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

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In the Matter of:)
)
 Fish and Seafood Labeled)
)
 and Sold in the United States)
)
 as “Organic”)
)

July 11, 2007

CONSUMER COMPLAINT AND PETITION FOR RULEMAKING AND COLLATERAL RELIEF

In compliance with the complaint procedure posted on the United States Department of Agriculture’s (USDA) National Organic Program’s (NOP) web page, the Center for Food Safety (CFS) submits the following complaint regarding seafood improperly labeled and marketed as “organic.”¹

Additionally, CFS files this document as a citizen petition for rulemaking and collateral relief under the Organic Foods Production Act (OFPA)² pursuant to the Right to Petition Government Clause contained in the First Amendment of the United States Constitution,³ the Administrative

¹ National Organic Program, How to File a Complaint, available at: <http://www.ams.usda.gov/nop/Compliance/FileComplaint.html> (Last visited Feb. 15, 2006)

² 7 U.S.C. § 6501, et seq.

³ 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).

Procedure Act,⁴ and the United States Department of Agriculture's (USDA) implementing regulations.⁵

As described below, CFS believes that presence of seafood in the U.S. marketed and/or labeled as "organic" violates both the OFPA and its implementing regulations. Accordingly, CFS requests that agency take immediate action to enforce the OFPA and to protect consumers from misleading and mislabeled products by undertaking the following actions:

- (1). Issue a publicly available legal opinion explaining the scope the National Organic Program's enforcement authority concerning use of the term "organic" on product labels and labeling. This document should be published in the Federal Register and on the USDA, NOP website.
- (2). As to organic certification agents accredited by the USDA, National Organic Program:
 - (A). Issue a general notice letter to all accredited certifying agents (ACAs) clarifying that the scope of the accreditation issued to certifiers under the NOP does not include certification for aquatic animal production as "organic;"
 - (B). Direct all ACAs to send notice to all of their clients and parties considering applying for certification that the production of aquatic animals as "organic" and/or the labeling of aquatic animal products is inconsistent with the scope of their certification;
 - (C). Issue a letter of non-compliance to each ACA that is currently certifying aquatic animal production and/or whose certification seal is appearing on U.S. seafood products labeled as "organic;"
 - (D). Order the removal of the term "organic," all certifier seals, and the USDA organic seal from any package, label or retail display of "organic" seafood sold or marketed in U.S. within ninety (90) days;
 - (E) Suspend the accreditation of any ACA that is found not to be in compliance with the order describe above in (D);
 - (F) Levy civil penalties consistent with 7 U.S.C. §6519(a) as deemed appropriate;

and

 - (G) Take action consistent with 18 U.S.C. §1001 as deemed appropriate.⁶
- (3). As to organic certification bodies operating under recognition agreements or equivalency determinations with the NOP:

⁴ 5 U.S.C. § 553(e)

⁵ 7 C.F.R. § 1.28

⁶ 7 U.S.C. § 6519(b) subjects false statements made to the Secretary to the provisions of 18 U.S.C. § 1001.

- (A). Issue a general notice letter to all foreign governmental regulatory bodies recognized by the NOP under either a recognition of conformity assessment or an equivalency determination that accredited certifying agents (ACAs) operating under their authority may not provide certification services for aquatic animals labeled or marketed as “organic” that are exported for the purposes of sale in the United States;
- (B). Issue a letter of non-compliance to each foreign certification agency that is identified as currently certifying aquatic animal production and/or whose certification seal is appearing on U.S. seafood products labeled as “organic;”
- (C). Order the removal of the term “organic” and all certifier seals from any package, label or retail display of “organic” seafood sold or marketed in U.S. within ninety (90) days;
- (D) Suspend the accreditation of any ACA that is found not be in compliance with the order describe above in (C);
- (E) Levy civil penalties consistent with 7 U.S.C. §6519(a) as deemed appropriate;
and
- (F) Take action consistent with 18 U.S.C. §1001 as deemed appropriate.

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 works to protect human health and the environment by curbing the proliferation of harmful food production technologies and by promoting organic and other forms of sustainable agriculture.⁷ Petitioner is supported by 45,000 members of the public concerned about environmental and food safety issues including the implementation of the National Organic Program.

Petitioner *Consumers' Union* is an independent, nonprofit testing, and information organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. To achieve this mission, we test, inform, and protect. To maintain our independence and impartiality, Consumers Union accepts no outside advertising, no free test samples, and has no agenda other than the interests of consumers. Consumers Union supports itself through the sale of our information products and services, individual contributions, and a few noncommercial grants.

Petitioner *Food and Water Watch* (FWW) is a nonprofit consumer organization that works to ensure clean water and safe food. FWW challenges the corporate control and abuse of our food and water resources by empowering people to take action and by transforming the public consciousness about what we eat and drink. FWW works with grassroots organizations around the world to create an economically and

⁷ See generally Center for Food Safety's homepage at <http://www.centerforfoodsafety.org>

environmentally viable future. Through research, public and policymaker education, media, and lobbying, we advocate policies that guarantee safe, wholesome food produced in a humane and sustainable manner and public, rather than private, control of water resources including oceans, rivers, and groundwater.

DISCUSSION

I. OFPA Regulates the Term “Organic.”

Congress passed the OFPA with a purpose of assuring consumers that organically produced products would meet a consistent standard.⁸ Congress further recognized that even slight departures from consistent use of the term “organic” would yield confusion among consumers.⁹ Indeed, a goal of the OFPA is to “set standards for use of the word “organic” on foods.”¹⁰ And Congress repeatedly spoke as to its intent that the OFPA regulate the word “organic.”¹¹

In the past, the USDA has repeatedly interpreted the OFPA to regulate the word “organic.” For instance, the agency has stated:

Lack of a nationwide standard has also created confusion for consumers, who may be uncertain what it really means when a food product is called “organic.”

With a national standard, consumers across the country can go into any store and have full confidence that any food product labeled “organic” meets a strict, consistent standard no matter where it was made. Use of the word, “organic,” on the label of any product that does not meet the standard is strictly prohibited.¹²

Thus, in order to use the word “organic” on a food label or in marketplace information the NOP has

⁸ 7 U.S.C. §6501(2); See House Conf. Rep. No 101-916, 1990 U.S.C.C.A.N. 5700 (adopting House version of legislation for the purposes of “assur[ing] consumers that organically produced products meet a consistent standard”).

⁹ See e.g. Sen. Rep. No. 101-357, 1990 U.S.C.C.A.N. 4943 (discussing that even minor differences in standards create an array of “organic” labels that cause consumer confusion).

¹⁰ 101 Cong. Rec. H569 (daily ed. Mar. 1, 1990) (statement of Rep. DeFazio) (emphasis added).

¹¹ For example, Senator Leahy introduced the OFPA by surveying the state of “organic” marketing stating:

Right now, unless there are legal restrictions on the use of the word “organic,” anyone can label anything as organic or natural regardless of how it was produced. Temptation for mislabeling is great because organic foods often sell at premium prices and some are deliberately mislabeled. (Emphasis added) 101 Cong. Rec. S1109 (Feb. 8, 1990).

¹² 65 Fed. Reg. 13512, 13513/1 (Mar. 13, 2000); See also 65 Fed. Reg. 13512, 13514/3 (Mar. 13, 2000) (Does this proposal prohibit “ecolabeling”? No. This proposal only regulates use of the term, “organic,” on product labels. Other labels would be allowed as long as they are truthful and not misleading and meet general food labeling requirements. The labeling requirements of this proposal are intended to assure that the term, “organic,” and other similar terms or phrases are not used in a way that misleads consumers.).

held that the product must comply with the existing U.S. regulations. These regulations sets standards for use of the word “organic” in relation to agricultural products and “[t]he term ‘organic,’ may only be used [in the labeling of products] that have been produced and handled in accordance with the regulations in this part.”¹³ The NOP has elaborated stating:

Section 205.300 specifies the general use of the term, “organic,” on product labels and market information. Paragraph (a) establishes that the term “organic,” may be used only on labels and in market information as a modifier of agricultural products and ingredients that have been certified as produced and handled in accordance with these regulations. The term “organic,” cannot be used on a product label or in market information for any purpose other than to modify or identify the product or ingredient in the product that is organically produced. Food products and ingredients that are not organically produced and handled cannot be modified, described, or identified with the term, “organic,” on any package or in market information in any way that implies the product is organically produced.¹⁴

Additionally, the agency has pronounced its intent to enforce against misuses of the word “organic” stating:

The labeling requirement of this final rule are intended to assure the term “organic,” and other similar terms or phrases are not used on a product package or in marketing information in a way that misleads consumers as to the contents of the package. Thus, we intend to monitor the use of the term, “organic,” and other similar terms and phrases. If terms of phrases are used on product packages to represent “organic” when the products are not produced to the requirements of this regulation, we will proceed to restrict their use.¹⁵

Consistent with this past expression of enforcement intent, the agency’s implementing regulations state that “no claims, statements, or marks using the term, ‘organic,’ or display of certification seals, other than as provided in this regulation may be used.”¹⁶ Thus, the use of the term “organic” on other products, including those products for which no U.S. organic standards yet exist, is prohibited. To further drive home this point, the OFPA implementing regulations note that “food products that are not organically produced and handled cannot be modified, described, or identified with the term ‘organic,’ on any package pane or market information in any way that implies the product is organically produced.”¹⁷ Congress recognized the breadth of this enforcement power by providing the USDA with authority to levy civil and criminal penalties against “any person who knowingly sells

¹³ 65 Fed. Reg. 80548, 80577 (Dec. 21, 2000).

¹⁴ 65 Fed. Reg. 80548, 80576/3 (Dec. 21, 2000)(emphasis added).

¹⁵ 65 Fed. Reg. 80548, 80580 (Dec. 21, 2000)(emphasis added).

¹⁶ 65 Fed. Reg. 80548, 80576/1 (Dec. 21, 2000).

¹⁷ Id.

or labels a product as organic.”¹⁸

II. There Currently Exists No Regulations for Labeling Seafood “Organic.”

The OFPA was passed to establish organic standards for all livestock, including “fish used for food.”¹⁹ Congress recognized, however, that standards for aquaculture did not yet exist.²⁰ Consistent with this recognition, in establishing initial organic standards the NOP temporarily restricted the definition of “livestock,” applying the current regulations only to non-seafood agricultural products.²¹ Since that time, NOP and the National Organic Standards Board (NOSB) have been in the process of developing aquaculture standards.

In May 2005, at the recommendation of the NOSB, the NOP appointed an Aquaculture Working Group (AWG) of the Aquaculture Task Force.²² In January 2006, the AWG submitted its Interim Final Report to the NOP.²³ A round of public comment through the NOSB took place.²⁴ The process culminated on March 29, 2007 as the NOSB made a final recommendation for initial aquaculture regulations.²⁵ Despite completion of these recommendations, the NOP has not initiated any rulemaking to adopt in whole or part the NOSB recommendations. As a result, there are still no regulatory standards for seafood and no organic certification organization can be accredited to certify

¹⁸ 7 U.S.C. §6519(a). The OFPA grants authority to the USDA to develop regulations for “agricultural products” while the enforcement provisions of the OFPA allow the agency to enforce against mislabeled “products.” This plain language difference speaks to the breadth of the USDA’s enforcement authority over the term “organic” on a variety of products.

¹⁹ 7 U.S.C. §6502(11)

²⁰ Sen. Rep. No. 101-357, 1990 U.S.C.C.A.N. 4946 (“The Committee recommends as well, that over time, USDA and the Organic Standards Board develop standards for aquaculture products.”)

²¹ 7 C.F.R. § 205.2 (explicitly providing that the term livestock excludes aquatic animals).

²² See NOSB, Aquaculture Standards Recommendation (March 29, 2007) at 21 available at <http://www.ams.usda.gov/nosb/FinalRecommendations/Mar07/NOSB%20Final%20Aquaculture%203-29-07.pdf> (last visited May 5, 2007).

²³ NOSB, Aquaculture Working Group, Interim Final Report, *available at* http://www.ams.usda.gov/nosb/transcripts/Oct2006/10_18_06.pdf (last visited May 5, 2007).

²⁴ While the public was able to provide comment to the NOSB on the interim report, this comment period was not consistent with formal commenting procedures for a proposed rulemaking as provided for under the APA. CFS has submitted comments to the NOSB concerning the development of aquaculture standards on several occasions available at <http://www.centerforfoodsafety.org/pubs/CFSCCommentAquaNOSB%203-16-07.pdf> (last visited May 8, 2007) (describing CFS comments provide Mar. 16, 2007, Oct. 12, 2006 and Apr. 15, 2006).

²⁵ NOSB, Aquaculture Standards Recommendation (March 29, 2007) available at <http://www.ams.usda.gov/nosb/FinalRecommendations/Mar07/NOSB%20Final%20Aquaculture%203-29-07.pdf> (last visited May 5, 2007).

aquatic animal production as “organic.”²⁶

III. Many Seafood Products are Being Mislabeled and Marketed as “Organic.”

Despite the absence of regulatory standards for livestock that are aquatic animals, seafood is currently being sold and marketed in the U.S. as “organic.” This commercial sale and marketing is occurring over the Internet, in print advertisements, on labels and in point-of-sale displays. CFS has provided examples of these “organic” marketing claims as Appendix A.

To date, CFS has identified the following companies that are marketing seafood in the U.S. as “organic”:

- Bio Centinela
- Black Pearl
- Blue Horizon
- Blue Origins
- Creative Salmon
- Delicious Organics
- Dom International Ltd.
- EcoFish
- Eighth Sea
- Hannaford Supermarkets
- Harris Teeter Supremarkets
- Johnson Seafarms
- Marine Harvest
- Martin International Corp.
- OceanBoy Farms
- Polar Seafood, LLC
- Sustainable Seafood
- Wild Oats Markets

Many of the companies marketing or labeling aquatic animal products in U.S. markets as “organic” are selling product that has been certified as “organic” by the following certifying agencies:

- Naturland E.V.
- Organic Food Federation
- Soil Association Certification Ltd

Petitioners’ limited ability to fully survey the marketplace suggests that there are likely more companies marketing such products and certifiers providing such certification services. CFS has provided contact, production and certification information for those firms it has identified in Appendix B.

²⁶ Recommendations made by the NOSB are not official policy until they are approved and adopted by USDA. See NOSB website available at <http://www.ams.usda.gov/nosb/index.htm> (last visited May 8, 2007).

IV. Consumers are Mislead by this Labeling, Believing Use of the Word “Organic” Means the Product is USDA Approved.

Since the passage of the OFPA and the NOP’s completion of implementing regulations, consumers have come to rely on the term “organic.”²⁷ Consumers understand the term “organic” to signify that the agricultural product was grown and raised according to certain practices which reflect a greater emphasis on sustainable agriculture, environmentalism and public health. Customers look for foods labeled as “organic” under the assumption that the word reflects the underlying production and handling history of the food.²⁸ Many consumers, believing that organic foods are environmentally, ethically, or nutritionally superior, actively seek out foods labeled as “organic.” Often, consumers are willing to pay a price premium for products they know have been produced organically.²⁹

The National Organic Program (NOP) recognizes that consumers look for the word “organic” when they make their purchasing decisions. In a consumer outreach brochure, the NOP states that “only food labeled ‘organic’ has been certified as meeting USDA organic standards” and instructs consumers to “look for the word ‘organic.’”³⁰

Seafood is no different. According to a consumer study undertaken by New Jersey Department of Agriculture, 72% of consumers from a variety of U.S. states indicated that they believed “organic” seafood to be “better” than conventionally farm-raised seafood.³¹ In part, this interest in “organic” seafood resulted from distrust of conventional aquaculture practices.³² Consumers based this preference for “organic” seafood a number of factors:

- 95% believed such seafood would be chemical and pesticide free
- 87% believed it would be free of antibiotics
- 59% believed it would be “ecologically sound”

²⁷ See e.g. Strohlic, California Institute of Rural Studies, “Regulating Organic: Impacts of the National Organic Standards on Consumer Awareness and Organic Consumption Patterns (Dec. 2005) available at http://www.cirsinc.org/docs/Regulating_Organic.pdf (last visited May 30, 2007) (USDA, AMS funded study finding that 79.1% of consumers that have seen the USDA organic seal reported increased confidence in the integrity of organic products as a result of the U.S. national organic standards).

²⁸ O’Dierno, et al., N.J. Dept. of Agriculture, The United States Market for Organic Seafood (hereinafter NJ Study) (Feb. 2006) at 23 available at <http://www.jerseyseafood.nj.gov/OrganicSumm.pdf> (32% say they are committed to buying organic; 46% say they purchase from time to time).

²⁹ Greene, USDA, Economic Research Service, Economics of Food Labeling at 26-29 available at <http://www.ers.usda.gov/publications/aer793/aer793g.pdf> (last visited May 8, 2007).

³⁰ National Organic Program, “Organic Food Standards and Labels: The Facts” available at <http://ams.usda.gov/nop/Consumers/brochure.html> (last visited May 8, 2007).

³¹ O’Dierno, New Jersey Dept of Agric, Identification and Evaluation of viable Market Opportunities for Organically-Grown Aquatic Products (NJ Study) (Feb. 2006) at 24 available at <http://www.jerseyseafood.nj.gov/Organic%20AquaFocusReport.pdf> (last visit May 30, 2007).

³² NJ Study, supra note 31, at 24.

- 36% believed “organic” seafood would have higher standards for animal welfare³³

Marketers are well aware of consumers’ expectations of the “organic” label. The data show that consumers are inclined to rely on the use of the term “organic” in order to obtain perceived benefits from seafood products because the products will have been produced in an exacting manner under the supervision of U.S. regulations. Absent such regulations, it is clearly misleading to consumers to allow seafood to be marketed or labeled as “organic” when there are no assurances that the production standards expected by consumers were met. Indeed, the California legislature has found that the labeling of seafood as “organic” without federal standards is misleading consumers.³⁴

V. USDA’s Misinterpretation of its Enforcement Authority is Allowing Seafood to be Mislabeled as “Organic.”

The continued marketing and sale of seafood products misleadingly labeled as “organic” is the result of both a flawed agency interpretation of its enforcement authority and failed agency enforcement against a clearly illegal activity. Of upmost importance to the continued integrity of the organic label is the agency’s misinterpretation of its enforcement power. As justification for its inaction on misleading “organic” seafood labels, NOP has interpreted the OFPA as providing limited authority to police the use of only the “USDA Organic” seal for the agricultural products currently regulated. At a recent meeting of the NOSB, agency representatives denied that USDA has legal authority to restrict use of the word “organic” on seafood, stating that:

[T]here’s NOP organic, and then there are possibly private organic standards. But that’s the unfortunate situation that we’re caught in. And that’s why I keep reminding you, go back to pre-October 21, ’02. You had the same situation for all commodities. Now you’ve got, you know, we’ve just got some that we have not brought under the umbrella.³⁵

This statement incorrectly assumes that the requirements of the OFPA extends only as far as products produced under the established regulations and bearing the USDA organic seal.

³³ NJ Study, *supra* note 31, at 25.

³⁴ In 2005, the California legislature recognized that “[t]here are currently no standards in place for what organic seafood must mean and, at this time, any seafood can be claimed as organic. This is a serious deviation from what consumers expect from other organic food that meets strict federal standards for organic production and is verified by an organic certifier.” In response, the legislature passed SB 730 which provides in pertinent part that “No aquaculture, fish, or seafood product, including, but not limited to, farmed and wild caught species, shall be labeled or represented as “organic” until formal organic certification standards have been developed and implemented by the United States Department of Agriculture’s National Organic Program or the California Department of Food and Agriculture.” The Governor approved the measure as law on October 7, 2005. The legislation is available at http://info.sen.ca.gov/cgi-bin/postquery?bill_number=sb_730&sess=PREV&house=B&site=sen (last visited May 8, 2007).

³⁵ NOSB Meeting, Transcript of Proceeding, Statement of Barbara Robinson at 63-64 (Oct 14, 2004) available at http://www.ams.usda.gov/nosb/transcripts/Oct2004/10_14_04.pdf (last Visited May 5, 2007).

Of additional concern, this agency enforcement interpretation has been “recognized” by the NOSB which recently stated:

Presently, the NOP regulations state that fish are not included in the scope of the rule, which means that there can be no enforcement of fish products in the market place making “organic” claims. Since some foreign organic certification programs include fish standards, many products appear on the US market with an “organic” claim, which will continue until the NOP regulations include provisions for organic aquatic species.³⁶

The agency’s interpretation of its enforcement authority is contrary to Congressional intent, the language of the OFPA, and past agency regulatory interpretations. As discussed at length supra, the organic program was established to enforce the use of the term “organic” on all products and not be limited to products using the USDA organic seal. Products that use the term “organic” and that are marketed in the U.S. must meet the existing U.S. standards or be subject to enforcement activities. Given that there are no existing standards yet for aquaculture, under the OFPA aquacultural products may not use the term “organic” without violating the terms of the Act. The NOP is well aware of the existence of seafood products that are improperly using the term “organic” and it must act to prevent consumer fraud and enforce the OFPA’s prohibitions.

VI. This Misinterpretation Allows Products Produced by Methods that Violate Existing Standards of the OFPA

The average consumer, uninformed about the inner workings of the USDA or the regulation process, has come to believe that the word “organic” on any food product reflects generally the same production methods. Consumers rely on this belief in making purchasing decisions that may include paying a price premium for “organic” seafood they believe meets these standards. This deception will continue until the use of the word “organic” is restricted to only those goods that have been actually produced in accordance with finalized USDA organic standards for aquatic animals.

In absence of U.S. organic aquaculture regulations, consumers are left to assume that U.S. “organic” seafood is being produced consistent with current livestock standards or the recent NOSB aquaculture recommendations. However, these seafood products labeled as “organic” are being produced in ways that fall outside of existing U.S. prohibitions on livestock rearing and contradict what Americans have come to expect of “organic” food. In particular, there are at least four areas where consumers are misled by use of the term “organic”: (1) antibiotic administration; (2) use of parasiticides; (3) use of certified organic feed; and (4) the accommodation of the animal’s natural behavior.

1. Antibiotics

Under the OFPA the use of antibiotics is a prohibited animal production practice.³⁷ USDA’s

³⁶ NOSB, Livestock Committee, Aquaculture Standards, Feb 20, 2007 at 1.

³⁷ 7 U.S.C. §6509(c)(3).

implementing regulations for non-fish livestock requires that “[t]he producer of an organic livestock operation must not . . . sell, label or represent as organic any animal or edible product derived from any animal treated with antibiotics.”³⁸ As a result, U.S. consumers have come to expect that organic food will be free of antibiotics and this belief extends to “organic” seafood.³⁹ While consumers may be purchasing seafood labeled as “organic” expecting a product that was produced free of antibiotics, in fact, a number of the “organic” seafood products are being produced under foreign standards that allow the use of antibiotics. For example, some marketed “organic” seafood is being certified by the Organic Food Federation (OFF) and the U.K. Soil Association (Soil Association).⁴⁰ Despite the U.S. prohibition on the use of antibiotics, the certification standards used by both OFF and the Soil Association allow the use of antibiotics in aquaculture.⁴¹ The NOSB’s proposed aquaculture standards also provide no relief from this situation as they would maintain a prohibition on all antibiotic use.⁴² Thus, consumers purchasing “organic” fish certified by either of these certification agents are being misled as to the use and presence of antibiotics in their seafood.

2. Parasiticides

Under the NOP regulations the use of parasiticides is limited to non-slaughter stock.⁴³ Further, even if a parasiticide is used on breeder or dairy stock, it must appear on the NOP list of acceptable production substances.⁴⁴ Similar to the situation with antibiotics, consumer expectation is that “organic” seafood is not produced using any such chemicals.⁴⁵ Regardless, seafood is being labeled and sold in the U.S. as “organic” via foreign certification allow production with parasiticides that are not allowed under the existing U.S. livestock regulations. For example, seafood marketed as “organic” that has been

³⁸ 7 C.F.R. §205.238(c)(1).

³⁹ NJ Study, *supra* note 31, at 28.

⁴⁰ Pursuant to 7 C.F.R. §205.500(c), the NOP allows agricultural products to be exported to the U.S. if the products are certified by non-NOP accredited foreign certification agent so long as those certification agents are operating under recognition of foreign equivalency. The NOP has entered into an equivalency agreement with the United Kingdom. See <http://www.ams.usda.gov/nop/NOP/TradeIssues/UnitedKingdom.html> (last visited May 8, 2007). OFF and the Soil Association operate under this equivalency agreement. See <http://www.defra.gov.uk/farm/organic/standards/certbodies/approved.htm> (last visited May 8, 2007). Given that no U.S. aquaculture standards exist the NOP recognition and equivalency determinations cannot cover aquaculture production.

⁴¹ See UK Soil Association Organic Aquaculture Standards, rule 30.10.12 (Jan. 2007); Organic Food Federation Aquaculture Standards 6a Salmonids Version 4, section 1.11.11(d) (Jun. 2004); Naturland Standards for Organic Aquaculture, Section II, provision 5.1 (Jan. 2006)

⁴² See NOSB, Aquaculture Standards Recommendation (March 29, 2007) at recommended §205.252(k)(1) (“the producer of organic aquatic animals shall not . . . incorporate any type of antibiotic or hormone in feeds, the water supply, or the environment.”); See also NOSB recommended §205.253(c)(1).

⁴³ 7 C.F.R. §205.238(b)(1)-(2).

⁴⁴ 7 C.F.R. §205.238(b); 7 C.F.R. §205.603.

⁴⁵ NJ Study, *supra* note 31, at 25.

certified by the Soil Association or OFF is permitted to utilize chloramines T,⁴⁶ a chemical parasiticide that is not found on the NOP list.⁴⁷ Again, the new NOSB recommendations provide no relief this violation and the parasiticides used in foreign certified seafood products are not approved from use in U.S. “organic” livestock production.⁴⁸

3. Feed Requirements

The OFPA requires that, in order to be certified as organic, livestock must be fed “organically produced feed that meets the requirements of this title”⁴⁹ and this standard is also reflected in the current USDA regulations.⁵⁰ A federal court has interpreted these provisions to require organic livestock to have a fed ration that is 100% organic.⁵¹ Nonetheless seafood is being labeled and marketed as “organic” in U.S. markets without meeting the 100% organic feed requirement. A number of the foreign certifying agents who have certified seafood products now appearing in the U.S. certify to organic aquaculture standards that do not require their seafood-based feed ingredients to be certified organic.⁵² These feed ingredients are usually required to come from trimmings of wild fish caught for human consumption.⁵³ It is clear, however, that under existing U.S. regulations there are currently no organically caught wild fish. Indeed, the NOSB has deferred setting standards for the organic certification of wild seafood and the use of wild fish and wild aquatic animals in fish meal and fish oil for organic aquatic animal production.⁵⁴ Creation of fish meal without the 100% use of organic fish means that fish meal cannot be used as a feed that conforms to the requirements of organic livestock production. Therefore, consumers relying on the assumption that seafood labeled as “organic” meets the basic standards of the current U.S. regulatory scheme are being misled.

⁴⁶ See generally <http://www.fishdoc.co.uk/treatments/chloramine-T.htm> (last visited May 8, 2007) (briefly describing the drug).

⁴⁷ See UK Soil Association Organic Aquaculture Standards, rule 30.10.12 (Jan. 2007); Organic Food Federation Aquaculture Standards 6a Salmonids Version 4, section 1.11.10(b) (Jun. 2004); see also 7 C.F.R. 205.603(12) (limited use of parasiticides in organic livestock production).

⁴⁸ See NOSB, Aquaculture Standards Recommendation (March 29, 2007) at recommended §205.253(b)(1) (requiring that any parasiticide used must first be approved under §205.603)

⁴⁹ 7 U.S.C. §6509 (c)(1).

⁵⁰ 7 C.F.R. §205.237.

⁵¹ See Harvey v. Johanns, 396 F.3d 28, 43, n.7 (1st Cir. 2005).

⁵² See e.g. UK Soil Assn.’s Aquaculture Standards, rule 30.8.2 (Jan. 2007); Organic Food Federation Aquaculture Standards, rule 1.9 (Jun. 2004); and Naturland Standards for Organic Aquaculture, Section II, provision 8 (Jan. 2006).

⁵³ Id.

⁵⁴ See NOSB, Aquaculture Standards Recommendation (March 29, 2007) at 2-3 available at <http://www.ams.usda.gov/nosb/FinalRecommendations/Mar07/NOSB%20Final%20Aquaculture%203-29-07.pdf> (last visited May 8, 2007).

4. Accommodation of Natural Behavior

Many U.S. consumers have come to associate the word “organic” with more humane living conditions for animals.⁵⁵ Current U.S. livestock regulations reflect this belief, requiring that a “producer of a livestock operation must establish and maintain livestock living conditions which accommodate the health and natural behavior of animals.”⁵⁶ Currently, many non-USDA “organic” certification standards allow for organic seafood production that encloses anadromous fish, such as salmon, in submerged nets. Such standards do not accommodate the free movement required by anadromous fish in order to migrate and spawn per their natural behavior. The NOSB has even deferred any recommendations on the compatibility of open water net pens with organic standards.⁵⁷ As such, to the extent that consumers seek the “organic” label in order to purchase seafood produced in a manner consistent with the natural behaviors of the fish species they are being misled by current labeling.

VII. USDA Has Enforcement Authority and Must Take Action

The OFPA vests USDA with enforcement authority and states that the agency may bring enforcement action against “[a]ny person who knowingly sells or labels a product as organic, except in accordance with this title.”⁵⁸ By the plain meaning of the OFPA, this authority is unmistakably broad, allowing the USDA to enforce misuse of the term “organic” on any product, not just currently regulated agricultural products.

Any certifying agent that certifies seafood as “organic” for sale in the U.S. is doing so in violation of the OFPA and its implementing regulations. Under 7 C.F.R. §205.500 a certifier may be accredited only “in the areas of crops, livestock, wild crops, livestock, or handling of any other combination thereof.”⁵⁹ As discussed supra, the definition of “livestock” in the regulations does not presently include seafood.⁶⁰ Therefore, no certifying agent is accredited to certify seafood for sale in the U.S. Certifying a seafood producer as “organic” is a violation of the general accreditation requirements of §205.501 and should be subject to enforcement action under §205.510(e).⁶¹

CFS and the undersigned petitioners request that the USDA immediately use its enforcement power to restrict the U.S. marketing and sale of seafood labeled “organic” by bringing action against

⁵⁵ NJ Study, supra note 31, at 25.

⁵⁶ 7 C.F.R. §205.239(a).

⁵⁷ See NOSB, Aquaculture Standards Recommendation (March 29, 2007) at 2-3 available at <http://www.ams.usda.gov/nosb/FinalRecommendations/Mar07/NOSB%20Final%20Aquaculture%203-29-07.pdf> (last visited May 8, 2007).

⁵⁸ 7 U.S.C. § 6519(a) (emphasis added).

⁵⁹ 7 C.F.R. § 205.500.

⁶⁰ 7 C.F.R. § 205.2 .

⁶¹ 7 C.F.R. §§ 205.501, 205.510(e).

producers, certifying agents and others engaged in this deceptive and illegal misuse of the term “organic.” CFS seeks such action for at least several important reasons. First, consumers are being induced to purchase agricultural products labeled as “organic” that do not meet U.S. statutory and regulatory requirements. Second, continued allowance of the use an “organic” label that is not in accordance with USDA standard will, in direct conflict with the Congressional intent of the OFPA, lead to a new proliferation of “organic” labeling claims based upon differing and contradictory standards. Third, continued allowance of these labeling claims will undermine the integrity of the current U.S. organic regulations and allow producers to circumvent the USDA “gold standard”⁶² while still enjoying the price premium connected to organic foods.

Ultimately, if the “organic” label ceases to be premised upon a consistently and rigorously enforced standard the entire organic marketplace is at risk. A loss of the organic market would result in a permanent loss of the environmental and public health benefits of expanding U.S. organic agricultural production.⁶³

Accordingly, CFS and the undersigned petitioners specifically request that USDA, NOP take the following actions:

- (1). Issue a publicly available legal opinion explaining the scope of the National Organic Program’s enforcement authority concerning use of the term “organic” on product labels and labeling. This document should be published in the Federal Register and on the USDA, NOP website.
- (2). As to organic certification agents accredited by the USDA, National Organic Program:
 - (A). Issue a general notice letter to all accredited certifying agents (ACAs) clarifying that the scope of the accreditation issued to certifiers under the NOP does not include certification for aquatic animal production as “organic;”
 - (B). Direct all ACAs to send notice to all of their clients and parties considering applying for certification that the production of aquatic animals as “organic” and/or the labeling of aquatic animal products is inconsistent with the scope of their certification;
 - (C). Issue a letter of non-compliance to each ACA that is currently certifying aquatic animal production and/or whose certification seal is appearing on U.S. seafood products labeled as “organic;”
 - (D). Order the removal of the term “organic,” all certifier seals, and the USDA organic seal from any package, label or retail display of “organic” seafood sold or marketed in U.S. within ninety (90) days;

⁶²NOSB Meeting, Transcript of Proceeding, Statement of Barbara Robinson at 65 (Oct 14, 2004) available at http://www.ams.usda.gov/nosb/transcripts/Oct2004/10_14_04.pdf (last visited May 5, 2007).

⁶³ See Center for Food Safety, Organic Foods Offer a Better Way to Farm and a Better Way to Eat - So Why Are They Under Siege? (July 2005) available at <http://www.centerforfoodsafety.org/pubs/FSRVol4.pdf> (last visited May 30, 2007)(explaining the environmental and public health benefits of organic agricultural production).

(E) Suspend the accreditation of any ACA that is found not to be in compliance with the order describe above in (D);

(F) Levy civil penalties consistent with 7 U.S.C. §6519(a) as deemed appropriate; *and*

(G) Take action consistent with 18 U.S.C. §1001 as deemed appropriate.⁶⁴

(3). As to organic certification bodies operating under recognition agreements or equivalency determinations with the NOP:

(A). Issue a general notice letter to all foreign governmental regulatory bodies recognized by the NOP under either a recognition of conformity assessment or an equivalency determination that accredited certifying agents (ACAs) operating under their authority may not provide certification services for aquatic animals labeled or marketed as “organic” that are exported for the purposes of sale in the United States;

(B). Issue a letter of non-compliance to each foreign certification agency that is identified as currently certifying aquatic animal production and/or whose certification seal is appearing on U.S. seafood products labeled as “organic;”

(C). Order the removal of the term “organic” and all certifier seals from any package, label or retail display of “organic” seafood sold or marketed in U.S. within ninety (90) days;

(D) Suspend the accreditation of any ACA that is found not be in compliance with the order describe above in (C);

(E) Levy civil penalties consistent with 7 U.S.C. §6519(a) as deemed appropriate; *and*

(F) Take action consistent with 18 U.S.C. §1001 as deemed appropriate.

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 may subject the agency to litigation.

⁶⁴ 7 U.S.C. § 6519(b) subjects false statements made to the Secretary to the provisions of 18 U.S.C. § 1001.

Respectfully submitted,

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Attach.

CERTIFICATE OF SERVICE

I hereby certify that a copy of petitioners', and all materials in support thereof, was served this _____ day of _____ by first class mail, hand delivery and electronic mail to:

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