

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

ORGANIC TRADE ASSOCIATION,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF  
AGRICULTURE, et al.

Defendants.

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

**FIRST AMENDED COMPLAINT**

Pursuant to this Court’s Order of November 20, 2017, Plaintiff Organic Trade Association (“OTA”) files this First Amended Complaint on behalf of itself and its members and alleges:

**INTRODUCTION<sup>1</sup>**

1. 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<sup>2</sup> (“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<sup>3</sup>, a properly promulgated and duly published final rule addressing livestock production practices on federally certified organic farms.

2. In addition to the rulemaking requirements imposed by the APA, the OFPA

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<sup>1</sup> Defendants are referred to herein as “USDA” or “the Secretary” depending on the context.

<sup>2</sup> 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.

<sup>3</sup> 82 Fed. Reg. at 7042-92 (January 19, 2017) (“Organic Livestock Rule”)

mandates USDA “consult” with and consider the advice and recommendations of an expert advisory board, the National Organic Standards Board (“NOSB”), prior to adopting, or amending by rulemaking, organic livestock production standards. Defendants failed to discharge the required duties under each statute respectively.

3. 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 *Organic Livestock and Poultry Practices*, was published by USDA in the Federal Register. 82 Fed. Reg. at 7042-92 (January 19, 2017) (“Organic Livestock Rule”)

4. No party sought reconsideration of the agency’s publication of the Organic Livestock Rule.

5. At the time of publication in January 2017 USDA said:

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 (7 U.S.C. 6508(g)).

\* \* \* [description of dairy pasture access rule of 2010]

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.* (emphasis added).

82 Fed. Reg. at 7082

6. The Organic Livestock Rule was scheduled to take effect on March 18, 2017. *Id.* at 7042.

7. 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 Organic Livestock Rule for 60 days to May 19, 2017. 82 Fed. Reg. at 9967 (February 9, 2017) (“First Delay Rule”).

8. 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) (“Second Delay Rule”)

9. In addition to further delay, on the same day, USDA published a *new proposed rule* styled, “Livestock and Poultry Practices Second Proposed Rule” without prior notice or an opportunity for public comment, or any consultation with the NOSB.

10. USDA invited comment solely on four procedural options:

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

82 Fed. Reg. at 21742 (May 10, 2017) (“the New Proposed Rule”).

11. 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”).

12. The Third Delay Rule was noticed, considered, adopted and published without satisfying the OFPA's pre-rulemaking requirement of consultation with the NOSB. 82 Fed. Reg. 52643-44 (no statement of consultation, its outcome or a proper waiver of the duty)

13. According to the USDA, further delay is necessary, "...to allow for AMS to issue another notice of proposed rulemaking to receive comments on USDA statutory authority under the OFPA to regulate animal welfare; the likely costs and benefits of the Organic Livestock Rule viewed in terms of the statutory objectives of the OPFA, as interpreted above; whether the Organic Livestock Rule requirements represent the most innovate (sic) and least burdensome way to achieve regulatory ends; and the revised calculations and analysis of the benefits of the Organic Livestock Rule." 82 Fed. Reg. 52643

14. The Third Delay Rule attempts to characterize the Organic Livestock Rule as little more than the product of agency confusion, where the agency failed to correctly complete the analyses required under Executive Orders 12866 and 13563 and failed to determine if the OFPA authorized the regulatory terms of the Organic Livestock Rule. To remedy this USDA proposes another round of notice and comment rulemaking at some time in the future which will decide whether the already completed rulemaking should become effective. 82 Fed. Reg. at 52643-44.

15. The final rule was completed and published. However, Defendants are serially imposing fixed-period delays and allowing them to serially expire only to renew them again. The Organic Livestock Rule remains published, yet delayed, and the harm to Plaintiff and Plaintiff's members is ongoing.

16. Additional rulemaking is unnecessary. The face of the Third Delay Rule demonstrates that the USDA's refusal to implement the Organic Livestock Rule arises from purported errors found in the *original record* and not from anything arising from the brief

rulemaking it just concluded. The USDA acknowledged that its intent to further delay the Organic Livestock Rule was supported by only a single comment out of more than 47,000 comments received. 82 Fed. Reg. at 52643-44. Whether the single commenter advanced the statutory construction argument or Executive Order compliance flaws the USDA now advances, is unknown.

17. USDA has delayed more than ten months to propose a *sua sponte* reconsideration of its own final rule, based on a purported *ex post* discovery of a flaw in certain calculations under the Executive Orders and a just discovered worry about its statutory authority. Although the delays began in February 2017, the purported flaw was not discovered until November 2017. Nothing in the OFPA, the APA or the text or controlling constructions of Executive Orders 12866 and 13563 compels or justifies the past or current agency delay to permit the agency to conduct reconsideration of its own rule.

18. The type of post-rulemaking concerns that USDA is expressing are more typically brought by parties to the rulemaking who, objecting to the agency's final action, would have standing to assert such contentions. Here no reconsideration motion was made, and no litigation to delay or strike down the Organic Livestock Rule was enjoined. The sole challenger to USDA's rulemaking is USDA.

19. Because each of the three Delay Rules have the effect of waiving the requirements of, or impermissibly amending, the duly published and promulgated organic standard in the Organic Livestock Rule, each is an arbitrary, capricious and *ultra vires* action under the APA and OFPA.

#### **JURISDICTION AND VENUE**

20. This Court has jurisdiction under 28 U.S.C. § 1331 and § 1361.

21. USDA's Delay Rules and New Proposed Rule are final agency actions subject to judicial review. 5 U.S.C. §§ 702, 704, 706.

22. This Court has the authority to issue the requested declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201-02 and 5 U.S.C. §§ 702 and 706; 28 U.S.C. § 1651 (writs).

23. An actual controversy exists between the parties within the meaning of 28 U.S.C. §§ 2201.

24. Venue is proper in this district because plaintiff Organic Trade Association resides and has its principal place of business in this judicial district, and because a substantial part of the acts or omissions giving rise to the claim occurred in this judicial district. 28 U.S.C. § 1391(c)(2), (e)(1).

#### **PARTIES AND STANDING**

25. Plaintiff the Organic Trade Association ("OTA"), is a membership-based business association for organic agriculture and products in North America and is the leading voice for the organic trade in the United States, representing almost 9,500 farms and organic businesses across 50 states. OTA brings consumers, farmers and livestock growers, ingredient suppliers, processors, manufacturers, distributors, retailers, certifying agents and those in international trade--together to promote and protect the growing organic business sector. OTA's members grow, make, distribute, and certify organic products including livestock products worldwide, with the majority of OTA's members operating both organic and non-organic farms, ranches and businesses. OTA's mission is to promote, develop and protect organic standards, ensure the due process rights of its members, and provide a unifying voice to federal and state entities. OTA worked on the substance of the Organic Livestock Rule for many years and support its adoption

and publication. OTA members are harmed by the failure of the USDA to implement the Final Rule.

26. OTA conducts public and policymaker education and outreach and, when necessary, litigation. 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”).

27. 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.

28. Defendant USDA is a department in the U.S. government charged with administering the Agricultural Marketing Service and implementing the Organic Foods Production Act;

29. Defendant Sonny Perdue (“Secretary”) is sued in his official capacity as the Secretary of the United States Department of Agriculture. The Secretary is the official ultimately responsible for the USDA’s activities and policies and for compliance with the OFPA and the APA.

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

31. Defendants are collectively referred to as “USDA.”

**STATUTORY AND REGULATORY FRAMEWORK**  
**The Organic Foods Production Act, National Organic Program and Role of the National Organic Standards Board**

32. The Organic Food Products Act (“OFPA”) was enacted in 1990 to eliminate a patchwork of state and private organic production and processing standards that resulted in inconsistent organic products, consumer confusion, and fragmented markets for organic producers, processors and products.

33. Congress took an “opt-in” approach to regulating organic products by creating “national standards” solely for those persons that voluntarily choose to produce and market products bearing an “organic” marketing claim. 7 U.S.C. § 6504.

34. For those that “opt-in,” Congress sought to “facilitate interstate commerce” by “establishing national standards governing the production and marketing of certain agricultural products. . . .” in order to “assure consumers that organically produced products meet a consistent standard.” 7 U.S.C. § 6501.

35. There are civil and criminal penalties arising from non-compliance with the national organic regulations. 7 U.S.C. § 6519.

36. Certifying agents have separate and distinct penalties for non-compliance with the national organic regulations. 7 U.S.C. § 6519(e)

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

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

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



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

41. In addition to setting criteria for the holder of each board seat, the statutory criteria also disclose the distinct perspectives that Congress expressly intended the Secretary to meaningfully consult when considering new organic standards, or amending existing ones. 7 U.S.C. § 6518. Unlike many advisory boards, the NOSB is not weighted towards those directly regulated by the National Organic Program. The additional perspectives include consumer interests and the role of consumer expectations in shaping emerging organic norms has been increasingly recognized. *See e.g.*, 82 Fed. Reg. at 7043, 7066 (recognizing consumer expectations in deliberations of NOSB).

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

43. 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).

44. The Secretary: “[S]hall consult with the National Organic Standards Board...” 7 U.S.C. § 6503(c).

45. The Senate Organic Report states: “The Committee regards this Board as an essential advisor to the Secretary on all issues concerning this bill and anticipates that many of the key decisions concerning standards will result from recommendations by this Board.” Senate Committee on Agriculture, Forestry and Nutrition, *Report of the Committee on Agriculture*,

*Forestry and Nutrition to Accompany S. 2830 Together with Additional and Minority Views, 101st Congress, S. REP. NO. 101-357, at 289 (1990) (“Senate Organic Report”) at p. 296.*

46. The USDA’s *NOSB Policy Manual* states: “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.” *NOSB Policy Manual*, at Pg. 26 available

47. The Senate Report demonstrates that the unique and novel public-private partnership adopted by Congress for the USDA and the NOSB was understood and intentional. “[M]uch of this title breaks new ground for the Federal government and will require the development of a unique regulatory scheme.” *Senate Organic Report*, at pg. 293.

48. The Senate Report explains that the new approach of directly involving the advisory board in the development of policy was to ensure a continual updating of organic standards, as occurred here with the Organic Livestock Rule. “The Committee is concerned that production materials and practices keep pace with our evolving knowledge of production systems.” *Senate Organic Report* at 297.

49. Under the Senate’s view, the OFPA creates a unique, collaborative, public-private partnership that ensures a kind of regulatory “continual improvement” model. 7 U.S.C. §§ 6518 and 6518(e).

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

51. The Senate went further, “The Board shall recommend livestock standards, in addition to those specified in this bill, to the Secretary.” *Id.* at pg. 303.

52. The OFPA contains a detailed section setting forth “Animal production practices and materials” 7 U.S.C. § 6509

53. Among the provisions: “[the NOSB] shall recommend to the Secretary standards in addition to those in [the foregoing section] *for the care of livestock to ensure that such livestock are organically produced.*” 7 U.S.C. § 6509(d)(2) (emphasis added).

54. Congress further commanded: “[the Secretary] [S]hall hold public hearings *and shall develop detailed regulations*, with notice and public comment, to guide the implementation of the standards for livestock products...” 7 U.S.C. § 6509(g) (emphasis added).

55. 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”).

### **The Administrative Procedure Act**

56. The APA provides that “[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.” 5 U.S.C. § 702.

57. 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”, or “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.” 5 U.S.C. § 553.

58. The APA defines “rule making” as the “agency process for formulating, amending, or repealing a rule.” *Id.* § 551(5).

59. The APA defines “rule” to include “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). 29.

60. 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).

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

### **FACTUAL ALLEGATIONS**

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

#### **History of Organic Livestock Standards at the National Organic Program**

63. In 1990, Congress expressly required that livestock production practices for organic livestock operations be developed by the Secretary, in consultation with the NOSB, and that public hearings be held to create a robust record.

64. In 2000, the National Organic Program was published, and USDA noted that additional development of livestock production standards was necessary. Since that time, USDA and NOSB have incrementally developed the management protocols and practice standards governing livestock on certified organic farms and have held many, on the record, public

meetings with experts and fact witnesses and developed and published many drafts and substantive recommendations for public comment. *See e.g.* 82 Fed. Reg. at 7045 (reviewing federal register notices of hearings on organic livestock regulations).

65. At the time of publication of the National Organic Program, the Secretary acknowledged that many livestock production questions remained unanswered: “We anticipate that additional NOSB recommendations and public comment will be necessary *for the development of space requirements.*” 65 Fed. Reg. at 80573 (emphasis added). “The NOP will work with the NOSB to develop additional guidance for managing ruminant production operations.” *Id.* “We will continue to explore with the NOSB specific conditions under which certain species could be temporarily confined to enhance their well-being.” *Id.*

66. Shortly thereafter, the NOSB began soliciting public comments on livestock production practices at public meetings.

67. In 2001, the NOSB recommended that the NOP issue more detailed standards for ruminant livestock. *Available at* [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 visited Sept. 12, 2017)

68. In 2002, the NOSB made a recommendation for poultry including outdoor access, stating that outdoor access should include open air and direct access to sunshine. In addition, the May 2002 recommendation stated that access to soil is necessary to meet the intent of the NOP’s requirement for outdoor access for poultry. *Available at* [https://www.ams.usda.gov/sites/default/files/media/Recommended Clarification on Access 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).

69. 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 the 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 21980 (discussion of case).

70. According to the Secretary in 2016, "This Decision served to address a fact-specific enforcement issue. Some certifying agents used this appeal decision to grant certification to poultry operations using porches to provide outdoor access. Thereafter, certification and enforcement actions have remained inconsistent and 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." 81 Fed. Reg. at 21980.

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. 63584, 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.

72. Between 2009 and 2011, the NOSB issued a series of recommendations on livestock production practices that incorporated prior NOSB recommendations that AMS had not addressed. A November 5, 2009 NOSB recommendation suggested revisions and additions to the livestock health care practice standards and living conditions standards.

73. On October 13, 2010, USDA published draft guidance, *Outdoor Access for Organic Poultry*, (NOP 5024) for public comment. The draft guidance advised certifying agents

to use the 2002 and 2009 NOSB recommendations as the basis for certification decisions regarding outdoor access for poultry.

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

75. In October 2010, the NOSB passed a recommendation to allow the administration of drugs in the absence of illness to prevent disease or alleviate pain stating such a change would improve the welfare of organic livestock.

76. 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).

77. On December 2, 2011, the NOSB unanimously adopted a Recommendation entitled “*Animal Welfare and Stocking Rates*” that combined its prior work on animal space requirements and handling, with its prior recommendations regarding animal welfare, handling, transport, and slaughter. *Welfare provisions are available at <https://www.ams.usda.gov/sites/default/files/media/NOP%20Livestock%20Final%20Rec%20Animal%20Welfare%20and%20Stocking%20Rates.pdf> ; Handling provisions are available at*

*[https://www.ams.usda.gov/sites/default/files/media/NOP\\_Livestock\\_Final\\_Rec\\_Animal\\_Handling\\_and\\_Transport\\_to\\_Slaughter.pdf](https://www.ams.usda.gov/sites/default/files/media/NOP_Livestock_Final_Rec_Animal_Handling_and_Transport_to_Slaughter.pdf)* (last visited on September 12, 2017).

78. On March 21, 2012, the Secretary acknowledged the NOSB recommendation on animal welfare and said it would conduct assessments of its regulatory burdens and particularly how certifying agents would monitor and enforce the proposed welfare requirements. Available at <https://www.ams.usda.gov/sites/default/files/media/recommendationsga.pdf> (last visited September 12, 2017).

79. In total, between 1994 and 2011 NOSB made nine recommendations regarding livestock health and welfare in organic production.

80. The NOSB invited public testimony on animal raising practices on approximately eleven occasions between 2001 and 2012, among them were specific instances of public comment opportunities appearing in Federal Register Notices: 67 Fed. Reg. 19375 (April 19, 2002); 74 Fed. Reg. at 46411 (September 9, 2009); 75 Fed. Reg. at 57194 (September 20, 2010); and 76 Fed. Reg. at 62336 (October 7, 2011).

81. In contrast, the USDA has published just two final rules regarding livestock since the passage of the OFPA in 1990 and its implementation in December 2000. 71 Fed. Reg. 32803 (June 7, 2006) (in response to a court order); 75 Fed. Reg. 7154 (February 17, 2010).

82. It is against this overwhelming record of substantive activity that the USDA's brief rulemaking in June 2017 and new legal position on the OFPA and the Organic Livestock Rule must be weighed.

### **The Proposed Organic Livestock Rule**



83. On April 16, 2016, the Secretary proposed the *Organic Livestock and Poultry Practices Rule* (“the Proposed Organic Livestock Rule”) in an extremely detailed 54-page publication. 81 Fed. Reg. at 21,956-22,009 (April 13, 2016).

84. The Secretary estimated that 4,177 currently certified foreign and domestic livestock operations will be subject to the amendments. 81 Fed. Reg. at 22004

85. The Secretary said, “AMS is proposing this rulemaking to maintain consumer confidence in the high standards represented by the USDA organic seal.” 81 Fed. Reg. at 21980.

86. The Secretary said, “[T]he provisions for outdoor access for poultry have a long history of agency and NOSB actions and are a focal issue [here].” 81 Fed. Reg. at 21957.

87. The Secretary 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.” *Id.*

88. The Secretary said, “Potentially affected entities include \* \* \* Existing livestock farms and slaughter facilities that are currently certified organic under the USDA organic regulations. Certifying agents accredited by USDA to certify organic livestock operations and organic livestock handling facilities. *Id.*

89. The Secretary proposed regulatory language for all *mammalian livestock*: “The producer of an organic livestock operation must establish and maintain year-round livestock living conditions which accommodate the health and natural behavior of animals, including: (1)

Year-round access for all animals to the outdoors, soil, shade, shelter, exercise areas, fresh air, clean water for drinking, and direct sunlight, suitable to the species, its stage of life, the climate, and the environment...” 81 Fed. Reg. at 22006.

90. The Secretary proposed regulatory language for all *poultry*: “An organic poultry operation must establish and maintain year-round poultry living conditions which accommodate the health and natural behavior of poultry, including: Year-round access to outdoors; shade; shelter; exercise areas; fresh air; direct sunlight; clean water for drinking; materials for dust bathing; adequate outdoor space to escape from predators and aggressive behaviors suitable to the species, its stage of life, the climate and environment. 81 Fed. Reg. at 22007.

91. The Secretary assessed consumer expectations: “We believe that organic consumers generally have high regard for animal welfare-friendly products.” 81 Fed. Reg. at 21988.

92. The Secretary said, “We believe that the space and 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 21988.

93. The Secretary considered consumer expectations and the impact of extended implementation periods. “Conversely, a 10-year implementation period could erode consumer demand for organic eggs if the organic label requirements do not keep pace with growing consumer preferences for more stringent outdoor living conditions. Prolonging the disparity in organic egg production practices and the resulting consumer confusion would be detrimental to the numerous organic egg producers who could readily comply with this proposed rule.” 81 Fed. Reg. at 21986.

94. The Secretary 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.

95. The Proposed Organic Livestock Rule received more than 6500 comments and an overwhelming number of commenters supported the proposed rule.

#### **The Final Organic Livestock Rule**

96. On January 19, 2017, the USDA issued a 51-page final rule containing extremely detailed standards for production of animals on organic farms entitled *Organic Livestock and Poultry Practices*. 82 Fed. Reg. at 7042-92 (January 19, 2017).

97. The Secretary 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.

98. The Secretary said, “The provisions in this rule on outdoor access for organic poultry have a significant history of AMS actions that are based on National Organic Standards

Board (the NOSB) recommendations. Outdoor access is a prominent issue in this final rule.” 82 Fed. Reg. 7043.

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

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

101. The Secretary dropped specific space requirements for turkeys from the final rule in part because of the “absence of an NOSB recommendation.” 82 Fed. Reg. at 7066.

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

103. The Secretary said, “The NOSB deliberated and made the recommendations described in this proposal at public meetings announced [in the Federal Register] on:

- a. April 19, 2002;
- b. September 9, 2009;

- c. September 20, 2010;
- d. October 7, 2011.”

104. The record demonstrates a deep collaboration between the NOP and the NOSB and repeated and ongoing efforts to gather the necessary information and make the best decisions.

#### **The Three Delay Rules and the New Proposed Livestock Rule and the Proposed Additional Rulemaking**

105. President Trump was inaugurated at noon on Friday, January 20, 2017. Later that day, White House Chief of Staff Reince Priebus issued a “Memorandum for the Heads of Executive Departments and Agencies” (“Priebus Memorandum”). The Priebus Memorandum was published in the Federal Register on Tuesday, January 24, 2017. 82 Fed. Reg. 8346 (Jan. 24, 2017).

106. Among other things, the Priebus Memorandum purports to direct agencies that have promulgated “regulations that have been published in the [Federal Register] but have not taken effect” to “temporarily postpone their effective date for 60 days from the date of the memorandum.” *Id.* The Priebus Memorandum further states that agencies should exclude from delay such regulations that OMB has determined should be excluded because of their impact on “health, safety, financial, or national security matters, or otherwise...” *Id.*

#### **The First Administrative Stay--60 Days**

107. The Organic Livestock Rule was originally set to take effect on March 20, 2017. On February 9, 2017 the effective date was delayed to May 19, 2017. 82 Fed. Reg. at 9967 (February 9, 2017). (“First Delay Rule”).

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

109. The First Delay Rule was not exempt from notice and comment requirements under the APA. It was a final rule that amended an existing, important and duly promulgated regulation.

110. USDA also claimed the First Delay Rule was exempt from notice and comment under the APA because it was “impracticable, unnecessary, or contrary to the public interest pursuant to 5 U.S.C. 553(b)(B).” No factual explanation was given. Because the final rule’s effective date was delayed, there was no reason that notice and comment could not be received, and as further delay is imposed until May 2018, the unexplained impracticability of receiving comments in February 2017 appears incorrect. 82 Fed. Reg. at 9967.

111. At a minimum, comment should have been received on whether the Priebus memorandum applied to duly vetted and promulgated organic standards at all. Organic standards only affect those parties that voluntarily choose to market such products and impose no duty or obligation on persons that do not. Thus, organic standards, like the Organic Livestock Rule, affect only those parties that opt-in to the program and no person’s business is adversely affected by governmental fiat.

112. Thus, had USDA received comment it could have, and should have, seriously considered whether the Organic Livestock Rule fell into the category in the Priebus memorandum of rules that are inappropriate for delay.

113. The Priebus memorandum specifically directed agency heads to consider whether “any regulations” should be excluded from the 60-day delay for “some other reason” than health,

safety, financial, and national security reasons. 82 Fed. Reg. at 8346. The memorandum further directed that the OMB Director would determine whether an exclusion was appropriate. *Id.*

114. Had the USDA sought comment, it could have fulfilled the duty to inform the OMB director of the organic rule's status, and the failure to seek comment foreclosed the possibility that OMB would have let the Organic Livestock Rule move forward on schedule.

115. On April 28, 2017, three hundred and thirty-four (334) certified organic livestock and poultry producers with estimated revenue of \$1.95 billion dollars sent a letter to the Secretary requesting immediate implementation of the Organic Livestock Rule. 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>.*

116. The NOSB conducted its semi-annual public meeting on April 19-21, 2017. 81 Fed. Reg. at 85205 (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 Secretary's First Delay Rule. (transcripts available at: <https://www.ams.usda.gov/sites/default/files/media/TranscriptsNOSBApril2017.pdf>)

117. The USDA ignored this request.

### **The Second Administrative Stay--180 Days**

118. 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)

119. The Second Delay Rule was entitled “Final rule; delay of effective date,” was published without prior notice or an opportunity for public comment, or any meaningful consultation with the NOSB, and delayed the effective date of the Organic Livestock Final Rule by an additional 180 days. 82 Fed. Reg. at 21677.

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

121. USDA again claimed, “good cause” existed for waiving notice and comment and further claimed the 180-day stay was exempt from notice and comment under the APA because it was “impracticable, unnecessary, or contrary to the public interest pursuant to 5 U.S.C. 553(b)(B).” *Id.*

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

### **The New Proposed Rule**

123. That same day, USDA published the New Proposed Rule with four procedural options. The four options presented were:

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

82 Fed. Reg. at 21742 (May 10, 2017).

124. 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. Options (b) and (c) posited indefinite further delay. Option (d) posited unwinding and erasing years of public process by mere fiat. *Id.*

125. USDA asked solely whether the published final Organic Livestock Rule should be implemented as published, further delayed or permanently withdrawn. 82 Fed. Reg. at 21742 (asking solely for comment on the four options).

126. 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 Third Administrative Stay--180 Days**

127. On November 14, 2017, USDA issued another stay of the effective date, this time to May 14, 2018. The stay was styled “Final rule; delay of effective date.” (“Third Delay Rule”) 82 Fed. Reg. 52643.

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

129. The third proposed effective date is more than 14 months after the original effective date of the final rule has passed. *Id.* at 52643.

130. The comments received in the 30-day comment period regarding the New Proposed Rule reportedly exceeded 47,000. 82 Fed. Reg. 52643.

131. AMS acknowledged that “more than 34,600” comments supported immediate implementation of the Organic Livestock Rule. *Id.* at 52643.

132. Upon information and belief, the full administrative record will disclose closer to 45,000 comments supported Option 1.

133. Regarding the commenters supporting its selection of Option 3, USDA stated “...only one chose “Option 3: Delay.” 82 Fed. Reg. 52643.

134. 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.

135. The Third Delay Rule failed to comply with the APA’s notice and comment requirements because the USDA did not meaningfully disclose the scope and intent of its inquiry with the New Proposed Rule and the choice of further delay can only be understood by examining the purpose for which the delay is purportedly required.

136. The rationale adopted for further delay is not rooted in the record made during the pendency of the New Proposed Rule. USDA instead appears to have revisited whatever might have existed in the prior record regarding Executive Orders 12866 and 13563. “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. 52643-44.

137. While contesting the existence of any flaw and whether it constitutes a sufficient factual foundation, or triggers legal authority, to delay a published rule, Plaintiff contends that if a flaw exists, it is harmless error and not prejudicial.

138. In addition, the question whether the OFPA authorizes organic livestock production practices like those published in the Organic Livestock Rule is a purely legal one that was fully vetted and examined in the Organic Livestock Rule. Nothing new has been cited or identified.

139. In the Organic Livestock Rule USDA said, “Several comments argued that USDA does not have sufficient regulatory authority under OFPA to publish final rules for livestock living conditions and animal welfare as described in the proposed rule. They argued that the livestock section of OFPA only provides authority to prepare regulations regarding feeds and animal health care issues.” [USDA response follows]. 82 Fed. Reg. at 7043.

140. Each of the three delay rules is a final rule, and is subject to review by this court. Each of the delay rules is not justified by the terms of the APA, the OFPA, or the Executive Orders cited in the Third Delay Rule.

### **Impact on Plaintiff and Plaintiff’s Members**

141. Plaintiff and its members are injured by the challenged actions because, as organic market participants and consumers, USDA deprived them of procedural and substantive rights, prevented them from meaningfully participating in an important rulemaking process, and further harmed Plaintiff’s members by suddenly halting the implementation of the Organic Livestock Rule after Plaintiff’s members had relied on its adoption to correct consumer confusion and inconsistent applications of the organic regulations to livestock operations. In addition, the deprivation of consultation with the NOSB harms Plaintiff and its members by depriving them of their substantive in

142. Plaintiff and its members have been and will continue to be injured by the USDA’s decision to issue the Delay Rules and any proposed new rulemaking. Plaintiff has expended significant resources for many years to support the collaborative process between the NOSB and NOP on developing detailed organic production standards for livestock and poultry. Plaintiff’s membership includes many parties whose agricultural activities are governed by the standards on livestock and poultry production, including egg production, and have made

investments in reliance on and in anticipation of the implementation of the now delayed final rule.

143. Because of the Delay Rules, Plaintiff has diverted—and will continue to divert—staff time and other resources to efforts that would have been unnecessary had the Organic Livestock Rule been timely implemented. This diversion diminishes Plaintiff’s ability to carry out other responsibilities.

144. Further, three declarations are attached to and incorporated in this Complaint and the statements made therein are fully realleged herein. Each declarant provides insight into the risk of irreparable harm arising from the loss of consumer trust in the federal program upon a record in the last ten months that subverts the nearly 10-year process that comports with the OFPA’s unique public-private partnership requirements. *See Exhibit A: Declaration of Pete and Gerry’s Organics; Exhibit B: Declaration of National Cooperative Grocers; and Exhibit C: Declaration of Accredited Certifiers Association.*

**FIRST CAUSE OF ACTION  
VIOLATION OF THE APA**

145. Each foregoing allegation is re-alleged in this paragraph.

146. The USDA published the Organic Livestock Rule on January 19, 2017 in accordance with the OFPA and the APA with an effective date of March 20, 2017. 5 U.S.C. § 552(a)(1)(D); 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). No party sought reconsideration.

147. The Proposed Organic Livestock rule and the final Organic Livestock Rule set forth sufficient detail to demonstrate the required analysis was in accordance with the agency’s obligations under Executive Order 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) and Executive Order 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

148. 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.” 5 U.S.C. § 551(4). The “effective” date and “implementation” dates based thereon that are set in the Final Organic Livestock Rule are measures “to implement...law or policy.”

149. The First, Second and Third Delay Rules are subject to notice and comment rulemaking because they amend the “effective date” and thus all follow-on implementation dates in the duly promulgated, final Organic Livestock Rule and consequentially alter the legal rights of parties affected by the programmatic changes in the final rule, including Plaintiff’s members.

150. The First, Second and Third Delay Rules are each separately designated by USDA as “final rules” and each standing alone constitutes the consummation of the agency’s deliberative process to block and to continue to block implementation of the Organic Livestock Rule and are thus each separately subject to immediate judicial review;

151. USDA published the First and Second Delay Rules amending the Organic Livestock Rule’s effective date and implementation dates without publishing a notice of proposed rulemaking or providing an opportunity for public comment in violation of 5 U.S.C. § 553.

152. USDA published the Third Delay Rule amending the Organic Livestock Rule’s effective date and implementation dates after publishing a notice of proposed rulemaking that was deficient under the APA because it failed to fairly disclose that USDA intended to conduct a *de facto* reconsideration of the completed proceeding that resulted in the Organic Livestock Rule, and thus deprived Plaintiff and Plaintiff’s members of adequate notice and a meaningful opportunity for public comment in violation of 5 U.S.C. § 553.

153. The substantive matters considered, and the rationale advanced for further delay (the Third Delay Rule), are not a logical outgrowth of the rulemaking noticed by the USDA because each was fully and fairly addressed in the completed rulemaking and are ripe for immediate review in this court.

154. Nothing cited in the record demonstrates the USDA's rationale for the Third Delay Rule is meritorious and on the face of the Proposed Livestock Rule, and the final Organic Livestock Rule, the analysis conducted under Executive Orders 12866 and 13563 was *not* deficient. Equally, the same two documents demonstrate the agency thoroughly assessed and properly concluded the OFPA fully authorizes the provisions in the Organic Livestock Rule. Each of these issues is ripe for review now, in this case. There is no purpose to further development of the record by additional notice and comment rulemaking because it will not alter this court's analysis--which must determine whether the existing, published Organic Livestock Rule may be delayed three times (two of the delay rules have no supporting record) on the instant record, not a record made in the future.

155. The single comment cited by USDA in support of the Third Delay Rule did not, upon information and belief, make the statutory construction argument, flawed Executive Order analysis, or other substantive arguments referenced by the USDA.

156. None of the exceptions to notice and comment in the APA are applicable to the First and Second Delay rules.

157. The Delay rules are each and together a significant and unlawful modification of the livestock production standards that were finalized and published in January 2017.

158. The First, Second, and Third Delay Rules are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” *id.* § 706(2)(A), and were published “without observance of procedure required by law,” *id.* § 706(2)(D).

**SECOND CAUSE OF ACTION  
VIOLATION OF THE APA FOR ACTION UNLAWFULLY WITHHELD**

159. Each foregoing allegation is re-alleged in this paragraph.

160. The USDA published the Organic Livestock Rule on January 19, 2017 pursuant to Congressional mandates set forth in the OFPA and in accordance with the APA. 5 U.S.C. § 552(a)(1)(D); 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).

161. The Proposed Organic Livestock rule and the final Organic Livestock Rule set forth sufficient detail to demonstrate the required analysis was conducted in accordance with and discharged the agency’s obligations under Executive Order 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) and Executive Order 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

162. 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.” 5 U.S.C. § 551(4). The “effective” date and “implementation” dates set in the Final Organic Livestock Rule inescapably are measures “to implement \* \* \* law or policy.”

163. The definition of “agency action” includes a “failure to act.” *Id.* § 551(13).

164. USDA published the Delay Rules on February 9, 2017 and May 10, 2017 and now November 20, 2017 respectively and the Organic Livestock Rule is farther from becoming effective than it ever has been. Presently the Organic Livestock Rule will not become effective until a new rulemaking is conducted and completed—a proceeding that is not yet begun and does not appear in any of the agency’s published workplans and may never occur.

165. Under the approach taken by USDA over the last 10 months, where fixed-period delays are renewed just prior to expiration, the delay is indefinite. The tactic of serial, fixed-period delays forever prevents implementation and may be argued by Defendants as creating mootness that would insulate the tactic from, and improperly evade, judicial review.

166. The Delay Rules have the effect of blocking the Organic Livestock Rule in its entirety and adversely altering the legal rights of affected parties, including certified organic farmers, certifying agents, organic meat processors and consumers of organic products, including Plaintiff's members, for which they have no adequate remedy at law.

167. USDA's extension of the "effective date" three times and failure to timely implement the Organic Livestock Rule upon the effective date set forth in the Organic Livestock Rule constitutes an unlawful "failure to act" pursuant to 5 U.S.C. § 551(13); 5 U.S.C. § 702, 706(1).

**THIRD CAUSE OF ACTION  
VIOLATION OF THE APA: THE USDA FAILED TO EXPLAIN ITS DEPARTURE  
FROM PRIOR CONCLUSIONS**

168. The allegations set forth above are incorporated by reference.

169. USDA published the Organic Livestock Rule on January 19, 2017 pursuant to Congressional mandates set forth in the OFPA and in accordance with its authority under the APA. 5 U.S.C. § 552(a)(1)(D); 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).

170. The Proposed Organic Livestock rule and the final Organic Livestock Rule set forth sufficient detail to demonstrate the required analysis was conducted in accordance with and discharged the agency's obligations under Executive Order 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) and Executive Order 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011)

171. At the time of publication of the proposed organic livestock rule in April 2016,



and the final organic livestock rule in January 2017, USDA made repeated, extensive and unequivocal statements regarding the need for the Organic Livestock Rule, that its publication comported with duties imposed on the Secretary by the OFPA to adopt detailed regulations for organic livestock standards by notice and comment rulemaking, and that it developed those standards in collaboration with, and based upon, the recommendations of the NOSB.

172. The proposed rule and final rule cited to the approximately 10-year record of study, public testimony, NOSB recommendations and revised recommendations as support for the proposals therein. During this ten-year period, and during the rulemaking itself, USDA was comfortable with its legal authority and its analysis and the NOSB's proposals, and the suggestion that it will really "get it right" if only another rulemaking is undertaken, is unsupported and undermined by the record.

173. In stark contrast to the record, just a few short months after publishing the Organic Livestock Rule, USDA issued the first two Delay Rules and the New Proposed Rule claiming nothing more than, "Because there are significant policy and legal issues addressed within the FR that warrant further review by USDA the public is being asked to comment on which of the following four actions [should be taken]" 82 Fed. Reg. at 21742. The options are:

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

174. The Third Delay Rule now posits additional rulemaking to cure purported errors that USDA has uncovered *in the original record* made in the Organic Livestock Rule proceeding. Further delay on the grounds advanced in the Third Delay Rule is unjustified and is a sudden and inexplicable departure from USDA's prior interpretation of the OFPA and its prior conclusions about the importance of the Congressional directive to develop detailed standards for

certified organic livestock and poultry producers, and the need for 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.

175. None of the measures adopted in the Organic Livestock Rule are novel in the context of organic livestock production requirements, and during the rulemaking USDA repeatedly noted that the final provisions are actually in the nature of clarification of the existing regulations. The concerns expressed after January 2017 nowhere explain what in the Organic Livestock Rule is unauthorized by the OFPA or why the prior position of USDA was incorrect.

176. Serially renewed fixed-periods of delay posit indefinite delay in bringing the National Organic Program regulations into full compliance with Congressional intent as expressed in the OFPA and the recommendations appearing in the USDA's OIG Audit Report, and those of the NOSB, and is the legal equivalent of an irrational and sudden departure from past policy.

177. The purported need to conduct additional rulemaking is a red herring because the statutory authority question was fully vetted in the Organic Livestock Rule and there is no legal authority cited in support of USDA's contention that a "do over" is necessary because it failed to properly complete the analysis under Executive Order 12866 and Executive Order 13563.

178. Taken together, the three Delay Rules constitute a reversal of the policy position taken in January 2017 when the Organic Livestock Rule was published and are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of 5 U.S.C. § 706(2)(A).

**FOURTH CAUSE OF ACTION  
VIOLATION OF THE OFPA**

179. Each foregoing allegation is re-alleged in this paragraph.

180. USDA published the Organic Livestock Rule on January 19, 2017 pursuant to Congressional mandates set forth in the OFPA and in accordance with its authority under the APA. 5 U.S.C. § 552(a)(1)(D); 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).

181. The Proposed Organic Livestock rule and the final Organic Livestock Rule set forth sufficient detail to demonstrate the required analysis was conducted in accordance with and discharged the agency's obligations under Executive Order 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) and Executive Order 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011)

182. 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).

183. 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).

184. Continued delay is contrary to the USDA's statutory duty to "develop detailed regulations" regarding organic livestock production practices because delay blocks *all of* provisions, and each delay further unwinds a duly promulgated rule that properly discharged the statutory duty to develop the required "detailed regulations". 7 U.S.C. § 6509 (g).

185. The First, Second and Third Delay rules are each final rules that block duly developed and promulgated organic regulations and for which the NOSB unlawfully was not consulted.

186. The USDA has failed to discharge its duties under the OFPA.

187. The USDA's ongoing failure to implement the Final Organic Livestock Rule erases ten years of collaborative effort with the NOSB and unlawfully blocks a rule based on series of NOSB recommendations that comported with the NOSB's duties.

188. The First, Second and Third Delay rules contravene the USDA's duty to consult the NOSB prior to taking action, and are *ultra vires* and in direct conflict with the OFPA.

**FIFTH CAUSE OF ACTION  
DECLARATORY JUDGMENT THAT THE OFPA AUTHORIZES  
THE ORGANIC LIVESTOCK RULE and  
EXECUTIVE ORDERS 12866 AND 13563 DO NOT COMPEL FURTHER DELAY**

189. Each forgoing allegation is re-alleged in this paragraph.

190. Following publication of the Third Delay Rule, there is now an immediate, live dispute between the parties regarding whether the OFPA authorizes the Organic Livestock Rule. Plaintiff and the USDA in January believe it does.

191. Additionally, there is now an immediate, live dispute between the parties whether the analysis conducted pursuant to Executive Order 12866 and Executive Order 13563 was so flawed as to compel continued delay and a need for further rulemaking.

192. The USDA repeatedly said in its Third Delay Rule that it must conduct further rulemaking to answer a question of statutory construction--whether USDA has "statutory authority to promulgate the Organic Livestock Rule." *Id.* at 52643.

193. This is an abrupt change from January 2017. But there is no need for additional rulemaking because, as USDA acknowledges, the question is whether the Organic Livestock Rule should become "effective" and fully implemented. *Id.* at 52644 ("delay" to allow USDA to make a "final decision on the direction of the OLPP.") Accordingly, it is the published Organic Livestock Rule that must be measured against the text of the OFPA. The Third Delay Rule does

not identify any part of the Organic Livestock Rule that is unauthorized and cannot be used as a springboard to further delay to undertake an unnecessary rulemaking.

194. The specific statutory authority question posed in the Third Delay Rule to justify further delay was asked and expressly answered in the affirmative in January 2017 in the Organic Livestock Rule. 82 Fed. Reg. at 7043-44. The analysis in the existing record is the starting point for this court, not something to be supplanted by some future record as USDA suggests.

195. The question of whether the OFPA authorizes the Organic Livestock Rule is ripe and ready for disposition.

196. Similarly, a strong and reviewable record demonstrating compliance with the duties required under Executive Orders 12866 and 13563 appears in the proposed rule, 81 Fed. Reg. at 21980-998, *and* in the final Organic Livestock Rule. 82 Fed. Reg. at 7082-84 (sections devoted exclusively to the required analysis).

197. No entity sought reconsideration of the Organic Livestock Rule on these, or other grounds.

198. Although the record does not support a finding that USDA failed to complete its duty under the Executive Orders, this court is in the best position to determine if the Third Delay Rule is justified by this contention and should assess not only whether error occurred, but whether the error, if any, was harmless. 5 U.S.C. § 706

199. The Executive Order issue identified in the Third Delay Rule cannot justify the First and Second Delay rules which were issued prior to USDA's purported discovery of this issue.

200. There is no need to conduct additional rulemaking to assess whether a mistake was made in the prior administrative record. The Organic Livestock Rule is published and any concerns that it is not authorized by the record, or by legal authority, can be evaluated and fairly addressed in this litigation.

201. Resolution of these questions will conserve judicial, agency and party resources as it will answer questions that USDA claims underpins its Third Delay Rule—if the OFPA question is answered affirmatively, the need for rulemaking and follow-on litigation dissipates. Likewise, if a flawed analysis under the Executive Orders does not authorize implementation delay, or if there was no error, then the same benefit applies.

#### **REQUEST FOR RELIEF**

For the foregoing reasons, Plaintiff respectfully requests that this Court:

202. Declare USDA’s First, Second and Third Delay Rules were each published “without observance of procedure required by law,” in violation of the APA, 5 U.S.C. § 706(2)(D) and are void *ab initio*;

203. Declare USDA’s First, Second and Third Delay Rules are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” in violation of the APA, 5 U.S.C. §706(2)(A) and are void *ab initio*;

204. Declare the First, Second and Third Delay Rules are in violation of the OFPA’s mandatory consultation requirements and are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” in violation of the APA, 5 U.S.C. §706(2)(A) and are void *ab initio*;

205. Declare the First, Second and Third Delay Rules are *ultra vires* under the OFPA’s mandatory consultation provisions and are void *ab initio*;

206. Declare the purported error in the analysis conducted under Executive Orders 12866 and 13563 identified in the Third Delay Rule is non-existent, or if it exists, that it is harmless and not prejudicial;

207. Vacate the First, Second and Third Delay Rules *ab initio* and issue an Order that the Organic Livestock Rule is “effective” as of a date appearing therein, following a court proceeding to adjust the implementation dates to avoid prejudice to any party;

208. Declare the Organic Livestock Rule does not violate or exceed the authority of the agency under the OFPA;

209. Enjoin USDA from further delay in implementation of the Organic Livestock Rule;

210. 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

211. Grant Plaintiff such other injunctive and/or declaratory relief as the Court deems just and equitable.

Respectfully Submitted:

/s/ William J. Friedman  
William J. Friedman (*admitted pro hac vice*)  
107 S. West St.  
Alexandria, VA 22314  
Tel.: 571.217.2190  
Email: pedlarfarm@gmail.com

/s/ Andrea M. Downing  
Andrea M. Downing  
Wade, Grimes, Friedman,

Meinken & Leischner, PLLC  
616 North Washington Street  
Alexandria, Virginia 22314  
(t) 703-836-9030  
(f) 703-683-1543  
downing@oldtownlawyers.com

Counsel for OTA