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2 **UNITED STATES DISTRICT COURT**
3 **FOR THE DISTRICT OF COLUMBIA**

4 **ORGANIC TRADE ASSOCIATION,**
5
6 444 North Capitol Street, N.W., Suite
7 445A Washington, D.C. 20001

8 *Plaintiff,*

9 v.

10 **UNITED STATES DEPARTMENT OF**
11 **AGRICULTURE,**

12 1400 Independence Ave., S.W.
13 Washington, DC 20250

14 **SONNY PERDUE, in his official capacity as**
15 **the Department of Agriculture,**

16 1400 Independence Ave., S.W.
17 Washington, DC 20250

18 and

19 **BRUCE SUMMERS, in his official capacity**
20 **as Administrator of the Agricultural**
21 **Marketing Service**

22 1400 Independence Ave., S.W.
23 Washington, DC 20250

24 *Defendants.*

Civil Case No: 1:17-cv-01875 (PLF)

THIRD AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF

25 Pursuant to this Court's Order of November 20, 2017, Plaintiff Organic Trade
26 Association ("OTA") timely files this Third Amended Complaint ("TAC") on behalf of itself and
27 its members and alleges:
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INTRODUCTION¹

1. This action seeks to prevent the government from arbitrarily reversing course and *sua sponte* rescinding an unchallenged and valid final rule adopted to ensure every certified organic livestock product sold in the United States meets a single national standard that is consistently applied, and that each animal receives species-specific indoor space and access to the outdoors during its lifetime. The Administrative Procedure Act (“APA”) and the Organic Foods Production Act² (“OFPA”) each require the Department discharge specific obligations when issuing or rescinding valid federal organic regulations, particularly ones affecting organic livestock, and the Department failed to discharge those duties here and the *Rescission* must be overturned.
2. On January 19, 2017, after more than ten years of public hearings and formal recommendations from the USDA’s expert advisory board, the National Organic Standards Board³ (“NOSB”), and USDA’s Office of Inspector General, a final rule based on those proceedings and recommendations was published in the Federal Register. The final rule was entitled the *Organic Livestock and Poultry Practices Rule* and contained an

¹ This document contains references to Exhibits that were attached to Plaintiff’s Second Amended Complaint. ECF No. 34, Attachments 1-16. Those Exhibits are not attached hereto but are incorporated by reference. The few Exhibits attached to this Third Amended Complaint are designated as “*TAC Exhibit*” to avoid confusion.

² Organic Foods Production Act of 1990, Pub. L. No. 101-624, § 2102, 104 Stat. 3359 (1990)(codified at 7 U.S.C. §§ 6501-6522) (“OFPA”); 7 C.F.R. pt. 205 (National Organic Program); S. Rep. No. 101-357 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 4656, 4949.

³ The National Organic Standards Board (“NOSB”) was created by Congress to hold public meetings and propose standards *inter alia* for “the care of” livestock, like the *OLPP*. *See e.g.* 7 U.S.C. §§’s 6509(d)(2) and 6518.

1 effective date of March 18, 2017. *See* 82 Fed. Reg. at 7042-92 (January 19, 2017)
2
3 (hereinafter “*OLPP*”).

4 3. At that time of publication of the *OLPP* the Department said,

5 AMS is conducting this rulemaking to maintain consumer confidence in the
6 USDA organic seal. This action is necessary to augment the USDA organic
7 livestock production regulations with clear provisions to fulfill one purpose of the
8 Organic Foods Production Act: To assure consumers that organically-produced
9 products meet a consistent and uniform standard. OFPA mandates that detailed
10 livestock regulations be developed through notice and comment rulemaking and
intends for the involvement of the National Organic Standards Board (NOSB) in
that process. (all citations omitted)

11 * * *

12 This rule [is] consistent with recommendations provided by USDA’s Office of
13 Inspector General and nine separate recommendations from the NOSB. This rule
14 adds requirements for the production, transport, and slaughter of organic livestock
and poultry. *The provisions for outdoor access and space for organic poultry
production are the focal areas of this rule.* (emphasis added by Plaintiff)

15 82 Fed. Reg. at 7082.⁴

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17 4. The *OLPP* was based on long standing and well-settled constructions of the OFPA with
18 regard to organic standards for the care of farm animals and the role of the NOSB in
19 developing those standards. *See e.g. TAC Exhibit 1* (previously submitted Declarations of
20 former Chairs of the NOSB covering the board’s 25-year history) In a complete reversal,
21 here the Department here disclaimed any duty to consult the NOSB regarding the *OLPP*
22 *Rescission* efforts and repudiated twenty years of accepted regulatory authority by
23 disclaiming statutory authority to adopt the *OLPP*. The Department pretextually
24 characterized the new measures as “stand alone animal welfare rules” to support a claim
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26 ⁴ *See also TAC Exhibit 2* (USDA Fact Sheet) The Department’s “Fact Sheet: Organic Livestock
27 Production Practices Final Rule” released the next day stated among other findings, “A lack of
28 clarity in organic livestock and poultry standards has led to inconsistent practices among organic
producers.”

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2 that they are not within the organic rulemaking authority granted by Congress under the
3 OFPA, despite the existence of similar standards since the creation of the National
4 Organic Program in 2000.⁵

5 5. Reports that the new Administration was targeting the *OLPP* for delay and elimination
6 emerged within days, and the chairmen of the Senate and House Agriculture Committees,
7 Sen. Pat Roberts (R-KS) and Rep. Mike Conaway (R-TX) reportedly supported the new
8 Administration scrapping the *OLPP*.⁶ Members urged prompt confirmation of a new
9 Department of Agriculture in order that he immediately review the “controversial”
10 *OLPP*.⁷

11 6. A few weeks later the Administration issued its first unlawful amendment of the *OLPP*'s
12 effective date and pursued a fourteen-month course of interlocking administrative actions
13 that inexorably led to publication of the *Rescission*. Beginning with vague
14 pronouncements that the *OLPP* was under review and proceeding to proposed *Rescission*
15 based on a purported lack of statutory authorization and a revised economic analysis, the
16 new Secretary embraced a pattern of refusal to comply with the requirements of the APA
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18 ⁵ The *OLPP* clarified and extended existing animal care practice standards for designating
19 livestock as “organically produced” under 7 C.F.R. §§’s 205.238, 205.239 and 205.240. *See* 82
20 Fed. Reg. at 7042

21 ⁶ *The National Review* (Jan. 23, 2017)(“Sonny Perdue Chosen to Lead USDA: Organic Animal
22 Welfare Rule Issued by USDA”) (Available at [https://www.natlawreview.com/article/sonny-
23 perdue-chosen-to-lead-usda-organic-animal-welfare-rule-issued-usda](https://www.natlawreview.com/article/sonny-perdue-chosen-to-lead-usda-organic-animal-welfare-rule-issued-usda)); *New York Magazine*,
24 (Jan. 23, 2017)(“Five Reasons Food Experts are Worried About Trumps New Agriculture
25 Department”)(noting with regard to *OLPP*, “Republicans are already vowing to reverse
26 them”)(Available at [https://www.grubstreet.com/2017/01/5-reasons-experts-worry-about-trumps-
27 agriculture-Department.html](https://www.grubstreet.com/2017/01/5-reasons-experts-worry-about-trumps-agriculture-Department.html))

28 ⁷ *Politico* (April 17, 2017)(“Perdue and the Disappearing Rule Act”) Available at
[https://www.politico.com/tipsheets/morning-agriculture/2017/04/perdue-and-the-disappearing-
rule-act-219807](https://www.politico.com/tipsheets/morning-agriculture/2017/04/perdue-and-the-disappearing-rule-act-219807); *Bloomberg News* July 11, 2018)(“Trump’s USDA is Killing Rules that Organic
Food Makers Want”)

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2 and the OFPA. Along the predetermined way the Department unlawfully amended the
3 “effective date” of the *OLPP* without consultation with the NOSB or receiving public
4 comment. Later, when the Department did seek public comment, it was always a
5 truncated period and requests for additional time were routinely denied. In one
6 rulemaking, as if to prove the public’s comments were perfunctorily received, the
7 Department chose one of the proposed rulemaking options supported *by a single public*
8 *comment* out of approximately 47,000 submitted.

- 9 7. The Department failed to produce a cogent and credible economic analysis in support of
10 its *Rescission*, even after a remand was authorized for this purpose. The Department now
11 characterizes its remand as merely an effort to "clarify and supplement the record...in
12 light of new facts and information that came to USDA's attention in December
13 2019...[and to determine] whether further rulemaking...is warranted."⁸ 85 Fed. Reg. at
14 57944 Instead of producing clarity it apparently spent the entire remand period finding
15 ways to blame its substandard economic work during the *Rescission* on the prior
16 Administration who produced the *OLPP RIA* -- "the *OLPP RIA* was significantly flawed
17 and caused the *Rescission RIA* to be flawed." *Id.* The Department now declares "no
18 changes" in the outcome are required. *Id.* There is no exception under the APA for flawed
19 economic analyses because the flaws were the product of inattention. This is not what
20 Judge Collyer had in mind when she authorized a remand she believed was requested (as
21 did OTA) to "correct" the admitted flaws and errors. Moreover, the Department has now
22 taken three and half years to write and rewrite its economic analysis while the public has
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25 ⁸ OTA notes that the Department opposed OTA’s request to include the *OLPP* administrative
26 record in this case but now asks the court to selectively consider it. *See Opposition to Plaintiff’s*
27 *Motion to Complete the Administrative Record*, at 1, ECF No. 87 (“The agency action at issue in
28 this lawsuit is USDA’s March 13, 2018 decision, after notice and comment, to withdraw a
previously-promulgated organic livestock rule known as the “*OLPP* Rule.” Accordingly, the
administrative record that this Court should review is the rulemaking record for that decision..”)

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2 had a total of two 30-day comment periods and on remand the Department irrationally
3 rejected substantial record evidence that it's revised look at the *OLPP* economic modeling
4 failed to consider several important factors, findings and newly submitted data and
5 provided a substandard comment opportunity.

6 8. Judicial review of the matter bogged down too. OTA moved for summary judgment on
7 October 31, 2019.⁹ *See Motion for Summary Judgment*, ECF No. 98. Plaintiff submitted
8 an analysis and declaration of a top economist, Dr. Tomislav Vukina, to assist the court.
9 To respond to Dr. Vukina's work the Department requested and received two extensions,
10 ECF Nos. 98 and 99, and only hours before its opposition was due suddenly requested
11 another 45-day delay. *See* ECF No. 102 At the end of the 45-day delay the Department
12 found its own economic work was flawed and asked for an open-ended remand to
13 determine "the impact of those findings on the *Rescission Rule*." *Remand Order* at 2, ECF
14 No. 108.

15 9. Although Judge Collyer was "sympathetic" to OTA's request to go forward with the key
16 issues in the case and forego the requested remand, on March 12, 2020 she found "USDA
17 seeks remand *to correct* a series of admitted flaws in the cost/benefit analysis in the *OLPP*
18 Rule that were carried over into the *Rescission Rule*" and that the Department should be
19 allowed to "cure its own mistakes."¹⁰ *Remand Order* at 2, ECF No. 112 (emphasis added
20 by OTA) Accordingly she authorized a narrow 180-day remand for that purpose while
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23 ⁹ Plaintiff's motion argued the Department's refusal to consult with the NOSB while considering
24 a major revision to its organic livestock rules violated Congress's command that the Department
25 "shall consult" the NOSB regarding livestock rules. The motion also challenged the
26 Department's conclusion that the *OLPP*'s clarification of the existing "outdoor access"
27 requirements for organic poultry (that had existed since the inception of the National Organic
28 Program in 2000) were not authorized by the OFPA.

¹⁰ *See Remand Order*, at 2, ECF No. 112 (Judge Collyer noting the case presented "the
fundamental question of USDA's authority" and that the "economic modeling" was secondary.)

lamenting the latest delay amounted to “the administrative process at its never-ending worst.” *Id.*

10. Rather than rectify the admitted errors the Department instead published a staff report in the Federal Register on April 23, 2020 purporting merely to be the completion of the “*Initial Review* of the flaws” in the Department’s economic analysis in support of its *Rescission* and expressed no conclusions with regard to the report’s impact on the *Rescission* decision. 85 Fed. Reg. 22664-677, at 22664 (April 23, 2020).¹¹ The Department sought public comment on the staff report and promised to publish a “final analysis, as informed by public comment” by Sept. 8, 2020. *Id.* at 22664. The public never received an opportunity to comment on the “final analysis” which belatedly appeared in the Federal Register on September 17, 2020 in final form. 85 Fed. Reg. 57937-944. The final staff report concluded the cost-benefit analyses underpinning the *Rescission* was so “seriously flawed” that it could not be relied upon and the remand “conclusively demonstrate[ed] its untrustworthiness.”¹² No effort whatsoever to conduct a proper cost-benefit analysis was undertaken.¹³

JURISDICTION AND VENUE

¹¹ The Department allotted but 30-days for public comment claiming to allow more would not allow it to “complete this Final Report by the deadline set” by the court. *See Initial Review*, at 26. Nothing prevented the Department from seeking more time from the court and the pattern of blaming others for outcomes it chose is on full display.

¹² *See e.g. Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1908 (2020)(Noting agency explanations following remand “must be viewed critically” to ensure an agency action is not upheld on the basis of impermissible “*post hoc* rationalization.”); *see also Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 217 n.8 (D.C. Cir. 2013) (stating that an agency’s further explanation on remand “must be more than a barren exercise of supplying reasons to support a pre-ordained result” (citation omitted)).

¹³ The Department’s pleadings before this court claim that “judicial invalidation” of the *Rescission* (and by backward extension the *OLPP*) was inevitable. ECF 111, at 1. t

1 11. The Court has subject matter jurisdiction under 28 U.S.C. § 1331 because this action
2 arises under the United States Constitution and the Organic Foods Production Act
3 (“OFPA”), 7 U.S.C. §§ 6501 *et seq.* and the Administrative Procedure Act, 5 U.S.C. § 551
4 *et seq.*
5

6 12. The Court has authority to grant declaratory and injunctive relief pursuant to the
7 Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*; 5 U.S.C. § 702; and the Court’s
8 inherent equitable powers.
9

10 13. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e)(1), because officers or
11 employees of agencies of the United States acting in their official capacities and an
12 agency of the United States are defendants, and because a substantial part of the events or
13 omissions giving rise to this action occurred in this district.
14

15 **PARTIES**

16
17 14. Plaintiff Organic Trade Association ("OTA") is a membership-based business association
18 for organic agriculture and products in North America and is the leading voice for the
19 organic trade in the United States, representing approximately 9500 organic farms and
20 businesses across fifty states. OTA members include organic product consumers, farmers
21 and livestock growers, ingredient suppliers, processors, manufacturers, distributors,
22 retailers, accredited certifying agents, and those in international trade. OTA's members
23 grow, make, distribute, purchase, and sell, and certify organic agricultural products,
24 including organic livestock products worldwide. OTA and its members are adversely and
25 irreparably affected by the actions of the defendants cited in this TAC. OTA has been
26 involved in the subject rulemakings and policy development for the entirety of the period
27 embraced by the referenced rulemakings.
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2 15. Defendant USDA is a Department in the U.S. government charged with administering the
3 Agricultural Marketing Service and implementing the OFPA.

4 16. Defendant Sonny Perdue ("Department") is sued in his official capacity as the Department
5 of Agriculture. The Department is the official ultimately responsible for the Department's
6 activities and policies and for compliance with the OFPA and the APA.

7 17. Defendant Bruce Summers is sued in his official capacity as the acting Administrator of
8 the Agricultural Marketing Service. He is legally responsible for administering marketing
9 programs of the USDA, including the National Organic Program.
10

11 LEGAL AND REGULATORY BACKGROUND

12 BACKGROUND

13 **A. The Organic Foods Production Act, National Organic Program and Role of the** 14 **National Organic Standards Board.**

15
16 18. The Organic Food Products Act¹⁴ ("OFPA") was enacted in 1990 to correct a market
17 failure arising from a patchwork of state and private organic production and processing
18 standards that resulted in inconsistent definitions for organic products, consumer
19 confusion, and fragmented markets for organic producers, processors and products.
20

21 19. Congress sought to "facilitate interstate commerce" by "establishing national standards
22 governing the production and marketing of certain agricultural products. . . ." in order to
23 "assure consumers that organically produced products meet a consistent standard." 7
24 U.S.C. § 6501. Further, Congress took an "opt-in" approach to regulating organic
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27 ¹⁴ Organic Foods Production Act of 1990, Pub. L. No. 101-624, § 2102, 104 Stat. 3359
28 (1990)(codified at 7 U.S.C. §§ 6501-6522) ("OFPA"); 7 C.F.R. Part 205 (National Organic
Program); *see also* S. Rep. No. 101-357 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 4656, 4949.

1 products by creating “national standards” solely for those persons who voluntarily choose
2 to produce and market products bearing an “organic” marketing claim. 7 U.S.C. § 6504.
3

4 20. Congress directed the USDA to develop and implement the new “national standards.”
5 7 U.S.C. § 6503.
6

7 21. To guide USDA in this undertaking, Congress created an expert citizen-advisory board,
8 the National Organic Standards Board (“NOSB”). 7 U.S.C. § 6518. The NOSB meets at
9 least twice a year and conducts all its meetings and voting on organic policy
10 recommendations in public in accord with the “Government in the Sunshine Act.” 5
11 U.S.C. § 552(b).
12

13 22. The NOSB is composed of fifteen members appointed according to statutory criteria; the
14 expertise necessary for each seat is set in the statute. 7 U.S.C. § 6518(b).
15

16 23. The OFPA requires the Department to seat four certified farmers, two certified handlers,
17 one organic retailer, one accredited certifying agent, three members with environmental
18 and resource conservation expertise, three members that represent, or are, public or
19 consumer interest groups, and one member with expertise in toxicology, ecology or
20 biochemistry. 7 U.S.C. § 6518(b).
21

22 24. In addition to setting criteria for each seat on the board, the statutory criteria also disclose
23 the distinct viewpoint diversity and perspectives that Congress expressly intended the
24 Department to meaningfully consult when considering new organic standards or amending
25 existing ones. 7 U.S.C. § 6518. Unlike many advisory boards, the NOSB is not weighted
26 towards those directly regulated by the National Organic Program. The additional
27 perspectives include consumer interests, as the role of consumer expectations in shaping
28

1 emerging organic norms has been increasingly recognized. *See e.g.*, 82 Fed. Reg. at 7043,
2 7066 (recognizing consumer expectations in deliberations of NOSB).
3

4 25. The NOSB: “[S]hall provide recommendations to the Department regarding the
5 implementation of this chapter,” 7 U.S.C. § 6518(k)(1).
6

7 26. The Department: “shall establish [the NOSB]to assist....and to advise the Department
8 on any other aspects of the implementation of this chapter.” 7 U.S.C. § 6518(a).
9

10 27. The Department: “[S]hall consult with the National Organic Standards Board...” 7 U.S.C.
11 § 6503(c).
12

13 28. The Senate Organic Report states: “The Committee regards this Board as an essential
14 advisor to the Department on all issues concerning this bill and anticipates that many of
15 the key decisions concerning standards will result from recommendations by this Board.”

16 Senate Committee on Agriculture, Forestry and Nutrition, *Report of the Committee on*
17 *Agriculture, Forestry and Nutrition to Accompany S. 2830 Together with Additional and*
18 *Minority Views, 101st Congress, S. REP. NO. 101–357, at 289 (1990) (“Senate Organic*
19 *Report”)*

20 29. The Senate Report demonstrates that the unique and novel public-private partnership
21 adopted by Congress for the USDA and the NOSB was understood and intentional.

22 “[M]uch of this title breaks new ground for the Federal government and will require the
23 development of a unique regulatory scheme.” *Senate Organic Report*, at 293.
24

25 30. The Senate Report explains that the new approach of directly involving the advisory board
26 in the development of policy was to ensure a continual updating of organic standards, as
27 occurred here with the *OLPP*. “The Committee is concerned that production materials
28

1 and practices keep pace with our evolving knowledge of production systems.” *Senate*
2
3 *Organic Report* at 297.

4 31. The Senate also considered that there was, at the time, limited knowledge, or consensus on
5 appropriate organic livestock standards. *Senate Organic Report* at 289.

6 32. The Senate found a special, express need for additional evaluation of organic livestock
7 production standards by the NOSB: “[T]he Committee expects that USDA, with the
8 assistance of the National Organic Standards Board will elaborate on livestock criteria.”
9
10 *Senate Report* at 289.

11 33. The Senate went further: “The Board shall recommend livestock standards, in addition to
12 those specified in this bill, to the Department.” *Id.* at 303.

13 34. When the House and Senate were reconciling their respective versions of the OFPA,
14 Congress stated that the “Conference substitute adopts the House provision with an
15 amendment which requires the Department to hold hearings and develop regulations
16 regarding livestock standards *in addition to* those specified in this title.” H.R. Rep. 101-
17 916 at 1177-78 (Oct. 22, 1990) (emphasis added by OTA).

18 35. The legislative history confirms that Congress intended the agency to enact organic
19 livestock standards in addition to those specified in the original language of the OFPA. All
20 evidence suggests that Congress intended USDA’s authority on this issue to be expansive,
21 enabling the NOSB and USDA to refine and extend livestock standards as research on the
22 subject grew. Congress “recognize[d] the need to further elaborate on the standards set
23 forth in the title and expect[ed] that by holding public discussions with interested parties
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1 and with the National Organic Standards Board, the Department will determine the
2 necessary standards.” *Id.*

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4 36. Congress specifically directed that the minimal livestock standards it placed in the OFPA
5 be augmented: “[the NOSB] shall recommend to the Department standards in addition to
6 those in [the foregoing section] *for the care of livestock to ensure that such livestock are*
7 *organically produced.*” 7 U.S.C. § 6509(d)(2) (emphasis added by OTA).

8
9 37. Congress further commanded: “[the Department] [S]hall hold public hearings *and shall*
10 *develop detailed regulations*, with notice and public comment, to guide the
11 implementation of the standards for livestock products...” 7 U.S.C. § 6509(g) (emphasis
12 added by OTA).

13
14 38. The *NOSB Policy Manual* states: “The unique nature of the NOSB and its relationship
15 with the NOP, as established through OFPA, requires that the volunteer Board, which
16 regularly receives stakeholder input through public comment, must work collaboratively
17 with the NOP. Similarly, the NOP, as required through OFPA, must consult and
18 collaborate with the NOSB.” *NOSB Policy Manual*, at 9 available at
19 <https://www.ams.usda.gov/sites/default/files/media/NOSB-PolicyManual.pdf>
20

21 39. The NOSB’s Federal Advisory Committee Act Charter states at p.1: “[T]he purpose of
22 the NOSB is to assist in the development of standards for substances to be used in organic
23 production and to advise the Department on any other aspects of the implementation of
24 OFPA. Key activities of the Board include assisting in the development of organic
25 standards and regulations...” (internal quotation marks removed)
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40. Nearly ten years after passage of the OFPA, USDA published the National Organic Program Final Rule (“NOP”) in December 2000. *National Organic Program*, 65 Fed. Reg. 80,548 (Dec. 21, 2000) (codified at 7 C.F.R. pt. 205) (“Program Rule”).

B. The Administrative Procedure Act.

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

42. A “rule” is “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” *Id.* § 551(4).

43. Under the APA, an agency must publish a notice of proposed legislative rulemaking in the Federal Register and solicit public comment before adopting or repealing a rule, unless the rule constitutes an “interpretative rule,” “general statement of policy,” “rule of agency organization, procedure, or practice,” or the agency “for good cause” finds that notice and comment are “impracticable, unnecessary, or contrary to the public interest.” *Id.* § 553.

44. Under the APA, “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” *Id.* § 702.

45. Under the APA, a reviewing court shall “hold unlawful and set aside” agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” *id.* § 706(2)(A), or that is “without observance of procedure required by law.” *Id.* § 706(2)(D). 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

1 important aspect of the problem, offered an explanation for its decision that runs counter
2 to the evidence before the agency, or is so implausible that it could not be ascribed to a
3 difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State*
4 *Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

5
6 46. The APA also grants reviewing courts the power to “compel agency action unlawfully
7 withheld or unreasonably delayed.” *Id.* § 706(1).

8
9 **C. Executive Order 12866.**

10 47. Executive Order 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993), “primarily aims to improve
11 planning and coordination in the regulatory process” *Envtl. Integrity Project v. Small Bus.*
12 *Admin.*, 151 F. Supp. 3d 49, 55 (D.D.C. 2015).

13
14 48. “The regulatory process shall be conducted so as to meet applicable statutory
15 requirements...” Exec. Order No. 12866 at Preamble.

16 49. “Each agency shall identify the problem that it intends to address (including, where
17 applicable, the failures of private markets or public institutions that warrant new agency
18 action) as well as assess the significance of that problem.” *Id.* at Section 1(b)(1).

19
20 50. “Each agency shall examine whether existing regulations (or other law) have created, or
21 contributed to, the problem that a new regulation is intended to correct and whether those
22 regulations (or other law) should be modified to achieve the intended goal of regulation
23 more effectively.” *Id.* at Section 1(b)(2).

24
25 51. “Each agency shall assess both the costs and the benefits of the intended regulation and,
26 recognizing that some costs and benefits are difficult to quantify, propose or adopt a
27
28

1 regulation only upon a reasoned determination that the benefits of the intended regulation
2 justify its costs.” *Id.* at Section 1 (b)(6).
3

4 52. “Each agency shall base its decisions on the best reasonably obtainable scientific,
5 technical, economic, and other information concerning the need for, and consequences of,
6 the intended regulation.” *Id.* at Section 1 (b)(7).
7

8 53. “Each agency shall (consistent with its own rules, regulations, or procedures) provide the
9 public with meaningful participation in the regulatory process *** In addition, each
10 agency should afford the public a meaningful opportunity to comment on any proposed
11 regulation, which in most cases should include a comment period of not less than 60 days.
12 Each agency also is directed to explore and, where appropriate, use consensual
13 mechanisms for developing regulations, including negotiated rulemaking.” *Id.* at Section
14 6 (a).
15

16 54. Cost-benefit analyses undertaken pursuant to EO 12866 are reviewable under the APA.
17 *See Nat'l Ass'n of Home Builders v. E.P.A.*, 682 F.3d 1032, 1040 (D.C. Cir. 2012); *City of*
18 *Portland v. EPA*, 507 F.3d 706, 713 (D.C.Cir.2007); *Owner–Operator Indep. Drivers*
19 *Ass'n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 206 (D.C.Cir.2007) (vacating
20 regulatory provisions because the cost-benefit analysis supporting them was based on an
21 unexplained methodology).
22

23 **FACTUAL ALLEGATIONS**

24 55. The OFPA is the first federal law to establish a voluntary nationwide system requiring full
25 disclosure of farming and food processing practices and the use of synthetic substances by
26 any producer or handler of agricultural products. 7 U.S.C. § 6506.
27
28

1 56. The National Organic Program is a “voluntary labeling program.” *See* 82 Fed. Reg. at
2 7084; 83 Fed. Reg. at 10779 (“[P]articipation in the NOP is technically voluntary...”)

3
4 57. Since the first rule published under the OFPA, organic livestock standards have included
5 provisions for animal care that are designed to improve the lives of farm animals by
6 ensuring production practices that reduce the need for synthetic medications.

7
8 58. USDA has only issued new, or amended existing, standards for livestock production
9 practices after providing extensive notice and comment, holding public hearings,
10 consulting with NOSB, and receiving recommendations from NOSB regarding livestock
11 practices.

12 59. The *OLPP* extended and clarified existing organic livestock production requirements. Its
13 terms became the “status quo” or existing policy of the National Organic Program upon
14 publication. “This final rule addresses care and production practices, transport, slaughter,
15 and living conditions for organic livestock and poultry.” 82 Fed. Reg. at 7043

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17 60. The *Priebus Memorandum* (discussed in detail *infra*) is the fifth instance where a
18 President ordered an across-the-board freeze of regulatory action. *See* Exec. Order No.
19 12,291, 3 C.F.R. 127, 131-32 (1981) (suspending the effective dates of all major rules that
20 an agency promulgated in final form, and prohibiting executive agencies from, among
21 other things, issuing regulations without an analysis of the costs and benefits of the
22 regulations); *see also* Memorandum, Postponement of Pending Regulations, 46 Fed. Reg.
23 11,227, 11,227-28 (Feb. 6, 1981) (ordering executive agencies to postpone pending final
24 regulations and proposed regulations for sixty days, with limited exceptions);
25 Memorandum on Reducing the Burden of Government Regulation, PUB. PAPERS 166-68
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1 (Jan. 28, 1992) (detailing the George H. W. Bush Administration's ninety-day moratorium
2 for proposed and final rules); Notice, Regulatory Review, 58 Fed. Reg. 6074, 6074 (Jan.
3 25, 1993) (reprinting a memorandum from the Office of Management and Budget (OMB),
4 instructing regulatory agencies regarding the Clinton Administration's directives for
5 “Regulatory Review,” including directives to suspend publication); Memorandum for the
6 Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702,
7 7702 (Jan. 24, 2001); and Memorandum, Postponement of Pending Regulations, 46 Fed.
8 Reg. 11,227, 11,227 (Feb. 6, 1981) (reprinting a White House memorandum sent to
9 executive agencies on January 29, 1981, directing agencies to “refrain, for 60 days
10 following the date of this memorandum, from promulgating any final rule.”).

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14 **A. History of Organic Livestock Standards at the National Organic Program.**

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16 61. As noted in greater detail in the Legal Background section *supra*, in the 1990 Farm Bill,
17 Congress expressly required that livestock production practices for organic livestock
18 operations be developed by the Department, in consultation with the NOSB, and that
19 public hearings be held to create a robust record. 7 U.S.C. § 6509(d)(2); 7 U.S.C. §
20 6509(g).
- 21
22 62. Since the inception of the National Organic Program, USDA has worked with the NOSB
23 and published organic livestock rules underpinned by clear statutory authority and a
24 programmatic commitment to maintaining animal welfare on certified organic operations.
25 For example, in the final rule that established the National Organic Program in 2000,
26 USDA stated:
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1 Animals in an organic livestock operation must be maintained under conditions
2 which provide for exercise, freedom of movement, and reduction of stress
3 appropriate to the species. Additionally, all physical alterations performed on
4 animals in an organic livestock operation must be conducted to promote the
animals' welfare and in a manner that minimizes stress and pain.¹⁵

5 63. The 2000 rule also required each producer submit a written organic system plan¹⁶ that
6 included a "proactive approach to health management," based *inter alia* on "access to the
7 outdoors, shade, shelter, exercise areas, fresh air, and direct sunlight." *Id.* at 80,561.

8 64. The 2000 rule also confirmed that these regulations were based upon and also satisfied
9 Congress' intent to "assure consumers that organically produced products meet a consistent
10 standard." *Id.* at 80664.

11 65. The 2000 rule is codified at 7 C.F.R. §§ 205.236 (Origin of Livestock); 205.237
12 (Livestock Feed); 205.238 (Livestock Healthcare practice standard); and 205.238
13 (Livestock living conditions). These requirements reflected USDA's now well-settled
14 policy that the care of organic farm animals involves much more than prohibiting non-
15 organic feedstuffs and limiting the ingestion of synthetic substances for medical treatment.
16 Notably, it also evinced that an animal's health and the concrete conditions of its overall
17 living arrangements are interdependent, and that the OFPA requires the organic standards
18 to take these interests into account when promulgating organic regulations.
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20 66. The 2000 rule acknowledged that many livestock production questions remained
21 unanswered: "We anticipate that additional NOSB recommendations and public comment
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26 ¹⁵ *National Organic Program*, 65 Fed. Reg. 80,547, 80,560 (Dec. 21, 2000) ("the 2000 rule").

27 ¹⁶ See 7 U.S.C. § 6502 Definitions "Organic Plan" ([A] plan of management . . . that includes
28 written plans concerning all aspects of agricultural production.."); 7 U.S.C. § 6513 (c) ("An
organic livestock plan shall contain provisions designed to foster the organic production of
livestock consistent with the purposes of this chapter.")

1 will be necessary *for the development of space requirements.*” 65 Fed. Reg. at 80,573
2 (emphasis added); “The NOP will work with the NOSB to develop additional guidance for
3 managing ruminant production operations.” *Id.*; “We will continue to explore with the
4 NOSB specific conditions under which certain species could be temporarily confined to
5 enhance their well-being.” *Id.*
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8 67. Since that time, USDA and NOSB have incrementally developed the management
9 protocols and practice standards governing livestock on certified organic farms and have
10 held many public, on-the-record meetings with experts and fact witnesses and developed
11 and published many drafts and substantive recommendations for public comment. *See, e.g.,*
12 82 Fed. Reg. at 7045 (reviewing federal register notices of hearings on organic livestock
13 regulations). Shortly thereafter, the NOSB began soliciting public comments on livestock
14 production practices at public meetings.
15

16 68. In 2001, the NOSB recommended that the NOP issue more detailed standards for
17 ruminant livestock. *Available at*
18 [https://www.ams.usda.gov/sites/default/files/media/Recommendations on Pasture.pdf](https://www.ams.usda.gov/sites/default/files/media/Recommendations%20on%20Pasture.pdf) (last
19 visited Sept. 12, 2017).
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21 69. In 2002, the NOSB made a recommendation for poultry regarding outdoor access, stating
22 that outdoor access should include open air and direct access to sunshine. In addition, the
23 May 2002 recommendation stated that access to soil is necessary to meet the intent of the
24 NOP’s requirement for outdoor access for poultry. *Available at*
25 [https://www.ams.usda.gov/sites/default/files/media/Recommended Clarification on Access](https://www.ams.usda.gov/sites/default/files/media/Recommended%20Clarification%20on%20Access%20to%20Outdoors%20Poultry.pdf)
26 [to Outdoors Poultry.pdf](https://www.ams.usda.gov/sites/default/files/media/Recommended%20Clarification%20on%20Access%20to%20Outdoors%20Poultry.pdf) (last visited Sept. 12, 2017).
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80. In 2002, the USDA’s Agricultural Marketing Service (“AMS”) issued an administrative appeal decision that reversed a certifying agent’s denial of certification of a poultry operation. The original denial found that while the operation had covered concrete “porches” it did not have “outdoor access” for its birds because the floor was concrete. The appeal decision reversed this finding. 81 Fed. Reg. at 21,980 (discussion of decision).

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71. In March 2005, the NOSB made recommendations regarding the temporary confinement of livestock. On October 24, 2008, AMS published a proposed rule on access to pasture for ruminant livestock, 73 Fed. Reg. 63,584, and published the final rule, *Access to Pasture (Livestock)* on February 17, 2010. 75 Fed. Reg. at 7154. According to AMS, this rule was based on several NOSB recommendations regarding ruminant livestock feed and living conditions. *Id.* at 7154-55; 7183-85.

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72. In 2010, USDA published its *Access to Pasture Rule* and included animal welfare provisions that built on those of the 2000 rule. *National Organic Program; Access to Pasture (Livestock)*, 75 Fed. Reg. 7154 (Feb. 17, 2010) (hereinafter “*Access to Pasture*”) (codified at 7 C.F.R. §§ 205.237; 205.239; 205.240). The final rule adopted additional livestock production rules providing more specific feed and living conditions for ruminant animals. The rules reflected the statutory authority to adopt organic production practices that enhanced the care of farm animals, to reduce the need for synthetic medications, to ensure organically raised animals meet a consistent standard of care, and to meet consumer expectations. *Access to Pasture*, 75 Fed. Reg. 7154 (February 17, 2010).

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73. The *Access to Pasture Rule* reiterated the programmatic and statutory construction principles first set forth ten years earlier in the 2000 rule that, “[o]ne of the tenants [sic] of

1 organic production is that animals are able to express their natural behaviors, and exercise
2 and move freely.” *Id.* at 7171. The rule emphasized that this tenet was designed to align
3 with the expectations of consumers and noted that thousands of commenters had
4 expressed their support. *Id.* When discussing temporary denial of access to the outdoors,
5 the Agency stated “[t]hese exceptions are intended for animal welfare concerns rather than
6 production yields.” *Id.* at 7170.

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9 74. The *Access to Pasture* rule was developed based on multiple NOSB recommendations
10 between 1994 and 2005, five public hearings, and thousands of comments from
11 stakeholders. In 2016, USDA noted the *Access to Pasture* rule was promulgated “in
12 response to the 2005 NOSB recommendation and extensive public input requesting clear
13 outdoor access requirements for ruminant livestock.” 81 Fed. Reg. 21,956-01 (Apr. 13,
14 2016) (“*Proposed OLPP*”). In 2017, USDA said the *OLPP* “would continue the process
15 initiated with the *Access to Pasture* rulemaking to establish clear and comprehensive
16 requirements for all organic livestock, consistent with recommendations provided by
17 USDA’s Office of Inspector General and nine separate recommendations from the
18 NOSB.” *OLPP*, 82 Fed. Reg. 7042, 7044 (Jan. 19, 2017).

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21 75. The parallels between the 2010 *Access to Pasture* rulemaking and the 2017 *OLPP*
22 procedure and statutory analysis are inescapably obvious:

23 A stated purpose of the OFPA (7 U.S.C. 6501) is to assure consumers that
24 organically produced products meet a consistent and uniform standard. This
25 action is being taken to facilitate and improve compliance and enforcement and
26 satisfy consumer expectations.... Sufficient specificity and clarity will bring
27 uniformity in application of the livestock regulations and enable certifying agents
28 and producers to assess compliance. The amendments set minimal objectives
which align with consumer expectations and producer perspectives. 75 Fed. Reg.
7154, 7184 (Feb. 17, 2010).

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2 76. The *Access to Pasture Rule* stressed the need for greater uniformity – to “create equitable,
3 consistent performance standards for all ruminant livestock producers,” *Id.* at 7186 – that
4 reflect “consumer preferences regarding the production of organic livestock and their
5 products.” *Id.*
6

7 77. In addition to the *Access to Pasture Rule*, between 2009 and 2011, the NOSB issued a
8 series of recommendations on livestock production practices that incorporated prior
9 NOSB recommendations that AMS had not addressed. A November 5, 2009 NOSB
10 recommendation suggested revisions and additions to the livestock health care practice
11 standards and living conditions standards.
12

13 78. On October 13, 2010, USDA published draft guidance, *Outdoor Access for Organic*
14 *Poultry* (NOP 5024), for public comment. The draft guidance advised certifying agents to
15 use the 2002 and 2009 NOSB recommendations as the basis for certification decisions
16 regarding outdoor access for poultry.
17

18 79. On May 6, 2011, USDA stated that, “Based upon the comments received, the NOP is not
19 finalizing the draft guidance, “NOP 5024—Outdoor Access for Poultry.” The NOP
20 intends to initiate a separate rulemaking on the outdoor access requirements for poultry in
21 2011.” Available at <https://www.regulations.gov/document?D=AMS-NOP-10-0048-0001>
22 (last visited September 12, 2017).
23

24 80. In October 2010, the NOSB passed a recommendation to allow the administration of drugs
25 in the absence of illness to prevent disease or alleviate pain, stating such a change would
26 improve the welfare of organic livestock.
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1 81. In March 2010, the USDA’s Office of Inspector General conducted an audit of the NOP
2 and issued a report entitled *Oversight of the National Organic Program*. The Report found
3 inconsistent treatment of outdoor access for livestock by accredited certifying agents and
4 noted that AMS “agreed that additional guidance would be beneficial.” *Oversight of the*
5 *National Organic Program*, OIG Audit Report No. 01601-03-Hy, 22 (“OIG Report”)
6 *available at* <https://www.usda.gov/oig/webdocs/01601-03-HY.pdf>.

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9 82. On December 2, 2011, the NOSB unanimously adopted a Recommendation entitled
10 “*Animal Welfare and Stocking Rates*” that combined its prior work on animal space
11 requirements and handling, with its prior recommendations regarding animal welfare,
12 handling, transport, and slaughter.¹⁷

13
14 83. On March 21, 2012, the Department acknowledged the NOSB recommendation on animal
15 welfare and said it would conduct assessments of its regulatory burdens and particularly
16 how certifying agents would monitor and enforce the proposed welfare requirements.¹⁸

17 84. In total, between 1994 and 2011, NOSB made nine recommendations regarding livestock
18 health and welfare in organic production.
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22 ¹⁷ NOSB, *Formal Recommendations by the NOSB to the NOP, Animal Welfare Stocking Rates*, 1
23 *available at* [https://www.ams.usda.gov/sites/default/files/media/NOP%20Livestock%20Final%20Rec%20An](https://www.ams.usda.gov/sites/default/files/media/NOP%20Livestock%20Final%20Rec%20Animal%20Welfare%20and%20Stocking%20Rates.pdf)
24 [imal%20Welfare%20and%20Stocking%20Rates.pdf](https://www.ams.usda.gov/sites/default/files/media/NOP%20Livestock%20Final%20Rec%20Animal%20Welfare%20and%20Stocking%20Rates.pdf); NOSB, *Formal Recommendation by the*
25 *NOSB to the NOP, Animal Handling and Transport to Slaughter*, 1 *available at*
26 [https://www.ams.usda.gov/sites/default/files/media/NOP Livestock Final Rec Animal Handling](https://www.ams.usda.gov/sites/default/files/media/NOP%20Livestock%20Final%20Rec%20Animal%20Handling%20and%20Transport%20to%20Slaughter.pdf)
and Transport to Slaughter.pdf.

27 ¹⁸ USDA-AMS, *Memorandum to the National Organic Standards Board*, 4 *available at*
28 <https://www.ams.usda.gov/sites/default/files/media/recommendationsga.pdf>.

1 85. The NOSB invited public testimony on animal raising practices on approximately eleven
2 occasions between 2001 and 2012. Among them were specific instances of public
3 comment opportunities appearing in Federal Register Notices: 67 Fed. Reg. 19,375 (April
4 19, 2002); 74 Fed. Reg. at 46,411 (September 9, 2009); 75 Fed. Reg. at 57,194 (September
5 20, 2010); and 76 Fed. Reg. at 62,336 (October 7, 2011).
6

7 86. From the creation of the NOP in December 2000 until the *OLPP*'s publication in January
8 2017, the USDA published only one final rule covering livestock production practices. *See*
9 75 Fed. Reg. 7154 (February 17, 2010).
10

11 87. In the eighteen years since the NOP was created, USDA has also issued guidance
12 documents that are still in use. Two documents are particularly relevant here.
13

14 88. USDA's *Guidelines for Organic Certification of Poultry* states: "Animal health is the
15 result of preventative and on-going management efforts to create living soils, provide
16 nourishing forage and feed, and improve the quality of livestock life. Animals must be
17 kept in healthy, low stress environments."¹⁹ This guidance was "based on the USDA
18 organic regulations" and in compliance with the standards described as required for
19 organic certification. *Id.*
20

21 89. USDA's *Guidelines for Organic Certification of Dairy Livestock* contains identical
22 language as appears in the poultry guidance cited above.²⁰
23

24 **B. The Proposed Organic Livestock and Poultry Practices Rule.**

25 ¹⁹ U.S. Department of Agriculture, *Guidelines for Organic Certification of Poultry*, available at
26 <https://www.ams.usda.gov/sites/default/files/media/Poultry%20-%20Guidelines.pdf>.

27 ²⁰ U.S. Department of Agriculture, *Guidelines for Organic Certification of Dairy Livestock*,
28 available at <https://www.ams.usda.gov/sites/default/files/media/Dairy%20-%20Guidelines.pdf>.

1 90. On April 16, 2016, the Department published the *Organic Livestock and Poultry Practices*
2 *Rule* (“the Proposed Organic Livestock Rule” or “Proposed *OLPP*”) in an extremely
3 detailed 54-page publication. 81 Fed. Reg. at 21,956-22,009 (April 13, 2016).
4

5 91. “AMS is proposing this rulemaking to maintain consumer confidence in the high
6 standards represented by the USDA organic seal.” 81 Fed. Reg. at 21,980.
7

8 92. The Department said, “[T]he provisions for outdoor access for poultry have a long history
9 of agency and NOSB actions and are a focal issue [here].” 81 Fed. Reg. at 21,957.

10 93. The Department said, “AMS has determined that the current USDA organic regulations (7
11 CFR part 205) covering livestock health care practices and living conditions need
12 additional specificity and clarity to better ensure consistent compliance by certified
13 organic operations and to provide for more effective administration of the National
14 Organic Program (NOP) by AMS. * * * By facilitating improved compliance and
15 enforcement of the USDA organic regulations, the proposed regulations would better
16 satisfy consumer expectations that organic livestock meet a uniform and verifiable animal
17 welfare standard.” *Id.*
18

19 94. The Department said, “Potentially affected entities include * * * Existing livestock farms
20 and slaughter facilities that are currently certified organic under the USDA organic
21 regulations. Certifying agents accredited by USDA to certify organic livestock operations
22 and organic livestock handling facilities.” *Id.*
23

24 95. The Department proposed regulatory language for all *mammalian livestock*: “The
25 producer of an organic livestock operation must establish and maintain year-round
26 livestock living conditions which accommodate the health and natural behavior of
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1 animals, including: (1) Year-round access for all animals to the outdoors, soil, shade,
2 shelter, exercise areas, fresh air, clean water for drinking, and direct sunlight, suitable to
3 the species, its stage of life, the climate, and the environment. . . ” 81 Fed. Reg. at 22,006.
4

5 96. The Department proposed regulatory language for all *poultry*: “An organic poultry
6 operation must establish and maintain year-round poultry living conditions which
7 accommodate the health and natural behavior of poultry, including: Year-round access to
8 outdoors; shade; shelter; exercise areas; fresh air; direct sunlight; clean water for drinking;
9 materials for dust bathing; adequate outdoor space to escape from predators and
10 aggressive behaviors suitable to the species, its stage of life, the climate and
11 environment.” 81 Fed. Reg. at 22,007.
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14 97. The Department assessed consumer expectations: “We believe that organic consumers
15 generally have high regard for animal welfare-friendly products.” 81 Fed. Reg. at 21,988.
16

17 98. The Department said: “We believe that the space and outdoor access requirements in this
18 proposed rule would enable consumers to better differentiate the animal welfare attributes
19 of organic eggs and maintain demand for these products.” 81 Fed. Reg. at 21,988.
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21 99. The Department considered consumer expectations and the impact of extended
22 implementation periods: “Conversely, a 10-year implementation period could erode
23 consumer demand for organic eggs if the organic label requirements do not keep pace with
24 growing consumer preferences for more stringent outdoor living conditions. Prolonging
25 the disparity in organic egg production practices and the resulting consumer confusion
26 would be detrimental to the numerous organic egg producers who could readily comply
27 with this proposed rule.” 81 Fed. Reg. at 21,986.
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100. The Department specifically concluded: “This proposed rule will maintain consumer trust in the value and significance of the USDA organic seal, particularly on organic livestock products. Clear and consistent standards for organic livestock practices, especially maximum stocking density and outdoor access for poultry, are needed and broadly anticipated by most livestock producers, consumers, trade groups, certifying agents, and OIG. This action completes the process, as intended by OFPA, and reiterated in the USDA organic regulations, to build more detailed standards for organic livestock. By resolving the ambiguity about outdoor access for poultry, this action furthers an objective of OFPA: Consumer assurance that organically produced products meet a consistent standard.” 81 Fed. Reg. at 21998.

C. The Final Organic Livestock and Poultry Practices Rule.

101. On January 19, 2017, the USDA issued a 51-page final rule, entitled *Organic Livestock and Poultry Practices*, which contained extremely detailed standards for production of animals on organic farms.” 82 Fed. Reg. at 7042-92 (January 19, 2017) (“the final rule” or “the Final *OLPP*” or the “Final Organic Livestock Rule”).

102. The Department said: “Based on recommendations from the Office of Inspector General and the National Organic Standards Board, AMS determined that the current USDA organic regulations covering livestock care and production practices and living conditions needed additional specificity and clarity to better ensure consistent compliance by certified organic operations and to provide for more effective administration of the National Organic Program (NOP) by AMS.” 82 Fed. Reg. at 7042.

1 103. The Department said: “The provisions in this rule on outdoor access for organic poultry
2 have a significant history of AMS actions that are based on National Organic Standards
3 Board (the NOSB) recommendations. Outdoor access is a prominent issue in this final
4 rule.” 82 Fed. Reg. 7043.

5
6 104. The Department said: “To assist with this rulemaking, the NOSB developed a series of
7 recommendations to further clarify organic livestock and poultry care and production
8 practices, transport, slaughter, and living conditions, including outdoor access for poultry.
9 The NOSB deliberations on these recommendations revealed that there is considerable
10 support for these recommendations within the organic community and consumers have
11 specific expectations for organic livestock care, which includes outdoor access for
12 poultry.” *Id.*

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15 105. The Department said: “This rule would continue the process initiated with the Access to
16 Pasture rulemaking to establish clear and comprehensive requirements for all organic
17 livestock, consistent with recommendations provided by USDA's Office of Inspector
18 General and nine separate recommendations from the NOSB.” 82 Fed. Reg. at 7044.

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20 106. Regarding the specific nature of the recommendation from the Inspector General the
21 Department said:

22 AMS issued an administrative appeal decision in 2002 that allowed the
23 certification of one operation that used porches as outdoor access to protect
24 water quality. This decision served to address a fact-specific enforcement
25 issue. Some certifying agents used this appeal decision to grant certification to
26 poultry operations using porches to provide outdoor access. Thereafter,
27 certification and enforcement actions have remained inconsistent and
28 contributed to wide variability in living conditions for organic poultry, as well
as consumer confusion about the significance of the organic label with regard
to outdoor access. In accordance with OFPA, this action will clarify USDA
statutory and regulatory mandates and establish consistent, transparent, and

1 enforceable requirements. Further, it will align regulatory language and intent
2 to enable producers and consumers to readily discern the required practices
3 for organic poultry production and to differentiate the products in the
4 marketplace. *OLPP* RIA at p. 12

5 107. “This variability perpetuates an uneven playing field among producers and sows
6 consumer confusion about the meaning of the USDA organic label.” 82 Fed. Reg. at 7082

7 108. The Department dropped specific space requirements for turkeys from the final rule
8 specifically noting the “absence of an NOSB recommendation.” 82 Fed. Reg. at 7066.

9 109. The Department recognized the OFPA mandated notice and comment rulemaking for
10 livestock standards and said, “Section 6509(g) directs the Department to develop detailed
11 regulations through notice and comment rulemaking to implement livestock production
12 standards. * * * [T]he statute contemplated that the assurance of organic integrity for
13 livestock products would require more specific guidelines and provided the authority for
14 that future regulatory activity.” *Id.*

15 110. “The provision on indoor and outdoor space requirements in this rule are based on nine
16 separate NOSB recommendations submitted to the Department. In developing these
17 recommendations at their public meetings, the NOSB considered technical information
18 and public comments, including comments from organic livestock producers, animal
19 welfare experts and the scientific community.” 82 Fed. Reg. at 7075.

20 111. The work of the NOSB was thoroughly integrated into the Final *OLPP*: “The NOSB
21 deliberated and made the recommendations described in this proposal at public meetings
22 announced [in the Federal Register] on April 19, 2002; September 9, 2009; September 20,
23 2010; and October 7, 2011.” 82 Fed. Reg. at 7045.

1 112. From 2002 through 2011, the NOSB produced six unanimously supported
2 recommendations in 2011 that eventually ended up in the *OLPP*. 81 Fed. Reg. at 21,981
3 (“The proposed provisions were developed by the NOSB in consideration of other animal
4 welfare certification programs, industry standards, input from organic producers, and input
5 from public comment.”). 82 Fed. Reg. at 7045.
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7 113. At a public meeting in April 2017, the NOSB unanimously recognized that the 2011
8 NOSB recommendation upon which the Final *OLPP* was based “was the product of a
9 decade of public NOSB meetings, lengthy discussions, public comment periods and
10 consultation from organic producers, processors, consumers, and the veterinary and
11 scientific community.” See National Organic Standards Board, April 20, 2017 Meeting
12 Transcript at p. 185: line 4—p. 191: line 11
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15 114. In addition, the NOSB stated: “consumers’ trust in the organic label and industry growth
16 depends on the strength and consistent application of organic regulations.” *Id.* at p. 185:
17 lines 4-8.
18

19 115. “AMS believes that aligning with other third-party animal welfare standards . . . is the
20 most sensible approach. * * * [T]his approach avoids creating separate requirements for
21 producers which could be confusing and burdensome.” 82 Fed. Reg. at 7048 (citing
22 standards from third party welfare programs, Certified Humane and the Global Animal
23 Partnership).
24

25 116. “AMS received comments that current organic regulations require access to the outdoors
26 and that these new rules are not necessary for AMS to require outside access or for AMS
27 to prohibit porches as outside access. The comments cited existing regulations at §
28

1 205.239(a)(1), which include a requirement that producers establish and maintain “year-
2 round access for all animals to the outdoors . . . Continuous total confinement of any
3 animal indoors is prohibited. (Response) AMS acknowledges that current organic
4 regulations require outdoor access for poultry, but we disagree with the argument that
5 current regulations could achieve the same results as the regulations revised by this final
6 rule. As recommended by the NOSB, AMS is implementing this final rule to establish
7 specific regulations for the care of livestock, as authorized under OFPA.” 7 U.S.C.
8 6509(d)(2); 83 Fed. Reg. at 7074.
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11 117. The record demonstrates a deep collaboration between the NOP and the NOSB and
12 repeated and ongoing efforts to gather the necessary information and make the best
13 decisions.
14

15 **D. The Final Regulatory Impact Statement.**²¹

16 118. In the Executive Summary of the *OLPP RIA* USDA said:

17 This rule will have broad, important benefits for the organic sector as a
18 whole which are difficult to quantify. Clear and consistent standards,
19 which more closely align to consumer expectations, are essential to
20 sustaining demand and supporting the growth of the \$43 billion U.S.
21 organic market. Clear parameters for production practices will ensure fair
22 competition among producers by facilitating equitable certification and
23 enforcement decisions. 83 Fed. Reg. 7083

24 119. The “qualitative benefits” of the Final *OLPP* were listed: “Protects the value of the
25 USDA organic seal to consumers; Facilitates level enforcement of organic livestock and
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27 ²¹ Hereinafter “*OLPP RIA*.” The Final Regulatory Impact Statement is summarized in the Final
28 *OLPP*. See 83 Fed. Reg. 7082-84. The full RIA is a 154-page document and is available at
<https://www.ams.usda.gov/rules-regulations/organic-livestock-and-poultry-practices-historical>

1 poultry standards; Alleviates the need to maintain additional third-party animal welfare
2 certification and the associated costs and resources.” *OLPP RIA* at 9.

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4 120. “Larger organic egg operations will likely bear higher costs because they face greater
5 constraints in providing adequate outdoor areas that comply with the new minimum space
6 requirements for birds outdoors.” *OLPP RIA* at 11.

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8 121. “Administrative costs: The total in this table do not include the estimate costs associated
9 with reporting and recordkeeping requirements as described in the Paperwork Reduction
10 Act. AMS estimates that the undiscounted value of these costs will be \$3.9 million
11 annually.” *OLPP RIA* at 11.

12
13 122. “AMS issued an administrative appeal decision in 2002 that allowed the certification of
14 one operation that used porches as outdoor access to protect water quality. This decision
15 served to address a fact-specific enforcement issue. Some certifying agents used this
16 appeal decision to grant certification to poultry operations using porches to provide
17 outdoor access. Thereafter, certification and enforcement actions have remained
18 inconsistent and contributed to wide variability in living conditions for organic poultry, as
19 well as consumer confusion about the significance of the organic label regarding outdoor
20 access. In accordance with OFPA, this action will clarify USDA statutory and regulatory
21 mandates and establish consistent, transparent, and enforceable requirements. Further, it
22 will align regulatory language and intent to enable producers and consumers to readily
23 discern the required practices for organic poultry production and to differentiate the
24 products in the marketplace.” *OLPP RIA* at 12.
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1 123. “This variability leads to consumer confusion about the meaning of the USDA organic
2 label and perpetuates an uneven playing field among producers. This rule enables AMS
3 and certifying agents to efficiently administer the NOP. In turn, the consistency and
4 transparency in certification requirements will facilitate consumer purchasing
5 decisions.” *OLPP RIA* at 12.
6

7 124. “AMS believes that in the context of organic livestock and poultry production,
8 particularly egg production, variations in practices result in consumers receiving
9 inadequate and inconsistent information about livestock products. * * * Currently, the
10 absence of clear standards and inconsistent practices across organic livestock and poultry
11 producers are critical barriers to informing consumers and effectively marketing organic
12 products. * * * Clear standards and consistent production practices are necessary to
13 clearly and accurately illustrate to consumers the meaning of the organic seal on these
14 products, and to differentiate organic products from other products in the market.” *OLPP*
15 *RIA* at 15.
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18 125. “This rule adds requirements for the production, transport, and slaughter of organic
19 livestock and poultry. The provisions for outdoor access and space for organic poultry
20 production are the focal areas of this rule. Currently, organic poultry are required to have
21 outdoor access, but this varies widely in practice. Some organic poultry operations provide
22 large, open-air outdoor areas, while other operations provide minimal outdoor space or use
23 screened and covered enclosures commonly called “porches” to meet outdoor access
24 requirements. This variability perpetuates an uneven playing field among producers and
25 sows consumer confusion about the meaning of the USDA organic label. This final rule
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1 will resolve the current ambiguity about outdoor access for poultry and address the wide
2 disparities in production practices among the organic poultry sector. Greater clarity about
3 the significance of the USDA organic seal in the marketplace will help to maintain
4 consumer confidence in the organic label, which drives the \$43 billion in sales of organic
5 products, and support a fair, viable market for producers who chose to pursue organic
6 certification.” *OLPP RIA* at 2-3.
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9 126. “This final rule (1) establishes clear standards that will create the foundation necessary to
10 present clear and consistent information to consumers about animal living conditions to
11 distinguish organic products from competing labeling terms in the market, (2) alleviates
12 the need for multiple certifications, which is assumed to result in the elimination of
13 duplicative paperwork, on-site inspections, and additional costs of third party
14 certifications.” *OLPP RIA* at 15.
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16 127. “This disparity in outdoor access has economic implications for producers and
17 jeopardizes consumer confidence in the organic label.” *OLPP RIA* at 139.
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19 **E. The Three Delay Rules, the New Proposed Livestock Rule, and the Proposed
20 Additional Rulemaking.**

21 **1. The First Unlawful Administrative Stay--60 Days.**

22 128. The Final *OLPP* was originally set to take effect on March 20, 2017. On February 9,
23 2017, the effective date was delayed to May 19, 2017. 82 Fed. Reg. at 9967 (February 9,
24 2017) (“First Delay Rule”).

25 129. President Trump was inaugurated at noon on Friday, January 20, 2017. Later that day,
26 White House Chief of Staff Reince Priebus issued a “Memorandum for the Heads of
27 Executive Departments and Agencies” (“*Priebus Memorandum*”). The *Priebus*
28

1 *Memorandum* was published in the Federal Register on Tuesday, January 24, 2017. 82
2
3 Fed. Reg. 8346 (Jan. 24, 2017).

4 130. Among other things, the *Priebus Memorandum* purports to direct agencies that have
5 promulgated “regulations that have been published in the [Federal Register] but have not
6 taken effect” to “temporarily postpone their effective date for 60 days from the date of the
7 memorandum.” *Id.*

8
9 131. The *Priebus Memorandum* plainly stated agencies were directed to postpone any
10 published but not yet effective rule only “as permitted by law.” *Priebus Memorandum*, at
11 ¶ 3 (emphasis added.)

12 132. The USDA claimed the First Delay Rule was undertaken to comply with the *Priebus*
13 *Memorandum*. 82 Fed. Reg. at 9967. The *Priebus Memorandum* is not an independent
14 legal source of agency authority for delay of any provision of a duly published and
15 finalized rule.

16
17 133. The First Delay Rule was not exempt from notice and comment requirements under the
18 D.C. Circuit Court precedent and the APA. It was a final rule that amended an existing,
19 important, and duly promulgated regulation.

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21 134. USDA also claimed the First Delay Rule was exempt from notice and comment under the
22 APA because it was “impracticable, unnecessary, or contrary to the public interest
23 pursuant to 5 U.S.C. 553(b)(B).” 82 Fed. Reg. at 9967. No factual explanation was given.
24 Because the final rule’s effective date was delayed, there was no reason that notice and
25 comment could not be received, and as further delay was imposed until May 2018, the
26 unexplained impracticability of receiving comments in February 2017 appears incorrect.
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135. On April 28, 2017, three hundred and thirty-four certified organic livestock and poultry producers with estimated revenue of \$1.95 billion dollars sent a letter to the Department requesting immediate implementation of the *OLPP*. The producers said, “As organic farmers, our very survival is dependent upon the trust that we have built with the American consumer. We are proud to be delivering a product that meets the highest standards possible and is in line with consumer expectations of what the USDA organic label means. The decision to become certified organic is voluntary, if consumers lose confidence in the organic seal it will have catastrophic impacts throughout the industry.”

Available at <https://www.regulations.gov/document?D=AMS-NOP-17-0031-0006>.

136. The NOSB conducted its semi-annual public meeting on April 19-21, 2017. 81 Fed. Reg. at 85,205 (Nov. 25, 2016) (meeting notice). During the meeting, the NOSB voted unanimously to recommend that the final rule not be delayed any longer and be released and become effective at the conclusion of the 60-day delay period established in the Department’s First Delay Rule. USDA, *National Organic Standards Board Public Hearing Transcript*, available at:

<https://www.ams.usda.gov/sites/default/files/media/TranscriptsNOSBApril2017.pdf>.

137. The USDA ignored this request.

2. The Second Unlawful Administrative Stay--180 Days.

138. On May 10, 2017, USDA issued another stay of the effective date, this time to November 14, 2017. 82 Fed. Reg. at 21,677 (May 10, 2017) (the Second Delay Rule).

139. The Second Delay Rule, entitled “Final rule; delay of effective date,” was published without prior notice or an opportunity for public comment, or any meaningful consultation

1 with the NOSB, and delayed the effective date of the Organic Livestock Final Rule by an
2 additional 180 days. 82 Fed. Reg. at 21,677.

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4 140. USDA claimed, “Because there are significant policy and legal issues addressed within
5 the final rule that warrant further review by USDA, AMS is delaying the effective date of
6 this rule by 180 days. . . .” 82 Fed. Reg. at 21677.

7
8 141. USDA again claimed “good cause” existed for waiving notice and comment, and further
9 claimed the 180-day stay was exempt from notice and comment under the APA because it
10 was “impracticable, unnecessary, or contrary to the public interest pursuant to 5 U.S.C.
11 553(b)(B).” *Id.* Because the final rule’s effective date was delayed, there was no reason
12 that notice and comment could not be received, and as further delay was imposed until
13 May 2018, the unexplained impracticability of receiving comments in February 2017
14 appears incorrect. 82 Fed. Reg. at 9967.

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16 142. The Second Delay Rule was not exempt from notice and comment requirements under
17 the APA or for any of the reasons cited by USDA. It was a final rule that unlawfully
18 amended an existing, important, and duly promulgated regulation without notice and
19 comment.

20
21 **3. The Proposed Third Delay Rule.**

22 143. USDA published a proposed rule presenting four procedural options, three of which
23 resulted in further delay:

- 24
25 a. Let the Organic Livestock Rule become effective on November 14, 2017;
26 b. Suspend the Organic Livestock Rule indefinitely;
27 c. Further delay the effective date of the Organic Livestock Rule; or
28 d. Withdraw the Organic Livestock Rule.

82 Fed. Reg. 21,742 (May 10, 2017) (“Proposed Third Delay Rule”).

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144. The Proposed Third Delay Rule posited no substantive inquiry; identified no deficiency in the existing administrative record made over approximately ten years; identified no outstanding issue of law, fact or policy; and did not mention the NOSB's role or its view on the proposed rule. *Id.* Although the final rule said, “[T]here are significant policy and legal issues addressed within the FR that warrant further review by USDA. . .” there was no description of the issues and no request for comment thereon. *Id.* The sole legal authority cited was the *Priebus Memorandum*.

145. A single sentence purportedly guided commenters: “USDA is asking the public to comment on the possible actions USDA should take in regards (sic) to the disposition of the FR.” 82 Fed. Reg. at 21,742.

4. The Third Administrative Stay--180 Days.

146. On November 14, 2017, USDA issued its third stay of the effective date, this time to May 14, 2018, a date more than 14 months after the original effective date of the final rule. The stay was styled “Final rule; delay of effective date.” (“Third Delay Rule”) 82 Fed. Reg. 52,643.

147. The Third Delay Rule was published without any consultation with the NOSB in contravention of the requirements set forth in the OFPA.

148. The comments received in the 30-day comment period regarding the Third Delay New Proposed Rule reportedly exceeded 47,000. 82 Fed. Reg. 52,643. AMS acknowledged that “more than 34,600” comments supported immediate implementation of the Organic Livestock Rule. *Id.* at 52643. Upon information and belief, the full administrative record will disclose closer to 45,000 comments supported Option 1.

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149. In any event, a single comment supported USDA's selection of Option 3, "...only one chose 'Option 3: Delay.'" 82 Fed. Reg. 52643. Citation to a single comment out of more than 47,000 comments is insufficient to constitute a rational or non-arbitrary basis for extending, for a third time, the effective date of a duly published and properly promulgated final rule.

150. USDA concluded two rationales existed for further delay. First, it contended delay was necessary "so that important questions regarding USDA's statutory authority to promulgate the *OLPP* rule and the likely costs and benefits of that rule, can be more fully assessed through the notice and comment process prior to AMS making a final decision on whether the *OLPP* final rule should take effect," 82 Fed. Reg. 52,643. And second, "AMS believes that OFPA's reference to additional regulatory standards "for the care" of organically produced livestock is limited to health care practices similar to those specified by Congress in the statute rather than as reflecting a stand-alone concern for animal welfare." 82 Fed. Reg. at 52,643.

151. USDA then explained the first rationale: "In the course of reviewing the record for the Organic Livestock Rule final rule, AMS discovered a significant, material error in the mathematical calculations of the benefits estimates." Based on this, USDA concluded: "It is not appropriate for AMS to allow a final rule to become effective based on a record containing such a material error." 82 Fed. Reg. 52,643-44.

152. The Proposed Third Delay rule did not mention a need to reconsider the record made in the *OLPP* rulemaking. The notice failed to fairly disclose that USDA intended a reconsideration of the *OLPP* and certainly did not ask the commenters to focus on the pre-

1 existing record or whether that record disclosed (1) a lack of statutory authority or (2)
2 technical errors in calculating the cost-benefit analysis. Most importantly, USDA failed to
3 provide the technical reports and documents it ultimately relied upon to conclude the costs
4 exceeded the benefits. Thus, it obscured the source of, and precluded substantive comment
5 upon, the ground for delay upon which it ultimately relied.
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8 153. In a subsequent, related rulemaking, in December 2017, USDA disclosed the technical
9 reports that should have been disclosed in the May 2017 Notice. *See* “Supporting
10 Documents Folder” (*OLPP*-PRIA) and “Benefit+Cost Workbook for OLP Notice”
11 available at <https://www.regulations.gov/docket?D=AMS-NOP-15-0012>.
12

13 154. Similarly, the substance of the agency’s concerns, *e.g.*, whether statutory authority
14 existed for a final rule that had been published approximately six months prior to the
15 issuance of the Notice in this rulemaking, was unspoken. Commenters could have
16 reasonably presumed the agency thought there was sufficient statutory authority since it
17 had just concluded it had sufficient authority in January 2017. No specific references to
18 the OFPA appeared in the notice of proposed rulemaking. Thus, there was no reason for
19 any commenters to surmise that this had changed in July 2017.
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21 155. The Third Delay Rule failed to comply with the APA’s notice and comment
22 requirements. Although USDA listed possible procedural outcomes in its Notice, it did not
23 meaningfully disclose the scope and intent of its reconsideration of the existing *OLPP*
24 record and it was thus impossible to formulate targeted and meaningful responsive
25 submissions. In fact, the questions the USDA claimed to be resolving were not only
26 presented in the *OLPP* but were resolved. *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C.
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1 Cir. 2017) (vacating administrative stay; noting reconsideration was unlawful because “all
2 of the issues Administrator Pruitt identified could have been, *and actually were*, raised
3 (and extensively deliberated) during the comment period.”)) (emphasis in original).

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5 156. The Third Delay Rule fits a pattern of serial, fixed-period delays that were designed to
6 evade judicial review due to their short duration and subsequent expiration and
7 replacement by a new delay final rule. Each of the three delay rules is a final rule and is
8 subject to review by this court under the exception to mootness for agency action that is
9 capable of repetition but evading review. *Grant v. Vilsack*, 892 F. Supp. 2d 252, 257
10 (D.D.C. 2012) (“a claim for declaratory relief will not be moot if the specific claim fits the
11 exception for cases that are capable of repetition, yet evading review.”); *Del Monte Fresh*
12 *Produce Co. v. United States*, 570 F.3d 316, 321 (D.C. Cir. 2009) (internal quotation
13 marks omitted).

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16 **F. The Proposed Rescission and Proposed Rescission RIA.**

17 157. On December 8, 2017, OTA filed its First Amended Complaint, challenging each of the
18 three delay rules *inter alia* as inexplicable and irrational policy changes from the policy
19 expressed in the final *OLPP*, and alleging an unlawful practice of using serial delay orders
20 that expire and are renewed to evade review by this court, along with a pattern of refusing
21 to consult the NOSB prior to undertaking rulemakings that altered existing organic policy.
22 *See* Dkt. No. 13.

23
24 158. Days later, on December 18, 2017, USDA published “*National Organic Program (NOP);*
25 *Organic Livestock Production Practices—Rescission*” proposing to withdraw the *OLPP*
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1 and limiting the comment period to 30 days.²² 82 Fed. Reg. 59,988-992 (Dec. 18, 2018)
2 (the “Proposed *Rescission*”). There was no consultation with the NOSB prior to
3 publishing the proposed *Rescission*. See e.g. *Dkt. No. 16, Exhibit 3: Declaration of NOSB*
4 *Chair Tom Chapman* at ¶¶’s 15, 18, 20, 22, 26;
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6 159. USDA asserted two principal grounds for *Rescission*. First, USDA said:

7 [I]t now believes OFPA does not authorize the animal welfare provisions of the [*OLPP*]
8 final rule. Rather, the agency’s current reading of the statute, given the relevant language
9 and context, suggests OFPA’s reference to additional regulatory standards ‘for the care’
10 of organically produced livestock should be limited to health care practices similar to
11 those specified by Congress in the statute, rather than expanded to encompass stand-alone
12 animal welfare concerns. 82 Fed. Reg. at 59,988.

13 160. The second rationale advanced was based on re-examining the Final Regulatory Impact
14 Statement in support of the Final *OLPP*:

15 In reviewing the *OLPP* final rule, AMS found that the calculation of benefits contained
16 mathematical errors in calculating the discount rates of 7% and 3%. AMS also the
17 estimated benefits over time were handled differently than were the estimated costs over
18 time. In addition, the range used for estimating the benefit interval could be replaced with
19 more suitable estimates. 82 Fed. Reg. at 59,990.

20 161. In sum, “AMS finds little, if any, economic justification for the *OLPP* final rule. The
21 RIA for the *OLPP* final rule did not identify a significant market failure to justify the need
22 for rule.”82 Fed. Reg. at 59,991.

23 162. USDA did not present its revised cost-benefit calculations in the Federal Register notice
24 but instead placed its proposed Regulatory Impact Analysis (“PRIA”) online. 82 Fed. Reg.
25 at 59,991 (“Copies of the full analysis are available on the Regulations.gov website.”); *Id.*

26 ²² USDA received over 72,000 comments, the vast majority of which supported the *OLPP*. 83
27 Fed. Reg. at 10775 (“AMS received approximately 72,000 comments . . . over 63,000, opposed
28 the *Rescission* * * * Approximately fifty comments supported *Rescission*. . .”); see also
<https://www.regulations.gov/document?D=AMS-NOP-15-0012-6686> (recording more than
seventy-two thousand comments) (last visited March 21, 2018)

1 (“The PRIA also provides additional information regarding the estimated benefits and
2 explains why they likely were overstated in the *OLPP* final rule RIA.”). *Id.*
3

4 163. On December 22, 2017 OTA submitted a written request that USDA enlarge the time for
5 comment from 30 to 90 days, due in part to the complexity of the cost-benefit analysis
6 issue raised and the reduced staffing and trade association membership coordination
7 associated with the winter holidays.²³ On Jan. 10, 2018, USDA rejected the requested
8 enlargement by letter ruling. *See Exhibit 1*
9

10 164. On Jan. 18, 2018 OTA submitted its comment to USDA on “*National Organic Program*
11 *(NOP); Organic Livestock Production Practices—Rescission*” and again asked for
12 enlargement of time to prepare comments. *See Exhibit 4; see also Exhibit 5*
13

14 **G. Rescission and the Final Regulatory Impact Analysis (“RIA”).**

15 165. On March 13, 2018 USDA published “*Final Rule; Rescission*” *See* 83 Fed. Reg. 10,775-
16 783 (March 13, 2018) (“*Rescission*”). Despite over 63,000 comments to the contrary (and
17 only 50 in support of *Rescission*), USDA made the following key conclusions:
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- 19 a. “AMS is withdrawing the *OLPP* final rule because it now believes OFPA does not
20 authorize the animal welfare provisions of the *OLPP* final rule.” 83 Fed. Reg. at
21 10,776; *accord* at 10,781 (“AMS maintains that the *OLPP* final rule exceeds AMS’
22 scope of authority...”);
23 b. “Further, AMS maintains that the costs of the *OLPP* final rule outweigh potential
24 benefits. After publication of the *OLPP* final rule, AMS discovered a mathematical
25 error in the calculation of benefits.” 83 Fed. Reg. at 10,779; and
26

27 ²³ *See, e.g.*, 83 Fed. Reg. at 10,775 (March 13, 2018) (“Commenters also requested an extension
28 of the public comment period, from 30 to 90 days, specifically noting they needed more time to
study the revisions discussed in the Preliminary Regulatory Impact Analysis (PRIA) and develop
meaningful comments.”)

1 c. “OFPA does not require AMS to consult with the NOSB prior to undertaking a
2 rulemaking to withdraw the *OLPP* final rule.” 83 Fed. Reg. 10,778 at n. 6.

3 166. USDA agreed with comments that the “OFPA requires USDA to consult with the NOSB
4 on certain matters and to receive recommendations from it,” 83 Fed. Reg. 10778, but
5 concluded such duty was limited to “developing the organic certification program (section
6 6503(c)), exemption for certain processed food (section 6505(c)), and certification and
7 labeling of wild seafood (section 6506(c))” *Id.* at fn 6.
8

9 167. USDA completely ignored 7 U.S.C. §§ 6509(d)(2) and (g) in its discussion of the role of
10 the NOSB in the *Rescission Rule*. Section 6509(d)(2) provides the NOSB, “shall
11 recommend to the Department standards in addition to those appearing in paragraph (1)
12 for the care of livestock to ensure such livestock are organically produced.”
13

14 168. The conclusions expressed in the *Rescission* directly conflict with those appearing in the
15 *OLPP* just a year ago.
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17 169. To assist with this rulemaking, the NOSB developed a series of recommendations to
18 further clarify organic livestock and poultry care and production practices, transport,
19 slaughter, and living conditions, including outdoor access for poultry.” 83 Fed. Reg. at
20 7043.
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22 170. Section 6509(d)(2) authorizes the NOSB to recommend standards in addition to the
23 OFPA provisions for livestock health care to ensure that livestock is organically produced.
24 Further, “Section 6509(g) directs the Department to develop detailed regulations through
25 notice and comment rulemaking to implement livestock production standards. * * * [T]he
26 statute contemplated that the assurance of organic integrity for livestock products would
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1 require more specific guidelines and provided the authority for that future regulatory
2 activity. 82 Fed. Reg. 7044
3

4 171. Instead, the *Rescission concluded* “nothing in OFPA requires AMS to consult the NOSB
5 at every phase of the rule making process or makes the NOSB’s recommendations binding
6 on the Department, nor could it.” 83 Fed. Reg. 10778
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8 172. Plaintiffs have not suggested that “every phase” of rulemaking is subject to NOSB
9 consultation. Instead Plaintiffs simply point out that the USDA has never enacted or
10 amended an existing organic livestock regulation without first consulting with and
11 obtaining a recommendation from the NOSB. To the extent USDA believes that
12 consultation on the amendments to the *OLPP* after it was published are somehow not
13 substantive, or are merely work on an unimportant “phase” of rulemaking, the view is
14 inconsistent with the controlling law in the D.C. Circuit. *Clean Air Council v.*
15 *Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017) (“order delaying the rule's effective date ... [is]
16 tantamount to amending or revoking a rule.”); *Id.* at 9 (agency is “bound by the rule until
17 that rule is amended or revoked.”)
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20 173. The *Rescission* claimed that 7 U.S.C. §§ 6509(d)(2) and (g) authorize USDA only to
21 issue livestock regulations that that are “similar to those specified” in Section 6509(d) and
22 that are necessary to meet the congressional objectives outlined in 7 U.S.C. 6501. 83 Fed.
23 Reg. at 10,776. USDA then reduced organic livestock production to the “aspects of
24 animal care that are similar to the examples provided in the statute and relate to ingestion
25 or administration of non-organic substances.” *Id.* at 10,776; *id.* at 10,778. (“[T]he
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1 authority for care of organic livestock is to ensure that organic livestock is raised with
2 minimal administration of chemical and synthetic substances.”).

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4 174. This construction of Section 6509 ignores other OFPA sections, which are not so limited
5 (discussed below), the legislative history of the OFPA and USDA’s own decades-old
6 interpretation of its authority and its current regulations. The Congressional mandate in
7 Section 6509(d)(2) and (g) to create additional standards “for the care” of livestock is not
8 limited to substances, by its plain language or by its placement within the statute.
9

10 175. The foregoing construction ignores that the reference to “organically produced” in
11 Section 6509(d)(2) is not limiting, but rather part of the whole clause commanding NOSB
12 to recommend additional standards for livestock to ensure that animal products labeled
13 organic were in fact raised organically. 7 U.S.C. § 6509(d)(2); Senate Report 101-357 at
14 292 (July 6, 1990); H.R. Rep. 101-916, at 1777-78 (1989). It also ignores that the existing
15 definition of “organic production” is not limited to restrictions on synthetic substances. 7
16 C.F.R. § 205.2 (defining “organic production” as “a production system that is managed
17 in accordance with the Act and regulations in this part to respond to site-specific
18 conditions by integrating cultural, biological, and mechanical practices that foster cycling
19 of resources, promote ecological balance, and conserve biodiversity.”).

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22 176. Commenters ASPCA and AWI each offered constructions of Section 6509 that
23 harmonized with the USDA’s historical construction of its authority to enact organic
24 standards for the care and welfare of farm animals and the scientific evidence of the link
25 between animal welfare and animal healthcare. *See Exhibit 5 (“Comment of ASPCA and*
26 *AWI”)* at p. 13-17.
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1 177. USDA rejected alternative constructions of Section 6509, claiming those constructions of
2 “care” were “largely divorced from the surrounding context of the OFPA,” 83 Fed. Reg.
3 10,777. It also rejected comments that argued that “animal health and welfare are
4 ‘inextricably linked.’” *Id.*

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6 178. USDA’s conclusions ignored the record of scientific consensus regarding the
7 interdependence of animal healthcare and animal welfare set forth in the *Comment of*
8 *ASPCA and AWI*, specifically: “USDA cannot reasonably distinguish between animal
9 health care practices and animal welfare practices because according to scientific research,
10 international standards, and USDA’s own research and materials, the concepts are
11 intertwined.” *See Comment of ASPCA and AWI at 2.*

12
13 179. Definition of animal welfare from the American Veterinary Medical Association--
14 “Animal welfare means how an animal is coping with the conditions in which it lives. An
15 animal is in a good state of welfare if (as indicated by scientific evidence) it is healthy,
16 comfortable, well nourished, safe, able to express innate behavior, and if it is not suffering
17 from unpleasant states such as pain, fear, and distress. Good animal welfare requires
18 disease prevention and veterinary treatment, appropriate shelter, management, nutrition,
19 humane handling, and humane slaughter. Animal welfare refers to the state of the animal;
20 the treatment that an animal receives is covered by other terms such as animal care, animal
21 husbandry, and humane treatment. Protecting an animal’s welfare means providing for its
22 physical and mental needs.”²⁴ *Comment of ASPCA and AWI at 2.*

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27 ²⁴ AVMA, *Animal Welfare: What Is It?* available at
28 <https://www.avma.org/KB/Resources/Reference/AnimalWelfare/Pages/what-is-animal-welfare.aspx>.

1 180. According to the OIE²⁵, animal welfare standards should be science-based and “should
2 always seek to maintain health as a basis of welfare.”²⁶ In its *Guiding Principles for*
3 *Animal Welfare*, the OIE asserts that there is “a critical relationship between animal health
4 and animal welfare.”²⁷ The *Principles* also note that “improvements in farm animal
5 welfare can often improve productivity and food safety, and hence lead to economic
6 benefits.”²⁸ *Comment of ASPCA and AWI at 3.*

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9 181. “[Authors] identify reduced resistance to disease as a consequence of poor welfare. They
10 note: “This has been known for a long time in the medical and veterinary professions and
11 is part of the more general process whereby poor welfare, whatever its cause, can lead to
12 increased susceptibility to disease.”²⁹ *Comment of ASPCA and AWI at 4-5.*

13
14 182. With regard to Congressional intent and the plain meaning of Section 6509, USDA’s
15 statutory construction assumptions run contrary to evidence before the agency, the
16 OFPA’s legislative history, and USDA’s own prior statements on the interdependence of
17 animal “health” and “welfare.” USDA has not shown, nor can it show, that Congress
18 believed the two were distinct and that the OFPA authorizes only those standards
19 pertaining to the use of synthetic substances regarding animals’ physical/medical
20 condition. Additionally, the standards authorized by Congress in subsection (d)(2) are
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24 ²⁵ World Organization for Animal Health (commonly referred to as “OIE”—Office of
International des Epizooties). With 181 member countries, including the United States,

25 ²⁶ World Organization for Animal Health, *Animal Welfare at a Glance*. Available at
<http://www.oie.int/en/animal-welfare/animal-welfare-at-a-glance/>.

26 ²⁷ World Organization for Animal Health, *Terrestrial Animal Health Code*, Introduction to the
Recommendations for Animal Welfare, Chapter 7.1.1, (2017).

27 ²⁸ *Id.*

28 ²⁹ Fraser, A.F. & Broom, D.M. (1997) *Farm Animal Behaviour and Welfare (3rd ed.)*, New
York, NY: CAB International, p. 295.

1 even broader than “health care” standards. Subsection (d)(2) contemplates standards “for
2 the *care* of livestock to ensure that such livestock is organically produced.” 7 U.S.C. §
3 6509(d)(2) (emphasis added). *See Comment of ASPCA and AWI* at 13-17.
4

5 183. Nothing in the OFPA or common definitions commands “health” or “care” refer to a
6 limitation to just synthetic substances or drugs to treat illness. Moreover, the phrase
7 “*raised* in accordance with this chapter” (7 U.S.C. § 6509(a)) belie constructions relating
8 only medical care standards. Nor is Section 6509(g) limited to substances or medical
9 regulations, but rather provides that USDA “shall” develop detailed regulation to
10 implement any “standards for livestock products” in Section 6509. *Id.* § 6509(g). *See*
11 *Comment of ASPCA and AWI* at 13-17.
12

13 184. Despite asking for comment on whether the OFPA authorized the *OLPP*, USDA
14 irrationally rejected references to additional sections of the OFPA that plainly authorized
15 the *OLPP*. *Compare* 82 Fed. Reg. at 59,988 (“OFPA does not authorize the animal
16 welfare provisions of the *OLPP* final rule.”); 83 Fed. Reg. at 10776 (“OFPA does not
17 authorize the animal welfare provisions of the *OLPP* final rule.”); *accord* at 10,781
18 (“AMS maintains that the *OLPP* final rule exceeds AMS’ scope of authority...”)
19
20

21 185. In its Proposed *Rescission*, USDA claimed the narrow reading it gave Section 6509 could
22 be understood by comparison to 7 U.S.C. § 2151, which provides: “The Department is
23 authorized to promulgate such rules, regulations, and orders as he may deem necessary in
24 order to effectuate the purposes of this chapter,” because “[U]SDA also believes Congress
25 knows to speak in plain terms when it wishes to circumscribe, and in capacious terms
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28

1 when it wishes to enlarge, USDA’s discretion.” 82 Fed. Reg. at 59989 n. 3; *see also* 83
2 Fed. Reg. 10,777 at n. 6.

3
4 186. As OTA pointed out in its comment, the characterization of the OFPA as having a single
5 authorizing section for regulations that might touch upon livestock production practices is
6 manifestly incorrect. *See Exhibit 4*, at pp. 7-9 OFPA grants the very authority that USDA
7 claimed was missing: “A program established under this chapter shall—require such other
8 terms and conditions as may be determined by the Department to be necessary.” 7 U.S.C.
9 § 6506(a)(11).
10

11 187. USDA largely ignored this comment and focused *solely* on Section 6509. 83 Fed. Reg.
12 10,776. (USDA concluded Section 6509 “was used as justification for the *OLPP* final
13 rule.”) USDA attempted to bolster this misplaced focus on a single section of the OFPA
14 by claiming it is “entitled to deference when it interprets the scope of its authority
15 narrowly.” *Id.* at 10,777; *see also id.* at 10,776 (“USDA believes its construction is
16 entitled to deference...”). Whether USDA’s construction of Section 6509 is entitled to
17 deference is largely immaterial in light of the express rulemaking query: Whether the
18 OFPA as a whole, with each Section read in *pari materia*, authorized the *OLPP*, not
19 whether its authorization could be exclusively located in Section 6509.
20
21

22 188. To avoid the plain language of Section 6506, USDA offered a single line of analysis that
23 Section 6506(a)(11) could not be relied upon because it authorizes the *OLPP*’s provisions
24 “only if the Department determines that they are necessary, which the *OLPP* final rule is
25 not.” 83 Fed. Reg. 10,778. This conclusion is not rooted in statutory construction
26 principles, it is an unsupported policy statement.
27
28

1 189. Similarly, the OFPA provides: “If a production . . . practice is not prohibited or otherwise
2 restricted under this chapter, such practice shall be permitted unless it is determined that
3 such practice would be inconsistent with the applicable organic certification program.” 7
4 U.S.C. § 6512.
5

6 190. This section plainly and unambiguously authorizes the Department to determine that
7 poultry “porches” that do not have “outdoor access” are disallowed under the NOP,
8 provided solely that the Department determines, as was done in the *OLPP*, that such
9 “porches” are not consistent with the requirements of the NOP. Standing alone this
10 provision would authorize the provisions of the *OLPP* that the Notice of *Rescission*
11 *principally* concerns itself with.
12

13 191. USDA expressly rejected a construction of the OFPA that comported with the historic
14 views of the agency and noted *Rescission of all the organic livestock production rules*
15 may be compelled by its new statutory interpretation. 83 Fed. Reg. at 10,779 (questioning
16 “whether [§§ 205.238, 205.239, and 205.240] are in accordance with AMS’s statutory
17 authority.”).
18
19

20 **H. The *Rescission* and the Final Regulatory Impact Analysis**

21 192. The Proposed Regulatory Impact Analysis (“PRIA”) and Final Regulatory Impact
22 Analysis (“*Rescission RIA*”) are identical. 83 Fed. Reg. at 10,781 (“This RIA on
23 Withdrawal remains unchanged from the PRIA because AMS did not receive new
24 information via public comments on the December 18, 2017 proposed rule that would
25 have altered the RIA.”).
26
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1 193. It is unsurprising that USDA did not receive much detailed response to its economic
2 analysis. The calculations were not published in the Federal Register and thirty days was
3 an insufficient amount of time to review, develop and prepare fully considered comments.
4 Several commenters requested additional time to prepare comments due to the complexity
5 of the issues raised. *See Exhibit 2* (AWI request for extension); *Exhibit 3* (ASPCA request
6 for extension)
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8

9 194. USDA made several conclusions based on its *Rescission RIA*:

- 10 a. “AMS did not identify a market failure in the *OLPP* final rule RIA and AMS has
11 now concluded that regulation is unwarranted.” 83 Fed. Reg. at 10,779;
- 12 b. “The RIA for the *OLPP* final rule did not identify a significant market failure to
13 justify the rule. * * * Variance in production practices and participation in
14 private, third-party certification programs, however, do not constitute evidence
15 of market failure.” 83 Fed. Reg. at 10,782;
- 16 c. “AMS considered the costs and benefits of the outdoor access and space
17 requirements (i.e., stocking density) for organic poultry production, as these were
18 focal areas in the *OLPP* Final Rule (82 FR 7082). Based on this review, the
19 revised benefits of these provisions, and the uncertain and difficult to quantify
20 benefits of the outdoor access and space requirements for organic poultry
21 production, would not justify their quantifiable costs and paperwork burden.”
22 *Rescission RIA* at 7;
- 23 d. “The range of \$0.21-\$0.49 reflects consumer willingness to pay for a dozen eggs
24 produced by chickens raised in a cage-free environment, without induced
25 molting, and with outdoor access. The first two items are already required in the
26 production of organic eggs. Only the latter requirement, outdoor access, was
27 added by the *OLPP* final rule.”) Rather than \$0.21-\$0.49 per dozen, the
28 appropriate range is \$0.16-\$0.25 per dozen...” *Rescission RIA*, at 10;
- e. “The cost/benefit analysis underlying the *OLPP* rule largely did not consider the
costs and benefits of the remainder of the rule’s requirements (i.e., the
mammalian health care, living conditions, transport, and slaughter provisions.”
Rescission RIA at 9.

1
2 195. Several errors undermine or rebut the conclusions advanced in the *Rescission RIA*. First,
3 USDA reduced the “benefits range” based on its mistaken belief that two of the three
4 factors that influence consumers’ willingness to pay (“WTP”) were already part of the
5 organic program. In fact, the outdoor access and forced molting provisions in the *OLPP*
6 are not part of current organic requirements. Thus, the benefit range reduction was
7 unjustified. This fatally distorted the cost-benefit calculations upon which the *Rescission*
8 relied.
9

10 196. USDA also determined that “AMS has estimated that a sizeable portion of organic
11 livestock producers already meet the requirements of the [Organic Livestock Rule].” 83
12 Fed. Reg. at 10,780. USDA did not account for these already-compliant operations when
13 it determined the number of operations that would need to come into compliance. Thus, it
14 erroneously assessed the costs to the industry of *OLPP* compliance, resulting in erroneous
15 and inflated cost figures.
16
17

18 197. The *OLPP RIA* listed three principal qualitative benefits of the *OLPP*: (1) it protects the
19 value of the USDA organic seal to consumers; (2) it facilitates level enforcement of
20 organic livestock and poultry standards; and (3) it alleviates the need to maintain
21 additional third-party animal welfare certification and the associated costs and resources.
22 *See OLPP RIA* at 9. The *OLPP* also repeatedly cited qualitative programmatic benefits
23 based on statutory factors regarding enforcement, USDA seal integrity, competition, and
24 consumer assurances that are referenced throughout this pleading.
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1 198. USDA erroneously dismissed the qualitative benefits in the *OLPP* record and failed to
2 assess their necessity, value or purpose in any way: “AMS finds that the qualitative
3 benefits are speculative . . .” 83 Fed. Reg. 10,779.

4
5 199. The approach to qualitative benefits conflicts with EO 12866 at Section 1(a): “Costs and
6 benefits should be understood to include. . . qualitative measures of costs and benefits that
7 are difficult to quantify, but nevertheless *essential to consider*.” (emphasis added).

8
9 200. The approach also conflicts with OMB’s *Economic Analysis of Federal Regulations*
10 *Under Executive Order 12866* (Jan. 1996) (“*OMB Guidelines*”). The *OMB Guidelines* ask
11 regulators to determine that: “[T]he potential benefits to society justify the potential costs,
12 recognizing that not all benefits and costs can be described in monetary or even in
13 quantitative terms, unless a statute *requires another regulatory approach*.” *Id.* at 2.
14 (emphasis added). Marketing program statutes, like the OFPA, require special
15 consideration because the statutory purposes belie a simple quantitative cost-benefit
16 analysis and are voluntary programs that create gateways to marketplaces, the costs of
17 which participants are free to accept or decline.
18

19
20 201. Regarding consumer attitudes the *Rescission RIA* ignored the findings in the *OLPP*
21 rulemaking record:

- 22 a. The *OLPP* found the: “The NOSB deliberations on these recommendations
23 revealed that there is considerable support for these recommendations within the
24 organic community and consumers have specific expectations for organic
25 livestock care, which includes outdoor access for poultry.” 82 Fed. Reg. at 7043;
- 26 b. The *OLPP* record contained findings that the pre-*OLPP* regulations “threaten
27 consumer confidence in the organic label and continue the economic disadvantage
28 for farmers using more stringent practices.” 82 Fed. Reg. at 7066;

1 c. The *OLPP* cited a Consumer Reports survey conducted in 2015 that concluded:
2 “[S]lightly more than two-thirds (68 percent) of participants think that the organic
3 label *should* mean that animals went outdoors.” *OLPP* RIA at 29. *See Exhibit 21*
4 *Consumer Report Survey*.

5 202. The *OLPP* concluded: “Consumer perceptions of organic claims are critical to
6 characterizing the benefits of this rule.” *OLPP* RIA at 29.

7 203. Although USDA has characterized the *Rescission rulemaking* as a “reconsideration” of
8 the *OLPP*, it failed to consider the *OLPP* record in this proceeding except when it
9 supported the deterministic outcome produced by USDA here. 83 Fed. Reg. at 10,777
10 (noting authority to “reconsider” prior rulemaking). USDA also failed to examine the
11 costs and benefits of “the remainder of the rule’s requirements (i.e., the mammalian health
12 care, living conditions, transport, and slaughter provisions.” *Rescission RIA* at 9. As the
13 Comment of the ASPCA, AWI and the Humane Society of the United States
14 demonstrates, there are significant benefits to the other provisions of the *OLPP* final rule.
15 *See generally Exhibit 5*, at pp. 1-13.

16 204. With regard to “enforcement,” the Accredited Certifiers Association Comment noted that
17 USDA’s revised reading of Section 6509 appeared “to place certifying agents in a
18 conflicted position under the statute” because correct application and enforcement of the
19 existing organic livestock regulations in light of the new construction of Section 6509 is at
20 best unclear and possibly impossible. *See Exhibit 7, Comment of Accredited Certifiers*
21 *Association*, at 2.

22 205. With regard to the benefit of improved animal welfare outcomes, USDA summarily
23 concluded: “The assertion that the *OLPP* final rule would result in economic benefits from
24 healthier animals is not supported by information or research linking outdoor access on
25
26
27
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1 pasture or vegetation to improved economic outcomes for producers.” 83 Fed. Reg.
2 10,779.
3

4 206. USDA erroneously focused its benefits analysis only on “outdoor access on pasture”
5 whereas the *OLPP* addressed many other welfare factors. The *Rescission* ignored and
6 failed to respond to the substantive scientific references appearing in the Comment of the
7 ASPCA, AWI and the Humane Society of the United States, which referenced both
8 qualitative and quantitative support for concluding that improved animal welfare improves
9 economic outcomes for livestock producers, including reduced use of synthetic
10 medications, a key if not exclusive statutory goal of the OFPA according to the
11 *Rescission*. 83 Fed. Reg. at 10,776; *see also Exhibit 5, Comment of ASPCA and AWI at*
12 *pp. 1-12.*
13
14

15 207. The *OLPP* RIA stated: “The final rule will resolve the current ambiguity about outdoor
16 access for poultry and address the wide disparities in production practices among the
17 organic poultry sector. Greater clarity about the significance of the USDA organic seal in
18 the marketplace will help to maintain consumer confidence in the organic label, which
19 drives the \$43 billion in sales of organic products, and support a fair, viable market for
20 producers who chose to pursue organic certification.” *OLPP* RIA at 3.
21

22 208. Despite this, USDA has now concluded that continued growth in the total dollars of the
23 organic sector is evidence that revisions to the livestock standards are not needed, *id.*, but
24 it relied on stale data to reach this conclusion, *see e.g., Exhibit 8, Declaration of Jack Lee,*
25 and did not provide sufficient time to commenters to prepare and submit more current
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27
28

1 economic information. *See e.g., Exhibit 4* (OTA request for extension); *Exhibit 2* (AWI
2 request for extension); *Exhibit 5* (ASPCA request for extension).

3
4 209. The gap between USDA’s conclusions in the *Rescission and* its accompanying RIA, on
5 the one hand, and what the APA and OFPA require, on the other, is vast. Many
6 significant factors that should have been considered were ignored or summarily dismissed.
7 This deficiency can be readily seen when the record is compared to recent conclusions of
8 the USDA’s own Economic Research Service regarding federal labeling programs like the
9 NOP³⁰. For example:

- 10
11 a) “Government intervention in labeling in the United States has served three main
12 purposes: to ensure fair competition among producers, to increase consumers’
13 access to information, and to reduce risks to individual consumer safety and
14 health ... a motivation for many government labeling laws has been to ensure fair
15 competition.” ERS Report No. 239 at 1;
- 16 b) Federal product identity standards and labeling requirements need continual
17 refreshing and upkeep to inform consumers: “Once a single, mandatory, federally
18 set standard is achieved, it does not automatically result in improved consumer
19 understanding.” ERS Report No. 39 at 1;
- 20 c) Information asymmetry between what organic consumers expect and the reality
21 can do serious damage to the organic market. “Credence attributes” are those that
22 the consumer cannot verify by looking at, buying or eating a product, *i.e.*, the
23 organic label: “If consumers are skeptical about claims they cannot verify, their
24 skepticism is likely to reduce their willingness to pay, and... markets for
25 attributes may vanish.” ERS Report No. 39, at 5;
- 26 d) Clarity regarding federal product identity standards and labeling requirements are
27 necessary to prevent anti-competitive outcomes: “Consumers sometimes confuse
28 Government standards with other standards. For example, the USDA Organic seal
is often confused with other label claims, such as ‘natural’ or ‘raised without

³⁰ *A Report Summary from the Economic Research Service, Beyond Nutrition and Organic Labels—30 Years of Experience with Intervening in Food Labels*, Report No. 39 (November 2017) (“ERS Report No. 39”).

1 antibiotics’ that have fewer and/or lower standards and lower production costs.”
2 ERS Report No. 239 at 2;

3
4 e) Mandatory federal product identity standards and labeling requirements for
5 organic products corrected a market failure: “Setting a national organic standard
6 ended variance among State standards. This gave the organic sector more access
7 to interstate and international markets, increasing sales.” ERS Report No. 239 at
8 2;

9
10 f) OFPA was designed to regulate “competition” and “information.” ERS Report
11 No. 239 at 5, Table 1; and

12
13 g) “[O]rganic labeling cases illustrate the strong role that the Federal Government
14 may play in setting standards, establishing certification, and providing
15 enforcement mechanisms.” ERS Report No. 239 at vi.

16
17 210. Overall, USDA failed to adequately address the impact on consumer confidence and
18 trust; consumer information needs; unfair competition in the marketplace; reduced
19 enforcement consistency and accuracy by accredited certifying agents; the integrity of the
20 USDA organic seal as the proxy for the government’s standard setting discussed in the
21 *OLPP* rulemaking record, which it purported to be reconsidering; and the adverse impact
22 of withdrawing widely supported standards perceived as embodying stricter and higher
23 integrity measures. USDA failed to explain contradictory evidence and its own prior
24 conclusions appearing in the *OLPP* rulemaking that arose from the pre-*OLPP*
25 inconsistencies and conflicts in the NOP.

26 **I. Market Failure**

27
28 211. EO 12866 identifies “failures of private markets or public institutions” as grounds
justifying regulatory action. EO 12866 at Section 1(b)(1). Public institution failures arise
when “existing regulations (or other law) have created, or contributed to, the problem that
a new regulation is intended to correct.” EO 12866 at Section 1(b)(2). Although “market

1 failure” was discussed in the *Rescission*, USDA did not respond at all to comments
2 alleging a market failure arising from public institution failures, or the *OLPP* record
3 establishing the failure of the NOP to meet the OFPA requirements of consistent national
4 standards for certification of organic products. *See e.g. Exhibit 4* (OTA comment at 4);
5 *Exhibit 5 Comment of ASPCA and AWI* at 17-19.
6

7
8 212. Despite the requirement under EO 12866 that USDA consider such failures, it summarily
9 concluded that “AMS did not identify a market failure in the *OLPP* final rule RIA and
10 therefore AMS has now concluded that regulation is unwarranted.” 83 Fed. Reg. at
11 10,779.

12
13 213. This statement ignores the findings made by USDA in January 2017 in support of the
14 *OLPP*, and the record made since that time, that the consumer confusion regarding the
15 meaning of organic certification with regard to the “outdoor access” requirements for
16 poultry operations is real and unabated.

17
18 214. Congress determined there was an organic market failure in 1990 and enacted the OFPA
19 as the remedy. *See generally* Senate Committee on Agriculture, Forestry and Nutrition,
20 *Report of the Committee on Agriculture, Forestry and Nutrition to Accompany S. 2830*
21 *Together with Additional and Minority Views*, S. Rep. No. 101-357, (1990) (discussion of
22 need for single national standard; inability of marketplace to solve the problem); *see also*
23 7 U.S.C. § 6501 (purposes of enactment).

24
25 215. It is against this market failure backdrop that the OFPA’s provisions regarding consumer
26 assurances and uniformity of organic regulations, Section 6501, were adopted and must be
27 construed today. The *OMB Guidelines* notes that compelling uniform product standards by
28

1 agency regulation should be avoided unless a “particularly demanding burden of proof” is
2 applied in order to avoid “unintentional harmful effects on the efficiency of market
3 outcomes.” *OMB Guidelines* at 4. This concern is legally and factually insignificant here
4 because Congress already determined the existence of a market failure and imposed
5 mandatory and uniform standards in the marketplace. That is precisely what marketing
6 programs at AMS, like the organic program, are designed to do.
7

8
9 216. Despite this background, USDA surprisingly concluded: “Variance in production
10 practices and participation in private, third-party certification programs, however, do not
11 constitute evidence of significant market failure.” 83 Fed. Reg. at 10,782. USDA
12 dismissed the need to layer other animal welfare certification programs on top of organic
13 certification as an indication of market failure, saying: “[A] variety of production methods
14 may be employed to meet the same standard. * * * Thus, variation in production practices
15 is expected and does not stand as an indicator of a significant market failure.” 83 Fed.
16 Reg. at 10,782
17

18
19 217. The USDA’s conclusions in the *Rescission Rule* ignore the market failure recognized by
20 Congress in 1990. This market failure requires constant vigilance and attention to
21 forestall. Small variance in production practices is not the same as a definition of “access
22 to the outdoors” that defies consistent application by certifying agents, distorts
23 competition, undermines consumer expectations and fails to assure that a consistent
24 national standard is applied. *See* 7 U.S.C. § 6501
25

26 218. The USDA’s position in the *Rescission Rule* also conflicts with the position taken in 2010
27 in the *Access to Pasture* (Livestock) rulemaking. The *Access to Pasture* rulemaking was
28

1 undertaken to clarify the requirements for access to pasture and imposed quantitative
2 measures designed to ensure pasture access was adequate, provable and that all organic
3 products of ruminants met a consistent national standard. *See generally* 75 Fed. Reg. at
4 7154 (Feb. 17, 2010). As was repeatedly pointed out in the *OLPP* and the *OLPP* RIA, the
5 *OLPP* rulemaking was undertaken for the same reasons.
6

7
8 219. According to *OMB Guidelines for Analysis* there are several kinds of market failures that
9 may be remediated by regulations. Among the failures described are those arising from
10 “inadequate or asymmetric information.” *Id.* at 4 (“[I]nadequate information can generate
11 a variety of social costs, including ...*inefficient resource allocation resulting from*
12 *deception of consumers.*”) (emphasis added).
13

14 220. The *Rescission Rule* failed to correctly apply the analysis required by EO 12866. For
15 example, OMB endorses “mandatory uniform quality standards for goods and services” as
16 one solution to such consumer deception. Here, of course, Congress determined that the
17 organic market was failing in 1990 and adopted the OFPA to require that organic livestock
18 products must meet a single, mandatory, national standard and must be consistently
19 applied by the USDA. *See* 7 U.S.C. § 6501. With specific regard to organic livestock
20 standards Congress imposed a continual updating mechanism as represented by the
21 NOSB’s role under Section 6509.
22

23 221. The premise of the federal organic labeling regulations is to correct a market failure that
24 existed in 1990 when there were multiple definitions of organic practices. From the outset
25 of the publication of the first organic standards in 2000, “Access to the outdoors” has been
26 required for all organically raised animals. 7 C.F.R. § 205.239(a)(1). But today, this
27
28

1 requirement is causing rather than correcting a market failure. There is demonstrable
2 evidence in the *OLPP* rulemaking record and in the findings of the *OLPP* of “consumer
3 deception” with regard to organic products, despite the existing NOP requirement that all
4 poultry have “access to the outdoors.” A market failure therefore exists as to this part of
5 the organic program.
6

7
8 222. Harm arising from the delay and *Rescission of the OLPP* is reflected in the record. Two
9 class action lawsuits have been filed since the *OLPP* was delayed, each alleging that
10 “certified organic” eggs are not from chickens that have access to the outdoors. *See e.g.*
11 *Exhibit 10*³¹ (hereinafter “Gibson Complaint”); *Exhibit 10*³² (“Silva Complaint”). Each
12 Complaint alleges that a major retailer is selling certified organic eggs that are marketed as
13 coming from certified organic laying birds that have “outdoor access” (as required by the
14 NOP) when the birds do not, in fact, have “outdoor access” that a reasonable consumer
15 would accept. Instead, the complaint argues that the laying hens at these facilities,
16 although certified organic, “do not actually have access to the outdoors.” *Gibson*
17 *Complaint* at ¶ 6; *see also Silva Complaint* at ¶ 6 (“confines its laying hens to industrial
18 barns without outdoor access”).
19
20

21 223. It is alleged in each case:

22 The industrial barns have two main parts: the central interior and the enclosed porches
23 that run along the side. The porches, which purportedly provide outdoor access, are fully
24 roofed and screened, without access to the soil and vegetation surrounding the industrial
25 barns. A reasonable consumer would not deem this outdoor access.
26 *Gibson Complaint* at ¶ 22; *Silva Complaint* at ¶ 22.
27

28 ³¹ *See Gibson v. WalMart and Cal-Maine Foods*, No. 3:18-cv-00134 (N.D. Cal. Jan. 8, 2018).

³² *See Silva v. WalMart et al.*, No. 2:18-cv-324 (W.D. Wash. Mar. 2, 2018).

1 224. The kinds of operations at issue in the California and Washington cases were described in
2
3 the *OLPP*:

4 Poultry practices for outdoor access currently vary, especially practices implemented for
5 layer operations. Some organic poultry operations provide large, open-air outdoor areas,
6 while other operations provide minimal outdoor space or use screened and covered
7 enclosures commonly called “porches” to meet outdoor access requirements. In a 2010
8 audit, the USDA Office of Inspector General identified inconsistencies in how accredited
9 certifying agents (or “certifiers”) consider porches under outdoor access while
10 implementing certification of organic poultry operations. 83 Fed. Reg. at 7043

11 225. To reduce regulatory variance, and thereby eliminate the informational asymmetry in the
12 marketplace, the *OLPP* defined ‘Outdoor space’ and “requires that outdoor spaces for
13 organic poultry include soil and vegetation.” 82 Fed. Reg. at 7042. The *OLPP* stated this
14 action was necessary to “[A]lign regulatory language and intent to enable producers and
15 consumers to readily discern the required practices for organic poultry production *and to*
16 *differentiate the products in the marketplace.*”³³ 82 Fed. Reg. at 7044 (emphasis added).

17 226. In January 2017, the USDA rejected the very arguments that it now accepts:

18 AMS disagrees with comments that argued that consumers are satisfied with the use of
19 porches, or that demand for organic eggs is evidence of their satisfaction. AMS received
20 a vast number of comments that indicate that consumers are unaware that porches have
21 been used for outdoor access inorganic production. The comments received indicate that
22 there is a gap between how consumers think birds are raised on organic farms and the
23 actual practices of some—but not all—organic producers.
24 83 Fed. Reg. at 7068

25 227. The delay and *Rescission of the OLPP* has resulted in the precise market failure
26 anticipated by the *OLPP* and identified in the OMB guidance: namely, consumer

27 ³³ At the time of publication of the *OLPP*, the Department said “We believe that the space and
28 outdoor access requirements in this proposed rule would enable consumers to better differentiate
the animal welfare attributes of organic eggs and maintain demand for these products.” 81 Fed.
Reg. at 21,988.

1 deception. This market failure should be precluded by the OFPA's mandate that
2 consistently applied, uniform standards are the core market-correcting purpose of the
3 National Organic Program. This demonstrable market failure would be corrected had the
4 delay and *Rescission of the OLPP* not occurred.
5

6 228. The class actions cited above demonstrate that consumers are confused by the "access to
7 the outdoors" requirements as currently applied, and that simplistic explanations that "the
8 market is working" because there is some overall growth, are insufficient. The *Rescission*
9 *misstates* the purpose of uniform and consistently applied product standards by concluding
10 that "variation in production practices is expected and does not stand as an indicator of a
11 significant market failure." 83 Fed. Reg. at 10,782. Site-specific variations in organic
12 practices are acceptable only if the range of variation in such practices conforms to the
13 requirements of the regulation. The "porches" described in the *OLPP* rulemaking and the
14 class action lawsuits are not variations; they are departures from common sense
15 application of mandatory requirements that were properly eliminated by the *OLPP*
16 rulemaking. It is inescapable that the *OLPP* would eliminate this kind of informational
17 asymmetry and the *Rescission Rule's* failure to account for the marketplace realities is
18 fatal.
19
20
21

22 229. Even assuming the *Rescission* is correct in its repeated statements that there is no market
23 failure, there is a failure of governmental processes that amounts to a failure to comply
24 with the OFPA. The *OMB Guidelines* expressly recognizes a new regulation may be
25 necessary in the absence of a market failure upon a "demonstration of compelling public
26 need, such as improving governmental processes..." *OMB Guidelines* at 3. The OIG
27
28

1 findings, the NOSB recommendations, and the record of the *OLPP* rulemaking expressly
2 addressed this concern. OFPA expressed the need to continually improve and update
3 livestock standards with increased specificity. 7 U.S.C. § 6509. This point was squarely
4 presented in the OTA and ASPCA/AWI Comments but went unheeded. *See Exhibit 4,*
5 *Comment of OTA at 4. 4; Exhibit 5, Comment of ASPCA and AWI at 17-19*

6
7
8 230. Congress mandated adoption of national standards for organically produced products and
9 commanded that these standards be consistently enforced. 7 U.S.C. § 6501.

10 231. In March 2010, the USDA’s Office of Inspector General’s report, entitled *Oversight of*
11 *the National Organic Program*, found inconsistent treatment of outdoor access for
12 livestock by accredited certifying agents and noted that AMS “agreed that additional
13 guidance would be beneficial.” *Oversight of the National Organic Program*, OIG Audit
14 Report No. 01601-03-Hy at 22 (“OIG Report”), available at
15 <https://www.usda.gov/oig/webdocs/01601-03-HY.pdf>.

16
17 232. Later, “AMS determined that rulemaking was necessary to reduce the variation in
18 outdoor access practices for organic poultry...” 82 Fed. Reg. at 7043. The *OLPP* is the
19 rulemaking solution. Its analysis, rather than the analysis appearing in the *Rescission Rule*,
20 is consistent with the principles under the relevant Executive Orders and OMB Guidance
21 documents.
22

23 233. “Modifications to existing regulations should be considered if those regulations have
24 created or contributed to a problem that the new regulation is intended to correct, and if
25 such changes can achieve the goal more efficiently or effectively.” *OMB Guidelines* at 4.
26
27
28

1 234. The *OLPP*'s clarifications solve the problem of "inconsistent" application of federal
2 organic standards by certifying agents and comports with Congressional intent.
3

4 **J. The Remand and the Two USDA Staff Reports Published in the Federal Register**

5 235. From the filing of Plaintiff's motion for Summary Judgment in October 2019 until the
6 March 2020 order authorizing a 180-day remand, the Department repeatedly delayed the
7 case to permit the Department to conduct unspecified non-public review of the economic
8 modeling that underpinned its *Rescission*. See ECF No. 102 (request for stay) (Jan. 2,
9 2020); ECF No. 108 (Status Report for Voluntary Remand); ECF No. 112. ("Remand
10 Order") Then on remand it offered the public a scant 30-day comment period.
11

12 236. Because of the complexity of the economic issues that spanned two separate rulemakings
13 and years of work by the Department's economic staff, OTA requested additional time for
14 submission of public comment and was denied. OTA's expert economist concluded:
15

16 Given the time constraints imposed by the Department it was not possible to fully
17 respond to the Ferrier Report, or raise a rebuttal to each suggestion of material
18 methodological error or provide an improved analysis or suggest a sounder
19 methodological approach in each circumstance. Taken in this light, and as a matter of
20 public accounting under the preferred federal framework for developing cost-benefit
21 analyses, the Ferrier Report does not provide a fully comprehensible standard against
22 which to measure the costs and benefits of the chosen regulatory course of action, in this
23 case the *Rescission* of the *OLPP*. See e.g. OMB Circular A-4; see also Executive Orders
24 12866 and 13563.

25 See *TAC Exhibit 3* (OTA Comment) (citing the Second Vukina Report, at p. 1-2.)

26 237. On April 23, 2020, the Department published a document in the Federal Register for
27 "clarifying and supplementing the record" regarding the economic modeling relied upon
28 for the *Rescission*. The document was prepared by a USDA staff economist who referred
to it as the completion of his "Initial review of the flaws" in the *Rescission*'s economic

1 modeling. 85 Fed. Reg. 22664-677, at 22664. (hereinafter “*Initial Review*”) Presumably
2 his review was underway concurrently with the Department’s litigation efforts to obtain a
3 remand. Because the staff economist was not involved in the *OLPP* or *Rescission*
4 rulemakings the Department described him as “able to provide an independent perspective
5 on the integrity of the methodology and calculations underlying the prior rulemakings.”
6 *Id.* at 22665 The Department promised to publish a “final analysis, as informed by public
7 comment” by Sept. 8, 2020. *Id.* Public comment on the “final analysis” did not occur.
8 The *Initial Review* is more in the nature of document prepared *post hoc* to assist the
9 Department in the ongoing litigation and is not an independent analysis of the economic
10 modeling at issue in this case.
11
12

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14 238. On September 17, 2020, the Department published another staff report by the same
15 economist. 85 Fed. Reg. 57937-944 (hereinafter “*Final Review*”) In it the Department
16 said the *Initial Review* was “to identify errors” and assess their meaning but not to “redo”
17 or “recalculate” the cost-benefit analysis nor to “evaluate any costs and benefits
18 themselves.” *Id.* at 57938. Instead the Department concluded the *OLPP RIA*’s
19 methodology “was significantly flawed and caused the *Rescission RIA* to be flawed.” *Id.*
20 at 57944 This blame-shifting outcome was hardly what Judge Collyer’s Remand Order
21 contemplated.
22

23
24 239. The sum of the two staff reports published in the Federal Register on remand is that while
25 the Department disavows the economic modeling it offered in support of its *Rescission* it
26 seeks to retain the outcome unchanged --“AMS makes no changes to the conclusions set
27 forth in the Withdrawal Rule that did not rely on the flawed RIAs and leaves the
28

1 remainder of the Withdrawal intact." *Id.* at 57944. The economic analysis offered in the
2
3 *Rescission RIA* to support of the *Rescission* has been abandoned.³⁴

4 240. The Department's *Final Review* cannot justify the *Rescission* for additional reasons as
5 well. It ignored substantial and compelling evidence in the administrative record that
6 conflicted with its predetermined narrative that the *OLPP* costs exceeded the future
7 benefits. The administrative record from the remand proceedings will demonstrate:

- 8
- 9 h) The scope of the *Initial Review* conducted on remand was artificially restricted to
10 exclude substantial parts of the *OLPP* administrative record that demonstrated the
11 qualitative and quantitative benefits of the *OLPP* far exceeded its costs and the
12 *Initial Review* appears to have been designed to support a predetermined factual
13 narrative and outcome;
- 14 i) The *Initial Review* cherry-picked the *OLPP* RIA, retaining conclusions favorable
15 and excluding those unfavorable, to support the Department's predetermined
16 conclusion that the *OLPP* costs exceeded the future benefits;
- 17 j) The *Initial Review* contained no final calculations regarding costs and benefits
18 and thus it was not possible to check results or replicate the many calculations or
19 their impact on a proper cost-benefit analysis thus falling far short of what the
20 applicable Executive Orders and the APA require, or Judge Collyer's Order
21 intended;
- 22 k) The *Initial Review* erroneously and arbitrarily reduced the egg production rates
23 used to calculate the future benefits of the *OLPP*, relying on unrepresentative and
24 unreliable data sources that conflicted with actual industry data submitted by
25 OTA and therefore understated the benefits of the *OLPP*;
- 26 l) The *Initial Review* erroneously and arbitrarily reduced the Willingness to Pay
27 values from the *OLPP* RIA and misapplied the literature cited and thus
28 understated the benefits of the *OLPP*;

34 The Department's *Rescission RIA* mistakenly asserted that it "corrected" errors discovered in the *OLPP RIA*. Instead it mischaracterized certain portions of the *OLPP RIA* as was demonstrated in OTA's *Motion for Summary Judgment, ECF No. 98* and in the first Vukina Report submitted therewith. The *Initial Review* and *Final Review* repeat and include many of the same errors as the *Rescission RIA*.

- 1
- 2 m) The *Initial Review* erroneously and arbitrarily raised poultry mortality rates and
- 3 ignored substantial academic and professional literature to the contrary as well as
- 4 industry data and evidence submitted by OTA and thus understated the benefits of
- 5 the *OLPP*;
- 6 n) The *Initial Review* erroneously and arbitrarily excluded discussion of the growth
- 7 opportunity for incumbent certified organic poultry operations and
- 8 overemphasized the costs of transition to an *OLPP*-compliant system expected to
- 9 be encountered by a very few large operators whose production practices were
- 10 barred and no longer acceptable after adoption of the *OLPP*. This approach
- 11 artificially overstated the costs and thus understated the benefits of the *OLPP*;
- 12 o) The *Initial Review* erroneously and arbitrarily failed to consider the reliance
- 13 interests and costs of ongoing delay in implementation of the *OLPP* to the
- 14 affected parties;
- 15 p) The *Initial Review* was not an independent assessment of the *OLPP RIA* or the
- 16 full administrative record that underpinned the adoption of the *OLPP* and should
- 17 be discounted as a *post hoc* litigation report;
- 18 q) The *Initial Review* misstated and overlooked the significance of the market
- 19 failures found in the *OLPP* and *OLPP RIA*;
- 20 r) The *Final Review* arbitrarily and erroneously incorporated the foregoing
- 21 methodological failures of the *Initial Review* and failed to respond to meritorious
- 22 evidence and argument that the *OLPP RIA* supported rather than undermined the
- 23 adoption of the *OLPP*.

24 241. The 180-day remand period was primarily used to attempt to map the indisputable errors

25 in the *Rescission RIA* to the *OLPP RIA* and the Department made no effort to correct the

26 errors it suggested to Judge Collyer in support of its request for remand. Instead, the

27 Department now contends the *Rescission RIA* is substandard because economic modeling

28 errors were “inadvertently carried forward” from *OLPP RIA*, thus disqualifying each. But

with the exception of the purported errors upon which the Department based its

Rescission, which were largely debunked in the first Vukina Report which led the

1 Department to request its remand, the quality of the *OLPP RIA* and its impact on the
2 issues in this case have not been litigated and the administrative record regarding it has
3 never been submitted. *See e.g.* USDA’s *Opposition to Plaintiff’s Motion to Complete the*
4 *Administrative Record*, at 1, ECF No. 87 (objecting to inclusion of *OLPP* administrative
5 record in this case) It is impracticable to request the court assess alleged errors in a
6 rulemaking that is not challenged in the instant case and the administrative record. The
7 Department needs to produce the *OLPP* administrative record.
8
9

10 242. The *Final Review* also erroneously and arbitrarily rejected the comments it received
11 saying, “USDA finds nothing in those comments that would cause it to reject or modify
12 the findings in [the *Initial Review*] and affirms the findings of the report.” *Id.* at 57944.
13 The Department failed to correct any of the “material errors” Judge Collyer’s Remand
14 Order referenced and declined to “start the cost-benefit analysis over from scratch.” *Id.* at
15 57943. The Department erroneously concluded “[N]o additional rulemaking action with
16 respect to the *OLPP* is necessary.” *Id.* at 57937. The Department does not state whether
17 its actions and conclusions expressed were vetted by OMB as would appear to be required
18 since the *Rescission* has been designated a “economically significant regulatory action.”
19 *See e.g. Rescission*, 83 Fed. Reg. at 10781.
20
21

22 243. The conclusion that the cost-benefit analyses in the *Rescission RIA* was so “seriously
23 flawed” that it could not be relied upon, combined with the rejection of any attempt to
24 provide a legally sufficient one renders invalid any reliance on the economic grounds
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1 advanced in support of *Rescission*, and this court may award summary judgment to OTA
2 on this ground and proceed to address the statutory construction issues.³⁵
3

4 244. The quantitative and qualitative future benefits of the *OLPP* far exceeded the anticipated
5 future costs and the *OLPP RIA* supported the adoption of the *OLPP* and any economic
6 modeling errors that may have occurred therein are harmless.
7

8 **COUNT ONE³⁶**
9 **VIOLATION OF THE OFPA AND APA**
10 **(Arbitrary and Capricious Agency Action and Action in Excess of Statutory Authority)**

11 245. Plaintiff realleges and incorporates by reference all prior paragraphs of this Third
12 Amended Complaint and the paragraphs in the counts below as though fully set forth in
13 this count.

14 246. USDA is an agency subject to the requirements of the APA. 5 U.S.C. § 701(b)(1).

15 247. USDA is an agency subject to the requirements of the OFPA. 7 U.S.C. § 6501 *et seq.*

16 248. In accordance with the OFPA, USDA consulted with the NOSB and obtained its
17 recommendations prior to publication of its 54-page final *OLPP* on January 19, 2017 with
18 an effective date of March 20, 2017. Publication was in accordance with the APA notice
19 and comment requirements. No party sought reconsideration.
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24 ³⁵ See *e.g. Remand Order*, at 2, ECF No. 112 (Judge Collyer noting the case presented “the
25 fundamental question of USDA’s authority” and that the “economic modeling” was secondary.)

26 ³⁶ This Count is identical to that dismissed as moot by Judge Collyer because the *Rescission*
27 superseded the unlawful delay final rules. See ECF Nos. 76 (opinion) and 77 (Order). It is
28 included herein for preservation purposes and will not be separately renewed as part of OTA’s
upcoming summary judgment filings.

1 249. In violation of the APA and OFPA, the USDA published three final rules³⁷ *seriatim* that
2 each unlawfully amended the effective date and temporarily revoked the *OLPP*. *Clean Air*
3 *Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017) (stating that an “order delaying the rule’s
4 effective date ... [is] tantamount to amending or revoking a rule.”)
5

6 250. USDA published the First and Second Delay Rules without publishing a notice of
7 proposed rulemaking or providing an opportunity for public comment in violation of 5
8 U.S.C. § 553 and without adequate justification under 5 U.S.C. § 553(b).
9

10 251. USDA published the Third Delay Rule following publication of a notice of proposed rule
11 that was deficient under the APA because it failed to disclose (1) the legal authority upon
12 which it intended to rely to amend the *OLPP* in violation of 5 U.S.C. § 553(b)(2); (2) that
13 USDA intended to conduct a *de facto* reconsideration of the entire *OLPP*, and ultimately
14 rescind it, based on (a) a lack of statutory authority under the OFPA and (b) technical
15 errors in calculating the cost-benefit analysis in the *OLPP*; and (3) it failed to provide the
16 technical reports and documents it ultimately relied upon to issue the Third Delay Rule
17 and to later rescind.
18

19 252. USDA’s publication of each of the three delay rules violated the OFPA because the
20 USDA failed to complete the pre-rulemaking consultation with the NOSB prior to each
21 amendment to the effective date of the *OLPP*, failed to disclose or provide an opportunity
22 to the NOSB to address the substantive concerns that had apparently arisen since
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27 ³⁷82 Fed. Reg. at 9967 (February 9, 2017) (first delay); 82 Fed. Reg. at 21677 (May 10, 2017)
28 (second delay); 82 Fed. Reg. 52643 (Nov. 14, 2017) (third delay).

1 publication of the *OLPP*, and failed to consult the NOSB regarding the “implementation”
2 of the livestock standards. & U.S.C. §§ 6503(c); 6509(d)(2); 6509(g); 6518(a); 6518(k)(1).

3
4 253. Each of the three delay final rules was unlawfully and intentionally framed to expire and
5 be succeeded by another unlawful delay which constituted an administrative practice and
6 pattern designed to be repeated while evading judicial scrutiny rather than an excusable
7 procedural anomaly that could be treated as a harmless or isolated misstep or error.

8
9 254. Each of the three delay final rules became effective immediately, in violation of the
10 APA’s requirement that an agency must publish a substantive rule not less than thirty days
11 before its effective date. 5 U.S.C. § 553(d).

12
13 255. Each of the three delay final rules relied in part on the *Priebus Memorandum* as legal
14 authority for the action. The *Priebus Memorandum* is not authority for failing to comply
15 with the binding requirements of the APA or OFPA.

16
17 256. The Third Delay Rule was not a logical outgrowth of the rulemaking noticed by the
18 USDA, and the Department’s unspoken reliance on cost/benefit calculations not disclosed
19 until December 2017, prevented meaningful comment.³⁸

20
21 257. Because the First, Second, and Third Delay Rules are arbitrary, capricious, an abuse of
22 discretion and are otherwise not in accordance with law and exceed USDA’s statutory
23 authority under the OFPA, Plaintiffs are entitled to relief under 5 U.S.C. § 706(2)(A) and
24 (C).

25 **COUNT TWO**
26 **VIOLATION OF THE APA AND OFPA**
(Arbitrary and Capricious Agency Action and Action in Excess of Statutory Authority)

27 ³⁸ See “Supporting Documents Folder” (*OLPP-PRIA*) and (“Benefit+Cost Workbook for OLP
28 Notice”), available at <https://www.regulations.gov/docket?D=AMS-NOP-15-0012>.

1
2 258. Plaintiff realleges and incorporates by reference all prior paragraphs of this Third
3 Amended Complaint and the paragraphs in the counts below as though fully set forth in
4 this count.
5

6 259. Rulemakings conducted by the Department are subject to the requirements of the APA
7 and OFPA.
8

9 260. In accordance with the OFPA, the Department consulted with the NOSB and obtained its
10 advice and received formal recommendations, many of which were incorporated into its
11 54-page *OLPP* final rule published in the Federal Register on January 19, 2017 with an
12 effective date of March 20, 2017. Publication was in accordance with the APA notice and
13 comment requirements. No party sought reconsideration.
14

15 261. The Department concluded it had ample statutory authority to adopt the *OLPP* and
16 affirmed the role of the NOSB in developing organic standards generally and its role in the
17 specific standards appearing in the *OLPP*. The *OLPP* and *OLPP RIA* included findings
18 supporting the regulatory action as directly addressing problems arising under the pre-
19 *OLPP* regulations during the last ten to fifteen years. The *OLPP* identified and cured,
20 among others, the following market, and programmatic failures:
21

- 22 a. the failure of the pre-*OLPP* organic regulations to assure consumers of a
23 consistent national standard for livestock products;
- 24 b. the failure of the pre-*OLPP* regulations to ensure fair competition among organic
25 poultry producers;
- 26 c. the adverse impact on federal certifying agents that enforce the inconsistent pre-
27 *OLPP* regulations.
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262. The *OLPP* and *OLPP RIA* also recognized the overwhelming support of consumers of organic livestock products and the reliance of regulated parties on the anticipated changes accomplished by the *OLPP*.

263. The Department concluded the administrative record demonstrated that a failure to adopt the *OLPP* would:

- a. likely cause or further exacerbate a loss of consumer trust in the USDA organic seal because of confusion and inconsistent rulings regarding the care of animals on certified organic farms, particularly poultry;
- b. improperly ignore the health benefits to farm animals that would occur based on the changes in production practices required by the *OLPP*;
- c. improperly ignore the overwhelming evidence that consumers prefer more and stricter oversight of the care of organically raised farm animals; and
- d. improperly ignore the role of consumer preferences as a required factor in keeping a voluntary marketing program's requirements up to date and current.

264. The APA requires a reviewing court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," 5 U.S.C. § 706(2)(A), or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," *id.* § 706(2)(C).

265. "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." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency rule 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

1 evidence before the agency, or is so implausible that it could not be ascribed to a
2 difference in view or the product of agency expertise.” *Id.*

3
4 266. The *Rescission* decision, as supplemented by the *post hoc* reports prepared by a staff
5 economist on remand, did not fully examine the relevant data, ignored key aspects of the
6 problems solved by the adoption of the *OLPP*, and certainly did not cure the defects in the
7 *Rescission RIA* as contemplated by the *Remand Order* and continues to prejudice the
8 Plaintiff by further delay, as is more fully set forth below.

9
10 267. The *Rescission* is an arbitrary and capricious course reversal and more than the Department’s
11 statutory jurisdiction and limitations for the following reasons, among others, because the
12 Department:

- 13
- 14 s) Concluded USDA lacked statutory authority for adoption of the production
15 practices set forth in the *OLPP*;
 - 16 t) Adopted a novel construction of Section 6509 of the OFPA that conflicted with
17 the past practice of every prior Administration, and ignored the context and
18 placement of Section 6509 in the overall statutory framework of the OFPA;
 - 19 u) Ignored the plain meaning and importance of other authorizing sections in the
20 OFPA;
 - 21 v) Determined the Department had no duty whatsoever to consult with and obtain
22 the views and recommendations of the NOSB when amending the *OLPP* three
23 times to delay its effective date following its publication, and in rescinding the
24 *OLPP* in its entirety which abandoned ten years of work by the NOSB;
 - 25 w) Determined that organic livestock production practices are restricted to avoidance
26 of synthetic medications only in contravention of the OFPA;
 - 27 x) Determined all existing regulations for “the care of” organic livestock not related
28 to restrictions on synthetic medications may be revisited and extinguished under
the new construction of the OFPA, thus potentially unsettling the entire federal
organic livestock regulatory regime;

- 1
- 2 y) Abandoned the Department’s prior conclusions about the importance of the
- 3 Congressional directive to develop detailed standards for certified organic
- 4 livestock via public hearings and NOSB public meetings and recommendations;
- 5 z) Abandoned the need for additional specificity and clarity in existing regulations
- 6 identified by the Department’s Inspector General to better ensure consistent
- 7 compliance by certified organic operations, and to provide for more effective
- 8 administration of the National Organic Program;
- 9 aa) Denied every request for extensions of time to comment on the Department’s
- 10 proposed actions, especially considering the time it allotted to itself and the
- 11 arguments it made in this Court regarding the complexity of the economic issues;
- 12 bb) Ignored substantial and compelling evidence in the record of a market failure and
- 13 programmatic failure arising from its existing confusing and inconsistently
- 14 applied pre-*OLPP* regulations governing “outdoor access” for poultry;
- 15 cc) Ignored substantial and compelling scientific evidence in the record that better
- 16 care of farm animals, including additional space and access to the outdoors,
- 17 reduces the need for synthetic animal drugs and other medicinal substances;
- 18 dd) Ignored substantial and compelling evidence that certifying agents are harmed by
- 19 the failure to correct the “outdoor access” section of the rules;
- 20 ee) Ignored or excluded many requirements of Executive Order 12866 and OMB
- 21 Guidelines on how to conduct proper and complete cost/benefit analyses;
- 22 ff) Ignored the many findings and conclusions stated in the *OLPP* and evidence in
- 23 the rulemaking record regarding the qualitative benefits of the *OLPP* cited in the
- 24 *OLPP* RIA, particularly considering the OFPA’s statutory purposes;
- 25 gg) Ignored, when conducting its *Regulatory Impact Assessment* including its remand
- 26 proceedings, that the NOP is a voluntary marketing program and imposes no duty
- 27 on any producer that does not wish to meet its requirements and economic
- 28 modeling must take this into account when calculating costs;
- hh) Systematically ignored the requirements of the APA and OFPA throughout the
- administrative proceedings since publication of the *OLPP*, particularly with

1 regard to notice and comment, and conducted a proceeding on remand that was a
2 barren and *pro forma* exercise in reaching a predetermined conclusion;

3 ii) Ignored substantial evidence submitted in the remand proceeding including
4 academic and professional literature and industry-submitted data;

5
6 jj) Failed to consider reasonable alternatives to its analysis that were presented in the
7 remand proceeding by ignoring or summarily addressing critical statutory factors
8 relevant to the inquiry that were presented by commenters and ignored comments
9 that undercut its predetermined outcome;

10 kk) Conducted a remand proceeding that produced a *post hoc* rationalization for its
11 actions more than two years ago that certainly cannot be judged an amplification
12 of its reasons for *Rescission* since the Department had not considered the issues
13 discussed in the remand before the first Vukina Report and OTA's *Motion for*
14 *Summary Judgment*;

15 ll) Conducted a remand proceeding with a staff economist who first appeared in the
16 litigation as an subordinate employee of the Department's Chief Economist and is
17 not a proper decisionmaker and whose work did not cure the defects identified in
18 the *Rescission RIA* or offer a better or more fulsome articulation of the
19 Department's thinking in 2018;

20 mm) Conducted a remand proceeding that was not based on the whole record of
21 the *OLPP* rulemaking but purports to assess facts and evidence regarding the
22 decision reached on the whole record at that time by an employee who the
23 Department presented as having no familiarity with the Department's process or
24 thinking in 2018;

25 nn) Requesting a voluntary remand to correct economic errors in the challenged
26 *Rescission RIA* and instead offered no corrections and thus issuing a document
27 that is unresponsive to the Court's directive on remand;

28 268. Because the *Rescission* is arbitrary, capricious, an abuse of discretion and is otherwise
not in accordance with law, and bypasses the limitations on the Secretary's discretion to
conduct major rulemaking actions without *any* involvement of the NOSB, and the result of

1 the remand proceedings have cured none of the identified flaws in the *Rescission RIA*, the
2 Plaintiff is entitled to relief under 5 U.S.C. § 706(2)(A) and (C).
3

4 **COUNT THREE**
5 **VIOLATION OF THE OFPA AND APA**
6 **(Failure to Consult NOSB; Failure to Obtain a Recommendation from NOSB)**

7 269. Plaintiff realleges and incorporates by reference all prior paragraphs of this Third
8 Amended Complaint and the paragraphs in the counts below as though fully set forth in
9 this count.
10

11 270. USDA published the *OLPP* on January 19, 2017 pursuant to Congressional mandates set
12 forth in the OFPA and in compliance with the requirements of the APA. The *OLPP*,
13 including its effective dates, was thereafter binding on USDA unless lawfully amended.
14 *Clean Air Council v. Pruitt*, 862 F.3d. 1, 9 (D.C. Cir. 2017)
15

16 271. The OFPA imposes unique pre-rulemaking duties on the USDA that are in addition to the
17 requirements of the APA. The statutory duties require the Department to consult with the
18 NOSB and obtain its recommendation for standards “for the care” of livestock. 7 U.S.C. §
19 6503(a) and (c); § 6509(d)(2)
20

21 272. Since the creation of the NOSB and the inception of the National Organic Program,
22 USDA has observed a well-settled practice of publishing proposed and final organic
23 livestock standards solely upon the receipt and consideration of recommendations from
24 the NOSB following significant public input. *See e.g. TAC Exhibit 1*.
25

26 273. The Department failed to consult with the NOSB on each of the three delay rules that
27 amended the effective date of the *OLPP* and failed to consult on the proposed and final
28 *Recission* and failed to consult regarding the remand proceedings. Each final rule that

1 resulted in amendment to the *OLPP*, up to and including the *Rescission* were published in
2 excess of USDA’s “statutory jurisdiction, authority, or limitations, or short of statutory
3 right.” 5 U.S.C. § 706(2).
4

5 274. The Department failed to discharge its duties under the OFPA during each of the
6 referenced proceedings.
7

8 275. The First, Second and Third Delay rules, the proposed *Rescission*, and final *Rescission*
9 Rule contravene the USDA’s duty to consult the NOSB prior to enacting or amending a
10 substantive, existing organic regulation only following receipt of an NOSB
11 recommendation. The three delay final rules and the *Rescission* and the remand
12 proceedings to the extent they are incorporated into the *Rescission* decision, are *ultra*
13 *vires*, harm Plaintiff and its members, and should be vacated.
14

15 **COUNT FOUR**
16 **VIOLATION OF THE APA AND OFPA**
17 **(Due Process; Closed Mind; Pre-Judgment)**

18 276. Plaintiff realleges and incorporates by reference all prior paragraphs of this Third
19 Amended Complaint and the paragraphs in the counts below as though fully set forth in
20 this count.
21

22 277. The record in this case strongly suggests that the Department’s proceedings to rescind the
23 *OLPP*, including those on remand, are unlawful because they are tainted by an irrevocably
24 closed mind that prevents the comments of the public from being fairly considered and
25 when taken as a whole suggests a pre-determined march to *Rescission* was conducted and
26 is ongoing. The procedurally flawed process violated the APA and the OFPA and was
27 marked by:
28

- 1 a. Unlawful delays of the effective date of the *OLPP* without public notice and
2 comment (the first two delay rules);
- 3
4 b. Unlawfully deficient economic analyses (*Rescission RIA* and remand
5 proceedings);
- 6
7 c. Barren inquiries on remand designed to reach a pre-ordained conclusion that did
8 not correct the identified flaws identified in the *Rescission RIA* or explain the
9 thinking of the Department in 2018 (*Initial Review on Remand and Final Review*);
- 10
11 d. Unlawful refusal to meaningfully engage or consult with the NOSB at any time
12 on the merits of the rescission of the *OLPP* (*Delay Rules; Rescission; remand*
13 proceedings);
- 14
15 e. Unlawfully truncated comment periods across all proceedings, never permitting
16 more than thirty days and were impermissibly *pro forma* (*Rescission; remand*
17 proceedings);
- 18
19 f. Selecting a single public comment as support for a proposed administrative action
20 that was opposed by more than forty thousand comments (*Third Delay Rule*);
- 21
22 g. Pretextual characterization of the production practices like stocking densities and
23 outdoor access requirements for poultry adopted in the *OLPP* as impermissibly
24 regulating “animal welfare as a stand-alone matter” unauthorized by the OFPA;
- 25
26 h. Requesting a voluntary remand to correct economic errors in the challenged
27 *Rescission RIA* and instead offered no corrections and thus issuing a final
28 document that is unresponsive to the Court’s directive on remand;

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- i. Offering a staff economist’s *post hoc* analysis in September 2020 as a reason for past administrative actions in 2018 when the analysis is not a further articulation of the Department’s reasoning in 2018 (remand proceedings);
 - j. Offering a staff economist’s *post hoc* review of documents that are several years old, who is not a decisionmaker for the Department, and took no decisions with regard to the substance of the *Rescission*, and cannot speak for the Department before this court (remand proceedings);
 - k. Repeatedly dismissing or completely ignoring qualitative and quantitative benefits of the *OLPP* that did not support its predetermined outcome (*Rescission*; remand proceedings);
 - l. Repeatedly rejecting commenters’ information that contradicted the predetermined narrative as inadequate, not peer reviewed, not the result of accepted methodologies or not supported by sufficient data despite only allowing thirty days for the public to prepare such comments (remand proceedings);
 - m. Selective adoption of findings from the *Rescission RIA* and misstatements of the extant record, such as claiming no market failure was found in the *OLPP RIA* (*Rescission*; remand proceedings);
 - n. Ignoring significant factors required for economic modeling by OMB and ignoring the requirement in EO 12866 that OMB review rulemakings, such as the *Rescission*, or perhaps the remand proceedings because taken together they constitute an “economically significant regulatory action” (remand proceedings).

1 278. While the actions described may appear innocent in themselves, taken together as a
2 whole from February 2017 to the present, the repeated departures from due process
3 minima assured by the APA and the complete abandonment of the pre-rulemaking duties
4 under the OFPA that are designed to bring diversity of viewpoints directly to the Secretary
5 via the NOSB are strongly suggestive of an impermissibly closed mind.
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8 279. The Department states the remand proceedings “were simply to identify errors in the
9 prior RIAs” which is tantamount to saying “improving our litigation position” since the
10 Department claims all mistakes in the *Rescission RIA* are attributable to the 2017 *OLPP*
11 *RIA* and therefore justify its 2018 *Rescission*. Under these circumstances a *prima facie*
12 case exists that the decision maker is engaging in *pro forma* due process with a closed
13 mind or undertaking procedures for which the outcome is impermissibly predetermined.
14

15 280. The *Rescission* and the *Initial Review* and *Final Review* are the product of process that
16 fails to comply with the APA’s procedural requirements for ensuring due process
17 guarantees are met.
18

19 **REQUEST FOR RELIEF**

20 WHEREFORE, Plaintiff prays this Court grant the following relief:

- 21 a. Enter a declaratory judgment pursuant to 28 U.S.C. § 2201(a) that the *Rescission* is
22 unlawful and was issued in violation of the APA and OFPA;
- 23 b. Enter a declaratory judgment pursuant to 28 U.S.C. § 2201(a) that the OFPA requires
24 the Department to consult with the NOSB prior to amending existing organic
25 livestock regulations, including the *OLPP*;
- 26 c. Enter a declaratory judgment pursuant to 28 U.S.C. § 2201(a) recognizing the OFPA
27 authorizes the production practices set forth in the *OLPP*;
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- d. Vacate and set aside the First, Second and Third Delay Rules and the *Rescission ab initio* or on such comparable terms that avoid prejudice to any party;
 - e. Issue an Order that the *OLPP* is “effective” as of a date appearing therein, and remanding to the Department to adjust the implementation dates to avoid prejudice to any party;
 - f. Permanently enjoin USDA from rescinding the *OLPP* without full compliance with the APA and the OFPA as construed in the Court’s decision;
 - g. Award Plaintiff its reasonable attorneys’ fees, costs and expenses associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 or other authority; and
 - h. Grant such other and further relief as this Court may deem just and proper.

Respectfully Submitted:

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