



CENTER FOR  
FOOD SAFETY

January 17, 2018

Dr. Paul Lewis  
Director, Standards Division  
National Organic Program  
U.S. Dept. of Agriculture Agricultural Marketing Service  
1400 Independence Ave SW, Room 2642—So.  
Ag Stop 0268  
Washington, D.C. 20250-0268

**Re: Docket No. AMS-NOP-15-0012; NOP-15-06—National Organic Program (NOP);  
Organic Livestock and Poultry Practices Final Rule; Withdrawal**

Dear Dr. Lewis,

Center for Food Safety (CFS) is a non-profit organization that empowers people, supports farmers, and protects the earth from the harmful impacts of industrial agriculture. CFS promotes the public's right to safe food, protects the environment, and promotes truly sustainable food production like organic through groundbreaking legal, scientific, and grassroots action. Our membership has grown to include more than 900,000 consumer and farmer supporters across the country that support organic food and farming, grow organic food, and regularly purchase organic products. Through its organic program, CFS has long worked to protect the integrity of organic standards and the organic label since its inception, including the development of livestock standards like the Organic Livestock and Poultry Practices (OLPP) rule. CFS strongly opposes the U.S. Department of Agriculture (USDA) Agricultural Marketing Service (AMS)'s proposal to withdraw this crucial rule. 82 Fed. Reg. 59988 (Dec. 18, 2017). The OLPP must be allowed to go into effect immediately and be fully implemented without further delay, as outlined in the notice of the final rule.

### **Background on the Organic Livestock and Poultry Practices Rule**

OLPP is the result of more than a decade of public participation, stakeholder input, and agency resources. Alongside a wide range of stakeholders, CFS has dedicated considerable time and staff and programmatic resources to the development, finalization, and implementation of the OLPP rule, which provides much needed specificity regarding the practices certified organic producers must implement to comply with the Organic Foods

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Production Act of 1990 (OFPA).<sup>1</sup> It strengthens the existing regulatory language on the care and wellbeing of animals raised on certified organic farms and promotes consistency in the organic meat and poultry market. USDA received thousands of comments in support of the rule during its development. Since its publication, USDA also received thousands more public comments supporting its implementation in response to the Agency’s multiple delays.

OLPP is a prime example of the robust process outlined under OFPA to leverage stakeholder input, consult experts, and engage with farmers to craft clear standards that strengthen the integrity of organic production and the USDA organic label. OLPP is the product of that process working effectively and as Congress intended. OLPP was developed *with* organic producers, the overwhelming majority of which support this rule going into effect. For poultry, USDA stated in the notice of the proposed rule that the rule is based on input from producers on the practices “that would improve the overall quality of life for birds.”<sup>2</sup> OFPA created the National Organic Standards Board (NOSB) as an advisory body to USDA on organic standards, and charged NOSB with recommending additional standards for the care of organic livestock. 7 U.S.C. §§ 6518; 6509. NOSB unanimously recognized that the 2011 NOSB recommendation upon which OLPP was based “was the product of a decade of public NOSB meetings, lengthy discussions, public comment periods and consultation from organic producers, processors, consumers, and the veterinary and scientific community.”<sup>3</sup> And that consumer trust in organic, a trust which is required for organic to remain viable, depends on the “strength and consistent application” of the organic standards. *Id.* USDA, along with NOSB, has proceeded accordingly to craft standards that are much needed for consistency and consumer confidence in organic.

### **OFPA Authority for Animal Welfare Standards**

OFPA provides USDA the express authority to promulgate standards for the health, including welfare and wellbeing, of organically produced livestock. When OLPP was adopted in January 2017, and indeed throughout its ten-year creation, USDA interpreted OFPA as giving it the authority to promulgate additional rules for the care of organic livestock, including OLPP. 82 Fed. Reg. 7042-01 (Jan. 19, 2017) (“AMS affirms that USDA has the authority to conduct this rulemaking; this action falls within our purview to implement the Organic Foods Production Act.”). This authority stems from at least three provisions in OFPA, including the Secretary’s general rulemaking authority, 7 U.S.C. §

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<sup>1</sup> CFS provided written comment to USDA on OLPP as it was being developed. CFS Comment on Proposed Rule and Attachments (July 13, 2016), AMS-NOP-15-0012-5127; CFS Attachments to Comment (July 14, 2016), AMS-NOP-15-0012-5123; CFS Comments on Proposed Delay (June 9, 2017), AMS-NOP-17-0031-46698. CFS has also submitted written comments and letters related to animal welfare in organic to the National Organic Standards Board in May 2012, April 2011, November 2009, December 2008, September 2006, and June 2006.

<sup>2</sup> National Organic Program; Organic Livestock and Poultry Practices, 81 Fed. Reg. 21956-22009, 21991 (April 13, 2016).

<sup>3</sup> Statement adopted unanimously by the National Organic Standards Board, April 20, 2017 Meeting Transcript at 185:4-191:11.

6503, and more specifically the sections for animal production practices and materials, § 6509 and § 6513.

First, section 6503 commands the Secretary to “establish an organic certification program for producers and handlers of agricultural products that have been produced using organic methods,” and to consult with NOSB in developing that program. *Id.* § 6503(a), (c). Second, section 6509(d)(2) commands the NOSB to recommend standards “for the care” of livestock, in addition to the existing OFPA provisions for livestock health care. The first subsection in section 6509(d), section 6509(d)(1), lists “prohibited practices” including the use of subtherapeutic antibiotics, systemic internal parasiticides on a routine basis, and medication, other than vaccinations, in the absence of illness. 7 U.S.C. § 6509(d)(1). Then, beyond these specific animal drug prohibitions, OFPA commands NOSB to recommend “standards in addition to those in paragraph (1) for the care of livestock to ensure that such livestock is organically produced.” *Id.* § 6509(d)(2). Third, following NOSB recommendations for animal care under section 6509(d)(2), section 6509(g) directs the Secretary to develop detailed regulations through notice and comment rulemaking to implement livestock production standards provided under section 6509 generally. This is the proper process by which OFPA standards are set: NOSB makes recommendations based on its members’ expertise, research, and stakeholder input, and USDA, with public notice and input, adopts rules. Fourth, section 6513(c) requires that organic livestock producers have an organic livestock plan, which shall contain provisions designed to foster the organic production of livestock consistent with OFPA. The organic livestock plan is where an operation lays out how it will comply with the organic standards, including rules for raising livestock organically, beyond simply avoiding certain substances.

Accordingly, by its plain language, OFPA requires that additional livestock care standards be recommended by NOSB, *id.* § 6509(d)(2), and then adopted through notice and comment rulemaking, *id.* § 6509(g). The ordinary meaning of the term “care” is very broad, clearly encompassing living conditions beyond just the provision or prohibition of certain animal drugs. Dictionary definitions of “care” bear this out, defining “care” as: “The provision of what is necessary for the health, welfare, maintenance, and protection of someone or something;” “Serious attention or consideration applied to doing something correctly or to avoid damage or risk;”<sup>4</sup> “painstaking or watchful attention;” “maintenance;” and “charge or supervision.”<sup>5</sup> Similarly, the plain meaning of “health,” used in the title of section 6509(d), includes wellbeing beyond just medications or illness: health is defined, for example, as “the condition of being sound in body, mind, or spirit” and “a condition in which someone or something is thriving or doing well.”<sup>6</sup> The same goes for “health care,” defined as: “efforts made to maintain or restore physical, mental, or emotional well-being especially by trained and licensed professionals.”<sup>7</sup>

Beyond the clear, unambiguous wording of OFPA, the context supplied by lawmakers at the time of its passage make it abundantly clear that Congress intended for the federal organic

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<sup>4</sup> Oxford English Dictionary, <https://en.oxforddictionaries.com/definition/care>.

<sup>5</sup> Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/care>.

<sup>6</sup> Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/health>.

<sup>7</sup> Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/health%20care>.

program to require superior animal welfare practices on certified organic farms. The 1990 Senate Report that accompanied OFPA stated that, while organic livestock production was a small industry in the U.S. at the time, “[w]ith additional research and as more producers enter into organic livestock production, the [Senate Committee on Agriculture, Nutrition, and Forestry] expects that USDA, with the assistance of the National Organic Standards Board will elaborate on livestock criteria.”<sup>8</sup>

Later in the same report, the Senate states that:

The [Senate Committee on Agriculture, Nutrition, and Forestry] expects that, after due consideration and the reception of public comment, the [National Organic Standards] Board will best determine the necessary balance between the goal of restricting livestock medications and *the need to provide humane conditions* for livestock rearing. The Board shall recommend livestock standards, in addition to those specified in this bill, to the Secretary.<sup>9</sup>

Without question, this report language illustrates that the congressional drafters of OFPA intended for the organic livestock criteria to include animal welfare provisions, including requiring humane conditions.

As a staff member of Senator Patrick Leahy’s (D-VT) office during the drafting of OFPA, former USDA Deputy Secretary Dr. Kathleen Merrigan was intimately involved<sup>10</sup> in the crafting of OFPA’s language and the creation of the federal organic program. Many in the organic community credit Dr. Merrigan as the principal drafter. In testimony before the National Organic Standards Board (NOSB) in 2007, Dr. Merrigan stated definitively that:

[A]nimal health and welfare issues have always been a part of the [National Organic Program] agenda...when we were framing the legislation in 1989 and 1990, I can assure that animal health and welfare issues, as nascent as the livestock sector was in the organic then, were on peoples’ minds. And we saw that when we developed the livestock sector and more expertise in organic livestock management, that animal health and welfare issues would be part and parcel to all the standards.<sup>11</sup>

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<sup>8</sup> Senate Report 101-357. July 6, 1990. “Report of the Committee on Agriculture, Nutrition, and Forestry, United States Senate, to accompany S. 2830 together with Additional and Minority Views.” 101<sup>st</sup> Congress – 2<sup>nd</sup> Session P. 292.

<sup>9</sup> Senate Report 101-357. July 6, 1990. “Report of the Committee on Agriculture, Nutrition, and Forestry, United States Senate, to accompany S. 2830 together with Additional and Minority Views.” 101<sup>st</sup> Congress – 2<sup>nd</sup> Session. Pp. 302-303 (emphasis added).

<sup>10</sup> In testimony to NOSB, Dr. Merrigan stated: “I worked for the Senate Agriculture Committee in the late eighties, early nineties, working for Chairman Patrick Leahy, and drafted the Organic Foods Production Act of 1990, the Senate committee report that is, in large measures, still the major text of congressional intent that helps in the administration of the law.” U.S. Department of Agriculture. November 28, 2007. Testimony of Kathleen Merrigan, National Organic Standards Board Meeting, Arlington VA, at 200.

<sup>11</sup> U.S. Department of Agriculture. November 28, 2007. Testimony of Kathleen Merrigan, National Organic Standards Board Meeting, Arlington VA, at 201.

Dr. Merrigan clearly elucidates that the intent was for the National Organic Program (NOP) to enshrine in the animal health organic standards provisions for the overall welfare of organic animals. Organic requirements were never intended to be limited to prohibiting certain animal drugs, but to provide for the overall wellbeing of certified organic animals.

Later in the same 2007 testimony, Dr. Merrigan states that “[i]t was on the agenda in 1990; it’s still on the agenda today. When we look at the final rule that was put out by USDA and the National Organic Program, again, a whole lot of anticipation of health and welfare standards for livestock...animal health and welfare standards are expected to be a part of a fully developed, robust National Organic Program.”<sup>12</sup>

Indeed, USDA has long exercised this authority to implement additional regulations regarding the care of organic livestock. In 2000, when the first set of regulations for organic were promulgated, they required that “[t]he producer of an organic livestock operation must establish and maintain livestock living conditions which accommodate the health and natural behavior of animals.” 7 C.F.R. § 205.239 (2000). And in 2010, USDA adopted rules providing more specific feed and living conditions for ruminants raised organically. Access to Pasture, 75 Fed. Reg. 7154 (February 17, 2010) (codified at 7 C.F.R. §§ 205.237; 205.239; 205.240). The Access to Pasture rule was promulgated using the same process as the OLPP, with multiple NOSB recommendations and tens of thousands of comments from producers, retailers, handlers, certifying agents, consumers, trade associations, organic associations, animal welfare organizations, consumer groups, state and local government entities, and various industry groups. *Id.* The overwhelming majority expressed support for heightened animal welfare requirements, including as relevant there, opposition to confinement as anathema to organic. The 2010 Access to Pasture regulations were based on the same authority as the OLPP and fulfilled the same OFPA purpose to ensure consistency and meet consumer expectations:

The purpose in amending the NOP regulations is to make clear what access to pasture and grazing mean under the NOP. A stated purpose of the OFPA (7 U.S.C. 6501) is to *assure consumers that organically produced products meet a consistent and uniform standard*. This action is being taken to facilitate and improve compliance and enforcement and satisfy consumer expectations that ruminant livestock animals are grazing pastures and that pastures are managed to support grazing throughout the grazing season. Sufficient specificity and clarity will bring uniformity in application of the livestock regulations and enable certifying agents and producers to assess compliance. The amendments set minimal objectives which align with consumer expectations and producer perspectives. Producers can select measures suitable to the conditions of their operation, regardless of size or location, to meet and exceed the requirements.

*Id.* at 7154 (emphasis added). The OLPP is an extension of USDA’s past rulemaking under OFPA, meeting the need to provide specific and consistent standards for organic animal

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<sup>12</sup> U.S. Department of Agriculture. November 28, 2007. Testimony of Kathleen Merrigan, National Organic Standards Board Meeting, Arlington VA, at 201-202, 203.

care, here addressing the needs of avian livestock as opposed to ruminants. OLPP Final Rule, 82 Fed. Reg. 7042, 7082 (“In 2010, AMS published a final rule (75 FR 7154, February 17, 2010) clarifying the pasture and grazing requirements for organic ruminant livestock, which partially addressed OFPA's objective for more detailed livestock standards. This rule extends that level of detail and clarity to all organic livestock and poultry, and would ensure that organic standards cover their entire lifecycle, consistent with recommendations provided by USDA's Office of Inspector General and nine separate recommendations from the NOSB.”).

### **USDA’s New Interpretation of OFPA Ignores Plain Statutory Language, is Not Permissible, and is Arbitrary and Capricious.**

USDA now reverses its decades-long interpretation of OFPA and claims that the unambiguous language in OFPA does not allow it to promulgate OLPP. 82 Fed. Reg. 59989-90 (Dec. 18, 2017). USDA suggests that sections 6509(d)(2) and (g) authorize it only to issue regulations that that are “similar to those described in section 6509(d)(1) *and* that are shown to be necessary to meet the congressional objectives specified in 7 U.S.C. 6501.” *Id.* at 59990. This reading completely ignores the plain language of section 6509(d)(2), which states that NOSB “shall” recommend additional standards “for the care” of organic livestock, and the language in section 6509(g) requiring that the Secretary “shall” hold public hearings and “shall develop detailed regulations...to guide implementation of the standards for livestock” provided generally under section 6509. Contrary to USDA’s new unprecedented interpretation, given the plain meaning of the words “for the care” of livestock and the OFPA drafters own words about animal welfare standards, it is unambiguous that OFPA authorizes, and in fact requires, that USDA promulgate additional animal care standards beyond those animal drug prohibitions listed at section 6509(d)(1). USDA provides no reasoning and points to no support in OFPA for its contention that section 6509(d)(2) is so limited, and instead tries to write the requirement of additional standards for livestock care out of existence.

As to its contention that NOP regulations must be “necessary” to meet the goals of OFPA, the section in question states clearly that additional standards for the care of animals are necessary to ensure that livestock are “organically produced.” *Id.* § 6509(d)(2). Moreover, as USDA itself stated when it adopted OLPP, this regulation is necessary to meet the goals of OFPA:

*This final rule creates greater consistency in organic livestock and poultry practice standards. Based on recommendations from the Office of Inspector General and the National Organic Standards Board, AMS determined that the current USDA organic regulations (7 CFR part 205) covering livestock care and production practices and living conditions needed additional specificity and clarity to better ensure consistent compliance by certified organic operations and to provide for more effective administration of the National Organic Program (NOP) by AMS. One purpose of the Organic Foods Production Act of 1990 (OFPA) (7 U.S.C. 6501-6522) is to assure consumers that organically produced products meet a consistent and uniform standard (7 U.S.C. 6501).*

82 Fed. Reg. 7042-01 (emphasis added). As the Inspector General noted in its 2010 review of the National Organic Program, the livestock care standards, specifically as to outdoor access and space requirements pre-OLPP were not being consistently enforced due to lack of clarity. USDA concurred with OIG's recommendation to clarify these standards, noted that NOSB had been working on recommendations for animal welfare and outdoor access for livestock for many years, and stated that it would continue to work with NOSB as to these standards.<sup>13</sup> Thus, OLPP clearly fulfills the OFPA purpose of assuring consumers that organically produced animal products meet a consistent and uniform standard.

Congress here expressly and unambiguously granted USDA the authority to promulgate standards for the care (including health and welfare) of organically raised animals. The inquiry ends there, and USDA's new interpretation is entitled to no deference in the face of clear, unambiguous statutory language and Congressional intent. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). All provisions of a statute must be given meaning, not rendered superfluous, and read together, in harmony. To the extent USDA now believes that the provision title "Health care" somehow renders section 6509(d)(2) inoperative or limited to animal drugs provisions just like section 6509(d)(1), it ignores both that subchapter headings cannot limit the plain meaning of the operative text of a statute, *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008), and that even if the title is used as a tool to resolve doubts as to the meaning of a statute, the phrase "health care" cannot reasonably be limited to just drugs. Health and care have a far more holistic meaning, as they do in other contexts—for example, we do not limit our definition of human health to what drugs are available to treat illness, but rather include other aspects of wellbeing, such as a nutritious diet and physical exercise.

USDA, AMS in addition to other branches of USDA, international bodies and a large body of research, recognizes that animal welfare and health are synonymous.<sup>14</sup> Indeed, in July 2013, USDA published a guidance on organic livestock requirements stating that, "organic livestock must be raised in a way that accommodates their health and natural behavior," and lists the following criteria for complying with this requirement: access to the outdoors; shade; clean, dry bedding; shelter; space for exercise; fresh air; clean drinking water; direct

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<sup>13</sup> Office of Inspector General, *Oversight of the National Organic Program*, 22, 26 (March 2010).

<sup>14</sup> World Animal Health Organization, *Animal Health Code*, Article 7.1.2(1), [http://www.oie.int/index.php?id=169&L=0&htmfile=chapitre\\_aw\\_introduction.htm](http://www.oie.int/index.php?id=169&L=0&htmfile=chapitre_aw_introduction.htm) (recognizing that practices that improve animal welfare also improve animal health); see also World Animal Health Organization, *Global Animal Welfare Strategy* 3 (2017), [http://www.oie.int/fileadmin/home/eng/Media\\_Center/docs/pdf/85SG/AW/EN\\_OIE\\_AW\\_Strategy.pdf](http://www.oie.int/fileadmin/home/eng/Media_Center/docs/pdf/85SG/AW/EN_OIE_AW_Strategy.pdf); see generally European Food Safety Authority, 2007, *Animal Welfare Factsheet* (March 2007) ("Why is animal welfare important for animal health? Lack of an adequate standard of animal welfare compromises the ability of animals to grow, reproduce, and survive. Maintaining an adequate level of animal welfare reduces the incidence of disease and improves animal health.") and European Commission Scientific Committee on Animal Health and Animal Welfare, *The Welfare of Chickens Kept for Meat Production (Broilers)* (March 21, 2000).

sunlight.<sup>15</sup> Additionally, USDA’s *Guidelines for Organic Certification of Poultry* states: “Animal health is the result of preventative and on-going management efforts to create living soils, provide nourishing forage and feed, and improve the quality of livestock life. Animals must be kept in healthy, low stress environments.”<sup>16</sup>

OFPA plainly and unambiguously authorizes additional NOP regulations for animal care and welfare. Even if the statute were ambiguous, USDA’s new interpretation of section 6509 is not a reasonable or permissible reading, given the plain meaning of the terms and intent of the drafters. As USDA itself has noted, organic consumers expect organic livestock to be raised with humane conditions that support their natural behaviors,<sup>17</sup> and consistency in meeting those standards is a primary purpose of OFPA. Tens of thousands of commenters, including organic farmers and consumers, support these standards and agree that USDA has not just the authority, but the duty, to ensure that animal products labeled “organic” have a high standard of animal welfare.

Moreover, USDA’s claim that it lacks authority to adopt animal welfare standards is a 180-degree shift from its views of the last 28 years since OFPA’s promulgation, and is arbitrary and capricious. 5 U.S.C. § 706. This monumental shift is not merely an inconsistency—USDA’s new interpretation runs contrary to the intention of the OFPA drafters, years of NOSB recommendations, and the agency’s own stance mere months ago. It also leads to absurd consequences. If USDA is correct that it lacks authority to issue any regulations for animal care that do not relate strictly to animal drugs (§ 6509(d)(1)), then it was also without authority to issue the ruminant Access to Pasture rule in 2010 and indeed much of the 2000 regulations for organic. By USDA’s new rationale, all of these prior regulations would be considered *ultra vires*. With the change in administration, USDA now seeks to undo years of work to build the organic label as a trustworthy and meaningful standard. This is untenable, especially in the face of overwhelming support by the very industry regulated under OFPA for OLPP and animal welfare rules in general.

Finally, USDA has the duty to consult with NOSB in developing organic standards, and specifically as to livestock care standards. 7 U.S.C. §§ 6503(c); 6509(d)(2). Yet USDA has not consulted with NOSB as to the withdrawal of OLPP, and its failure to do so violates OFPA and the Administrative Procedure Act, 5 U.S.C. § 706. To the contrary, during its April, 2017 meeting, the NOSB unanimously voted to formally recommend to the Secretary

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<sup>15</sup> USDA, *Organic Livestock Requirements* (July 2013), <https://www.ams.usda.gov/sites/default/files/media/Organic%20Livestock%20Requirements.pdf>.

<sup>16</sup> AMS/NOP, *Guidelines for Organic Certification of Poultry*, <https://www.ams.usda.gov/sites/default/files/media/Poultry%20-%20Guidelines.pdf>.

<sup>17</sup> A majority of U.S. consumers, regardless of purchasing habits, believe that it is very or extremely important that organic animals are raised on farms with high welfare standards; this number skyrockets to 86% for regular organic consumers. Specifically as to organic eggs, over half of all consumers expect that hens are able to access and move freely in the outdoors, while 83% of regular organic purchases believe organic hens must go outdoors. Consumer Reports National Research Center, *Animal Welfare Survey: 2017 Nationally-Representative Phone Survey* (March 18, 2017), <http://greenerchoices.org/wp-content/uploads/2016/01/2017-Animal-Welfare-Survey-Public-Report.pdf>.

that OLPP not be delayed and be allowed to go into effect no later than May 19, 2017.<sup>18</sup> As part of that unanimous statement, NOSB reiterated its recognition that consumer trust in the organic label depends on the strength and consistency of application of organic standards, that NOSB has an “integral role” in the promulgation of these “volunteer” standards, and that OLPP was a consensus rule supported by organic producers, consumers, industry and NOSB. *Id.* at 185-86.

### **USDA’s Second Rationale for Withdrawal is Arbitrary and Capricious**

USDA’s second rationale for its proposed withdrawal of OLPP, the supposed regulatory burdens and costs to producers, relies on factors Congress never intended to guide organic standards, while ignoring the benefits (including non-economic benefits) of strong and consistent organic standards, as intended by OFPA. As such, this rationale is arbitrary and capricious.

First and foremost, cost considerations cannot impede improvement in the organic industry or efforts to better align the standards with the organic law and organic principles. The organic program is founded on process-based standards. Central to organic is the guarantee that the manner in which organic foods and goods are produced reflects specific social and ethical values. The organic law and regulations do not allow for cost concerns to prevent certified producers from meeting these values. OFPA is not a cost/benefit statute; it does not authorize USDA to refuse to promulgate a standard due to its cost to producers who choose to become certified organic. OFPA is unlike statutes where Congress does explicitly require the agency to compare risks and benefits when regulating, for instance, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), where EPA must consider the benefit of a pesticide as well as its adverse effects on the environment when registering pesticide products. 7 U.S.C. § 136a; 136(bb) (“The term ‘unreasonable adverse effects on the environment’ means (1) any unreasonable risk to man or the environment, *taking into account the economic, social, and environmental costs and benefits* of the use of any pesticide.” (emphasis added)). OFPA, to the contrary, contains no such provision and does not couch standards for production in terms of costs and benefits.

Nor is it appropriate or legally permissible for USDA to transpose economic considerations from an extra-statutory, non-OFPA source, in order to overturn OFPA rulemaking. USDA’s statutory mandate is to effectuate the purposes of OFPA in this rulemaking. Alleged economic considerations, which are erroneous in any event, see *infra*, are only relevant, if at all, to the extent they stem from an OFPA command, and OFPA is not a cost-benefit statute.

Moreover, organic certification, and therefore regulation under OFPA, is *voluntary*; food producers who do not wish to comply with the standards for organic production, which command a higher price, can sell food in the conventional market. This makes organic unique, and undercuts USDA’s new rationale that any additional burden or cost to producers renders a regulation undesirable or unlawful. Organic producers were the

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<sup>18</sup> Statement adopted unanimously by the National Organic Standards Board, April 20, 2017 Meeting Transcript at 185:4-191:11.

proponents of OFPA itself, to provide consistency for organically-labeled products across the country and internationally. This same industry seeks the clarification that OLPP provides for organic animal care, because these standards reflect the high level of integrity for which consumers pay a premium and will level the playing field for organic poultry and egg producers.

USDA's discussion of the burden on producers from OLPP's implementation is wrought with flawed and problematic logic. In the notice of the proposed rule, "AMS notes that organic producers have already made significant investment in facilities and infrastructure to support the growing organic market under the current USDA organic regulations." 82 Fed. Reg. 59990. While this is true, this statement does not negate the need for improved animal welfare standards for organic producers or USDA's authority to promulgate such rules. Further, the OLPP rules do not represent a substantial burden to the vast majority of organic food animal producers or in any way devalue their investments made to date. To the contrary, it levels the playing field so that the vast majority of producers who made prior investments in raising animals humanely are not undercut by the handful of producers (1%) who have not made such investments, but are still able to sell their products as "organic" in the absence of the loop-hole closing OLPP.

Prior to the change in administration, USDA recognized that OLPP would largely codify existing industry practices, impose no costs for mammals, and no or marginal costs for the majority of organic egg and poultry producers. National Organic Program; Organic Livestock and Poultry Practices, 81 Fed. Reg. 21956-01 (April 13, 2016). USDA's own economic study—*Economic Impact Analysis of Proposed National Organic Standards Board Regulations for Living Conditions for Organic Poultry*<sup>19</sup>—looked at the estimated cost increases of complying with the proposed regulations for small (<16,000 birds), medium (16,000-100,000 birds), and large (>100,000 birds) organic egg and broiler producers. The analysis found that small and medium organic egg and broiler producers would have "negligible" additional costs as a result of implementing the NOSB's proposed regulations, and only marginal costs to large broiler producers. Additionally, as noted by NOSB in its unanimous statement to USDA in 2017, a survey conducted by the Organic Egg Farmers of America in 2014 indicated that the majority of egg producers, representing the majority of organic egg production, *already adhere* to the practices and standards in OLPP.<sup>20</sup> Not only did USDA predict no or marginal cost increases from its proposed OLPP rule, it stated that even those producers who made operational changes to comply with the rule would see net returns from the organic market that would *exceed* the conventional cage-free market. 81 Fed. Reg. at 21992. Moreover, the clear and consistent standards imposed by OLPP are "needed and broadly anticipated by most livestock producers...." *Id.* at 21998.

Based on USDA's own analysis, large, medium, and small organic broiler producers and medium and small organic egg producers would all have *minimal* burden as a result of

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<sup>19</sup> Vukina, *et al.*, *Economic Impact Analysis of Proposed Regulations for Living Conditions for Organic Poultry: Phase 3 Report* (Aug. 2012); Vukina, *et al.*, *Proposed changes in living conditions for broilers under the National Organic Program will have limited economic effects* (2014); Vukina, *et al.*, *Economic effects of proposed changes in living conditions for laying hens under the National Organic Program* (2014).

<sup>20</sup> NOSB Meeting Tr. at 186 (April, 2017).

implementing the regulations. These producers have made and continue to make significant investments to ensure their eggs and chicken meet a high standard of welfare, and have contributed significantly to the growing organic market. They are also largely in support of the OLPP rules going into effect.

The outliers are the handful of large organic egg producers, which account for only 1% of total organic egg producers in the U.S. Concerns over the investment and cost barriers required to bring an operation into compliance are limited solely to these large facilities. Because 100% of organic broiler producers and 99% of organic producers in the U.S. can comply with the OLPP rules with no or negligible changes to their current operations, USDA's new position that the rules represent an undue burden on producers is wildly unfounded.

USDA also posits that continued growth of the organic market in the U.S. since its establishment is evidence that the existing regulations are sufficient. 82 Fed. Reg. 59990. However, this logic is flawed—just because more consumers are choosing organic over conventional does not indicate that all organic foods are consistently produced to standards that live up to organic consumer expectations. As OIG found in its investigation, the lack of clarity of rules for the care of poultry resulted in inconsistent enforcement.<sup>21</sup> According to agricultural economist Dr. John Ikerd, “[m]arkets for organic foods are fundamentally different from markets for conventional agricultural products...many ‘organic values’ are purely social or ethical and thus are not reflected in markets and cannot be assessed economically. These social and ethical values are major contributors to the existence of organic markets but are not reflected in supply of or demand for organic products.”<sup>22</sup> As such, the growth in the organic market is not definitive evidence that the social and ethical values of organic consumers are being fully met by the existing standards. It simply reflects that consumers are increasingly choosing organic over conventional products, which could be for any number of reasons from avoiding toxic pesticide residues and genetically engineered foods to the belief that organic products are more nutritious.<sup>23</sup>

Several surveys<sup>24</sup> have shown that many consumers purchase organic poultry products *believing* that all products carrying the organic seal were raised with a high level of welfare. This belief is likely behind the consistent growth in the organic poultry market. To allow a few large producers to continue operating at a lower bar undermines this growth in the future. It also runs counter to a central purpose of OFPA, “to assure consumers that

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<sup>21</sup> OIG Report, *supra* n.13.

<sup>22</sup> Paige M. Tomaselli, Esq. & Lisa J. Bunin, Ph.D., *USDA Stalls Regulations to Improve Organic Poultry Living Conditions: Agency Hides Behind Faulty Economic Impact Assessment*, CFS (Apr. 2014), [https://www.centerforfoodsafety.org/files/animal-welfare-final\\_56276.pdf](https://www.centerforfoodsafety.org/files/animal-welfare-final_56276.pdf).

<sup>23</sup> *Id.* at 8-10.

<sup>24</sup> Center for Food Safety, *Survey on Organic Eggs & Poultry* (Sept. 2013) (Online Survey, participants comprise a group of self-selected Center for Food Safety supporters who volunteered to take the survey, and they were not randomly selected); Consumer Reports National Research Center, *Natural Food Labels Survey: 2015 Nationally-Representative Phone Survey* (2015), [http://greenerchoices.org/wp-content/uploads/2016/08/CR\\_2015\\_Natural\\_Food\\_Labels\\_Survey.pdf](http://greenerchoices.org/wp-content/uploads/2016/08/CR_2015_Natural_Food_Labels_Survey.pdf).

organically produced products meet a consistent standard,” contrary to the Agency’s claims. 7 U.S.C. § 6501(2). Given that lack of consistency without OLPP, and some “organic” animals raised with significantly lower health/welfare standards than others, the failure to implement OLPP could be disastrous for consumer confidence in organic.<sup>25</sup>

USDA also expressed concern regarding the prescriptive nature of the OLPP rules and the potential for prescriptive regulations to discourage technological and social innovation in the industry. 82 Fed. Reg. 59990. First, the OLPP rules are not prescriptive. They prohibit practices and conditions for animals that do not meet the bar of animal care and welfare established by OFPA and which consumers expect from the organic label. They do not, however, prescribe strict methods of compliance, instead leaving open to individual producers the methods by which they choose to comply. As noted above, organic is a program that farmers opt into. As a voluntary program, it is critical that the regulatory framework prohibit all practices that do not conform to its basic principles and tenets. Second, it is precisely through the innovation of small and mid-size organic poultry producers that the OLPP rules have come to be. It is through innovation that the majority of producers have identified strategies for pasturing chickens sustainably and maintaining indoor housing conditions that promote the health and wellbeing of birds. The refusal of a few large producers to innovate and advance their systems is holding the industry, and now OLPP, back—not the other way around.

Simply, there are no “substantial costs” associated with OLPP. USDA’s new conclusion to the contrary, 82 Fed. Reg. at 59991, is flawed and not supported by the record before the agency. The improvement of organic regulations would not result in “substantial costs” nor do they need to be “supported by evidence of significant market failure.” *Id.* USDA’s rejection of the “first alternative” of allowing the OLPP final rule to become effective was therefore arbitrary and capricious. “Market failure” is not a requirement for standard implementation under OFPA. *See* 7 U.S.C. §§ 6501 *et seq.* OLPP will fulfill the OFPA purpose to ensure organically produced products meet a consistent standard and to provide for the care of organic livestock as required in section 6509. Such a rule, indeed any organic rule, does not rely on a “market failure” for its justification. USDA has provided no explanation of where this “market failure” standard derives or why it should be applied to organic standards. As noted above, if consumer confidence in organic drops because it is allowed to become nothing more than more-expensive conventional food, there will be a catastrophic “market failure” in organic. That is why the NOP must improve standards where loopholes exist, to maintain the integrity of the organic label. Were a “market failure” needed—it is not—the disconnect between current consumer expectations for organically raised poultry and the requirements pre-OLPP constitutes such a failure. USDA’s focus on costs to producers and “market failure” runs contrary to the letter and spirit of OFPA, and the evidence before the agency, and as such is an arbitrary and capricious rationale for withdrawing OLPP.

Additionally, to the extent USDA is basing its rationale for withdrawing OLPP on Executive Order 13771, which directs agencies to identify two existing regulations to be

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<sup>25</sup> Tomaselli & Bunin (2014), *supra* n.22, at 11-12.

repealed for every new regulation, this application of E.O. 13771 is arbitrary and capricious, in violation of the APA.<sup>26</sup>

Finally, USDA ignores the benefits of OLPP and animal welfare standards, which, like organic generally, are not exclusively economic.<sup>27</sup> The organic industry is currently worth nearly \$50 billion per year, but if consumer confidence is lost, that value will plummet. But USDA cannot base organic regulations solely on economic factors; USDA must factor the ethical treatment of animals and consumer desires into decisions regarding organic regulations as well. Indeed, while “assuring consumers that organically produced products meet a consistent standard” is an explicit purpose of OFPA, ensuring that food producers can slap on an “organic” label for as little cost as possible is *not* one of the purposes of OFPA. There is simply no rational connection between the facts here (rules developed over a decade with participation and support by the vast majority of the industry and public as necessary for consistency across the industry and the ethical values embedded in organic) and USDA’s new conclusion that the OLPP rules would be too burdensome or costly to justify. This reliance on faulty economic considerations and failure to include non-economic benefits runs contrary to OFPA and is arbitrary and capricious.

## Conclusion

USDA has not provided a permissible rationale for its proposed withdrawal of OLPP, a set of rules that have been thoroughly vetted and are requested by the vast majority of the industry to be regulated. To hold organic hostage to the 1% of operations that refuse to live up to the organic standards is unacceptable and unlawful. USDA must not withdraw OLPP and instead let it go into effect immediately.

Sincerely,



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Senior Manager, Organic & Animal Policy

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<sup>26</sup> Executive Order 13771 also exceeds the President’s constitutional authority, violates his duty under the Take Care Clause of the Constitution, U.S. Const. art. II § 3, and results in federal agencies, here USDA, engaging in unlawful actions, here the withdrawal of OLPP.

<sup>27</sup> Tomaselli & Bunin (2014), *supra* n.22, at 7-8.