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**THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

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| CENTER FOR FOOD SAFETY, et al.<br><br>*Plaintiffs,*<br><br>v.<br><br>SONNY PERDUE, et al.<br><br>*Defendants.* | Case No. 3:20-cv-1537-RS<br><br>**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**<br><br>Date: January 21, 2021<br>Courtroom: 3 – 17th Floor<br>Hon. Richard Seeborg |

## NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on January 21, 2021, or as soon thereafter as counsel can be heard, Plaintiffs Center for Food Safety, Swanton Berry Farms, Inc., Full Belly Farm, Inc., Durst Organic Growers, Inc., Terra Firma Farms, Inc., Jacobs Farm/Del Cabo, Inc., Long Wind Farm, Inc., OneCert, Inc., and Maine Organic Farmers and Gardeners Association, will move this Court for summary judgment on all issues raised in their March 3, 2020 Complaint, ECF No. 1.

Pursuant to Civil Local Rules 7-2 and 56-1, Plaintiffs respectfully move this Court to grant summary judgment in Plaintiffs' favor on all claims alleged in Plaintiffs' Complaint, on the grounds that there is no genuine issue as to any material fact and that Plaintiffs are entitled to judgment as a matter of law. USDA's June 6, 2019 letter denying a rulemaking petition which requested USDA to conduct rulemaking to exclude organic certification of hydroponic agricultural production systems under the Oganic Foods Production Act (OFPA), 7 U.S.C. §§ 6501-6523, violates the plain language of OFPA's purpose, its statutory and regulatory provisions, and is arbitrary and capricious, and contrary to law, in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2). This Motion is based upon the pleadings and administrative record on file in this case, the concurrently-filed Motion to Complete or Supplement the Administrative Record and supporting papers therewith, the points and authorities herein, and the declarations submitted herewith.

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## INTRODUCTION

In *The Soil and Health: A Study of Organic Agriculture*, Sir Albert Howard, regarded by many as the "father" of what we know today as organic farming, stated: "[a]ll the great agricultural systems which have survived have made it their business never to deplete the earth of its fertility without at the same time beginning the process of restoration."[1] This belief, that agricultural systems should sustain and enhance the health of the soil, became the core principle of organic farming, a principle that was embedded into the Organic Foods Production Act of 1990 (OFPA), 7 U.S.C. §§ 6501-6524, which established federal production standards that govern foods certified and sold as organic throughout this nation.

Recognizing the centrality of soil in organic farming, Congress prescribed in OFPA that all organic crop producers "shall" contain in their production plan "provisions designed to foster soil fertility." 7 U.S.C. § 6513(b)(1). USDA's regulations implementing OFPA (the OFPA Regulations or Regulations) embody the same principle; they require that organic producers "must" implement "soil fertility," "crop nutrient," and "crop rotation" practices to "maintain or improve" the health of the farm's soil. 7 C.F.R. §§ 205.200; 205.203; 205.205. The Regulations also command that organic operations "must" engage in farming practices to strengthen the natural resources, ecological balance, and biodiversity of the operation. *See id.* §§ 205.2; 205.200; 205.203; 205.205.

This case concerns the failure of Defendant United States Department of Agriculture (USDA or the Agency) to abide by these mandatory production standards of OFPA. USDA violated OFPA when it issued a letter (the Petition Denial) denying a rulemaking petition (the Petition) which requested USDA to conduct rulemaking to prohibit organic certification of hydroponic systems, which are container production systems that grow crops without *any* soil. In denying the Petition, USDA unlawfully exempted soil-less hydroponic operations from OFPA's soil fertility provisions, even though OFPA plainly requires all organic crop producers to engage in soil management. USDA also erroneously concluded that hydroponic operations' generalized

[1] Albert Howard, *The Soil and Health: A Study of Organic Agriculture* 35 (Univ. Press of Kentucky 2006) (1945).

environmental benefits alone qualify them for organic certification, even though the OFPA Regulations call for all producers to conserve natural resources and biodiversity *onsite*. As a result of the Petition Denial, hydroponically produced products are able to obtain organic certification—and enjoy the price premium that often comes with the Organic label—without having to comply with OFPA's required practice standards. In so doing, USDA's double standard frustrates the purpose of OFPA to create an uniform organic production program.

Plaintiffs include many of the nation's oldest certified organic farms, certifiers, and organic farming and consumer interest assocations. Plaintiffs and their members' economic, reputational, and vocational interests are injured by USDA's refusal to prohibit organic certification of hydroponic operations.[2] Plaintiffs seek summary judgment that USDA's Petition Denial is arbitrary and capricious and contrary to law, in violation of OFPA and the Administrative Procedure Act (APA). For the reasons stated below, the Court should grant summary judgment for Plaintiffs and vacate the Petition Denial.

## RELEVANT STATUTORY AND REGULATORY BACKGROUND

### I. THE ORGANIC FOODS PRODUCTION ACT.

OFPA created a national organic program (the National Organic Program) to address the "lack of consistent standards for production" of organic foods. *See* S. Rep. No. 101-357 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4656, 4943; 7 U.S.C. § 6503(a) (establishing the National Organic Program). Congress proclaimed that "it is time for national standards for organic production so that farmers know the rules, so that consumers are sure to get what they pay for, and so that national and international trade in organic foods may prosper." 1990 U.S.C.C.A.N. at 4943; *Id.*

[2] Plaintiffs have standing. The individual organic farm and certifier Plaintiffs have suffered economic, reputational, and vocational injuries as a result of USDA's Petition Denial. *See* Chapman Decl. ¶¶ 5-8; Durst Decl. ¶¶ 7-9; Jacobs Decl. ¶¶ 5-8; Muller Decl. ¶¶ 5-11; Underhill Decl. ¶¶ 6-9; Cochran Decl. ¶¶ 4-8; Welsch Decl. ¶¶ 5-7. Similarly, members of the organizational Plaintiffs have experienced injury to their agricultural and consumer interests due to the Petition Denial. *See* Alexander Decl. ¶¶ 7-12; Hanson Decl. ¶¶ 8-9; Gray Decl. ¶¶ 2-6; Lawson Decl., 6-7. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342-43 (1977); *see also Harvey v. Veneman*, 396 F.3d 28 (1st Cir. 2005) (injury to consumer interests from inconsistent orgnaic standards sufficient to confer standing under OFPA).

(noting that varying standards amongst different organic certification programs has "create[d] havoc for the industry"); 7 U.S.C. § 6501(1)-(2) (purpose of OFPA include: "establish national standards governing the marketing of certain agricultural products as organically produced products" and "assure consumers that organically produced products meet a consistent standard"). OFPA and the National Organic Program it established created the Organic label seen on foods sold in supermarkets and grocery stores today. 1990 U.S.C.C.A.N. at 4946 ("This legislation establishes a USDA 'organically produced' label—a USDA seal of approval for organic products.")

As Congress explained, the Organic label represents a set of production standards that adhere to the sustainable principles embedded in organic farming. 1990 U.S.C.C.A.N. at 4946 ("Organic food is food produced using sustainable production methods that rely primarily on natural materials. The 'organically produced' label authorized under this bill therefore *pertains to the production methods used to produce the food* rather than to the content of the food.") (emphasis added). Congress outlined in OFPA three baseline production standards that foods must satisfy to be labeled and sold as organic. *See* 7 U.S.C. § 6504. These standards require that an organically produced agricultural product be produced: (1) "without the use of synthetic chemicals, except as otherwise provided [by the Act]"; (2) on land where synthetic chemicals have not been applied in the previous three years; and (3) in compliance with an organic production plan." *Id.* § 6504 (1)-(3). Congress emphasized that the last of the three standards, the requirement that an organic producer complies with the terms of an organic production plan, "is a key element" necessary to "ensure that the 'organically produced' label indeed signifies that the product has been produced in accordance with the requirements of this title." 1990 U.S.C.C.A.N. at 4946; *id.* ("But defining organically grown food based on production materials and a three-year transition period alone is not sufficient. Organically grown food is produced using farming and handling systems that include site-specific farm plans.") Accordingly, OFPA requires each organic producer to develop and follow an "organic plan" for organic agricultural production. 7 U.S.C. § 6506(2); *id.* § 6513(a).

Congress recognized from OFPA's inception that the essence of organic crop production is active soil management to build soil fertility. Congress stated that "[a] crop production farm plan must detail the procedures that the farmer will follow in order to foster soil fertility [and] provide

for crop rotations . . . ." 1990 U.S.C.C.A.N. at 4946; *id.* (explaining that organic crop production standards "reflect[] the extent of knowledge and consensus on appropriate organic crop production methods and materials."). Congress made fostering soil fertility a necessary condition for organic crop production, listing it as the first requirement of any organic crop production plan. *See* 7 U.S.C. § 6513 (b)(1) ("Soil Fertility. – An organic plan shall contain provisions designed to foster soil fertility, primarily through the management of the organic content of the soil through proper tillage, crop rotation and manuring.").

OFPA's production standards were written with input from the organic farming community, and based on preexisting standards from state organic programs. Administrative Record (AR) at 452 ("The writing of [OFPA] was a grassroots effort."); 1990 U.S.C.C.A.N. at 4945 (OFPA "reflected the advice" of the "organic industry, as well as consumer and environmental advocacy organizations."). OFPA tasked USDA with promulgating regulations for the National Organic Program, and to implement the Program through state and private certifiers charged with ensuring that organic producers adhered to its production standards. *See* 7 U.S.C. § 6503(a), (d); *id.* § 6514(a). The structure of bill thus reflects congressional recognition of the National Organic Program as a "partnership between [the] government and private organizations in standard setting and certification." 1990 U.S.C.C.A.N. at 4945. A critical example of this partnership is OFPA's National Organic Standards Board (NOSB), a fifteen-member board composed of representatives from the organic community. *Id.* § 6518(b). OFPA tasked the NOSB with "assist[ing] in the development of standards for substances to be used in organic production" and "advis[ing] [the USDA] on any other aspects of the implementation of [OFPA]." *id.* § 6518(a). USDA is required to consult with the NOSB in developing standards for the Natioal Organic Program. *Id.* § 6503(c).

## II. THE NATIONAL ORGANIC PROGRAM REGULATIONS.

USDA recognized the importance of soil fertility and working with natural resources in its OFPA Regulations. In the Federal Register notice[3] announcing the final Regulations, USDA stated that "[a] producer of an organic crop must manage soil fertility, including tillage and cultivation practices, in a manner that maintains or improves the physical, chemical, and biological

[3] 65 Fed. Reg. 80,548, 80,559 (Dec. 21, 2000).

condition of the soil and minimizes soil erosion." USDA explained that a crop producer "is required to implement a crop rotation" to address the needs of its farm operation to "maintain or improve soil organic matter content," "manage deficient or excess plant nutrients," and "control erosion." *Id.* at 80,560. USDA repeated this emphasis on active soil management and crop rotation throughout the rulemaking process. *See* 65 Fed. Reg. 13,512, 13,532 (Mar. 13, 2000) (proposing regulations).[4]

The Regulations also emulate the importance of self-sustainability in organic food production systems. The Regulations define "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.

Subpart C of the Regulations detail mandatory soil-based production practice requirements to improve an organic farm's soil quality, and to promote its natural resources and biodiversity. Organic crop production "must maintain or improve the natural resources of the operation, including soil and water quality." 7 C.F.R. § 205.200. Specifically, organic crop producers "must" engage in farming practices that address "soil fertility and crop nutrient management." *Id.* § 205.203. The Regulations require organic crop producers to "implement tillage and cultivation practices that maintain or improve . . . the physical, chemical, and biological condition of soil," to "manage crop nutrient and soil fertility through rotations, cover crops, and the application of plant and animal materials," and to utilize "plant and animal materials to maintain or improve soil organic matter . . . ." *Id.* § 205.203(a)-(c). Also, organic crop producers "must implement a crop rotation" to "(a) [m]aintain or improve soil organic matter content; (b) [p]rovide for pest management in annual and perennial crops; (c) [m]anage deficient or excess plant nutrients, and (d) [p]rovide erosion control." *Id.* § 205.205.

Consistent with OFPA, the Regulations require an organic farming operation to detail practices to meet these soil fertility and resource conservation requirements in an organic system plan. *Id.* § 205.201(a) ("[A]n organic system plan must meet the requirements set forth in this

[4] This March 13, 2000 Federal Register notice is in the Administrative Record at AR29-176.

section for organic production or handling."). An organic producer must satisfy all the requirements in order to sell agricultural products under the Organic label. *Id.* § 205.200.

## FACTUAL AND PROCEDURAL BACKGROUND

### I. THE INCOMPATIBILITY OF HYDROPONIC SYSTEMS WITH THE PRINCIPLES OF ORGANIC FARMING.

OFPA was created out of the organic farming movement in the United States. This movement, developed in the early 1940s, was itself a response to the industrial agricultural revolution which promoted farming with chemicals, under which farmers cultivated crops using synthetic fertilizers, and not nutrients derived naturally from the soil. *See* AR447. Consequently, the pioneers of organic farming techniques "intently focused on the life in the soil." AR447-448. At the heart of organic farming is "the sound management of soil biology and ecology." AR271; *see* AR451 ("The pioneers [of the organic farming movement] (Sir Albert Howard, Lady Eve Balfour, Rudolf Steiner, Jerome Irving Rodale, Aldo Leopold, William Albrecht, and others) fostered the notion that the success and sustainability of farming relies on the management of soil[] health."). Organic farmers believed that "[h]ealthy plants, animals, and humans result from balanced, biologically active soil," and that the goal of organic farming is to "[f]eed the soil, not the plant." AR533. As described by a report put together by the task force (the Hydroponic Task Force) convened by USDA specifically to study whether hydroponic systems align with OFPA's requirements, soil management is "the heart of organic production." AR442, 464 ("Reliance on a complex soil system is the foundation of organic farming.").

Organic farmers work hard to increase the complexity and biodiversity of soil. *See* AR448 ("The complexity of this soil system was based on the rich diversity of life in the soil. This varied web of organisms includes bacteria, fungi, protozoa, nematodes, springtails, mites, spiders, worms, and burrowing mammals."). The interactions of diverse soil organisms—commonly known as the soil food web—create natural nutrients and minerals (referred to as the soil organic matter) necessary for crops to flourish. *See* AR448 ("This complex system is the basis of all life on the planet."), 465; AR1077 (diagram of soil food web). Organic farmers work the land with practices such as the use of cover crops, the application of compost and other natural manure, tilling, and

other activities in order to "focus on soil building" and "continually improve soil fertility." AR802. Simply put, soil is what makes the "organic" in organic farming. AR271 ("The organic farming method derives its name from the practice of maintaining or improving the organic matter (carbon containing) content of farm soil through various methods and practices.").

In stark contrast to organic farming's emphasis on the soil, in hydroponic systems (commonly referred to as "hydroponics"), crops are not grown in soil, but in various container systems, [5] fed not with natural soil organic matter but prepared mineral nutrient solutions, similar to the application of fertilizers on crops in non-organic agricultural production. AR279; AR562 (common hydroponic systems); AR8. As noted by the Hydroponic Task Force, whereas organic farmers feed their crops with nutrients from soil biology, hydroponic operators apply nutrients "without the need for any biology." AR565, 562 (explaining that the growing media in hydroponic operations "does not readily decompose or contribute nutrition to the plants.").

This lack of need for soil building and soil biology makes hydroponic systems particularly suitable methods for growing food where natural resources are scarce and where natural conditions are unsuitable for land-based farming. AR801. In recent years, the simplicity of this indoor, controlled growing system has been put forth as a solution to some of the challenges facing today's food system, such as drought, lack of availability of farmland, and shortage of fresh foods in urban food deserts. *See* AR581. Commerical hydroponic operations today are typically housed in large industrial warehouses, producing a wide range of crops such as herbs, microgreens, tomatoes, peppers, berries, and edible flowers. AR390; AR499 (typical hydroponic facility).

Because hydroponic operations produce crops by applying nutrients or nutrient solutions rather than having such nutrients be derived naturally from the soil, whether these operations can meet the requirements of organic certification has been a subject of intense debate within the organic farming community. AR1375; AR989-990. Globally, most countries renounce hydroponic systems as organic farming. *See* AR333 ("Mexico, Canada, Japan, New Zealand, and 24 European

[5] Hydroponics is a catch-all term that covers many different types of soil-less production systems, such as aeroponics (systems where plants are suspended in air), aquaponics (systems involving plants and aquatic species), and bioponics (systems where plants are grown in some other non-soil media). AR563-66.

countries (including Holland, England, Germany, Italy, France, and Spain) all prohibit hydropoic vegetable production to be sold as organic in their own countries."); AR537. Yet, despite their conflict with the soil-centric focus of organic farming, and in spite of global rejection of these products as organic, USDA has refused to prohibit hydroponic operations from receiving organic certification under OFPA. As a result, hydroponically produced crops have been allowed on the market, labeled and sold with the Organic label, in wholesale and retail outlets alongside soil-grown organic fruits and vegetables without any differentiation.

## II. USDA'S FAILURE TO PROHIBIT ORGANIC CERTIFICATION OF HYDROPONIC SYSTEMS.

Consideration of whether hydroponic systems can be certified organic under OFPA began even before USDA had finalized OFPA's implementing regulations. In 1995, the NOSB considered "specialized standards" for particular production systems, including greenhouses, mushrooms, and hydroponic operations. From the beginning, members of the NOSB were concerned with the fundamental difference between hydroponic operations and soil-based organic farming. AR27-28. Ultimately, the NOSB's recommendation (the 1995 Recommendation) specified standards for organic certification of greenhouse and mushroom operations, and—unable to come up with such standards for hydroponic systems—simply stated that hydroponic production can be certified organic if it complies with all provisions of OFPA. AR25; *see* AR674 (1995 NOSB member explaining that the recommendation was written as is because of "the general feeling that the provisions of OFPA could not be met.").

Because the 1995 Recommendation predates the final Regulations, USDA did not act on it. Instead it waited for the NOSB to make a new recommendation. AR206. Discussions concerning the striking differences between hydroponic systems and the principles of organic farming ensued, with many questioning the fundamental conflict between soil-less hydroponic systems and the soil fertility requirements of OFPA. *See, e.g.*, AR247 (Testimony from NOSB member stating "[w]e have to really look at the regulation as it exists, talking about soils and the ecology of soils, and what makes organic farming organic farming. Hydroponics, if you really look at it, you do not have a soil ecology for plants, to grow plants that normally should be grown in a

soil with its accompanying ecology."); AR266 ("We had an overwhelming response from the public that they did not want organic hydroponics."); Stevenson Decl., Ex. A at 32-33[6] (public comment on May 22, 2008 from an organic certifier stating that "hydroponics cannot be certified because there's no soil involved."). The NOSB finally made its recommendation in 2010 (the 2010 Recommendation), reversing its prior one-line statement and concluding that organic certification of hydroponic systems should be prohibited. The NOSB stated:

> Observing the framework of organic farming based on its foundation of sound management of soil biology and ecology, it becomes clear that systems of crop production that eliminate soil from the system, such as hydroponics or aeroponics, can not be considered as examples of acceptable organic farming practices.

AR271-72. The 2010 Recommendation was a culmination of years of discussion and public input. AR270. The USDA acknowledged receipt of the 2010 Recommendation, and stated that the Agency "will develop a proposed rule based on the NOSB final recommendations." AR299.

Instead, USDA did just the opposite. In a 2012 publication to organic crop producers, USDA unilaterally claimed that hydroponic operations can be certified organic, without any explanation as to how they can comply with OFPA. AR308. USDA then sat on the 2010 Recommendation until 2015, when it convened the Hydroponic Task Force, a 16-member task force made up of representatives from both the soil-based organic farming community and the hydroponic sector, "to examine hydroponic and aquaponics practices and their alignment with the USDA organic regulations and [OFPA]." AR327. The Hydroponic Task Force published its findings, consisting of three separate subcommittee reports, in 2016. Of the three subcommittees, the subcommittee tasked with clarifying the 2010 Recommendation affirmed the 2010 Recommendation's conclusion that hydroponic operations cannot meet the soil fertility requirements of OFPA. AR441. Another subcommittee, tasked with examining the current state of hydroponic systems, also agreed with the 2010 Recommendation that sterile and inert hydroponic operations are ineligible for organic certification, but recommended that certain types

[6] Concurrent with the present motion, Plaintiffs are also asking the Court to compel completion of the Administrative Record with missing documents that should have been produced as part of the Administrative Record. *See* Pls.' Mot. Complete or Supplement Admin. R.; Stevenson Decl., Exs. A-D (filed concurrently).

of hydroponic operations—called "organic bioponics"—may, in the subcommittee's view, comply with OFPA's soil health and ecological requirements. *See* AR554-555. The subcommittee proposed changes to the Regulations and additional guidance that it deemed necessary to ensure that only those "organic hydroponic systems" receive organic certification. *See* AR555.

USDA again took no action. USDA was well-aware that its inaction had resulted in inconsistent and confusing certification of hydroponic systems. *See* Stevenson Decl., Ex. C (survey responses from certifiers showing inconsistent certification of hydroponic operations); AR387 (summarizing survey results); AR643 (letter from Senator Sanders describing "lack of consistency in the certification process" and asking for clarification). Rather than providing clarification, USDA doubled down, unilaterally stating in a web bulletin that "[c]ertification of hydroponic, aquaponic, and aeroponic operations is allowed under USDA organic regulations . . . ." AR1212.

USDA's disregard for OFPA's soil requirements has been met with outcry from the organic community. Former NOSB members, organic farming associations, consumer advocacy groups, and other organic stakeholders, urged USDA to put a moratorium on organic certification of hydroponic operations. *See* AR536-547. Their plea was joined by Senator Patrick Leahy, the drafter of OFPA. Stevenson Decl., Ex. B. at 2. Organic stakeholders told USDA that its failure to take a stance to prohibit organic certification of hydroponic operations has led to confusing organic standards and inconsistent applications, with some certifiers certifying hydroponic operations and others unwilling or unable to do so absent guidance from USDA. *See, e.g.*, Stevenson Decl., Ex. A at 9 ("[T]here's lots of inconsistencies among certifiers in regards to how they certify hydroponic systems and this diminishes the value of the organic label."), 55-56; Ex. B at 3-4; AR816-17 ("[S]ome certifiers are certifying and some will not certify and are against it."). They told USDA that the lack of organic standards for certifiers to evaluate and measure hydroponic operations has resulted in incidents of blatant violations of OFPA's production standards, including its prohibition against pesticides and chemicals on organic farm sites. *See* AR1328-29 (detailing an incident where hydroponic growers applied herbicide on land to remove weeds prior to setting up hydroponic operations and obtaining organic certification). Soil-based organic farmers repeatedly reminded USDA that they invest time and resources on soil-building and soil management as part

of their organic certification, practices not required nor conducted by hydroponic operators. *See, e.g.,* Ex. A at 42; *id.* at 50 (detailing practices for soil-based farming that are not required for hydroponic operations); *id.* at 67 (describing soil management practices that are audited by a certifier); *id.* at 4-5 (same).

The NOSB also stressed the need for agency action. In a 2016 Resolution, the NOSB stated that "it is the will of the majority of the current members of the NOSB to prohibit hydroponic systems that have an entirely water-based substrate." *See* AR645; *see also* AR917-945 (2017 NOSB proposal defining different types of hydroponic and soil-less production systems and recommending changes to regulations based on their differences).

Yet, despite continued pressure from the organic community and follow-up calls from the NOSB demanding that USDA reverse its position that all hydroponic operations are eligible for organic certification, USDA still refused to act.

## III. THE RULEMAKING PETITION.

Faced with USDA's near decade-long disregard of the clear recommendations of the NOSB, the opinions of the Hydroponic Task Force, and the repeated pleas from the organic community at large, on January 16, 2019, Plaintiff Center for Food Safety submitted a rulemaking petition to USDA. The Petition highlighted the historical importance of soil in organic production and emphasized the express language in OFPA and its implementing regulations that plainly require organic production practices to foster soil fertility through management of the soil. AR5, 7, 9-10. Petitioners explained that organic certification of hydroponic operations is not permissible under OFPA. First, hydroponic operations cannot be certified organic because they do not accomplish OFPA's statutory mandate to foster soil fertility and improve the organic matter content of the soil. AR11-12. Second, hydroponic operations violate OFPA's mandatory requirement of consistency in organic production because hydroponic operations fail to adhere to OFPA's soil fertility requirements. AR20. Third, hydroponic operations violate OFPA's implementing regulations requiring improvement of soil quality, management of soil fertility, use of crop rotation practices, conservation of biodiversity, use of other soil management practices, and use of soil samples to measure compliance with OFPA. AR12-13.

The Petition requested that USDA conduct rulemaking to prohibit certification of hydroponic agricultural production. AR1-23. The Petition asked USDA to revoke existing organic certifications previously issued to hydroponic operations, and requested that USDA ensure that ecologically-integrated organic production practices are required for all organic certification, as defined by OFPA and its regulations. AR5. The Petition was endorsed by thirteen other organic stakeholders that included organic farmers, retailers, certifiers, and public interest and consumer interest groups. AR22-23.

## IV. USDA'S PETITION DENIAL.

By way of a letter dated June 6, 2019, USDA denied the Petition. *See* Petition Denial (AR1375-1378). USDA issued the Petition Denial without any prior notice or opportunity for public comment.

The four-page Petition Denial acknowledged that "[o]rganic hydroponic systems have been controversial," AR1375, and that the NOSB had recommended that USDA prohibit organic certification of hydroponic operations. *Id.* at 1375-76. USDA also agreed that OFPA requires organic crop producers to engage in various soil-based production practices to build soil fertility, achieve ecological balance, and conserve resources and biodiversity. *Id.* at 1376-77.

For the very first time, USDA addressed the applicability of OFPA's soil-centered statutory and regulatory provisions to hydroponic operations. Even though this very question had been before the USDA for more than a decade, USDA stated for the first time in the Petition Denial that, in its view, OFPA's requirements that organic producers improve soil fertility and engage in specific soil management practices "are applicable to production systems that *do* use soil." AR1377 (emphasis in original). Prior to the Petition Denial, USDA had never publicly stated its position that hydroponic operations are completely exempt from OFPA's soil management requirements.

USDA also "reaffirm[ed] the need for all organic operations, including hydroponic operations, to demonstrate compliance with the USDA regulations . . . includ[ing] requiring production systems to maintain or improve the natural resources of the operation," and cited to hydroponic systems' general environmental benefits to summarily conclude—without any

explanation or elaboration—that hydroponic operations can satisfy OFPA's regulations concerning natural resources, ecological balance, and biodiversity. AR1377.

In the Petition Denial, USDA insisted that hydroponic operations may be certified organic "if done in compliance with OFPA and the USDA organic regulations," AR1376, but entirely failed to explain how or what measures certifiers must apply to ensure compliance. USDA refused the Petition's requests that USDA engage in rulemaking to prohibit organic certification of hydroponic operations, and revoke existing certifications for hydroponic operations. AR1375-78.

## STANDARD OF REVIEW

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). An issue is "material" if its resolution could affect the outcome of the action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The APA provides interested citizens with the right to petition federal agencies such as the USDA. *See* 5 U.S.C. § 553(e). The APA requires agencies to respond to rulemaking petitions "within a reasonable time." *Id.* § 555(b).

The APA also grants "persons suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action" the right to "judicial review." *Id.* § 702. USDA's Petition Denial is a final agency action reviewable under the APA. *See Weight Watchers Int'l. v. Fed. Trade Comm'n*, 47 F.3d 990, 992 (9th Cir. 1995) (citing cases holding agencies' denials of rulemaking petitions reviewable final agency actions under the APA); *Massachusetts v. EPA*, 415 F.3d 50, 53-54 (D.C. Cir. 2005) (EPA's denial of rulemaking petition was final agency action).

Under the APA, a reviewing court "shall . . . hold unlawful and set aside agency actions, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). In reviewing claims brought under the APA, a court evaluates whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). An action is arbitrary and capricious if

the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

The APA also directs courts to "interpret . . . statutory provisions, and determine the meaning or applicability of an agency action," 5 U.S.C. § 706, and "hold unlawful and set aside agency action, findings, and conclusions" that are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id.* § 706(2)(C). Judicial review should be "searching and careful," and a court "must not rubber-stamp administrative decisions that . . . [are] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Bureau of Alcohol, Tobacco & Firearms v. Fed. Labor Relations Auth.*, 464 U.S. 89, 97 (1983) (internal quotation marks omitted). A court reviews an agency's interpretation of a statute it administers under the framework set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). A court will invalidate an agency's interpretation that is contrary to the clear intent of Congress. *Id.* A court discerns congressional intent by reviewing the plain language of the statute while "exhaust[ing] all the 'traditional tools' of construction," including "text, structure, history, and purpose." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (quoting *Chevron*, 467 U.S. at 843 n.9); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Similarly, a court must take into account "the text, structure, history, and purpose of [the] regulation" in reviewing an agency's interpretation of its regulations. *Kisor*, 139 S. Ct. at 2413.

**ARGUMENT**

As discussed below, USDA's Petition Denial violated OFPA and the APA. First, USDA's exemption of hydroponic operations from OFPA's soil-based statutory and regulatory commands is contradicted by the plain meaning of OFPA and its Regulations. Second, USDA's conclusion that hydroponic operations' generalized benefits satisfy OFPA's specific natural resource and biodiversity conservation requirements is contrary to the Regulation and the Agency's own interpretation, and is contradicted by the Record. Third, USDA's Petition Denial and the double standards therein have resulted in inconsistent organic standards, in violation of OFPA.

## I. USDA'S PETITION DENIAL VIOLATES OFPA'S STATUTORY MANDATE THAT ORGANIC CROP PRODUCERS FOSTER SOIL FERTILITY.

In the Petition Denial, USDA acknowledged that OFPA "impose[s] certain requirements to maintain or improve soil quality or engage in crop rotation and similar practices," but disregarded them as allegedly inapplicable to soil-less production systems. AR1376-77. USDA is wrong. OFPA's relevant statutory provisions, its overall scheme, and its legislative history establish that Congress intended that *all* organic crop production "shall foster soil fertility." *Altera Corp. & Subsidiaries v. Comm'r of Internal Revenue*, 926 F.3d 1061, 1075 (9th Cir. 2019) ("We start with the plain statutory text and, 'when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.'") (quoting *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015)). USDA's decision to exempt hydroponic systems from OFPA's soil fertility mandate is impermissible and must be rejected. *Chevron*, 467 U.S. at 842 ("If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress.").

### A. USDA's Exemption for Hydroponic Systems Is Contrary to the Plain Language of OFPA's Statutory Provisions Concerning Organic Crop Production.

USDA's interpretation that hydroponic production systems and other soil-less production systems are exempt from OFPA's statutory requirement that organic crop productions foster soil fertility is contrary to the statute's plain language.

First, it is a fundamental canon of statutory interpretation that the plain meaning of a statute must be based on "consideration of 'the entire text, in view of its structure' and 'logical relation of its many parts.'" *Mont v. United States*, 139 S. Ct. 1826, 1833-34 (2019) (quoting A. Scalia & B. Garner, *Reading Law* 167 (1st ed. 2012)). Under OFPA, in order "[t]o be sold or labeled as an organically produced agricultural product . . . , an agricultural product *shall* . . . be produced and handled in compliance with an organic plan agreed to by the producer and handler of such product and the certifying agent." 7 U.S.C. § 6504(3). Section 6513 of OFPA spells out the details of organic plans. The first provision of OFPA's statutory section concerning requirements for organic crop production, entitled "Soil Fertility," states: "[an] organic plan *shall* contain provisions designed to foster soil fertility, primarily through the management of the

organic content of the soil through proper tillage, crop rotation and manuring." *Id.* § 6513(b)(1) (emphasis added). That Congress used "shall" shows that the requirement is mandatory. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) ("[T]he word 'shall' usually connotes a requirement."); *Brower v. Evans*, 257 F.3d 1058, 1067 n.10 (9th Cir. 2001); ("'Shall' means shall.") (quoting *Ctr. for Biological Diversity v. Norton*, 254 F.3d 833, 837–38 (9th Cir. 2001)).

Second, under the "ordinary-meaning" canon of interpretation, absent specific definitions, words in a statute must be interpreted using "their ordinary, contemporary, common meaning." *Perrin v. United States,* 444 U.S. 37, 42 (1979); *see generally* A. Scalia & B. Garner, *supra*, at 69-77. Neither "foster" nor "soil fertility" is defined in OFPA; thus their meaning is supplied by the ordinary usage of the words, which can be based on dictionary definitions. *United States v. Carter*, 421 F.3d 909, 911 (9th Cir. 2005) ("[W]e follow the common practice of consulting dictionary definitions to clarify [words'] ordinary meaning . . . ."). The Merriam-Webster Dictionary defines "foster" as "to promote the growth or development of."[7] "Soil" is "firm land," or in the agricultural context, "the upper layer of earth that may be dug or plowed in which plants grow."[8] And "fertility" is "the quality or state of being fertile."[9]

Thus, for crop production, in order to be certified organic, OFPA requires that the organic crop producer *must* include in his or her organic plan for certification, management practices to promote the growth and development of fertile soil. And OFPA requires that the organic crop producer achieve this development "primarily through the management of the organic content of the soil through proper tillage, crop rotation and manuring." 7 U.S.C. § 6513(b)(1). Organic crop producers must document these management practices in their oganic plans in order to obtain organic certification. *Id.* § 6513 (a) (certifers "shall determine if such plans meet[] the requirements

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[7] *Foster*, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/foster (last visited Sept. 15, 2020).

[8] *Soil*, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/soil (last visited Sept. 15, 2020).

[9] *Fertility*, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/fertility (last visited Sept. 15, 2020).

of the programs."); *id.* § 6504(3) (compliance with an organic plan required for something "[t]o be sold or labeled as an organically produced agricultural product.").

Read as a whole, fostering soil fertility through farming practices that directly work the soil is mandatory for *all* organic crop production, soil-based or not. USDA's interpretation that the provision only applies to soil-based organic crop production is contrary to the plain meaning of 7 U.S.C. § 6513(b)(1). *See United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv.*, 837 F.3d 1055, 1064 (9th Cir. 2016) (refusing to find agency discretion where the statutory command is "shall").

### B. OFPA's Overall Statutory Scheme Demonstrates Congressional Intent That Organic Crop Production Must Foster Soil Fertility.

As discussed before, OFPA was created in response to differing state certification standards and the need for uniform and consistent standards for organic production. *See supra* 2-4. It is thus no surprise that in drafting OFPA, Congress mandated practices that must be met in order to market and sell one's product under the Organic label. When Congress intended a practice or standard to be discretionary under OFPA, it did so clearly, assigning such standards with a discretionary "may", rather than the mandatory "shall." *See, e.g.*, 7 U.S.C. § 6507 (providing that state organic certification programs "may contain more restrictive requirements" than those under OFPA); AR440 (Hydroponic Task Force report stating "OFPA and the NOP regulatory text did an excellent job of representing this heart of the early certification programs by using the word 'must' or 'shall' (rather than 'may') in the sections regulating soil management.").

Nothing in OFPA supports USDA's distinction between soil-based vs. soil-less production systems. The requirements of organic production plans are set forth under 7 U.S.C. § 6513. That section differentiates amongst organic production plans for organic production and organic handling, and prescribes different standards for four different types of organic products—crops, livestock, mixed crop livestock production, and harvesting of wild crops; it does not differentiate by the type of production systems. *See id.* § 6513 (b) (crop production farm plan), (c) (livestock plan), (d) mixed crop lifestock production, (e) (handling), (f) (management of wild crops). Other statutory sections are similarly divided based on the products produced, rather than by the type of production system. *See, e.g., id.* § 6508 ("Prohibited crop production practices and materials"); *id.*

§ 6509 ("Animal production practices and materials"). There is no support for USDA's view that the soil fertility requirement for organic crop production only applies to production systems that use soil.

And while Congress did contemplate the possibility of "other production and handling practices" other than those specifically enumerated under OFPA obtaining organic certification, it required that any such practice still must be consistent "with the applicable organic certification program." *Id.* § 6512. ("If a production or handling practice is not prohibited or otherwise restricted under this chapter, such practice shall be permitted unless it is determined that such practice would be inconsistent with the applicable organic certification program."). Hydroponic operations produce crops. The applicable organic certification program, the crop production program and the requirements therein, mandate that organic crop producers foster soil fertility.

Nor did Congress grant USDA the discretion to exempt hydroponic or other soil-less systems under OFPA. Congress specified the types and particular instances where exemptions are allowed under OFPA. Subsection 6505(c) exempted particular types of processed foods and only *one* type of producer—small agricultural producers with annual sales of less than $5,000, from compliance with OFPA's production standards. *See id.* § 6505(c) ("Exemption for Processed Food"), (d) ("Small Farmer Exemption"). Congress narrowly authorized USDA to "provide for reasonable exemptions" from OFPA's production standards for agricultural products produced by certified organic farms that "are subject to a Federal or State emergency pest or disease treatment program," *id.* § 6506(b)(2), and to work with the NOSB to create time-limited exemptions for the use of synthetic and otherwise prohibited substances, *id.* § 6517(c). Congress did not use the word "exempt" or "exemption" in the statutory provision concerning organic plans for organic crop production. Under the canon of statutory construction, *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of another), the fact that Congress listed narrow and specific exemptions in OFPA, but failed to mention any exemptions from OFPA's requirements for organic crop production plans, demonstrates congressional intent that no such exemptions be allowed. *Chicago v. Envt'l. Def. Fund*, 511 U.S. 328, 338 (1994)) ("[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a

statute but omits it in another.").

Taken together, nothing in OFPA's statutory scheme supports USDA's interpretation that hydroponic operations are exempt from the soil fertility requirement of organic crop production. *In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1362 (D.C. Cir. 1980) ("It is [ ] a fundamental principal of statutory construction that 'effect must be given, if possible, to every word, clause and sentence of a statute . . . so that no part will be inoperative or superfluous, void or insignificant.'"); *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133 (courts should "interpret [a] statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into an harmonious whole.'"); *see generally* A. Scalia & B. Garner, *supra*, at 174–183.

**C. The Legislative History Shows That the Soil Fertility Requirement Is Mandatory.**

That building soil fertility is a mandatory component of organic crop production is also consistent with OFPA's purpose and its legislative history. Congress explained that OFPA "has been carefully written to prevent widespread exceptions or 'loopholes' in the organic standards." 1990 U.S.C.C.A.N. 4656 at 4952. Congress emphasized that organic crop production plans "must detail the procedures that the farmers will follow in order to foster soil fertility." 1990 U.S.C.C.A.N. at 4946; *see supra* pp.2-4.

Senator Leahy, the introducer of OFPA, stated that the purpose of OFPA is to support "farmers who protect the soil and water." AR9.[10] In a 2016 letter to USDA requesting that USDA prohibit organic certification of hydroponic operations, Senator Leahy explained that "[f]armers who have advised me since before I wrote [OFPA] see soil as fundamental to organics." Stevenson Decl., Ex. B at 1. Similarly, members of the organic community that were instrumental in the passage of OFPA repeatedly emphasized that building soil fertility is a mandatory aspect of organic crop production under the statute. *See id.*, Ex. A at 9, 45-46; AR1319; AR673. Indeed, USDA itself had noted, in its 1980 report on organic agriculture, that the basic tenets of organic agriculture

[10] *Organic Foods Production Act, The National Organic Law at 20: Sowing Seeds for a Bright Future*, S. Hrg. 111-1027, at 5 (Sept. 15, 2010), *available at* https://www.agriculture.senate.gov/imo/media/doc/111_1027.pdf.

include the firm belief that "[s]oil is the source of life." AR533[11]; *see also* AR441-42 ("It is the management of the soil that is at the heart of organic production.").

The Hydroponic Task Force USDA convened to help inform its decision regarding organic certification of hydroponic operations noted that "[t]he basic premise of organic farming was that agricultural soil needs continuous restoration by means of adding manure and/or compost, managing cover crops and crop residue, and adding natural rock powders. The earliest organic certification programs based their standards on this premise." AR440, 452; AR371 (chart showing timeline of organic farming that led to the development of OFPA).

Taken together, the plain language of OFPA's provisions on organic crop production , OFPA's purpose and its overall statutory design, as well as its legislative history, unambiguously require that, in order to obtain organic certification, all crop producers must foster soil fertility through soil management practices. USDA's Petition Denial exempting hydroponic systems from these mandatory requirements is impermissible and must be rejected. *Chevron*, 467 U.S. at 842-43 (Courts must enforce "the unambiguously expressed intent of Congress.").

## II. USDA'S PETITION DENIAL IS CONTRARY TO THE OFPA REGULATIONS.

As with statutory interpretation, the meaning of a regulation is discerned from its "text, structure, history, and purpose," and is based on applications of traditional rules of construction. *Kisor*, 139 S. Ct. at 2415; *Amazon.com, Inc. v. Comm'r*, 934 F.3d 976, 984 (9th Cir. 2019) ("Regulations are interpreted according to the same rules as statutes, applying traditional rules of construction."). The Supreme Court has instructed that courts should defer to an agency's interpretation only if the regulations are "genuinely ambiguous." *Kisor*, 139 S. Ct. at 2414.

OFPA's implementing regulations unambiguously mandate that *all* organic producers must "maintain or improve" soil quality, and require all organic producers to engage in soil management practices to improve soil health. *See* 7 C.F.R. §§ 205.200, 205.203. USDA admitted that the regulations implementing OFPA "impose certain requirements to maintain or improve

[11] USDA, *Report on Organic Agriculture* 9 (1980), *available at* https://pubs.nal.usda.gov/sites/pubs.nal.usda.gov/files/Report%20and%20Recommendations%20on%20Organic%20Agriculture_0.pdf.

soil quality or engage in crop rotation and similar practices," but claimed that those regulations only apply to soil-based production systems. AR1376-77. USDA's interpretation fails.

**A. Organic Crop Producers "Must" Maintain or Improve Soil Quality.**

The OFPA Regulations detail production practices producers must meet in order to certify their products as organic. The subsection governing requirements for organic production states that "production practices must maintain or improve the natural resources of the operation, including soil and water quality" in order for a producer to label and sell his or her products under the Organic label. 7 C.F.R. § 205.200. The Regulations detail production practices that meet that command. Specifically, the applicable regulatory provision, entitled "soil fertility and crop nutrient management practice standard," mandates that all organic producers:

> (a) . . . *must* select and implement tillage and cultivation practices that maintain or improve the physical, chemical, and biological condition of soil and minimize soil erosion;
> (b) . . . *must* manage crop nutrients and soil fertility through rotations, cover crops, and the application of plant and animal materials.
> (c) . . . *must* manage plant and animal materials to maintain or improve soil organic matter content in a manner that does not contribute to contamination of crops, soil, or water . . . .

*Id.* § 205.203 (emphases added). Another provision, the "crop rotation practice standard," requires that organic producers "*must* implement a crop rotation" so that producers may "maintain or improve soil organic matter content." *Id.* § 205.205 (emphasis added).

These regulations leave no room for equivocation: To sell one's produce as organic, one "must" [12] engage in soil fertility and crop management practices that "manage . . . soil fertility" and "maintain or improve" soil health and soil organic matter content. *See Carter*, 421 F.3d at 911; *Sec'y of Labor v. Seward Ship's Drydock, Inc.*, 937 F.3d 1301, 1308 (9th Cir. 2019) ("A regulation should be construed to give effect to the natural and plain meaning of its words."); *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1097 (9th Cir. 2007) ("the plain meaning of a regulation governs.") (quoting *Wards Cove Packing Corp. v. Nat'l Marine Fisheries Serv.*, 307 F.3d 1214, 1219

[12] "Must, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/must (last visited Sept. 15, 2020) (defining "must" as "be commanded or requested to", "be required by law").

(9th Cir. 2002)) (internal quotation marks omitted). Indeed, as the district court in the Eastern District of California noted in a case concerning the meaning of "raw animal manure" in 7 C.F.R. § 205.203(c)(1), under 7 C.F.R. § 205.203(a), "[p]roducers are to manage crop nutrients and soil fertility through rotations, cover crops and plant and animal materials." *Cal. Organic Fertilizers, Inc. v. True Organic Products, Inc.*, No. 1:19-cv-0296 AWI EG, 2019 WL 5422919, at *6 (E.D. Cal. Oct. 22, 2019). USDA's interpretation that these mandatory regulatory requirements are inapplicable to hydroponic operations is arbitrary and capricious, and contrary to law.

**B. The Regulatory Context and History Show That OFPA's Soil Fertility and Crop Rotation Regulations Are Mandatory.**

USDA's statements leading up to the promulgation of the OFPA Regulations also demonstrate that the regulatory provisions apply to all organic producers. In the Federal Register notice accompanying the draft Regulations, USDA explained that "this proposal contains a practice standard for soil fertility and crop nutrient management which describes the tillage practices, sources, and handling restrictions for nutrients, and prohibited activities that a production operation *must comply with*." AR40 (emphasis added). USDA stressed that "organic production or handling operations must comply with all applicable provisions . . . ." AR50.

Nor do the Regulations grant USDA discretion to exempt hydroponic operations from its production requirements. Specifically, Part 205 of the Regulations only authorizes USDA to set up "temporary variances" from its production standards, and only under the following circumstances: "(1) Natural disasters declared by the Secretary; (2) Damage caused by drought, wind, flood, excessive moisture, hail, tornado, earthquake, fire, or other business interruption; and (3) Practices used for the purpose of conducting research or trials . . . in organic production or handling." 7 C.F.R. 205.290(a). Permanent hydroponically produced tomatoes and lettuce, grown in large indoor warehouses year-round and destined for supermarket shelves, do not qualify.

That the Regulations strictly require organic producers to adhere to soil management practices makes perfect sense in light of OFPA's statutory purpose. *See supra* pp. 2-4.USDA itself had explained in the Federal Register notice for the draft Regulations that the requirement that "an organic operation maintain or improve its soil and water quality" set forth in 7 C.F.R.

§ 205.200 "retains the linkage between production and handling practices and the natural resources of the operation, which is a fundamental tenet of both organic production and OFPA." AR53. USDA stressed that "a producer of an organic crop must manage soil fertility, including tillage and cultivation practices, in a manner that maintains or improves the physical, chemical, and biological condition of the soil and minimizes soil erosion." AR50. USDA's abandonment of its prior recognition that soil fertility is a necessary component of organic crop production is arbitrary and capricious, and contrary to the plain text of the OFPA Regulations.

In sum, USDA's interpretation that hydroponic operations are exempt from OFPA's soil-related Regulations is arbitrary and capricious and contrary to law, because USDA's regulations implementing OFPA unequivocally require organic producers to manage soil health by engaging in certain crop production and cultivation practices. *Kisor*, 139 S. Ct. at 2415 ("If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law.").

## III. USDA'S DETERMINATION THAT HYDROPONIC OPERATIONS SATISFY OFPA'S ECOLOGICAL AND CONSERVATION REGULATIONS IS ARBITRARY AND CAPRICIOUS.

Part and parcel with organic farming's objective of building healthy soils is its focus on a farm's ability to maintain ecological balance and promote biodiversity. To that end, the Regulations require all organic operations "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 (definition of "organic operation") (emphasis added). Unlike its treatment of OFPA's statutory and regulatory requirements that require soil fertility, USDA did not try to excuse hydroponic operations from OFPA's resource and conservation requirements. Instead USDA summarily claimed, without any citations nor supporting evidence, that hydroponic operations can meet these requirements because hydroponic operations "can [] preserve natural resources" and "can support biological communities." AR1377. USDA's response is arbitrary and capricious, and contrary to law.

First, USDA's reliance on the general water and land conservation benefits of hydroponic operations ignores that, under the Regulations, organic operations "*must* maintain or improve the

*natural resources of the operation*, including soil and water quality." 7 C.F.R. § 205.200 (emphases added). The Regulations define "natural resources of the operation" as the "physical, hydrological, and biological features *of a production operation*, including soil, water, wetlands, woodlands, and wildlife." *Id.* § 205.2 (emphasis added). Thus to be certified organic, it is not enough for an agricultural operation to achieve general environmental benefits; the operator "must" promote ecological balance and biodiversity to the agricultural site. *See id.*; *id.* § 205.200.

USDA's own statements confirm this. In the preamble to the final Regulations, USDA stated that "[c]ompliance with the requirement to conserve biodiversity requires that a producer incorporate practices . . . that are beneficial to biodiversity on his or her operation."[13] *Cf.* AR50 (USDA explanation of draft Regulations that "[a]ny practice implemented in accordance with [7 C.F.R. part 205] must maintain or improve the natural resources, including soil and water quality, of the operation."). USDA's own guidance on the regulations (NOP 5020)[14] also show that organic operations must demonstrate conservation benefits *to the operation itself*. *See* NOP 5020, at 3 (explaining that, for sites that have both certified and non-certified operations, the natural resource and biodiversity conservation requirements can be met with conservation practices implemented on a portion of the operation "that is not certified but is adjacent to the certified land, if this practice directly benefits the certified land."). USDA's claim that hydroponic operations can have "general" environmental benefits reads out OFPA's requirement that operations engage in practices that *directly benefit* the natural resources and biodiversity on lands they cultivate, and therefore it is unlawful. *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43 (action is arbitrary and capricious if agency "relied on factors which Congress has not intended it to consider" or "failed to consider an important aspect of the problem").

Second, contrary to USDA's bald assertion, the Administrative Record is replete with evidence that commercial hydroponic operations do *not* actually meet OFPA's ecological and

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[13] Nat'l Organic Program, 65 Fed. Reg. 80,563, 80,563 (Dec. 21, 2000).

[14] Nat'l Organic Program, USDA, *NOP 5020, Guidance, Natural Resources and Biodiversity Conservation* (last revised Aug. 31, 2018), https://www.ams.usda.gov/sites/default/files/media/NOP%205020%20Biodiversity%20Guidance%20Rev01%20%28Final%29.pdf.

conservation-based requirements. *See* AR884 ("[Hydroponic operations] are not meeting the biodiversity [requirement.]"); AR908 ("[I]n a closed greenhouse, you are not going to find the biodiversity that you are going to find in an organic field."); AR926 (explaining that "for a number of hydroponic systems, the principle source of fertility" is "import[ed]" from highly soluble sources such as hydrolyzed soybean meal" made in Europe and questioning the environmental costs of using such inputs); Stevenson Decl., Ex. A at 42, 62-63.

Members of the Hydroponic Task Force that concluded that hydroponic operations fail to meet OFPA's mandates explained that "[hydroponic operations] use unapproved inputs, insufficient carbon and biology in these systems and there's no nutrient cycling." AR395-96. Significantly, the Hydroponic Task Force report recognized that, even soil-less hydroponic systems that recirculate resources grown using some organic materials do not "promote ecological balance" within the meaning of "organic production" as defined by the regulations. *See* AR587 (finding that such systems "do[] not align" with OFPA's requirement that organic production "promote ecological balance" because they "may not contribute to long term ecological stability.").

USDA's blanket and unsupported assertion in the Petition Denial that hydroponic operations can meet OFPA's definition requiring organic operations to foster cycling of resources and to promote ecological balance and biodiversity is contrary to OFPA's regulatory requirements, and is also belied by the record. The Court should reject USDA's conclusion that hydroponic operations comply with OFPA's natural resource and biodiversity conservation requirements. *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43 (agency must "articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made . . . .'").

## IV. USDA'S PETITION DENIAL PERPETUATES INCONSISTENT ORGANIC STANDARDS, IN VIOLATION OF OFPA.

USDA's Petition Denial and its decision to allow organic certification of hydroponic operations also violates OFPA's purpose of establishing consistent organic production standards. *See* 7 U.S.C. § 6501; *supra* pp. 2-4. USDA's Petition Denial unlawfully exempts hydroponic operations from all of OFPA's soil management requirements, and fails to explain how and what types of hydroponic operations can satisfy OFPA's natural resources and biodiversity conservation

requirements. By allowing hydroponic crops to be certified organic without meeting the same requirements for soil-based crops, USDA's Petition Denial subverts the overarching purpose of OFPA: the creation of a set of uniform organic production standards. *See* 7 U.S.C. § 6501.

First, USDA's Petition Denial unlawfully exempts hydroponic systems from OFPA's soil management requirements, even though OFPA commands all organic crop producers to maintain or improve soil health. *See supra* pp. 15-23. OFPA was created to ensure consistent standards of organic production applied to all organic farmers. *See supra* pp. 2-4. Yet according to the Petition Denial, a soil-grown organic tomato must be cultivated under a detailed set of soil management practices, none of which apply to a hydroponically produced one. *See, e.g.*, AR680 ("If I try to go out and feed all my crops in the field every day with a backpack sprayer of fish emulsion and kelp, my certifier would not even certify me because that wouldn't be consistent with good organic management . . . ."); Stevenson Decl., Ex. A at 70 ("This land did not magically turn around through simple input substitution of organically-approved materials, but took years of compost applications, green manure, cover cropping, and proper crop rotation to be nurtured to healthy soils.").

Second, USDA claimed, without specifying how, that hydroponic systems can meet OFPA's conservation and biodiversity requirements based on their general environmental benefits. But the record makes clear that not all hydroponic systems are created equal. *See* AR562 ("[t]here is [a] wide variety of hydroponic systems."). The subcommittee of the Hydroponic Task Force responsible for detailing different types of hydroponic systems explained that, while "recirculating" hydroponic systems recycle the nutrient solutions used to feed the plants, there are also "open" hydroponic systems where the nutrient solution is applied and then simply "drained to waste," with no cycling of resources. AR563. Critically, the subcommittee emphasized that, in its view, only a subset of hydroponic production systems may be capable of meeting OFPA's conservation and biodiversity goals. *See* AR581 ("Bioponic and other types of container production which rely on biological activity are in a unique category of crop production systems that allow for increased conservation of land and water resources"). And even for those systems, the subcommittee noted the inapplicability of the current soil-based regulations, and recommended additional rulemaking

and guidance to establish standards for organic hydroponic operation. *See, e.g.*, AR586 (recommending that USDA require "recirculating systems or [systems that] account for any water-runoff"); AR593-94 (recommending that USDA adopt regulations that would require hydroponic operations to compost or reuse growing media and capture and reuse nutrient solution). Yet, whereas the regulations and guidance detail land management practices that soil-based operations can undertake to promote cycling of resources, ecological balance, and conserve biodiversity, USDA has issued no regulation nor guidance on how and what types of hydroponic operations can meet OFPA's command that organic operations must "foster cycling of resources, promote ecological balance, and conserve biodiversity." *See* NOP 5020, *supra* note 14, at App. A (table detailing ways for different types of organic production systems to conserve resources). USDA's failure to clarify how hydroponic operations satisfy OFPA's natural resources and biodiversity conservation requirements has created inconsistent organic standards.

This lack of clarity, from what types of hydroponic operations can be certified organic, to precisely how hydroponic operations can meet OFPA's mandatory requirements, have already resulted in confusion around, and inconsistent application of, the organic production standards. *See supra* pp. 6-13; *see, e.g.,* Stevenson Decl., Ex. B at 3-4 (loss of certification business due to USDA's failure to follow NOSB's 2010 Recommendation).

USDA nonetheless insisted in the Petition Denial that there have been no inconsistent organic standards because USDA has consistently stated that organic certification of hydroponic operations is allowed. This is a strawman. Congress created mandatory production practice standards, and gave USDA limited discretion to exempt or deviate from such standards, for the very purpose of achieving OFPA's goal of creating consistent national standards for organic food production. *Supra* pp 2-4. That USDA may have consistently ignored OFPA's purposes does not render its determination to allow hydroponic operations to be certified organic without due regard for OFPA's soil fertility and natural resources requirements lawful under OFPA.

Nor is it true that USDA's position has actually been consistent. The decade-long debate concerning organic certification of hydroponic operations finds USDA repeatedly recognizing the need for further rulemaking in order to define hydroponic operations and provide standards for

their organic certification, but then flip-flopping to state that hydroponic operations can be certified under the existing law. *See supra* pp. 6-13. After the Hydroponic Task Force issued its report, Miles McEvoy, former deputy administrator of the National Organic Program, told the NOSB that "from our perspective, this seems like it would be a significant rulemaking action . . . ." AR701; *see, e.g.*, AR299 (stating that USDA "will develop a proposed rule based on the NOSB final recommendations"); AR920 (USDA deputy administrator told NOSB board member that "[USDA] believe[s] that hydroponics are covered under the standards. . . . But we recognize that . . . there may be additional details that need to be added . . . ."). That USDA has consistently refused to clear up confusion around organic certification of hydroponic operations does not create consistent organic standards; it does the opposite.

USDA's Petition Denial authorizing organic certification of hydroponic operations has resulted in two sets of production standards for organic crop production: a detailed, onerous set of requirements for organic farmers working with the soil to grow organic crops, and no standards at all for hydroponic operators. USDA's Petition Denial violates OFPA's objective of establishing consistent standards of organic production. *See* 7 U.S.C. § 6501(1)-(2); *supra* pp. 2-4.

## V. THE COURT SHOULD VACATE USDA'S PETITION DENIAL.

As a result of USDA's Petition Denial, hydroponic crop producers are being certified organic, and their produce is being marketed as identical to their soil-based organic counterpart, without having to meet OFPA's mandatory command that *all* organic crop production must improve soil fertility and promote local ecology and biodiversity. The Court must declare that the Petition Denial's interpretation of OFPA's statutory and regulatory requirements authorizing organic certification of hydroponic operations is unlawful, in violation of OFPA and the APA, and vacate the Petition Denial. In light of the decade-long confusion and inconsistent application of OFPA's requirements, the Court should instruct USDA to issue a new response in accordance with the Court's order, within 90 days of the Court's decision.

Under settled principles of administrative law, if an agency's decision "is not sustainable on the administrative record made, then the [agency's] decision must be vacated and the matter remanded to [the agency] for further consideration." *Camp v. Pitts*, 411 U.S. 138, 143 (1973); 5

U.S.C. § 706(2)(A) ("[R]eviewing court shall . . . *hold unlawful and set aside* agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.") (emphasis added). Where an agency has "made an error of law, . . . the case must be remanded to the agency for further action consistent with the corrected legal standards." *PPG Indus. v. United States*, 52 F.3d 363, 365 (citing *Securities & Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80 (1943)).

Thus under the APA, remand and vacatur is the presumptive and appropriate remedy for USDA's unlawful Petition Denial. *See, e.g., Se. Alaska Conserv. Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 654 (9th Cir. 2007) ("[T]he normal remedy for an unlawful agency action is to 'set aside' the action. In other words, a court should vacate the agency's action and remand to the agency to act in compliance with its statutory obligations.") (internal quotation marks and citation omitted), *rev'd on other grounds sub nom. Coeur Alaska v. Se. Alaska Conserv. Council*, 557 U.S. 261 (2009); *Int'l Ctr. For Tech. Assessment v. Johanns*, 473 F. Supp. 2d 9, 26 (D.D.C. 2007) (holding USDA's petition denial contrary to the Plant Protection Act and vacating the denial with remand to USDA to issue a new response accordingly); *See, e.g., Pollinator Stewardship Council v. U.S. Envtl. Prot. Agency*, 806 F.3d 520, 532–33 (9th Cir. 2015); *Humane Soc'y v. Locke*, 626 F.3d 1040, 1048, 1053 & n.7 (9th Cir. 2010); *Ctr. for Envtl. Health v. Vilsack*, No. 15-cv-01690-JSC, 2016 WL 3383954, at *10-13 (N.D. Cal. June 20, 2016) (remand and vacatur of USDA's National Organic Program guidance on allowable compost in organic food production for violations of the APA).

There are "rare circumstances" in which vacatur is not required, based on equity. *See Humane Soc'y*, 626 F.3d at 1053 n.7; *Ctr. for Envtl. Health*, 2016 WL 3383954, at *10 ("In the Ninth Circuit, remand without vacatur is the exception rather than the rule.") (citing *Cal. Cmtys. Against Toxics v. U.S. Envt'l Prot. Agency*, 688 F.3d 989, 992 (9th Cir. 2012)). Such rare circumstances depend on the "seriousness of the agency's errors" and "the disruptive consequences of an interim change that may itself be changed." *Pollinator Stewardship Council*, 806 F.3d at 532. "The Ninth Circuit has only found remand without vacatur warranted by equity concerns in limited circumstances, namely serious irreparable environmental injury." *Ctr. for Food Safety v. Vilsack*, 734 F. Supp. 2d 948, 951 (N.D. Cal. 2010) (providing detailed discussion of APA vacatur standards and discussing cases); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir.

1995) ("In the present case, concern exists regarding the potential extinction of an animal species"); *cf. Cal. Cmtys. Against Toxics*, 688 F.3d at 994 (remanding without vacating because vacating could lead to air pollution, undermining the goals of the Clean Air Act).

Such extraordinary circumstances do not exist here. First, as to the seriousness of the agency's errors, USDA's Petition Denial violates the plain language and substantive requirements of OFPA, such that USDA cannot just adopt the same interpretation on remand. *Pollinator Stewardship Council*, 806 F.3d at 532 (considering whether "[the agency] could adopt the same rule on remand" in deciding whether to remand without vacatur). As to the second factor, "'[the Court] must balance the [Agency's] errors against the consequences of such a remedy.'" *Cal. Cmtys. Against Toxics*, 688 F.3d at 993; *Ctr. for Envtl. Health*, 2016 WL 3383954, at*11 (same). Here, any alleged economic harm or disruption to the hydroponic industry alone would be insufficient to warrant remand without vacatur. *See Ctr. for Envtl. Health*, 2016 WL 3383954, at *12-13 (in case challenging USDA's National Organic Program Guidance, which created an exception to OFPA to allow the use of contaminated compost, holding that disruption to organic industry alone insufficient to meet defendants' burden overcoming the default vacatur remedy).

Instead, vacatur of USDA's Petition Denial would benefit the environment and protect the integrity of the Organic label by ensuring that organic producers adhere to practices that build fertile soil, and implement agricultural practices that promote ecological balance, and that conserve natural resources and biodiversity. The Court should vacate the Petition Denial, declare the rationale therein unlawful, and order USDA to issue a new response accordingly.

## CONCLUSION

USDA has created an unlawful loophole in organic crop production. The Petition Denial impermissibly exempts hydroponic and other soil-less systems from OFPA's statutory and regulatory requirements, and has resulted in inconsistent organic standards, eroding the very purpose of OFPA. Left alone, the Petition Denial creates a slippery slope towards inconsistent organic standards for other organic products. The Court should grant summary judgment in Plaintiffs' favor.

Respectfully submitted this 16th day of September, 2020.

*/s/ Sylvia Shih-Yau Wu*

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