UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ORGANIC TRADE ASSOCIATION, **Plaintiff,** **v.** **UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,**	**Civil Case No. 1:17-cv-01875-PLF** **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON ITS THIRD AMENDED COMPLAINT** **[Oral Argument Requested]**

Plaintiff OTA respectfully and timely submits this Memorandum of Law in support of its summary judgment request.

INTRODUCTION

This case involves the Congressionally mandated regulation of our nation's organic food marketplace. It presents two first impression statutory construction questions arising under the seminal enactment, the Organic Foods Production Act. Like many cases over the last several years, it also includes an Administrative Procedure Act challenge to a rather impactful agency course reversal undertaken by the prior administration. The final rule had the misfortune to be published in the waning hours of the Obama administration thus it immediately drew the Trump administration's fire for what the administration calls its unlawful, "stand-alone animal welfare standards."[1]

What did the Department object to? It rejected prohibitions against unnecessary and disfavored livestock rearing practices such as—flat cages and cage stacking for piglets, teeth clipping and tail docking of pigs, debeaking and forced molting for chickens, denooding of turkeys, and similarly rejected prohibitions on minimally humane euthanasia practices,

[1] In fairness, the *Final Withdrawal Rule* also noted the rescission of the *OLPP* was "a deregulatory action under Executive Order 13771." 83 Fed. Reg. at 10,775

prohibitions on denial of pain medication during livestock surgery and decreased indoor stocking densities for birds adopted to ensure a bird can at least flap its wings. Each of these reasonable prohibitions was fully reversed and extinguished when the *OLPP* was rescinded. The Department also, perhaps most controversially, relieved very large organic egg producers of the impact of the *OLPP* on multi-story aviaries that allow birds to exit the aviary only onto off-the-ground and covered "porches." The *OLPP* prohibited "outdoor space" that has less than 50% soil and accompanying vegetation. This ensured all livestock, including chickens, have "access to the outdoors" that means direct contact with the Earth. This likely disqualifies most multi-story aviaries because they do not provide "access to the outdoors" that comports with the updated definition.

In January 2017, the USDA published the *Organic Livestock Production Practices Final Rule* ("the *OLPP*"). The *OLPP* was the product of more than ten years of public process arising from "recommendations provided by USDA's Office of Inspector General and nine separate recommendations from the NOSB." 82 Fed. Reg. 7082. The NOSB recommendations accepted by the Secretary were based on long- standing and well-settled agency constructions of the OFPA with regard to on-farm practices for the care of organically produced livestock, and the role of the NOSB in developing those practice standards. The *OLPP* clarified and extended *existing* animal care practice standards for designating livestock as "organically produced" under Sections 205.238, 205.239 and 205.240. 82 Fed. Reg. 7042 (January 19, 2017). In response to comments USDA carefully posed a six-year implementation period with an effective date of February 20, 2017.

After the transition to the new administration, USDA suddenly reversed course and embarked on a single purpose, fourteen-month course of interlocking administrative actions that unfolded across five rulemakings and seven Federal Register publications wherein USDA

conducted a rolling, *sua sponte* reconsideration of its *OLPP*.[1] Following receipt of over 63,000 comments to the contrary (and only 50 in support of withdrawal), the *Final Withdrawal Rule* was publishedin March 2018.[2]

Not content to extinguish the *OLPP,* the Secretary went so far as to note nearly all existing regulations governing "organically produced" livestock were now likely *ultra vires.* 83 Fed. Reg. at 10779. The Secretary's novel and erroneous construction of the OFPA conflicted with every prior administration's approach to rulemaking regarding organic livestock since the passage of the Act in the early 1990's and violated multiple requirements of the Administrative Procedure Act ("APA").

STATUTORY AND REGULATORY BACKGROUND

The statutory and regulatory background to this case has been set out in prior pleadings and this court's memorandum opinion. *See* ECF No. 34; *see also* TAC ¶¶ 18-40 (The Organic Foods Production Act, National Organic Program and Role of the National Organic Standards Board); TAC ¶¶ 41-46 (Administrative Procedure Act); TAC ¶ ¶ 47-54 (Executive Order 12,866); TAC ¶¶ 55-60 (Factual Allegations); TAC ¶¶ 61-89 (History of Organic Livestock Standards at the National Organic Program).

PROCEDURAL BACKGROUND

TAC ¶¶ 90-117 (The Proposed Organic Livestock and Poultry Practices Rule); TAC ¶¶ 118-127 (The Final Regulatory Impact Statement); TAC ¶¶ 128-156 (The three delay rules); TAC ¶ ¶ 157-164)(The Proposed Rescission and RIA); TAC ¶¶ 165-210 (The Rescission and Final RIA); TAC ¶¶ 210-234 (Market Failure allegations); TAC ¶¶ 234-244 (The Remand and two staff economist reports); TAC ¶¶ 244-257 (Count 1): TAC ¶¶ 257-268 (Count 2); TAC ¶¶ 269-275 (Count 3); TAC ¶¶ 275-280.

ARGUMENT

OTA IS ENTITLED TO SUMMARY JUDGMENT ON COUNT TWO VIOLATION OF OFPA AND APA[2] (Arbitrary and Capricious Secretary Action and Action in Excess of Statutory Authority)

In January 2017 the Department published the OLPP. The final rule expressly relied on Sections 6501, 6509 and 6513[3] of the OFPA. *See* 82 Fed. Reg. at 7043-44. The Department noted its reliance was consistent with long-standing Department policy. 82 Fed. Reg. at 7044 ("AMS has already exercised this authority to implement additional regulations regarding feed and living conditions for organic livestock, 75 Fed. Reg. 7154 (February 17, 2010."); *see also* 7 C.F.R. 205.238-40 (requirements for "organically produced livestock" such as shade, water, outdoor access etc.)

In December 2017, less than twelve months later, the Department proposed to rescind the *OLPP* "in light of its [new] interpretation of the scope of authority granted to USDA by OFPA….". 82 Fed. Reg. 59,998. The Department proposed the "threshold question" is whether "Congress authorized the proposed action." *Id.* OTA's comment answered yes and pointed out that in addition to the plain language of Sections 6501, 6509 and 6513 relied upon in the *OLPP*, that Sections 6506 and 6511 of the Act, "plainly and unambiguously" authorized the *OLPP*.

OTA Comment at 8; *Id.* at 9 ("Section 6509 is *not* the only section of the OFPA that authorizes the OLPP."). The proposed rescission focused instead on a single statutory section: "USDA believes 7 U.S.C. 6509 is the [only] relevant authority for OFPA-related regulations

---

[2] Count Two of the Third Amended Complaint, Dkt. No.121, (¶¶'s 258-268) alleges the Department mistakenly concluded it lacked statutory authority to promulgate the *OLPP*, at ¶ 267, and that the *Final Withdrawal Rule's* construction of the OFPA generally and its construction of Section 6509 specifically, is unreasonable.

[3]. *See* 82 Fed. Reg. at 7085 ("OFPA authorizes the further development of livestock production standards (7 U.S.C. 6513(c)).

governing animal production practices." 82 Fed. Reg. at 59,989. OTA's comment informed the Department its construction was "manifestly incorrect" and the focus on a single statutory section "misplaced." *OTA Comment to Proposed Withdrawal,* at 7.

In March 2018, the Department published the *Final Withdrawal Rule* and said, "AMS maintains its interpretation that OFPA does not provide authority for the OLPP final rule" and characterized the *OLPP* as "broadly prescriptive stand-alone animal welfare regulations" that are fatally infirm because the, "OFPA does not provide authority for the OLPP…"[4]; *Final Withdrawal Rule,* 83 Fed. Reg. at 10,776. The Department rejected OTA's comment that Sections 6506 and 6512 are unambiguous delegations, summarily stating they "do not convey unfettered discretion" and that the animal care provisions of the *OLPP* are not "necessary." 83 Fed. Reg. at 10,778. Instead, the Department returned to its focus on a single section of the Act.

> [N]othing in Section 6509 authorizes the broadly prscriptive, stand-alone animal welfare regulations contained in the OLPP final rule. 83 Fed. Reg. at 10,776.

In sum, the Department concluded the rescission of the OLPP was commanded by the limitations imposed by Section 6509 to adopt regulations for livestock that are "organically produced." As is demonstrated below, the Department's construction fails under either Step 1 or Step 2 of the analysis required under *Chevron.*

A. The Plain Text of OFPA Unambiguously Delegates Sufficient Rulemaking Authority to the Secretary to Promulgate the OLPP.

The scope of an agency's statutory authority to act is reviewed under the principles set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under step

[4] Defendants also declared the organic livestock regulations that pre-existed the *OLPP* and had been accepted since the National Organic Program began more than twenty years ago, may likely be *ultra vires* under the same analysis. *Final Withdrawal Rule,* 83 Fed. Reg. at 10,779. (Defendants may "in the future" invalidate the pre-existing livestock regulations on the same grounds as here as part of "the regulatory reform review." [7 C.F.R. ¶¶'s 205.238-40]).

one of the *Chevron* analysis, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. Courts utilize "traditional tools of statutory construction" to determine whether Congress has unambiguously expressed its intent. *Serono Lab'ys, Inc. v. Shalala*, 158 F.3d 1313, 1319 (D.C. Cir. 1998). Here, Congress spoke to the precise question—adoption of additional standards for livestock that are "organically produced"—Section 6509(g)(2) and spoke to the nature of the regulations that were required—Section 6509(d)(2) (requiring new standards be "in addition to" those in Section 6509(2)1).

To discern Congressional intent a court must look at the entire Act. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007) ("In making the threshold determination under *Chevron,* a reviewing court should not confine itself to examining a particular statutory provision in isolation.") (internal citations and quotation marks omitted by Plaintiff); *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson,* 559 U.S. 280, 290 (2010) (court noting duty is "to construe statutes, not isolated provisions."); *see also Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 349 (D.C. Cir. 2019) ("[I]n expounding a statute, we must not be guided by a single sentence ... but look to the provisions of the whole law." (quoting *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 895 F.3d 90, 97 (D.C. Cir. 2018)) Review of the *entire* Act demonstrates the Department's singular focus on Section 6509 resulted in a truncated analysis that must be reversed.

Congress delegated broad authority to the Secretary to "establish national standards" for all "agricultural products" moving in interstate commerce that are labeled "organically produced." *See* Section 6501(1) This includes "products derived from livestock." *See* Section 6502(1). Furthermore, the Act includes an additional specific delegation regarding standards for "organically

produced" livestock—"The Secretary shall…develop detailed regulations…for livestock products."[5] *See* Section 6509(g)(2) (Animal Production Practices and Materials)

In addition to the foregoing unambiguous delegations of rulemaking authority, Plaintiff repeats the additional authorizing sections cited by Plaintiff in its comment opposing rescission:

- Section 6503 ("National Organic Program")-- the "Secretary **shall** establish an organic certification program" for "agricultural products that have been produced using organic methods as provided in this chapter." *See* Section 6503(a);

- Section 6506 (a)(11) (General requirements)-- "A program established under this chapter **shall** require such other terms and conditions as may be determined by the Secretary to be necessary."

- Section 6509 (Animal production practices and materials)-- the Secretary "**shall** develop detailed regulations… [for]… for livestock products provided under this section. This directive was augmented by Section 6509 (d)(2)'s requirement that the NOSB recommend to the Secretary standards "for the care of livestock to ensure that such livestock is organically produced."

- Section 6512 (Other production and handling practices)[6]--"If a production or handling practice is not prohibited or otherwise restricted under this chapter, such practice shall be permitted unless it is determined that such practice would be inconsistent with the applicable organic certification program."

- Section 6521 states, the Department "**shall issue** . . .regulations to carry out [the OFPA]."

The authorizations above demonstrate the Secretary "has been charged with broad responsibilities for the orderly development of an appropriate system" of producing and marketing "organically produced" agricultural products in the United States. *See e.g. United States v. Sw. Cable Co*., 392 U.S. 157, 172 (1968) (refusing to restrictively construe broad grant of authority to FCC-recognizing national market purpose); *accord Motion Picture Ass'n of Am., Inc. v. F.C.C.*, 309

[5] The Department's mistaken analysis of Section 6509 is addressed below.

[6] A recent federal court decision found USDA attributes the same meaning to this section as Plaintiff does here. "USDA reads this provision as a Congressional directive to permit and regulate a broad range of production practices." *Ctr. for Food Safety v. Perdue,* No. 20-CV-01537-RS, 2021 WL 1220949, at *7 (N.D. Cal. Mar. 19, 2021) Perhaps it was USDA's brief in that case that got the win: "And the OFPA's broad grant of authority to USDA to develop the national organics program authorizes USDA to establish standards for other or new production and handling systems." *Brief of the United States.* Dkt. No. 23, at p. 10.

F.3d 796, 804 (D.C. Cir. 2002) (Communications Act was "implemented for the purpose of consolidating federal authority over communications in a single agency to assure "an adequate communication system for this country.")

The foregoing sections, without turning yet to the precise problems with the construction given Section 6509 in the *Final Withdrawal Rule,* when taken together demonstrate a capacious delegation of authority to enact regulations governing the farming and handling together practices for "organically produced" agricultural products, including livestock products.[7] *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 296 (2013) ("Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.") The foregoing, when read in light of Sections 6501 and 6509, demonstrate that Congress *never mentioned* a proscription on the type or form of regulation, and certainly expressed no intent to prohibit regulations to ensure the welfare of livestock on certified organic farms. *See Section B, infra.* If the Department reasonably determined that "organically produced" livestock includes ensuring the welfare of farm animals, the cited sections unambiguously authorize such regulations and that is an end to the matter.

If any doubts remain Sections 6506 and 6512 put them to rest. Section 6509 authorizes the Department to determine whether *any* farming or handling practice for a covered agricultural product such as livestock, is inconsistent under the program authorized by Section 6503, and may therefore be disallowed. Section 6512 expressly delegates a negative power—*any livestock production practice* may be a disallowed if determined "inconsistent" with the Secretary's program

[7] The unlawful construction that the Department gave Section 6509, in reliance on two dictionaries instead of the statutory definition, is addressed under *Chevron* Step 2. *See Section B, infra*..

authorized under Section 6503.[8] Section 6506 authorizes any measure the Secretary determines to be "necessary" including prohibitions on "inconsistent" livestock rearing practices. This is precisely what the Secretary determined and the *OLPP* accomplished after ten years of public process--certain outdated and unnecessary livestock rearing practices not presently prohibited were determined inconsistent with the requirements of the program created under 6503. *See OLPP,* 82 Fed. Reg. at 7045-051 ("Summary")

The five separate statutory sections that delegate rulemaking authority discussed here, taken together, unambiguously demonstrate Congresses' intent to delegate broad rulemaking authority to the Secretary to promulgate regulations for livestock that are "organically produced." *Chevron*, 467 U.S. at 843 n.9, ("If a court, *employing traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.") There is nothing in the cited sections that is ambiguous or cabins the broad delegations and the *Final Withdrawal Rule* points to no such limiting statutory language. "When the statute is clear, the text controls and no deference is extended to an agency's interpretation in conflict with the text." *Adirondack Med. Ctr. v. Sebelius*, 29 F. Supp. 3d 25, 36 (D.D.C. 2014) (citing *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195 (2011)). The conclusion in the *Withdrawal Rule* is in direct conflict with the plain language of multiple sections, including Section 6509.

The Department's analysis and construction of Section 6509 is unavailing for several reasons. *See also Section B, infra.* Most importantly, it did not conclude the Section was ambiguous, it concluded its new interpretation of Section 6509 unambiguously foreclosed the *OLPP*. 83 Fed. Reg. at 10,776-77 ("Therefore section 6509 does not provide authority for [OLPP].") It is well settled that absent an ambiguity that the agency resolves, no deference is due

[8] For example, this authority underpins the Secretary's designation of genetic engineering as a "excluded method." *See* 7 C.F.R. 205.2. Moreover, this section is especially important because the *OLPP* disallowed a poultry production practice that had been allowed, the use of "porches."

its interpretation as to the scope of its authority. *See e.g. City of Arlington Tex. v. FCC*, 569 U.S. 290, 296 (2013); *accord Helicopter Ass'n Int'l., Inc. v. FAA*, 722 F.3d 430, 433 (D.C. Cir. 2013) ("[D]eference by the court extends to the agency's interpretation of *statutory ambiguity* that concerns the scope of the agency's jurisdiction.") (emphasis added by Plaintiff) Moreover, the Department purports to find a restriction in a section actually *authorizing* new livestock standards. When Congress wanted to restrict the delegation of authority under the OFPA, it did so expressly. *See* 6517(d)(2) (Secretary may not include exemptions for the use of specific synthetic substances in the National List [except those recommended by the NOSB]"). *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544. ("Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.")

When the simple and direct language of Section 6517's restriction is compared to the twisted path taken in the *Final Withdrawal Rule* to transform a statutory delegation of rulemaking authority for organic livestock standards into a near nullity, it is apparent that the *Final Withdrawal Rule* cannot stand Congress intended for the Secretary to do exactly as was done in the OLPP and did not hide a limitation based on an "overarching purpose" that is nowhere in the statute. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 467–68 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

The Department's determination went far past what was purportedly ambiguous in Section 6509 and ignored and contradicted the plain and unambiguous delegations cited above. *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 481 (2001)(reversing where "[T]he agency's interpretation goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear."). Moreover, any ambiguity introduced to Section 6509's plain terms was introduced by the

Department's failure to apply Congresses' definition of "organically produced" instead of one it plucked from a dictionary. 83 Fed. Reg. at 10,776-77 (Section 6509 analysis based on the erroneous statement that "Congress did not define "organically produced in the OFPA"). The failure to correctly apply the statutory definition meant the analysis ignored the "text" of the OFPA, and as is demonstrated below, irrevocably lead to the agency misreading the "structure" of Act and structure of Section 6509. *Hearth, Patio & Barbecue Ass'n v. U.S. Dep't of Energy*, 706 F.3d499, 504 (D.C. Cir. 2013) (reviewing court must consider "the text, structure, purpose, and history of an agency's authorizing statute") These failures caused the Department to mistakenly void the unambiguously broad and comprehensive delegations in the OFPA cited above. *National Broadcasting Co. v. United States*, 319 U.S. 190, 214, 216 (1943) (internal quotation marks omitted)("To define the scope of delegated authority, we have looked to the text in "context" and in light of the statutory "purpose.")

Here the traditional tools of statutory construction demonstrate quite conclusively that Congress spoke directly to the issue--promulgation of livestock regulations--mandating they be adopted by notice and comment procedures. Despite this the Department concluded it lacked authority and rescission was compelled. It is a foundational principle of administrative law that a federal agency's rule that is based on the unjustified assumption that Congress has commanded it, must be invalidated. *Sec.& Exch. Comm'n v. Chenery Corp*., 318 U.S. 80, 94 (1943) ("… an order may not stand if the agency has misconceived the law.); *see e.g. Mozilla Corp. v. Fed. Commc'ns Comm'n*, 940 F.3d 1, 38 (D.C. Cir. 2019) (declining to apply doctrine; noting "we must remand a decision when the agency rests its result on a mistaken notion that it is compelled by statute."); *Prill v. NLRB*, 755 F.2d 941, 947–948 (D.C. Cir. 1985). The Department determined the *OLPP* was a "broadly prescriptive animal welfare regulation" that must be rescinded because the,

"OFPA does not provide authority for the OLPP…" *Final Withdrawal Rule,* 83 Fed. Reg. 10776. This conclusion is wrong.

B. The Final *Withdrawal Rule* is Based on a Legal Error—The Rule used Two Dictionary Definitions instead of the Definition of "organically produced" in the Act. The Department's Construction of Section 6509 is in Conflict with the Act and is not a Permissible Construction.[9]

The Department concluded "nothing in Section 6509 authorizes [the OLPP]" and its recission was based on a "permissible statutory construction." 83 Fed. Reg. at 10,777. The Department is wrong. *Chevron*, 467 U.S. at 843–44. (deference is due "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.") There was no gap to fill or ambiguity to resolve. The Department created a gap by ignoring the statutory definition, then filled the gap with two dictionary definitions to produce the result, which conflicts with the cited sections of the Act.

1. The *Withdrawal Rule* impermissibly and unreasonably ignored and overwrote Congresses' definition of "Organically Produced" in the Act.

The *Withdrawal Rule* stated:

> [S]tandards promulgated pursuant to section 6509(d)(2) and section 6509(g) must be relevant to ensuring that livestock is ''organically produced. Although Congress *did not define the term* "organically produced, the Cambridge Dictionary defines "organic"…'' 83 Fed. Reg. at 10,777 (emphasis added by Plaintiff).

But Congress *did* define "organically produced." *See* Section 6502(14) Leaving aside how the agency charged with enforcing the OFPA's requirements could have overlooked the meaning of "organically produced" appearing in the Act, the Department's reliance on its own dictionary-based definition renders its construction facially unreasonable under the APA. *Stenberg v. Carhart,* 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow

that definition ...."); 2A N. Singer & J. Singer, Sutherland on Statutory Construction § 47:7, pp. 298–299, and nn. 2–3 (7th ed.2007).

The Department's erroneous abandonment of Congresses' definition ran afoul of other applicable canons of construction. For example, the Department is bound by "the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014) Additionally, "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (citation omitted and formatting modified) The abandonment of the statutory definition impermissibly rendered it superfluous or void and the substitution of the Department's dictionary definition was a "rewrite" that renders its analysis facially defective and unreasonable.

Perhaps most damaging to Department's argument, the failure to deploy Congresses' definition of "organically produced" led the Department to seriously misunderstand and mischaracterize the overall structure and purpose of the OFPA. Thus, even if some aspects of the OLPP such as certain provisions pertaining to physical alterations—can be characterized as relating to ''health care,'' AMS finds that they are not related to the OFPA's overarching purpose of regulating the use of chemical and synthetic substances in organic farming. Therefore, section 6509 does not provide authority for those provisions. 83 Fed. Reg. at 10,777.

In the space of a few pages the Department went from erroneously stating Congress did not define the term "organically produced" to concluding its dictionary definition frames the "overarching purpose" of the OFPA. But Congress nowhere stated even a single purpose, much less suggested that OFPA's "overarching purpose" was to exclude synthetic substances. In fact it is agency gloss that is inconsistent with the plain words of the Act, Congressional intent, and should be rejected. *See e.g. Shays v. FEC*, 414 F.3d 76, 105 (D.C. Cir. 2005) (vacating agency rules

at *Chevron* step one because the agency's too "narrow interpretation of" a statutory term was "implausible," and acknowledging that the district court reached the same result at *Chevron* step two).

First, Congress plainly stated three "purposes" of the OFPA—not one mentions synthetic substances or anything remotely like the Secretary's dictionary definition. *See* Section 6501. On this ground alone the Department's reliance on its own definition of "organically produced" to redefine the "purposes" of the OFPA must be rejected. "Statutory definitions control the meaning of statutory words ... in the usual case." *Burgess v. United States*, 553 U.S. 124, 129–30 (2008) quoting *Lawson v. Suwannee Fruit & S.S. Co.,* 336 U.S. 198, 201 (1949). Congress did not use the word "synthetic" or "chemical" when fixing the purposes of the Act and such misreading cannot be used to cabin an otherwise clear delegation of rulemaking authority.

Second, Congress expressly *allowed* the use of synthetic substances in "organically produced" livestock production. Section 6504(1) Section 6509 recognized the use of two allowed synthetic substances, vaccines and internal parasiticides. Section 6517(b) expressly created a pathway for the approval of *additional* synthetic substances for use in organic production of livestock. The allowance of synthetic substances in livestock that is "organically produced" means their use is *consistent* with the Act and *consistent* with Congresses' definition of "organically produced" It is inconsistent only with the Department's dictionary. Plaintiff's reading comports with the agency's longstanding determination that synthetic substances are allowed in organic livestock production. *See e.g.* 7 C.F.R. 205.603 (Synthetic substances allowed for use in organic livestock production)(two pages of "allowed synthetics").

Third, Section 6509 (Animal production practices and materials) does not prohibit the use of a *single synthetic substance.* Instead, it recognizes their use and prohibits only their use to "stimulate growth", 6509(c)(3), or in the case of "synthetic internal parasiticides" prohibits their

use on a "routine basis. Section 6509(d)(3). The Department's attempts to construe the OFPA to suit its needs in the rescission, and against the plain language of the OFPA and its own past constructions which have held steady since the NOP was initially created, is plainly unreasonable.

Last, the distance between the Department's version of the OFPA and the purposes Congress selected is vast. Congress placed its definition of "organically produced" in each of the three purposes it set forth in Section 6501. *See* Section 6501 (1)-(3). It defined the term in Section 6502. The *Withdrawal Rule* wrote them out of the "purposes" section. Congress placed its definition in Section 6509. The *Withdrawal Rule* wrote it out. *D.C. v. U.S. Dep't of Agric.,* 444 F. Supp. 3d 1, 25 (D.D.C. 2020 (finding statutory classification "plainly limits USDA's discretion" reversing because "USDA has arbitrarily written this distinction out of the Rule.")

The significance of Congresses' definition can only be fully understood by reading Section 6509 in the context of the entire Act, which the Department failed to do. *See, e.g.*, *Genus Med. Techs. LLC v. United States Food & Drug Admin.,* 994 F.3d 631, 641 (D.C. Cir. 2021) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (internal marks and citations omitted by Plaintiff)

Plaintiff turns now to the correct construction of Section 6509.

2. When the Erroneous Dictionary Definition is Discarded, the Secretary's Construction of Section 6509 is Patently Unreasonable.

The *OLPP* expressly relied on Sections 6501, 6509 and 6513 of the OFPA. Once the Department's dictionary is stowed, and the statutory definition is used, Section 6509 is easily demonstrated to sustain the *OLPP* and the construction advanced in the *Final Withdrawal Rule* is unreasonable and impermissible.

Section 6509(d)(2) authorizes the NOSB to recommend and the Secretary top adopt "standards in addition to" those that appear in the preceding paragraph provided the additional standards are "for the care of livestock to ensure such livestock is organically produced." We already know that this means it must ensure that livestock meet any mandatory feature of the OFPA. Section 6509(d)(1) sets out three "prohibited practices" and nothing more. Thus a recommended standard clears the required statutory hurdles as long as it "in addition to" the ones in the preceding paragraph, is "for the care" of livestock and does not contravene the definition of "organically produced" as Congress defined it in the Act.

The Department's *Withdrawal Rule* concluded that Section 6509(d)(2)'s authorization for new standards was strictly cabined by the list of prohibitions in (d)(1) to, "standards….ensuring that organic livestock is raised with minimal administration of chemical and synthetic substances." 10,777. The Department's additional, extra-textual requirement that *any* standard for organically produced livestock be related to restricting synthetic substances is the product of its use of a the dictionary rather than the statutory definitions. It is mere gloss and should be rejected.

Moreover, the Department's construction cannot be squared with the plain terms used in Section 6509. Section 6509(d)(1) only contains "prohibitions." There would be no national production program under Section 6503 for "organically produced" livestock if all that could be added to the OFPA's requirements for the care of livestock were further prohibitions, as the Department argued. Second, Section 6509(d)(2) only requires that the additional standards be "in addition to" not "similar" or "for the same purpose as" the prohibitions in (d)(1). Third, the requirement that new standards be "for the care of livestock" demonstrates standards beyond the prohibited practices described in (d)(1) are not restricted to "healthcare" measures. Had Congress intended to limit the new standards to merely extend the prohibitions appearing in (d)(2) it could easily have used the word "healthcare" or "additional prohibitions" or some other similar restrictive

term. Instead Congress broadly authorized any standard that was "for the care" of livestock provided only that each be in addition to the three prohibitions appearing in (d)(2). *See New York v. EPA*, 443 F.3d 880, 887 (D.C. Cir. 2006) (setting aside an agency action, albeit at *Chevron* step one, based on an interpretation "contrary to '[the] cardinal principle of statutory construction' " that words in the statute should not be made "insignificant" or "superfluous")

Section 6509(g)(2), which was also referenced when the OLPP was promulgated, in no way supports the restrictive reading of Section (d) relied upon by the Department. Instead, it broadly commands that the Department "shall develop detailed regulations….for standards for livestock products." But the Department's review of 6509(g) was tainted by its earlier misreading of the OFPA.

AMS now believes that the authority granted in section 6509(d)(2) and section 6509(g) for the Secretary to issue additional regulations fairly extends only to those aspects of animal care that are similar to those described in section 6509(d)(1)—*i.e.,* relate to the ingestion or administration of non-organic substances.

Nothing in the OFPA, or Section 6509 expressly states livestock standards be restricted to ones that relate to ingestion or administration of synthetic chemicals. Nothing in the OFPA, or Section 6509, can be reasonably read to impose the outdated idea on the modern organic industry In fact the language "for the care of livestock" is broad and appropriately fettered by the requirement that no new standard contravene the other relevant sections of the Act that are imported to Section 6509(d) by its express reliance on the "organically produced" definition. Similarly, nothing in the history of the Department's implementation of this Act suggests such a construction has ever considered and the existing rules for "organically produced" livestock are in conflict with this unreasonable outlier view. *Compare* 7 C.F.R. 205.238-239 (pre-existing livestock regulations).

Last, the requirements for the care of livestock in the OLPP are most commonly viewed as "prohibitions" on livestock rearing practices that are contrary to modern concepts of animal welfare. *See Appendix B.* (listing each OLPP provision; noting the prohibited practice) A few examples will suffice—

Requiring adequate shade	Prohibiting overexposure to sunlight
Requiring access to the outdoors	Prohibiting indoor confinement
Requiring adequate feed and water	Prohibiting deprivation of food and water

Even if Section 6509 (d)(1) somehow cabined the delegation to adopt new standards for organically produced livestock that were themselves further "prohibitions" the OLPP's new standards easily meet this requirement. The Department's conclusion that Section 6509 bars the adoption of the OLPP is incorrect. The Department's construction of Section 6509, and by extension Section 6501, are unreasonable and impermissible.

C. The *Final Withdrawal Rule* is Arbitrary and Capricious

The law is well-settled that "[a] rule is arbitrary and capricious if (1) the agency 'has relied on factors which Congress has not intended it to consider'; (2) the agency 'entirely failed to consider an important aspect of the problem'; (3) the agency's explanation 'runs counter to the evidence before the agency'; or (4) the explanation 'is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Am. Bankers Ass'n v. NCUA*, 934 F.3d 649, 663 (D.C. Cir. 2019) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co. (State Farm*), 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L.Ed.2d 443 (1983)). The *Final Withdrawal Rule* ran afoul of these basic requirements of reasoned decision making.

In January 2017 the Department announced:

> 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 OrganicProgram (NOP) by AMS[9]. 82 Fed. Reg. at 7042.

The *OLPP* also stated:

> 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: 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) inthat process. (all citations omitted).
>
> This rule [is] 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 livestockand poultry. *The provisions for outdoor access and space for organic poultry production are the focal areas of this rule*. (emphasis added by Plaintiff).

82 Fed. Reg. at 7082.[4] The Department also found the benefits of the *OLPP* to include:

- Protects the value of the USDA organic seal to consumers.
- Facilitates level enforcement of organic livestock and poultry standards.
- Alleviates the need to maintain additional third- party animal welfare certification and the associated costs and resources. *OLPP RIA* at 9.

The benefits attributed to the *OLPP* are significant.[10] As the preceding sections of this brief demonstrate, the *Final Withdrawal Rule* was based on a lack of statutory authority. Accordingly,

---

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

[10] With regard to organic poultry, the *OLPP* relied on specific findings that were not addressed at all in the *Final Withdrawal Rule*. *OLPP RIA,* at 13 ("Consumer surveys indicate the need for more precise animal welfare standards within the USDA organic regulations."); *OLPP RIA* at 93 ("We believe that the space and outdoor access requirements in this final rule would enable consumers to better differentiate the animal welfare attributes of organic eggs and maintain demand for these products"); *OLPP RIA* at 94 ("consumers of organic eggs appear willing to pay higher premiumsfor production practices than consumers of other types of eggs."); *OLPP RIA* at 94 ("In addition informal national surveys reveal consumer expectations that organic eggs are produced from hens that went outdoors."); *OLPP RIA* at 95 ("We expect that clear, consistent requirements foravian living conditions can sustain consumer demand and support the growth in the market for organic poultry products.")

each of the impingements on statutory rights and the programmatic failures addressed by the *OLPP* went unaddressed and each problem had been found and remediated by the *OLPP*, each was reinstated by the *Final Withdrawal Rule*.

1. The *Final Withdrawal Rule* Failed to Address the Section 6501 Statutory Factors

A "statutorily mandated factor, by definition, is an important aspect of any issue before an administrative agency, as it is for Congress in the first instance to define the appropriate scope ofan agency's mission." *Public Citizen v. Federal Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004); *accord Lindeen v. SEC*, 825 F.3d 646, 657 (D.C. Cir. 2016) ("A rule is arbitrary and capricious if an agency fail[s] to consider a factor the agency must consider under its organic statute."). The *OLPP* addressed four statutory purposes: product consistency, uniform enforcement and consumer trust and unfair competition. *See e.g. OLPP,* 82 Fed. Reg. at 7042 (noting need for "consistent and uniform" product standards to enforce); *Id.* 7044 (noting need to clarify regulatory text to ensure "consistent enforcement"); *Id.* at 7066 (purpose of proposed sections was "to clarify the authority of the NOP, certifying agents and state organic programs to initiate compliance action…"); *see e.g.* 6501 (Purposes); Section 6519 (Violations of Chapter); *see also* Section 6505(a)(2) (USDA standards and seal).

> It is the purpose of this chapter:
>
> (1) to establish national standards governing the marketing of certain agricultural products as organically produced products;
> (2) to assure consumers that organically produced products meet a consistent standard; and
> (3) to facilitate interstate commerce in fresh and processed food that is organically produced. Section 6501.

The *OLPP* found:

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

OLPP sought to eliminate inconsistency in organic livestock production, particularly poultry, and to ensure that all organic livestock producers observe the same "national standards".[11] To accomplish this the *OLPP* imposed adopted new definitions and clarified existing rules to eliminate ambiguities. *See Appendix A* (listing and summary of changes). Moreover, the OLPP sought to assure consumers receive an agricultural product that meets a "consistent standard" by clarifying the rules for certifying agents to ensure consistent enforcement is undertaken. *See* Section 6503(d) (certification activities conducted by accredited certifying agents).

The *OLPP* sought to protect the value of the USDA Organic Seal as a consumer assurance, by responding to consumer confusion, lack of trust and to close the gap between organic livestock production practices and third-party programs with higher welfare standards. *See* Section 6501(b) (assure consumers). The *OLPP* focused on eliminating what were perceived to be loopholes in "outdoor access" and outdated animal welfare practices. *See Appendix A* (listing changed practices); *see also* Section 6505(a)(2) (USDA organic seal demonstrates product "meets Department of Agriculture standards for organic production…") The *OLPP* sought to prohibit unfair competition and thereby facilitate interstate commerce. *See* Section 6501(c). Significant record evidence exists addressing these issues, from federal certifying agents, that went largely unaddressed.[12] *See Lilliputian Sys., Inc. v. Pipeline & Hazardous Materials Safety Admin.*, 741

---

[11] *See OLPP,* at 7066 ([purpose of proposed sections was "to clarify the authority of the NOP, certifying agents and state organic programs to initiate compliance action…"); *Id.* at 7077 ("The role of Accredited Certifying Agents is to review transport times to verify that certified operations are in compliance…"); *Id.* at 7077 ("New § 205.242(b)(1) requires [certified livestock handlers] … be in full compliance with the Humane Methods of Slaughter Act (HMSA) of 1978

[12] The Secretary's decision to abrogate the *OLPP* was strongly opposed in the record by federal certifying agents who are in the front line of dealing with the enforcement inconsistencies that were remedied by the *OLPP. See e.g.* Comment of Accredited Certifiers Association, at AR 00001571 (noting loss of consumer trust and unfair competition if OLPP is withdrawn); Comment of Accredited Certifiers Association, at AR 00050089 (NOP depends on fairness and consistency); Comment of CCOF, at AR 00086830 (Rescission of OLPP results in unfair competition; products that don't meet organic principles or consumer

F.3d 1309, 1312(D.C. Cir. 2014) ("An agency's failure to respond to relevant and significant public comments generally demonstrates that the Department's decision was not based on a consideration of the of the NOP, certifying agents, and State organic programs to initiate compliance action if certified operations are found to have violated the Poultry Products Inspection Act (PPIA)…"); *Id.* at 7079 ("New § 205.242(c)(2) requires [certified livestock handlers]…provide, during the annual organic inspection, any FSIS noncompliance records and corrective action records relatedto [good manufacturing practices]."

In sum, the rescission of the *OLPP* reinstated the problems identified in the *OLPP* and did not address them at all in the *Final Withdrawal Rulemaking*. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co. (State Farm*), 463 U.S. 29, 43 (1983)).

On March 12, 2020, the U.S. District Court issued an Order directing the Department to address "a series of admitted flaws" in the economic analysis the Department published in support of its March 2018 *Withdrawal Rule*[2]. ECF No. 112 at p.1. On April 23, 2020, the Department published its "Request for Comment on Organic Livestock and Poultry Practices Economic Analysis Report" ("*Ferrier One*"). *See* 85 Fed. Reg. 22,624 (April 23, 2020). The Revision published a report prepared by the Department's analyst, Dr. P. Ferrier, entitled "Economic Analysis Report: Peer Review of Regulatory Impact Analysis for the Organic Livestock and Poultry Production Practices Rule and the Withdrawal Rule." 85 Fed. Reg. 22624-77 (April 23, 2020) ("the Ferrier Report"). The Ferrier Report is a "review of the Regulatory Impact Analysis (RIA) for both the *OLPP* Rule (Final RIA) and the *Withdrawal Rule* (Withdrawal RIA)." 85 Fed.

---

expectations); Comment of MOSA, at AR 00088036 and AR 00009219 (Rescission of OLPP prevents consistency in enforcement between certifying agents); Comment of PCO, at 00055525 (noting loss of consumer trust and unfair competition if OLPP is withdrawn); Comment of QAI,at AR 00052910 (similar); Comment of Washington State Department of Agriculture Organic Program at 00029572 (similar)

Reg. at 22664. The Revision sought comments on the "findings" in the *Ferrier Report* "and their impact on the *Withdrawal Rule*." 85 Fed. Reg. at 22664. On September 17, 2020, a final report was published in the federal register styled, "Final Decision on *OLPP* and Summary of Comments on the Economic Analysis Report" ("*Ferrier Two*") 85 Fed. Reg. 57,937-43 (September 17, 2020).

2. The Department did not Produce a Competent Cost-Benefit Analysis Following Remand

Despite more than nine months of delay in the case, the Department did not produce a reliable or trustworthy cost benefit analysis. Instead, the Department concluded the *Withdrawal Rule RIA* was "seriously flawed and thus did not produce a reliable projection of costs and benefits." 85 Fed. Reg. at 57,943. Although the Department determined the "only way" it could "confidently address all of the errors…would be to start the cost benefit analysis over from scratch," it decided not to. The Department blamed the Withdrawal RIA's flaws on the *OLPP* RIA, concluding the *OLPP RIA's* methodology "was significantly flawed and caused the *Rescission RIA* to be flawed." *Id. at* 57,944 "The Economic Analysis Report discredits the Final RIA because that RIA contained multiple methodological errors that were carried forward to the Withdrawal RIA and conclusively demonstrate its untrustworthiness." 85 Fed. Reg.at 57,944. "AMS is withdrawing its prior conclusions regarding the economic impacts of the *OLPP* Rule to reflect these assessments without initiating further policy changes." 85. Fed Reg. 57,944.

a. **The Admittedly Flawed *Withdrawal RIA* Requires Vacatur of the *Withdrawal Rule*.**

Plaintiff's TAC ¶267 states a claim under the APA alleging the *Withdrawal Rule* violates the APA in part because, "the result of the remand proceedings have cured none of the identified flaws in the *Withdrawal* RIA." In this circuit, "when an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the

rule unreasonable." *Nat'l Ass'n of Home Builders v. E.P.A.*, 682 F.3d 1032, 1040 (D.C. Cir. 2012); *City of Portland v. EPA,* 507 F.3d 706, 713 (D.C.Cir.2007) (noting that "we will [not] tolerate rules based on arbitrary and capricious cost-benefit analyses"); *Owner–Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.,* 494 F.3d 188, 206 (D.C.Cir.2007) (vacating regulatory provisions because the cost-benefit analysis supporting them was based on an unexplained methodology).

Here the Department ultimately disclaimed the *Withdrawal RIA's* "seriously flawed analysis." 85 Fed. Reg. at 57,943. When the agency that offered the rule undertook a cost-benefit analysis that it discards as unreliable, that rule must be vacated. "Even when an agency's regulatory impact analysis was conducted pursuant to Executive Orders, the analysis is reviewable under the APA whenever the government relie[s] on the analysis in its final rule. *See Cigar Ass'n of Am. v. U.S. Food & Drug Admin.*, No. 1:16-CV-01460 (APM), 2020 WL 4816459 (D.D.C. Aug. 19, 2020)(internal marks omitted) citing *Council of Parent Attorneys & Advocates, Inc.v. DeVos*, 365 F. Supp. 3d 28, 54 n.11 (D.D.C. 2019). The Department's own analysis concluded the cost-benefit analysis was fatally flawed and the ultimate decision to rely on it was arbitrary and capricious. *Nat'l Ass'n of Home Builders v. E.P.A.*, 682 F.3d at 1040. The Final *Withdrawal Rule* should be vacated. *Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 934 F.3d 649, 673–74 (D.C. Cir. 2019), cert. denied, 141 S. Ct. 160, 207 L. Ed. 2d 1097 (2020) (noting when a rule is contrary to law, the "ordinary practice is to vacate").

b. The Economic Analysis on Remand was Conducted in an Arbitrary and Capricious Manner

In addition to the flaws cited above, the economic work conducted on remand for this court was conducted in an arbitrary and capricious manner. The *Final Ferrier Report* was not the product of a full re-evaluation of the *OLPP RIA*, but instead was the review of cherry-picked parts of

a complicated cost-benefit analysis. *See Comment of OTA; Second Vukina Report.* Despite the narrow scope of the *Final Ferrier Report*, it was relied upon to issue a disingenuous blanket condemnation of the *OLPP RIA* in a last-ditch attempt to save its rescission. Plaintiff disclaims the process as mostly pretextual and does not accept that all of the *Withdrawal RIA* cost-benefit flaws were fully and materially present in the *OLPP RIA*.

The Department attempts to retain all that it likes about the flawed *Withdrawal Rule* while disclaiming the principal ground upon which it initially withdrew the *OLPP*. To the extent the *Withdrawal Rule* formed an assessment of the likely costs and benefits of the *OLPP* Rule based on that flawed analysis—"AMS hereby modifies that assessment and concludes simply that the Final RIA does not support promulgation of the *OLPP* Rule in light of its significant flaws." 85 Fed. Reg.at 57,944; *Id.* "AMS makes no changes to the conclusions set forth in the *Withdrawal Rule* that did not rely on the flawed RIAs and leaves the remainder of the *Withdrawal Rule* intact."

This foregoing conclusions are improper as they purport to substantiate a decision reached in 2018 by facts admittedly developed in 2020. The Supreme Court has recently cautioned that explanations following remand "must be viewed critically to ensure that the rescission is not upheld on the basis of impermissible *post hoc* rationalization." *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1908, 207 L. Ed. 2d 353 (2020)(internal quotations and citations omitted by Plaintiff). Whether the statements are impermissible *post hoc* statements or not, the Department cannot have it both ways—if the economic analysis is so flawed that it sinks the *OLPP*, it would be arbitrary and capricious if it did not sink the *Withdrawal Rule* as well.

c. The *Final Withdrawal Rule* and the *Second Ferrier Report* Arbitrarily Ignored the Role of Qualitative Benefits

The *OLPP RIA* listed three principal qualitative benefits of the OLPP that directly impacted the cost-benefit analysis: (1) it protects the value of the agency's organic seal to consumers; (2) it facilitates level enforcement of organic livestock and poultry standards; and (3)it alleviates the need to maintain additional third-party animal welfare certification and the associated costs and resources. *See OLPP RIA* at 9. It was also recognized that, "The benefits of this final rule are the real improvements in attributes (*e.g*., animal welfare) for society.") *OLPP RIA,* at 36. The *OLPP* also repeatedly cited other findings indicating qualitative benefits arising from the *OLPP.* [13] This approach comports with *OMB's Economic Analysis of Federal Regulations Under Executive Order 12866* at 2, (Jan.1996) ("OMB Guidelines for Analysis") (Regulators should determine whether: "The potential benefits to society justify the potential costs, recognizing that not all benefits and costs can be described in monetary or even in quantitative terms, unless a statute requires another regulatory approach."); *accord see also Mozilla Corp. v. Fed. Commc'ns Comm'n*, No. 18-1051, 2019 WL 4777860, at 47 (D.C. Cir. Oct. 1, 2019) (leaving analysis undisturbed, noting the "Commission's ultimate decision to conduct a qualitative analysis appears consistent with the Circular")

The *Final Ferrier Report* did not address qualitative benefits at all. Thus we are left with the *Withdrawal Rule's* summary dismissal: it is "uncertain and difficult to quantity benefits of outdoor access and space requirements" and then proposed such benefits "would not justify their quantifiable costs and paperwork burden." *See also Final Withdrawal Rule* at 10779 ("the

[13] *See also OLPP RIA,* at 95 ("Several articles describe a positive association between the establishment of uniform regulation of product labels and consumer confidence."); *Id.* at 96 ("[paper author] also observes that governmental standards can address the market failure connected to uncertainty about product quality and prevent consumer deception and fraud."); *Id.* at 11 (("[c]ertification 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."); *see also Oversight of the National Organic Program,* OIG Audit Report No. 01601-03-Hy, 22 ("OIG Report")

qualitative benefits [are] speculative because it is uncertain that the organic farmers and consumers would see positive impacts from the implementation of the *OLPP* rule.") These statements ignored the many significant statutory factors embedded in the listed benefits – particularly consistent enforcement and consistent product standards of identity, under Section 6501. Last, the clear and non-speculative benefit of eliminating the cost and trouble of a second certification for certified organic producers was completely ignored while the "paperwork burden" of implementing the OLPP was relied upon to rescind. This is internally inconsistent.

With regard to the widespread belief that livestock that live outdoors are healthier, the *Final Withdrawal Rule* simply said that this was not a declared basis for promulgating the *OLPP* and furtherstated "economic benefits" arising from healthier animals are not demonstrated by "informationor research linking outdoor access on pasture or vegetation to improved economic outcomes forproducers." *Final Withdrawal Rule* at 10779. This conclusion is unreasonable and flawed. First, the record evidence in this rulemaking is to the contrary and is ignored in the *Final Withdrawal Rule.*[14] *See* EO 12,866 at Section 1(a)("Costs and benefits

[14] Many commenters identified and stated the health and wellbeing benefits of increased outdoor access and access to soil and cited academic studies to that effect. *See* Comment of Health Care Without Harm, at AR 00086839 (Scientific studies indicate that indoor confinement is a risk factor for spreading disease.); Comment of Beyond Pesticides, at AR 00085014 (Nutrients obtained from insects don't need to be supplied by synthetic inputs. Birds with more space and access to soil biology are healthier, requiring less intervention to support their health.); Comment of Center for Food Safety, at AR 00090159 (Organic poultry facilities that provide outdoor access and lower stocking densities for the birds are less susceptible to virulent strains of highly pathogenic avian influenza (HPAI)… Strong organic practices outlined in the final rule, like lower stocking densities and providing outdoor access, are a part of the solution and provide economic benefit in terms of protections for flocks against HPAI.); Comment of NOFA-NY, at AR 00028139 (As organic evolves its standards to reflect these differences, we expect to see a decreasing reliance on conventional systems that are used with organic input substitutions, and an increase in wholly more organic, welfare-based sustainable systems.); Comment of ASPCA, at AR 00045535 (The Rule Does Not Increase the Risk of Animal Disease. Continuing to suggest that outdoor access increases the risk of disease represents an attempt to frighten consumers and to deflect attention from the true issue, which is the need to provide higher-

should be understood to include qualitative measures of costs and benefits that are difficult to quantify, but nevertheless *essential to consider* [emphasis added]"); *see also* p. 2 OMB's *Economic Analysis of Federal Regulations Under Executive Order 12866* (Jan. 1996) ("*OMB Guidelines*")(regulators should determine "[T]he potential benefits to society justify the potential costs, recognizing that not all benefits and costs can be described in monetary or even in quantitative terms, unless a statute requires another regulatory approach."); *see e.g. Mozilla Corp. v. Fed.Comm. Comm'n*, No. 18-1051, 2019 WL 4777860, at *47 (D.C. Cir. Oct. 1, 2019)(approvingqualitative benefits as sole source of rule's benefit; citing OMB Circular A-4 at 10 --"[w]hen important benefits and costs cannot be expressed in monetary units," attempting a quantitative cost-benefit analysis "can even be misleading, because the calculation of new benefits in such cases does not provide a full evaluation of all relevant benefits and costs."

---

welfare conditions for animals on organic farms.); Comment of CCOF, at AR 00086830 (The OLPP standards do not pose biosecurity risks to poultry.); Comment of Consumers Union, at AR 00046733 (We are aware that some opponents of the new rule argue that outdoor access for chickens increases disease risk. This argument is contradicted by published research.); Comment of CVR, WFF, EI, at AR 00005547 (We do not agree with the unfounded assertions that this final rule will increase biosecurity risks.); Comment of Organic Trade Association, at AR 00026756 (The final rule does not compromise biosecurity measures and food safety requirements.); Comment of Cornucopia Institute, at AR 00089989 (Detailed information about living conditions of animals in relation to animal welfare); Comment of NOSB, at AR00010725

OTA IS ENTITLED TO SUMMARY JUDGMENT ON COUNT THREE

VIOLATION OF OFPA AND APA
(Failure to Consult NOSB; Failure to Obtain a Recommendation)

A. The Department's Failure to Consult the NOSB Prior to Promulgating the *Proposed Withdrawal* and *Final Withdrawal Rules* Violates the OFPA and the APA.

The National Organic Standards Board ("NOSB") was created by Congress, 7 U.S.C. § 6518, to serve two distinct and unambiguous purposes. "[T]o assist in the development of standards for substances to be used in organic production and to advise the Secretary on any other aspects of the implementation of this chapter." *See* Section 6518(a); *accord* Section 6518 (k)(1) (NOSB "[S]hall provide recommendations to the Secretary regarding the implementation of this chapter.") The advisory role thus involves all aspects of the Act.[15] The *National Organic Production Program* was created by Congress, Section 6503(a), and Congress said, "In developing the program under subsection (a) of this section, and the National List, the Secretary shall consult [the NOSB]." Section 6503(c) (Consultation). The Department recognized the duty:

> AMS requires AMS to consult with the NOSB….in developing the organic certification program under Section 6503(c). 83 Fed. Reg at 10,778, fn 6.

But the Department failed to read the foregoing in conjunction with other sections of the Act, and concluded, "The OFPA does not require AMS to consult…prior to undertaking a rulemaking to withdraw the *OLPP* final rule." 83 Fed. Reg at 10,778, fn 6.

As is more fully demonstrated below, the plain meaning of "shall consult" is obvious, but its concrete reach can only be understood by reading the Act as a whole. *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133, (2000) (noting the "fundamental canon of statutory

[15] *See e.g.*; Section 6504 ("National Standards for Organic Production"); Section 6505 ("Compliance Requirements"); Section 6506 ("General requirements"); Section 6508 ("Prohibited crop production practices and materials")' Section 6509 ("Animal productionpractices and materials"); Section 6511 ("Additional guidelines"); Section 6512 ("Other production and handling practices"); Section 6517 ("National List").

construction that the words of astatute must be read in their context and with a view to their place in the overall statutory scheme") The programmatic aspects of the certification program established by Section 6503, and upon which consultation is required, are complex and comprehensive.[16]

For example, under Section 6506 (General Requirements) there are more than ten components of administrative activity, each of which requires confirmation of facts or tasks to be completed to ensure only those agricultural products that are "certified" as being "organically produced" enter the marketplace, thus elucidating the breadth of the advisory and consultative duties. *See King v. Burwell*, 576 U.S. 473, 492 (2015) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."); *see also* Appendix B (listing more than 50 instances in the OFPA of cognates of "under this chapter" etc.)

The certification program's requirements include determinations simple as an annual statement to the Department that a producer or handler complies with the program and as complex as development and implementation of a "residue testing" program, enforcement procedures and even measures regarding appeals of adverse administration decisions. *See generally* Section 6506. Likewise, the definitions of certified farms, handlers and the "organic plan" each refer back to the Act as a whole, thus demonstrating the program only works as a series of interlocking measures.[17] *See Burgess v. United States*, 553 U.S. 124, 129–30 (2008). "Statutory definitions control the meaning of statutory words ... in the usual case."); *Appendix B* (list of internal cross-references in the Act) (demonstrating integrating nature of each specific section).

---

[16] The program under Section 6503 is "an organic certification program for producers and handlers of agricultural products that have been produced using organic methods as provided for in this chapter."

[17] *See* Section 6502(4) ("certified organic farm"); Section 6502(5) ("certified handling operation"); Section 6502(13) ("Organic plan"); Section 6502(14) (definition of "organically produced").

Given the unambiguous advisory role of the NOSB in creating the comprehensive certification program "under this Chapter", Section 6503(c), and the ongoing duty to advise on implementation "under this Chapter", Section 6518(a), the breadth of the duty to consult is most logically read to match up with the breadth of the duty to advise. *See Am. Paper Inst., Inc. v. EPA*, 996 F.2d 346, 356 n.10 (D.C. Cir. 1993) (statutes must be "construed holistically"). In fact, the use of word "shall" in conjunction with advisory and consultative duties under "this chapter" compels this outcome. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 35 (1998)(recognizing that "shall" is "mandatory" and "normally creates an obligation impervious to judicial discretion"). From start to finish, the Congress unambiguously required the Department to consult.[18] The Department's crabbed construction of the Act conflicts with unambiguous statutory obligations to consult the NOSB. *See e.g., University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. 338, 353, 133 S. Ct. 2517, 186 L.Ed.2d 503 (2013)(construction fails that is "inconsistent[t] with the design and structure of the statute as a whole.")

1. Livestock Production Practice Standards are part of the Department's Certification Program and a Mandatory Duty to Consult the NOSB Exists Under Sections 6503, 6509 and 6517.

Organic livestock production practices, like those in the *OLPP,* are *always* part of the certification program created under Section 6503 because they govern the contents of the "organic

[18] Additional terms used to frame specific NOSB responsibilities under the Act strongly suggest Congress did not intend draw any subtle distinction between the chosen cognates, each of which comports with the basic directive to "assist the Secretary" in implementing the Act. *see e.g. Mozilla Corp. v. Fed. Commc'ns Comm'n*, 940 F.3d 1, 38 (D.C. Cir. 2019) (applying cognate analysis to caching.); *see generally* Section 6518(k) ("Responsibilities of the Board"); (k)(2) ("shall *develop* the proposed National List"); (k)(3)("shall *convene* technical advisory panels"); (k)(4) ("shall….*review* all botanical pesticides"); (k)(5) "shall *advise* concerning" residue testing; (k)(6) ("shall *advise* concerning…emergency pest program"); Section 6518 (l)(1) ("shall *review* available information" of federal agencies regarding National List substances); (l)(d) ("shall *work with* manufacturers of substances"); (l)(3) shall *submit to the Secretary*" the result of technical work); Section 6518 (m) ("shall *consider*" seven categories of information regarding substances proposed for inclusion on the National List; 6518 (n) ("shall *establish*" petition procedures.)

livestock plan" and such products must be certified to transact in interstate commerce. With regard to livestock, Congress gave the NOSB a specific role regarding the development of organic livestock regulations. Section 6509(d)(2) provides: "[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." *See* (italics added by Plaintiff) This section dovetails with Section 6509(g) which provides: "[the Secretary]…*shall develop detailed regulations*…to guide the implementation of the standards for livestock productsprovided under this section.") (italics added by Plaintiff). Here the duty to recommend programmatic standards is directly coupled with a directive to the Department to adopt regulations based on those recommendations. It would be absurd to construe this section to refuse to consult the NOSB during the rulemakings to promulgate the regulations in light of the fact that livestock regulations are also part of the certification program established under Section 6503. *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 481 (2001) (only when a statute is "silent or ambiguous" with respect to the issue may a court defer to a "reasonable" interpretation).

2. The Legislative History Confirms the Primacy of the NOSB to the National Organic Program.

The legislative history of the Act bolsters Plaintiff's argument that Congress intended the NOSB to be at the center of the development of all organic program requirements. *See* S. Rep. No. 101-357 (July 6, 1990)("Senate Report"); H.R. Rep. 101-916 (Oct. 22, 1990)("H.R. Rep.").

At the time of passage of the OFPA, Congress recognized that limited knowledge or consensus on appropriate organic livestock production standards existed. *Senate Report,* at 289. "[T]he Committee expects that USDA, with the assistance of the National Organic Standards Board will elaborate on livestock criteria." *Senate Report,* at 289; *id.* at 303 ("The Board shall recommend livestock standards, inaddition to those specified in this bill, to the Secretary."). When the House

and Senate were reconciling their respective versions of the OFPA, Congress stated that the "Conference substitute adopts the House provision with an amendment which requires the Department to hold hearings and develop regulations regarding livestock standards *in addition to those specified in this title*." H.R. Rep. 101-916 at 1177-78 (Oct. 22, 1990) (italics added by Plaintiff). The Conferees, "recognize[d] the need to further elaborate on the standards set forth in the title and expect[ed] that by holding public discussions with interested parties and with the National Organic Standards Board, the Secretary will determine the necessary standards." *Id. See also Senate Organic Report* at 297 ("The Committee is concerned that production materials and practices keep pace with our evolving knowledge of production systems.") The statute was written to ensure the NOSB provided continual updating of organic standards to the Department, as occurred here with the *OLPP*.

The Senate's *Organic Report* states: "The Committee regards this Board as an essential advisor to the Department on all issues concerning this bill and anticipates that many of the key decisions concerning standards will result from recommendations by this Board." *Senate Organic Report*, at 289 (1990) The *Senate Report* demonstrates confirm a unique and novel public-private partnership. "[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 293.

The agency has accepted this arrangement since before the publication of the first final rule in 2000. *See e.g.,* 65 Fed. Reg. at 80,666 (2000) ("The NOSB has assisted in developing the standards promulgated in this final rule and will play an advisory role for the NOP even after the final rule is in place."); *Id.* at 80,608 ("Anyone may request that a provision of these regulations be amended… amendments submitted to the NOP Program Manager will be forwarded to the NOSB for its consideration.") Even today the Department recognizes, 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. *See NOSB Policy Manual*.

3. Twelve Former Chairs of the NOSB Lodged Declarations in this Matter Stating the Department Always Consulted the NOSB on Organic Rulemakings and Policy Matters.

The *Proposed Withdrawal* and *Final Withdrawal Rules* are the first rulemakings for which the NOSB was not consulted since it was first seated in 1994. *See* Dkt. Ex. D. The well settled public/private partnership contemplated by Congress was abrogated by the prior administration. *See e.g., NOSB Policy Manual*, at Pg. 26 ("Similarly, the NOP, as required through OFPA, must consult and collaborate with the NOSB."); *see also* Dkt. No. 98-4 (twelve declarations). Twelve former chairs of the NOSB, representing nearly 90% of history of the NOSB have lodged declarations in the administrative record in this case. The declarations are nearly identical and in material part state:

1. I am also aware that the Rescission states "[T]he OFPA does not require the NOP to consult with the NOSB prior to undertaking a rulemaking to withdraw the *OLPP* final rule." 83 Fed. Reg. at 10778 (March 13, 2018).
2. The quoted statement is inconsistent with my experience and knowledge of the USDA's past practices, with regard to pre-rulemaking consultation with the NOSB. In my experience any action by the NOP or Department that required public notice and comment, whether guidance or legislative rulemakings, was conducted solely in the aftermath of consultation with the NOSB.

It is well settled that "Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) quoting *National Cable & Telecommunications Assn. v. Brand X Internet Services,* 545 U.S. 967, 981–982 (2005). Here the *Final Withdrawal Rule* explained only that, "The OFPA does not require AMS to consult…prior to undertaking a rulemaking to withdraw the *OLPP* final rule." 83 Fed. Reg at 10,778, fn 6. This terse and summary conclusion lacks the kind

of reasoned explication for policy change such as significant as changing more than twenty years of agency practice calls for. The policy change is an arbitrary and capricious course change that must be reversed. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127, 195 L. Ed. 2d 382 (2016).

FEE REQUEST

Plaintiff renews its request that this court award Plaintiffs their 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.

CONCLUSION

For the foregoing reasons OTA respectfully requests judgment be entered in its favor on Counts Two, Three and Four of its Third Amended Complaint and the Final Withdrawal Rule be vacated. Count 1 is preserved by prior adverse ruling.

Respectfully Submitted:

/s/ William J. Friedman
William J. Friedman
107 S. West Street
Alexandria, Virginia 22314
Phone: 571-217-2190
Email: pedlarfarm@gmail.com

COUNSEL FOR PLAINTIFF ORGANIC TRADE ASSOCIATION