



CORNUCOPIA
INSTITUTE

Secretary Tom Vilsack
Room 200-A Whitten Building
U.S. Department of Agriculture
Washington, DC 20250

August 18, 2015

Re: Appointment of Ashley Swaffar to National Organic Standards Board

Dear Secretary Vilsack:

This letter constitutes an administrative complaint pursuant to the United States Department of Agriculture’s (“USDA”) National Organic Program Complaint Handling Procedure. The Procedure allows that any person may file a complaint if he or she believes a violation of the Organic Foods Production Act (“OFPA”) or its implementing regulations has occurred or is about to occur. *See also* 7 C.F.R. § 1.133(b). Cornucopia believes that the Secretary violated 7 U.S.C. § 6518(b)(1) when he appointed Ashley Swaffar to a National Organic Standards Board (“NOSB”) seat that OFPA reserves for “individuals who own or operate an organic farming operation.” Cornucopia requests that the Secretary remove Ms. Swaffar from the NOSB and appoint an individual who actually owns or operates an organic farming operation, as OFPA requires.

A. USDA’s Appointment of Ashley Swaffar to the NOSB as “an individual who owns or operates an organic farming operation” violates OFPA

Congress enacted OFPA to establish consistent national standards for the marketing of organically produced agricultural products. *See* 7 U.S.C. § 6501 (Appendix 1). The NOSB assists in development of standards for substances to be used in organic production and advises the Secretary of Agriculture¹ on other aspects of implementing OFPA. *Id.* OFPA directs the Secretary to appoint members to the NOSB for a term of five years, and provides categories of Secretary appointments. *Id.* §§ 6518 (b)-(d). Along with other positions, the Act reserves four seats for “individuals who own or operate an organic farming operation.” *Id.* § 6518(b)(1) This complaint refers to such individuals as “(b)(1) appointees”.

Ashley Swaffar submitted her application to the NOSB in May 2014, and was appointed in September 2014, with a term beginning in January 2015.² When Ms. Swaffar applied to the

¹ “Secretary of Agriculture” and “USDA” are used interchangeably throughout this Complaint.

² Even though the USDA’s application form does not require applicants to indicate which appointment they seek, Ms. Swaffar’s application did note that she was seeking the “farmer position.”

NOSB, she was the Director of Special Projects at the Arkansas Egg Company (“AEC”). AEC is an egg production company that became certified organic in 2009. On the resume she submitted in her NOSB application, Ms. Swaffar described her position in the company as “responsible for financial planning, developing new products and customers, industry relations, growth planning, government relations and compliance, animal welfare program development and compliance, liaison between contract growers and company and organic system plan development and compliance.” Prior to her current Special Projects role, she was the “Operations Manager” for AEC, “responsible for production, processing, and quality assurance departments and growth plans” for AEC. Her resume also noted that she was the President of the Organic Egg Farmers of America (“OEFA”). *See* Application of Ashley Swaffar to National Organic Standards Board (May 5, 2014) (Appendix 2). OEFA appears to act as a trade association with their membership almost exclusively comprised of vertically-integrated egg production companies and egg marketers rather than working farmers.³

Because Congress clearly stated in OFPA that (b)(1) appointees must own or operate an organic farming operation, and because Ms. Swaffar failed to show how she met that requirement in the NOSB application, Ms. Swaffar’s appointment violates OFPA. To conform to OFPA’s statutory requirements, the Secretary should remove Ms. Swaffar from the NOSB and appoint a qualified individual.

1. OFPA requires NOSB (b)(1) appointees to own or operate an organic farming operation

The text of OFPA makes clear that (b)(1) appointees are farmers. Oxford’s English Dictionary defines “own” as “[t]o have or hold as one’s own; to have belonging to one, be the proprietor of, possess.” *Own*, Oxford English Dictionary, <http://bit.ly/1ePIoTo> (last visited Apr. 28, 2015). It defines “operate” in a number of ways; the one which reads most naturally in the context of the OFPA statutory provision is “To manage, to direct the operation of (a business, enterprise, etc.)” *Operate*, Oxford English Dictionary, <http://bit.ly/1FurnEL> (last visited Apr. 28, 2015). The dictionary definitions of these terms indicate that Congress meant for NOSB seats to go to individuals who “own or operate” a farm, *i.e.*, farmers or farm owners. Additionally, the USDA itself has repeatedly used the word “farmer” to describe (b)(1) appointees. *See National Organic Standards Board (NOSB)*, USDA, <http://www.ams.usda.gov/rules-regulations/organic/nosb> (last visited Aug. 4, 2015); National Organic Standards Board (NOSB) Call for Nominations, 80 Fed. Reg. 19,059 (Apr. 9, 2015); USDA, National Organic Standards Board New Member Guide 6 (2013) (collectively, Appendix 3).

The legislative history supports the plain meaning of the statute. One instructive Senate debate concerned the composition of the NOSB. In discussing “industry” representation, the Senate Report notes that “the Committee restructured the Board so that the *farmers* and handlers...receive six representatives” and that “the Committee recommends that the Secretary appoint *farmers* who have operated organic farms under existing state or private standards. Such

³ Cornucopia obtained Ms. Swaffar’s application materials pursuant to a Freedom of Information Act (“FOIA”) request. Cornucopia believes that, in the interest of agency transparency, the USDA should make the applications of all NOSB applicants publicly available without requiring the public to submit a FOIA request for them.

farmers will have the insight and knowledge necessary to guide the Secretary in implementing the title.” S.Rep. No. 357, 101st Cong., 2d Sess., at 296-97 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4656, 4950-51 (emphases added). The Senate’s use of the word “farmer” in this discussion about the NOSB’s composition supports the reading that business or technical specialists who represent a corporate employer in contracting with farms, like Ms. Swaffar, are not congressionally envisioned (b)(1) appointees.

Congress knows how to make “expertise” in a certain subject the sole eligibility criterion for an NOSB seat, without requiring the “expert” to be employed in a specific position. Indeed, Congress expressly created several NOSB positions to include “individuals with expertise” in “areas of environmental protection and resource conservation” and “the fields of toxicology, ecology, or biochemistry.” 7 U.S.C. § 6518(b)(4), (6). Here, in contrast, Congress sought individuals with more than just expertise—it required that (b)(1) appointees be actual owners or operators of farming operations.

2. Ms. Swaffar’s application provides no basis from which the USDA could have concluded that she “owns or operates an organic farming operation.”

i. Ms. Swaffar’s position(s) at the time of her NOSB appointment do not qualify her for a (b)(1) appointment.

Ms. Swaffar’s application provided no indication that she “own[ed] or operate[d]” an organic farming operation at the time of her appointment. At the time of her appointment, Ms. Swaffar was “Director of Special Projects” at AEC. On her NOSB application resume, she listed “financial planning, developing new products and customers, industry relations, growth planning, government relations and compliance” first on her list of responsibilities in this role. None of these duties are specific to the farming industry or relate to the production of food; this list could easily appear on the resume of an individual working in a finance or software industry.

Ms. Swaffar does later mention farming in the description of her AEC position, noting that she is a “liaison between contract growers and company” and that she is “[r]esponsible for compliance oversight for 48 family and company owned farms.” However, this only serves to underscore the fact that Ms. Swaffar herself is not a farmer; she is merely *a liaison* for farmers who oversees some type of farm compliance.⁴ If working with farmers and providing them with compliance information were sufficient to qualify an individual as a farmer, then corporate counsel and compliance officers would be eligible for appointment to NOSB seats reserved for “individuals who own or operate an organic farming operation.” This would directly conflict with both the text of OFPA and Congress’s intent for the NOSB.

Similarly, Ms. Swaffar’s affiliation with the Organic Egg Farmers of America does not qualify her as an “individual who owns or operates and organic farming operation.” Ms. Swaffar identified herself in her NOSB application as the President of the Organic Egg Farmers of America. However, this does not establish Ms. Swaffar as a farmer because the group does not limit its membership to farmers. On the contrary, the organization was registered in Wisconsin by a management staff member of Organic Valley, a cooperative and almost \$1 billion per year

⁴ Ms. Swaffar’s application does not specify what type of compliance oversight she is responsible for, or whether farm compliance with the National Organic Program is within the scope of her responsibility.

enterprise that purchases eggs from its farmer-members. OEFA members include privately-held, vertically-integrated egg producers and marketers while others exclusively contract for production (owning and operating no organic farms). Many are engaged in the production and/or marketing of conventional eggs as well as organic.

OEFA also offers memberships to “marketers,” “associates,” and “certifying agents” in addition to farmers. *See OEFA Membership Selection and Purchase*, Organic Egg Farmers of Am., <http://www.organiceggfarmers.org/#!/membership/c184b> (last visited May 26, 2015) (Appendix 4). Ms. Swaffar’s application provided no indication that her membership was a farmer membership.

ii. *Ms. Swaffar’s work experience prior to her NOSB application does not qualify her for a (b)(1) appointment.*

Ms. Swaffar’s prior work experience does not qualify her for a (b)(1) appointment. In contrast to her position at the time of appointment, prior to her “Director of Special Projects” position, Ms. Swaffar was “Operations Manager” at AEC, where she oversaw the production, processing, and quality assurance departments. “Production” and “processing” fit with the general concept of operating a farm, as opposed to “financial planning” and “product development.” Ms. Swaffar’s earlier position seems much more in line with the plain meaning of “operator” of an organic farming operation. But the present tense of OFPA (“own or operate”) indicates that an eligible position in the past does not satisfy appointment criteria, if one’s current position is ineligible. Thus, her appointment was inconsistent with the meaning of OFPA, and the Secretary should remove her from the NOSB.

iii. *The Secretary cannot justify Ms. Swaffar’s appointment based upon information that was not before him at the time of appointment.*

Any farming activity which Ms. Swaffar did not include in her NOSB application cannot be the basis for the Secretary’s appointment decisions. In the entirety of Ms. Swaffar’s NOSB application, she makes no reference to farming outside of her position at AEC and OEFA--she only notes her degree in Poultry Science and involvement in 4-H during her youth. The USDA has not indicated that Ms. Swaffar notified them that she owned a farm at any point during the appointment process. Nor did the USDA mention Ms. Swaffar’s operation of a farm in the press release issued for Ms. Swaffar’s appointment. *See Arkansas Egg Company’s Swaffar named to organic standards board*, Watt Ag Net, (Sept. 26, 2014), http://www.wattagnet.com/Arkansas_ does not refer to Ms. Swaffar’s personal farm, USDA cannot use it to justify Ms. Swaffar’s (b)(1) appointment.

3. Ms. Swaffar’s appointment creates an imbalance on the NOSB.

Congress carefully balanced the NOSB when drafting OFPA, creating discrete limits on how many NOSB seats were available for each type of appointment. *Compare* 7 U.S.C. § 6518(b) *with* 7 U.S.C. § 2327 (“Membership of the [Plant Variety Protection] Board shall include farmer representation and shall be drawn approximately equally from the private or seed industry sector and from the sector of government or the public.”) In doing so, it provided for (b)(1) appointees to have more seats than any other category. Given that one of the NOSB’s primary responsibilities is to advise the Secretary on what synthetic materials organic farmers

should be able to use in food production, it is sensible for Congress to provide farmers with greater representation than other groups.

By appointing Ms. Swaffar, an individual who did not own or operate an organic farming operation when she was appointed, the USDA has upset this balance. Farmers no longer make up the largest voting group on the NOSB. While non-farming employees of corporate farming operations, like Ms. Swaffar, may have an understanding of how to assist farmers in complying with organic farming regulations, they lack a connection to farming practices. Those whose livelihood depends upon successfully raising organic crops and livestock have both the knowledge of what materials work best on the farm and the incentive to protect the value of the organic label. The USDA should restore the balance that OFPA requires by removing Ms. Swaffar and appointing a qualified individual farmer in her place.

Ashley Swaffar does not satisfy the statutory requirements for a (b)(1) appointment to the NOSB. Her application provided no basis from which the Secretary could have determined that she “owns or operates an organic farming operation.” Therefore, the Secretary violated OFPA when he appointed her. Accordingly, Cornucopia requests that the USDA recall her appointment and appoint a qualified individual to restore the congressionally intended balance to the NOSB.

Sincerely,

A handwritten signature in cursive script that reads "Will Fantle".

Will Fantle, Codirector