

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

ORGANIC TRADE ASSOCIATION,

OTA,

v.

**UNITED STATES DEPARTMENT OF
AGRICULTURE, et al.**

Defendants.

Civil Case No: 1:17-cv-01875-RMC

RESPONSE IN OPPOSITION TO THE GOVERNMENT’S MOTION TO DISMISS¹

Pursuant to this Court’s Order of November 20, 2017, OTA Organic Trade Association (“OTA”) timely files this Response in Opposition to Defendants’ Motion to Dismiss.²

INTRODUCTION

This is an action for declaratory and injunctive relief arising from the USDA’s failure to comply with the Administrative Procedure Act (“APA”) and the Organic Foods Production Act (“OFPA”) when it repeatedly delayed the “effective date” and continues to this day to refuse to implement the Organic Livestock and Poultry Practices final rule, a properly published final rule addressing livestock production practices on federally certified organic farms. (“OLPP”)

OTA Organic Trade Association (“OTA”) is a trade association representing certified organic farmers, food processors, food retailers, and accredited certifying agents and consumers

¹ Defendants are referred to herein as “defendants” “USDA” or “the agency” or “the Secretary” depending on the context.

² The parties previously stipulated to a briefing schedule for the present motion and OTA’s anticipated motion for summary judgment. The court determined to schedule only the government’s motion to dismiss. As directed by that Order, OTA is presently withholding its arguments for summary judgment until completion of this pleading cycle.

of organic products.³ See FAC at ¶¶'s 25-28; see also Declarations of OTA members attached hereto as Exhibits 1-7 (*Exhibit 1: Declaration of George Siemon; Exhibit 2: Declaration of Gina Asoudegan; Exhibit 3: Declaration of Tom Chapman; Exhibit 4: Declaration of John Lee; Exhibit 5: Declaration of Kyla Smith; Exhibit 6: Declaration of Laura Batcha; Exhibit 7: Declaration of Robynn Schrader*)

The Defendants have moved to dismiss the OTA's First Amended Complaint ("FAC") arguing OTA lacks standing to bring any claims, Motion to Dismiss (hereinafter "MTD") at pp. 12-16; that OTA's claims as to the first two delay rulemakings are moot, MTD at pp. 22-24 and that each of OTA's five claims under the APA and OFPA fail to state a claim under Rule 12(b)(6). See MTD at pp. 24-34. Defendants contend the Secretary has *no duty* to consult the NOSB on organic-related rulemakings. See e.g. MTD, at p. 2 ([O]TA points to no action that USDA is required to take under the OFPA.)

OTA demonstrates herein that the unlawful rulemakings it challenges have caused it, and its members, harm in fact that is non-speculative and is directly traceable to the defendants' unlawful delays. The subsequent rulemakings defendants' have purportedly undertaken to cure the harm caused by the unlawful delays under the APA are irrelevant as the OLPP remains

³ OTA member declarations were also attached to the First Amended Complaint and were incorporated by reference into the First Amended Complaint. See FAC at ¶¶'s 141-144 (incorporating Exhibits A-C)(Exhibit A: Declarations of Pete and Gerry's Organics; Exhibit B: Declaration of National Cooperative Grocers; Exhibit C: Declaration of Accredited Certifiers Association.) The declarations attached to this pleading supplement the factual record in response to the challenge brought under Rule 12(b)(1). See e.g. *Wilderness Soc'y v. Griles*, 824 F.2d 4, 16 n. 10 (D.C.Cir.1987)(record not limited to allegations in complaint); see also *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C.Cir.1992) (citing *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.1981)) ("where necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.")

unlawfully delayed, thirteen months later. The initial two delays are *void ab initio* and thus subsequent actions, predicated on the unlawful initial delays, are void as well. 5 U.S.C. § 706(2)(A) (requiring court to set aside agency actions “not in accordance with law”)

The harm arising from violation of the OFPA’s consultative requirements is ongoing as the defendants have *never* consulted the National Organic Standards Board regarding any of the actions taken since the initial delay in February 2017. *See Exhibit 3 Declaration of T. Chapman, NOSB*) The additional matters of record in the various dockets that are excerpted herein conclusively demonstrate that the harms described are not speculative and is instead real, current and ongoing. OTA’s members have suffered actual economic harm, procedural injury with concrete harm, and injury to their statutory rights under the OFPA. The motion to dismiss should be denied in its entirety. *See e.g. Monsanto v. Geerson*, 130 S. Ct. 2743, 2745 (claim is valid when OTA demonstrates standing to pursue each form of relief pled).

BACKGROUND

The relevant sections of the Organic Foods Production Act, §§’s 32-55, the history of organic livestock regulations, §§’s 63-104 and the history of the actions of USDA since the February 2017 initial delay of the OLPP §§’s 105-40 are fully set forth in plaintiff’s First Amended Complaint and are not reproduced here.

APPLICABLE STANDARDS OF REVIEW

A motion to dismiss under Rule 12(b)(1) tests OTA’s factual allegations necessary to establish this Court has subject-matter jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). When, as here, the motion challenges OTA’s standing,

For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. At the same time, it is within the trial court's power to allow or to require the OTA to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of OTA's standing.

Warth v. Seldin, 422 U.S. 490, 501-02, 95 S.Ct. 2197, 2206-07, 45 L.Ed.2d 343 (1975) (internal citations omitted); accord *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 14 (D.D.C. 2001); see also *Hudson v. Am. Fed'n of Gov't Employees*, No. CV 17-1867 (JEB), 2018 WL 707431, at *3 (D.D.C. Feb. 5, 2018) (noting the Court “may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction.”) While the inquiry is searching, it is not intended to be overly burdensome and the D.C. Circuit has noted, “the impropriety of transforming Rule 12(b)(1) motions into summary-judgment motions is well-settled.” *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987) citing *Gordon v. National Youth Work Alliance*, 675 F.2d 356, 363 n. 18 (D.C.Cir.1982)

Associations, like OTA, may sue on its own behalf and on behalf of its members. See, e.g., *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 552, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996). An association has standing to sue on its own behalf when legal interests germane to its purposes are invaded. It may sue on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests the organization seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. See *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 15 (D.D.C. 2001) citing *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977); see also *National Lime Ass'n. v. E.P.A.*, 233 F.3d 625, 637 (D.C.Cir.2000).

Challenges under 12(b)(6) are met when the complaint contains sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ ” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible when it contains factual allegations that, if proved, would ‘allow the court to draw the reasonable inference that the USDA is liable for the misconduct alleged.’ ” *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) (alteration omitted) (quoting *Iqbal*, 556 U.S. at 678). In this inquiry, a court must “draw all reasonable inferences from those allegations in the OTA’s favor.” *Id.*

ARGUMENT⁴

I. OTA Has Standing on Behalf of its Members

An association has standing to bring suit on behalf of its members when: (1) “its members would otherwise have standing to sue in their own right;” (2) “the interests it seeks to protect are germane to the organization's purpose;” and (3) “neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit

Ctr. for Sustainable Econ. v. Jewell, 779 F.3d 588, 596 (D.C. Cir. 2015) Each factor is addressed below.

A. Individual Standing

An individual has standing when, (1) she has suffered an “injury in fact” that is concrete and particularized, and actual or imminent rather than conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 596 (D.C. Cir. 2015) citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

“OTA’s members grow, make, distribute, and certify organic products including livestock products worldwide...” FAC at 25. Declarants in this case, each OTA members, include certified organic dairy producers and processors, certified organic egg farmers and processors, accredited certifying agents, certified organic retailers and certified organic livestock product processors and the current chair of the NOSB. Each declarant “supports” OTA in this

⁴ OTA withdraws its claim based on its own standing that is addressed in defendants’ MTD at p. 12-13. OTA proceeds on associational standing grounds based on member standing. OTA withdraws Count 5 of the First Amended Complaint. See FAC at ¶¶’s 189-201.

litigation.⁵ Each of the declarants has filed comments in the underlying rulemakings before USDA and the USDA's currently open rulemaking on the OLPP.⁶ Each declarant or their business is either "certified" to federal program standards or conducts certification on behalf of the USDA. Each declarant is directly and substantively impacted by amendments to the National Organic Program standards, including the delay or withdrawal of NOP standards by amendment with which declarant's disagree, because they are in this case directly regulated entities. *See e.g Nat'l Ass'n of Regulatory Util. Commissioners v. Fed. Commc'ns Comm'n*, 851 F.3d 1324, 1327 (D.C. Cir. 2017) (noting NARUC standing not "self evident" because it was not "directly regulated by the challenged agency action")

The record overwhelmingly shows that each declarant intends to continue in the organic industry and thus is harmed in fact by the unlawful rulemaking under the APA and the OFPA. Organic regulations and the fairness of the processes that determine them are core, concrete interests of such regulated businesses. Redress by this court, in the form of voiding the unlawful acts, and declaring the OFPA must be followed by the Secretary in the future would redress the injuries.

The following declarations are attached hereto or were previously filed. Each is from a separate sector of the organic market place and each declaration tells a short story of the impact arising from the OLPP delay and the concrete, particularized harm that has been visited upon each of the declarant's businesses. Specific paragraphs are called out throughout the pleading.

1. Declaration of George Siemon, CEO Organic Valley Family of Farms, Exhibit 1
(produces and processes certified organic livestock products);

⁵ Each declaration submitted is styled "Declaration of [OTA member] in support of" or "Declaration of [OTA member] submitted in support of" OTA's claims here.

⁶ *See* Appendix A (hyper-links to declarants' comments on regulations.gov)

2. Declaration of Gina Asoudegan, Applegate, Exhibit 2 (processes and markets certified organic livestock products);
3. Declaration of Tom Chapman, NOSB Chairman, Exhibit 3 (processes and markets certified organic products and is chair of the NOSB);
4. Declaration of John Lee, Marketing Manager, Exhibit 4;
5. Declaration of Kyla Smith, Chair, Accredited Certifiers Association, (certifying agent for USDA) Exhibit 5
6. Declaration of Laura Batcha, (Executive Director/CEO of OTA) Exhibit 6;
7. Declaration of Robynn Schrader, (CEO of National Co+op Grocers) Exhibit 7.
8. Declaration of Jesse LaFlamme, Dkt. No. 1 (produces and markets certified organic shell eggs)
9. Declaration of National Coop Grocers Dkt. No. 1 (markets certified organic livestock products)
10. Declaration of Accredited Certifiers Association, Dkt. No. 1

B. Organizational Germaneness

“The germaneness requirement mandates “pertinence between litigation subject and organizational purpose.” Ctr. for Sustainable Econ. v. Jewell, 779 F.3d 588, 597 (D.C. Cir. 2015) quoting *Humane Soc. of the United States v. Hodel*, 840 F.2d 45, 58 (D.C.Cir.1988)

The purpose of the OTA is “promote and protect the growing organic business sector” and “promote, develop and protect organic standards, ensure the due process rights of its members.” FAC at 25. “OTA actively participates in hearings and other fact gathering events before the National Organic Standards Board (“NOSB”) and routinely engages in policy discussions with the National Organic Program (“NOP”). FAC at 26. “OTA routinely submits comments on NOSB recommendations and NOP Guidance Documents and related matters that

impact organic businesses, producers including livestock producers and product manufacturers and retailers, handlers, certifying agents and consumers.” FAC at 27. “OTA conducts public and policymaker education and outreach and, when necessary, litigation.” FAC at 26 The interest it seeks to protect in this litigation, the due process rights of its members under the APA and rights secured by the OFPA, are inescapably “germane” to OTA’s organizational purpose.

C. Individual Litigants are Unnecessary

Member participation is not required where a “suit raises a pure question of law” and neither the claims pursued nor the relief sought require the consideration of the individual circumstances of any aggrieved member of the organization. *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 597 (D.C. Cir. 2015) citing *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 287–88, 106 S.Ct. 2523, 91 L.Ed.2d 228 (1986); see also *Warth v. Seldin*, 422 U.S. 490, 515, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Here OTA raises questions of law: (1) compliance with the APA’s notice and comment requirements and (2) the requirement that a non-arbitrary explanation for a change in policy be established and (3) failure to discharge its consultative duty under the OFPA. See FAC 202-207 (relief requested) *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (“[W]hen a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal. The entire case on review is a question of law.” (footnote and internal quotation marks omitted)); see also *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014) (“It is textbook administrative law that an agency must provide a reasoned explanation for departing from precedent or treating similar situations differently.”) (internal citation and quotation marks omitted)

Overall the USDA attempts to show that the refusal to implement the OLPP won't hurt anyone—as though the 10-year effort to reach consensus and publication on the OLPP was all a big misunderstanding that can now be forgotten. Not just yet. Each argument is addressed separately below.

First, USDA contends that the allegations of harm by expenditure of resources to come into compliance with the OLPP's provisions is insufficiently specific, pg. 16, or implausible because the OLPP was delayed after just 20 days. 82 Fed. Reg. at 9967 (February 9, 2017). ("First Delay Rule"). The kind of expenditures made by OTA members are described in the Declaration of George Siemon. *Exhibit 1: Declaration of George Siemon* at ¶¶'s 12, 20; *Declaration of Gina Asoudegan* at ¶¶'s 11-14. But more important to this case, the structure of the OFPA and its pre-rulemaking consultative requirements meant that the contours of the OLPP were known well in advance of the publication. *Id. Exhibit 1: Declaration of George Siemon*. The NOSB deliberated many years on the subjects, and issued more than 10 formal recommendations and the NOP issued an Advanced Notice of Proposed Rulemaking in April 2016 prior to the OLPP publication in January 2017. This extensive "pre-vetting" of the new standards meant that compliance costs were often incurred in advance of final rule publication.

Defendants also argue that it is compliance with OLPP and not the delay that was costly. This overlooks that the reason compliance costs are a *harm is because of the unlawful delay*. In addition, there is concrete competitive harm that is directly traceable to the continued operation of the kind of organic production systems that the OLPP was intended to bar. *Exhibit 1: Declaration of George Siemon* at ¶¶'s 20-22, 25, 26; *Exhibit 2: Declaration of Gina Asoudegan* at ¶¶'s 8-10, 14; *Exhibit 4: Declaration of John Lee* at ¶¶'s; 3,5-10. The Declaration of John Lee indisputably demonstrates a non-speculative market downturn attributable to the defendants'

delaying actions. *Declaration of John Lee* at ¶¶'s; 3,5-10 Mr. Lee attributes the egg market downturn in 2017 to the “a rapidly expanding supply arising from the use organic production systems that were set to be disallowed under the OLPP.” *Id.* at ¶ 10 The reality of costly litigation has already hit the organic sector and is causing concern because the closing of the type operations that the OLPP intended to bar has not occurred. *See e.g. Exhibit 5: Declaration of Kyla Smith* at ¶¶'s;9-10; *Exhibit 7: Declaration of Robynn Schrader* at ¶¶'s 4,9; *Exhibit 6: Declaration of Laura Batcha* at ¶¶'s 20-21

Defendants claim the concerns about the loss of consumer confidence and trust in the USDA organic seal is speculative. But in January 2017 defendants themselves claimed “AMS is conducting this rulemaking to maintain consumer confidence in the USDA organic seal.” 82 Fed. Reg. at 7082. And: “This action is necessary....[t]o assure consumers that organically – produced products meet a consistent and uniform standard.” *Id.*; *see also FAC*, at p. ¶ 5 (quoting lengthy sections of the OLPP demonstrating agency understands and acted on this issue) Trust lies at the heart of the entire organic regulatory undertaking: Congress established national standards to “assure consumers” that products meet a “consistent standard.” 7 U.S.C. §6501 In fact defendants proudly claimed the OLPP was “consistent with recommendations provided by the USDA’s Office of Inspector General and nine separate recommendations from the NOSB.” 82 Fed. Reg. at 7082. It is implausible to take the position in this litigation that consumer trust is a speculative concern when AMS, the Inspector General and the NOSB all recognized the risk and acted to abate it. *See also Exhibit 5: Declaration of Kyla Smith* at ¶¶'s;9-10; *Exhibit 7: Declaration of Robynn Schrader* at ¶¶'s 4,5,10; : *Declaration of Gina Asoudegan* at ¶¶'s8-10, 11-14; *Exhibit 6: Declaration of Laura Batcha* at ¶¶'s; 20; *Exhibit 1: Declaration of George Siemon* at ¶¶'s 8-9, 28

Defendants contend in a footnote that any failure to consult the NOSB was harmless error because the NOSB made a “Formal Recommendation” regarding the May 10 new proposed rule. *See p. 31, fn 13* This statement is incorrect in two ways. First, the action of the board was a “resolution” taken in approximately 10-15 minutes during a meeting, and it was taken because there was no consultation. *See Exhibit 10* (transcript excerpt) The NOSB was not consulted. *Exhibit 3: Declaration of NOSB Chair Tom Chapman* at ¶¶’s 15, 18, 20, 22, 26; *see Exhibits 12-13* (meeting agendas; no OLPP matters). Moreover, formal recommendations require a response and Exhibit 11 contains the defendants’ required response to the formal recommendations adopted by the NOSB at the April meeting and there is no mention of the cited resolution. It is only in this litigation that the NOSB appears to be able to help these defendants. The consultative drought has also deprived OTA members of a useful and typical conduit for providing input to the defendants, but this has been closed. *Exhibit 1: Declaration of George Siemon* at ¶¶’s 15-18, 31; *see also Exhibit 6: Declaration of Laura Batcha*.

II. Challenges to the First Two Delay Rules are Not Moot

Count One of OTA’s First Amended Complaint challenges each of the three separate delay rules as having been undertaken and causing deprivation of rights secured by the APA. FAC 145-58 Count Four challenges the same three rules as deficient for failing to consult with the NOSB prior to issuance. FAC at 179-188 OTA seeks the three delay rules be declared void *ab initio* under the APA. FAC at 202-04 OTA seeks the three delay rules be declared *ultra vires* and void *ab initio* under the OFPA. FAC at 205

Defendants do not contest that the first two delay rules were published without notice and comment. *See MTD at 22* (OTA’s claims are “based on the fact that the agency did not provide notice or an opportunity to comment”). Nor do defendants contest OTA’s allegations that the

agency failed to consult with the NOSB prior to the issuance of these two delay rules. *See e.g.* (OFPA allegations) FAC at 2, 12, 44-46, 50-53, 179-188; *but see MTD* at p. 31, fn 13. Instead defendants claim they satisfied the APA when the agency “issued the May 10 Proposed Rule” that purported to “provide OTA with notice and an opportunity to comment on the delay of the OLPP Rule.” *MTD* at 22. Defendants also contend that this court can “provide no relief to OTA.” *MTD* at 23. The mootness argument should be rejected for several reasons.

First, Defendants contend OTA’s challenges to the February 9 and May 10 delay rules, are moot because the “primary attack” is the allegation of procedural injury. *MTD* at 22. *See* 73A C.J.S. Public Administrative Law and Procedure § 552 (“Specifically, whether an agency has complied with the Administrative Procedure Act's notice and comment requirements is a question of law for the courts, and an agency's failure to provide required notice and to invite public comment is a fundamental flaw that normally requires vacatur of the agency's rule.”); *see also Florida Audubon Soc. v. Bentsen*, 94 F.3d 658, 665 (D.C. Cir. 1996) citing *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882–83, 110 S.Ct. 3177, 3185–86, 111 L.Ed.2d 695 (1990) (noting that the APA may provide a right to sue for final agency actions that omit some procedural requirement); *see also* § 3531.4 Injury in Fact, 13A Fed. Prac. & Proc. Juris. § 3531.4 (3d ed.) (“The basic interest in notice and opportunity to be heard readily supports standing.”)

To the extent defendants contend that OTA has alleged a procedural injury with no harm, *Spokeo*, this is rebutted by the record. *See generally Exhibits 1-7; see also* p. 10 (specific harms related to each declarant). OTA alleges separate concrete and particularized harms arise from the enactment and effect of each delay rule. *See e.g.* FAC 149-50 (noting inevitable delay in follow-on implementation dates set forth in the rule); FAC 157 (effect of change in effective date results in “significant and unlawful modification of the livestock standards”). Moreover, since the delay

began the cited harms are ongoing and adverse effects have continued to accrue. *See e.g. Exhibit 1: Declaration of George Siemon* at ¶¶20-22, 25, 26; *Exhibit 2: Declaration of Gina Asoudegan* at ¶¶8-10, 14; *Exhibit 4: Declaration of John Lee* at ¶¶3, 5-10. *See e.g. Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, at 1548 (2016) (“We have made it clear time and time again that an injury in fact must be both concrete and particularized.”); *see also United Transportation Union v. ICC*, 891 F.2d 908, 912 n. 7 (D.C.Cir.1989) (noting that allegations of competitive harm founded on “basic economic logic” can establish standing).

Several declarants expressed concern about the delay’s effect of leaving organic operations in business that would be barred by the OLPP, and the harm to the USDA seal and consumer confidence. *See generally Exhibit 1: Declaration of George Siemon* at ¶¶20-22, 25, 26; *Exhibit 2: Declaration of Gina Asoudegan*. Strikingly, defendants seem no closer to understanding. *See* MTD at 19-21 (dismissing concerns as speculative, implausible and contradicted by old sales data); *see also Exhibit 5: Declaration of Kyla Smith* at ¶¶9-10; *Exhibit 7: Declaration of Robynn Schrader* at ¶¶4, 5, 10; *Exhibit 8: Declaration of Gina Asoudegan* at ¶¶8-10, 11-14; *Exhibit 6: Declaration of Laura Batcha* at ¶¶20; *Exhibit 1: Declaration of George Siemon* at ¶¶8-9, 28; *see also* 82 Fed. Reg. at 7082 (“AMS is conducting this rulemaking to maintain consumer confidence in the USDA organic seal.”)

Second, defendants wrongly contend the February 9 delay rule was authorized by the Priebus memorandum. MTD at 7-8 citing *Memorandum to Heads of Executive Departments and Agencies*, 2017 WL 280678 (“Priebus memo”) “The advent of a new Administration cannot justify the Government's complete and continued disregard of the APA's rulemaking requirements.” *Pub. Citizen v. Dep't of Health & Human Servs.*, 671 F.2d 518, 520 (D.C. Cir. 1981) But contrary to the use to which defendants would put the Priebus memorandum here, it

did not authorize the departure from the APA’s or the OFPA’s required procedures. FAC at 108
The Priebus memo plainly stated agencies were directed to postpone any published but not yet effective rule only “*as permitted by law.*” *Priebus Memo*, at ¶3(emphasis added)

The D.C. Circuit’s approach to amendment of “effective dates” in published rules was well settled at that time—amendment without notice and comment was unlawful.
See Environmental Defense Fund v. EPA, 716 F.2d 915, 920 (D.C.Cir.1983)
(citing *Environmental Defense Fund v. Gorsuch*, 713 F.2d 802, 816 (D.C.Cir.1983)); *see also Public Citizen v. Steed*, 733 F.2d 93, 98 (D.C.Cir.1984) (holding that agency’s suspension of rule was “a paradigm of a revocation,” constituting “a 180 degree reversal of [the agency’s] former views as to the proper course”) In addition OTA contends the agency did not follow the Priebus memo’s procedural requirements for assessing whether a regulation should be excluded from the memo’s purview, thus precluding defendant’s reliance at this stage of the case. The challenge to the February 9 delay rule is not moot. FAC at ¶¶’s 111-114 Defendants claim no independent legal authority for the May 10 delay rule. MTD at 8 It thus fails as an unlawful amendment to the OLPP under the D.C. Circuit authorities cited above.⁷

Third, mootness is inapplicable because it is well settled in this circuit that a “[E]ven though the specific action that the OTA challenges has ceased, a claim for declaratory relief will not be moot” if “the specific claim fits the exception for cases that are capable of repetition,

⁷ Defendants claimed the February 9 and May 10 delay rules were each exempt from the APA’s notice and comment requirements because it was “impracticable, unnecessary, or contrary to the public interest” pursuant to 5 U.S.C. 553(b)(B). 82 Fed. Reg. at 9967 (first delay); 82 Fed. Reg. at 21677 (second delay) In light of the fact that the delay is ongoing and is now extended to 14 months from the original effective date in the rule, the record contradicts the defendants’ reliance on this rarely necessary and disfavored exemption. In any event OTA challenged these findings. FAC at 109 (first delay), 122 (second delay)

yet evading review.” *Grant v. Vilsack*, 892 F. Supp. 2d 252, 257 (D.D.C. 2012) citing *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 321 (D.C.Cir.2009) (internal quotation marks omitted).

The exception requires OTA demonstrate that (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.” *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 321 (D.C.Cir.2009) (removing additional citations and quotation marks) With regard to the evading review prong this circuit generally recognizes a two-year minimum period for challenging agency actions. *Id.* at 322. Here the challenged delays of February and May were 60 and 180 days, each within the required limit. The third delay rule of 180 days is likewise within the limit.

With regard to repetition, the focus is not “whether the precise historical facts that spawned the OTA's claims are likely to recur” but should be on “whether the legal wrong complained of by the OTA is reasonably likely to recur.” *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 324 (D.C. Cir. 2009) In fact, the court expressly noted that no “precedent requires that the very same facts must recur for the capable of repetition exception to apply.” *Id.* 325 (D.C. Cir. 2009); *see also Campbell v. Clinton*, 203 F.3d 19, 34 (D.C.Cir.2000) (“Circuit precedent requires us to determine whether the activity challenged is ‘inherently’ of a sort that evades review”).

In other words, the question is not, as defendants posit (MTD at 22-23), whether OTA or the NOSB eventually received a chance to comment on further delay here, but whether the use of serial, fixed periods of short delay that fall back on 5 U.S.C. 553(b)(B)’s exception from notice and comment language, willful exclusion of the NOSB from the rulemaking process could recur.

OTA and its members, organic businesses, certifiers, NOSB members and consumers, will likely be in position to comment on agency rulemaking and NOSB consultation developments in the future, and the unlawful actions here should not be countenanced for future administrators by a premature determination of mootness

Last, defendants contend this court may not provide any relief if it determines the February and May delay rules were unlawful. MTD at 23-4 This is incorrect. The OLPP remains in limbo—it is a published, final rule that could be made effective by this court’s order granting the requested *ab initio* relief. FAC at ¶¶’s 202-205; *see e.g. NRDC v. US Reg. Comm* (DC Cir. Jan. 18, 2018)(“The APA, of course, requires this court to “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).”); *see also Sugar Cane Growers Co-operative of Florida v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002) (“[T]he decision whether to vacate depends on ‘the seriousness of the order’s deficiencies ... and the disruptive consequences of an interim change that may itself be changed.’ ” (quoting *Allied–Signal, Inc. v. United States Nuclear Regulatory Commission*, 988 F.2d 146, 150–51 (D.C. Cir. 1993))); *see also State of Nebraska Department of Health & Human Services v. Department of Health & Human Services*, 435 F.3d 326, 330 (D.C. Cir. 2006) (reviewing district court’s choice of equitable remedy for abuse of discretion).

COUNTS 1-5 OF THE FIRST AMENDED COMPLAINT STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED

I. Count I States a Claim and Should Not be Dismissed⁸

On May 10, 2017 the agency published a Proposed Rule with four procedural options.

1. Let the Organic Livestock Rule become effective on November 14, 2017;
2. Suspend the Organic Livestock Rule indefinitely;
3. Further delay the effective date of the Organic Livestock Rule;
4. Withdraw the Organic Livestock Rule.

See 82 Fed. Reg. at 21742 (May 10, 2017). No further guidance as to the goal of the rulemaking was offered except a single sentence: “USDA is asking the public to comment on the possible actions USDA should take in regards to the disposition of the FR.” *Id* The New Proposed 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. *See* FAC at ¶¶ 127-40 (discussion of Nov. 14 rule)

To understand the why OTA believes the Nov. 14 rule was not a logical outgrowth of the May 10 rulemaking notice, it is necessary to review what the agency said just four months before about the rulemaking it was now proposing to delay, suspend, or withdraw.

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. OFPA mandates that detailed livestock regulations be developed through notice and comment rulemaking and intends for the involvement of the National Organic Standards Board (NOSB) in that process. (emphasis added)

⁸ The defendants MTD characterizes OTA’s Count 1 as only attacking the November 14 rule. MTD at 24 However, the FAC alleged all three delay rules, the Feb. 9, May 10, and Nov. 14. Rules are challenged. FAC at ¶¶ 149-50.

* * *

This rule extends that level of detail and clarity to all organic livestock and poultry, and would ensure that organic standards cover their entire lifecycle, consistent with recommendations provided by USDA's Office of Inspector General and nine separate recommendations from the NOSB. 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. Reg. at 7082

82 Fed. Reg. at 7082 The FAC contains an extensive catalogue of additional statements and conclusions appearing in the FAC at ¶¶'s at 62-104. The agency said,

AMS has determined that the current USDA organic regulations (7 CFR part 205) covering livestock health care practices and living conditions need 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. * * * By facilitating improved compliance and enforcement of the USDA organic regulations, the proposed regulations would better satisfy consumer expectations that organic livestock meet a uniform and verifiable animal welfare standard.

81 Fed. Reg. at 21957 In addition, the agency released a guide to the new rule that said,

A lack of clarity in organic livestock and poultry standards has led to inconsistent practices among organic producers. For example, as a result of ambiguous standards for what constitutes "outdoor access" for poultry, there are currently two very different organic egg production systems in the United States: operations whose outdoor space consists of an enclosed porch with a roof, mesh walls and cement floor, and operations that provide birds with access to pasture. Both production systems are currently able to utilize the organic seal and capture a premium from consumers.

Multiple recommendations from the National Organic Standards Board (NOSB), a 15-member Federal advisory committee, and an Office of Inspector General audit asked USDA to bring consistency to organic livestock and poultry production for two reasons. First, they note that consistent standards are important to consumer confidence in the organic brand. Consumers expect the organic seal to indicate that a consistent standard has been followed, but in this case, it has not been. If consumers begin to doubt the integrity of the seal, it may erode confidence in the \$43 billion organic industry.

Second, they note the issue of producer fairness. Returning to the egg example, the majority of organic egg producers – including both small and large operations – provide their birds with access to pasture and do so because consumers expect that organic birds come into contact with soil and vegetation and can exhibit natural behaviors. The added costs associated with this type of production are balanced by the premium provided by the organic seal. When porch-based systems capture that same premium without

incurring the same costs, pasture-based systems are unable to fairly compete. The recommendations USDA has received, which are echoed in many public comments on the proposed rule, call on us to level the playing field for all producers.

See Exhibit 14 AMS “Questions and Answers on the OLPP” It is against this backdrop of extensive effort and repeated expressions of need for OLPP by the NOSB, agency staff, Office of Inspector General and the public that the new rule came into being. This stands in stark contrast to the brevity of the May 10 delay rulemaking.

According to [regulations.gov](https://www.regulations.gov), the total number of comments received on the May 10 proposed rule was 47, 109. *See* <https://www.regulations.gov/document?D=AMS-NOP-17-0031-0001> And the in the final rule’s discussion of the comments it received, the agency said, of its selection of Option 3, “...only one chose “Option 3: Delay.” 82 Fed. Reg. 52643. Relying on a single comment out of 47,000 is facially arbitrary. *See FAC* at 133-34

This final rule adopts Option 3: Delay, 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.

[D]uring the course of reviewing the rulemaking 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 discovery, AMS 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. at 52643-44

On December 18, 2017, USDA issued a notice of proposed rulemaking seeking comment on a proposal to withdraw the OLPP Rule. *See* National Organic Program (NOP); Organic Livestock and Poultry Practices—Withdrawal, 82 Fed. Reg. 59,988 (Dec. 18, 2017) (the “Proposed Withdrawal Rule”). The comment period was only open for 30 days and over the holidays. OTA filed a request for enlargement of time and it was denied. *See Exhibit 6*

Declaration of Laura Batch at ¶19 The comment period has closed and over 77,000 comments were received. Available at <https://www.regulations.gov/docket?D=AMS-NOP-15-0012>

The November delay rule citing the agency's own apparently erroneous cost/benefit analysis was not a logical outgrowth of the four procedural questions posed in the May 10, 2017 notice of rulemaking. The D.C. Circuit recently said,

A final rule is the “logical outgrowth” of a proposed rule if “interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.” *CSX Transportation, Inc. v. Surface Transportation Board*, 584 F.3d 1076, 1080 (D.C. Cir. 2009) (citation and internal quotation marks omitted). A final rule “fails the logical outgrowth test” if “interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.” *Id.* (citations and alterations omitted).

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There was no mention of technical errors in calculating cost benefit analyses in the proposed and there was no reason to suspect that the agency's determination made in the OLPP was incorrect—after all the agency accepted it and published the rule. The technical reports necessary to assess whether a cost/benefit error had been made in the OLPP were not referenced in the rulemaking materials released in May, and thus could not be evaluated and commented upon. The documents that USDA was apparently analyzing were posted to the regulations.gov website on December 18, 2017. Available at <https://www.regulations.gov/docket?D=AMS-NOP-15-0012> “Supporting Documents Folder” (OLPP-PRIA) and (“Benefit+Cost Workbook for OLP Notice”); *Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 237 (D.C. Cir. 2008) (“It would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment.”) The absence of the necessary

technical reports foreclosed meaningful commentary. *See Exhibit 6* Declaration of Laura Batch at ¶¶s 14-19 Last, the statutory authority question had been raised and rejected by the agency in the OLPP rulemaking. There was no reason to believe it was being revisited *sub silento*.

The defendants MTD claims reference to “legal and policy issues” was sufficient notice under the APA. MTD at p. 24-25. Under APA notice and comment requirements, “[a]mong the information that must be revealed for public evaluation are the ‘technical studies and data’ upon which the agency relies [in its rulemaking].” *Chamber of Commerce v. SEC (Chamber of Commerce II)*, 443 F.3d 890, 899 (D.C.Cir.2006) (citation omitted). *Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 236 (D.C. Cir. 2008) The failure to provide the technical information necessary to possibly avoid another delay ruling violated the APA.

There was no way for OTA members to know that the agency in May intended to announce a complete reconsideration of its own legal and factual position in November. It just makes no sense in light of the statements made by the agency in January. *See e.g. FAC at 139* (quoting agency that comments in the OLPP rulemaking questioned the agency’s statutory authority in the rulemaking and the agency rejected them); *see also* pp. 19-20 (herein) The Nov. 14 rule was not a logical outgrowth of the noticed rule in May, and it turned out it was an unexplained departure from the policies expressed in the OLPP.

The NOSB was not consulted. *See Exhibit 3* Declaration of Tom Chapman, NOSB board chair. The failure to consult the NOSB on a question as central to its work as the statutory authority necessary to make recommendations like those it had made over the past 10 years that resulted in the OLPP states a claim for relief. *See generally Exhibit 3: Declaration of Tom Chapman* (explaining role of chair and NOSB procedure)

II. Count Two States a Claim and Should not be Dismissed

Section 706(1) authorizes a court to compel agency action, where the agency has "unlawfully withheld or unreasonably delayed" action. In March 2010, the USDA's Office of Inspector General conducted an audit of the NOP and issued a report entitled, Oversight of the National Organic Program. The Report found inconsistent treatment of outdoor access questions for livestock by accredited certifying agents and noted that AMS "agreed that additional guidance would be beneficial." Oversight of the National Organic Program, OIG Audit Report No. 01601-03-Hy at pg. 22 ("OIG Report") Available at <https://www.usda.gov/oig/webdocs/01601-03-HY.pdf> (last visited September 12, 2017)

On January 19, 2017, after more than ten years of public process and numerous public hearings and formal recommendations from the USDA's expert advisory board, a final rule entitled the Organic Livestock and Poultry Practices final rule was published by USDA in the Federal Register. 82 Fed. Reg. at 7042-92 (January 19, 2017) No party sought reconsideration of the OLPP. The Organic Livestock Rule was scheduled to take effect on March 18, 2017. *Id.* at 7042.

On February 9, 2017, USDA issued a stay entitled, "Final rule; delay of effective date," without prior notice or an opportunity for public comment, or any consultation with the NOSB, delaying the effective date of the OLPP for 60 days to May 19, 2017. 82 Fed. Reg. at 9967 (February 9, 2017). On May 10, 2017, just days before the stay in the First Delay Rule dissipated, USDA issued another stay entitled, "Final rule; delay of effective date" without prior notice or an opportunity for public comment, or any consultation with the NOSB, delaying the effective date of the Organic Livestock Final Rule by an additional 180 days until November 14,

2017. 82 Fed. Reg. at 21677 (May 10, 2017) On Nov. 14, 2017, the day the second administrative delay dissipated, the Secretary published the Third Delay Rule choosing Option (c): further delay for 180 days. The new effective date for the Organic Livestock Rule is May 14, 2018. 82 Fed. Reg. 52643 (Nov. 14, 2017) (the “Third Delay Rule”).

OTA contends the “failure to timely implement the Organic Livestock Rule upon the effective date set forth in [that] Rule constitutes an unlawful ‘failure to act’ pursuant to” section 706(1) of the APA. First Am. Compl. ¶ 167. The USDA was obligated to act in accordance with its published effective date, unless it conducted notice and comment rulemaking to alter the date. See *Clean Air Council v. Pruitt*, 862 F.3d 1, 16 (D.C. Cir. 2017); *Environmental Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802 (D.C. Cir. 1983) holds “an agency decision which effectively suspends the implementation of important and duly promulgated standards ... constitutes rulemaking subject to notice and comment” *Id.* at 816 (citing *Council of the Southern Mountains, Inc. v. Donovan*, 653 F.2d 573 (D.C.Cir.1981) and *Nat. Res. Def. Council, Inc. v. EPA*, 683 F.2d 752 (3d Cir. 1982) as “stand[ing] for the [same] proposition”)

Defendants argue that the agency has not failed to take action it is legally required to take. MTD at p. 28 Defendants rely on *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) and the statement that: “a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take.” MTD at 27-28 In addition to the quotation to which defendants refer, the *Norton* court also noted that an agency may ignore a lawful deadline only when the action to be taken is discretionary. Here, however, the action was not discretionary. The effective date is not malleable feature of a final rule.

The defendants appear to miscite *Clean Air Council v. Pruitt*, 862 F.3d 1, 8-9 (D.C. Cir. 2017) as support for their “inherent” agency discretion regarding stays argument. MTDA 28.

Defending the stay, EPA repeatedly invokes its “broad discretion” to reconsider its own rules. EPA Opp. 6. Agencies obviously have broad discretion to reconsider a regulation at any time. To do so, however, they must comply with the Administrative Procedure Act (APA), including its requirements for notice and comment. 5 U.S.C. § 553; *see Perez v. Mortgage Bankers Association*, — U.S. —, 135 S.Ct. 1199, 1206, 191 L.Ed.2d 186 (2015) (“[T]he D.C. Circuit correctly read § 1 of the APA to mandate that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.”). As we have explained, “an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked” and “may not alter [such a rule] without notice and comment.” *National Family Planning and Reproductive Health Association, Inc. v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992).

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[E]PA cites nothing for the proposition that it has such authority, and for good reason: as we have made clear, it is “axiomatic” that “administrative agencies may act only pursuant to authority delegated to them by Congress.” *Verizon v. FCC*, 740 F.3d 623, 632 (D.C. Cir. 2014) (alteration and citations omitted);

Id. Defendants here are trying out a very similar argument. But unlike here, in *Clean Air* a statutory provision expressly authorized a stay “for a period not to exceed three months.” *Id.* at 5. The court found that the mandatory preconditions for issuing the stay were not met and thus the stay was unreasonable. Accordingly,

[the statute] . . . did not authorize the stay. EPA's decision to impose a stay, in other words, was “arbitrary, capricious, [and] . . . in excess of [its] . . . statutory . . . authority.” 42 U.S.C. § 7607(d)(9)(A), (C). We shall therefore grant Environmental Petitioners' motion to vacate the stay.

Clean Air Council v. Pruitt, 862 F.3d 1, 14 (D.C. Cir. 2017) Much like the defendants’ reliance on the *Priebus* memorandum here, the EPA’s reliance on the statute was misplaced and led to vacatur. *See Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) citing *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1760, 91 L.Ed. 1995

(1947) (“[A] reviewing court ... must judge the propriety of [agency] action solely by the grounds invoked by the agency” when it acted)

OTA has demonstrated a legally required and discrete act: make the rule effective on the published effective date. Count two states a valid claim.

III. Count Three States a Claim and Should not be Dismissed

OTA contends that the delay of the OLPP Rule’s effective date constitutes an unexplained and unlawful “reversal of the policy position taken in January 2017, when the Organic Livestock Rule was published[.]” FAC, at ¶ 178. As alleged in the FAC and discussed above, the agency’s *published* position in January 2017 was that the rule was necessary to fulfill the statute’s purpose of uniform national standards and consistent application of the standards, that it relied on recommendations of the NOSB and Inspector General, and that the OLPP was programmatically necessary. But by May 2017 it seems, according to defendants, a rulemaking notice that offered four procedural options should have been understood to raise the most fundamental question of all: does the agency have the requisite statutory authority. *See* FAC at ¶¶’s 171-175.

It is not possible to separate the February 9 and May 10 delay orders from the OLPP. Similarly, it is not possible to separate the Nov. 18 analysis from that which underpinned the OLPP. Once the effective date was published, all of the reasons and purposes behind the entire OLPP are part of the picture that must be examined to determine if a policy change exists. OTA has alleged a policy change has occurred and it is evident in the delay actions. Plaintiff states a claim.

IV. Count Four States a Claim and Should not be Dismissed

OTA alleges consultation with the NOSB before *rulemaking* is required. FAC ¶ 183. No consultation on any of the five OLPP-related rulemakings has occurred. *See Exhibit 3* (Declaration of Tom Chapman, NOSB chairman) The refusal to consult is inconsistent with the past practice of the board. *See Exhibit 1* (Declaration of George Siemon) “The OFPA imposes unique pre-rulemaking duties on the USDA that are in addition to the procedural assurances in the APA. The duties require the Secretary to consult with the NOSB prior to promulgating final rules like the three Delay Rules. 7 U.S.C. § 6503(c); 7 U.S.C. § 6509(d)(2); 7 U.S.C. § 6509(g); 7 U.S.C. § 6518(k)(1); 7 U.S.C. § 6518(a)” FAC at ¶ 182 “The USDA’s failure to consult the NOSB prior to publication of each of the three Delay Rules violated the statutory duty to ‘consult with the National Organic Standards Board...’7 U.S.C. § 6503(c).” FAC at ¶ 183

According to the NOSB Vision Statement appearing in the board’s Policy and Procedures Manual at Section I (A),

The NOSB’s vision is an agricultural community rooted in organic principles and values that instills trust among consumers, producers, processors, retailers and other stakeholders. Consistent and sustainable organic standards guard and advance the integrity of organic products and practices. *Available at* <https://www.ams.usda.gov/sites/default/files/media/NOSB-PolicyManual.pdf>

According to Section III (E) of the board’s Policy and Procedures Manual,

The unique nature of the NOSB and its relationship with the NOP, as established through OFPA, requires that the volunteer Board, which regularly receives stakeholder input through public comment, must work collaboratively with the NOP. Similarly the NOP, as required through OFPA, must consult and collaborate with the NOSB *Available at:* <https://www.ams.usda.gov/sites/default/files/media/NOSB-PolicyManual.pdf>

According to Section III (F) of the Policy and Procedures Manual, the board's workplan may include only those items that USDA determines are "within the scope of OFPA." *Available at:* <https://www.ams.usda.gov/sites/default/files/media/NOSB-PolicyManual.pdf>

Defendants recognize that the OFPA duties of the NOSB with regard to the National List are express, but they fail to note the key difference between the statute's use of "shall" with regard to the National List and "shall" with regard to consultation. Section 6517 mandates consultation and also *restricts* expressly the Secretary's options (can't place a synthetic substance on the list without recommendation from NOSB) but that language does not make the use of the word "shall" in other sections non-mandatory. 7 U.S.C. § 6517; *see also* FAC 32-55

Perhaps most importantly, the NOSB: "[S]hall provide recommendations to the Secretary regarding the implementation of this chapter," 7 U.S.C. § 6518(k)(1). Not only is this mandatory, but "implementation" is far closer to the considerations involved in the delay determination than "advise." Equally, the Secretary "shall establish [the NOSB]to assist....and to advise the Secretary on any other aspects of the implementation of this chapter." 7 U.S.C. § 6518(a).. The Secretary: "[S]hall consult with the National Organic Standards Board..." 7 U.S.C. § 6503(c). OTA has alleged shall means shall. FAC at 182. The declarations submitted support this. The declarations also establish the various no-speculative harms that have arisen from the non-consultation and subsequent delay. *See Exhibits 1-7.*

CONCLUSION

For the foregoing reasons OTA respectfully requests the court deny the contested portions of the defendants' motion to dismiss.

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