hen to Administrator Yates, dated October 22, 2002.

(the NOP) within the Agricultural Marketing Service. Mr. Mathews had previously met with George Bass, the owner of The Country Hen, at least three times.<sup>63</sup> It is hard to understand how all pertinent information could have been submitted in the absence of the decision, when the regulations require a statement of reasons that the certifying agent's decision was improper.

The program regulations provide that, "All appeals shall be reviewed, heard, and decided by persons not involved with the decision being appealed."<sup>64</sup> The involvement of Mr. Mathews in the decision-making appears to be confirmed by the Administrator's decision letter, which states that, "The NOP sustains the appeal."<sup>65</sup> The Administrator's letter further states that, "The NOP acknowledges the plan submitted by Mr. Bass lacks clarity." It would be quite surprising for the Administrator of the Agricultural Marketing Services to refer to himself as "the NOP." There appears to have been a violation of the regulations and a failure to separate regulatory functions due to the involvement of Richard Mathews in the Administrator's decision-making process.

The Country Hen had provided a proposal that it claimed would at some time in the future provide its hens access to the outdoors, but the Administrator—or at least the NOP Program Manager—conceded that, "the plan submitted by Mr. Bass lacks clarity."<sup>66</sup> The Administrator directed Massachusetts Independent Certification to "continue to cooperate with" the applicant, despite regulations prohibiting accredited certifying agents from providing advice to certification applicants on how to overcome identified barriers to certification.<sup>67</sup> This provision is intended to prevent conflicts of interest and the appearance of impropriety.

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<sup>63</sup> Appendix, Tab 2, pp. 2-3, The Country Hen Trip Report.

<sup>64</sup> 7 C.F.R. § 205.680(e).

<sup>65</sup> Appendix, Tab 5, Letter from Administrator Yates, dated October 25, 2002.

<sup>66</sup> Appendix 5, Letter from Administrator Yates, dated October 25, 2002.

- (4) *The Administrator did not find that The Country Hen met the program requirement of providing access to the outdoors for its hens, and in fact, The Country Hen did not provide access to the outdoors as required by the regulations at the time of application or denial, nor did its proposed plan comply with program regulations.*

The Administrator's decision ordered Massachusetts Independent Certification to issue an organic certificate to The Country Hen, but did not find that the applicant satisfied the requirements for certification by providing access to the outdoors for its hens, as required by the National Organic Program regulations at 7 C.F.R. § 205.239(a)(1).<sup>68</sup> That regulatory provision states that:

(a) The producer of an organic livestock operation must establish and maintain livestock living conditions which accommodate the health and natural behavior of animals, including:

(1) 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;

...

(b) The producer of an organic livestock operation may provide temporary confinement for an animal because of:

(1) Inclement weather;

(2) The animal's stage of production;

(3) Conditions under which the health, safety, or well being of the animal could be jeopardized; or

(4) Risk to soil or water quality.

At least two certifying agents have found that The Country Hen was not in compliance

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<sup>67</sup> 7 C.F.R. § 205.501(a)(11)(iv) (2003).

<sup>68</sup> Access to the outdoors as a required management element for all organically raised livestock was in response to virtually unanimous public comment in favor of requiring access to the outdoors for all animals of all species. 58 Fed. Reg. 80,548, 80,571 (2000). In addition to its general requirement of notice and comment rule-making to implement the OFPA, Congress specifically noted the importance of notice and comment rule-making with respect to livestock.

with the requirement to provide access to the outdoors. Quality Assurance International, The Country Hen's previous certifier, had sent The Country Hen Notices of Noncompliance dated October 25, 2001 and May 30, 2002, advising The Country Hen that it must come into compliance by the time of its annual monitoring date, June 3, 2002.<sup>69</sup> Program regulations require applicants for certification to disclose noncompliances from previous certifiers, and to correct them before applying to a new certifier.<sup>70</sup> There is little that certifying agents can do to prevent "certifier-shopping," in the absence of a database that the NOP staff pledged to create to facilitate exchange of information among certifying agents.<sup>71</sup> Massachusetts Independent Certification did not learn of the previous noncompliance notices until after it had issued its notice of denial.

At the time Massachusetts Independent Certification denied organic certification to The Country Hen, the producer was not providing any access to the outdoors to its hens. The chickens were being raised in a permanent confinement system. The Country Hen proposed a plan to build porches, but the porches were not even constructed at the time that The Country Hen asked MICI to make a final decision on its application for certification.

Massachusetts Independent Certification considered The Country Hen's proposal to build porches, even though it viewed The Country Hen's failure to provide access at the time as a major noncompliance requiring denial of certification.<sup>72</sup> MICI concluded that the fully enclosed structures would not provide adequate access to exercise areas, fresh air, and direct sunlight, as

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7 U.S.C. § 6509(g).

<sup>69</sup> Appendix, Tab 7, Notices of Noncompliance, and Appendix, Tab 8, Notice of Noncompliance.

<sup>70</sup> 7 C.F.R. § 205.401(c)(2003).

<sup>71</sup> See 65 Fed. Reg. 80,548, 80,588 (2000).

<sup>72</sup> The determination of whether a noncompliance is major or minor is for the certifying

required in section 205.239 of the organic regulations.<sup>73</sup> If given an opportunity to respond to The Country Hen’s “appeal,” Massachusetts Independent Certification might have noted that an enclosed structure, such as the proposed porches may not reasonably be considered to be “outdoors.” In any event, MICI concluded that the proposed porches would not provide the chickens with enough space to choose to be outside.<sup>74</sup> The Administrator dismissed this conclusion, noting that the program regulations do not establish space regulations.<sup>75</sup> MICI’s conclusion that The Country Hen proposal would not provide sufficient space may be supported, and likely would have been supported had the certifying agent been given the opportunity to respond to The Country Hen’s “appeal,” with reference to another provision of the organic livestock health standards, which require producers to provide all livestock with “freedom of movement.”<sup>76</sup>

As a certifying agent, MICI would not have authority to impose specific square footage requirements, but it could certainly conclude that the space The Country Hen proposed to provide was insufficient. Frankly, The Country Hen was not even in the ballpark in terms of being able to provide freedom of movement. As a matter of fact, the owner of The Country Hen had publicly testified before the National Organic Standards Board regarding his inability to provide access to the outdoors in any proper fashion.<sup>77</sup> Mr. Bass testified that he had only 13 acres of land, but would need 670 acres to provide access to the outdoors at historically approved rates. The proposal to use porches did not use the full 13 acres. Mr. Mathews, the NOP Program

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agent to make.

<sup>73</sup> Appendix, Tab 4, Notice of Denial, dated October 24, 2002.

<sup>74</sup> Appendix, Tab 4, Notice of Denial, dated October 24, 2002.

<sup>75</sup> Appendix, Tab 5, Letter from Administrator Yates, dated October 25, 2002.

<sup>76</sup> 7 C.F.R. § 205.238(a)(4) (2003).

<sup>77</sup> Appendix, Tab 6, George Bass testimony before the National Organic Standards Board,

Manager, was present, and questioned Mr. Bass during his testimony.

MICI further concluded that The Country Hen's proposed limitations on what months of the year and what hours of the day the chickens could be allowed outside were far too restrictive for conditions in Massachusetts.<sup>78</sup> MICI acknowledged that the rules provide for temporary confinement in certain limited circumstances. The regulations provide that:

The producer of an organic livestock operation may provide temporary confinement for an animal because of:

- (1) Inclement weather;
- (2) The animal's stage of production;
- (3) Conditions under which the health, safety, or well being of the animal could be jeopardized; or
- (4) Risk to soil or water quality.<sup>79</sup>

A proper appeal procedure with an investigation or opportunity for The Country Hen and Massachusetts Independent Certification to submit further details to the Administrator would have further developed the evidence. For example, among the reasons that The Country Hen provided for limiting access to the outdoors to certain hours of the day was so that it could more easily collect the eggs laid in the morning. MICI correctly concluded that the regulations do not allow for temporary confinement for this reason.

The statute and regulations clearly acknowledge that it is the accredited certifying agents who are possessed of the requisite technical expertise to make the judgments required in evaluating organic system plans. At least some degree of deference to the expertise and understanding of the principles and practice of organic agriculture possessed by the certifying

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May 6, 2002.

<sup>78</sup> Appendix, Tab 4, Notice of Denial, dated October 24, 2002.

agents that USDA has itself found worthy of accreditation seems in order.

**B. The Administrator’s decision is arbitrary and capricious.**

The Administrator’s decision summarily overturning Massachusetts Independent Certification’s denial of certification was arbitrary and capricious. The sequence of events strongly suggests that the Administrator’s decision reflects the Administrator’s will, rather than an exercise of reasoned judgment.

Massachusetts Independent Certification decided to deny certification to The Country Hen on October 21, 2002, because it had concluded that the program requirements were not satisfied. Late that evening, MICI notified The Country Hen of its decision, and informed the applicant that a Notice of Denial of Certification would be forthcoming within a few days. The next day, before MICI had issued its Notice of Denial, The Country Hen wrote its “appeal” to Administrator Yates. The letter from The Country Hen did not comply with the program regulations.<sup>80</sup> On October 24, 2002, Massachusetts Independent Certification issued its Notice of Denial of Certification.

On October 25, 2002, the Administrator issued a decision overturning MICI’s denial of certification. In his decision, the Administrator faulted MICI for failing to provide evidence “demonstrating that Mr. Bass’ assessment of weather conditions at Hubbardston, Massachusetts is not in keeping with Mr. Bass’ ability to protect the animal’s health, safety, or well being under 7 C.F.R. 205.239(b)(3)<sup>81</sup>—despite the fact that the Administrator had never given Massachusetts Independent Certification the opportunity to respond to the producer’s letter.

At least five factors point to the arbitrary and capricious nature of the Administrator’s

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<sup>79</sup> 7 C.F.R. § 205.239(b) (2003).

<sup>80</sup> 7 C.F.R. § 205.681(d)(3) (2003).

decision. First, the haste with which it was issued. Note that the new National Organic Program was to be fully operational as of October 21, 2002, and producers could not lawfully claim to be “organic” after October 21, 2002, if they were not certified organic under the program. This haste, coupled with the role of Richard Mathews in meeting with and apparently advising The Country Hen, and apparently in deciding the appeal, as discussed above, create an appearance that the Administrator’s decision was improperly motivated by a desire to help The Country Hen to retain use of the organic label, whether or not it was in compliance with the regulations.

Second, the Administrator’s decision to entertain The Country Hen’s letter as an appeal despite the failure of the producer to meet regulatory requirements for an appeal and the absence of a Notice of Denial. Third, the Administrator’s decision to forego any investigation or follow-up with the accredited certifying agent, the party it had already determined to have expertise in organic production and satisfactory record-keeping practices. Fourth, the Administrator’s shifting of the burden from the applicant-- to explain why the denial was improper or unlawful-- to the accredited certifying agent-- to justify the denial of certification. Fifth, the Administrator’s acknowledgement that the plan lacks clarity and admonishment to Massachusetts Independent Certification to “continue to cooperate with” the applicant, despite regulations prohibiting accredited certifying agents from providing advice to certification applicants on how to overcome identified barriers to certification.<sup>82</sup>

**C. The Administrator’s decision was not supported by substantial evidence.**

The Judicial Officer should invalidate the Administrator’s decision as a matter of law because it was unsupported by substantial evidence. The applicant failed to provide a list of

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<sup>81</sup> Appendix, Tab 5, Letter from Administrator Yates, dated October 25, 2002.

reasons why the decision by Massachusetts Independent Certification to deny certification was improper or contrary to law. The Administrator did not find that the applicant was in compliance with the requirements of the organic certification program. The Administrator did not find that the applicant's eggs were being produced and handled in compliance with an organic plan agreed to by the producer and the certifying agent. The Administrator failed to provide a reasoned basis for finding that the decision of Massachusetts Independent Certification to deny certification was flawed.

### **CONCLUSION**

The Judicial Officer has subject matter jurisdiction over this appeal petition. The regulation that purports to deny appeal rights to accredited certifying agents when the Administrator overturns their denials of certification is inconsistent with the Organic Food Production Act and unconstitutional. The Administrator's decision exceeded his authority and was arbitrary and capricious and invalid as a matter of law.

Dated: December 11, 2003.

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<sup>82</sup> 7 C.F.R. § 205.501(a)(11)(iv) (2003).

Respectfully submitted,

s/ Jill E. Krueger

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### **CERTIFICATE OF SERVICE**

I hereby certify that on the 11th day of December, 2003, an original and three copies of the foregoing appeal brief were served by Federal Express upon the Hearing Clerk of the Office of Administrative Law Judge:

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s/ Jill E. Krueger

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