

## APPENDIX B

(Rule Excerpts for Section II.C of Memorandum of Law in Support of Summary Judgment)

AMS is conducting this rulemaking to maintain consumer confidence in the USDA organic seal. This action is necessary to augment the USDA organic livestock production regulations with clear provisions to fulfill one purpose of the Organic Foods Production Act (OFPA) (7 U.S.C. 6501-6522): to assure consumers that organically-produced products meet a consistent and uniform standard. \* \* \* This rule 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. Currently, organic poultry are required to have outdoor access, but this varies widely in practice. \* \* \* This variability perpetuates an uneven playing field among producers and sows consumer confusion about the meaning of the USDA organic label. This final rule will resolve the current ambiguity about outdoor access for poultry and address the wide disparities in production practices among the organic poultry sector. Greater clarity about the significance of the USDA organic seal in the marketplace will help to maintain consumer confidence in the organic label, which drives the \$43 billion in sales of organic products, and support a fair, viable market for producers who chose to pursue organic certification. *OLPP RIA*, pgs. 2-3

Establishing clear practice standards for organic products which meet or exceed most of the private animal welfare certification requirements will foster a more efficient market for organic products. Narrowing the range of acceptable practices within organic egg production would bolster consumer confidence in the information conveyed by an organic label claim on these products. As the requirements in this final rule would meet or exceed most of the private animal welfare certification standards, we expect that producers would find organic certification sufficient and reduce participation in other certification programs. This would streamline the business practices of organic livestock producers by reducing redundant and duplicative paperwork, verification processes for organic certification, and a need for separate animal welfare certification. Several studies show a correlation between consumer preferences/demand for products associated with higher animal welfare standards and higher price premiums. *OLPP RIA*, at 90-91

Sustained consumer demand for organic eggs drives the markets for these products. One of the central purposes of the Organic Foods Production Act of 1990 (OFPA) is to assure consumers that organic products meet a consistent standard. This rule creates consistency in production and certification practices and better aligns with the prevalent consumer assumption that organic poultry is outdoors. If these assumptions are not validated in the production standards for these products, consumers would likely shift purchases to alternate products certified under private, third-party standards that clearly delineate outdoor access requirements. This assertion is supported by research showing that consumers are willing to pay a premium for outdoor access, referenced in the section, Benefits of the Final Rule. Based on that research AMS predicts that the organic label could lose market share if consumers cannot readily discern whether the

organic label signifies outdoor access but can discern that information from other labels. By establishing clear organic livestock and poultry standards, this rule will shape what information is being conveyed to consumers about organic livestock products through the media, advocacy and trade groups, USDA or AMS outreach, and other sources. With the implementation of this rule, the information conveyed to consumers about the organic label and animal welfare practices will shift to reflect the new requirements and consumers will be better informed. *OLPP RIA* at 51

This action also responds to the 2010 USDA Office of Inspector General (OIG) audit findings of inconsistent applications of the USDA organic regulations for outdoor access for livestock. OIG noted the absence of regulatory provisions covering the duration (i.e., hours per day) of outdoor access and the size of the outdoor area. *RIA* at p. 16

### Market Failure Excerpts

The following *OLPP* excerpts demonstrate that a market failure existed:

AMS is conducting this rulemaking to maintain consumer confidence in the USDA organic seal. [and] \* \* \* to assure consumers that organically-produced products meet a consistent and uniform standard. *OLPP RIA*, at 2

Some organic poultry operations provide large, open-air outdoor areas, while other operations provide minimal outdoor space or use screened and covered enclosures commonly called “porches” to meet outdoor access requirements. This variability perpetuates an uneven playing field among producers and sows consumer confusion about the meaning of the USDA organic label. This final rule will resolve the current ambiguity about outdoor access for poultry and address the wide disparities in production practices among the organic poultry sector. Greater clarity about the significance of the USDA organic seal in consumer in the marketplace will help to maintain confidence in the organic label...” *OLPP*, 82 Fed. Reg. 7082-83.

The prevalent participation among organic poultry producers in private animal welfare certification programs demonstrates *that the organic certification alone does not provide the quality assurances that consumers expect for animal welfare attributes*. [emphasis added] Adding specificity to the USDA organic regulations for poultry living conditions would fill that void and add stability to a market sector that has widely varying production characteristics. *OLPP RIA*, at 96. [italics added by plaintiff]

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. In turn, it also provides assurance to producers that organic certification standards reflect the expectations of the consumer base. Augmenting the animal welfare practice standards for organic livestock would provide a foundation for efficient and equitable compliance and enforcement, and facilitate fair competition among organic livestock producers. *OLPP RIA*, at 13.