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February 14, 2017

Inga Bumbarly-Langston
Deputy General Counsel
Office of General Counsel, USDA
1400 Independence Ave. SW, Room 107 W.
Washington, DC 20250

Re: Transitional Organic Certification/Labeling

Dear Ms. Bumbarly-Langston:

We represent the Western Organic Dairy Producers Alliance (“WODPA”) with respect to concerns it has related to the National Certified Transitional Program (NCTP) recently developed through a partnership between the U.S. Department of Agriculture (USDA) and the Organic Trade Association (OTA)¹. The purpose of this letter is to make demand of the USDA to terminate the NCTP and related programs in lieu of WODPA commencing litigation against the USDA. For the reasons set forth below, we believe that the USDA has exceeded its authority by creating and implementing the NCTP.

As you are aware, the certification and labeling of organic agricultural products is governed by the Organic Foods Production Act of 1990 (as amended, the “OFPA”). The plain text of the OFPA provides no authority for transitional certification or labeling. In fact, the terms “transition” and “transitional” are not present in the text of the OFPA.

The legislative history of the OFPA provides further indication that transitional certification and labeling are outside the scope of the law. When the OFPA was being considered, the Senate bill included provisions creating a National Transition Label Demonstration Program that would have evaluated the impacts of a transitional label, including the limited use of a transitional label on select agricultural products. The House bill contained no comparable provisions. After conference on the two bills, the House bill was adopted. Congress’ consideration and subsequent rejection of establishing a program to explore transitional labeling suggests that it did not intend for transitional labeling to be included as part of the OFPA.

¹ WODPA points out that the OTA is an industry trade organization that is about growing “the organic category.” The OTA is not a farmer organization, does not represent the farmer, and should not be leading or creating policy on production based regulations.

In fact, it is our understanding that the USDA itself previously advocated that transitional labeling is beyond the scope of the OFPA. When the National Organic Standards Board (NOSB) recommended a transitional label at its Spring 2002 meeting, the USDA and the National Organic Program (NOP) made it abundantly clear that 1) “transitional” is outside the scope of the OFPA; 2) the USDA would not regulate “transitional,” and that “transitional” cannot use the word organic; and 3) the NOP would not sanction a recommendation of transitional labeling because such recommendation does not comply with the OFPA.

The recent establishment of the NCTP is nothing less than a complete reversal of the USDA’s prior position on transitional certification. Furthermore, when establishing the NCTP, the USDA significantly expanded the scope of the NOP into a previously unregulated area without properly considering the economic impacts on transitioning producers, certified producers, and the demand for organic products. Likewise, the USDA’s recent expansion of the National Organic Certification Cost Share Program (NOCCSP) to cover transitional certification fees violates the provisions of the Agricultural Act of 2014; the Food, Conservation, and Energy Act of 2008; and the Farm Security and Rural Investment Act of 2002. Those acts plainly limit the NOCCSP to reimbursement of fees incurred to obtain “organic” certification. The USDA’s reversal of policy to enter and expand into a new area of regulation raises Administrative Procedure Act issues due to the USDA’s lack of notice and comment rulemaking.

Finally, the NCTP plainly violates the express provisions of the OFPA. 7 U.S.C. Section 6505(a)(1)(B) provides that “no person may affix a label to, or provide other market information concerning, an agricultural product if such label or information implies, directly or indirectly, that such product is produced and handled using organic methods, except in accordance with this chapter.” As we understand, the standards to obtain transitional certification will (with one obvious exception) mirror the NOP standards for organic certification. Consequently, any indication that an agricultural product is “transitional” will imply that it is produced using organic methods—in clear violation of the OFPA. Such violations will expose producers marketing transitional products to liability under the OFPA.


Based on all of the foregoing, it appears that the USDA and NOP do not have the authority to provide transitional certification or labeling, as well as reimbursement of fees to obtain such certification. Accordingly, WODPA requests that the USDA:

1. Immediately take all actions necessary to publicly withdraw approval and terminate the recently announced Accreditation Program for Transitional Agricultural Products;
2. Immediately issue cease and desist notices to CCOF, QAI, and all other NOP Accredited Certifying Agents that may be certifying transitional agricultural products; and
3. Immediately take all actions necessary to work with the USDA Farm Service Agency to withdraw approval and terminate the recently announced expansion of the National Organic Certification Cost Share Program to include reimbursement for transitional certification fees.

Please be advised that WODPA views this issue as a very serious matter with significant impacts to its members. Please let us know before **5:00 p.m. MST on March 1, 2017**, whether the USDA will comply with WODPA's requests. In the event the USDA refuses to comply with such requests, we are prepared to file suit and exercise all legal remedies available, including without limitation injunctive relief. In such proceedings, WODPA will also seek recovery of its costs and attorney fees.

Thank you for your prompt attention to this matter. We look forward to your response.

Sincerely,

A handwritten signature in black ink, appearing to read 'Andrew B. Wright', written over a white background.

Andrew B. Wright