

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 22 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CENTER FOR FOOD SAFETY; et al.,

No. 21-15883

Plaintiffs-Appellants,

D.C. No. 3:20-cv-01537-RS

v.

MEMORANDUM*

THOMAS J. VILSACK, in his official capacity as Secretary of the United States Department of Agriculture; et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Richard Seeborg, Chief District Judge, Presiding

Argued and Submitted July 27, 2022
San Francisco, California

Before: GRABER and OWENS, Circuit Judges, and BAKER,** International Trade Judge.

This case presents the question whether hydroponically grown crops—i.e., crops grown without the use of soil—meet the requirements of the Organic Foods

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable M. Miller Baker, Judge for the United States Court of International Trade, sitting by designation.

Production Act (OFPA) of 1990, 7 U.S.C. § 6501 *et seq.* Appellants petitioned the U.S. Department of Agriculture (USDA or the Department) to issue new regulations barring organic certification of hydroponically grown crops. USDA refused, leading to this case. The district court granted summary judgment for the Department, citing the highly deferential standard of review and the relevant statutory provisions. The plaintiffs timely appealed. We have appellate jurisdiction under 28 U.S.C. § 1291 and we review the district court’s order granting summary judgment *de novo*. *Corrigan v. Haaland*, 12 F.4th 901, 906 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 901 (2022). “When an agency refuses to exercise its discretion to promulgate proposed regulations, the Court’s review is extremely limited and highly deferential.” *Compassion Over Killing v. U.S. FDA*, 849 F.3d 849, 854 (9th Cir. 2017) (cleaned up).

1. The district court declined to “disturb[]” USDA’s decision not to issue the requested regulation because the court found the Department’s interpretation of the OFPA to be at least “equally persuasive” as the plaintiffs’ interpretation. *Ctr. for Food Safety v. Perdue*, 527 F. Supp. 3d 1130, 1142 (N.D. Cal. 2021). Appellants contend that the district court should have applied the familiar *Chevron* analysis in analyzing USDA’s statutory interpretation. *Chevron*, however, would be relevant for interpreting the requested rule had the Department issued it. Here, because USDA *declined* to issue the rule, we agree with the government that the question is whether the OFPA required the Department to issue the rule.

2. Turning to that substantive question, we conclude that the OFPA does not clearly require USDA to issue the requested rule.¹ The statute imposes three requirements for organic crops—a restriction on synthetic chemicals, 7 U.S.C. § 6504(1); a prohibition on growing organic crops “on land to which any prohibited substances . . . have been applied,” *id.* § 6504(2); and a requirement that organic products “be produced and handled in compliance with an organic plan,” *id.* § 6504(3). The statute further sets forth three types of “[p]rohibited crop production practices and materials.” *Id.* § 6508 (section title). If the OFPA’s text clearly barred hydroponic production, we would be required to enforce it according to its terms and set aside USDA’s interpretation. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004). But no part of the statute clearly precludes organic certification of crops grown hydroponically.

Appellants argue, however, quoting 7 U.S.C. § 6513(b)(1), that because hydroponic operations do not use soil, hydroponic producers cannot comply with the OFPA’s requirement that crop production farm plans “contain provisions designed to foster soil fertility.” USDA’s decision instead interpreted that provision to mean that *if* crops are grown in soil, their producers must take measures to preserve that soil’s “fertility” and “organic content.” That interpretation is consistent with the

¹ Appellants argue that other USDA regulations bar organic certification of hydroponic crops. That argument would require the Department to enforce those regulations, but that issue is not before us in this case involving only whether USDA must issue *new* rules.

OFPA, which provides that “[i]f a production or handling practice is not prohibited or otherwise restricted under this chapter, such practice shall be permitted unless it is determined that such practice would be inconsistent with the applicable organic certification program.” 7 U.S.C. § 6512.

3. Finally, Appellants contend that USDA’s interpretation of the OFPA, and of the Department’s own regulations, “conflicts with its experts’ opinions.” But expert opinion is not a reason for us to reverse the district court, much less second-guess USDA. We may set aside an agency’s denial of rulemaking only if the agency has failed to “consider[] the potential problem identified in the petition” or has failed to “provide a reasonable explanation as to why it cannot or will not . . . initiate rulemaking.” *Compassion Over Killing*, 849 F.3d at 857 (cleaned up). Here, USDA explained its reasoning and exercised “scientific judgments and technical analyses within the agency’s expertise,” so our review “must be at its most deferential.” *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1075 (9th Cir. 2011) (cleaned up).

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
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Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- A response, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or response must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

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- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send an email or letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista (maria.b.evangelista@tr.com));
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
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The Clerk is requested to award costs to *(party name(s))*:

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