



THE CENTER FOR FOOD SAFETY

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CITIZEN PETITION BEFORE THE UNITED STATES UNITED STATES DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE, NATIONAL ORGANIC PROGRAM

CENTER FOR FOOD SAFETY,
660 Pennsylvania Ave., S.E.
Suite 302
Washington, DC 20003,
et al.,
Petitioners,

Filed With:

ANN VENEMAN,
in her official capacity as,
Secretary of the United States
Department of Agriculture,

A.J. YATES,
in his official capacity as,
Administrator, USDA, Agricultural
Marketing Service,

RICHARD MATTHEWS,
in his official capacity as,
Program Manager,
National Organic Program,
USDA, AMS.

Docket No. _____

PETITION FOR RULEMAKING AND COLLATERAL RELIEF SEEKING THE CREATION OF AN ACCREDITATION PEER REVIEW PANEL FOR THE NATIONAL ORGANIC PROGRAM

Pursuant to the Right to Petition Government Clause contained in the First Amendment of the United States Constitution,^a the Administrative Procedure Act,^b and the United States Department of Agriculture's (USDA) implementing regulations,^c the undersigned submit this citizen petition for rulemaking and collateral relief under the Organic Foods Production Act^d (OFPA) requesting the Secretary take actions to comply with mandatory standards and procedures specified under the Act to ensure that certifying agents operating under the Act are accredited only upon full and complete compliance with all such procedures and standards enumerated under the Act. Specifically, petitioners request the Secretary undertake the following actions:

- (1). Establish the Peer Review Panel as a standing committee of the National Organic Standards Board, pursuant to the Federal Advisory Committee Act;
- (2). Create a three member Peer Review Panel with one alternate member;
- (3). Direct the National Organic Standards Board to recommend, by majority vote, members for appointment to the Peer Review Panel;
- (4). Mandate that all appointees to the Peer Review Panel must have expertise in organic production and handling methods and certification procedures;
- (5). Allow all current and former members of the National Organic Standards Board to serve as appointees to the Peer Review Panel; and
- (6). Establish that appointees to the Peer Review Panel may serve up to two 3-year terms and that all appointments will be made on rotational basis.

^a The right to petition for redress of grievances is among the most precious of the liberties safeguarded by the Bill of Rights. United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 222, 88 S. Ct. 353, 356, 19 L. Ed. 2d 426 (1967). It shares the "preferred place" accorded in our system of government to the First Amendment freedoms, and has a sanctity and a sanction not permitting dubious intrusions. Thomas v. Collins, 323 U.S. 516, 530, 65 S. Ct. 315, 322, 89 L. Ed. 430 (1945). "Any attempt to restrict those First Amendment liberties must be justified by clear public interest, threatened not doubtful or remotely, but by clear and present danger." *Id.* The Supreme Court has recognized that the right to petition is logically implicit in, and fundamental to, the very idea of a republican form of government. United States v. Cruikshank, 92 U.S. (2 Otto) 542, 552, 23 L. Ed. 588 (1875).

^b 5 U.S.C. § 553(e) (2000).

^c 7 C.F.R. § 1.28 (2000).

^d 7 U.S.C. § 6501, et seq. (2000).

PETITIONERS

Petitioner the *Center for Food Safety* (CFS), is a non-profit, membership organization located at 660 Pennsylvania Ave., SE, Suite 302, Washington, DC 20003. Petitioner was established in 1997 to address the increasing concerns about the impacts of our food production system on human health, animal welfare, and the environment. Petitioner maintains direct contact with over 100,000 members of the public concerned about environmental and food safety issues including the implementation of the National Organic Program.

Petitioner *Beyond Pesticides* (*National Campaign Against the Misuse of Pesticides*) is located at 701 E Street, SE, Suite 200, Washington, DC 20003. Petitioner is a 501(c)(3) public interest organization incorporated in the District of Columbia. Petitioner is composed of member organizations and individuals in every state. Beyond Pesticides promotes pesticide safety and the adoption of alternative pest management strategies, including organic techniques that reduce or eliminate a dependency on toxic chemicals as a means of controlling pests such as insects, rodents, weeds and fungi. Beyond Pesticides provides information to the public in the form of printed publications and electronically via the internet. Many of its members practice organic agriculture and/or consume organic food. Beyond Pesticides has been active in the organic policy and program arena since its inception.

Petitioner *National Campaign for Sustainable Agriculture* is located at P.O. Box 396, Pine Bush, NY 12566. The National Campaign for Sustainable Agriculture (National Campaign) was launched in 1994 to meet the need for a national forum in which local, regional, and national interests could develop a strong, unified voice for federal sustainable agriculture policy. The National Campaign is an independent non-membership 501(c) (3) national network with over 125 active partner organizations.

Petitioner *Rural Advancement Foundation International-USA* (RAFI-USA) is located at 21 Hillsboro Street, Pittsboro, NC. Petitioner is dedicated to community, equity, and diversity in agriculture. While focusing on North Carolina and the southeastern United States, petitioners also work nationally and internationally. Petitioner plays a leadership role in responding to major agricultural trends and creating movement among farm, environmental, and consumer groups to promote sustainable agriculture; to strengthen family farms and rural communities; to protect the diversity of plants, animals and people in agriculture; and to ensure responsible use of new technologies.

Petitioner *Union of Concerned Scientists* (UCS) is located at 1701 H Street, NW, Washington, DC 20007. Petitioner promotes sustainable agriculture, a safe food system, and opportunities for consumers and citizens to make choices about how food is produced. Working in coalition with the environmental community, progressive farmers, and other public interest organizations, UCS urges new policies, analyzes agency actions, and engages the public in advocacy efforts to improve our food web – the interlinked systems of agriculture, food, and the environment.

STATEMENT OF GROUNDS

As the USDA's National Organic Program (NOP) begins full implementation this October 21, 2002, consumer and farmer-based certifying organizations have continued to raise questions about whether the NOP is properly performing its role as accreditor of organic certifying organizations. The petitioners and other organizations have made repeated requests that the USDA take action to institute the legally mandated, public Peer Review Panel to evaluate the NOP's adherence to its accreditation procedures and its accreditation decisions. To date, the USDA has refused to create such a panel. This refusal, and the events surrounding the implementation of the program, threaten to undermine the integrity of the NOP and the "organic" label.

Fueling public concern over a reduction in the integrity of the new "organic" label is the appearance of numerous new, previously unknown certifying agents applying for accreditation to the USDA. During development of the NOP Final Rule in 2000, the USDA identified 49 existing organic certifying agents, including 13 State programs.^e In anticipation of its role as accreditor, the USDA further found that the number of entities remained constant between 40 and 50 over the past years and anticipated that there would be no growth in the number of certifying agents seeking accreditation in the USDA run program.^f Contrary to such findings, the number of applicants to the USDA program has actually far surpassed this number to total 122.^g This large number of accreditation applicants presents important questions as to the USDA's ability to properly assess the large volume of applicants for adherence to accreditation norms^h over the short time since the accreditation program was first implemented. The Peer Review Panel called for in the OFPA is the public enforcement mechanism designed to ensure the USDA's accreditation procedures are followed and to assist the NOP in improving the quality of its accreditation reviews. Absent creation of this Peer Review Panel, consumer and small farmer-based certifying organizations have a number of fears about the direction of the NOP and the "truth" behind the organic label.

Consumers are concerned that USDA accreditation procedures may not be rigorous enough to prevent new certifying agents that seek to manipulate and minimize compliance with the substantive standards promulgated in the NOP Final Rule from entering the program. In 1994, the National Organic Standards Board (NOSB) recognized the critical role that the Peer Review Panel has in ensuring continued consumer confidence in the integrity of the organic label. In making its recommendation on the Peer Review Panel the NOSB stated:

^e 65 Fed. Reg 80667

^f Id.

^g USDA, List of Applicants for USDA Accreditation as Organic Certifying Agents, <http://www.ams.usda.gov/nop/ApplicantsList093002.pdf> (last visited October 8, 2002).

^h As mandated in the National Organic Program Final Rule, the establishment of a Peer Review Panel is to evaluate annually the NOP's adherence to the accreditation procedures established in USDA regulations, to review the NOP's accreditation decisions and to ensure that the NOP accreditation process is in conformity with ISO/IEC Guide 61, "General requirements for assessment and accreditation of certification/registration bodies." See 65 Fed. Reg. 80604

Under the Organic Foods Production Act of 1990, any person or State government can apply to be an agent of the Department of Agriculture for the purpose of certifying a farm or handling operation in accordance with the Act. Only food products produced on a USDA certified farm and handled by a USDA certified organic handling operation can sell or label their food products “organically produced” or “organic.” Organic handling operations are defined as operations that receive or otherwise acquire organic agricultural products, and process, package, or store such products. Under the USDA’s National Organic Production Program, consumers of food labeled “organic” are guaranteed by the USDA they are purchasing food products raised and handled according to the standards set for the in the Act.

Because the USDA Accredited Organic Certifying Agents are the critical element in legitimizing the organic label claim, to be an accredited certifying agent, an application must be made to the USDA, and verified through on-site field evaluation. Both the application and the field assessment then go to a Peer Review Panel appointed to assist the secretary in evaluating the performance of certifiers.

The specification of a Peer Review Panel in the Act, the history of the US organic movement, and the use of quality management systems models (which certification programs resemble and which are required for international trade) argue for a community or stakeholder role in assuring consumers that organic farmers and handlers (sic) are meeting the quality standards indicated by the “organic” label.ⁱ

Unfortunately, the lack of a Peer Review Panel has already shaken consumer confidence in the organic label. As the agency is well aware, one company, Fieldale Farms Corp., has attempted to pressure the NOP into relaxing the 100% organic feed requirement for organic chicken production.^j While USDA has admirably refused to accede to this demand, the NOP has accredited Fieldale’s certifying agent Georgia Crop Improvement Association, Inc. (GCIA). This raises serious questions as to how thoroughly USDA scrutinized the GCIA accreditation application and whether the processes of accreditation review and decision making are rigorous enough to prevent acceptance of new certifying agents intent on manipulating the stringency of existing organic standards.

In addition to an erosion of consumer confidence in the organic label, farmer-based certifying

ⁱ National Organic Standards Board, Final Recommendation: Standards and Procedures Governing the Accreditation of Organic Certification Organizations, Adopted June 4, 1994, at lines 926-954.

^j Melinda Fulmer, “Standards for Organic Meat Under Review,” Los Angeles Times, June 5, 2002; See generally, 7 C.F.R. § 205.237

entities are concerned that without adequate oversight of the USDA accreditation program they will be treated inconsistently by the agency during review and audit of their accreditation applications. As USDA is well aware, there are a number of issues that have prompted certifying agents to seek clarifications from the NOP. Certifiers continue to report that questions posed by one certifying agent during an accreditation review will receive a different answer when another certifying agent asks NOP the same question. Such experiences call into question whether the NOP is equitably reviewing and scrutinizing all organic certifying agents' applications for accreditation.

Implementing the Peer Review Panel requirements of the OFPA would help resolve many of these issues by ensuring transparency in the accreditation procedures through public review. Such scrutiny would assist in preventing non-conforming certification agents from becoming or remaining accredited certification bodies and in ensuring consistent application of accreditation procedures to all certifiers. In passing the OFPA, Congress specifically designed the Peer Review Panel to accomplish this, stating:

The concept of a peer review committee is based upon the university system where accreditation teams, consisting of persons from accredited universities, evaluate fellow universities applying for accreditation. Applying this peer review model to the accreditation of certification organizations will ensure a high degree of integrity and consistency among the certifying agents.^k

The USDA should uphold the intent of Congress and immediately institute a Peer Review Panel.

STATEMENT OF THE LAW

Administrative Procedure Act, 5 U.S.C. § 551, et seq.
National Organic Program, 7 U.S.C. § 6501, et seq.

ARGUMENT

The authorizing statute for the organic program, the Organic Food Production Act (OFPA), requires the creation of a Peer Review Panel.¹ Specifically, the OFPA contains one section concerning peer review of certifying agents, 7 U.S.C. § 6516, which provides:

(a) Peer review. In determining whether to approve an application for accreditation submitted under [7 U.S.C. section 6514], the Secretary *shall* consider a report concerning such applicant that *shall* be prepared by a peer review panel established under subsection (b).

^k S. Rep. No. 101-357, 101st Cong 2d Sess. July 6, 1990 at 294.

¹ 7 U.S.C. § 6501, et seq.

(b). Peer review panel. To assist the Secretary in evaluating applications under [7 U.S.C. section 6514], the Secretary may establish a panel of not less than three persons who have expertise in organic farming and handling methods, to evaluate the State governing official or private person that is seeking accreditation as a certifying agent under such section. Not less than two members of such panel shall be persons who are not employees of the Department of Agriculture or of the applicable State government. (*emphasis added*).

As a result of the statute, a mandatory duty is created for the Secretary to review a report of the peer review panel when deciding whether or not to approve certifiers' applications for accreditation. The language provides neither discretion to the Secretary in review of such a Peer Review Panel report nor discretion in whether or not such a report is created. In mandating both creation and review of a Peer Review Panel report, the statutory language creates a mandatory duty upon the Secretary to create the Peer Review Panel to author such reports.

The OFPA's creation of a mandatory duty to establish the Peer Review Panel has been recognized by USDA in its own action. Under the Act, USDA is required to establish and implement an accreditation program.^m In its implementing regulations, USDA committed itself to appoint a Peer Review Panel. The agency used mandatory language concerning the Peer Review Panel in the final OFPA implementing regulations. In section 205.509, the final NOP rule states:

The Administrator *shall* establish a peer review panel pursuant to the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2 et. seq.) The peer review panel shall be composed of not less than 3 members who *shall* annually evaluate the National Organic Program's adherence to the accreditation procedures in this subpart F and ISO/IEC Guide 61, General requirements for assessment and accreditation of certification/registration bodies, and the National Organic Program's accreditation decisions. This *shall* be accomplished through the review of accreditation procedures, document review and site evaluation reports, and accreditation decision documents or documentation. The peer review panel *shall* report its finding, in writing, to the National Organic Program's Program Manager. (*Emphasis added.*)ⁿ

Additionally, throughout the rule USDA treats the creation of the Peer Review Panel as mandatory. In discussing section 205.509, the agency states, "As amended, the section *requires* that the Administrator establish a peer review panel pursuant to the [the Federal Advisory Committee Act] (5

^m 7 U.S.C. § 6514.

ⁿ 65 Fed. Reg. 80548, 80599.

U.S.C. App. 2 *et seq.*.” (*Emphasis added*).^o The agency also repeats that it is bound with mandatory language, and acknowledged doing so in response to public comment.^p

More recently, the agency has again acknowledged the mandatory duty to establish the Peer Review Panel. The agency has posted an update on the “Status of the Peer Review Panel” on the NOP’s website.^q The News Update, dated February 4, 2002, acknowledges that the final rule requires AMS to appoint a peer review panel. It states that NOP has submitted a document concerning the Peer Review Panel, which includes discussion of such issues as the nominating and appointment process and duties and responsibilities of panel members, to the Office of General Counsel (OGC).^r

Despite these repeated acknowledgments of the agency’s legal obligation to establish the Peer Review Panel, the agency has begun, and continues, accreditation of certifiers without the oversight of the panel. This is a direct violation of the OFPA and the agency’s own regulations. Furthermore, the refusal to place the agency’s accreditation procedures and decisionmaking under the scrutiny of the Peer Review Panel threatens to undermine consumer confidence in the “organic” label just as the national organic label begins to reach consumers.

Accordingly, the petitioners request that the USDA and NOP immediately establish the Peer Review Panel by taking the following actions as recommended by the NOSB in 2001:

- (1). Establish the Peer Review Panel as a standing committee of the National Organic Standards Board, pursuant to the Federal Advisory Committee Act;
- (2). Create a three member Peer Review Panel with one alternate member;
- (3). Direct the National Organic Standards Board to recommend, by majority vote, members for appointment to the Peer Review Panel;
- (4). Mandate that all appointees to the Peer Review Panel must have expertise in organic production and handling methods and certification procedures;
- (5). Allow all current and former members of the National Organic Standards Board to serve as appointees to the Peer Review Panel; and
- (6). Establish that appointees to the Peer Review Panel may serve up to two 3-year terms and that all appointments will be made on rotational basis.

^o Id. at 80604.

^p Id. at 80604-80605.

^q NOP, “Status of Peer Review Panel,” found at <http://www.ams.usda.gov/nop/prp~faca.pdf> (Last visited October 7, 2002.)

^r Id.

Furthermore, petitioners request that the USDA provide the Peer Review Panel with terms of reference for operation as recommended by the NOSB's Accreditation Committee. See Appendix I.

CONCLUSION

As established at 5 U.S.C. § 706(1) and 7 C.F.R. § 1.28, petitioners request that the agency provide an answer to this citizen petition within a reasonable time. Failure to respond within a reasonable time will be construed as constructive denial of the requests contained here and will subject the agency to litigation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joseph Mendelson, III", with a long horizontal flourish extending to the right.

Joseph Mendelson, III
Legal Director

Center for Food Safety
660 Pennsylvania Ave., SE
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Washington, DC 20003

CERTIFICATE OF SERVICE

I hereby certify that a copy of petitioners' Petition for Rulemaking and Collateral Relief Seeking the Creation of an Accreditation Peer Review Panel For the National Organic Program, and all materials in support thereof, was served this 16th day of October 2002 by first class mail, hand delivery and electronic mail to:

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