

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	OFPA Docket No. 03-0001
)	
MASSACHUSETTS INDEPENDENT)	
CERTIFICATION, INC.,)	REPLY BRIEF
)	
Petitioner.)	

Petitioner Massachusetts Independent Certification, Inc. submits this reply brief to the Judicial Officer in order to address new arguments raised for the first time in Respondents’ opposition brief.

INTRODUCTION

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 (“NOP”) on April 29, 2002. MICI had a short-term agreement with NOFA/Mass, a separate nonprofit organization that had formerly performed organic certification duties, to use the name NOFA/Mass Organic Certification Program until January 1, 2004. MICI planned to launch a new name, Baystate Organic Certifiers, for its organic certification program in 2004, and indeed has now done so.

In July 2002, The Country Hen applied to Massachusetts Independent Certification for organic certification. Prior to applying, The Country Hen had received notices of noncompliance for failure to provide its birds with access to the outdoors from its previous certifier, Quality Assurance International. The Country Hen did not disclose these noncompliances on its application, nor did it describe any measures taken to correct the noncompliance prior to

applying to MICI. On October 24, 2002, MICI issued a Notice of Denial of Certification to The Country Hen for failure to meet NOP requirements relating to access to the outdoors and freedom of movement for organic livestock.¹

The next day, the Administrator of the Agricultural Marketing Service (“AMS”) issued a decision sustaining The Country Hen’s objection to the denial and directing MICI to issue an organic certificate to The Country Hen, retroactive to October 21, 2002.² 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.”

MICI filed a complaint on February 26, 2003, raising counts challenging the lawfulness of the actions of USDA officials, the agency’s interpretation of the requirement to provide access to the outdoors, and the failure to provide due process of law. In a decision dated November 4, 2003, Administrative Law Judge Clifton (“ALJ”) held that she lacked subject matter jurisdiction over MICI’s appeal under the NOP regulations, and dismissed the complaint. MICI appealed the ALJ’s decision to the Judicial Officer on December 12, 2003. Respondents requested and received an extension of time to file their response, and filed a brief opposing the petition on January 30, 2003.

ARGUMENT

I. Massachusetts Independent Certification Has Standing to Bring This Appeal.

Massachusetts Independent Certification has standing to bring this appeal because it meets the test for standing under Article III of the Constitution and because OFPA gives

¹ Opening Brief, Appendix, Tab 4, Notice of Denial of Certification.

² Opening Brief, Appendix, Tab 5, Letter from Administrator Yates.

adversely affected persons and persons who wish to object to violations of the organic certification program a right to appeal. The test for standing under Article III requires that:

a plaintiff must show (1) that it has suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.³

The Organic Food Production Act of 1990 (“the Act” or “the OFPA”) requires the Secretary to provide an administrative appeals process. 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, 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.⁴

This requirement provides insight into the showing a person must make in order to establish standing under the OFPA. “Person” is defined as “an individual, group of individuals, corporation, association, organization, cooperative or other entity.”⁵ As a Massachusetts corporation, Massachusetts Independent Certification is a person within the meaning of the Act.

A. Massachusetts Independent Certification has Suffered an Injury in Fact.

Massachusetts Independent Certification has a cognizable interest in the subject matter of the appeal based on its commitment to preserving the integrity of the organic label and its interest in continuing to serve clients as an accredited certifying agent. Among the injuries to Massachusetts Independent Certification resulting from the Administrator’s action are:

³ *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 180-181 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 56-561 (1992)).

⁴ 7 U.S.C. § 6520(a).

The Country Hen’s claim of certification by NOFA/Mass on its label, despite the fact that MICI had not issued an organic certificate; damage to the goodwill associated with the “NOFA/Mass Organic Certification Program” name; damage to MICI’s reputation as operator of an organic certification program; disparaging and defamatory public statements made by The Country Hen that were made in reliance upon the Administrator’s wrongful acts; denial of statutory appeal rights; usurpation of MICI’s statutory authority to agree or not agree that a proposed organic system plan meets the requirements of the Act; denial of MICI’s constitutional right of due process; costs associated with MICI’s effort to secure its statutory and constitutional rights; and costs associated with being compelled to enter into a certifying agent relationship with an applicant that MICI’s certification committee had concluded was not in compliance with the organic program requirements and was not able to come into compliance using the proposed organic system plan.

MICI rendered a reasoned determination that was consistent with the requirements of the NOP, but that determination was summarily dismissed; MICI’s efforts to gain redress have been similarly rebuffed, and its judgment and knowledge disparaged, all as a direct consequence of the Secretary’s actions. At issue in this appeal are MICI’s decision, MICI’s statutory authority, and MICI’s statutory and constitutional right to due process. This appeal is based on actual events and is indeed “concrete and particularized.” MICI has standing because it has suffered a direct “injury in fact.”

B. The Injury Suffered by Massachusetts Independent Certification Is Fairly Traceable to Respondents.

Most of the injuries suffered by Massachusetts Independent Certification were directly

⁵ 7 U.S.C. § 6502(15), “Person.”

caused by Respondents. The Administrator's decision usurped the statutory role of the certifying agent, and his subsequent conduct in this appeal has directly opposed MICI's efforts to assert its statutory and constitutional right to appeal. After the Administrator overturned its denial of certification, MICI continued to consider The Country Hen's application for certification until it issued an amended Notice of Denial of Certification for The Country Hen and a Notice of Denial of Certification for its contract pullet houses on June 2, 2003.

MICI suffered other injuries that are fairly traceable to the Administrator's decision and to Respondents' steadfast resistance to allowing a neutral decision-maker to review the issue on appeal. MICI has alleged that Richard Mathews, the Program Manager of the National Organic Program, approved The Country Hen's label, including its use of a claim that its feed and eggs were certified organic by NOFA/Mass.⁶ The Country Hen, relying upon Mathews's approval and the Administrator's decision, subsequently used these labels. The Country Hen's use of the NOFA/Mass name caused damage to MICI's reputation in the organic community. The Country Hen later claimed in its newsletter that because of the ongoing dispute with MICI in 2003: "we searched for a new certifier who was more practical in their outlook. We found NFC and explained to them why we felt chickens were different than cows, pigs, sheep, and sterrs (*sic*) when it comes to diseases and the outdoors."⁷ The newsletter went on to state that, "The particular rule applying to access to the outdoors is quite broad." Had the Administrator not summarily overturned MICI's decision, directed MICI to issue a certificate, and denied MICI's appeal rights at every turn, The Country Hen could not have believed itself justified to make

⁶ Complaint, paragraphs 23 and 24.

⁷ Reply Brief, Appendix, Tab 9, The Country Hen newsletter, August 10, 2003. MICI believes that the current edition of the newsletter is distributed in every carton of eggs sold by The Country Hen. The newsletter is also available on The Country Hen's website, even when superseded by subsequent issues.

such disparaging and defamatory statements.

C. The Injury Suffered by Massachusetts Independent Certification Can Be Redressed by the Relief Sought in This Appeal.

The relief sought by MICI is likely to redress its concerns about the Secretary's usurpation of certification functions reserved by statute to accredited certifying agents as well as its concerns about the denial of statutory and constitutional appeal rights that must be accorded to certifying agents. Reversal of the ALJ's findings, an order finding that 7 C.F.R. § 205.681(a)(1) is inconsistent with the OFPA, and an order to conduct rule-making vis-à-vis appeal procedures, are all likely to cure the violations of due process that are at the heart of this appeal. Rehabilitating the appeal system would also provide an avenue of redress for the Administrator's usurpation of the right of an accredited certifying agent to exercise reasoned judgment in making certification decisions in this and other cases.

II. The Dispute Between Massachusetts Independent Certification and the U.S. Department of Agriculture Is a Live Controversy.

This appeal raises at least five issues that present live controversies or fall within an exception to the mootness doctrine. The course of this appeal demonstrates the difficulty any accredited certifying agent will encounter if it seeks to appeal a decision of the Administrator overturning its denial of certification. Because one important function of accredited certifying agents is denying certification to applicants who do not meet the NOP standards, this situation is likely to be repeated. But because applicants for certification are free to approach other certifying agents, these situations are likely to evade review if another certifying agent's act of granting certification (even if under the direction of the government) is allowed to render the first certifying agent's appeal moot.

Under the exception to the mootness doctrine frequently referred to as "capable of

repetition, yet evading review,” a controversy is not considered moot if there is a reasonable expectation that the same complaining party will be subjected to the same action again, and the complaining party would again be unable to resolve the issue because of the short duration of the action.⁸ This case reveals that some producers and handlers who are denied certification are likely to go “certifier shopping,” so that the decision of one certifier may be followed by that of another in rapid succession, and that USDA will accept a decision to grant certification at face value, no matter how many denials precede it.⁹

A. The Injury to Massachusetts Independent Certification Is Ongoing, and the Change in the Name of MICI’s Organic Certification Program Neither Impedes Standing Nor Renders the Claim Moot.

Massachusetts Independent Certification has suffered “injury in fact” in the form of damage to the reputation and goodwill associated with its organic certification program, whether that program is known as the NOFA/Mass Organic Certification Program or Baystate Organic Certifiers. That harm will continue until this dispute is resolved.

Massachusetts Independent Certification has been deprived of liberty and property without due process of law, in violation of the Fifth Amendment to the Constitution. Respondents interfered with MICI's right to approve the proper use of its program name, in which it has a property interest. Respondents also interfered with MICI's freedoms of speech and association in attempting to compel MICI to issue an organic certificate, despite Respondents' lack of statutory authority to do so; all of these are deprivations of MICI's liberty interests. MICI has recently transitioned from its use of the NOFA/Mass Organic Certification Program name to the use of the name Baystate Organic Certifiers. This transition does not negate the fact

⁸ *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

that The Country Hen used the NOFA/Mass name for at least ten months in reliance on the Administrator's decision, causing damage to the goodwill and reputation associated with the NOFA/Mass name. That damage to the goodwill and reputation associated with the NOFA/Mass name has not simply vanished with the transition to a new name. Organic consumers in Massachusetts are likely to be aware of the transition and of the fact that Baystate Organic Certifiers and the NOFA/Mass Organic Certification Program are one entity operated by Massachusetts Independent Certification. Organic producers and handlers who are the current and prospective clients of MICI are certainly aware of these facts.

MICI's use of the NOFA/Mass Organic Certification Program name was done under an interim agreement between MICI and the NOFA/Mass organization.¹⁰ However, the value of the Baystate Organic Certifiers name may be diminished among organic consumers, producers, and handlers who are not aware that the transition in program names was planned long before MICI issued its decision on The Country Hen's application. These persons may perceive the transition from the NOFA/Mass Organic Certification Program name as a tacit admission of error in the matter of The Country Hen. The damage to MICI's property interest in its program name is serious and ongoing.

B. Whether The Country Hen Meets NOP Standards Is a Live Controversy.

In arguing that this appeal is moot because The Country Hen has been certified by another certifier, Respondents confuse the question. The question is not, "Is The Country Hen certified?" but "Does the organic system plan implemented by The Country Hen meet the

⁹ Compare *Olmstead v. L.C.*, 527 U.S. 581, 594, n.6 (1999) (finding a mentally disabled plaintiff who had experienced multiple institutional placements likely to experience additional future placements).

¹⁰ NOFA/Mass objected to the improper use of its name by The Country Hen—a use approved by Respondents, not MICI. Complaint, paragraph 111.

requirement that organic livestock be provided with freedom of movement and access to the outdoors?" No accredited certifying agent – not Quality Assurance International, not Massachusetts Independent Certification, and not Natural Food Certifiers – has affirmatively found that The Country Hen’s organic system plan meets the NOP requirement to provide access to the outdoors.

Natural Food Certifiers granted an organic certificate to The Country Hen because it concluded that temporary confinement of the birds was allowed due to a nearby outbreak of avian influenza.¹¹ Natural Food Certifiers stated that the porches provided “reasonable limited access to fresh air and sunshine” but did not find that the porches provided access to the outdoors, and expressly reserved the right to review “its position on the limited access provided by the porches.”¹² The Country Hen’s statement that Natural Food Certifiers approved the porches appears to be at odds with the certifying agent’s express reservation of the issue, but it is consistent with the Administrator’s decision and appears to be intended to demonstrate that MICI’s decision was incorrect.¹³

In addition to denying certification because The Country Hen was not providing any access to the outdoors at the time of decision, MICI concluded that the porches would not be in compliance with the requirement to provide organic livestock with freedom of movement and access to the outdoors when built.¹⁴ The occasion excusing the temporary confinement of organic livestock will pass – indeed, it may have already passed – but The Country Hen's organic

¹¹ Respondents' Opposition Brief, Exhibit 2. Temporary confinement of organic livestock is allowed under certain circumstances. 7 C.F.R. § 205.239(b). This outbreak of avian influenza occurred in Connecticut in the spring of 2003, and had not occurred in October 2002, when MICI denied certification.

¹² Respondents' Opposition Brief, Exhibit 2.

¹³ Reply Brief, Appendix , Tab 10, The Country Hen newsletter, September 18, 2003.

¹⁴ 7 C.F.R. §§ 205.238(a)(4) and 205.239(a)(1).

system plan appears likely to remain the same. Where a party's noncompliance is likely to recur, its coming into compliance with the law is insufficient to warrant dismissal of a complaint as moot.¹⁵ The party must instead meet the “heavy burden” of persuading the court that it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.”¹⁶ Moreover, MICI’s complaint is not against The Country Hen, but against Administrator Yates, Secretary Veneman, and the U.S. Department of Agriculture. Respondents have not yet taken any action to come into compliance.

C. Whether USDA Has Any Certification Functions Is a Live Controversy.

Under the OFPA, a "certifying agent" means,

the chief executive officer of a State, or in the case of a State that provides for the Statewide election of an official to be responsible solely for the administration of the agricultural operations of the State, such official, and 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.¹⁷

The Secretary is clearly not a certifying agent within the meaning of the Act. 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 of such product and the *certifying agent*."¹⁸ To the extent that certification decisions are entitled to deference, the deference is due to the experts in organic food production, accredited certifying agents.

¹⁵ *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167 (2000) (citing *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968)).

¹⁶ *Id.* at 189.

¹⁷ 7 U.S.C. § 6502(3), "Certifying agent."

¹⁸ 7 U.S.C. § 6504(3) (*emphasis added*).

Certification functions are assigned by statute to the certifying agents, not to the Secretary. The Secretary previously acknowledged this fact in the prefatory comments to the final rule, stating that, “USDA does not perform organic certification activities under any circumstance.”¹⁹ Respondents’ belated claim to possess certification functions is a live controversy in regard to The Country Hen and all applicants for certification.

This issue is not rendered moot by the fact that The Country Hen has managed to secure an organic certificate from another accredited certifying agent. The decision from the new certifying agent explicitly states that the NOP Program Manager intervened in the certifying agent's decision-making process with respect to whether fishmeal is allowed as a feed or feed supplement – and, in the certifying agent's judgment, reached an unreasonable conclusion.²⁰ MICI’s appeal should not be dismissed based on the new certifying agent's decision, when that decision was, on its face, dictated by Respondents.

Because the Secretary has the power to suspend or revoke a certifying agent's accreditation, her interference in the certification process has a chilling effect on the exercise of independent judgment by accredited certifying agents. Thus, the question of whether the Secretary may overrule reasonable interpretations of program requirements made by accredited certifying agents and substitute her own judgment or whim is a question of enormous ongoing importance to Massachusetts Independent Certification, and to accredited certifying agents as a group. Indeed, it is not an overstatement to assert that the integrity of the entire National Organic Program will be determined by the answer.

¹⁹ 65 Fed. Reg. 80,548, 80,595 (2000) (Comment 7).

²⁰ Respondents' Opposition Brief, Exhibit 2.

D. The Proper Interpretation of the Regulatory Requirements of Access to the Outdoors and Freedom of Movement Is a Live Issue.

Massachusetts Independent Certification certifies other organic egg producers and organic poultry growers, but Respondents' actions frankly leave MICI uncertain of the extent of its authority to interpret non-numeric standards. Contrary to the protestations of Respondents, the agency has not striven single-mindedly for consistency in implementation of the program. On some questions where no consensus emerged during the rule-making process, such as space requirements for livestock living conditions, the agency deliberately chose not to establish numerical standards.²¹ Because the regulations adopted meaningful standards, but not always standards with numerical precision, it is incumbent upon accredited certifying agents to interpret the regulations in light of their own knowledge and experience in order to determine whether a given application for certification meets the requirements of the NOP. This critical question of how to interpret the non-numeric standards of the regulations will repeatedly arise under the program, yet it may evade review, as long as producers and handlers are able to find certifying agents who may be cowed into granting organic certificates.

MICI noted that The Country Hen's birds would not be free to choose to go outdoors, so The Country Hen would not come into compliance even when the porches were finally built. In the absence of numeric stocking densities, accredited certifying agents must determine what would provide "reasonable" freedom of movement and "reasonable" access to the outdoors. It is reasonable to be guided by the fact that access to the soil, sunlight, and fresh air are fundamental tenets of organic agriculture and by the nearly unanimous comments during the NOP rule-making process that every animal of every species must have access to the outdoors. With or

²¹ 65 Fed. Reg. 80,548, 80,573 (2000).

without numeric stocking densities, no reasonable person could conclude that a proposal to construct one or two porches or runways of well under 1,000 square feet per barn would provide freedom of movement for the roughly 6,000 birds housed in each barn, consistent with the norms of the organic community.²² MICI interpreted the requirements at issue in a reasoned, consistent manner that is in concert with the understanding of others in the organic community.

Respondents correctly state that if MICI or any other certifying agent denied an application for certification because the applicant did not meet its own higher standards, that denial should not be allowed to stand. But that is not what happened in this case. MICI denied The Country Hen's application for certification because The Country Hen was not providing its birds with access to the outdoors.²³ MICI's decision did nothing more than enforce the plain requirements of the regulation.

Respondents' policy statement on Access to the Outdoors for Organic Livestock has many shortcomings.²⁴ Moreover, changes to the organic standards should be made with input from the organic community, not by the unilateral adoption of a policy statement.²⁵ Congress singled out standards for organic livestock as needing formal notice and public comment.²⁶

²² See Complaint, Paragraphs 60 and 61 for details of the porches proposed by The Country Hen. See Opening Brief, Appendix, Tab 6 for The Country Hen's admission that The Country Hen could not provide access to the outdoors and freedom of movement within the norms of the organic community.

²³ Opening Brief, Appendix, Tab 4, Notice of Denial of Certification.

²⁴ Reply Brief, Appendix, Tab 11. This policy statement is available on the NOP website at www.ams.usda.gov/nop/NOP/PolicyStatements.htm. Among the shortcomings of the policy statement are the way it (1) disregards the requirement of freedom of movement; (2) urges producers and certifying agents to "closely consult with each other" in contravention of the rules; and (3) overemphasizes the right of a producer to make a case for temporary confinement, without acknowledging that the certifying agent must weigh that evidence in light of the regulations and its own knowledge and experience.

²⁵ See 15 U.S.C. § 272(b) (3) and (10); 63 Fed. Reg. 8546 (1998) (revising OMB circular A-119).

²⁶ 7 U.S.C. § 6509(g).

The policy statement is at least correct in emphasizing that producers must present a clear plan, and that access to the outdoors means, at a minimum, that the producer must provide livestock with an opportunity to exit any barn or other enclosed structure. Yet the Administrator overturned MICI's denial of certification to The Country Hen, despite The Country Hen's failure to provide access to the outdoors at the time, to provide a clear plan, or to provide a plan for the birds to exit the porches, which are no less “enclosed structures” than the barns. Respondents are not entitled to deference, because the Administrator’s decision is in conflict with the agency’s own policy statement on access to the outdoors for livestock. If the Administrator's decision is shielded from review, consistency will not be the result.

The Administrator had no reasoned basis for overriding MICI’s decision. The dramatic departure from any reasonable interpretation of the requirements, along with other irregularities discussed in MICI’s opening brief, suggest that Respondents' agenda has more to do with getting applicants – and in particular, this applicant – certified, than with enforcing the Act.

E. Whether Accredited Certifying Agents Have the Right to Appeal When the Administrator Reverses Their Certification Decisions Is a Live Controversy.

Massachusetts Independent Certification’s claim to the right to appeal is a live controversy. As was noted above, Natural Food Certifiers’ decision granting certification was dictated by government interpretations of the regulations that Natural Food Certifiers found unreasonable. One reason that both the OFPA and the Constitution require due process of law should be apparent – to increase the probability that the right procedures are followed and that the right decisions are reached. Resort to a neutral decision-maker is required under the law, and will help to increase the odds that the right result is ultimately reached in the case of The Country Hen, as well as in the cases of other applicants for organic certification.

The OFPA provides that the Secretary “shall” establish an expedited administrative

appeals procedure for persons with claims in two specified categories. The OFPA states that actions of the Secretary “shall” be appealable and then subject to judicial review.²⁷ There are no gaps or ambiguities in the language in 7 U.S.C. § 6520 requiring the Secretary to establish administrative appeals procedures. The Secretary must implement precisely the administrative appeals procedure required by the Act. Until she does, MICI’s appeal remains a live controversy.

CONCLUSION

Accredited certifying agents such as Massachusetts Independent Certification have an ongoing right and duty to uphold the integrity of the organic label, even when that means pointing out that a decision of the Administrator is unlawful. The issues raised in the appeal are live controversies and should be decided by the Judicial Officer now. MICI has demonstrated that Respondents’ actions were arbitrary, capricious, unsupported by substantial evidence, and contrary to law. Therefore, Massachusetts Independent Certification requests that the Judicial Officer grant the appeal and order that the relief requested in the appeal petition be granted.

Dated: February 17, 2004.

Respectfully submitted,

s/ Jill E. Krueger

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²⁷ 7 U.S.C. § 6520(a) and (b).

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of February, 2004, an original and three copies of the foregoing reply brief and request for permission to file reply brief were served by Federal

Express upon the Hearing Clerk:

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