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January 16, 2018

Paul Lewis, Ph.D.
Director, Standards Division, National Organic Program
USDA – Agricultural Marketing Service
1400 Independence Ave. SW, Room 2642-So., Ag Stop 0268
Washington, DC 20250-0268

**Re: National Organic Program: Organic Livestock and Poultry Practices; Withdrawal
AMS-NOP-15-0012; NOP-15-06; RIN 0581-AD75**

Dear Dr. Lewis,

Attached are comments submitted by Mercy For Animals opposing the Agricultural Marketing Service's (AMS's) proposed rule to withdraw the Organic Livestock and Poultry Practices regulations (RIN 0581-AD75).

Mercy For Animals is a leading international animal protection charity dedicated to preventing cruelty to farmed animals and promoting compassionate food choices and policies. Mercy For Animals submits these comments on behalf more than 2.5 million members and supporters who are concerned about the welfare of animals raised for meat and other products.

Sincerely,

A handwritten signature in blue ink that reads "Vandhana Bala".

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I. Introduction

The Organic Foods Production Act of 1990 (OFPA) was enacted to establish strong, consistent standards across the organics industry.¹ To that end, the National Organic Standards Board (NOSB) has for nearly two decades periodically issued recommendations for specific standards of animal care and health to achieve those statutory goals and to benefit the organic industry and consumers of organic meat and other animal products. Most recently, recommendations for the care of mammals and birds were proposed and – after considerable public comment – promulgated as regulations in the Organic Livestock and Poultry Practices (OLPP) Final Rules. These rules were applauded and welcomed by consumers and most organic producers. Conversely, they were opposed only by large corporations that sell “faux-ganic” products and likely did not want to change production practices so they could continue profiting by misleading consumers.

In a display of gross disregard for public opinion, the Agricultural Marketing Service (AMS) now seeks to withdraw these necessary and wildly popular OLPP Final Rules in their entirety. This would result in an unlawful reversal of the AMS’s statutory interpretation of the OFPA and a repugnant waste of the vast resources and taxpayer money that went into producing the OLPP Final Rules. The AMS must not withdraw the rules; rather, it should allow them to go into effect as soon as possible.

II. “Animal Welfare Is a Basic Principle of Organic Production” and Should Be Reflected as Such in the Rules

Every year in the United States, 10 billion animals are killed for their meat. Countless more are raised and kept for their milk or eggs. Each one of these animals is a sentient being, capable of feeling joy and capable of suffering. Yet despite widespread knowledge about these animals’ complexity, intelligence, and environmental needs, the vast majority of farmed animals are deprived of even the most basic consideration of their welfare throughout their lives. Other than the OFPA,² no federal law addresses the

¹ 7 U.S.C. § 6501. U.S. Department of Agriculture. 2007. Testimony of Kathleen Merrigan, National Organic Standards Board Meeting, Arlington VA. November 28. pp. 201 (cited in Center for Food Safety, USDA Stalls Regulations to Improve Organic Poultry Living Conditions: Agency Hides Behind Faulty Economic Impact Assessment (Apr. 24, 2014), <https://www.centerforfoodsafety.org/reports/3103/usda-stalls-regulations-to-improve-organic-poultry-living-conditions-agency-hides-behind-faulty-economic-impact-assessment>).

² 7 U.S.C. §§ 6501–6522.

conditions under which farmed animals are raised. The only two federal laws that do address the treatment of farmed animals—the 28 Hour Law³ and the Humane Methods of Slaughter Act⁴—are woefully underenforced and have been interpreted by the USDA to exclude 98 percent (over 9 billion) of the animals transported and slaughtered in the U.S. every year: poultry.

Depending on the species, most of the farmed animals raised for their meat, milk, or eggs are confined in large-scale industrial (i.e., factory farm) conditions.⁵ They are crowded in filthy barns; they have their tails, beaks, horns, and toes cut off without anesthesia; males have their testicles ripped out without pain relief; and pigs and poultry never set foot outside. Industrial farms are not integrated with the land but instead wreak environmental havoc.

³ 49 U.S.C. § 805200. The 28-Hour Law prohibits confining “animals” in “a vehicle or vessel for more than 28 consecutive hours without unloading the animals for feeding, water, and rest.” *Id.* However, the USDA excludes birds from coverage of the law by regulation, despite the use of the word “animals” in the statute. *See* 9 C.F.R. § 89.1. USDA has also never developed a system for tracking transport time, and as a result, the 28-Hour Law is barely enforced, and “for all intents and purposes, there is no federal transport law in the United States.” Animal Welfare Institute, Legal Protections for Farm Animals During Transport, *available at* <https://awionline.org/sites/default/files/uploads/legacy-uploads/documents/FA-LegalProtectionsDuringTransport-081910-1282577406-document-23621.pdf>.

⁴ 7 U.S.C. §§ 1901–1907. The Humane Methods of Slaughter Act requires that livestock be rendered unconscious and unable to feel pain prior to slaughter. As with the 28-Hour Law, USDA arbitrarily excludes poultry from coverage under the Humane Methods of Slaughter Act. *See generally*, Mercy For Animals, Petition for Rulemaking to the FSIS to Include Chickens, Turkeys, and Other Birds Slaughtered for Food Under the Humane Methods of Slaughter Act and the Federal Meat Inspection Act, *available at* <https://www.fsis.usda.gov/wps/wcm/connect/260fe135-c980-47f3-b023-4092651b48f4/17-06-Petition-Mercy-for-Animals.pdf?MOD=AJPERES>. The USDA also fails to adequately enforce the law. *See generally*, Animal Welfare Institute, Non-Rulemaking Petition for Improving Humane Methods of Slaughter Act Enforcement, *available at* https://www.fsis.usda.gov/wps/wcm/connect/2f0d567b-d053-416f-bc11-327e496b66ec/Petition_Animal_Welfare_Institute.pdf?MOD=AJPERES.

⁵ “Animal agriculture is now dominated by the factory farm – 99.9% of chickens raised for meat, 97% of laying hens, 99% of turkeys, 95% of pigs, and 78% of cattle.” JONATHAN SAFRAN FOER, *EATING ANIMALS* 12, 271 (2009).

In large part, organic production systems arose as an alternative to this industrial system in almost every sense: more environmental responsibility; greater attention to animal welfare; and non-reliance on chemicals, pesticides, and antibiotics. Consumers flock to these products because they seek these characteristics in the food they feed themselves and their families. And consumers willingly pay a premium for products that adhere to these values.

As the NOSB, seven of the 15 members of which are from organic operations or retailers, has said: “Animal welfare is a basic principle of organic production. The Livestock Committee of the NOSB considers that a focus on animal welfare warrants appropriate and effective regulation.”⁶

The AMS now appears to have forgotten this central tenet of organic production, long embedded in the OFPA and implementing regulations, as it now claims that it lacks authority under the OFPA to regulate animal care and living conditions.

III. Organic’s Dirty Truth: Factory Farmed Meat and Eggs with an Organic Price Tag

Unfortunately, a handful of producers (owned by large agribusiness corporations) have taken advantage of the lack of regulations, consistency, and consumer awareness to reap profits without conforming to the higher standards—particularly with respect to animal welfare—that many organic producers maintain. In short, consumers are getting ripped off.

Nowhere is this truer than with poultry, meat, and eggs labeled “USDA Organic.” According to a survey conducted by the Center for Food Safety, more than 70 percent of consumers who purchase organic meat or other animal products identify “humane and natural conditions—outdoor space and ability to engage in natural behaviors—as among the top five reasons they choose organic.”⁷

Contrary to consumers’ expectations for organic, “under current regulations, which lack considerable specificity, organic chickens may be housed in cramped, dark, unsanitary

⁶ National Organic Standards Board, Final Recommendation on Animal Welfare and Stocking Rates 1 (2011), *available at* <https://www.ams.usda.gov/sites/default/files/media/NOP%20Livestock%20Final%20Rec%20Animal%20Welfare%20and%20Stocking%20Rates.pdf>.

⁷ Center for Food Safety, Survey on Organic Eggs and Poultry (2013) (cited in Center for Food Safety, *supra* note 1 at 8–9).

facilities with little or no access to the outdoors, let alone soil or pasture.”⁸ They can have their beaks and toes amputated without anesthesia to prevent them from cannibalizing each other in crowded conditions. They can be confined by the tens of thousands. Nearly all—99 percent—of the chickens raised for their meat in organic systems are kept in facilities that house more than 100,000 birds at once.⁹ More than one in 10 cartons of organic eggs comes from laying hens cramped in barns that hold about 180,000 birds at a time, or three birds per square foot.¹⁰

There are currently 586 organic egg and poultry producers, yet the vast majority of organic egg and poultry products comes from merely five producers, large-scale factory farming operations that employ production practices similar to those detailed above.¹¹ These five producers—literally the 1 percent—have been flouting animal welfare standards for years and are now on the cusp of successfully drafting the AMS into their scheme to continue exploiting animals, misleading consumers, and stealing more of the market share from small- and medium-sized farmers.

As a result, animals raised at these large-scale farms suffer under egregiously cruel yet customary practices; consumers are deceived; and the organic producers who hold themselves to a higher standard are put at a competitive disadvantage to large corporations that simply want to maximize profits.

The OLPP Final Rules would help address these serious issues and repair some of the damage to consumer trust in the organic industry by increasing the clarity, transparency, and consistency of organic regulations. Unsurprisingly, these same producers were among the few objectors to the new rules. Rather than allowing the new rules to go into effect and promote animal welfare, consumer fairness, and uniform standards, the AMS—caving to pressure from a handful of large corporations—now seeks to withdraw them. The AMS should not go through with this reckless proposal

⁸ National Organic Standards Board. 2011. NOSB Meeting Transcript, Seattle, WA. April 28. pp. 286–287; NOSB. 2009. NOSB Meeting Transcript, Washington, D.C. November 3. pp. 273–274

⁹ Center for Food Safety, *supra* note 1 at 10.

¹⁰ Peter Whoriskey, “Why the hell am I paying more for this?” *Major Egg Operation Houses “USDA Organic” Hens at Three Per Square Foot*, WASH. POST (July 13, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/07/13/more-than-a-million-hens-filling-barns-at-three-per-square-foot-and-yes-theyre-usda-organic/?tid=a_inl&utm_term=.68d8164a9d93.

¹¹ Center for Food Safety, *supra* note 1 at 3.

because, as explained below, doing so would be contrary to the OFPA, and it would be arbitrary and capricious.

IV. The AMS's Current Statutory Interpretation Is Manifestly Contrary to the Plain Meaning and Intent of the OFPA

Agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” is unlawful and will be set aside by a court.¹² When reviewing an agency’s interpretation of a statute it is charged with administering, the primary consideration is congressional intent: “If the intent of Congress is clear, that is the end of the matter, for the ... agency must give effect to the unambiguously expressed intent of Congress.” But if “the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”¹³

The OFPA was enacted to establish strong, consistent standards across the organics industry, including standards of higher animal welfare than conventional agriculture.¹⁴ Despite having repeatedly issued rules governing animal welfare in the past, the AMS claims to have reinterpreted the statute and “it now believes OFPA does not authorize the animal welfare provisions of the OLPP Final Rules.”¹⁵ It now conveniently “believes” that its authority to proscribe animal care practices is limited to practices involving the administration of medicines or drugs.

The AMS’s claimed interpretation is manifestly contrary to the plain text of the OFPA and Congress’s clear intent in enacting it. The AMS’s interpretation is therefore arbitrary, capricious, an abuse of discretion, and not in accordance with law.

The OFPA not only authorizes but *compels* the AMS to establish consistent standards for the treatment and living conditions of animals raised in organic production systems. The text of the statute plainly encompasses animal welfare within the statute’s purview.

¹² 5 U.S.C. § 706.

¹³ *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 842–843 (1986).

¹⁴ Senate Report 101–357. 1990. *Report of the Committee on Agriculture, Nutrition, and Forestry, United States Senate, to accompany S. 2830 together with Additional and Minority Views*. 101st Congress – 2nd Session. July 6. pp. 302–303 (cited in Center for Food Safety, *supra* note 1 at 3).

¹⁵ Proposed Rule, National Organic Program (NOP): Organic Livestock and Poultry Practices—Withdrawal, 82 Fed. Reg. 59988, 59989 (Dec. 18, 2017) (hereinafter, “Proposed Rule—Withdrawal”).

The OFPA has three purposes:

- (1) to establish national standards governing the marketing of certain agricultural products as organically produced products;
- (2) to assure consumers that organically produced products meet a consistent standard; and
- (3) to facilitate interstate commerce in fresh and processed food that is organically produced.

The OFPA section on “animal production practices and materials” establishes a few basic standards regarding breeding stock, feed, and identification. It also prohibits a few specific practices by organic farmers:

- (A) us[ing] subtherapeutic doses of antibiotics;
- (B) us[ing] synthetic internal parasiticides on a routine basis; or
- (C) administer[ing] medication, other than vaccinations, in the absence of illness.¹⁶

It then expressly directs the NOSB to recommend “standards *in addition to* [these] for the care of livestock to ensure that such livestock is organically produced.”¹⁷ In turn, “organically produced” is expansively defined as “an agricultural product that is *produced and handled* in accordance with this chapter.”¹⁸ Thus, by the plain terms of the statute, standards for organic production encompass any aspect of animal care, production, and handling, including the treatment and living conditions of animals. The AMS’s attempt to narrow the scope of authorization merely to practices similar to those already prohibited¹⁹ has no basis in the statutory text.

The legislative history of the OFPA supports this interpretation. The purpose of OFPA standards was to ensure higher animal welfare.²⁰ One of OFPA’s principal drafters explained in 2007:

¹⁶ 7 U.S.C. § 6509(d)(1).

¹⁷ 7 U.S.C. § 6509(d)(2) (emphasis added).

¹⁸ 7 U.S.C. § 6502(14) (emphasis added).

¹⁹ Proposed Rule—Withdrawal, 82 Fed. Reg. 59989.

²⁰ Center for Food Safety, *supra* note 1 at 3 (citing Senate Report 101–357. 1990. *Report of the Committee on Agriculture, Nutrition, and Forestry, United States Senate, to accompany S. 2830 together with Additional and Minority Views*. 101st Congress – 2nd Session. July 6. pp. 302–303).

When we were framing the legislation in 1989 and 1990, ... animal health and welfare issues, as nascent as the livestock sector was 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 ... to have a fully operational NOP.²¹

Consistent with this intent, the NOSB said in 2009 (and again in 2011): "Animal welfare is a basic principle of organic production. ... From its conception, regulation in organic agriculture was intended to provide conditions that foster the natural behavior of livestock."²²

The legislative history of the OFPA also directly refutes the AMS's novel theory that organic standards for livestock production are limited to the three items enumerated in section 6509(d)(2) and do not include animal welfare. The senate report that accompanied the OFPA legislation specifically explained that the NOSB was to determine further standards for the care of livestock, without limitation to issues already addressed:

More detailed standards are enumerated for crop production than for livestock production. This reflects the extent of knowledge and consensus on appropriate organic crop production methods and materials. With additional research and as more producers enter into organic livestock production, the Committee expects that USDA, with the assistance of the National Organic Standards Board will elaborate on livestock criteria.²³

²¹ U.S. Department of Agriculture. 2007. Testimony of Kathleen Merrigan, National Organic Standards Board Meeting, Arlington VA. November 28. pp. 201. (cited in Center for Food Safety, *supra* note 1 at 3).

²² National Organic Standards Board. 2009. *Formal Recommendation by the National Organic Standards Board (NOSB) to the National Organic Program (NOP): Animal Welfare*. November 5. pp. 1; National Organic Standards Board, Final Recommendation on Animal Welfare and Stocking Rates 1 (2011), available at <https://www.ams.usda.gov/sites/default/files/media/NOP%20Livestock%20Final%20Rec%20Animal%20Welfare%20and%20Stocking%20Rates.pdf>.

²³ Senate Committee on Agriculture, Forestry and Nutrition, *Report of the Committee on Agriculture, Forestry and Nutrition to Accompany S. 2830 Together with Additional and Minority Views*, 101st Congress, S. REP. NO. 101-357, at 289 (1990).

Within this broad scope of authority over all aspects of “produc[ing] and handl[ing]” of animals in organic systems, Congress clearly intended that those practices be governed by consistent standards to protect consumers and maintain their confidence in these products. Indeed, as the January 20, 2017 Federal Register Notice made clear, this mandate of setting consistent standards is the basis for the agency’s authority to issue the OLPP Final Rules.²⁴ Even now, the AMS admits that there is *no* consistency in livestock production standards for avian species, especially for egg-laying hens.²⁵

The OLPP Final Rules promote consistency, as required by the OFPA. Therefore, the OFPA not only authorizes but *requires* the creation of additional, detailed standards regarding animal treatment and living conditions. The plain text, legislative history, and consistent interpretation by the NOSB clearly support this interpretation. By withdrawing the rules, with full knowledge that the status quo of organic production is inconsistent and inequitable, the AMS is directly contradicting congressional intent. The AMS’s novel interpretation of its statutory authority under the OFPA therefore would likely not survive a legal challenge in court.

V. The AMS’s Unexplained Reversal of Its Longstanding Interpretation of the OFPA Violates the Administrative Procedure Act

The AMS’s new “interpretation” also flies in the face of essentially two decades of consistent interpretation by the NOSB and the AMS. While agencies may revise their interpretation of the statutes they are charged with administering (so long as any new interpretation complies with statutory authority and mandates), they are required to provide an explanation for such revision. The change in interpretation, and the justification, must be the product of “reasoned decisionmaking.” This means that the agency “must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”²⁶

The AMS provides almost no explanation for the sudden reversal of over two decades of creating standards for animal welfare and living conditions in organic production

²⁴ See Proposed Rule, 81 Fed. Reg. 21955, 21955; Final Rule, 82 Fed. Reg. 7042, 7043–4033. The AMS’s new claim that the OLPP Final Rules were motivated by “stand-alone animal welfare concerns,” Proposed Rule—Withdrawal, 82 Fed. Reg. 59989, is false and misleading because the basis of authority for the OLPP Final Rules was the mandate to protect consumers by establishing consistent standards for organic production.

²⁵ See Propose Rule—Withdrawal, 82 Fed. Reg. 59991.

²⁶ *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

under the OFPA. Clearly, it cannot provide such explanation, since its abrupt and illogical position most likely stems from pressure from huge agribusiness corporations that seek to profit at the expense of animals and consumers alike. This is arbitrary and capricious, as the Supreme Court recently explained:

[I]n explaining its changed position, an agency must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account. An unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice, and an arbitrary and capricious regulation of this sort receives no *Chevron* deference.²⁷

Animal welfare considerations have been part of the creation of standards for livestock production from the time the NOSB began making recommendations for organic livestock production. This long history was chronicled in the notice of proposed rules for OLPP:²⁸

- June 1994: The NOSB recommended provisions for care and handling of livestock at organic farms, including health care standards, living conditions, and transportation.
- April and October 1995: The NOSB made additional recommendations for various health care practices, requirements for outside access, and the use of vaccines.
- December 1997: The AMS issued a proposed rule, which included the NOSB's proposed language requiring organic livestock producers to develop a preventive health care plan and standards for livestock living conditions, including when animals could be confined. (This proposed rule was not finalized.)
- March 1998: The NOSB reaffirmed its earlier recommendations on animal health care and living conditions, the importance of treating sick livestock, and clarifying when livestock could be confined indoors. It also defined outdoors as having direct access to sunshine.

²⁷ *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2020 (2016) (internal citations and quotation marks omitted).

²⁸ Proposed Rule, National Organic Program; Organic Livestock and Poultry Practices, 71 Fed. Reg. 21956, 21958 (Apr. 13, 2016) (hereinafter, "Proposed Rule—OLPP").

- March 2000: The AMS published a second proposed rule establishing standards for animal care and living conditions, which required treating sick animals, even if it meant the animal would lose organic status, and provided that living conditions for organic livestock must maintain the health of animals and allow for natural behaviors, including access to the outdoors. These rules were finalized in December 2000 and fully implemented on October 21, 2002.
- 2002: The NOSB issued recommendations regarding outdoor access for animals, stating that it should include open air and direct access to sunshine and that bare surfaces other than soil do not meet outdoor access requirements for poultry. It also clarified when livestock could be temporarily confined.
- March 2005: The NOSB recommended that the temporary confinement provision referring to “stage of production” be changed to “stage of life.”
- October 2008: The AMS published a proposed rule on access to pasture for ruminants, based on several NOSB recommendations. The final rule implementing these recommendations for access to pasture was published in the Federal Register on February 17, 2010.
- 2009 to 2011: The NOSB issued a series of recommendations on animal welfare, intending to incorporate suggested revisions and additions to livestock health care practice standards that were not previously addressed by the AMS. These included prohibitions on mutilations, separating avian housing requirements from those of mammals, maximum ammonia levels, perch space, outdoor access clarifications, space requirements, stocking densities, transport, and slaughter.

Because the NOSB and the AMS have for two decades affirmed that animal care and living standards are mandated by the OFPA and have been working toward issuing these standards for just as long, a majority of small- and medium-sized operations have significant reliance interests in animal welfare standards under the National Organic Program (NOP). A vast number of small- and medium-sized organic farms already do or could easily comply with the OLPP Final Rules.²⁹ These smaller producers make up

²⁹ Vukina, T., K. Anderson, M.K. Muth, & M. Ball. 2012. *Economic Impact Analysis of Proposed Regulations for Living Conditions for Organic Poultry. Phase 3 Report prepared for the U.S. Department of Agriculture Agricultural Marketing Service National Organic Program. August.* It is a small number of large-scale operations, who because of scale make up a large portion of the organic market, that have exerted pressure to hold the OLPP Final Rules hostage.

99 percent of the organic industry, and less cruel living conditions are central to the organic ethos of these farms.³⁰

Consumers of organic animal products, most of whom believe that organic means higher animal welfare with adequate outdoor access, also have significant reliance interests in animal welfare standards under the NOP. The AMS utterly fails to address these reliance interests, while proposing to take away the rules that would have finally leveled the playing field for these small- and medium-sized producers against large corporations. The public, and especially affected parties, must have meaningful opportunity to comment.³¹ But the AMS provides no explanation for its complete reversal of the policy that the OFPA broadly covers animal care and living conditions. Absent such an explanation, withdrawing the OLPP Final Rules would be arbitrary and capricious.

VI. The Few Reasons Given for Withdrawing the Rules Are Not the Product of “Reasoned Decisionmaking”

The AMS’s failure to explain why it now believes that the OFPA does not authorize regulations of animal care and living conditions, alone, makes the decision to withdraw the OLPP Final Rules unlawful under the Administrative Procedure Act. But the AMS also makes several additional arguments for withdrawing the rules. None of these arguments provides reasoned justification for withdrawal.

An agency decision is

[A]rbitrary 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.³²

The AMS’s withdrawal of the OLPP Final Rules is also arbitrary and capricious because it ignores and fails to “address an important aspect of the problem”; there are egregious

³⁰ See Center for Food Safety Report, *supra* note 1 at 11.

³¹ See *Sprint Corp. v. F.C.C.*, 315 F.3d 369, 373 (D.C. Cir. 2003).

³² *State Farm*, 463 U.S. at 43.

inconsistencies in the treatment of animals—especially birds—among organic farming systems.³³ In March 2010, the USDA Office of Inspector General (OIG) issued a report finding inconsistent certification practices regarding outdoor access for poultry.³⁴ The OIG recommended that the AMS issue guidance on outdoor access for livestock and poultry. In response, in October 2010 the AMS did exactly that, issuing draft guidance on outdoor access for organic poultry. Based on comments received, the AMS did not finalize the draft guidance and opted to use rulemaking to clarify outdoor access for poultry.³⁵ It then issued the OLPP rules at issue now.

The AMS’s proposal to withdraw these rules fails to address the near certainty that withdrawal will only exacerbate the longstanding inconsistency in animal care, housing, and outdoor access practices that plagues the organics industry—to the detriment of many organic producers and consumers. Moreover, consumer confidence in the organic label will be shaken as a result of the withdrawal.

The AMS also claims that withdrawal is justified because there is no “market failure” necessitating the establishment of standards for animal care and living conditions.³⁶ But as explained above, the creation and implementation of such standards is required by the plain language of the OFPA and Congress’s intent in enacting the law. The AMS’s

³³ Proposed Rule—OLPP, 81 Fed. Reg. 21981 (“The current practices of organic poultry operations to provide outdoor access and minimum indoor and outdoor space per bird vary widely. This disparity causes consumer confusion about the meaning of the USDA organic label, threatens to erode consumer confidence in the organic label more broadly, and perpetuates unfair competition among producers.”). *See also* Twilight Greenaway and Adrien Schless-Meier, *Just Because Your Chicken Is Organic Doesn’t Mean It Was Raised Humanely*, CIVIL EATS (Apr. 23, 2015), <https://civileats.com/2015/04/23/just-because-your-chicken-is-organic-doesnt-mean-it-was-raised-humanely/>; Peter Whoriskey, “Why the hell am I paying more for this?” Major egg operation houses “USDA Organic” hens at three per square foot, WASH. POST (July 13, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/07/13/more-than-a-million-hens-filling-barns-at-three-per-square-foot-and-yes-theyre-usda-organic/?tid=a_inl&utm_term=.68d8164a9d93.

³⁴ OIG, No. 01601-03-HY, Oversight of the National Organic Program (2010), *available at* <https://www.usda.gov/oig/webdocs/01601-03-HY.pdf>.

³⁵ Proposed Rule—OLPP, 81 Fed. Reg. 21958.

³⁶ Proposed Rule—Withdrawal, 82 Fed. Reg. 59991.

new requirement of “market failure” to justify any regulation of organic production standards has no basis in the OFPA or in sound policy.

At any rate, there clearly is a market failure that the rules are necessary to fix. As explained above,³⁷ companies that make up just 1 percent of the organic producers of poultry, meat, and eggs have completely flooded the market with products that come from facilities indistinguishable from conventional factory farms. Where just 1 percent of the industry dominates the market and is able to fill it with products that are the opposite of consumers’ expectations or desires, that is a market failure.

Lastly, the AMS claims that the use of private third-party animal welfare certifications, separate from the “USDA Organic” seal, by organic producers can essentially fill the gap in the organic program with respect to animal care. Reliance on private third-party animal welfare certifications makes no sense and “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”³⁸

Reliance on private third-party certification is contrary to the purpose of the statute to create consistent national standards. Third-party animal welfare certification is highly variable and doesn’t assure consumers that organic products all meet the same high standards against animal cruelty in production practices.³⁹

The AMS has entirely failed to consider that reliance on third-party labels only exacerbates consumer confusion and distrust of the organic market, because there is variance among the different certification standards and most common standards (e.g., American Humane Certified, Certified Humane, and Global Animal Partnership Steps 1 and 2) do not prohibit many cruel but customary practices in conventional animal agriculture.⁴⁰ Additionally, none of these standards requires outdoor access with vegetation for birds, so they do not even match one of the main standards in the OLPP Final Rules.

Lastly, the AMS also claims that withdrawal of the rules will reduce costs. But this is also untrue. Instead of being able to rely on one “USDA Certified Organic” label,

³⁷ And in great detail in Center for Food Safety’s white paper, *supra* note 1.

³⁸ *State Farm*, 463 U.S. at 43.

³⁹ Erin Eberle, Farm Forward, *Not All Certifications Are Created Equal* (Feb. 24, 2017), <https://farmforward.com/2017/02/24/animal-welfare-certifications/>.

⁴⁰ AWI, Animal Welfare Standards: A comparison of Industry Guidelines and Independent Labels, <https://awionline.org/sites/default/files/uploads/documents/FA-AWI-standardscomparisontable-070816.pdf>.

consumers who care about animal welfare will have to research individual animal welfare programs and attempt to find out about their standards to determine whether the product comports with their expectations and desires. The AMS's proposal to withdraw the rules will also seriously cost producers in the long run by preventing them from charging a price premium that comes with the USDA label. Consumers rely on labels when making food-purchasing decisions, and government labels carry the most weight.⁴¹ As the AMS has already found, consumers' willingness to pay for organic chicken breast depended on the type of organic label; consumers would pay only a 35 percent premium for a generic organic label versus a 104 percent premium for meat labeled "USDA Certified Organic."

Thus, the AMS's assertion that third-party animal welfare certifications are adequate for consumers to find products that address animal welfare concerns is misguided and uninformed.

VII. The AMS Has Failed to Justify Withdrawal of All the OLPP Final Rules, Which Address Many Issues Besides Poultry Welfare

The OLPP Final Rules also include prohibitions on bodily mutilations, establish permissible housing systems (including group housing for pigs), clarify adequate outdoor access for ruminants, set requirements for the welfare of livestock during transport, and establish record-keeping requirements to ensure that slaughter of mammals complies with the Humane Methods of Slaughter Act and that slaughter of poultry complies with good commercial practices under the Poultry Products Inspection Act. While the AMS is proposing to withdraw the rules wholesale, its economic justification focuses only on the egg industry. It is baffling how the AMS uses costs in the egg industry to justify the withdrawal of standards such as the one requiring group housing for pigs.

Even if costs alone were a valid justification for withdrawing the OLPP Final Rules (which given the OFPA's mandate and the policy implications detailed above, they are not), costs could not justify withdrawing the standards that apply to mammals, because there are no costs.⁴²

⁴¹ Van Loo et al. (2011) (Cited in Proposed Rule—OLPP, 81 Fed Red 21988-89).

⁴² 81 Fed. Reg. 21989 ("We do not expect the mammalian health care and living conditions sections, transportation, or slaughter provisions to impose additional costs, as we expect that these sections will largely codify existing industry practices.").

The AMS's notice of withdrawal of the OLPP Final Rules is utterly devoid of any discussion of the many other provisions of the rules. These standards for the care and living conditions of mammalian livestock are—like the rest of the standards—well-informed, long-considered, and wildly popular. Further, these standards, as explained above, are required by the OFPA and consistent with Congress's goals in enacting the statute, because they promote consistency in the standards of organic production.

Therefore, even if the AMS could provide some rational explanation for withdrawing the care and living condition standards applicable to birds—which it cannot—such explanation could not justify the wholesale withdrawal of the OLPP Final Rules.

VIII. Conclusion

For the reasons explained above, the AMS's proposal to withdraw the OLPP Final Rules is contrary to the OFPA and to congressional intent. Further, the AMS's proposal is arbitrary and capricious and does not comply with minimal standards of reasoned agency decision making. Therefore, the AMS must not withdraw the rules; it should allow them to go into effect as soon as possible to prevent further harm to consumers, small farmers, and animals.