IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ORGANIC TRADE ASSOCIATION, *Plaintiff*, v. UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*, *Defendants*.	Case No. 1:17-cv-01875-PLF

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR BRIEFING SCHEDULE

On Friday evening, Plaintiff Organic Trade Association ("OTA") filed a ten-page document alternately styled as a proposed "Case Management Schedule" and a "Motion for Briefing Schedule" ("Motion"), ECF No. 116. USDA respectfully submits this brief response:[1]

1. OTA argues that the Court should bifurcate the statutory authority question from the economic issues because the statutory authority question is "the principle issue[] in the case," Mot. at 6, and "if Plaintiff prevails on this [issue], the Withdrawal Rule must be remanded on this ground alone." *Id.* at 8; *see also id.* at 1-2, 7. OTA has it backward: *USDA* could prevail on this ground alone, but OTA could not. That is because, as USDA explained in the Withdrawal Rule, even if it possessed statutory authority to promulgate the OLPP Rule, it "would choose [not to exercise that authority] as a policy matter," in light of "the high degree of uncertainty and subjectivity in evaluating the benefits of the OLPP" Rule, "the lack of any market failure to justify [it]," and "the clear potential for [the Rule] to distort the market or drive away consumers." 83

[1] USDA disagrees with much of how OTA's Motion characterizes the agency action challenged in this lawsuit, as well as how this lawsuit has unfolded. However, USDA confines its remarks to those that are relevant and necessary at this stage of the proceedings.

Fed. Reg. 10775, 10779 (Mar. 13, 2018). Moreover, in its final decision on remand, USDA explained that it would choose to withdraw the OLPP Rule in any event because the regulatory impact analysis underlying the OLPP Rule "contained multiple methodological flaws" and could "not support promulgation of the OLPP Rule in light of [those] significant flaws."[2] Indeed, OTA has *conceded* that these flaws compel invalidation of the OLPP Rule. *See* Pl.'s Mot. for Summ. J. at 28-29, ECF No. 98 (contending that the economic analysis underlying the OLPP Rule was "a paradigm of unreasonable agency action [that] cannot stand under . . . controlling D.C. Circuit authority"); *see also Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1039-40 (D.C. Cir. 2012) (if 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"). In light of the serious deficiencies in the OLPP Rule's cost-benefit analysis, which USDA has now confirmed and OTA has already conceded, the Court could affirm the Withdrawal Rule *on that basis alone* without even reaching the statutory questions.

2. Even assuming there were any basis to defer a merits disposition of the issues regarding the economic analysis, the Court could not grant OTA the remedy it seeks without evaluating those issues, as OTA concedes. Mot. at 9. It would make no sense to vacate the Withdrawal Rule (as OTA requests) and thereby reinstate a rule that both sides agree was premised on serious methodological deficiencies. *See Stand Up for California! v. United States Dep't of Interior*, No. CV 12-2039 (BAH), 2013 WL 12203229, at *3 (D.D.C. Dec. 16, 2013) (noting that any decision to vacate a regulation is based on equitable considerations, including "the disruptive consequences of an interim change that may itself be changed" (quotation marks and citation

[2] *See* Nat'l Organic Program; Final Decision on Organic Livestock and Poultry Practices Rule and Summary of Comments on Economic Analysis Report, at 27-28 (Aug. 4, 2020) ("Final Decision"), https://www.ams.usda.gov/sites/default/files/media/OLPPDecisionNoticeFINAL.pdf.

omitted)). The Court should therefore reject OTA's flawed bifurcation proposal and evaluate all of the issues at once.[3]

3. OTA's proposal is separately flawed because it invites the Court to assume that motion practice with respect to USDA's production of the supplemental administrative record will be necessary, contending that "complete [production of the administrative record on first production] has not happened in this case before." Mot. at 2 (citing ECF Nos. 85-91). That is false. The Court denied OTA's motion to complete the original administrative record. *See* ECF Nos. 90-91. The mere potential for motion practice regarding the scope of the supplemental administrative record is not a reason to defer setting summary judgment deadlines on all of OTA's theories now.

4. Finally, OTA states that its "approach, if adopted, would also resolve the Department's failure to meet the court's Federal Register publication deadline." Mot. at 1. This is the second time OTA has accused USDA of failing to meet the Court's deadline, *see* ECF No. 114 ¶ 4, and the accusation is no more meritorious now than it was the first time. *See id.* ¶ 5. Nor does it justify OTA's labyrinthine case management schedule. As USDA has explained to OTA (now many times), official publication in the Federal Register is expected imminently, and therefore should not disrupt the schedule proposed by Defendants.

5. In sum, while OTA claims to "seek[] a comprehensive disposition" that would "bring [this case] to a close," Mot. at 1, its proposed schedule would do anything but. USDA thus respectfully requests that the Court enter its proposed schedule, ECF No. 115, under which merits

[3] For further background on these issues, which the parties have extensively litigated, *see* ECF No. 102 at 2-5, 8-9; ECF No. 106 at 7-8; ECF No. 108; ECF No. 111 at 3-4.

briefing in this case would be fully concluded by January 21, 2021 (which is hardly "deep into 2021" as OTA contends, Mot. at 2).

Dated: September 14, 2020

Respectfully Submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

ERIC R. WOMACK
Assistant Director, Federal Programs Branch

/s/ Serena M. Orloff
SERENA M. ORLOFF
California bar no. 260888
Trial Attorney, U.S. Department of Justice
1100 L Street NW, Room 12512
Washington, D.C. 20005
Tel: 202-305-0167
Fax: 202-616-8470
serena.m.orloff@usdoj.gov

Attorneys for Defendants