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

13  
14 CENTER FOR ENVIRONMENTAL HEALTH, )  
CENTER FOR FOOD SAFETY, and BEYOND )  
15 PESTICIDES, )

16 *Plaintiffs,* )

17 v. )

18 TOM VILSACK, SECRETARY OF THE )  
UNITED STATES DEPARTMENT OF )  
19 AGRICULTURE; ANNE ALONZO, )  
ADMINISTRATOR OF THE AGRICULTURAL )  
20 MARKETING SERVICE; MILES MCEVOY, )  
DEPUTY ADMINISTRATOR OF THE )  
21 NATIONAL ORGANIC PROGRAM; UNITED )  
STATES DEPARTMENT OF AGRICULTURE; )  
22 AGRICULTURAL MARKETING SERVICE , )

23 *Defendants.* )  
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Case No.: 15-cv-01690

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

1 **COMPLAINT**

2 Plaintiffs Center for Environmental Health, Center for Food Safety, and Beyond  
3 Pesticides, on behalf of themselves and their members, allege as follows:

4 **NATURE OF ACTION**

5 1. Plaintiffs Center for Environmental Health, Center for Food Safety, and Beyond  
6 Pesticides challenge the failure of Defendants Tom Vilsack, Secretary of the United States  
7 Department of Agriculture, Anne Alonzo, Administrator of the Agricultural Marketing Service,  
8 the Agricultural Marketing Service (AMS), an Administrative Agency of the United States  
9 Department of Agriculture, and the United States Department of Agriculture (collectively  
10 USDA), and Miles McEvoy, Deputy Administrator of the USDA’s National Organic Program  
11 (NOP), to subject the NOP Guidance Document—NOP 5016 (the Contaminated-Compost  
12 decision), issued under the Organic Foods Production Act (OFPA)—to notice and comment  
13 procedures required for administrative rulemaking pursuant to the Administrative Procedure Act  
14 (APA), 5 U.S.C. § 553(b), (c).

15 2. In 2010, USDA improperly issued the Contaminated-Compost decision as a  
16 “guidance” document without providing public notice or comment opportunities. However, the  
17 Contaminated-Compost decision is a legislative rule, and thus should have been subject to APA  
18 notice-and-comment rulemaking requirements.

19 3. OFPA established national organic standards for the benefit of both consumers  
20 and producers, who increasingly seek to avoid foods cultivated with use of synthetic chemicals.  
21 Prior to the Contaminated-Compost decision, OFPA and the NOP prohibited organic producers  
22 from using contaminated compost materials—those containing synthetic pesticides. But the  
23 Contaminated-Compost decision radically changed organic requirements, allowing organic  
24 producers to use compost materials, such as lawn clippings, treated with synthetic pesticides.  
25 The Contaminated-Compost decision thus altered the rights of organic producers and consumers  
26 without having undergone the required rulemaking procedures, vitiating the public’s right to  
27 participate in that process.

1 4. Plaintiffs seek declaratory and injunctive relief for Defendants' violations of the  
2 APA. Specifically, Plaintiffs ask the Court to declare that USDA failed to comply with  
3 administrative rulemaking procedures pursuant to the APA. Plaintiffs also seek an order  
4 requiring USDA to vacate the Contaminated-Compost decision while it undertakes the formal  
5 notice, comment, and rulemaking procedures as required by the APA, 5 U.S.C. § 553, as well as  
6 attorneys' fees and costs pursuant to 28 U.S.C. § 2412(d).

#### 7 **JURISDICTION AND VENUE**

8 5. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal  
9 question), 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief) and 28  
10 U.S.C. § 1346 (United States as Defendant). The challenged agency action is subject to this  
11 Court's review pursuant to the APA. 5 U.S.C. §§ 702, 706.

12 6. Venue properly lies in this Court pursuant to 28 U.S.C. § 1391(e) because  
13 Plaintiff Center for Environmental Health resides in Oakland, California.

#### 14 **PARTIES AND STANDING**

##### 15 ***Plaintiffs***

16 7. Plaintiff Center for Environmental Health (CEH) is located in Oakland, CA.  
17 Founded in 1996, CEH is a nonprofit organization dedicated to protecting the public from  
18 environmental and public health hazards. CEH is committed to environmental justice, promoting  
19 a safe and sustainable food supply, supporting communities in their quest for a safer  
20 environment, and fostering corporate accountability. CEH and its members are being, and will  
21 be, adversely affected by USDA's failure to follow APA rulemaking when making the pesticide  
22 compost decision.

23 8. CEH has long had a dedicated program to protecting organic standards. For  
24 example, in 2011 CEH revealed that dozens of companies had been selling personal care  
25 products labeled as "organic" which were not in fact certified as organic, which eventually lead  
26 to litigation and settlements requiring the misleading labeling be corrected.

27 9. Plaintiff Center for Food Safety (CFS) brings this action on behalf of itself and its  
28 members. CFS is a public interest nonprofit membership organization with offices in San

1 Francisco, CA; Portland, OR; Honolulu, HI; and Washington, D.C. CFS has more than 650,000  
2 members nationwide. CFS and its members are being, and will be, adversely affected by  
3 USDA's actions.

4 10. Since the organization's founding in 1997, CFS's overarching mission has been to  
5 address and ameliorate the adverse impacts of industrial agriculture and food production systems  
6 on public health, animal welfare, and the environment, including the impacts of pesticides. At  
7 the same time, CFS promotes and protects sustainable forms of agriculture, including organic  
8 agriculture.

9 11. Another pillar of CFS's mission is the public's right to know: transparency and  
10 accountability in the food production system, through labeling and other means. A key  
11 component of this programmatic work is the education of the public and stakeholders concerning  
12 organic food production methods and the integrity of the organic label. To this end, CFS  
13 provides scientific, policy, and legal oversight to the USDA organic regulatory program, to  
14 ensure organic integrity.

15 12. In other words, CFS acts as an organic standards watchdog, as it has since the  
16 USDA organic regulations were first adopted in 2000. CFS spearheads the public interest  
17 community's efforts to ensure the integrity of the organic label, protect the organic standard from  
18 being undermined, and promote the organic ethic.

19 13. To achieve its goals, CFS combines multiple tools and strategies, including public  
20 and policymaker education, outreach, campaigning and, when necessary, litigation. CFS closely  
21 monitors and engages with National Organic Program and National Organic Standards Board  
22 (NOSB) activities and decisions. For example, CFS provides legal, scientific, and policy written  
23 and oral testimony at every NOSB meeting, twice a year. With regard to education, CFS  
24 disseminates to government agencies, members of Congress, and the general public a wide array  
25 of informational materials addressing organic standards. These materials include news articles,  
26 policy reports, legal briefs, press releases, action alerts, and fact sheets. CFS also works to  
27 educate and involve the public and engage with governmental officials on issues related to  
28 organic integrity, involving the National Organic Program, National Organic Standards Board,

1 and other issues affecting the organic label and sustainable food systems. Collectively, the  
2 dissemination of this material has made CFS an information clearinghouse for public  
3 involvement and governmental oversight of organic issues.

4 14. USDA's failure to comply with APA rulemaking procedures and the resulting  
5 Contaminated-Compost decision injures CFS members by weakening organic integrity, creating  
6 inconsistent organic production standards, and demonstrating arbitrary and capricious application  
7 of administrative functions.

8 15. Members of CFS and CEH rely on the integrity of organic label in their work and  
9 day-to-day lives, from the food they purchase and feed to their children to those whose  
10 livelihood depends on production of crops and food with strict adherence to the organic  
11 standards. Arbitrary and capricious rulemaking injures these Plaintiffs' members and others by  
12 weakening the integrity of organic.

13 16. Plaintiff Beyond Pesticides is a national nonprofit organization based out of  
14 Washington D.C. with members throughout the United States and the District of Columbia,  
15 including California. Beyond Pesticides and its members are being, and will be, adversely  
16 affected by USDA's failure to comply with APA rulemaking procedures and the resulting  
17 contaminated compost decision injures Beyond Pesticides' members by weakening organic  
18 integrity, creating inconsistent organic production standards, and demonstrating arbitrary and  
19 capricious application of administrative functions. Beyond Pesticides promotes safe air, water,  
20 land, and food, and works to protect public health and the environment by encouraging a  
21 transition away from the use of toxic pesticides.

22 17. With Beyond Pesticides' resources made available to the public on a national  
23 scale, Beyond Pesticides contributes to a significant reduction in unnecessary pesticide use and  
24 environmentally conscious agricultural practices, much of which is achieved through the support  
25 and promotion of the organic program.

26 18. Beyond Pesticides members include organic consumers, farmers, certifiers,  
27 retailers, and processors who aim to expand the organic program and maintain its integrity. It is  
28 the goal of Beyond Pesticides to educate the public on the important health and environmental

1 benefits of organic food production, and generate support for sound ecological-based regulatory  
2 and management systems.

3 19. Many Beyond Pesticides members rely on the integrity of the organic label in  
4 their work and day-to-day lives, from the food they purchase and feed to their children to those  
5 whose livelihood depends on production of crops and food with strict adherence to the organic  
6 standards. Arbitrary and capricious rulemaking injures these Beyond Pesticides' members and  
7 others by weakening the integrity of organic.

8 20. Plaintiff organizations have standing to bring this action on behalf of themselves  
9 and their members. Members of Plaintiff organizations depend on the integrity of the organic  
10 label and suffer injury when it is weakened. The above-described interests of the Plaintiff  
11 organizations and their members have been and will continue to be adversely affected and  
12 irreparably injured by Defendants' decision to issue the Contaminated-Compost decision without  
13 regard to APA rulemaking procedures.

14 ***Defendants***

15 21. Defendant Tom Vilsack (Secretary) is sued in his official capacity as the  
16 Secretary of the United States Department of Agriculture. The Secretary is the official  
17 ultimately responsible for the USDA's activities and policies and for compliance with all laws  
18 applicable to organic food production, including OFPA and the APA.

19 22. Defendant Anne Alonzo is sued in her official capacity as the Administrator of  
20 the Agricultural Marketing Service. She is legally responsible for overseeing and administering  
21 programs of the USDA, including the National Organic Program.

22 23. Defendant Miles McEvoy is the Deputy Administrator of the National Organic  
23 Program. He is legally responsible for overseeing National Organic Program activities,  
24 including the National Organic Standards Board. He is sued in his official capacity.

25 24. Defendant Agricultural Marketing Service is the federal agency responsible for  
26 administering programs that facilitate marketing of U.S. agricultural products, including the  
27 National Organic Program, which is the program responsible for developing national standards  
28 for organically produced agricultural products. The AMS is charged with ensuring that the

1 National Organic Program is administered in compliance with the regulations and laws that  
2 govern it, including OFPA and the APA.

3 25. Defendant United States Department of Agriculture is responsible for overseeing  
4 the actions of the individual agencies and programs within the Department of Agriculture.

### 5 LEGAL BACKGROUND

6 26. The Organic Foods Production Act, 7 U.S.C. § 6501 *et seq.*, established national  
7 standards for organically produced agricultural products, which USDA implements through the  
8 National Organic Program, 7 C.F.R. Part 205.

9 27. To achieve its purpose, OFPA established three baseline standards that an  
10 agricultural product must satisfy to be sold or labeled as organic. 7 U.S.C. § 6504. These  
11 fundamental organic standards remain unchanged. The first requires that organic agricultural  
12 products must “have been produced and handled without the use of synthetic chemicals, except  
13 as otherwise provided in this chapter.” 7 U.S.C. § 6504(1). The second standard prohibits  
14 organic production on land where synthetic chemicals have been applied in the previous three  
15 years, and the third requires compliance with an organic production plan. 7 U.S.C. § 6504  
16 (2) - (3).

17 28. The first of the three organic standards—the “no synthetics in organic” rule—  
18 allows for limited exceptions as provided for in OFPA. Namely, under OFPA, any organic  
19 agricultural product must be “produced and handled without the use of synthetic chemicals,  
20 except as otherwise provided in [the National List of Allowed and Prohibited Substances  
21 (National List)].” 7 U.S.C. § 6504(1). The National List identifies a small number of synthetic  
22 chemicals approved for specific, limited uses in organic agriculture, *id.* § 6517(b); under OFPA,  
23 any synthetic chemical not on the National List is prohibited. Only if a substance undergoes  
24 review and is then approved for addition to the National List, can it be used in organic  
25 production—despite the fact that it is inherently not organic. *Id.*

26 29. OFPA requires that substances undergo rigorous review before inclusion on the  
27 National List. The National List “shall contain an itemization, by specific use or application, of  
28 each synthetic substance permitted [for use in organic production] . . .” 7 U.S.C. § 6517(b), and

1 may provide for the use of synthetic substances and prohibited natural substances only if the  
2 Secretary determines the substance would not be harmful to human health or the environment,  
3 the substance is necessary because of the unavailability of wholly natural substitute products, and  
4 the substance is consistent with organic farming and handling. 7 U.S.C. § 6517(c)(1)(A)(i)-(iii).  
5 The National List is codified in the NOP regulations at 7 C.F.R. §§ 205.601 and 205.602, and  
6 can only be amended after notice and comment. 7 U.S.C. § 6517(d)(4).

7 30. NOP regulations expressly prohibit fertilizers and compost from containing any  
8 synthetic substances not included on the National List, explaining that a producer may not use  
9 “[a]ny fertilizer or composted plant and animal material that contains a synthetic substance not  
10 included on the National List of synthetic substances allowed for use in organic crop production .  
11 . . . .” 7 C.F.R. § 205.203(e). The NOP further explained, “[t]he producer’s first responsibility is  
12 to identify the source of the feedstocks used in the composting system. This requirement ensures  
13 that only allowed plant and animal materials are included in the composting process, [and] that  
14 they are not contaminated with prohibited materials . . . .” National Organic Program, 65 Fed.  
15 Reg. 80,548, 80,565 (Dec. 21 2000) (to be codified at 7 C.F.R. pt. 205).

16 31. The only synthetic substance allowed under the National List for compost  
17 feedstocks in organic production is “[n]ewspapers or other recycled paper, without glossy or  
18 colored inks.” 7 C.F.R. § 205.601(c). Nevertheless, recognizing that trace amounts of synthetic  
19 chemicals—a legacy of industrial agriculture—may already be present on farms, OFPA and the  
20 NOP regulations make an exception for the presence of “unavoidable residual environmental  
21 contamination” (UREC) in organic products. *See* 7 U.S.C. § 6518(k)(5). The UREC exemption  
22 was intended to account for truly unavoidable residual substances, but not “permissible levels of  
23 contamination where it is avoidable.” National Organic Program, 65 Fed. Reg. 80548, 80629  
24 (Dec. 21, 2000) (to be codified at 7 C.F.R. pt. 205).

25 32. “Unavoidable residual environmental contamination” is defined as “[b]ackground  
26 levels of naturally occurring or synthetic chemicals that are present in the soil or present in  
27 organically produced *agricultural products* that are below established tolerances.” 7 C.F.R.  
28 § 205.2 (emphasis added). OFPA’s UREC exception thus applies to “agricultural products,”

1 such as vegetables, but does not apply to “agricultural inputs,” such as substances or materials  
2 used for organic compost. *Id.*

3 33. Specifically, “agricultural product” is defined as “any agricultural commodity or  
4 product, whether raw or processed, including any commodity or product derived from livestock,  
5 that is marketed in the United States for human or livestock consumption.” 7 C.F.R. § 205.2.  
6 “Agricultural input,” on the other hand, is a different thing altogether: “[a]ll substances or  
7 materials used in the production or handling of organic agricultural products.” *Id.*

8 34. “Agricultural input” includes compost that comes from green waste, because it is  
9 used to provide nutrients to the soil, which will then produce fruit and vegetables—the product  
10 for human or livestock consumption.

11 35. The NOP Rule demonstrates that UREC was intended only for products coming  
12 out of farms, where the farmers could not control the amount of contamination already in the soil  
13 and the air. NOP regulations designate a separate testing procedure for agricultural inputs than  
14 for agricultural products. For inputs, the administrator has the discretion to perform pre-harvest  
15 and post-harvest testing if she suspects contamination. 7 C.F.R. §205.670(b). UREC testing, on  
16 the other hand, is a separate procedure used for testing agricultural products according to the  
17 NOP 2000 final rule (specifically, residue testing). National Organic Program, 65 Fed. Reg.  
18 80548 (Dec. 21, 2000) (to be codified at 7 C.F.R. pt. 205).

19 36. OFPA’s legislative history also demonstrates the intended application of UREC.  
20 The Senate Report on OFPA states, “[t]he Committee does not intend to prohibit minimal  
21 residue contamination that does not result from practices used by the organic farming operation.  
22 For example, some older pesticides may remain in the soil for years and show up in minute  
23 quantities of little concern to human health and the environment.” S. Rep. No. 101-357, at 4954  
24 (1990). The legislative history provides, as an example, that “[o]n occasion, organic farmers,  
25 although following the strict standards in this bill, may produce products with minimum residues  
26 due to inadvertent environmental contamination such as drift from a neighboring farm.” *Id.* The  
27 legislative history demonstrates that the UREC exemption was intended to extend to involuntary  
28 sources of contamination that already existed on the farm or came from immediately adjacent

1 non-organic operations, it is not intended to cover voluntary acts of the farmer to bring in outside  
2 sources of material as compost.

### 3 *Administrative Procedure Act*

4 37. Under the Administrative Procedure Act, an agency must publish notice of a  
5 proposed rule in the Federal Register and provide comment opportunities to the public before  
6 adopting a rule. 5 U.S.C. § 553(b), (c).

7 38. The APA defines “rule” as “the whole or a part of an agency statement of general  
8 or particular applicability and future effect designed to implement, interpret, or prescribe law or  
9 policy . . . .” *Id.* § 551(4).

10 39. The APA grants a right of judicial review to “[a] person suffering legal wrong  
11 because of agency action, or adversely affected or aggrieved by agency action . . . .” *Id.* § 702.

12 40. A court must “hold unlawful and set aside agency action . . . found to be . . .  
13 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . [or]  
14 *without observance of procedure required by law . . . .*” *Id.* § 706(2) (emphasis added).

15 41. The definition of “agency action” includes a “failure to act.” *Id.* § 551(13).  
16 Under the APA, a reviewing court “shall compel agency action unlawfully withheld or  
17 unreasonably delayed . . . .” *Id.* § 706(1).

18 42. An agency must follow the procedures of the APA for a substantive amendment  
19 of a prior regulation and cannot avoid the procedures of the APA by taking action and calling  
20 that action a mere guidance that interprets the existing regulation.

### 21 **FACTUAL BACKGROUND**

#### 22 *The Contaminated-Compost decision*

23 43. In 2009, inspectors from the California Department of Food and Agriculture  
24 (CDFA) found detectable levels of bifenthrin—a popular and persistent residential insecticide—  
25 in three compost products listed for use in organic agriculture. CDFA subsequently banned all  
26 three products.

1           44.     In response, USDA promulgated NOP 5016 – Allowance of Green Waste in  
2 Organic Production Systems (the Contaminated-Compost decision)<sup>1</sup> in 2011, titling it a  
3 “guidance” document and declining to provide notice-and-comment opportunities to the public.  
4 Attached as Exhibit A hereto.

5           45.     Although the Contaminated-Compost decision acknowledged that NOP  
6 regulations prohibit organic producers from using any “composted plant and animal materials  
7 that contain a synthetic substance not included on the National List,” *id.* at 2 (quoting 7 C.F.R.  
8 § 205.203(e)), it nevertheless contravened that legal requirement, purporting to establish that  
9 organic producers may in fact use these contaminated plant and animal materials in compost  
10 under certain circumstances.

11           46.     According to the Contaminated-Compost decision, the “green waste” organic  
12 producers purchase as foundation for their compost “can be composed of garden or park waste,  
13 such as grass or flower cuttings and hedge trimmings, as well as domestic and commercial food  
14 waste.” *Id.* The Contaminated-Compost decision recognized that “[g]reen waste and green waste  
15 compost . . . may contain pesticide residues,” but nevertheless stated, “[p]rovided that the green  
16 waste and green waste compost (i) is not subject to any direct application or use of prohibited  
17 substances (i.e. synthetic pesticides) during the composting process, and (ii) that any residual  
18 pesticide levels do not contribute to the contamination of crops, soil or water, the compost is  
19 acceptable for use in organic production.” *Id.*

20           47.     That is, for the first time, the Contaminated-Compost decision allowed organic  
21 producers to use contaminated materials—such as commercial food waste and lawn trimmings  
22 treated with synthetic pesticides—as compost for their crops, as long as the producers do not  
23 either directly apply synthetic pesticides or “contribute to the contamination of crops, soil or  
24 water . . . .” *Id.* The Contaminated-Compost decision did not define or explain how it would  
25 measure contamination of crops, soil, or water.

26  
27  
28 <sup>1</sup> U.S. Dep’t of Ag., Ag. Mktg. Serv., Nat’l Organic Program, NOP 5016 – Allowance of Green  
Waste in Organic Production Systems (July 22, 2011), attached hereto as Exhibit A and  
*available at* <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5087122>.

1           48.     The Contaminated-Compost decision also did not explain how producers could  
2 reconcile this new rule with the contrary legal requirements of OFPA and the NOP regulations.  
3 However, the Contaminated-Compost decision did vaguely point to OFPA’s exception for  
4 “unavoidable residual environmental contamination,” *id.*, which had never previously been  
5 applied to organic compost.

6           49.     As written, the Contaminated-Compost decision could apply to any avoidable  
7 pesticide so long as the residue does not “contribute to contamination.” It is unclear from OFPA  
8 or from the NOP regulations exactly what constitutes “contamination.” Thus, in addition to  
9 applying UREC to compost for the first time, the Contaminated-Compost decision also  
10 effectively reads “unavoidable” out of the UREC standard, by failing to identify what pesticide  
11 residues it purports to allow or in what situations a pesticide residue would be considered  
12 “unavoidable.” The Contaminated-Compost decision conflicts with prior NOP regulations that  
13 require that the producer must not use “[a]ny fertilizer or composted plant and animal material  
14 that contains a synthetic substance not included on the National List of synthetic substances  
15 allowed for use in organic crop production.” 7 C.F.R. §205.203(e)(1).

16           50.     The Contaminated-Compost decision uses bifenthrin as an example of residual  
17 pesticide. Bifenthrin was the specific insecticide banned by California agricultural officials in  
18 2009, prior to NOP’s Contaminated-Compost decision.

19           51.     Bifenthrin is not an unavoidable environmental contaminant that exists on the  
20 land where crops are grown; rather, it is a common household insecticide that is widely used  
21 today and ends up in compost, which pursuant to the Contaminated-Compost decision is then  
22 imported into and used in organic farming operations.

23           52.     Like most synthetic pesticides, bifenthrin is not on the National List. *See* 7  
24 U.S.C. §205.601.

25           53.     In order to avoid contribution to the contamination of crops or soil, green waste  
26 and green waste compost must not contain synthetic materials not on the National List.

27  
28

1 54. The Contaminated-Compost decision changed the legal status of bifenthrin and  
2 other pesticides that are prohibited for use in organic production but are now being allowed in  
3 green waste used in organic production.

4 55. The Contaminated-Compost decision is binding on private parties and it affects  
5 the substantive rights of organic farmers, certification agents, and consumers.

6 56. Prior to the Contaminated-Compost decision, the National Organic Program  
7 banned producers from using contaminated compost materials in organic agriculture. But the  
8 Contaminated-Compost decision renounced that ban, tolerating use of contaminated compost  
9 materials and thus undermining organic standards.

10 57. Organic certification depends on whether there are any prohibited substances in  
11 the soil and in production. 7 U.S.C § 205.200.

12 58. Now after the issuance of the Contaminated-Compost decision, certifying  
13 agencies must alter their procedures to allow for pesticide presence. In order to be certified,  
14 farmers must meet certification criteria and organic farmers not in compliance may lose their  
15 certification. 7 U.S.C §205.405(a); 205.510(e).

16 59. The Contaminated-Compost decision allows farmers to relax controls that  
17 prohibit pesticides in their operations and utilize contaminated compost without losing or being  
18 denied organic certification.

19 ***Harm to Plaintiffs***

20 60. Plaintiff organizations and their members are injured by the challenged action,  
21 because Defendants negated their procedural rights, as organic stakeholders, to meaningfully  
22 participate in an important rulemaking process. The Contaminated-Compost decision is labeled  
23 a “guidance” document, but it is actually a legislative rule. USDA never subjected the  
24 Contaminated-Compost decision to formal notice and comment rulemaking and therefore,  
25 USDA failed to ensure that its regulation is consistent with OFPA and the standards set forth for  
26 approving the use of synthetic substances. *See* 7 U.S.C. § 6517(c)(1)(A).

27 61. Plaintiffs’ members depend on the integrity of organic labeling to choose the food  
28 they want to eat and want to feed their families. However, because of the

1 Contaminated-Compost decision, organic consumers are being misled, and can no longer rely on  
2 the organic label to ensure the food they purchase is produced without synthetic pesticides in  
3 agricultural inputs.

4 62. Plaintiffs' members buy organic foods because they know a fundamental tenet of  
5 the Organic standard is the general prohibition on the use of synthetic pesticides. Plaintiffs'  
6 members know that pesticides are harmful to public health and the environment, and express  
7 their values in the marketplace. In so doing, consumers, including Plaintiffs' members, pay a  
8 premium for organic foods in large part to avoid synthetic pesticides, such as those the  
9 Contaminated-Compost decision now allows in organic compost for the first time. Plaintiffs are  
10 injured by Defendants' allowance of such substances in "organic" compost, without engaging in  
11 notice and comment rulemaking.

12 63. Plaintiffs' members also include organic farmers who believe in the integrity of  
13 the organic standard and label and fully comply with it in their production practices. These  
14 members are also injured by Defendants' creation of a pesticide-compost loophole in the  
15 challenged rulemaking action, which negated their ability to participate through notice and  
16 comment.

### 17 CAUSE OF ACTION

#### 18 **VIOLATION OF THE APA**

19 64. Each and every of the foregoing allegations is re-alleged in this paragraph.

20 65. The APA requires agencies to provide notice-and-comment opportunities before  
21 promulgating rules. 5 U.S.C. § 553(b), (c). A "rule" is "the whole or a part of an agency  
22 statement of general or particular applicability and future effect designed to implement, interpret,  
23 or prescribe law or policy." *Id.* § 551(4).

24 66. Regardless of USDA's decision to label the Contaminated-Compost decision as  
25 "guidance" that interprets a prior rule, the Contaminated-Compost decision is subject to notice  
26 and comment because it is a legislative rule that alters legal rights, allowing contaminated  
27 compost materials that were previously not allowed.

1           67.     The Contaminated-Compost decision conflicts with prior NOP regulations,  
2 allowing for amounts of bifenthrin and other pesticides to be present in organic compost and to  
3 be used for organic production.

4           68.     As a legislative rule, the Contaminated-Compost decision was subject to APA  
5 notice-and-comment rulemaking requirements. However, contrary to the APA, USDA did not  
6 provide notice and comment opportunities to the public before promulgating the  
7 Contaminated-Compost decision.

8           69.     Through the adoption and application of the Contaminated-Compost decision, the  
9 NOP altered the established rights of organic farmers, certifying agents, and consumers.

10          70.     The Contaminated-Compost decision is thus a concrete alteration of citizens'  
11 rights with binding force of law.

12          71.     The Contaminated-Compost decision has the force and effect of a legislative rule,  
13 because it acts to amend an existing legislative rule.

14          72.     Defendants did not subject the Contaminated-Compost decision to notice and  
15 comment, but instead issued it as a "guidance" document.

16          73.     The APA requires that before an agency adopts a legislative rule, it must publish a  
17 notice in the Federal Register of the proposed rule and provide interested persons the opportunity  
18 to comment. 5 U.S.C. § 553(b), (c).

19          74.     USDA's failure to provide for notice and comment in adopting the  
20 Contaminated-Compost decision has deprived the Plaintiffs of their right to comment on and  
21 inform the outcome of rulemaking pursuant to the OFPA.

22          75.     The promulgation of the Contaminated-Compost decision is a final agency action  
23 that can be reviewed by this Court.

24          76.     USDA's failure to follow notice and comment rulemaking procedures constitutes  
25 unlawful agency action without observance of required procedures under 5 U.S.C. § 706(2)(A),  
26 (D). Additionally, USDA's failure to engage in formal rulemaking constitutes a "failure to act"  
27 pursuant to 5 U.S.C. § 551(13); 5 U.S.C. § 706(1).

28

**REQUEST FOR RELIEF**

Plaintiffs respectfully request that the Court:

A. Declare that the Defendants' actions as set forth in this complaint are arbitrary, capricious, an abuse of their discretion, are not in accordance with law and are without observance of procedures required by law and therefore must be set aside;

B. Enjoin Defendants from authorizing the use of compost with prohibited substances pursuant to the Contaminated-Compost decision in the production of organic crops;

C. Vacate the Contaminated-Compost decision and require the USDA to follow the regulations that are in place;

D. Award Plaintiffs their reasonable attorneys' fees, costs and expenses associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 or other authority; and

E. Grant Plaintiffs such additional and further relief, as the Court deems just and equitable.

Respectfully submitted this 14th day of April, 2015.

s/ Paige M. Tomaselli

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