

1 SYLVIA SHIH-YAU WU (CSB No. 273549)
 2 GEORGE KIMBRELL (*Pro Hac Vice pending*)
 3 AMY VAN SAUN (*Pro Hac Vice pending*)
 4 Center for Food Safety
 5 303 Sacramento Street, 2nd Floor, San Francisco, CA 94111
 6 T: (415) 826-2770 / F: (415) 826-0507
 7 Emails: swu@centerforfoodsafety.org
 8 gkimbrell@centerforfoodsafety.org
 9 avansaun@centerforfoodsafety.org

10 *Counsel for Plaintiffs*

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

13 CENTER FOR ENVIRONMENTAL) Case No. 18-1763
 14 HEALTH, CENTER FOR FOOD SAFETY,)
 15 CULTIVATE OREGON, and)
 16 INTERNATIONAL CENTER FOR) **COMPLAINT FOR**
 17 TECHNOLOGY ASSESSMENT;) **DECLARATORY AND**
 18) **EQUITABLE RELIEF**

19 *Plaintiffs,*)

20 v.)

21 SONNY PERDUE, in his official capacity as)
 22 the Secretary of Agriculture, BRUCE)
 23 SUMMERS, in his official capacity as)
 24 Acting Administrator of Agriculture)
 25 Marketing Service, RUIHONG GUO, Ph.D.,)
 26 in her official capacity as Acting Deputy)
 27 Administrator of the National Organic)
 28 Program, and the UNITED STATES)
 DEPARTMENT OF AGRICULTURE)

Defendants.)

COMPLAINT

1
2 Plaintiffs Center for Environmental Health, Center for Food Safety, Cultivate Oregon,
3 and International Center for Technology Assessment, on behalf of themselves and their
4 members, allege as follows:

5 **INTRODUCTION AND NATURE OF ACTION**

6 1. This is a civil action for declaratory and equitable relief stemming from the
7 United States Department of Agriculture (USDA)’s withdrawal of a crucial rule setting standards
8 for the raising, transporting, and slaughtering organic livestock, based on a novel and
9 dangerously far-reaching interpretation by the new administration, in a complete reversal of the
10 last 28 years of organic standards and policy. The USDA’s revocation of this organic livestock
11 rule violates the Organic Foods Production Act (OFPA), failed to comply with the
12 Administrative Procedure Act (APA), and threatens to undermine the very integrity of the
13 organic label that consumers trust and producers rely upon.

14 2. On January 19, 2017, after more than a decade of administrative process,
15 including public notice and comment, public hearings, and consultation with the National
16 Organic Standards Board (NOSB), the USDA published a final rule setting detailed standards for
17 organically-produced livestock, particularly poultry. *See* Final Rule, Organic Livestock and
18 Poultry Practices, 82 Fed. Reg. 7042 (Jan. 19, 2017) (hereafter “Organic Livestock Rule”).

19 3. The Organic Livestock Rule is the result of years of public participation,
20 stakeholder input, and agency resources—a prime example of the robust process outlined under
21 OFPA—and is supported by the overwhelming majority of organic producers and consumers,
22 including the NOSB, the statutorily-created advisory board that Congress charged with
23 recommending additional standards for the care of organic livestock. The Organic Livestock
24 Rule is based on the same authority as the prior USDA organic rules for the care and raising of
25 organic livestock, and is necessary to meet consumer expectations about the welfare of
26 organically raised livestock and to assure consumers that organically produced animal products
27 meet a consistent standard, a primary purpose of OFPA.
28

1 4. Although the final rule was set to become effective on March 20, 2017, following
2 the Administration change USDA delayed the effective date of the rule three times, then finally
3 withdrew the final rule a year later, without consulting NOSB and despite tens of thousands of
4 comments urging USDA to allow the rule to become effective. National Organic Program
5 (NOP); Organic Livestock and Poultry Practices, 83 Fed. Reg. 10775 (March 13, 2018).

6 5. USDA's first rationale for revoking the final Organic Livestock Rule is based on
7 a total reversal of USDA's interpretation of its authority under OFPA to set standards for organic
8 livestock production, overturning a decades-long interpretation and the basis for several prior
9 organic livestock rules. This new interpretation is contrary to the plain language of OFPA, which
10 unambiguously requires USDA to promulgate additional standards for the care of livestock based
11 on NOSB recommendation, nor is it a permissible interpretation of OFPA's requirements, and is
12 arbitrary and capricious in violation of the APA.

13 6. USDA's second rationale for revoking the Rule, the supposed regulatory burdens
14 and costs to producers, similarly violates both OFPA and the APA, as it runs contrary to the
15 economic evidence before USDA, and relies on factors Congress never intended USDA to
16 consider, while ignoring the benefits (including non-economic benefits) of strong and consistent
17 organic standards, as intended by OFPA. Further, as OFPA does not grant USDA the authority to
18 refuse to promulgate organic standards based on costs to producers or a lack of "market failure,"
19 the Organic Livestock Rule withdrawal exceeds USDA's authority under OFPA, in violation of
20 the APA.

21 7. NOSB is the statutorily-created advisory body to USDA that is integral to setting
22 standards in the organic program generally, and which Congress specifically intended to assist
23 USDA in setting standards for livestock. 7 U.S.C. §§ 6509(g), 6509(d)(2), 6503(c), 6518(k)(1).
24 Despite basing the Organic Livestock Rule on numerous NOSB recommendations, USDA did
25 not consult with NOSB regarding its proposed withdrawal of the Organic Livestock Rule, and it
26 failed to explain its deviation from NOSB's recommendation to promulgate the rule, in violation
27 OFPA and the APA.

28

1 8. Accordingly, Plaintiffs seek declaratory relief esbtalishing that USDA's
2 revocation of the final Organic Livestock Rule is unlawful under OFPA and that USDA's
3 rationale for revoking the Organic Livestock Rule is contrary to OFPA and arbitrary and
4 capricious and contrary to law under the APA. Plaintiffs respectfully request that the Court set
5 aside or vacate USDA's rule withdrawing the Organic Livestock Rule, reinstating the final
6 Organic Livestock Rule duly promulgated in January 2017. Finally, Plaintiffs seek attorney's
7 fees and costs pursuant to 28 U.S.C. § 2412(d).

8 JURISDICTION

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

11 10. Venue in this Court is proper under 28 U.S.C. § 1391(e) because no real property
12 is involved and because one or more Plaintiffs reside in this judicial district.

13 PARTIES

14 *Plaintiffs*

15 11. Plaintiff **Center for Environmental Health (CEH)** is located in Oakland, CA.
16 Founded in 1996, CEH is a nonprofit organization dedicated to protecting the public from
17 environmental and public health hazards. CEH is committed to environmental justice, promoting
18 a safe and sustainable food supply, supporting communities in their quest for a safer
19 environment, and fostering corporate accountability. CEH works to protect people from toxic
20 chemicals through engagement with communities, businesses, and as a government watchdog to
21 demand practices that are safe for human health and the environment. CEH promotes safer food
22 and farming to provide families the right to know what they are feeding their families, including
23 through labels like organic, and to help people avoid harmful pesticides, food additives,
24 genetically engineered foods, and other health and safety threats. CEH works in support of safer,
25 sustainable food production that serves to regenerate natural resources, support healthier food for
26 consumers, and create healthier environments for farmers, farm workers, and rural communities.
27 CEH's scientific investigations, food safety testing, legal advocacy and litigation, and work with
28 state and national food advocacy coalitions all converge around the goals of ending unsafe,

1 unsustainable food production practices and supporting ecological, organic alternatives that
2 promote healthy farming and a healthier food supply.

3 12. CEH has long had a dedicated program to protecting organic standards. For
4 example, in 2011 CEH revealed that dozens of companies had been selling personal care
5 products labeled as “organic” which were not in fact certified as organic, which eventually lead
6 to litigation and settlements requiring the misleading labeling be corrected. CEH was also a
7 plaintiff in a successful challenge to USDA’s failure to comply with APA notice and comment
8 procedures for a rule that would have allowed compost contaminated with pesticides in organic,
9 in *Ctr. for Env’tl. Health v. Vilsack*, No. 15-CV-01690-JSC, 2016 WL 3383954 (N.D. Cal. June
10 20, 2016).

11 13. CEH has devoted staff time and resources to the protection of the Organic
12 Livestock Rule, including joining comments on the proposed withdrawal. CEH as an
13 organization and its supporters are being, and will be, adversely affected by USDA’s failure
14 comply with OPFA and the APA by revoking the Organic Livestock Rule.

15 14. Plaintiff **Center for Food Safety (CFS)** brings this action on behalf of itself and
16 its members. Founded in 1997, CFS is a national public interest non-profit organization with
17 more than 900,000 members nationwide that support organic food and farming, grow organic
18 food, and regularly purchase organic products. CFS has offices in San Francisco, CA; Portland,
19 OR.; and Washington, D.C., with members in nearly every state, including organic farmers,
20 producers, retailers, consumers, and certifiers. CFS and its members are being, and will be,
21 adversely affected by USDA’s actions.

22 15. CFS’s mission is to empower people, support farmers, and protect the
23 environment from the harmful impacts of industrial agriculture, and to promote truly sustainable
24 agriculture, like organic and beyond. One of CFS’s flagship programs has always been its
25 “Organic and Beyond” program, which seeks to protect the integrity of the organic standard.
26 CFS has multiple full-time staff members, policy, scientific, outreach, and legal devoted to this
27 program and its goals.
28

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

11 17. In addition to information and public education, one of CFS's core activities is
12 challenging administrative actions and serving as an agency watchdog to protect organic
13 integrity. When necessary, CFS engages in public interest litigation challenging agricultural
14 practices that harm human health and the environment—such as pesticide use and genetically
15 engineered crops—or impact farmers, its members, and the public interest. Many of CFS's past
16 lawsuits involved organic issues and agricultural interests. For example, CFS was an amici in
17 *Harvey v. Veneman*, 396 F.3d 28 (1st Cir. 2005), litigation that challenged provisions of the
18 National Organic Program Final Rule as inconsistent with OFPA and a dilution of its organic
19 standards. CFS was also counsel and a plaintiff in a successful challenge to USDA's failure to
20 comply with APA notice and comment procedures for a rule that would have allowed compost
21 contaminated with pesticides in organic, in *Ctr. for Env'tl. Health v. Vilsack*, No. 15-CV-01690-
22 JSC, 2016 WL 3383954 (N.D. Cal. June 20, 2016). Finally, CFS brought a challenge to ensure
23 that synthetic substances are not unduly allowed in organic production and to preserve the
24 Congressionally-intended process for removing those substances from the list of allowed
25 synthetics, in *Ctr. for Food Safety et al. v. Perdue*, No. 15-cv-1590-HSG (N.D. Cal.).

26 18. Through its organic program, CFS has worked to protect the integrity of organic
27 standards and the organic label since its inception, including the development of livestock
28 standards like the Organic Livestock Rule. Alongside a wide range of stakeholders, CFS has

1 dedicated considerable time and staff and programmatic resources to the development,
2 finalization, and implementation of the Organic Livestock Rule, which provides much needed
3 specificity regarding the practices certified organic producers must implement to comply with
4 OFPA.

5 19. CFS was heavily involved in the lengthy process that lead to promulgation of the
6 Organic Livestock Rule, including the following actions:

- 7 a. In September 2006, CFS sent a letter, signed by five organizations, to
8 NOSB members on requirements for outdoor access for organic poultry.¹
- 9 b. In 2009, NOSB issued a formal recommendation to USDA on standards
10 for animal welfare, and in 2011 the Board incorporated additional
11 livestock standards into the recommendations based on public input. In
12 response, in October 2009, CFS submitted comments to NOSB on the
13 Livestock Subcommittee's 2009 proposed animal welfare
14 recommendations and in April 2011, CFS submitted comments² providing
15 further input on the NOSB's recommendation on animal welfare
16 standards.
- 17 c. In May 2012, CFS submitted comments to NOSB including an assessment
18 of the Board's proposed Poultry Guidance, which was intended to assist
19 industry in assessing whether operations complied with the requirements
20 of USDA's regulations implementing OFPA, specifically 7 C.F.R. §§
21 205.238-241.³
- 22 d. In April 2014, CFS published the report, *USDA Stalls Regulations to*
23 *Improve Organic Poultry Living Conditions*, analyzing the Agency's 2012
24

25
26 ¹ CFS, *Letter to NOSB Re: Access to the outdoors for organically raised poultry* (Sept. 30,
2006), https://www.centerforfoodsafety.org/files/poultry_statement.pdf.

27 ² CFS, *Comments to NOSB re: Docket No. AMS-NOP-11-0014; NOP-11-05* (April 10, 2011),
<https://www.centerforfoodsafety.org/files/cfs-nosb-final-comments-10-april-2011.pdf>.

28 ³ CFS, *Comments to NOSB re: Docket No: AMS-NOP-12-0017; NOP-12-06* (May 3, 2012),
<https://www.centerforfoodsafety.org/files/cfs-nosb-comments-3-may-2012.pdf>.

1 economic analysis of the costs for industry to comply with the National
2 Organic Standards Board's recommended standard for animal welfare.⁴

3 e. In April 2016, after USDA published the proposed Organic Livestock
4 Rule, CFS submitted comments for the spring meeting of the NOSB
5 requesting that the Board take up the issue of recommending breed
6 requirement for poultry be added to the Organic Livestock Rule.

7 f. In July 2016, CFS submitted extensive substantive comments to USDA
8 providing input on the proposed Organic Livestock Rule, supporting many
9 of its changes to the current livestock regulations that would significantly
10 improve the organic program, and suggesting further revisions.⁵

11 g. In April and August 2016, CFS published and shared blogs raising
12 awareness of the rule, highlighting some areas in need of improvement,
13 and calling on readers to submit their own comments and countering
14 common arguments from opponents of the proposed rule.⁶

15 h. In March 2017, CFS submitted comments to NOSB again requesting the
16 Board develop requirements for breed and origin of poultry to be added to
17 the Organic Livestock Rule.

18 i. USDA did not provide for public notice and comment on its first two
19 amendments to the Organic Livestock Rule delaying its effective date (in
20 February and May 2017), but in June 2017, CFS submitted comments in
21 response to USDA's proposed rule continuing the delay of the Organic
22 Livestock Rule implementation and proposing four possible next steps for
23

24 ⁴ Available at https://www.centerforfoodsafety.org/files/animal-welfare-final_56276.pdf.

25 ⁵ CFS, *Comments to USDA Re: Docket No. AMS-NOP-15-0012; NOP-15-06PR; RIN 0581-AD44* (July 13, 2016), https://www.centerforfoodsafety.org/files/center-for-food-safety-comments-to-nop--organic-livestock-and-poultry-practices-71320161_24974.pdf.

26 ⁶ CFS, *Raising the Bar on Organic Animal Welfare* (Apr. 8, 2016),
27 <https://www.centerforfoodsafety.org/issues/306/organic-and-beyond/blog/4335/raising-the-bar-on-organic-animal-welfare>; CFS, *Senate Misses the Mark on the Organic Animal Welfare Rule*
28 (Aug. 5, 2016), <https://www.centerforfoodsafety.org/issues/306/organic-and-beyond/blog/4442/senate-misses-the-mark-on-the-organic-animal-welfare-rule>.

1 the Organic Livestock Rule, calling on USDA to allow the rule to go into
2 effect without further delay.⁷

3 j. In January 2018, CFS submitted comments⁸ opposing USDA's proposal to
4 withdraw the Organic Livestock Rule, demonstrating that USDA has the
5 authority to implement the rules and countering the Agency's flawed
6 economic assessment. CFS also submitted separate comments signed by
7 10,000 of CFS's True Food Network subscribers.

8 20. USDA's violation of the APA and OFPA when repealing the Organic Livestock
9 Rule injures CFS as an organization. A core program for CFS is the promotion and protection of
10 the organic program, including consumer education on the meaning and benefits of organic for
11 both human health and the environment, scientific and policy research on the same, and
12 advocacy to consumers to choose organic and ensure their voices are heard by the NOSB and
13 USDA. CFS also works to promote transparency in advertising and labeling and to provide
14 consumers with information about the meaning and integrity of common advertising claims. As
15 noted above, CFS was highly involved in the NOSB and public engagement process that lead to
16 the final Organic Livestock Rule. Then, in response to USDA's delays and ultimate withdrawal
17 of the Organic Livestock Rule since February 2017, CFS spent hundreds of staff hours to combat
18 the delay of implementation of the Organic Livestock Rule and the withdrawal of the same.
19 Because CFS has had to use organizational resources to fight to protect the Organic Livestock
20 Rule and ensure its implementation, it has been forced to divert resources from CFS's other
21 work, including the promotion of organic, as well as its other agency watchdog activities aimed
22 at preventing the harm from industrial agriculture and aquaculture to the environment and public
23 health. USDA's unlawful withdrawal of the Organic Livestock Rule following the
24 Administration change has frustrated CFS's organizational mission to protect the integrity of

25 _____
26 ⁷ CFS, *Comments to USDA re: Docket No. AMS-NOP-15-0012; NOP-15-06PR; RIN 0581-AD44*
(July 13, 2016), <https://www.regulations.gov/document?D=AMS-NOP-15-0012-5127>.

27 ⁸ CFS, *Comments to USDA Re: Docket No. AMS-NOP-15-0012; NOP-15-06—National Organic*
Program (NOP); Organic Livestock and Poultry Practices Final Rule; Withdrawal (Jan. 17,
28 2018), [https://www.centerforfoodsafety.org/files/2018-1-17_cfs-comments-on-olpp-
withdrawal_final_36905.pdf](https://www.centerforfoodsafety.org/files/2018-1-17_cfs-comments-on-olpp-withdrawal_final_36905.pdf).

1 organic, and specifically to ensure consistent and high standards for organic livestock, while
2 diverting CFS's resources to combatting the revocation of the long-overdue and overwhelmingly
3 supported the Organic Livestock Rule.

4 21. CFS's members are organic farmers and purchasers of organic products who rely
5 on the organic label to ensure that organic food was produced with high and consistently-applied
6 standards, including high animal welfare standards. CFS members, as consumers of organic
7 products, consider it extremely important, and in many cases already believe, that organic
8 animals are raised on farms with high welfare standards. This is one of the reasons CFS members
9 choose organic food. Particularly as to eggs labeled organic, the production of which was
10 addressed in the final Organic Livestock Rule, CFS members and organic consumers expect that
11 hens are able access and move freely in the outdoors, an expectation that was not consistently
12 met prior to the Organic Livestock Rule. Thus, USDA's unlawful revocation of the Rule harms
13 CFS members as it fails to meet the purposes of OFPA, including assuring consumers that
14 organically produced products meet a consistent and uniform standard.

15 22. Further, USDA's withdrawal of the Organic Livestock Rule without consulting
16 NOSB, or explaining its derivation from NOSB's prior recommendations, and overturning over a
17 decade of public and stakeholder engagement harms CFS's members' procedural rights to be
18 involved with the promulgating of organic standards under OFPA. In sum, USDA's failure to
19 comply with the APA and OFPA when it withdrew the Organic Livestock Rule harms CFS's
20 members by weakening organic integrity, creating inconsistent organic production standards, and
21 depriving them of their procedural right to be involved in the creation and promulgation of
22 organic standards.

23 23. Plaintiff **Cultivate Oregon** is located in Portland, OR. Founded in 2015, Cultivate
24 Oregon is a nonprofit organization that is a project of Earth Island Institute. Earth Island Institute
25 is a non-profit, public interest, membership organization that supports people who are creating
26 solutions to protecting the planet. Since 1982 Earth Island Institute has been a hub for grassroots
27 campaigns dedicated to conserving, preserving, and restoring the ecological health. Earth Island
28 Institute's Project Support program acts as an incubator for start-up environmental projects,

1 giving crucial assistance to groups and individuals with new ideas for promoting environmental
2 sustainability.

3 24. Cultivate Oregon is focused on regenerative agriculture issues and building food
4 system resiliency, in part by promoting organic and regenerative agriculture principles, and
5 raising awareness of environmental and food production hazards that threaten the integrity of the
6 food system. Cultivate Oregon promotes food system resiliency by supporting consumers' right
7 to know what they are eating, including through labels like organic, and helping people avoid
8 harmful pesticides, food additives, and genetically engineered foods.

9 25. Cultivate Oregon also supports sustainable food production that creates healthier
10 environments for farmers, farm workers, and agricultural communities. Cultivate Oregon has
11 worked with state and national food advocacy coalitions to create transparency in our food
12 system; to end unsustainable food production practices; and to support regenerative alternatives
13 that promote healthy food and agriculture systems.

14 26. Cultivate Oregon has a vested interest in protecting organic standards. Cultivate
15 Oregon has devoted time and resources to the creation and protection of the Organic Livestock
16 Rule, including joining comments on the proposed withdrawal. Cultivate Oregon as an
17 organization, will be adversely affected by USDA's failure comply with OPFA and the APA by
18 revoking the Organic Livestock Rule.

19 27. Plaintiff **International Center for Technology Assessment (ICTA)** is a non-
20 profit public interest organization incorporated in California, committed to providing the public
21 with full assessments and analyses of technological impacts on society, including food
22 production technologies. These include economic, ethical, social, environmental, and political
23 impacts that can result from technological systems. ICTA was involved in the original formation
24 of the organic rules in 1997-1999, leading a comment campaign of 270,000 public comments, at
25 the time a record, on the first draft organic rules, successfully protecting the integrity of the
26 standard in the final rules with baseline determinations that foods produced in the organic
27 standard could not use genetic engineering, irradiation, or sewage sludge in production.
28

1 28. ICTA has focused on ethical and social aspects of industrial agriculture, including
2 the impacts of livestock confined animal feeding operations and the proposed genetic
3 engineering of livestock, and instead championing more holistic approaches, including
4 supporting organic. ICTA has been working on the treatment and care of animals for years. It
5 successfully challenged the patent office patenting of a beagle and a rabbit for research purposes
6 wherein the only invention was infecting the animals with pathogens to test drugs on them. ICTA
7 has also challenged the cloning of animals due the awful animal health effects, such as large
8 offspring syndrome that kills surrogate mothers. ICTA has challenged the genetic engineering of
9 a goat and an Atlantic salmon, in part, due to the animal welfare effects of the genetic
10 engineering. ICTA provided comments on the withdrawal of the Organic Livestock Rule and is
11 adversely affected by USDA's failure comply with OPFA and the APA by revoking the Organic
12 Livestock Rule.

13 ***Defendants***

14 29. Defendant Sonny Perdue is the Secretary of the USDA. The Secretary is the
15 official ultimately responsible for the National Organic Program and for compliance with all
16 OFPA and APA laws and regulations. The Secretary is sued in his official capacity.

17 30. Defendant Bruce Summers is Acting Administrator of the USDA's Agricultural
18 Marketing Service (AMS). He is legally responsible for overseeing AMS, which administers
19 several programs to support U.S. agriculture, including the National Organic Program. As
20 Administrator of USDA's AMS, he is legally responsible for the National Organic Program and
21 the Program's compliance with all OFPA and APA laws and regulations. The Administrator is
22 sued in his official capacity.

23 31. Defendant Ruihong Guo, Ph.D. is the Acting Deputy Administrator of the
24 National Organic Program. She is legally responsible for overseeing National Organic Program
25 activities, including the National Organic Standards Board. The Deputy Administrator is sued in
26 her official capacity.

LEGAL BACKGROUND

I. Administrative Procedure Act

32. The APA applies to agency actions, including rulemaking, defined as the “agency process for formulating, amending, or repealing a rule.” 5 U.S.C. § 551(5).

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

34. Under the APA, courts “shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” *id.* § 706(2)(A). An agency action is “arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Assoc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

35. Under the APA, a court must also “hold unlawful and set aside” any agency action taken that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(C).

36. Finally, under the APA, a court shall also “hold unlawful and set aside” any agency action that was promulgated “without observance of procedure required by law.” *Id.* § 706(2)(D).

II. Organic Foods Production Act

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

38. With the passage of OFPA, Congress created a national organic production framework that aimed to achieve three general purposes: (1) establish national standards

1 governing the marketing of certain agricultural products as organically produced products; (2)
2 assure consumers that organically produced products meet consistent standards; and (3) facilitate
3 interstate commerce in fresh and processed food that is organically produced. 7 U.S.C. § 6501.

4 39. Like all organic food producers, organic livestock producers may only sell or
5 label their products as organic if they are produced consistent with the provisions of OFPA and
6 its regulations. This includes following an “organic livestock plan,” which “shall contain
7 provisions designed to foster the organic production of livestock consistent with the purposes” of
8 OFPA. *Id.* §§ 6505(a)(1)(A), 6513(a), (c).

9 40. OFPA directs USDA to “establish an organic certification program” providing
10 national standards, and requires that USDA “shall” consult with NOSB in developing these
11 organic standards. *Id.* § 6503(a), (c). NOSB is an advisory body created by Congress “to assist in
12 the development of standards for substances to be used in organic production and to advise the
13 Secretary on any other aspects of the implementation of [OFPA].” *Id.* §6518(a).

14 41. Congress set out requirements for organic livestock production in Section 6509,
15 specifically providing for development of additional standards “for the care” of livestock, in
16 consultation with NOSB, *id.* §§ 6509(d)(2), and to promulgate detailed regulations with public
17 hearings and notice and comment. *Id.* § 6509(g).

18 42. Because the organic livestock industry was still nascent in 1990, Congress
19 explicitly provided that additional standards for livestock would be developed later, according to
20 the process established by OFPA: first NOSB makes recommendations based on its members’
21 expertise, research, and stakeholder input, and then USDA, following those recommendations
22 and with public notice and input, adopts rules.

23 43. Indeed, the 1990 Senate Report that accompanied OFPA stated that, while organic
24 livestock production was a small industry in the U.S. at the time, “[w]ith additional research and
25 as more producers enter into organic livestock production, the [Senate Committee on
26 Agriculture, Nutrition, and Forestry] expects that USDA, with the assistance of the National
27 Organic Standards Board will elaborate on livestock criteria.” Senate Report 101-357 at 292
28 (July 6, 1990).

1 44. Rather than limit livestock standards to what was known in 1990, Congress,
2 decided to “require[] the Secretary to hold hearings and develop regulations regarding livestock
3 standards *in addition to* those specified in [the OFPA].” H.R. Rep. 101-916, at 1777-78 (1989)
4 (emphasis added). “[R]ecogniz[ing] the need to further elaborate on the standards set forth in the
5 [OFPA],” the Committee explained that it added language in the OFPA requiring USDA to hold
6 “public discussions with interested parties and with the [NOSB]” to set additional standards. *Id.*

7 45. Thus, OFPA states that “[t]he National Organic Standards Board shall
8 recommend to the Secretary standards in addition to those in paragraph (1) for the care of
9 livestock to ensure that such livestock is organically produced.” 7 U.S.C. § 6509(d)(2); *see also*
10 § 6509(g) (USDA “shall hold public hearings and shall develop detailed regulations, with notice
11 and public comment, to guide the implementation of the standards for livestock products
12 provided under this section.”).

13 **FACTUAL BACKGROUND**

14 **I. Existing Livestock Rules in Organic Program**

15 46. USDA has long exercised its authority under OFPA to implement regulations
16 additional to the statutory text regarding the care of organic livestock. Since the first
17 promulgation of the organic rules, USDA has acknowledged that animal health and welfare are
18 synonymous and that detailed standards are required to meet the purpose of OFPA to to assure
19 consumers that organically produced products meet a consistent and uniform standard.

20 47. In exercising its authority to promulgate regulations under OFPA, USDA has only
21 issued new standards for livestock production practices after providing extensive notice and
22 comment, holding public hearings, consulting with NOSB, and receiving recommendations from
23 NOSB regarding livestock practices.

24 48. In 2000, when the first set of regulations for organic were promulgated, USDA
25 required that “[t]he producer of an organic livestock operation must establish and maintain
26 livestock living conditions which accommodate the health and natural behavior of animals.” 7

27 C.F.R. § 205.239 (2000). In this first set of livestock standards, USDA stated that:

28 Animals in an organic livestock operation must be maintained under conditions
which provide for exercise, freedom of movement, and reduction of stress

1 appropriate to the species. Additionally, all physical alterations performed on
2 animals in an organic livestock operation must be conducted to promote the
animals' welfare and in a manner that minimizes stress and pain.

3 National Organic Program, 65 Fed. Reg. 80548, 80560 (Dec. 21, 2000). Organic producers are
4 required to maintain an organic system plan that reflects a "proactive approach to health
5 management," including living conditions that accommodate health and natural behavior of
6 livestock, including "access to the outdoors, shade, shelter, exercise areas, fresh air, and direct
7 sunlight." *Id.* at 80561 (and describing other requirements for living conditions). These
8 requirements reflect a concern not only for animals' medical needs, but also for animal welfare
9 and make clear USDA's recognition that welfare and health are intertwined, and that USDA has
10 authority to take animal welfare interests into account when promulgating organic regulations.
11 USDA also stated that these regulations would meet all OFPA goals, including the goal of
12 "assur[ing] consumers that organically produced products meet a consistent standard." *Id.* at
13 80664.

14 49. In 2010, USDA adopted rules providing more specific feed and living conditions
15 for ruminant animals raised organically, again reinforcing the agency's authority to adopt
16 standards for the welfare of organic animals, and the necessity of the same to ensure animal are
17 consistently raised organically and to meet consumer expectations. Access to Pasture, 75 Fed.
18 Reg. 7154 (February 17, 2010) (codified at 7 C.F.R. §§ 205.237; 205.239; 205.240).

19 50. The Access to Pasture rule was promulgated using the same process as the
20 Organic Livestock Rule, with multiple NOSB recommendations (six of them between 1994 and
21 2005), five public hearings, and tens of thousands of comments from producers, retailers,
22 handlers, certifying agents, consumers, trade associations, organic associations, animal welfare
23 organizations, consumer groups, state and local government entities, and various industry
24 groups. The overwhelming majority expressed support for heightened animal welfare
25 requirements, including opposition to confinement as anathema to organic. USDA recently
26 explained that the Access to Pasture rule was promulgated "in response to the 2005 NOSB
27 recommendation and extensive public input requesting clear outdoor access requirements for
28

1 ruminant livestock.” National Organic Program; Organic Livestock and Poultry Practices, 81
2 Fed. Reg. 21956-01 (Apr. 13, 2016).

3 51. Notably, the Access to Pasture rule made clear that “[o]ne of the tenants [sic] of
4 organic production is that animals are able to express their natural behaviors, and exercise and
5 move freely.” *Id.* at 7171. The rule emphasized that this tenet was designed to align with the
6 expectations of consumers, and noted that thousands of commenters had expressed their support
7 therefor. *Id.* Not only is the content of these rules evidence of USDA’s interest in improving
8 animal welfare, it said as much when discussing temporary denial of access to the outdoors,
9 stating: “[t]hese exceptions are intended for animal welfare concerns rather than production
10 yields.” *Id.* at 7170.

11 52. The 2010 Access to Pasture regulations were based on the same authority as the
12 Organic Livestock Rule and fulfilled the same OFPA purpose to ensure consistency and meet
13 consumer expectations:

14 The purpose in amending the NOP regulations is to make clear what access to
15 pasture and grazing mean under the NOP. A stated purpose of the OFPA (7
16 U.S.C. 6501) is to assure consumers that organically produced products meet a
17 consistent and uniform standard. This action is being taken to facilitate and
18 improve compliance and enforcement and satisfy consumer expectations that
19 ruminant livestock animals are grazing pastures and that pastures are managed to
20 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.

21 75 Fed. Reg. 7154, 7184 (Feb. 17, 2010); *id.* at 7191 (authority for the rule derived from 7
22 U.S.C. §§ 6501-6522).

23 53. USDA stressed that greater specificity was needed for the livestock care standards
24 to provide for greater uniformity, to “create equitable, consistent performance standards for all
25 ruminant livestock producers.” *Id.* at 7186. These detailed, uniform standards would also reflect
26 “consumer preferences regarding the production of organic livestock and their products.” *Id.*

27 54. CFS participated in the creation of the Access to Pasture rule, including through
28 comments to USDA on the proposed rule in 2005, 2006 and 2008.

1 55. In addition to the 2000 and 2010 rules, USDA published a guidance on organic
2 livestock requirements stating that, “organic livestock must be raised in a way that
3 accommodates their health and natural behavior,” and lists the following criteria for complying
4 with this requirement: access to the outdoors; shade; clean, dry bedding; shelter; space for
5 exercise; fresh air; clean drinking water; and direct sunlight.⁹ Additionally, USDA’s *Guidelines*
6 *for Organic Certification of Poultry* states: “Animal health is the result of preventative and on-
7 going management efforts to create living soils, provide nourishing forage and feed, and improve
8 the quality of livestock life. Animals must be kept in healthy, low stress environments.”¹⁰ This
9 organic poultry guidance was “based on the USDA organic regulations” and USDA stated that
10 compliance with the standards described was required for organic certification. *Id.*

11 56. In publishing these guidances prior to promulgating the Organic Livestock Rule,
12 USDA was recognizing, like other international bodies and a large body of research, that animal
13 health and welfare are synonymous, and that providing for the welfare of livestock raised for
14 food ensures good health, and vice versa, and that living conditions which increase the “welfare”
15 of livestock also provide for their health, such as preventing disease.

16 **II. Organic Livestock Rule Promulgation and Revocation**

17 57. The Organic Livestock Rule is an extension of USDA’s long-standing
18 interpretation of and rulemaking under OFPA, meeting the need to provide specific and
19 consistent standards for organic animal care, in particular addressing the needs of avian livestock
20 in addition to ruminants. Organic Livestock and Poultry Practices Final Rule, 82 Fed. Reg. 7042,
21 7082 (“In 2010, AMS published a final rule (75 FR 7154, February 17, 2010) clarifying the
22 pasture and grazing requirements for organic ruminant livestock, which partially addressed
23 OFPA’s objective for more detailed livestock standards. This rule extends that level of detail and
24 clarity to all organic livestock and poultry, and would ensure that organic standards cover their
25

26
27 ⁹ USDA, *Organic Livestock Requirements* (July 2013), <https://www.ams.usda.gov/sites/default/files/media/Organic%20Livestock%20Requirements.pdf>.

28 ¹⁰ AMS/NOP, *Guidelines for Organic Certification of Poultry*, <https://www.ams.usda.gov/sites/default/files/media/Poultry%20-%20Guidelines.pdf>.

1 entire lifecycle, consistent with recommendations provided by USDA’s Office of Inspector
2 General and nine separate recommendations from the NOSB.”).

3 58. On April 13, 2016, USDA published the fifty-four-page proposed rule in the
4 Federal Register. National Organic Program; Organic Livestock and Poultry Practices, 81 Fed.
5 Reg. 21956-01 (Apr. 13, 2016).

6 59. The Organic Livestock Rule added new standards for livestock handling,
7 transport for slaughter, and avian living conditions, and expands upon and clarifies standards
8 covering livestock care, production practices, and mammalian living conditions, pursuant to 7
9 U.S.C. §§ 6509(d)(2), (g).

10 60. USDA proposed the Organic Livestock Rule to “maintain consumer confidence in
11 the high standards represented by the USDA organic seal,” and specifically USDA stated that the
12 Organic Livestock Rule “is necessary to augment the USDA organic livestock production
13 regulations with robust and clear provisions to fulfill a purpose of the OFPA, to assure
14 consumers that organically-produced products meet a consistent and uniform standard (7 U.S.C.
15 6501).” 81 Fed. Reg. at 21980. This “added specificity would further the process, initiated with
16 the enactment of OFPA, to develop detailed standards for organic livestock products. OFPA
17 mandates that detailed livestock regulations be developed through notice and comment
18 rulemaking and intends for NOSB involvement in that process (7 U.S.C. 6508(g)).” *Id.*

19 61. A primary purpose of the Organic Livestock Rule was to ensure the consistency
20 in production that is one of the core purposes of OPFA. Specifically, USDA recognized that
21 “[t]he current practices of organic poultry operations to provide outdoor access and minimum
22 indoor and outdoor space per bird vary widely. This disparity causes consumer confusion about
23 the meaning of the USDA organic label, threatens to erode consumer confidence in the organic
24 label more broadly, and perpetuates unfair competition among producers. This rule would enable
25 AMS and certifying agents to efficiently administer the NOP. In turn, the consistency and
26 transparency in certification requirements will facilitate consumer purchasing decisions.” *Id.*

27 62. Consumer surveys conducted from 2013 through 2017 (including studies
28 conducted by Plaintiffs) all indicate that a majority of consumers already believe that livestock

1 and poultry products carrying the organic seal were raised with a high level of welfare,
2 “indicat[ing] the need for more precise animal welfare standards in the USDA organic
3 regulations.” *Id.*

4 63. Indeed, in a recent November 2017 report put out by the Trump administration’s
5 USDA, the agency’s Economic Research Service explained in detail how information asymmetry
6 between what organic consumers expect and the reality can do serious damage to the organic
7 market.¹¹ “Credence attributes” are those that the consumer cannot verify by looking at, buying
8 or eating a product, i.e., the organic label, and “[i]f consumers are skeptical about claims they
9 cannot verify, their skepticism is likely to reduce their willingness to pay, and as mentioned
10 earlier, markets for attributes may vanish.”¹²

11 64. The Organic Livestock Rule was based on several NOSB recommendations from
12 2002 through 2011, including the six dozen unanimously-supported recommendations in 2011
13 that eventually ended up in the Organic Livestock Rule. 81 Fed. Reg. at 21981 (“The proposed
14 provisions were developed by the NOSB in consideration of other animal welfare certification
15 programs, industry standards, input from organic producers, and input from public comment.”).
16 NOSB deliberated and made its recommendations at public meetings announced on April 19,
17 2002; August 26, 2002; October 9, 2002; May 1, 2003; September 9, 2009; September 20, 2010;
18 and October 7, 2011. *Id.* at 21980; Organic Livestock and Poultry Practice Final Rule, 82 Fed.
19 Reg. at 7045. These NOSB meetings were open to the public and allowed for public
20 participation. *Id.*

21 65. NOSB unanimously recognized that the 2011 NOSB recommendation upon
22 which the Organic Livestock Rule was based “was the product of a decade of public NOSB
23 meetings, lengthy discussions, public comment periods and consultation from organic producers,
24 processors, consumers, and the veterinary and scientific community.” And that consumer trust in
25 organic, a trust which is required for organic to remain viable, depends on the “strength and
26

27 ¹¹ USDA Economic Research Service, *Beyond Nutrition and Organic Labels—30 Years of*
28 *Experience With Intervening in Food Labels*, Economic Research Report Number 239 (Nov.
2017), <https://www.ers.usda.gov/webdocs/publications/85687/err-239.pdf?v=43053>.

¹² *Id.* at 5.

1 consistent application” of the organic standards. National Organic Standards Board, April 20,
2 2017 Meeting Transcript at 185:4-191:11.

3 66. In responding to public comment on the rule, USDA demonstrated the importance
4 of NOSB consultation, indeed indicating it could only make changes to the extent they had been
5 recommended by NOSB. Organic Livestock and Poultry Practice Final Rule, 82 Fed. Reg. 7042,
6 7053-54, 7058-59.

7 67. USDA recognized that “most of” the requirements added by the Organic
8 Livestock Rule “align with current practices of organic operations,” that expected that “many of
9 the requirements in this proposed rule are already implemented and will not produce significant
10 costs.” 81 Fed. Reg. at 21981.

11 68. USDA’s own economic study—*Economic Impact Analysis of Proposed National*
12 *Organic Standards Board Regulations for Living Conditions for Organic Poultry*¹³—looked at
13 the estimated cost increases of complying with the proposed regulations for small (<16,000
14 birds), medium (16,000-100,000 birds), and large (>100,000 birds) organic egg and broiler
15 producers. The analysis found that small and medium organic egg and broiler producers would
16 have “negligible” additional costs as a result of implementing the NOSB’s proposed regulations,
17 and only marginal costs to large broiler producers. Additionally, as NOSB noted in its
18 unanimous statement to USDA in 2017, a survey conducted by the Organic Egg Farmers of
19 America in 2014 indicated that the majority of egg producers, representing the majority of
20 organic egg production, *already adhere* to the practices and standards in the Organic Livestock
21 Rule.¹⁴

22 69. In addition to NOSB recommendations, public comment, and consumer surveys
23 all pointing to the need for more consistent standards for organic livestock production, the
24 Organic Livestock Rule “also responds to the 2010 USDA Office of Inspector General (OIG)

25 ¹³ Vukina, *et al.*, *Economic Impact Analysis of Proposed Regulations for Living Conditions for*
26 *Organic Poultry: Phase 3 Report* (Aug. 2012); Vukina, *et al.*, *Proposed changes in living*
27 *conditions for broilers under the National Organic Program will have limited economic effects*
28 *(2014)*; Vukina, *et al.*, *Economic effects of proposed changes in living conditions for laying hens*
under the National Organic Program (2014).

¹⁴ NOSB Meeting Tr. at 186 (April, 2017).

1 audit findings of inconsistent applications of the USDA organic regulations for outdoor access
2 for livestock,” and the OIG’s recommendations that these standards, specifically outdoor access
3 and space requirements, be clarified. 81 Fed. Reg. at 21981-2; Office of Inspector General,
4 *Oversight of the National Organic Program*, 22, 26 (March 2010).

5 70. On January 19, 2017 USDA promulgated the final Organic Livestock Rule,
6 including an implementation date of March 20, 2018. 82 Fed. Reg. 7042.

7 71. Following the change in Presidential Administration, USDA delayed the
8 implementation of the Organic Livestock Rule three times before proposing to withdraw the rule.
9 First, on February 9, 2017 USDA delayed the effective date from March 20 to May 19, 2017,
10 without notice and comment or justification beyond the White House direction to agencies to
11 extend the dates of final regulations that had not yet taken effect. 82 Fed. Reg. 9967.

12 72. During its April 2017 meeting, the NOSB voted unanimously to formally
13 recommend to USDA not to delay the effective date of the Organic Livestock Rule beyond May
14 19, 2017. USDA has never responded to this NOSB recommendation or otherwise explained
15 why it disagreed with the repeated NOSB recommendations to adopt the Organic Livestock
16 Rule.

17 73. Then on May 10, 2017, USDA delayed the effective date of the Organic
18 Livestock Rule for a second time, without notice and comment, for an additional six months. 82
19 Fed. Reg. 21677.

20 74. Also on May 10, 2017, USDA published a Federal Register notice seeking
21 comment on whether USDA should implement, suspend indefinitely, withdraw, or delay for a
22 third time the effective date of the Organic Livestock Rule. 82 Fed. Reg. 21742.

23 75. USDA received over 47,000 comments on this notice, with only a handful of
24 commenters selecting any option other than implementing the Organic Livestock Rule (99%
25 urged USDA not to further delay or revoke the Rule). However, USDA again delayed the
26 effective date of the Organic Livestock Rule for another six months, on November 14, 2017. 82
27 Fed. Reg. 52643. For the first time, USDA indicated that it was questioning its authority under
28 OFPA to promulgate the detailed standards for organic livestock in the Organic Livestock Rule.

1 In total, USDA delayed the effective date of the Organic Livestock Rule for 14 months before
2 ultimately proposing to withdraw it.

3 76. On December 18, 2017, USDA proposed to withdraw the Organic Livestock Rule
4 based on “USDA’s current interpretation of OFPA,” and “USDA’s revised assessment of the
5 regulatory benefits and burdens of the [Organic Livestock Rule].” 82 Fed. Reg. 59988. On
6 March 13, 2018, USDA withdrew the Organic Livestock Rule. 83 Fed. Reg. 10775 (“Withdrawal
7 Rule”). The withdrawal was premised on the same two rationales, despite over 63,000 comments
8 urging USDA to retain the Organic Livestock Rule and allow for its implementation (as
9 compared to 50 comments favoring withdrawal).

10 77. USDA did not consult NOSB prior to promulgating this new rule revoking the
11 Organic Livestock Rule. Nor did USDA explain why it was deviating from the prior
12 recommendations of NOSB or adopting a rule not recommended by NOSB. As explained above,
13 for all prior livestock rules (and organic rules in general) USDA has consulted NOSB, as
14 required by OFPA. In adopting the final Organic Livestock Rule, USDA even stated it could
15 only make changes to the extent they had been recommended by NOSB, demonstrating the
16 importance of consulting with NOSB prior to making changes to the organic standards,
17 especially for major livestock rules like the Organic Livestock Rule. 82 Fed. Reg. at 7053-54.

18 **A. USDA’s First Rationale For Withdrawing Organic Livestock Rule**

19 78. Despite its consistent interpretation of its authority for the last 28 years since
20 OFPA’s passage, USDA now claims that the unambiguous language in OFPA does not allow it
21 to promulgate the Organic Livestock Rule. 82 Fed. Reg. at 59989-90; 83 Fed. Reg. at 10775-6.
22 USDA now asserts that OFPA’s direction to NOSB and USDA to promulgate additional
23 standards “for the care” of livestock cannot include the standards for handling, transport, and
24 living conditions that it terms “stand-alone animal welfare regulations” detailed in the Organic
25 Livestock Rule. 83 Fed. Reg. at 10776. USDA now erroneously describes the Organic Livestock
26 Rule care standards as “broadly prescriptive animal welfare regulations,” creating a false
27 dichotomy between “welfare” of animals and their general “health.” *Id.*

1 79. Specifically, USDA now asserts that OFPA’s provisions at 7 U.S.C. §§
2 6509(d)(2) and (g), authorize it only to issue regulations that that are “similar to those specified”
3 in Section 6509(d) and that are necessary to meet the congressional objectives outlined in 7
4 U.S.C. 6501. 82 Fed. Reg. at 59990; 83 Fed. Reg. at 10776.

5 80. USDA’s new interpretation of Section 6509(d)(2) is essentially that it does not
6 provide for any organic livestock regulations beyond those related to the “aspects of animal care
7 that are similar to the examples provided in the statute and relate to ingestion or administration of
8 non-organic substances.” *Id.* at 10776. USDA arrives at this conclusion by trying to limit the
9 statutory direction to promulgate additional standards “for the care of livestock to ensure that
10 such livestock is organically produced,” § 6509(d)(2), based cherry-picked dictionary definitions
11 of “organic” that USDA claims limits this language to chemical substances.

12 81. As described above, this new interpretation flies in the face of the plain language
13 of Section 6509 and other OFPA sections, which are not so limited, the legislative history of
14 OFPA’s enactment, USDA’s own interpretation for decades and its current regulations, and
15 common sense. The Congressional mandate in Section 6509(d)(2) and (g) to create additional
16 standards “for the care” of livestock is not limited to substances, by its plain language or by its
17 placement within the statute.

18 82. In its final notice of the Withdrawal Rule, USDA now relies on dictionary
19 definitions of “organic” to prove that “for the care of livestock” is limited to chemical substances
20 or drugs. 83 Fed. Reg. at 10776 (citing definitions of “organic” from two dictionaries). USDA’s
21 interpretation is contrary to the text of the statute and ignores the existing regulatory definition of
22 organic production. First, the reference to “organically produced” in Section 6509(d)(2) is not
23 limiting, but rather part of the whole clause commanding NOSB to recommend additional
24 standard for livestock to ensure that animal products labeled organic were in fact raised
25 organically. 7 U.S.C. § 6509(d)(2); Senate Report 101-357 at 292 (July 6, 1990); H.R. Rep. 101-
26 916, at 1777-78 (1989). Second, USDA fails to cite or explain its deviation from the existing
27 definition of “organic production” in its own regulations, which is not limited to substances. 7
28 C.F.R. § 205.2 (defining “organic production” as “a production system that is managed in

1 accordance with the Act and regulations in this part to respond to site-specific conditions by
2 integrating cultural, biological, and mechanical practices that foster cycling of resources,
3 promote ecological balance, and conserve biodiversity.”).

4 83. USDA provided no reasoning or support for its total reversal of interpretation of
5 Section 6509, and failed to reconcile the contrary OFPA legislative history, plain language, or
6 USDA’s own regulatory history. Implicit in USDA’s new interpretation limiting livestock care
7 rules to substances are three unsupported and unsupportable assertions: 1) Animal health care is
8 categorically and universally distinct from animal welfare; 2) In drafting the OFPA, Congress
9 presumed no overlap between the two; and 3) OFPA’s text allows standards of “care” that have
10 no connection to animals’ welfare. USDA cannot support these assumptions, as they run contrary
11 to evidence before the agency, legislative history, and USDA’s own prior statements on the
12 overlap between “health” and “welfare.” USDA has not shown, nor can it show, that Congress
13 believed the two were distinct and that the OFPA authorizes only standards pertaining to
14 animals’ physical/medical condition. No definitions in OFPA, nor any dictionary definitons of
15 the plain language of “heath” or “care” indicate a limitation to just substances or drugs to treat
16 illness.¹⁵ Congress’s use of the terms “*raised* in accordance with this chapter” (7 U.S.C. §
17 6509(a)) and “*raised and handled* in accordance with this chapter” (*id.* §§ 6509(e)(1), (2)(A))
18 belie USDA’s new view that the statute authorizes only medical care standards. Nor is Section
19 6509(g) limited to substances or medical regulations, but rather provides that USDA “shall”
20 develop detailed regualtions to implement any “standards for livestock products” in Section
21 6509. *Id.* § 6509(g).

22 84. Indeed, USDA *admits* that its new interpretation would be contrary to its current
23 regulations governing livestock care, specifically 7 C.F.R. §§ 205.238, 205.239, and 205.240. 83
24 Fed. Reg. at 10779. While it states that it cannot revoke those long-standing rules in this action
25 because it did not previously provide notice, it states that it “may seek comment in the future
26

27 ¹⁵ CFS, *Comments to USDA Re: Docket No. AMS-NOP-15-0012; NOP-15-06—National Organic*
28 *Program (NOP); Organic Livestock and Poultry Practices Final Rule; Withdrawal* (Jan. 17,
2018), at 3, [https://www.centerforfoodsafety.org/files/2018-1-17_cfs-comments-on-olpp-
withdrawal_final_36905.pdf](https://www.centerforfoodsafety.org/files/2018-1-17_cfs-comments-on-olpp-withdrawal_final_36905.pdf).

1 regarding whether the cited regulations are in accordance with AMS’ statutory authority”—
2 essentially threatening to undo decades of organic standards, upon which both producers and
3 consumers have long relied.

4 85. USDA also entirely failed to address OFPA’s goal to assure consumers that
5 organically produced products meet a consistent and uniform standard (7 U.S.C. § 6501(2)), a
6 purpose that is not currently being met without the Organic Livestock Rule (as found by OIG),
7 and that USDA previously cited when explaining why the Organic Livestock Rule is necessary.

8 **B. USDA’s Second Rationale For Withdrawing Organic Livestock Rule**

9 86. USDA’s second rationale for withdrawing the Organic Livestock Rule is based on
10 the newly asserted impact on producers, a lack of “material market failure to justify prescriptive
11 regulatory action,” and USDA’s concern that the Organic Livestock Rule “may hamper market-
12 driven innovation and evolution and impose unnecessary regulatory burdens.” 82 Fed. Reg. at
13 59990; 83 Fed. Reg. at 10779-80.

14 87. This rationale is based on both a reliance on extra-statutory economic factors (i.e.,
15 a “market failure”) and a flawed assessment of the impacts of the Organic Livestock Rule.

16 88. USDA imports a standard not found in OFPA, the need for a “market failure” to
17 justify the Organic Livestock Rule. 82 Fed. Reg. at 59990-91 (withdrawal is based lack of a
18 “significant market failure to justify the need for [the] rule.”); 83 Fed. Reg. at 10779 (“AMS did
19 not identify a market failure in the OLPP final rule RIA and there AMS has now concluded that
20 regulation is unwarranted.”).

21 89. USDA maintains that the continued growth of the organic sector is evidence that
22 revisions to the livestock standards are not needed, *id.*, but fails to address the consumer
23 confusion over what the pre-Organic Livestock Rule requirements where, and the mistaken
24 belief by a significant portion of organic consumers that organic animal products, particularly
25 poultry and eggs, were already produced with a high level of welfare, as noted above.

26 90. Further, USDA, in a reversal of its findings when the Organic Livestock Rule was
27 promulgated, now “maintains that the costs of the [Organic Livestock Rule] outweigh potential
28 benefits.” 83 Fed. Reg. at 10779.

1 livestock, in consultation with NOSB, *id.* §§ 6509(d)(2), and to promulgate detailed regulations
2 with public hearings and notice and comment. *Id.* § 6509(g). OFPA provides USDA the express
3 authority to promulgate standards for the health, including welfare and wellbeing, of organically
4 produced livestock. 7 U.S.C. §§ 6503, 6509, 6513.

5 96. One of the enumerated purposes of OFPA is “to assure consumers that organically
6 produced products meet a consistent and uniform standard.” *Id.* § 6501(2).

7 97. USDA has always interpreted OFPA as providing it the authority to promulgate
8 additional standards for the care of livestock, including living conditions, beyond those
9 restrictions enumerated in OFPA. In accordance with this interpretation, USDA promulgated
10 regulations in 2000 and 2010, as well as guidances, most notably including the 2010 Access to
11 Pasture rule for the care of ruminant livestock raised organically.

12 98. In withdrawing the Organic Livestock Rule, USDA has abandoned its prior long-
13 standing and consistent interpretation of its authority under OFPA and now asserts that it lacks
14 authority to promulgate detailed livestock standards that improve the health and welfare of
15 organic animals. 82 Fed. Reg. 59988, 59990 (Dec. 18, 2017), 83 Fed. Reg. 10775 (March 13,
16 2018).

17 99. USDA’s current explanation for the Withdrawal Rule runs counter to the plain
18 language of OFPA, the legislative history of its passage, the agency’s consistent interpretation
19 for the last 28 years, and the record before the agency (including extensive public input and
20 dozens of NOSB recommendations).

21 100. Under the APA, courts “shall...hold unlawful and set aside agency action,
22 findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise
23 not in accordance with law,” 5 U.S.C. § 706(2)(A). An agency action is “arbitrary and capricious
24 if the agency has relied on factors which Congress has not intended it to consider, entirely failed
25 to consider an important aspect of the problem, offered an explanation for its decision that runs
26 counter to the evidence before the agency, or is so implausible that it could not be ascribed to a
27 difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Assoc. v. State Farm*
28 *Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

1 101. The Withdrawal Rule runs contrary to the plain language of OFPA and is
2 arbitrary and capricious and contrary to law, in violation of the APA.

3 102. USDA's failure to comply with OFPA and the APA by its withdrawal of the
4 Organic Livestock Rule harms Plaintiffs' and their members' interests.

5
6 **SECOND CLAIM FOR RELIEF**
7 **(Violation of OFPA and APA: Withdrawal of the Organic Livestock Rule Based on Alleged**
8 **Costs to Producers Exceeds USDA's Authority under OFPA.)**

8 103. Paragraphs 1 through 102 are realleged and incorporated herein by reference.

9 104. Under the APA, a court must also "hold unlawful and set aside" any agency
10 action taken that is "in excess of statutory jurisdiction, authority, or limitations, or short of
11 statutory right." *Id.* § 706(2)(C).

12 105. Compliance with OFPA is voluntary, only those food producers seeking to label
13 their products as "organic" are required to follow the rules promulgated by USDA to obtain
14 organic certification. OFPA is not a cost/benefit statute and nowhere in its language does OFPA
15 permit USDA to refuse to promulgate standards on the basis of alleged cost to producers.

16 106. USDA's second rationale for the Withdrawal Rule, the alleged costs to producers,
17 relies on extra-statutory economic factors and is therefore in excess of USDA's authority under
18 OFPA.

19 107. USDA's explanation for the Withdrawal Rule includes the lack of "market
20 failure," which is not a concept pertinent to OFPA or found anywhere in its text. *See* 7 U.S.C. §§
21 6501 *et seq.* Although previously stating that the Organic Livestock Rule will fulfill the OFPA
22 purpose of ensuring organically produced products meet a consistent standard and to provide for
23 the care of organic livestock as required in Section 6509, USDA now relies on this requirement
24 of a "market failure" to justify its Withdrawal Rule. USDA has provided no explanation of where
25 this "market failure" standard derives from or why it should be applied to organic standards.
26 Because the organic program standards do not require "market failure" for their justification,
27 USDA's reliance on this standards is arbitrary and capricious, and in excess of its statutory
28 authority in violation of the APA.

1 108. Additionally, to the extent USDA is basing its rationale for withdrawing the
2 Organic Livestock Rule on Executive Order 13771, which directs agencies to identify two
3 existing regulations to be repealed for every new regulation, OFPA does not allow USDA to
4 repeal a rule for this reason and this application of E.O. 13771 exceeds USDA's authority, in
5 violation of the APA.

6 109. USDA's failure to comply with OFPA and the APA by its withdrawal of the
7 Organic Livestock Rule harms Plaintiffs' and their members' interests.

8 **THIRD CLAIM FOR RELIEF**
9 **(Violation of OFPA and APA: Withdrawal of Organic Livestock Rule Based on Alleged**
10 **Costs to Producers is Arbitrary and Capricious and Contrary to Law.)**

11 110. Paragraphs 1 through 109 are realleged and incorporated herein by reference.

12 111. Under the APA, courts "shall...hold unlawful and set aside agency action,
13 findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise
14 not in accordance with law," 5 U.S.C. § 706(2)(A).

15 112. OFPA requires that NOSB make recommendations for livestock standards in
16 addition to those enumerated in OFPA, 7 U.S.C. § 6509(d)(2), and that USDA promulgate
17 detailed regulations, with public hearings and notice and comment, to implement those standards
18 for livestock, *id.* § 6509(g). These standards must be "for the care of livestock to ensure that such
19 livestock is organically produced." *Id.* § 6509(d)(2). There is no provision in OFPA allowing
20 USDA to refuse to set such standards based on costs to producers, particularly costs to a very
21 small sub-set of producers. Rather, one purpose of OFPA is to "assure consumers that
22 organically produced products meet a consistent and uniform standard." 7 U.S.C. § 6501.

23 113. USDA's second rationale for the Withdrawal Rule, the alleged costs to producers,
24 runs contrary to the record before the agency. The record before the agency showed no or
25 minimal impact to nearly all producers, as noted by USDA itself in the Withdrawal Rule notice.
26 83 Fed. Reg. at 10780 ("AMS has estimated that a sizeable portion of organic livestock
27 produces already meet the requirements of the [Organic Livestock Rule].").
28

1 114. Further, the second rationale relied on factors which Congress has not intended
2 USDA to consider in administration of the organic program. Nowhere does OFPA require a
3 “market failure” for USDA to make changes to the organic standards. Further, USDA failed to
4 consider other factors, like the nonquantifiable benefits of the Organic Livestock Rule and
5 animal welfare standards, which like the organic program itself, are not exclusively based on
6 economic considerations. Thus, USDA failed to consider an important aspect of organic
7 standards, including consumer expectation and confidence in organic and the ethical treatment of
8 animals. As such, the Withdrawal Rule, and USDA’s reliance on costs to producers to withdraw
9 the Organic Livestock Rule, is arbitrary and capricious in violation of the APA.

10 115. Even if the agency could consider a cost-benefit analysis in adopting organic
11 standards, the rationale that the Organic Livestock Rule does not “correct a market failure” is
12 arbitrary and capricious, as it is not a rational or reasonable conclusion based on the record
13 before the agency. The record before USDA shows consumer confusion over the care of organic
14 animals, as shown above, and a gap between consumers’ reasonable expectations and the organic
15 standards, absent the Organic Livestock Rule. Thus, the Rule was needed to correct this failure
16 of the pre-Rule standards to fulfill one of the primary purposes of OFPA. 7 U.S.C. § 6501(2).

17 116. Additionally, to the extent USDA is basing its rationale for withdrawing the
18 Organic Livestock Rule on Executive Order 13771, which directs agencies to identify two
19 existing regulations to be repealed for every new regulation, this application of E.O. 13771 is
20 arbitrary and capricious and contrary to law, in violation of the APA.

21 117. USDA’s failure to comply with OFPA and the APA by its withdrawal of the
22 Organic Livestock Rule harms Plaintiffs’ and their members’ interests.

23
24 **FOURTH CLAIM FOR RELIEF**
25 **(Violation of OFPA and APA: Failure to Consult NOSB Before Withdrawing the Organic Livestock Rule and Failure to Explain Deviation from NOSB Recommendation)**

26 118. Paragraphs 1 through 117 are realleged and incorporated herein by reference.

27 119. OFPA mandates that USDA consult with the NOSB in developing the organic
28 standards, and requires that NOSB specifically recommend standards “for the care” of livestock

1 in addition to those enumerated in OFPA. 7 U.S.C. §§ 6503(a), (c); 6509(d)(2). Moreover,
2 USDA practice has been to adopt only livestock standards that have been recommended by
3 NOSB.

4 120. The Organic Livestock Rule was a final rule, promulgated after consultation with
5 NOSB, and public notice and comment. 82 Fed. Reg. 7042 (January 19, 2017). When USDA
6 withdrew the Organic Livestock Rule, it was issuing a new legislative rule. 5 U.S.C. §§ 551(4)-
7 (5).

8 121. USDA did not consult with NOSB prior to creating the new substantive standard
9 (Withdrawal Rule), in violation of OFPA's requirement that USDA shall consult with NOSB in
10 establishing the organic certification program, and specifically the additional standards for
11 organic livestock production. 7 U.S.C. §§ 6503, 6509.

12 122. Accordingly, the Organic Livestock Rule withdrawal was promulgated in excess
13 of USDA's statutory jurisdiction, authority, or limitations, or short of statutory right and
14 conducted without observance of procedure required by law, in violation of the APA, 5 U.S.C. §
15 706(2).

16 123. Further, USDA did not explain its derivation from NOSB's numerous prior
17 recommendations for standards in the Organic Livestock Rule, or its April 2017 recommendation
18 to implement the final rule. The agency failed to provide the public an explanation of why it was
19 not adopting these standards, or why it was adopting a standard *not* recommended by NOSB, in a
20 complete break with USDA's statutory obligations and past practice. This failure to explain its
21 rationale for ignoring NOSB was arbitrary and capricious and contrary to law, in violation of the
22 APA.

23 124. USDA's failure to consult with NOSB or explain its derivation from NOSB's
24 prior recommendations, in violation of OFPA and the APA, harms Plaintiffs' and their members'
25 interests.

26 **PRAYERS FOR RELIEF**

27 WHEREFORE, the Plaintiffs respectfully request that the Court:
28

1 125. Declare that Defendants' rationale for withdrawing the Organic Livestock Rule,
2 that USDA lacks authority to promulgate these standards for the care of livestock under OFPA,
3 is contrary to the plain language of OFPA and arbitrary and capricious in violation of the APA;

4 126. Declare that Defendants' rationale for withdrawing the Organic Livestock Rule
5 based on costs to producers and a lack of market failure, is in excess of USDA's authority under
6 OFPA, in violation of the APA;

7 127. Declare that Defendants' rationale for withdrawing the Organic Livestock Rule
8 based on costs to producers and a lack of market failure, is arbitrary and capricious and contrary
9 to law, in violation of the APA;

10 128. Declare that Defendants violated OFPA and the APA when they withdrew the
11 Organic Livestock Rule without consulting NOSB, contrary to OFPA, and that Defendants'
12 failure to explain their departure from NOSB's recommendations was arbitrary and capricious
13 and contrary to law, in violation of the APA;

14 129. Set aside USDA's rule withdrawing the Organic Livestock Rule, thereby
15 reinstating the Organic Livestock Rule as duly promulgated on January 19, 2017;

16 130. Award Plaintiffs attorney fees, costs, and all other reasonable expenses incurred
17 in pursuit of this action; and

18 131. Grant any other declaratory or equitable relief the Court deems necessary, just,
19 and proper.

20 Respectfully submitted this 21st day of March, 2018 in San Francisco, California.

21 /s/ Sylvia Wu

22 _____
23 Sylvia Shih-Yau Wu (CSB No. 273549)
24 George Kimbrell (*Pro Hac Vice pending*)
25 Amy van Saun (*Pro Hac Vice pending*)
26 Center for Food Safety
27 303 Sacramento Street, 2nd Floor
28 San Francisco, CA 94111
T: (415) 826-2270 / F: (415) 826-0507
Emails: swu@centerforfoodsafety.org
gkimbrell@centerforfoodsafety.org
avansaun@centerforfoodsafety.org

Counsel for Plaintiffs