

JURISDICTION AND VENUE

1. This court has jurisdiction over the subject matter of this action by virtue of 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-706 (Administrative Procedure Act, or “the APA”). Plaintiff is suffering legal wrong because of the challenged agency action and is adversely affected and aggrieved by the challenged agency action within the meaning of 5 U.S.C. § 702. This action arises under the Organic Foods Production Act of 1990, 7 U.S.C. §§ 6501 *et. seq.*, which also mandates an administrative remedy for USDA actions inconsistent with the Act and implementing regulations.
2. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201(a). The court may grant declaratory relief, injunctive relief, and any additional relief pursuant to 28 U.S.C. §§ 2201, 2202, and 5 U.S.C. § 706.
3. Venue is proper in this judicial district pursuant to 7 U.S.C. § 6520(b) and 28 U.S.C. § 1391(e) because it is the district in which MICI is located.

PARTIES

A. Plaintiff

4. Plaintiff is Massachusetts Independent Certification, Inc. (“MICI”), a Massachusetts non-profit corporation located in Winchendon, Massachusetts. MICI’s mission is to provide affordable certification services to farms using sustainable agriculture practices and to food processing and handling operations that purchase sustainable agriculture products.
5. MICI was accredited by the Secretary as a certifying agent for the purpose of certifying farms and handling operations in accordance with the OFPA and implementing regulations.

6. MICI grew out of, but is independent from, another organization, the Northeast Organic Farming Association—Massachusetts Chapter (“NOFA/Mass”), which had operated an organic certification program for approximately 17 years before MICI was created.
7. Before being granted accreditation by USDA on April 29, 2002, MICI received permission from NOFA/Mass to use the name “NOFA/Mass Organic Certification Program” for MICI’s organic certification activities through December 31, 2003. On or about January 1, 2004, MICI began to use the name “Baystate Organic Certifiers” for the activities of its organic certification program.

B. Defendant

8. Defendant Michael O. Johanns is the Secretary of the United States Department of Agriculture and is the official ultimately responsible for administering the Organic Foods Production Act, 7 U.S.C. §§ 6501 *et. seq.*, and the National Organic Program (“NOP”), 7 C.F.R. Part 205. Therefore, all allegations made herein against USDA and its constituent agencies and officials are intended to be understood as allegations against the Defendant. Mr. Johanns is sued in his official capacity as Secretary of Agriculture.

STATUTORY AND REGULATORY PROVISIONS

A. Organic Foods Production Act

9. OFPA’s purposes are (1) to establish national standards governing the marketing of certain agricultural products as organically produced products; (2) to assure consumers that organically produced products meet a consistent standard; and (3) to

facilitate interstate commerce in fresh and processed food that is organically produced. 7 U.S.C. § 6501.

10. OFPA authorizes the Secretary to establish a program to accredit private persons and governing state officials to provide third-party organic certification services to producers and handlers of agricultural products that have been produced or handled using organic methods as provided for in the Act. 7 U.S.C. § 6514.
11. To be accredited as a certifying agent under OFPA, a governing state official or a private person must be able to fully implement the National Organic Program (“NOP”), as set forth in OFPA and its implementing regulations. 7 U.S.C. § 6515.
12. Under OFPA, a “certified organic farm” is “a farm, or portion of a farm, or site where agricultural products or livestock are produced, that is certified by the certifying agent under [OFPA] as utilizing a system of organic farming as described by [OFPA].” 7 U.S.C. § 6502(4).
13. An organic plan is defined under OFPA as: “A plan of management of an organic farming or handling operation that has been agreed to by the producer or handler and the certifying agent and that includes written plans concerning all aspects of agricultural production or handling described in [OFPA] including crop rotation and other practices required under [OFPA].” 7 U.S.C. § 6502(13).
14. Accredited certifying agents are authorized to grant organic certification to farms and handling operations that the certifying agents determine meet the requirements of the Act and regulations. 7 U.S.C. § 6513(a).

15. In order to be sold or labeled as an organically produced agricultural product, an agricultural product must be produced and handled in compliance with an organic plan agreed to by the producer and handler of the product and the certifying agent. 7 U.S.C. § 6504(3).
16. A certifying agent that falsely or negligently certifies any farming operation that does not meet the terms and conditions of the National Organic Program places its own accreditation at risk. 7 U.S.C. § 6519(e).
17. The Secretary was charged with the responsibility to issue regulations to carry out OFPA. 7 U.S.C. §§ 6521(a) and 6509(g).
18. OFPA requires the Secretary to establish an expedited administrative appeals process under which a person may appeal an action of the Secretary or a certifying agent that adversely affects that person or is inconsistent with the organic certification program established under OFPA. 7 U.S.C. § 6520.

B. National Organic Program Regulations

19. The Administrator of the Agricultural Marketing Service (“Administrator”) is responsible for exercising the functions of the Secretary under OFPA, including implementation and enforcement of the National Organic Program. 7 C.F.R. § 2.79(a)(8)(l)(iii).
20. The National Organic Program final rule was published in the Federal Register on December 21, 2000. 65 Fed. Reg. 80,548 (2000). The final rule was scheduled for full implementation on October 21, 2002. The delayed implementation of the National Organic Program was intended to allow regulated entities time to come

into compliance with the new regulations. After full implementation, all farming and handling operations with more than \$5,000 in annual sales of agricultural products were required to produce and handle their raw or processed agricultural products (including ingredients) in compliance with an organic system plan agreed to by the producer/handler and a certifying agent in order to sell or label their agricultural products as “organic.” 7 U.S.C. § 6505.

21. The final rule set forth organic crop and livestock production and handling requirements. Among other things, the regulations state that an organic livestock producer must provide conditions which allow for exercise, freedom of movement, and reduction of stress appropriate to the species. 7 C.F.R. § 205.238(a)(4). The regulations also state that the producer of an organic livestock operation must establish and maintain livestock living conditions which accommodate the health and natural behavior of animals, including access to the outdoors, shade, shelter, exercise areas, fresh air, and direct sunlight suitable to the species, its stage of production, the climate, and the environment. 7 C.F.R. § 205.239(a)(1).
22. A raw or processed agricultural product sold in a package labeled as “100 % organic” or “organic” is required to identify on its information panels the name of the certifying agent that certified the handler of the finished product. 7 C.F.R. § 205.303(b)(2).
23. “Certification” is defined in the regulations as: “A determination made by a certifying agent that a production or handling operation is in compliance with the Act and regulations in [Part 205], which is documented by a certificate of organic operation.” 7 C.F.R. § 205.2.

24. The regulations bar certifying agents from giving advice or providing consultancy services to certification applicants or certified operations for overcoming identified barriers to certification. 7 C.F.R. § 205.501(a)(11)(iv).
25. The regulations require certifying agents to accept applications from all production or handling operations that fall within their areas of accreditation and certify all qualified applicants, to the extent of its administrative capacity to do so, without regard to size or membership in any association or group. 7 C.F.R. § 205.501(a)(19).
26. In general, certifying agents must issue a notice of noncompliance when they determine that an applicant for certification or a certified operation is not in compliance with the Act and implementing regulations. 7 C.F.R. § 205.662. However, a certifying agent may deny certification without first issuing a notice of noncompliance if the certifying agent has reason to believe that the applicant for certification has willfully made a false statement or otherwise purposefully misrepresented the applicant's operation or its compliance with certification requirements. 7 C.F.R. § 205.405(g).
27. If the applicant or certified operation is unable to resolve the noncompliance, the certifying agent must issue a notice of denial of certification, or a notice of suspension or revocation of certification. 7 C.F.R. § 205.405.
28. A farming or handling operation that receives a notice of denial of certification may reapply for certification, request mediation, or file an appeal. 7 C.F.R. § 205.405(d).

29. If, after receiving a notice of noncompliance or denial of certification, a farming or handling operation applies for certification from a different certifying agent, the operation is required to include a copy of the notification of noncompliance or denial of certification and a description of actions it has taken, with supporting documentation, to correct the noncompliance. 7 C.F.R. § 205.405(e).

C. Appeals Process Under the National Organic Program Regulations

30. The National Organic Program appeals process established by the Secretary is found at 7 C.F.R. §§ 205.680 and 205.681. Additional applicable appeals regulations are found at 7 C.F.R. §§ 1.130 *et. seq.*
31. While the National Organic Program regulations purport to provide for appeals of actions that adversely affect a person, the regulations do not provide for appeals of actions that are inconsistent with the Act and implementing regulations, as mandated by 7 U.S.C. § 6520(a)(2). The NOP appeal regulations also fail to provide for appeals by non-certified entities of enforcement actions as required by 7 U.S.C. § 6519(c)(1).
32. The regulations allow farming and handling operations to appeal denials, suspensions, and revocations of their own certification. 7 C.F.R. §§ 205.680 and 205.681.
33. All appeals under the National Organic Program must be filed in writing and must include a copy of the adverse decision and a statement of the appellant's reasons for believing that the decision was not proper or made in accordance with applicable program regulations, policies, or procedures. 7 C.F.R. § 205.681(d)(3).

34. Under 7 C.F.R. §§ 205.680 and 205.681, the Administrator is responsible for making initial adjudicative decisions with respect to the National Organic Program.
35. If the Administrator denies an appeal, the regulations state that USDA will initiate a formal administrative proceeding under the Department's Uniform Rules of Practice, 7 C.F.R. part 1, subpart H. 7 C.F.R. § 205.681; 7 C.F.R. §§ 1.130 *et. seq.*
36. The National Organic Program regulations provide that if the Administrator sustains a certification applicant's appeal of a certifying agent's decision, the applicant will be issued organic certification. 7 C.F.R. § 205.681(a)(1). The regulations further provide that the act of sustaining the appeal shall not be an adverse action subject to appeal by the affected certifying agent.

FACTS GIVING RISE TO THE ACTION

37. MICI, by and through its NOFA/Mass Organic Certification Program, applied to the Secretary for accreditation under the NOP, and received accreditation on April 29, 2002. The accreditation continues in effect for MICI's Baystate Organic Certifiers program.
38. On May 6, 2002, Mr. Bass, owner of The Country Hen, an egg producer based in Hubbardston, Massachusetts, testified at a meeting of the National Organic Standards Board ("NOSB") that the National Organic Program regulations should not require outdoor access for organic chickens. The NOSB is a citizen advisory board appointed pursuant to OFPA. 7 U.S.C. § 6518.
39. According to the NOSB meeting transcript, Mr. Bass argued that it would be impracticable for him to provide outdoor access, in part because it would be cost-

prohibitive for him to obtain sufficient land to provide access to the outdoors at the historically recommended number of birds per acre.

40. At the NOSB meeting, Mr. Bass indicated that he had no plans to change his operations in order to provide outdoor access because he hoped to receive a variance from the NOSB or a change in the requirements.
41. NOP Program Manager Richard Mathews was present at the NOSB meeting and took part in the discussion of the variance requested by The Country Hen.
42. At The Country Hen's request, in May, 2002, MICI mailed an application and a copy of its NOFA/Mass Organic Certification Program's 2002 Program Manual to The Country Hen. The 2002 Program Manual included separate sections on use of the "USDA Organic" seal and the "NOFA/Mass Organic Certification Program" seal, and stated that: "Use of the NOFA/Mass Organic Certification seal is reserved for certified operations that meet all requirements of the standards in this program manual."
43. On July 15, 2002, The Country Hen applied to MICI for organic certification.
44. When The Country Hen applied to MICI for organic certification, it had already received a notice of noncompliance from its then-certifier, Quality Assurance International ("QAI"), due to The Country Hen's failure to provide its hens with access to the outdoors. The Country Hen did not disclose the notice of noncompliance from QAI in the application to MICI, nor did it describe to MICI actions it had taken to correct the compliance deficiencies, as required by the NOP regulations.

45. At the time that it applied to MICI for organic certification, The Country Hen housed approximately 67,000 laying hens in eleven barns on about thirteen acres of land in five locations. The Country Hen also had contractual relations with growers that supplied it with pullets (hens that have not yet begun to lay eggs).
46. Upon information and belief, The Country Hen submitted for approval a proposed egg carton to Richard Mathews, the NOP Program Manager, during the summer or fall of 2002. The proposed egg carton bore the USDA Organic seal and statements that The Country Hen was “certified organic by NOFA/Mass,” and that The Country Hen’s “feed and eggs are certified organic by NOFA/Mass.”
47. Upon information and belief, Mr. Mathews personally reviewed and approved The Country Hen’s proposed egg carton at some time prior to October 9, 2002, without consulting MICI.
48. On October 4, 2002, MICI issued a notice of noncompliance to The Country Hen.
49. The notice of noncompliance issued by MICI cited four areas of noncompliance with OFPA and the NOP regulations, stating that: (1) feed rations were not 100 percent organic as required by 7 C.F.R. § 205.237; (2) none of the inspected facilities allowed the animals to have access to the outdoors as required by 7 C.F.R. § 205.239; (3) the compost produced by The Country Hen could not be approved for use on organic farms because its records did not demonstrate a ratio of carbon to nitrogen that met the requirements of 7 C.F.R. § 205.203; and (4) on-site inspections of two of the pullet houses had not been completed.

50. MICI's cover letter accompanying the October 4, 2002, notice of noncompliance advised The Country Hen that it was not authorized to "use any packaging stating that you are certified by the NOFA/Mass Organic Certification Program until you have been granted certification by the program."
51. The notice of noncompliance gave The Country Hen until December 31, 2002, to take corrective action and submit supporting documentation showing the corrective actions taken.
52. Upon information and belief, Mr. Bass met with NOP Program Manager, Richard Mathews, and Arthur Neal of the NOP staff on October 9, 2002, to discuss how The Country Hen could obtain certification despite the deficiencies noted by MICI.
53. Upon information and belief, Mr. Mathews advised The Country Hen of steps that could be taken to correct or rebut each of the four areas of noncompliance identified by MICI.
54. Upon information and belief, Mr. Mathews advised Mr. Bass that USDA could take action only after MICI had issued a formal denial.
55. Upon information and belief, The Country Hen voluntarily surrendered its organic certificate from QAI on or about October 10, 2002.
56. On October 11, 2002, Don Franczyk, MICI's certification administrator, called the NOP office in an attempt to clarify what had transpired at the October 9 meeting between Mr. Bass and the NOP staff. He was told that Mr. Mathews was out of the office, so he spoke with Arthur Neal, a member of the NOP staff who was also present at the October 9 meeting.

57. Mr. Neal advised Mr. Franczyk to use the recommendations passed by the National Organic Standards Board in May 2002 for guidance in making certification decisions with respect to access to the outdoors. Mr. Neal further stated that certifying agents had the power to issue “conditional certification” and allow applicants to come into compliance with the rule over time, or revoke the certificate if the applicant failed to come into compliance within a set time.
58. Mr. Franczyk met with Mr. Bass to discuss The Country Hen’s noncompliance on October 15, 2002. Mr. Bass presented The Country Hen’s proposed plan for providing its hens outdoor access at several locations.
59. The plan proposed by Mr. Bass called for each barn to be outfitted with one or more fully enclosed porches including, in some cases, second-story porches. Varying dimensions for the proposed porches were given, ranging from 100 square feet to 420 square feet. Each barn housed approximately 6,000 birds. The sketches noted that, “details may change after work begins.” According to the proposal, the hens would be allowed outside in June, July, and August on days with no high winds nor heavy rain, and only between the hours of 12:30 p.m. and 5:00 p.m. The Country Hen planned to keep the hens indoors in the morning hours, so that collecting the eggs would be more convenient.
60. At the October 15, 2002, meeting with Mr. Franczyk, Mr. Bass requested that MICI’s certification committee grant or deny certification immediately, rather than waiting until the time provided in the notice of noncompliance had elapsed to make a final decision.

61. On or about October 16, 2002, The Country Hen sent a letter to MICI with new details of its proposed organic plan. The letter stated that The Country Hen “will also agree” to open the barns at any time during the year when the temperature is above 60 degrees between the hours of 11:00 a.m. and 5:00 p.m.
62. On October 21, 2002, MICI’s organic certification committee met and voted to deny certification to The Country Hen.
63. As a courtesy, MICI notified Mr. Bass of the certification committee’s decision by e-mail late the night of October 21, 2002, noting that a formal notice of denial of certification would be issued in a matter of days. In the e-mail, MICI again advised Mr. Bass that The Country Hen could not use any egg cartons bearing MICI’s program name on them.
64. The following day, October 22, 2002, The Country Hen e-mailed and mailed what it called an “appeal” to the Administrator. Mr. Mathews, the NOP Program Manager, was copied on The Country Hen’s “appeal” letter.
65. The Country Hen’s “appeal” noted that MICI’s official denial would be sent later in the week and stated: “We do not know the reason for the denial, but since all issues were discussed and approved except access to the outdoors, we must suppose the access to the outdoors is the problem.” The “appeal” did not include any argument from The Country Hen regarding its compliance status.
66. On October 23, 2003, MICI e-mailed and mailed (return receipt requested) a notice of denial of certification to The Country Hen.

67. The notice of denial of certification stated that MICI's organic certification committee concluded that two of the four deficiencies identified in the October 4 notice of noncompliance had been corrected. The committee concluded that the noncompliance regarding lack of inspection of the pullet houses had not been corrected, but would not prevent certification of the operation.
68. The notice of denial stated that the certification committee had concluded that none of The Country Hen's henhouses or pullet houses allowed for the hens or pullets to have access to the outdoors as specified in 7 C.F.R. § 205.239.
69. The notice of denial stated that certification committee had concluded that, even when fully implemented, the proposed plan for two-story porches to be attached to the existing henhouses would not provide adequate access to exercise areas, fresh air, and direct sunlight as required under 7 C.F.R. § 205.239.
70. The notice of denial of certification also stated that The Country Hen's limitations on what months of the year and what hours of day the chickens could be allowed outside were far too restrictive for the species and the climate of Massachusetts, based on the experiences and knowledge of the certification committee in certifying organic laying hens in Massachusetts. The certification committee observed that the limitations were inconsistent with the NOSB recommendation to maximize and encourage access to the outdoors.
71. The notice of denial advised The Country Hen of its rights to reapply for certification, request mediation, or appeal.

72. NOP Program Manager Richard Mathews called Mr. Franczyk, on or about October 23, 2002, and stated that MICI should certify The Country Hen and give it from seven to nine months to come into compliance with the rule.
73. On October 24, 2002, The Country Hen again wrote to Mr. Franczyk with minor revisions to its proposal for providing outdoor access.
74. On October 24, 2002, Plaintiff mailed and e-mailed a copy of the notice of denial of certification to NOP Manager Richard Mathews.
75. On October 24, 2002, Mr. Mathews replied to MICI's e-mail containing the notice of denial with an e-mail stating, "We will be in touch when we complete our review of this matter."
76. On October 25, 2002, Mr. Franczyk received an e-mail communication from an assistant to the Administrator which included an attached decision letter stating that The Country Hen's appeal had been sustained by the NOP.
77. The October 25, 2002 decision stated: "The NOP acknowledges that the plan submitted by Mr. Bass lacks clarity. This lack of clarity, however, does not preclude certification."
78. The Administrator's decision directed MICI to grant certification to The Country Hen retroactive to October 21, 2002, which was three days prior to the date MICI issued the notice of denial to The Country Hen. October 21, 2002 was the date for full implementation of the organic regulations.

79. The Administrator's decision further directed MICI to "continue to cooperate with Mr. Bass in development of a production plan which clearly and verifiably demonstrates Mr. Bass's compliance with the access to the outdoors requirement."
80. On October 25, 2002, the very day that Mr. Franczyk received the decision letter from the Administrator, a MICI Board member, Judith Gillan, spoke with Barbara Robinson, Deputy Administrator, by telephone. Ms. Robinson told Ms. Gillan that any accredited certifying agent would be informed of any appeal brought by an applicant for certification and allowed to respond as a part of due process.
81. On October 28, 2002, MICI sent a letter to the Administrator, objecting to the procedure followed in deciding The Country Hen's appeal and the substance of the October 25 decision. The Administrator did not respond to MICI's letter.
82. On October 29, 2002, USDA published a one-page policy statement regarding access to the outdoors for organic livestock on its NOP Web site, www.ams.usda.gov/nop.
83. After the Administrator's decision was issued, The Country Hen released eggs on the market packaged in cartons bearing the USDA Organic seal and claiming that The Country Hen was "certified organic by NOFA/Mass" and that The Country Hen's "feed and eggs are certified organic by NOFA/Mass."
84. Any person could quickly and easily determine who had purportedly certified The Country Hen by examining its egg cartons.
85. MICI's NOFA/Mass Organic Certification Program has never issued an organic certificate for The Country Hen. NOFA/Mass, Inc., which licensed its name to

MICI for organic certification activities through December 31, 2003, has never been an accredited certifying agent under the National Organic Program and, consequently, could not have issued an organic certificate to any operation that would be valid after October 21, 2002.

86. The Country Hen's decision to use the USDA Organic seal and the NOFA/Mass name appears to be traceable to (1) the personal review of the carton conducted by the NOP Manager, (2) the Administrator's decision, and (3) the provisions of 7 C.F.R. § 205.681(a)(1).
87. Upon information and belief, USDA took no action to direct The Country Hen to cease and desist in its claim that its eggs and feed were certified organic by NOFA/Mass.
88. The Country Hen continued for nearly 10 months to package its eggs in cartons bearing the claim of organic certification by NOFA/Mass.
89. On February 25, 2003, MICI filed a complaint with the USDA Office of Administrative Law Judges, petitioning to overturn the Administrator's October 25, 2002, decision.
90. On November 4, 2003, Administrative Law Judge Jill S. Clifton issued an "Order Dismissing 'Complaint,'" OFPA Docket No. 03-0001, concluding that she lacked subject matter jurisdiction over MICI's complaint under 7 C.F.R. § 205.681(a)(1).
91. On December 11, 2003, MICI filed an appeal petition and brief with the USDA Judicial Officer pursuant to 7 C.F.R. § 1.145, renewing its objection to the

Administrator's decision, and arguing that the Secretary had a duty under OFPA and the United States Constitution to provide MICI with appeal rights.

92. An "Order Dismissing Petitioner's Appeal" was issued on April 27, 2004, by Judicial Officer William G. Jensen. The Judicial Officer concluded he lacked subject matter jurisdiction to hear MICI's appeal.
93. Following the AMS Administrator's October 25, 2002, decision, MICI inspected the farms that provided pullets under contract to The Country Hen. On June 2, 2003, MICI issued a notice of denial of certification to The Country Hen for the pullet houses, and issued an amended version of the October, 2002, denial of certification for the henhouses. The second denial of certification covered the entire farming and handling operation. In the notice of denial, MICI reminded The Country Hen that MICI had not certified The Country Hen, and demanded that The Country Hen cease and desist its claims to be certified by NOFA/Mass.
94. In the summer of 2003, The Country Hen obtained certification by another accredited certifying agent, Natural Food Certifiers. MICI's appeal to the Administrative Law Judge was still pending at this time.
95. In its letter granting certification, Natural Food Certifiers noted its belief that The Country Hen was not in compliance with National Organic Program regulations regarding livestock feed, but that it acceded to the written opinion of National Organic Program staff regarding the use of fish meal in organic livestock feed. Natural Food Certifiers also concluded that The Country Hen could permissibly confine its hens on a temporary basis, due to an outbreak of avian influenza. Natural Food Certifiers expressly reserved the right to reexamine after the avian influenza

had abated the question of whether The Country Hen was in compliance with the NOP standards requiring access to the outdoors for organic livestock.

96. Following its certification by Natural Food Certifiers, The Country Hen produced a newsletter which it posted on its Web site and included in its egg cartons. The newsletter disparaged MICI and stated that, after MICI's refusal to issue a certificate as directed by the National Organic Program, and to "avoid unending conflict," The Country Hen decided to search for "a certifier who was more practical in their outlook."
97. Accredited certifying agents compete with other accredited certifying agents for clients, based upon reputation, price, location, expertise with organic crops, livestock, or food handling, educational offerings, and quality of service.
98. MICI has an economic interest in the integrity of its own organic certification decisions, due to the effect of these decisions upon its business reputation and ability to attract clients.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION: The NOP Appeal Regulations Violate OFPA and the APA.

99. Paragraphs 1-98 are incorporated by reference.
100. The Secretary has a duty to implement the Organic Foods Production Act. 7 U.S.C. §§ 6501 *et. seq.* The Secretary has authority to promulgate regulations to carry out OFPA. 7 U.S.C. §§ 6521 and 6509(g).
101. OFPA directs the Secretary to establish an expedited administrative appeals process under which persons may appeal an action of the Secretary that adversely affects

the person or is inconsistent with the organic certification program established under OFPA. 7 U.S.C. § 6520. A “person” is defined as “an individual, group of individuals, corporation, association, organization, cooperative or other entity.” 7 U.S.C. § 6502(15).

102. MICI is a “person” within the meaning of OFPA. Therefore, the Secretary has a duty to provide an administrative appeals process for MICI to appeal decisions by the Secretary which adversely affect MICI or which MICI believes to be inconsistent with OFPA and the NOP regulations.
103. 7 C.F.R. § 205.680 provides for appeals by persons who are adversely affected by various specified decisions. The appeal authorizations provided for in the regulation purport to be exclusive; there is no general right to appeal *any* decision that has an adverse effect. The regulation also makes no provision for appeals of actions that are inconsistent with the OFPA and NOP regulations. This regulation is in violation of OFPA; it must be held unlawful and set aside as not in accordance with law pursuant to 5 U.S.C. § 706(2)(A) and short of statutory right pursuant to 5 U.S.C. § 706(2)(C).
104. 7 C.F.R. § 205.681(a)(1) provides: “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.” This regulation is in violation of OFPA; it must be held unlawful

and set aside as not in accordance with law pursuant to 5 U.S.C. § 706(2)(A) and short of statutory right pursuant to 5 U.S.C. § 706(2)(C).

105. Pursuant to the Uniform Rules of Practice of the USDA, MICI sought to be heard within USDA, first before the USDA Administrative Law Judge (ALJ) and then before the USDA Judicial Officer (JO). 7 C.F.R. § 205.681; 7 C.F.R. §§ 1.131 *et seq.*
106. In the administrative proceedings, MICI alleged that the Secretary had engaged in actions inconsistent with OFPA and the NOP regulations. In the administrative proceedings, MICI also alleged it was adversely affected by the Secretary's actions.
107. Both the ALJ and the JO denied jurisdiction over MICI's petition to be heard, citing the challenged regulatory provision at 7 C.F.R. § 205.681(a)(1).
108. The Secretary's enforcement of regulatory provisions denying MICI the right to appeal deprived MICI of an opportunity to dissipate the cloud placed upon its reputation by USDA's decision to overturn MICI's denial of certification to The Country Hen. It also deprived MICI of an administrative means of resolving its dispute with respect to The Country Hen's subsequent claim to be certified by NOFA/Mass. As a result MICI suffered harm in the marketplace.
109. Enforcement of the NOP appeal regulations promulgated by the Secretary denied MICI the opportunity to be heard, in violation of 7 U.S.C. § 6520 and 5 U.S.C. § 706(2)(A) and (C).

110. A similar denial of statutory appeal rights could happen at any time to MICI or any other certifying agent. Because the NOP regulations both allow producers and handlers to reapply with other certifying agents and deny certifying agents the right to appeal, this claim is capable of repetition, yet seems likely to evade review.

SECOND CAUSE OF ACTION: The NOP Appeal Regulations Violate the Due Process Guarantees of the Fifth Amendment to the United States Constitution.

111. Paragraphs 1-110 are incorporated by reference.

112. The Secretary has a duty to establish an administrative appeals process that is consistent with the requirements of due process guaranteed by the Fifth Amendment to the Constitution of the United States.

113. The NOP appeal regulations promulgated by the Secretary fail to provide due process of law to MICI and other accredited certifying agents.

114. With no provision for notice or an opportunity to be heard, 7 C.F.R. § 205.681 strips accredited certifying agents of their statutory entitlement to determine whether an applicant for certification's organic system plan complies with OFPA and its implementing regulations and is therefore entitled to organic certification.

115. Taken together with the labeling requirements of 7 C.F.R. § 205.303, 7 C.F.R. § 205.681 deprives an accredited certifying agent, without due process of law, of the right to determine whether a producer or handler may claim certification by the certifying agent. The regulation denies an accredited certifying agent the right to prevent farmers and handlers whom the certifying agency has determined do not satisfy the requirements of the NOP from claiming certification by the certifying agent.

116. The Country Hen's claims to be certified organic by NOFA/Mass and that its feed and eggs were certified by NOFA/Mass took place after MICI expressly advised The Country Hen that any claims to be certified by the NOFA/Mass Organic Certification Program were not approved by MICI. USDA's regulations and actions were the proximate cause of The Country Hen's claim that its operation and its feed and eggs were certified organic by NOFA/Mass. This claim caused MICI confusion and harm in the marketplace for a period of approximately ten months.
117. A similar denial of due process could happen at any time to MICI or any other certifying agent. Because the NOP regulations both allow producers and handlers to reapply with other certifying agents and deny certifying agents the right to appeal, this claim is capable of repetition, yet seems likely to evade review.
118. MICI has been injured by the NOP's violation of its Fifth Amendment right to due process. The denial of due process deprived MICI of the opportunity to protect the value and integrity of its certification mark and dissipate the cloud placed upon its reputation by USDA's decision to overturn MICI's denial of certification to The Country Hen.

THIRD CAUSE OF ACTION: Failure to Comply With USDA Procedures in Violation of the APA: Defective Appeal and Combination of Functions.

119. Paragraphs 1-119 are incorporated by reference.
120. All National Organic Program appeal requests are required to include (1) a copy of the adverse decision, and (2) a statement of the appellant's reasons for believing that the decision was not proper or made in accordance with applicable program regulations, policies, or procedures. 7 C.F.R. § 205.681(d)(3).

121. The Country Hen's October 22, 2002, letter "appeal" did not include either of the required components.
122. The Administrator rendered his decision based upon a defective appeal request; the decision must be held unlawful and set aside as not in accordance with law pursuant to 5 U.S.C. § 706(2)(A) and without observance of procedure required by law pursuant to 5 U.S.C. § 706(2)(D) .
123. The Country Hen's claims to be certified organic by NOFA/Mass and its claims that its feed and eggs were certified by NOFA/Mass took place after MICI expressly advised The Country Hen that any claims to be certified by the NOFA/Mass Organic Certification Program were not approved by MICI. USDA's regulations and actions were the proximate cause of The Country Hen's claim that its operation and its feed and eggs were certified organic by NOFA/Mass. This claim caused MICI confusion and harm in the marketplace for a period of approximately ten months.
124. MICI was injured by the Secretary's action to sustain The Country Hen's appeal without satisfying USDA procedures.
125. The NOP regulations require that all appeals shall be reviewed, heard, and decided by persons not involved with the decision being appealed. 7 C.F.R. § 205.680(e).
126. Upon information and belief, NOP Program Manager Richard Mathews was involved in both the investigation of The Country Hen's application for certification and in the decision to sustain The Country Hen's appeal.

127. The Secretary's failure to enforce regulations requiring a separation of functions in NOP appeals must be held unlawful and the appeal decision must be set aside as not in accordance with law pursuant to 5 U.S.C. § 706(2)(A) and without observance of procedure required by law pursuant to 5 U.S.C. § 706(2)(D).
128. The Country Hen's claims to be certified organic by NOFA/Mass and that its feed and eggs were certified by NOFA/Mass took place after MICI expressly advised The Country Hen that any claims to be certified by the NOFA/Mass Organic Certification Program were not approved by MICI. USDA's regulations and actions were the proximate cause of The Country Hen's claim that its operation and its feed and eggs were certified organic by NOFA/Mass. This claim caused MICI confusion and harm in the marketplace for a period of approximately ten months.
129. MICI was injured by the Secretary's action to sustain The Country Hen's appeal without satisfying USDA procedures.

FOURTH CAUSE OF ACTION: October 25, 2002, Decision and Order to Grant Organic Certification Violates OFPA and the APA

130. Paragraphs 1-129 are incorporated by reference.
131. The Secretary has authority under OFPA to accredit private persons and state officials as certifying agents. 7 U.S.C. § 6514.
132. Only accredited certifying agents are authorized under OFPA to determine whether producers and handlers meet the requirements of OFPA and the NOP regulations and certify those applicants that meet the requirements. 7 U.S.C. 6513(a). The Secretary has no authority under OFPA to certify producers and handlers as organic.

133. As of October 25, 2002, no accredited certifying agent had determined that The Country Hen met the requirements of OFPA and the NOP regulations.
134. By directing MICI to issue an organic certificate to The Country Hen, presumably in reliance upon 7 C.F.R. § 205.681(a)(1), the Administrator, in effect, attempted to act as the certifying agent.
135. The October 25, 2002 decision issued on behalf of the Administrator did not determine that The Country Hen met the requirements of OFPA and the NOP regulations.
136. The Administrator's October 25, 2002 decision sustaining The Country Hen's appeal and directing MICI to issue an organic certificate was in violation of OFPA; it must be held unlawful and set aside as arbitrary, capricious, and not in accordance with law pursuant to 5 U.S.C. § 706(2)(A); it was in excess of statutory jurisdiction, authority, and limitations and short of statutory right pursuant to 5 U.S.C. § 706(2)(C), without observance of procedure required by law pursuant to 5 U.S.C. § 706(2)(D), and unsupported by substantial evidence pursuant to 5 U.S.C. § 706(2)(E).
137. The October 25, 2002, decision and order to MICI to certify The Country Hen and the challenged regulatory provisions in 7 C.F.R. § 205.681(a)(1), deprived MICI of its statutory entitlement to determine whether the applicant was in compliance with OFPA and the NOP regulations, and deprived MICI of its right to exclude an applicant from claiming to be certified by MICI, based on a determination of noncompliance with OFPA and the NOP, without due process of law.

138. The Secretary's denial of MICI's right to appeal deprived MICI of an opportunity to dissipate the cloud placed upon its reputation by USDA's decision to overturn MICI's denial of certification to The Country Hen. As a result MICI suffered harm in the marketplace.
139. The Country Hen's claims to be certified organic by NOFA/Mass and that its feed and eggs were certified by NOFA/Mass took place after MICI expressly advised The Country Hen that any claims to be certified by the NOFA/Mass Organic Certification Program were not approved by MICI. USDA's actions were the proximate cause of The Country Hen's claim that its operation and its feed and eggs were certified organic by NOFA/Mass. This claim caused MICI confusion and harm in the marketplace for a period of approximately ten months.

FIFTH CAUSE OF ACTION: NOP Regulations Violate MICI's Rights to Freedom of Speech and Freedom of Association Under the First Amendment to the United States Constitution

140. Paragraphs 1-139 are incorporated by reference.
141. The Secretary has a duty to operate USDA programs in a manner consistent with the requirements of the First Amendment to the United States Constitution.
142. 7 C.F.R. § 205.681(a)(1) states that if USDA sustains a person's appeal of an accredited certifying agent's decision, the person "will be issued organic certification," and the "affected" certifying agent will not be allowed to appeal.
143. 7 C.F.R. § 205.681(a)(1) compels accredited certifying agents to communicate messages that they believe are untrue and with which they do not agree.

144. 7 C.F.R. § 205.681(a)(1) also compels accredited certifying agents to be associated with producers and handlers they believe are not in compliance with OFPA and the NOP requirements.
145. The Administrator's order of October 25, 2002 directed MICI to issue an organic certificate to The Country Hen despite MICI's determination that The Country Hen was not in compliance with OFPA and the NOP requirements and was not entitled to organic certification and despite MICI's authority under OFPA as an accredited certifying agent to make certification determinations.
146. The October 25, 2002, order directing to MICI to certify The Country Hen and the challenged regulatory provisions in 7 C.F.R. § 205.681(a)(1), violated MICI's constitutional rights of freedom of speech and freedom of association without due process of law.
147. The Country Hen's claims to be certified organic by NOFA/Mass and that its feed and eggs were certified by NOFA/Mass took place after MICI expressly advised The Country Hen that any claims to be certified by the NOFA/Mass Organic Certification Program were not approved by MICI. USDA's actions were the proximate cause of The Country Hen's claim that its operation and its feed and eggs were certified organic by NOFA/Mass. This claim caused MICI confusion and harm in the marketplace for a period of approximately ten months.

REQUEST FOR RELIEF

MICI requests that this Court:

1. Assume jurisdiction of this action;
2. Issue an injunction against enforcement of 7 C.F.R. § 205.681(a)(1);
3. Issue a declaratory judgment that administrative appeals under OFPA shall be heard under the USDA's Uniform Rules of Practice, 7 C.F.R., pt 1, subpart H and that the Organic Foods Production Act shall be deemed included in the list of statutes in 7 C.F.R. § 1.131;
4. Issue a declaratory judgment that the Secretary may not compel an accredited certifying agent to certify a farm or handling operation as organic;
5. Issue an order directing that MICI be awarded reasonable costs and attorney fees incurred in bringing this action before the agency and the court; and
6. Award such other relief as this Court deems just and proper.

Date: September 22, 2005

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* Motions for admission *pro hac vice* are being submitted along with this complaint.

Date: September 23, 2005

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