

1 PAIGE M. TOMASELLI (State Bar No. 237737)  
SYLVIA SHIH-YAU WU (State Bar No. 273549)  
2 Center for Food Safety  
303 Sacramento Street, 2nd Floor  
3 San Francisco, CA 94111  
Phone: (415) 826-2770  
4 Fax: (415) 826-0507  
Emails: ptomaselli@centerforfoodsafety.org  
5 swu@centerforfoodsafety.org

6 *Counsel for Plaintiffs*

7  
8 **THE UNITED STATES DISTRICT COURT**  
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
10

11 CENTER FOR FOOD SAFETY; ) Case No. 3:15-cv-1590  
12 BEYOND PESTICIDES; EQUAL )  
13 EXCHANGE; FOOD & WATER WATCH; )  
14 LA MONTANITA CO-OP; ORGANIC ) **COMPLAINT FOR DECLARATORY**  
15 SEED GROWERS AND TRADE ) **AND INJUNCTIVE RELIEF**  
16 ASSOCIATION; THE CORNUCOPIA )  
17 INSTITUTE; NORTHEAST ORGANIC )  
18 DAIRY PRODUCERS ALLIANCE; PCC )  
19 NATURAL MARKETS; )  
20 GREENSWARD/NEW NATIVES LLC; )  
21 FREY VINEYARDS, LTD.; ORGANIC )  
22 CONSUMERS ASSOCIATION; MAINE )  
23 ORGANIC FARMERS AND )  
24 GARDENERS ASSOCIATION; and OHIO )  
25 ECOLOGICAL FOOD AND FARM )  
26 ASSOCIATION, )

27 *Plaintiffs,* )

28 v. )

29 TOM VILSACK, SECRETARY OF THE )  
30 UNITED STATES DEPARTMENT OF )  
31 AGRICULTURE; ANNE ALONZO, )  
32 ADMINISTRATOR OF THE )  
33 AGRICULTURAL MARKETING )  
34 SERVICE; and MILES MCEVOY, )  
35 DEPUTY ADMINISTRATOR OF THE )  
36 NATIONAL ORGANIC PROGRAM, )

37 *Defendants.* )

1 **COMPLAINT**

2 Plaintiffs Center for Food Safety, Beyond Pesticides, Equal Exchange, Food & Water  
3 Watch, La Montanita Co-op, Organic Seed Growers and Trade Association, The Cornucopia  
4 Institute, Northeast Organic Dairy Producers Alliance, PCC Natural Markets, Greensward/New  
5 Natives LLC, Frey Vineyards, Ltd., Organic Consumers Association, Maine Organic Farmers  
6 and Gardeners Association, and Ohio Ecological Food and Farm Association, on behalf of  
7 themselves and their members, allege as follows:

8 **NATURE OF ACTION**

9 1. This is a civil action for declaratory and injunctive relief. Plaintiffs seek  
10 declaration that Defendants violated federal laws, as set forth in the causes of action below, in  
11 developing and promulgating the September 16, 2013, Federal Register notice, *National Organic*  
12 *Program–Sunset Process* (Sunset Notice), without regard to rulemaking procedures under the  
13 Administrative Procedure Act (APA) and standards of the Organic Foods Production Act  
14 (OFPA).

15 2. The United States Department of Agriculture (USDA), under Defendants  
16 Secretary Vilsack, Administrator Alonzo, and Deputy Administrator McEvoy’s supervision and  
17 control, issued a substantive rule governing the standards and procedures of OFPA’s National  
18 List material review and renewal process, known as Sunset Review. By law, each material on the  
19 National List, be it an exempted synthetic or prohibited natural, must be considered invalid after  
20 five years unless the National Organic Standards Board reviews the material utilizing the  
21 procedures proscribed by OFPA and the Secretary of the USDA renews the placement of the  
22 material on the National List. Because USDA did not promulgate the Sunset Notice through the  
23 proper advanced notice and public comment procedures mandated under section 553 of the APA  
24 and required under OFPA, the Sunset Notice threatens the integrity of the National Organic  
25 Program, constitutes arbitrary and capricious actions on the part of the Agency, and must be  
26 corrected.

27 3. This suit specifically alleges that the Sunset Notice is a substantive rule that  
28 injures organic consumers, farmers, and producers, and impacts the rights of interested persons

1 by weakening the integrity of the National Organic Program and degrading the quality of  
2 organically labeled food. USDA must provide both advanced publication of the proposed rule  
3 and opportunity for public comment, as required under sections 553(b) and 553(c) of the APA,  
4 and have failed to do so. Defendants' decision to promulgate the Sunset Notice without  
5 providing advanced notice of the proposed rule and opportunity for public comment violates the  
6 APA.

7 4. Defendants' violation of the rulemaking requirements under the APA also violates  
8 OFPA, by failing to implement a primary purpose of the organic law: consistent organic  
9 standards that abide by the transparency and public involvement requirements of OFPA.

10 5. Plaintiffs seek a declaration that through the promulgation of the Sunset Notice  
11 without advanced publication in the Federal Register and opportunity for public comment,  
12 Defendants violated the APA and OFPA. Plaintiffs seek invalidation of the September 16, 2013,  
13 Sunset Notice and reinstatement of the previous sunset rules and procedures pending APA notice  
14 and comment review. Finally, Plaintiffs seek attorneys' fees and costs pursuant to 28 U.S.C.  
15 § 2412(d).

#### 16 **JURISDICTION AND VENUE**

17 6. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal  
18 question), 28 U.S.C. § 2201 (declaratory judgment), and 5 U.S.C. § 702 (APA).

19 7. Venue in this Court is proper under 28 U.S.C. § 1391(e) because no real property  
20 is involved and because one or more Plaintiffs resides in this judicial district.

#### 21 **PARTIES AND STANDING**

##### 22 ***Plaintiffs***

23 8. Plaintiff Center for Food Safety (CFS) is a national nonprofit organization with  
24 more than 650,000 members nationwide. CFS has offices in Washington, D.C., San Francisco,  
25 CA, Portland, OR, and Honolulu, Hawai'i, with members in nearly every state, including organic  
26 farmers, producers, retailers, consumers, and certifiers. CFS and its members are being, and will  
27 be, adversely affected by USDA's actions.  
28

1           9.       CFS seeks to protect human health and the environment by advocating for  
2 consumers' right to know how food is produced and what is contained within it. A key part of  
3 this advocacy effort is the education of the public concerning organic food production methods  
4 and the integrity of the organic label. CFS also provides public oversight to the organic  
5 regulatory program to ensure organic integrity.

6           10.      To achieve its goals, CFS disseminates to government agencies, members of  
7 Congress, and the general public a wide array of educational and informational materials  
8 addressing organic standards and food supply issues. These materials include, but are not limited  
9 to, reprints of news articles, policy reports, legal briefs, press releases, action alerts, and fact  
10 sheets. CFS also sends out action alerts to its True Food Network. These action alerts generate  
11 public involvement, education, and engagement with governmental officials on issues related to  
12 the National Organic Program, National Organic Standards Board, and other issues affecting the  
13 organic label and the sustainable food system it advances. Collectively, the dissemination of this  
14 material has made CFS an information clearinghouse for public involvement and governmental  
15 oversight of the organic label.

16           11.      When necessary, CFS also engages in public interest litigation challenging  
17 agricultural practices that harm human health and the environment—such as pesticide use and  
18 genetically engineered crops—or impact farmers, its members, and the public interest. Many of  
19 CFS's past lawsuits involved organic issues and agricultural interests. For example, CFS filed an  
20 amicus brief in *Harvey v. Veneman*, 396 F.3d 28 (1st Cir. 2005), litigation that challenged  
21 provisions of the National Organic Program Final Rule as inconsistent with OFPA and a dilution  
22 of its organic standards.

23           12.      USDA's failure to comply with the APA's rulemaking procedures and the  
24 resulting Sunset Notice injures CFS members by weakening organic integrity, creating  
25 inconsistent organic production standards, and demonstrating arbitrary and capricious application  
26 of administrative functions.

27           13.      Plaintiff Beyond Pesticides is a national nonprofit organization based out of  
28 Washington, D.C. with members in fifty states and the District of Columbia, including

1 California. Beyond Pesticides and its members are being, and will be, adversely affected by  
2 Defendants' decisions to promulgate OFPA rules without due regard for mandatory rulemaking  
3 procedures and the transparency and public engagement requirements established under OFPA.  
4 Beyond Pesticides promotes safe air, water, land, and food, and works to protect public health  
5 and the environment by encouraging a transition away from the use of toxic pesticides.

6 14. With Beyond Pesticides' resources made available to the public on a national  
7 scale, Beyond Pesticides contributes to environmentally conscious agricultural practices and a  
8 significant reduction in unnecessary pesticide use, much of which is achieved through the  
9 support and promotion of the organic program.

10 15. Beyond Pesticides' members include organic consumers, farmers, certifiers,  
11 retailers, and processors who aim to expand the organic program and maintain its integrity. It is  
12 the goal of Beyond Pesticides to educate the public on the important health and environmental  
13 benefits of organic food production and generate support for sound ecology-based regulatory and  
14 management systems.

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

20 17. Plaintiff Equal Exchange is a national mission-based for-profit food company  
21 based in West Bridgewater, MA with regional offices in St. Paul, MN and Portland, OR. Equal  
22 Exchange has national and international distribution of fair trade products, and sources the  
23 ingredients for those products from organic farmers on several continents. Equal Exchange, its  
24 multiple shareholders, and consumers of Equal Exchange products are being, and will be,  
25 adversely affected by Defendants' decisions to promulgate OFPA rules without due regard for  
26 mandatory rulemaking procedures and the transparency and public engagement requirements  
27 established under OFPA.  
28

1           18.     Equal Exchange's mission is to build long-term trade partnerships that are  
2 economically just and environmentally sound, to foster mutually beneficial relationships between  
3 farmers and consumers and to demonstrate, through our success, the contribution of worker  
4 co-operatives and Fair Trade to a more equitable, democratic and sustainable world. Organic  
5 sales account for 95% of Equal Exchange's revenue; sales in 2013 were \$56.1 Million. Much of  
6 our success since our inception in 1986 is directly attributable to the demand for organic food in  
7 the marketplace.

8           19.     All of Equal Exchange's stakeholders rely on the integrity of the organic label in  
9 their work and day-to-day lives. Many of Equal Exchange's farmer partners have made a  
10 considerable investment to adopt organic production methods, and the additional premium they  
11 receive from certified organic sales is vital to their success. Likewise, Equal Exchange's  
12 consumers rely on strict adherence to the organic standards in the decisions they make with  
13 regard to food purchases. Arbitrary and capricious rulemaking injures these farmers and  
14 consumers by weakening the integrity of organic.

15           20.     Plaintiff Food & Water Watch (FWW) is a national nonprofit organization with  
16 more than 80,000 members and 780,000 supporters nationwide. FWW has offices in  
17 Washington, D.C., San Francisco, CA, and fourteen other states.

18           21.     FWW works to create a healthy future for our families and for generations to  
19 come, with access to wholesome food, clean water, and sustainable energy for everyone. A key  
20 part of FWW's work on food involves working through the regulatory system to protect the  
21 integrity of the USDA organic label, in order to create a credible standard for consumers in the  
22 marketplace.

23           22.     FWW communicates with federal agencies, members of Congress and state  
24 legislatures, other nonprofit organizations, the media, and the general public about many food  
25 policy issues, including the USDA's organic standards. FWW communicates with members and  
26 supporters about opportunities to comment during public comment periods on many food issues,  
27 including rulemaking on USDA's organic standards and the public comment period process for  
28 the National Organic Standards Board.

1           23.     USDA's Sunset Notice, and the Agency's failure to comply with APA rulemaking  
2 procedures in making that policy change, injures FWW's members and supporters by weakening  
3 the integrity of the organic standards, adding inconsistency into the standards that consumers rely  
4 upon to determine if the organic label is credible. This demonstrates arbitrary and capricious  
5 application of administrative functions.

6           24.     Plaintiff La Montanita Co-op is a community-owned cooperative with six retail  
7 locations in Albuquerque, Santa Fe, and Gallup, New Mexico. La Montanita Co-op also operates  
8 a food hub warehouse that distributes products for family farmers, ranchers and organic food  
9 producers in a three hundred mile radius around Albuquerque. La Montanita Co-op, its  
10 approximately 16,500 member-owners and over 400 local food-producing partners are being,  
11 and will be, adversely affected by Defendants' decisions to promulgate OFPA rules without due  
12 regard for mandatory rulemaking procedures and the transparency and public engagement  
13 requirements established under OFPA.

14           25.     La Montanita Co-op's mission is to provide healthy food for local communities  
15 and to restore and sustain the local food system while building economic stability for the  
16 food-producing community throughout the Southwestern United States. La Montanita's goal of  
17 providing fresh, fair, and locally produced food requires the development of long-term  
18 partnerships that are economically just and environmentally sound, throughout the value chain,  
19 from producer to consumer. Organic sales are the backbone of La Montanita's organization and  
20 La Montanita is the largest community-owned natural and organic food business in New Mexico.  
21 Approximately 99% of all our fresh fruit and vegetable sales are of organic product and we  
22 regularly stock and sell approximately 3000 individual certified organic products. In 2014, La  
23 Montanita's revenues were \$38 Million. La Montanita directly employs nearly 300 people, and  
24 provides income for numerous others. La Montanita's success since its inception in 1976 is  
25 directly attributable to the demand for organic food in the marketplace.

26           26.     La Montanita's member-owners and non-member shoppers rely on the integrity of  
27 the certified organic label as they make their consumer choices. Many of La Montanita's farmer  
28 partners have made a considerable investment to adopt organic production methods, and the

1 additional premium they receive from certified organic sales is vital to their success. Strict  
2 adherence to the organic standards and the rules provided in the National Organic Program  
3 provide the greatest security for shoppers to make informed food and personal care choices. The  
4 reliability of organic certification requirements and people's trust in them directly impacts the  
5 well-being of La Montanita's business. Any weakening of the integrity and transparency of  
6 organic certification through arbitrary and capricious rulemaking injures the many thousands of  
7 La Montanita Co-op's stakeholders, and tens of millions of food producers and consumers across  
8 the nation.

9         27. Organic Seed Growers and Trade Association (OSGATA) is the  
10 farmer-controlled national nonprofit membership trade organization for the organic seed  
11 community. OSGATA's membership is comprised of certified organic farmers, certified organic  
12 seed farmers, certified organic seed companies, organic seed breeders, affiliate organizations and  
13 individuals dedicated to the advancement of a high quality and independently certified organic  
14 seed supply. Headquartered in Washington, Maine, OSGATA's membership spans the United  
15 States.

16         28. OSGATA works to protect, promote, and develop the organic seed trade and its  
17 growers. Its goal is to assure that the organic community has access to excellent quality, resilient,  
18 certified organic seed, free of transgenic contaminants and adapted to the diverse needs of local  
19 organic agriculture. The integrity of the organic label is vital to the livelihoods and viability of  
20 OSGATA's certified organic members.

21         29. The Organic Consumers Association (OCA) is an online and grassroots nonprofit  
22 501(c)3 public interest organization campaigning for health, justice, and sustainability. OCA  
23 deals with crucial issues of food safety, industrial agriculture, genetic engineering, children's  
24 health, corporate accountability, Fair Trade, environmental sustainability, and other key topics.  
25 OCA is the only organization in the United States focused exclusively on promoting the views  
26 and interests of the nation's estimated fifty million organic and socially responsible consumers.

27         30. OCA represents over 2,000,000 members, subscribers, supporters, and volunteers,  
28 including several thousand businesses in the natural foods and organic marketplace. Our United



1 States and international policy board is broadly representative of the organic, family farm,  
2 environmental, and public interest community.

3 31. OCA was formed in 1998 in the wake of the mass backlash by organic consumers  
4 against the USDA's controversial proposed national regulations for organic food. Through  
5 OCA's Safeguard Organic Standards campaign, as well as the work of allies in other  
6 organizations, the organic community has been able to mobilize hundreds of thousands of  
7 consumers to participate in the National Organic Standards Board process and submit public  
8 comments to USDA's National Organic Program to preserve strict organic standards.

9 32. USDA's arbitrary and capricious violation of APA rulemaking procedures and the  
10 improper Sunset Notice deprives OCA's members of the opportunity to be heard at the National  
11 Organic Standards Board and USDA's National Organic Program in support of organic integrity  
12 and strong organic production standards.

13 33. Plaintiff The Cornucopia Institute (Cornucopia) is a national nonprofit  
14 organization engaged in farm and food policy research and education. Cornucopia's members  
15 come from nearly every state and include organic farmers, direct market farmers, consumers,  
16 retailers, businesses, processors, and certifiers. Cornucopia is believed to have more certified  
17 organic farmer members than any similar organization. Three current members of Cornucopia's  
18 board of directors are former members of the National Organic Standards Board. Cornucopia is  
19 incorporated in Wisconsin and has staff in six states.

20 34. Cornucopia works to educate farmers, consumers, and the media about issues  
21 affecting the integrity of organic food and agriculture. As detailed in its organizational purpose,  
22 Cornucopia will engage in educational activities supporting the ecological principles and  
23 economic wisdom underlying sustainable and organic agriculture.

24 35. One primary piece of this work concerns oversight and watchdogging of  
25 government and corporate activities in organic food and agriculture. In particular, this includes  
26 the careful monitoring of and reporting on activities of the USDA, its National Organic Program,  
27 and the National Organic Standards Board.

28

1           36.     Cornucopia’s staff regularly attend meetings of the National Organic Standards  
2 Board and provide detailed analysis of issues before the board, including public testimony.  
3 Cornucopia also works to involve the public in these meetings, engaging consumers, farmers,  
4 businesses, and retailers to attend and testify in support of the integrity of organic food and  
5 agriculture. Decisions and initiatives from the National Organic Standards Board are broadly  
6 disseminated to the organic community, general public, and the media through news releases,  
7 organizational publications, educational forums, and action alerts.

8           37.     Members of Cornucopia depend on the integrity of organic food and agriculture  
9 for their livelihoods and/or food for their families. USDA’s change to the Sunset Review  
10 process, in addition to being both arbitrary and capricious, threatens to injure the public  
11 perception of organic integrity and harm Cornucopia’s farmer, consumer, retailer, processor, and  
12 certifier members.

13           38.     Plaintiff Northeast Organic Dairy Producers Alliance (NODPA) is a national  
14 nonprofit membership organization based in Deerfield, Massachusetts. NODPA is the largest  
15 organic dairy farmer organization in the country with a membership of eight hundred and thirty  
16 six organic dairy farmers in the Eastern United States. NODPA is not aligned with any one  
17 processor or cooperative and therefore is able to represent the views and needs of many different  
18 farmers. NODPA and its members are being, and will be, adversely affected by USDA’s actions.

19           39.     NODPA’s mission is to “enable organic dairy family farmers, situated across an  
20 extensive area, to have informed discussion about matters critical to the well-being of the organic  
21 dairy industry as a whole.” A key part of this mission is the education of the public concerning  
22 organic food production methods and integrity of the organic label. The integrity of the organic  
23 label is essential for the economic sustainability of organic dairy farmers. NODPA serves its  
24 organic dairy family farmers by providing oversight of the organic regulatory program to ensure  
25 organic integrity.

26           40.     To achieve its goals, NODPA provides a wide range of resources and services,  
27 such as the hosting and moderation of the Odairy list serve, the six-times per year print  
28 newsletter, monthly e-newsletter, website management, annual Field Days, and Washington

1 representation on behalf of all organic dairy farm families through NODPA's membership in the  
2 National Organic Coalition. NODPA regularly provides comments to the National Organic  
3 Standards Board on issues that are important to farmers, and attends many of their meetings.  
4 Collectively, the dissemination of this material has made NODPA an information clearinghouse  
5 for organic farmers' involvement and governmental oversight of the organic label.

6 41. USDA's failure to comply with the APA rulemaking procedures and the resulting  
7 Sunset Notice injures NODPA's members by weakening organic integrity, creating inconsistent  
8 organic production standards, and demonstrating arbitrary and capricious application of  
9 administrative functions, which undermine consumer trust in the label. Consumers have many  
10 choices in the marketplace and NODPA members, most of whom sell their milk on the wholesale  
11 market, rely on consumers' trust in the integrity of the process and administration of the organic  
12 label.

13 42. PCC Natural Markets (PCC) is the nation's largest consumer-owned grocery  
14 retailer. PCC has ten stores in Seattle and adjacent cities, and nearly 55,000 active  
15 member/owners. PCC's business is very dependent on organic farmers, processors, certifiers,  
16 and consumers. They are—and will be—adversely affected by USDA's decision to issue rules  
17 without regard for the rulemaking process mandated by OFPA.

18 43. PCC Natural Markets is directed by its consumer-owners to create a sustainable  
19 environment where the organic supply chain can thrive. Much of PCC's business is built upon  
20 trust in the process for organic integrity. Our members and shoppers are engaged and  
21 well-educated in organic food and farming concerns. PCC members submitted ten percent of the  
22 entire nation's public comments to USDA during the run-up to national organic standards. They  
23 care about organic standards and demand organic foods with high integrity. PCC is a certified  
24 organic retailer to ensure organic integrity when handling fresh produce, meat, deli cheese, juice  
25 bar, and espresso bar ingredients.

26 44. Educating staff, members, and the general public about food production and  
27 practices has been part of PCC Natural Markets' business model for decades. PCC Natural  
28 Markets believes food production practices and the process to establish rules regulating organic

1 foods should be fully transparent. PCC Natural Markets believes OFPA's mandate requiring full  
2 notice and opportunity for public comment before rulemaking is fundamental to the high level of  
3 consensus needed to ensure both credibility of the organic label and public support for organic  
4 products.

5 45. PCC advocates for the consumer's interest in organic standards through an array  
6 of multi-media venues, including published articles and newsletters sent to member homes,  
7 in-store food education tours, an award-winning cooking class program, television cooking  
8 segments, radio ads, and a robust social media program. As events warrant, PCC challenges  
9 practices or proposals that harm the organic supply chain and/or human and environmental  
10 health. As events warrant, PCC submits comments during public comment periods on issues  
11 affecting transparency and integrity of food standards.

12 46. USDA's failure to comply with the APA rulemaking procedures demonstrates  
13 arbitrary and capricious disregard for administrative functions and injures PCC by weakening  
14 organic integrity.

15 47. Greensward/New Natives LLC is a certified organic farm based in Aptos, CA.  
16 Greensward/New Natives LLC has been certified organic by California Certified Organic  
17 Farmers continuously since 1983. Greensward/New Natives LLC is, by USDA's definition, a  
18 mid-sized farm. Greensward/New Natives LLC and its customers are being, and will be,  
19 adversely affected by Defendants' decisions to promulgate OFPA rules without due regard for  
20 mandatory rulemaking procedures and the transparency and public engagement requirements  
21 established under OFPA. Greensward/New Natives LLC has an unwavering commitment to  
22 organic practices and the rule of law embodied in OFPA, as evidenced by its early adoption of  
23 organic principles and embracing of organic certification even before OFPA came into being.

24 48. Frey Vineyards, Ltd. is a winery in California producing premium organic and  
25 biodynamic wines since 1980. Frey Vineyards farms about 300 acres of winegrapes and other  
26 crops and livestock, including grains, chickens and cows. Frey Vineyards has been active in  
27 promoting organic production methods for many years. For example, members of Frey  
28 Vineyards have been organic farm inspectors and helped draft processor standards that became

1 part of USDA's National Organic Program. Frey Vineyards has defended organic integrity at the  
2 National Organics Standards Board by testifying against a petition seeking to allow a prohibited  
3 substance to be added to the National Organics Program's list of allowed substances. It has come  
4 to Frey Vineyards' attention that USDA is proposing weakening Sunset Notice provisions by  
5 bypassing OFPA rulemaking procedures. This would obviously compromise organic label  
6 integrity, and would seriously undermine consumer trust in the organic regulatory program and  
7 organic products. This rapidly growing agricultural sector derives much of its strength from  
8 public trust in the maintenance and transparency of the regulatory system which gives consumers  
9 trust and confidence that the products they are buying meet the standards of integrity they have  
10 come to expect. Bypassing and undermining these regulatory procedures to lessen input into the  
11 process cannot inspire confidence in the system, and will lead to consumer mistrust.

12 49. Plaintiff Maine Organic Farmers and Gardeners Association (MOFGA) is a  
13 nonprofit organization based in Unity, Maine with more than 11,000 dues-paying members.  
14 MOFGA membership includes certified organic farmers and gardeners, organic consumers,  
15 producers, retailers and certifiers. Our members are primarily residents of Maine, but MOFGA  
16 has members in many states around the nation as well.

17 50. MOFGA works to help farmers and gardeners grow organic food, fiber, and other  
18 crops; protect the environment; recycle natural resources; increase local food production; support  
19 rural communities; and illuminate for consumers the connection between healthful food and  
20 environmentally sound farming practices.

21 51. To achieve its goals, MOFGA certifies organic farmers according to USDA rules  
22 and regulations, trains organic farmers in production methods and certification requirements,  
23 provides educational materials to organic consumers to help guide their purchasing decisions and  
24 advises others regarding the positive role organic food production and consumption can play in  
25 creating a healthful food supply.

26 52. USDA's unwillingness to act in accordance with the APA rulemaking procedures  
27 and the resulting Sunset Notice injures MOFGA members by weakening organic integrity,  
28

1 creating inconsistent organic production standards, and demonstrating arbitrary implementation  
2 of administrative functions.

3 53. The Ohio Ecological Food and Farm Association (OEFFA) is a 501(c)3 nonprofit  
4 organization based in Columbus, Ohio. From 1981 until 2002, OEFFA offered organic  
5 certification services for Ohio's organic producers and since 2002, its sister organization,  
6 OEFFA Certification has done so as a USDA accredited certifier. OEFFA is a broad-based  
7 membership organization that includes 3400 certified organic farmers, consumers, backyard  
8 gardeners, sustainable farmers, homesteaders, and others. OEFFA and its members oppose  
9 Defendants' disregard for mandatory rulemaking procedures, including advance notice and  
10 comment, as required by the Administrative Procedure Act.

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

17 ***Defendants***

18 55. Defendant Tom Vilsack is the Secretary of USDA. The Secretary is the official  
19 ultimately responsible for the National Organic Program and for compliance with all OFPA and  
20 APA laws and regulations. The Secretary is sued in his official capacity.

21 56. Defendant Anne Alonzo is the Administrator of USDA's Agricultural Marketing  
22 Service. She is legally responsible for overseeing USDA's Agricultural Marketing Service,  
23 which administers several programs to support U.S. agriculture, including the National Organic  
24 Program. As Administrator of USDA's Agricultural Marketing Service, she is legally  
25 responsible for the National Organic Program and the Program's compliance with all OFPA and  
26 APA laws and regulations. The Administrator is sued in her official capacity.



1 natural substitute products, and the substance is consistent with organic farming and handling. 7  
2 U.S.C. § 6517(c)(1)(A)(i)-(iii).

3 62. Specific exemptions on the National List must be developed using the  
4 “Procedures for Establishing the National List.” 7 U.S.C. § 6517(c)(1)(C). Procedures for  
5 establishing the National List require that the Secretary shall base the National List on “a  
6 proposed national list or proposed amendments to the National List developed by the National  
7 Organic Standards Board.” 7 U.S.C. § 6517(d)(1).

8 63. OFPA procedures for establishing the National List also state that the Secretary  
9 “may not include exemptions for the use of specific synthetic substances in the National List  
10 other than those exemptions contained in the Proposed National List or Proposed Amendments  
11 to the National List.” 7 U.S.C. § 6517(d)(2). Thus, even if the Secretary believes a synthetic  
12 chemical should be added to the National List, he cannot do so unless the National Organic  
13 Standards Board has included that chemical on its Proposed National List or Proposed  
14 Amendments to the National List.

15 64. Under OFPA both the establishment and amendment of the National List require  
16 transparency and public engagement. The statutory procedures for establishing the National List  
17 state that the Secretary must publish the Proposed National List or any Proposed Amendments to  
18 the National List in the Federal Register and seek public comment on such proposals. 7 U.S.C.  
19 § 6517(d)(4). The Federal Register publication must include Changes to the Proposed National  
20 List or Proposed Amendments that are recommended by the Secretary, meaning that the public  
21 must be aware of both the original recommendations of the National Organic Standards Board  
22 and the Secretary’s amendments to those recommendations. *Id.*

23 65. Neither the Secretary nor the National Organic Standards Board can elect whether  
24 to carry out the duties assigned to each concerning the National List. It is a mandatory duty of  
25 the National Organic Standards Board to develop the Proposed National List or Proposed  
26 Amendments to the National List for submission to the Secretary in accordance OFPA’s section  
27 governing the National List. 7 U.S.C. § 6518(2).  
28



1           66.     Just as OFPA provides for specific and mandatory procedures and standards in  
2 establishing the National List, OFPA also places a time limit on the exception granted to the  
3 substances placed on the National List and which are inherently contrary to the “no synthetics in  
4 organic” rule. Subtitled, “Sunset provision,” this provision imposes a five-year limit on a  
5 National List material’s exemption. The Sunset provision reads: “No exemption or prohibition  
6 contained in the National List shall be valid unless the National Organic Standards Board has  
7 reviewed such exemption or prohibition as provided in this section within 5 years of such  
8 exemption or prohibition being adopted or reviewed and the Secretary has renewed such  
9 exemption or prohibition.” 7 U.S.C. § 6517(e).

10           67.     Thus after five years a substance is no longer exempted and cannot be used in  
11 organic production unless two actions occur: (1) the National Organic Standards Board reviews  
12 the substance as provided in the National List section of OFPA, and (2) the Secretary decides to  
13 renew a material’s placement on the National List. *Id.*

14 ***Administrative Procedure Act***

15           68.     The APA requires federal agencies to provide notice of proposed rulemaking  
16 through publication in the Federal Register. 5 U.S.C. § 553(b). Agencies must also provide  
17 “interested persons an opportunity to participate in the rule making through submission of  
18 written data, views, or arguments . . . .” 5 U.S.C. § 553(c).

19           69.     The APA grants a right of judicial review to “[a] person suffering legal wrong  
20 because of agency action, or adversely affected or aggrieved by agency action . . . .” 5 U.S.C.  
21 § 702.

22           70.     Under the APA, courts “shall compel agency action unlawfully withheld or  
23 unreasonably delayed,” *id.* § 706(1), and “hold unlawful and set aside agency action, findings,  
24 and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in  
25 accordance with law,” *id.* § 706(2)(A). Courts may only review a final agency action, *id.* § 704,  
26 and “agency action” includes a “failure to act,” *id.* § 551(13).

**FACTUAL BACKGROUND*****OFPA and the National List***

71. In 1990, Congress passed OFPA, 7 U.S.C. §§ 6501-6523, which tasked the Secretary of Agriculture with the establishment of the National Organic Program and developing the required underlying regulations. Shortly after OFPA's passage the Secretary appointed the first members of the statutorily-mandated National Organic Standards Board, an advisory committee generally responsible for assisting the Secretary in the development of standards for substances to be used in organic production and advising the Secretary on any other aspects of the implementation of OFPA. *See* 7 U.S.C. § 6518(a).

72. Working with the National Organic Standards Board, USDA published in the Federal Register the first proposed OFPA rule (Organic Rule) in 1997.<sup>1</sup> Included in the proposed Organic Rule of 1997 was a review of the activities of the National Organic Standards Board in developing the Proposed National List:

The Board has reviewed approximately 170 substances, including botanical pesticides as required in section 2119(k)(4) of the OFPA (7 U.S.C. 6518(k)(4)), for possible placement on the National List, and the Board used technical advisory panels to provide scientific evaluation of the materials considered in its review of the substances.

The [National Organic Standards Board]'s initial recommendations were presented to the Secretary on August 1, 1994. The [National Organic Standards Board] has continued to make recommendations and has submitted 30 addenda to its initial recommendations.<sup>2</sup>

73. Despite the National Organic Standards Board's work on developing the Proposed National List, the National Organic Program's 1997 draft of the Organic Rule and the National List incorporated within the draft Organic Rule included substances not recommended by

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<sup>1</sup> National Organic Program, 62 Fed. Reg. 65, 850 (proposed Dec. 16, 1997).

<sup>2</sup> *Id.* at 65,851; *see also* National Organic Program, NOSB Final Recommendations, <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&navID=NationalOrganicProgram&leftNav=NationalOrganicProgram&page=NOSBFinalRecommendations&description=NOSB%20Final%20Recommendations>.

1 National Organic Standards Board or included in the Board's Proposed National List, an action  
2 which spurred an outpouring of public comments and organic community backlash.<sup>3</sup>

3 74. In response to the public comments, the National Organic Program revised its  
4 proposed Organic Rule and published an amended version of it in the Federal Register on March  
5 13, 2000.<sup>4</sup> Included in the National Organic Program's explanation for the revisions was the  
6 statement that "[t]he first proposal included some substances on the National List that were not  
7 recommended by the National Organic Standards Board. This proposal contains no substances  
8 on the approved list that were not found in the National Organic Standards Board's  
9 recommendations."<sup>5</sup>

10 75. After receiving public comments on the revised proposed Organic Rule, the  
11 National Organic Program promulgated the final Organic Rule in December 2000 with still  
12 additional requests for public comments.<sup>6</sup>

13 76. Included in the final Organic Rule was the first National List with an effective  
14 date of February 20, 2001. This effective date would be corrected in a later Federal Register  
15 notice, amending it to April 21, 2001.<sup>7</sup>

16 77. Described within the final Organic Rule was a general review of the National  
17 Organic Standards Board's process and review standards for evaluating substances petitioned to  
18 be included on the National List. Guidance on how the public should petition a substance to be  
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21 <sup>3</sup> Gene Rowson, Congressional Research Service, 98-264 – *Organic Foods and the Proposed*  
22 *Federal Certification and Labeling Program*, Sept. 8, 1998,  
<http://cnie.org/nle/crs/abstract.cfm?NLEid=391>.

23 <sup>4</sup> National Organic Program, 65 Fed. Reg. 13,512 (proposed March 13, 2000) (to be codified at 7  
24 C.F.R. pt. 205), <https://www.federalregister.gov/articles/2000/03/13/00-5723/national-organic-program>.

25 <sup>5</sup> *Id.* at 13,513.

26 <sup>6</sup> National Organic Program, 65 Fed. Reg. 80,548 (Dec. 21, 2000) (to be codified at 7 C.F.R. pt.  
27 205), <https://www.federalregister.gov/articles/2000/12/21/00-32257/national-organic-program>; National Organic Program; Correction of the Effective Date Under Congressional  
28 Review Act (CRA), 66 Fed. Reg. 15,619 (March 20, 2001),  
<https://www.federalregister.gov/articles/2001/03/20/01-6836/national-organic-program-correction-of-the-effective-date-under-congressional-review-act-cra>.

<sup>7</sup> National Organic Program, 65 Fed. Reg. 80,548 National Organic Program; Correction of the  
Effective Date Under Congressional Review Act (CRA), 66 Fed. Reg. 15619.

1 added to the National List, however, was published in a separate Federal Register notice.<sup>8</sup> The  
 2 guidance, prepared in a questions and answers format, addressed the kinds of information should  
 3 be included in a petition, where the petition should be directed, and what criteria the National  
 4 Organic Standards Board must apply according to OFPA in evaluating a petition.

5 78. Despite the final Organic Rule effective date of April 21, 2001, the National  
 6 List's effective date did not commence until October 21, 2002.<sup>9</sup>

7 ***Sunset Review***

8 79. Three years later, on June 17, 2005, the National Organic Program published the  
 9 First Advanced Notice of Proposed Rulemaking (ANPR) in the Federal Register concerning  
 10 Sunset Review of materials set to expire on October 21, 2007 (the first Sunset Review ANPR).<sup>10</sup>  
 11 The National Organic Program requested public comment on this ANPR. Contained within the  
 12 first Sunset Review ANPR is the following statement:

13 Expiration of the exempted or prohibited use of substances is provided for under  
 14 the OFPA's sunset provision. This ANPR announces the sunset of 165 exempted  
 15 and 9 prohibited substances currently on the National List, which became  
 16 effective October 21, 2002. This ANPR establishes October 21, 2007, as the date  
 17 by which the Sunset Review and renewal process must be concluded and also  
 18 begins the public comment process on whether the existing specific exemptions or  
 19 prohibitions on the National List should be continued. This ANPR discusses how  
 20 the National Organic Program will manage the Sunset Review and renewal  
 21 process.<sup>11</sup>

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22 <sup>8</sup> National Organic Program, Submission of Petitions for Evaluation of Substances for Inclusion  
 23 on or Removal From the National List of Substances Allowed and Prohibited in Organic  
 24 Production and Handling, 65 Fed. Reg. 43,259 (July 13, 2000) (notice of guidelines and call  
 25 for national list petitions), [https://www.federalregister.gov/articles/2000/07/13/00-  
 17689/submission-of-petitions-for-evaluation-of-substances-for-inclusion-on-or-removal-  
 from-the-national](https://www.federalregister.gov/articles/2000/07/13/00-17689/submission-of-petitions-for-evaluation-of-substances-for-inclusion-on-or-removal-from-the-national).

26 <sup>9</sup> National Organic Program, Sunset Review, 70 Fed. Reg. 35,177 (June 17, 2005) (ANPR with  
 27 req. for comment), [https://www.federalregister.gov/articles/2005/06/17/05-12007/national-  
 organic-program-sunset-review](https://www.federalregister.gov/articles/2005/06/17/05-12007/national-organic-program-sunset-review).

28 <sup>10</sup> *Id.* ("As required by the Organic Foods Production Act of 1990 (OFPA), the allowed use of  
 165 synthetic and non-synthetic substances in organic production and handling will expire on  
 October 21, 2007. In addition, prohibitions on the use of 9 non-synthetic substances will  
 expire in organic production on October 21, 2007.")

<sup>11</sup> National Organic Program, Sunset Review, 70 Fed. Reg. 35,177 (June 17, 2005) (ANPR with  
 req. for comment), [https://www.federalregister.gov/articles/2005/06/17/05-12007/national-  
 organic-program-sunset-review](https://www.federalregister.gov/articles/2005/06/17/05-12007/national-organic-program-sunset-review).

1 The ANPR goes on to describe the review and renewal process and substances facing expiration,  
 2 with specific subsections included in the ANPR subtitled, “Sunset Process” and “Guidance on  
 3 Submitting Your Comments.”<sup>12</sup>

4 80. After receiving comments on the first Sunset Review ANPR and conducting  
 5 multiple public National Organic Standards Board meetings, the National Organic Program  
 6 published a proposed rule to implement the National Organic Standards Board recommendations  
 7 concerning the first Sunset Review on March 6, 2007.<sup>13</sup> Discussed within the proposed rule was  
 8 a review of the number and nature of public comments received after publication of the first  
 9 Sunset Review ANPR. The subject matter of the comments included not only discussion of  
 10 individual substances, but also the process used to review those substances.<sup>14</sup>

11 81. A final rule on the first Sunset Review followed on October 16, 2007, wherein  
 12 consistent with the recommendations from the National Organic Standards Board, the National  
 13 Organic Program renewed 165 exemptions and prohibitions on the National List (along with any  
 14 restrictive annotations) and removed three exemptions.<sup>15</sup>

15 82. Including the first Sunset Review, five Sunset Reviews have occurred between  
 16 2005 and 2013,<sup>16</sup> as well as a nutrient vitamin Sunset Review.<sup>17</sup> With each of these five Sunset  
 17

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18 <sup>12</sup> *Id.*

19 <sup>13</sup> National Organic Program, Sunset Review, 72 Fed. Reg. 9872 (proposed March 6, 2007) (to  
 20 be codified at 7 C.F.R. pt. 205), <https://www.federalregister.gov/articles/2007/03/06/E7-3829/national-organic-program-sunset-review>.

21 <sup>14</sup> *Id.*

22 <sup>15</sup> National Organic Program, Sunset Review, 72 Fed. Reg. 58,469 (Oct. 16, 2007),  
<https://www.federalregister.gov/articles/2007/10/16/E7-20326/national-organic-program-sunset-review>.

23 <sup>16</sup> *See id.* and National Organic Program, Sunset Review (2008), 73 Fed. Reg. 59,479 (Oct. 09,  
 24 2008), <https://www.federalregister.gov/articles/2008/10/09/E8-24114/national-organic-program-nop-sunset-review-2008>; National Organic Program, Sunset Review (2011), 76 Fed.  
 25 Reg. 46,595 (Aug. 03, 2011), <https://www.federalregister.gov/articles/2011/08/03/2011-19659/national-organic-program-nop-sunset-review-2011>; National Organic Program, Sunset  
 26 Review (2012) 77 Fed. Reg. 33,290 (June 06, 2012),  
<https://www.federalregister.gov/articles/2012/06/06/2012-13523/national-organic-program-nop-sunset-review-2012>; National Organic Program, Sunset Review (2013), 78 Fed. Reg.  
 27 61,154 (Oct. 3, 2013), <https://www.federalregister.gov/articles/2013/10/03/2013-24208/national-organic-program-nop-sunset-review-2013>.

28 <sup>17</sup> National Organic Program (NOP); Sunset Review (2012) for Nutrient Vitamins and Minerals,  
 77 Fed. Reg. 1980 (proposed Jan. 12, 2012),

1 Reviews and the nutrient vitamin Sunset Review, the National Organic Program utilized the  
 2 same notice and comment process, initiating the relevant Sunset Review process with an ANPR,  
 3 inviting public comment on the ANPR, following the ANPR with one or more National Organic  
 4 Standards Board public meetings, publishing a proposed rule based on the recommendations of  
 5 the National Organic Standards Board resulting from open discussion and votes taken at those  
 6 public meetings, and finally, publishing a final Sunset Review rule.

7 83. Each of the ANPRs and proposed rules corresponding to the Sunset Reviews  
 8 invited public comment and included a description of the standards and process utilized in the  
 9 Sunset Review.<sup>18</sup>

10 ***The Revised Sunset Review***

11 84. On September 16, 2013, Defendants published in the Federal Register the  
 12 Notification of Sunset Process (Sunset Notice), which imposed new, mandatory standards and  
 13 Sunset Review procedures.<sup>19</sup> No comment period was provided.

14 85. In the Sunset Notice, the National Organic Program states that the “Sunset  
 15 Process described in [this Sunset Notice] will be used for future Sunset Reviews and renewals,  
 16 unless [the Agricultural Marketing Service] replaces or updates this document. This document  
 17 replaces the process that [the Agricultural Marketing Service] described in the first Advanced  
 18 notice of Proposed Rulemaking (ANPR) for Sunset Review published in the Federal Register on  
 19 June 17, 2005 (70 FR 35177).”<sup>20</sup>

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23 <https://www.federalregister.gov/articles/2012/01/12/2012-354/national-organic-program-nop-sunset-review-2012-for-nutrient-vitamins-and-minerals>.

24 <sup>18</sup> See, e.g., National Organic Program; Sunset Review (2008), 72 Fed. Reg. 73,667 (Dec. 28,  
 25 2007) (ANPR with req. for comments),  
 26 <https://www.federalregister.gov/articles/2007/12/28/E7-25270/national-organic-program-nop-sunset-review-2008>;  
 27 National Organic Program; Sunset Review (2008), 73 Fed. Reg. 40194 (proposed July 14, 2008),  
 28 <https://www.federalregister.gov/articles/2008/07/14/E8-15389/national-organic-program-nop-sunset-review-2008>.

<sup>19</sup> National Organic Program, Sunset Process, 78 Fed. Reg. 56,811, 56,812 (Sept. 16, 2013) (notification of Sunset process).

<sup>20</sup> *Id.*

1 86. Significant substantive changes resulted from the Sunset Notice. While there are  
2 numerous issues with the changes implemented, the most problematic and at odds with the  
3 standards and directives of OFPA included the following:

- 4 • **Subcommittees—not the full, balanced National Organic Standards Board—**  
5 **conduct the sunset review in instances where proposals to remove do not arise.** This  
6 is problematic because (1) it vests the ultimate authority of deciding whether a material  
7 should be proposed for removal in the subcommittee (an unbalanced representation of the  
8 National Organic Standards Board), and (2) it only allows a vote of the full National  
9 Organic Standards Board for materials for which removal proposals are included in the  
10 preliminary review. If a material is not proposed for removal in the subcommittee’s  
11 published preliminary review, then it will be considered untimely to make a motion to  
12 remove the material or present new information for consideration of the National Organic  
13 Standards Board.
- 14 • **“No additions” (7 U.S.C. 6517(2)) provision may be violated.** If the National Organic  
15 Standards Board does not cast a decisive vote to renew a synthetic material that has not  
16 been proposed for removal in the subcommittee’s preliminary review, then USDA’s  
17 decision to renew may actually be in conflict with the “no additions” provision because  
18 the decisive vote of the National Organic Standards Board concerning that synthetic was  
19 unconfirmed.
- 20 • **The default expiration standard is reversed to one of default retention.** This standard  
21 is undermined in three ways: (1) subcommittees must develop a proposal to remove  
22 materials; (2) National Organic Standards Board must cast a two-thirds decisive vote to  
23 remove, not renew; and (3) substance remains on the National List at Sunset unless the  
24 subcommittee proposes removal, the National Organic Standards Board votes to remove,  
25 and USDA accepts recommendation.
- 26 • **Public opportunity for input on sunset materials and National Organic Standards**  
27 **Board determinations is limited to first publication and meeting.** After the  
28 preliminary review is published, even if new information is presented or submitted, it will  
be considered untimely and a material cannot be proposed for removal during that sunset  
review.
- **Increases burden on public to apply limited exceptions standard and reduces**  
**incentive to seek and develop alternatives.** The burden is shifted to the public to make  
the case for why a material that is inherently in conflict with the organic standard should  
not be an exception to organic, rather than requiring the material to continually meet the  
criteria permitting its exception. This in turn removes the incentive for the organic  
industry to seek and develop materials that are truly organic and do not require an  
exemption.

24 87. In response to publication of the Sunset Notice, numerous groups issued  
25 statements opposing both the secretive and unilateral process behind developing and  
26 promulgating the substantive rule, as well as identifying numerous substantive issues within the  
27 rule that did not comply with OFPA. Because no comment period accompanied promulgation of  
28 the rule, objections to the Sunset Notice were issued in the form of press releases, op-eds, blogs,

1 letters, and address within the fall 2013 National Organic Standards Board meeting comments.<sup>21</sup>  
2 Objections raised included calls for the retraction of the rule so that it could be properly vetted  
3 through the public comment process.

4 88. Objectors were not limited to the organic community. On April 24, 2014, Senator  
5 Leahy and Representative DeFazio, original drafters of OFPA, sent a letter to Secretary Vilsack  
6 expressing their grave concern over both the substance and process of the Sunset Notice. In this  
7 letter, the Congressmen noted, “Perhaps the most alarming part of this sunset policy  
8 announcement was the decision by the agency to not subject this substantive policy change to  
9 full notice and comment rulemaking, a critical step to allow the public to provide scientific and  
10 market information to aid the Secretary and the National Organic Standards Board in fulfilling its  
11 statutory review duties. Had the agency engaged in the a full rulemaking process for the policy  
12 change, it would have given the Secretary the benefit of hearing about the strong objections to  
13 this change from the public, from many in the affected organic community, and from Members  
14 of Congress, such as ourselves.”<sup>22</sup>

15 89. Despite these calls for retraction of the Sunset Notice from all corners of the  
16 organic community, National Organic Program made clear at the spring 2014 National Organic  
17 Standards Board meeting through public statements, presentations to the public, training  
18 materials and sessions for the National Organic Standards Board, and the mandated application  
19 of the process and standards established under the Sunset Notice to the 2015 Sunset Review  
20 materials that it would not retract the Sunset Notice and issue it subject to public notice and  
21 comment.

22 90. Moreover, because of USDA’s failure to subject the Sunset Notice to the scrutiny  
23 and input of the organic community, substantive issues within the rule have resulted in  
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25 <sup>21</sup> See, e.g., Joint Statement of Consumers Union, Food and Water Watch, Beyond Pesticides,  
26 and Center for Food Safety, U.S. Department of Agriculture Guts National Organic Law;  
27 Circumvents Public Process, *available at* [https://consumersunion.org/wp-](https://consumersunion.org/wp-content/uploads/2013/09/USDA_Decision_on_National_List.pdf)  
28 [content/uploads/2013/09/USDA\\_Decision\\_on\\_National\\_List.pdf](https://consumersunion.org/wp-content/uploads/2013/09/USDA_Decision_on_National_List.pdf). Letter from National  
Organic Coalition, to Miles McEvoy, NOP-USDA (Nov. 4, 2013) (attached as Exhibit A).

<sup>22</sup> Letter from Sen. Patrick Leahy and Rep. Peter DeFazio, Congress of the United States, to Sec.  
Thomas J. Vilsack, Dept. of Agric. (April 24, 2014),  
<http://www.cornucopia.org/USDA/LeahyDeFazioSunset.pdf>.



1 inconsistent application of OFPA standards and confusion among the regulated community, and  
 2 arbitrary and capricious actions on the part of the National Organic Program and Secretary in  
 3 applying the very procedures and standards espoused in the Sunset Notice.<sup>23</sup>

4 91. USDA's issuance of the September 16, 2013, Sunset Notice without adherence to  
 5 APA rulemaking requirements, including the offering of a public comment period, is arbitrary,  
 6 capricious, and not in accordance with OFPA and the APA.

7 92. USDA's arbitrary and capricious actions and failure to utilize required rulemaking  
 8 procedures weakens the integrity of the organic program by creating inconsistent organic  
 9 production standards and causing injury to organic consumers, producers, certifiers, and others.

### **FIRST CAUSE OF ACTION**

#### **DEFENDANTS VIOLATED THE APA BY FAILING TO PROVIDE SUFFICIENT PUBLIC NOTICE AND COMMENT ON THE SUNSET NOTICE**

13 93. Plaintiffs hereby incorporate paragraphs one through ninety-two as set forth  
 14 herein.

15 94. The APA requires federal agencies to provide public notice of proposed  
 16 rulemaking, and requires the agencies to give interested person an opportunity to participate in  
 17 the rule making through the submission of data or arguments. 5 U.S.C § 553.

18 95. The Sunset Notice, published in the Federal Register on September 16, 2013,  
 19 constitutes a substantive rule under the APA.

20 96. Promulgation and implementation of the procedures and standards set forth within  
 21 the Sunset Notice constitutes final agency action, which impacts the legal obligations of the  
 22 public and causes injury to the organic community.

23 97. Defendants' promulgation of a substantive rule and final agency actions described  
 24 herein violate section 706 of the APA in that Defendants acted arbitrarily and capriciously,

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26  
 27 <sup>23</sup> See Memorandum from Miles McEvoy to the National Organic Standards Board (NOSB)  
 (Oct. 8, 2014),  
 28 <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5109177>; U.S. Dept. of  
 Agriculture, National Organic Standards Board Meeting, Transcript, Oct. 28-30, 2014,  
<http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5109861>.

1 abused their discretion, and failed to act in accordance with the law by failing to adhere to  
2 section 553 of the APA and its implementing regulations.

3 98. Defendants' decision to promulgate a substantive rule concerning Sunset Review  
4 of materials on the National List without sufficient notice and public comment must be corrected  
5 to restore organic integrity.

## 6 **SECOND CAUSE OF ACTION**

### 7 **DEFENDANTS' PROMULGATION OF THE SUNSET NOTICE WITHOUT** 8 **SUFFICIENT NOTICE AND COMMENT CREATES INCONSISTENT ORGANIC** 9 **STANDARDS AND VIOLATES OFPA**

10 99. Plaintiffs hereby incorporate paragraphs one through ninety-eight as set forth  
11 herein.

12 100. USDA's promulgation and implementation of the Sunset Notice constitutes final  
13 agency action under 5 U.S.C. § 704. Defendants' final agency actions described herein violate  
14 section 706 of the APA, in that Defendants acted arbitrarily, capriciously, abused their  
15 discretion, and failed to act in accordance with the law by violating OFPA's overarching  
16 requirement to provide consistent organic production standards.

17 101. Defendants' decision to develop, promulgate, and implement inconsistent organic  
18 procedures which weaken the integrity of the organic label and injure the organic community, is  
19 arbitrary and capricious, an abuse of discretion, otherwise not in accordance with law, and  
20 without observance of standards required by law, in violation of OFPA.

## 21 **REQUEST FOR RELIEF**

22 WHEREFORE, Plaintiffs respectfully request that this Court:

23 A. Declare that Defendants' September 16, 2013, Sunset Notice is a substantive rule  
24 under the APA and must adhere to APA rulemaking procedures;

25 B. Declare that the Defendants have violated the substantive rulemaking  
26 requirements of the APA by developing, promulgating, and implementing the September  
27 16, 2013, Sunset Notice, without sufficient notice and public comment;

28 C. Declare that the Defendants have created an inconsistent organic standard, thus  
violating OFPA, by developing, promulgating, and implementing the September, 16,

1 2013, Sunset Notice procedures and standards without sufficient notice and public  
2 comment;

3 D. Enter an order vacating Defendants' rulemaking and mandating submission of the  
4 Sunset Notice to public comment;

5 H. Issue preliminary and permanent injunctive relief barring Defendants from  
6 implementing Sunset Notice procedures and standards during Sunset Review until APA  
7 rulemaking requirements have been met;

8 I. Award Plaintiffs their costs and reasonable attorneys' fees under the Equal Access  
9 to Justice Act or other applicable statute; and,

10 J. Grant Plaintiffs such further relief as the court deems to be just, proper, and  
11 equitable.

12 Respectfully submitted this 7th day of April, 2015.

13 /s/ Paige M. Tomaselli

14 PAIGE M. TOMASELLI (State Bar No. 237737)

15 SYLVIA SHIH-YAU WU (State Bar No. 273549)

16 Center for Food Safety

17 303 Sacramento Street, 2nd Floor

18 San Francisco, CA 94111

19 Phone: (415) 826-2770

20 Fax: (415) 826-0507

21 Emails: ptomaselli@centerforfoodsafety.org

22 swu@centerforfoodsafety.org

23 *Counsel for Plaintiffs*