

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

MASSACHUSETTS INDEPENDENT CERTIFICATION, INC.,)	
)	Civil Action No. 05-40169
Plaintiff,)	(Judge F. Dennis Saylor IV)
)	
v.)	
)	
MICHAEL O. JOHANNNS, Secretary of Agriculture, United States Department of Agriculture,)	FIRST AMENDED COMPLAINT
)	
Defendant.)	
)	

PRELIMINARY STATEMENT

Plaintiff, Massachusetts Independent Certification, Inc. (“MICI”), brings this Complaint against the Defendant, Michael O. Johanns, Secretary of the United States Department of Agriculture (“Secretary” or “USDA”) seeking declaratory and injunctive relief from the Secretary’s adoption and enforcement of regulations which unlawfully deny Plaintiff appeal rights required under the Organic Foods Production Act (“OFPA” or “the Act”) and the Constitution. The regulations deny MICI an administrative remedy for USDA actions which adversely affect it, and which are inconsistent with OFPA and its implementing regulations, despite the Act’s mandate to provide such a remedy.

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. This action also arises under the First and Fifth Amendments to the United States Constitution.

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 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.

6. 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.
7. Since April 29, 2002, MICI has been accredited by the USDA to act as a certifying agent for the purpose of certifying farms and handling operations in accordance with the OFPA and implementing regulations. MICI makes decisions to approve or disapprove applications for organic certification on an ongoing basis.

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 requires 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 private person or a governing state official 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).

B. National Organic Program Regulations

18. 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).
19. 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.

20. The final rule defines “organic production” as, “a production system that is managed in accordance with the Act and regulations in this part to respond to site-specific conditions by integrating cultural, biological, and mechanical practices that foster cycling of resources, promote ecological balance, and conserve biodiversity.” 7 C.F.R. § 205.2 “Organic Production.”
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.
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 with the certifier, 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 OFPA and the National Organic Program Regulations

30. 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(a). OFPA states that a final decision administrative appeals decision of the Secretary may be appealed in federal district court. 7 U.S.C. § 6520(b).
31. OFPA also requires notice and an opportunity to be heard before USDA may declare a person accused of violations of the Act ineligible to receive organic certification. 7 U.S.C. § 6519(c).
32. 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.*
33. The National Organic Program regulations fail to provide for appeals of all actions that adversely affect a person, and do not separately 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 of enforcement actions as required by 7 U.S.C. § 6519(c)(1).
34. The USDA has failed to add OFPA to the list of statutes to which the Uniform Rules of Practice apply, despite explicitly referencing the Uniform Rules of Practice in its appeal regulations. 7 C.F.R. § 205.681; 7 C.F.R. § 1.131.

35. The regulations do allow farming and handling operations to appeal denials, suspensions, and revocations of their own certification. 7 C.F.R. §§ 205.680 and 205.681.
36. 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.
37. 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).
38. The 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.
39. If the Administrator denies an appeal, the regulations state that a formal administrative proceeding will be initiated 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.*

BACKGROUND FACTS

40. 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.

41. As an accredited certifying agent, MICI strives to comply with its obligation to certify only applicants who meet NOP organic standards, and to deny organic certification to applicants who do not meet NOP organic standards.
42. The USDA asserts that it may order MICI to certify producers that MICI determines do not meet NOP program standards.
43. The USDA asserts that MICI has no administrative appeal or due process rights either prior to or following a USDA reversal of a denial of certification issued by MICI.
44. The USDA has enforced these positions and exercised these alleged authorities in both its rulemaking and adjudicative capacities.

**A. MICI's Original Certification Dispute with USDA
Illustrates Threat of Harm to MICI**

45. On July 15, 2002, The Country Hen applied to MICI for organic certification.
46. MICI learned much later that 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.

47. 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).
48. After conducting an inspection of The Country Hen's operations, MICI issued a notice of noncompliance on October 4, 2002.
49. This notice cited four areas of noncompliance with OFPA and the NOP regulations, and gave The Country Hen until December 31, 2002, to take corrective action. One of the four areas of noncompliance stated that none of the inspected facilities allowed the animals to have access to the outdoors as required by 7 C.F.R. § 205.239.
50. On October 15, 2002, Don Franczyk, MICI's certification administrator, met with George Bass, The Country Hen's owner. Mr. Bass presented The Country Hen's proposed plan for providing its hens with outdoor access as required by NOP regulations. The plan called for each barn to be outfitted with one or more fully enclosed porches including, in some cases, second-story porches. Each barn housed approximately 6,000 birds. Varying dimensions for the proposed porches were given, ranging from 100 square feet to 420 square feet. 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.

51. 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.
52. On October 21, 2002, MICI’s organic certification committee met and voted to deny certification to The Country Hen. MICI 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. MICI 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 the outdoors to accommodate the health and natural behavior of the chickens and would not provide sufficient exercise areas, fresh air, and direct sunlight as required under 7 C.F.R. § 205.239. MICI concluded that the birds were not provided conditions allowing for exercise and freedom of movement, which is required under 7 C.F.R. § 205.238.
53. 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.

54. Upon information and belief, while MICI's review of The Country Hen's application was still pending, 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."
55. 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 and before MICI had even made a certification decision on The Country Hen's application.
56. 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. MICI was not included in this meeting.
57. On October 22, 2002, The Country Hen e-mailed and mailed what it called an "appeal" of MICI's October 21 vote to the Administrator. Mr. Mathews was copied on The Country Hen's "appeal" letter.
58. This "appeal" did not comply with the requirements of 7 C.F.R. .681(d)(3), which requires both 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.

59. NOP also 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).
60. 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.
61. On or about October 23, 2002, NOP Program Manager Richard Mathews called Mr. Franczyk and stated that MICI should certify The Country Hen and give it from seven to nine months to come into compliance with the rule.
62. On October 24, 2002, MICI mailed and e-mailed a copy of the notice of denial of certification to Mr. Mathews.
63. 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."

**B. MICI Seeks the Opportunity to Participate in the
Administrator's Review of the Producer's Appeal**

64. On October 25, 2002, 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.
65. That same day, 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.

66. The Administrator's decision directed MICI to grant certification to The Country Hen retroactive to October 21, 2002.
67. 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.
68. 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." MICI never issued such a certificate.
69. Any person could quickly and easily determine who had purportedly certified The Country Hen by examining its egg cartons.
70. MICI repeatedly demanded that The Country Hen cease and desist its claims to be certified by NOFA/Mass.

C. Another Certifier Doubts The Country Hen's Organic Qualifications but Certifies Absent a Vehicle for Expressing Disagreement with USDA

71. In the summer of 2003, The Country Hen obtained certification from another accredited certifying agent, Natural Food Certifiers, and discontinued its claims to be certified by NOFA/Mass.
72. 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. Natural Food Certifiers also withheld judgment on the question of whether The Country Hen was in compliance with the NOP standards requiring access to the outdoors for organic livestock until after a local avian influenza outbreak had abated.

73. Natural Food Certifiers asserted its total disagreement with USDA's interpretation of livestock feed regulations, even as it issued an organic certificate to The Country Hen.
74. Upon information and belief, the evident futility of denying certification, given the USDA's appeal regulations, deterred Natural Food Certifiers from denying certification.
75. 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." The newsletter remained on The Country Hen's Web site, as of the date of filing this First Amended Complaint.

**D. MICI's Administrative Efforts to Exercise Appeal Rights
Provided for by OFPA in § 6520(a)**

76. 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.

77. 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. In its initial complaint, MICI alleged that USDA had violated the requirements of due process.
78. 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).
79. 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 pursuant to § 6520(a) and the United States Constitution to provide MICI with appeal rights.
80. 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.

**E. MICI's Ongoing Interest in Organic Certification Decisions
That are Consistent with the Law**

81. A commitment to maintain the consistency and meaningfulness of its organic certification decisions, and of the organic program generally, is of vital interest to MICI and is inherent in its mission as an organic certifier.
82. The success of the National Organic Program and the "USDA Organic" seal depend upon consumer confidence in third-party organic certification as a means of assuring that the products so labeled have been produced in a manner consistent

with organic standards, such as those imposing a general prohibition on use of synthetic chemicals in farming, requiring crop rotations, and accommodating the health and natural behavior of animals.

83. Consumers pay a price premium when they purchase certified organic foods.
84. The price premium for certified organic foods is one factor that motivates producers and handlers to seek organic certification.
85. A substantial portion of MICI's annual budget derives from organic certification fees paid by producers and handlers.
86. 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.
87. MICI has an ongoing economic interest in the integrity of its own organic certification decisions, due to the effect of these decisions upon its business reputation and consequent ability to attract clients.
88. MICI has a personal stake in the integrity of organic certification decisions generally, due to the importance of consumer confidence in third-party certification to the continued existence and growth of the organic marketplace upon which MICI depends for much of its income.
89. As a certifying agent, MICI has the requisite expertise in organic farming and handling to help ensure that certification decisions are consistent with the law. As a certifier, MICI also has the best firsthand knowledge of what is actually happening in the operations it investigates and reviews for organic certification.

90. The absence of an administrative appeals process, or indeed of any apparent means of obtaining review of USDA orders of organic certification following denials by certifying agents, deprives MICI of any opportunity now or in the future to participate in efforts to ensure that the organic certification decisions which the regulations require it to represent as its own are consistent with the law.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION:

The NOP Appeal Regulations Violate OFPA and the APA

91. Paragraphs 1-90 are incorporated by reference.
92. 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).
93. 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 broadly to encompass “an individual, group of individuals, corporation, association, organization, cooperative or other entity.” 7 U.S.C. § 6502(15).
94. 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.

95. The Secretary failed to implement such an appeal process in its rules and has not enforced individual appeal rights under 7 U.S.C. § 6520(a) in its adjudicative proceedings.
96. 7 C.F.R. § 205.680 provides for appeals by persons who are adversely affected by various specified decisions. However, 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 upon a person. 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).
97. 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).
98. The Secretary’s continued enforcement of these NOP appeal regulations denies MICI of its right to appeal and participate in the administrative appeals process in violation of 7 U.S.C. § 6520 and 5 U.S.C. § 706(2)(A) and (C).

99. MICI continues to make organic certification decisions. The continued existence of these agency regulations ensures that a similar denial of MICI's statutory appeal rights will happen every time MICI attempts to appeal a reversal of one of its organic certification denials.
100. The October 25, 2002, USDA decision mandating MICI to certify The Country Hen, coupled with USDA's refusal to hear MICI's appeal in that matter, also caused harm to MICI's reputation. This harm is ongoing.

SECOND CAUSE OF ACTION:

**The NOP Appeal Regulations Violate the Due Process Guarantees
of the Fifth Amendment to the United States Constitution**

101. Paragraphs 1-100 are incorporated by reference.
102. MICI has a protected property interest in whether a product that would advertise the claim upon its label to be certified organic by MICI has met the requirements of organic certification.
103. Prior to depriving MICI of this protected property interest, 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.
104. The NOP appeal regulations promulgated by the Secretary fail to provide due process of law to MICI and other accredited certifying agents. 7 C.F.R. §§ 205.680 and 205.681. The regulations provide no process to certifying agents, either before or after their denial of certification is reversed.

105. The regulations fail to provide an opportunity for MICI and other certifying agents to participate as parties in an applicant's appeal of the certifying agent's denial of certification to the Administrator, even though the decision on the appeal will affect the certifying agent's interest in the consistency of its own decisions with the law, the credibility of its own name, and the continued validity of its own certification decisions.
106. The regulations additionally prohibit an "affected" certifying agent from appealing a decision by the Administrator which upholds the applicant's appeal, overturns the certifying agent's denial of certification, and dictates that a certificate "will be issued."
107. By stating that an organic certificate "will be issued" when an applicant's appeal of a certifying agent's decision is sustained by the Administrator, 7 C.F.R. § 205.681 strips accredited certifying agents of their statutory authority to participate in the determination of whether an applicant for certification's organic system plan complies with OFPA and its implementing regulations.
108. The regulations deprive certifying agents of the opportunity to object to serious substantive and procedural irregularities, as occurred in The Country Hen's appeal to the Administrator, which increases the risk that organic certification decisions that are inconsistent with the law will result. Inconsistent and arbitrary certification decisions undercut the value of the organic certification program and the organic label to organic consumers, producers, handlers, and certifying agents.
109. MICI continues to make organic certification decisions. The continued existence and enforcement of the current appeal regulations deny MICI due process at any

time before or after the USDA reverses a denial by MICI of an application for certification.

THIRD CAUSE OF ACTION:

**Use of NOP Appeals Regulations to Compel Certifying Agents
to Grant Organic Certification Violates OFPA and the APA**

110. Paragraphs 1-109 are incorporated by reference.
111. The Secretary has authority under OFPA to accredit private persons and state officials as certifying agents. 7 U.S.C. § 6514.
112. 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). OFPA provides that proposed organic system plans “shall be reviewed by the certifying agent who shall determine if such plan meets the requirements of the programs.” *Id.* The Secretary has no express statutory authority under OFPA to certify producers and handlers as organic.
113. Under OFPA, issuance of an organic certificate depends upon whether the certifying agent agrees that the proffered organic system plan is in compliance with OFPA and the regulations. 7 U.S.C. § 6502(13); *see also* 7 U.S.C. §§ 6502(4), (5).
114. USDA’s promulgation and enforcement of 7 C.F.R. § 205.681(a)(1) exceeds USDA’s authority under OFPA. 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).

115. MICI continues to make organic certification decisions. The continued existence of these agency regulations, and USDA's interpretation of the regulations as authorizing USDA to summarily order certifying agents to grant organic certification, ensures that a similar denial of MICI's statutory authority to agree or disagree with an applicant's organic system plan will happen every time USDA overturns a denial of certification by MICI.
116. By unlawfully limiting MICI's role in certification, USDA jeopardizes MICI's specific economic interests and its broader interest in organic certification and the growth of the organic marketplace.

FOURTH 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

117. Paragraphs 1-116 are incorporated by reference.
118. 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.
119. As an accredited certifying agent, MICI has an independent duty to carry out the provisions of OFPA and the NOP regulations. It has a duty to grant organic certification for producers and handlers whose organic system plans it agrees are in compliance with OFPA and the NOP regulations. 7 U.S.C. § 6513(a).
120. 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.

121. The NOP regulations provide that packaged agricultural products labeled “USDA Organic” must include the statement “Certified organic by ” and name the certifying agent. 7 C.F.R. § 205.303(b)(2).
122. 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.
123. 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.
124. By unlawfully compelling MICI to deliver this private endorsement, USDA jeopardizes MICI’s specific economic interests and its broader interest in organic certification and the growth of the organic marketplace.

REQUEST FOR RELIEF

MICI requests that this Court:

1. Assume jurisdiction of this action;
2. Issue a declaratory judgment that the Secretary has not complied with 7 U.S.C. § 6520(a) and that the Secretary has a duty under OFPA to remedy the NOP appeals regulations;
3. Issue a declaratory judgment that the current NOP appeals regulations violate certifiers’ constitutional guarantee of procedural due process;
4. Issue a declaratory judgment that the Secretary may not compel an accredited certifying agent to certify a farm or handling operation as organic without due process of law;

5. Issue an injunction against enforcement of 7 C.F.R. § 205.681(a)(1);
6. 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 is included in the list of statutes in 7 C.F.R. § 1.131;
7. 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
8. Award such other relief as this Court deems just and proper.

Date: December 14, 2005

/s/ Jill E. Krueger

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**ATTORNEYS FOR PLAINTIFF
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CERTIFICATION OF SERVICE

I hereby certify that on December 14, 2005, I caused to be served upon the attorneys of record a true and correct copy of the foregoing document by electronic means.

Dated: December 14, 2005

/s/ Jill E. Krueger

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