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**

REPLY TO DEFENDANTS RESPONSE TO BRIEFING SCHEDULE PROPOSAL

On September 11, 2020 OTA proposed the Court let the Department finish its incomplete administrative work arising from its voluntary remand and possibly narrow the issues that stand between the parties and comprehensive conclusion of this litigation. On September 14, 2020 Defendants responded in opposition. The Department of Agriculture has repeatedly delayed consideration of the legal claims in this case and invites this court to once again agree with a request for delay. OTA now respectfully replies that the Defendants' invitation should be declined.

REPLY

Notably absent from each of USDA's submissions is a meritful response to its having failed to meet the Court's deadline for publication in the Federal Register of a final remand outcome, or any proposed remedy for this dereliction. In addition, neither submission explains why USDA's express offer to complete summary judgment proceedings in fourteen days made more than nine months ago should not be taken into account now. Instead it persists in seeking to force OTA to prepare a possibly unnecessary Third Amended Complaint based on manifestly non-final draft document while delaying merits briefing on the core legal issues in the case.

USDA ignores the very real possibility of the case drifting into avoidable motions practice that extends into next year. Each of USDA's enumerated points is addressed serially below.

1. Agency Regulations Based on Erroneous Statutory Authority Determinations are Invalid

USDA first offers a glaring misconstruction of nearly fifty years of bedrock U.S. Supreme Court and D.C. Circuit law holding an agency rule that violates the authorizing statute must be remanded. ECF No. 117, *USDA Response* at 2. Instead USDA contends that as long as the Department alleges other grounds for its actions which it contends are non-arbitary, the rule may stand. The U.S. Supreme Court has repeatedly made the point that, "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Michigan v. E.P.A.*, 576 U.S. 743, 750 (2015) (internal punctuation omitted) In other words *both* requirements must be met to sustain an agency action. *Accord United Parcel Serv., Inc. v. Postal Regulatory Comm'n*, No. 19-1026, 2020 WL 1856495 (D.C. Cir. Apr. 14, 2020) USDA's contention that a semi-meritful economic analysis (which here OTA contests) can overcome a fundamental misconstruction of the controlling statute is incorrect. *See e.g. Mozilla Corp. v. Fed. Commc'ns Comm'n*, 940 F.3d 1, 38 (D.C. Cir. 2019)(noting the *Chenery* doctrine holds "we must remand a decision when the agency rests its result on a mistaken notion that it is compelled by statute.")

Moreover, "[A]n agency regulation must be declared invalid, even though the agency might be able to adopt the regulation in the exercise of its discretion…" when the regulation was based on a misconstruction of the controlling statute. *Prill v. N.L.R.B.*, 755 F.2d 941, 948 (D.C. Cir. 1985) (quoting *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 96 (1953). Thus, USDA's argument that it can be wrong on the statute but right on the discretionary policy choice is wrong without regard to the merits of the supporting reason(s).

The sole question before the court now is the sequence in which the issues should be reached when there is a likelihood that one path may result in conservation of judicial and party resources and the other path cannot.

A. OTA does not Concede the Errors in the Withdrawal RIA Invalidate the OLPP or the OLPP RIA's Conclusions

USDA also claims that OTA has conceded the OLPP RIA was unlawfully deficient and this is a ground for ignoring OTA's argument that remedy litigation would be less resource intensive than the new allegations of a Third Amended Complaint. *See Response* at p. 2. This is incorrect. First, the section of OTA's summary judgment brief miscited by USDA plainly demonstrates the statement that OTA declared a paradigm of unreasonable agency action was the statement appearing *in the Withdrawal RIA.* *See* OTA's Mot. for Summ. J. at 28-29, ECF No. 98 OTA's expert demonstrated and OTA actually argued the Withdrawal RIA was flawed:

> [in the Withdrawal RIA] The agency used an incorrect analytic methodology when calculating the estimated costs and benefits and in so doing artificially reduced the estimated benefits of the OLPP below the estimated costs of the rule. *See Exhibit A*, Declaration of Dr. T. Vukina, at ¶ ¶'s 9-10; *Exhibit B* Review of the Cost-Benefit Analysis Conducted by AMS in Support of Rescission of the Organic Livestock and Poultry Practices Final Rule, at p. 3-4 ("Review") (with accompanying spreadsheet showing calculations)

The comparison of the costs to benefits in the OLPP RIA reached the correct outcome. In other pleadings in this case OTA also has *expressly* rejected USDA's contention that any errors in the OLPP RIA rendered the OLPP rule invalid. *See* ECF No. 105, OTA's *Opposition to Voluntary Remand*, pgs. 10-11 (rejecting USDA claim that OLPP RIA contained dispositive flaws.) USDA cannot make it otherwise now, and surely cannot support the argument that a remedy briefing would be more time consuming that starting over with a Third Amended Complaint.

OTA's case has challenged *only* the OLPP Withdrawal proceedings and at no time has it argued or considered the OLPP proceedings so flawed as to prohibit reinstatement of the OLPP.

See e.g. ECF No. 34-2, OTA's *Second Amended Complaint*, at ¶¶'s 226-273 (extensive challenges *solely* to Withdrawal RIA flaws); ECF No. 98, OTA's *Memorandum in Support of Summary Judgment*, Pgs. 26-40 (extensive discussion of Withdrawal RIA flaws in addition to those cherrypicked by USDA to support remand) In contrast USDA's request for remand was supposed to be based on a completely different issue. *See* ECF No. 102, USDA's *Motion for Voluntary Remand*, at p. 1 (claiming remand issue "[W]as not presented …in the course of this litigation.") USDA's apparent belief that the OLPP cannot be reinstated as a remedy if the fatally flawed Withdrawal RIA is vacated, is just what OTA says it is: a remedy question. It is meritless to contend a Third Amended Complaint is a prerequisite to considering this issue. OTA does not consider the original OLPP RIA, or the characterizations of it in the remand proceedings ,a bar to reinstatement of the OLPP.

2. The Economic Modeling Issues in Dispute May be Narrowed by Resolving the Legal Issues First.

USDA mischaracterizes OTA's position. OTA simply contends proceeding to resolve the legal issues now serves at least two distinct purposes. First, it will allow USDA to complete its unfinished administrative work—publication in the Federal Register and lodging of a complete administrative record. This conservation of judicial and party resources occurs whether or not OTA prevails on the legal issues. There is no reason to waste more valuable time.

Second, OTA believes the question of the proper remedy should OTA prevail on the legal issues is narrower than that arising from allegations that may appear in a Third Amended Complaint. Issues such as closed mind, bad faith conduct, failure to fully consider the submitted comments, post-hoc rationalizations, barren remand exercise etc. are all topics for consideration in a Third Amended Complaint. Vetting these topics may be unnecessary when deciding vacatur of the Withdrawal Rule and reinstatement of the OLPP.

3. USDA's Proposed Schedule Ignores Typical Motions Practice Arising from Compilation of an Administrative Record and Amendment of Complaints

USDA objects to OTA pointing out that motions practice and delay in this case has been extensive and may continue. But the speculative nature of USDA's schedule is apparent and the nearly three-year delay in getting to a merits disposition in this case hardly inspires confidence. Why not move forward with the ripe issues? Why presume the parties will agree to waive Defendants' Answer, or a motion to dismiss will not be filed, or disagreement about the completeness of the administrative record will not arise? Immediate action on the legal issues will reduce the likelihood that these disputes delay the entire case. This is the reason Fed. R. Civ. Pro. 54 authorizes sequential consideration of case issues.

4. USDA has Missed the Court-Ordered Publication Deadline—A Third Amended Complaint Requires a Final Action

A document bearing a header in bold on every page stating "**The official publication of the Notice in the Federal Register may include changes from this version**" is not a final document. While USDA states it has informed OTA that publication is imminent, when asked to agree to a thirty day publication deadline, USDA refused. Although OTA believes the Third Amended Complaint requires a final, published document in the Federal Register, the schedule it has proposed is based foremost on addressing the ripe legal issues to avoid a possibly unnecessary filing and additional delay. It is premature to act on a draft document and it is unnecessary to delay merits briefing while USDA finalizes its draft.

Respectfully Submitted:

William J. Friedman
William J. Friedman
107 S. West Street
Alexandria, VA 22314
(P) (571) 217-2190
pedlarfarm@gmail.com

Attorney for Plaintiff Organic Trade Assoc.