



May 26, 2020

Hon. Dr. Jennifer Tucker
AMS Deputy Administrator
National Organic Program
USDA-AMS-NOP
1400 Independence Ave SW
Room 2642-So., Ag Stop 0268
Washington, DC 20250-0268

Re: Docket No. AMS-NOP-20-0037; NOP-20-03

Dear Dr. Tucker:

Attached to this cover letter please find the Organic Trade Association's response to the Department's April 23, 2020 "Request for Comment on Organic Livestock and Poultry Practices Economic Analysis Report" referenced above by its docket number.

Included in the body of the Comment is a request for an enlargement of time for the public to submit comments. This request renews our prior request for an enlargement of time for the public to prepare comments to the referenced Federal Register Notice dated April 29, 2020 and submitted on May 1, 2020 by OTA. That request was denied by electronic mail on May 15, 2020.

Respectfully Submitted:

Laura Batcha
Executive Director/CEO
Organic Trade Association

Comment of the Organic Trade Association¹

Docket No. AMS-NOP-20-0037; NOP-20-03

May 26, 2020

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List of Exhibits (Filed as separate attachments)

- Attachment A: Second Vukina Report
- Attachment B: OTA Extension Request (April 29, 2020)
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- Attachment D: OTA Extension Request for Proposal to Withdraw Final Rule (December 20, 2017)
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¹ The Organic Trade Association (“OTA”) is a membership-based business association for organic agriculture and products in North America, representing over 9,500 organic businesses across 50 states and every aspect of the food and agriculture supply chain. OTA’s membership represents a significant portion of the U.S. organic egg industry including egg producers of all sizes and organic-compliant production models throughout all geographic locations throughout the U.S. Our membership also includes regional and national poultry management and marketing companies that work with broad networks of organic poultry producer pools and facilitate commercial scale value chains to fulfill consumer demand for organic eggs. The vast majority of OTA livestock and poultry operations (approximately 95%), including egg producers both large and small, are currently in compliance with the OLPP Rule and fully support these standards and view them as essential.

Comment of OTA

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 Rule². 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” (“Revision”) 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. Reg. at 22664. The Revision seeks comments on the “findings” in the Ferrier Report “and their impact on the Withdrawal Rule.”³ 85 Fed. Reg. at 22664.

The Ferrier Report is only an “initial review of the flaws in the Final RIA and the Withdrawal RIA” and the Department will disclose its “final analysis” in a subsequent publication. 85 Fed. Reg. at 22664. The plan regarding public comment on the Department’s “final analysis” is undisclosed.⁴

² On March 13, 2018 the Department withdrew the OLPP, 83 Fed. Reg. 10,775- 783 finding *inter alia*, “the costs of the OLPP final rule outweigh potential benefits” and because there purportedly was “a mathematical error in the calculation of benefits.” 83 Fed. Reg. at 10,779. The Department now proposes “clarifying and supplementing the record regarding the economic analysis underlying both the OLPP Rule and the Withdrawal Rule.” 85 Fed. Reg. at 22664

³ The Revision cites the District Court’s Order in *Organic Trade Association v. USDA*, Civil Action No. 17-1875 (RMC) (March 12, 2020), ECF No. 112). The Order authorized the Department to publish a “final rule, after notice and public comment, fully explaining its updated cost benefit analysis.” *Id.* at 3.

⁴ The Department also noted other aspects of the Withdrawal Rule that are presently in dispute and pending before the District Court (statutory construction issues and market failure). These were not addressed in the Revision or the Ferrier Report. 85 Fed. Reg. at 22664 For this reason, such issues are not addressed in this Comment and OTA reserves its right to address them at an appropriate juncture. *See* Attachment G (OTA Comments on Proposal to Withdraw Final Rule)

A. Renewed Request for Enlargement of the Public Comment Period.⁵

This Comment expressly renews OTA’s April 29, 2020 request for an enlargement of time in which to prepare comments to the Federal Register Notice published April 23, 2020. *See* Attachment B (copy of request). The request was denied by email communication the afternoon of May 15, 2020 *See* Attachment C (copy of denial) At the time of its request OTA implored the Department to extend the deadline to permit the most robust public participation and develop the best possible administrative record. At that time OTA said:

After a conducting a careful preliminary review of the Department’s Economic Analysis, OTA has determined the document’s complexity, lack of clarity and express findings on key issues, and failure to address the full range of legal and factual issues appurtenant to administrative action under the Organic Foods Production Act and APA, together support a request for not less than a thirty-day (30 day) extension of the present deadline, currently set for May 26, 2020. OTA respectfully requests the period for receipt of comments addressing the Economic Analysis be reset for June 26, 2020.

The implementation of the OLPP has been delayed since the Department’s first Delay Rule in Feb. 2017. By the time of the publication of the April 23, 2020 Economic Analysis, the Department has taken three years and two months to write and rewrite its economic analysis while the public has had but 30 days to comment. Now, nearly thirty-six months after the OLPP was supposed to become effective, the Department requested and received a 180-day period from the U.S. District Court to revisit its analysis. Against this backdrop, the organic stakeholders and public are provided a scant 30-day comment opportunity. This patently unfair allocation of time to itself and so little to the public is only exacerbated by the fact that the Department retains approximately 90 additional days to conduct further revision *after* the expiration of the public comment period. This is not what the U.S. District Court had in mind.

* * * *

While there may be many reasons the Department has been unable for three years to produce a cogent economic analysis, the principal problem with the Department’s approach these last 38 months has been the persistent lack of meaningful opportunity for the affected parties and the public to provide comment. The Economic Analysis is a complicated and extensive document that requires professional review. The record shows a fundamentally unfair process and that is increasingly indistinguishable from an intentional effort to exclude meaningful comment and the

⁵ *See e.g.* Exec. Order No. 12866, § 6(a), 58 Fed. Reg. 51735 (October 4, 1993) (opportunity for public comment “in most cases should include a comment period of not less than 60 days.”); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011)(Section 2: “afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a with a comment period that should generally consist of not less than 60 days”); 5 U.S.C. § 553 (b)-(c) (requiring meaningful public comment opportunity); OMB Circular A-4 at 17 (“Transparency and Reproducibility of Results”)(requiring disclosure sufficient to permit meaningful review of the analysis proposed).

airing of contrary views. The proposed 30- day comment period, if not altered, will once again deprive the Department of the best thinking and will frustrate the development of a robust record.

The foregoing summary remains OTA's position and is bolstered by the Second Report of Dr. T. Vukina.⁶ See Attachment A ("Second Vukina Report")

Given the time constraints imposed by the Department it was not possible to fully respond to the Ferrier Report, or raise a rebuttal to each suggestion of material methodological error or provide an improved analysis or suggest a sounder methodological approach in each circumstance. Taken in this light, and as a matter of public accounting under the preferred federal framework for developing cost-benefit analyses, the Ferrier Report does not provide a fully comprehensible standard against which to measure the costs and benefits of the chosen regulatory course of action, in this case the withdrawal of the OLPP. See e.g. OMB Circular A-4; see also Executive Orders 12866 and 13563. See Second Vukina Report, at p. 1-2.

Although the Department, by its own admission failed to conduct an appropriate Regulatory Impact Analysis to substantiate its decision to withdraw the OLPP following denial of a similar request for additional time to receive public comment, it nonetheless denied the meritorious request for additional time here without discussion of the grounds advanced by OTA. Instead the denial mistakenly claimed the public had access to the information and documentation necessary to fully assess the Withdrawal RIA since November 2018. This statement is fully controverted by the First Vukina Report, and the Ferrier Report's repeated conclusions that a knowledgeable reader could not have replicated the analysis in the Withdrawal RIA and the Workbook of spreadsheets the Department published was incomprehensible. The denial also erroneously cited the September 2020 deadline in the District Court's Order, which actually supported robust public comment rather than giving 150 of 180 allotted days to the Department. See Attachment C (denial due to "tight timelines involved...[arising from] court deadlines in the District of Columbia case.")

B. The Second Vukina Report Demonstrates the Benefits of the OLPP Exceed the Costs and the Ferrier Report Cannot Substantiate the Withdrawal RIA.

The attached review of the Ferrier Report concludes the impact of the Ferrier Report on the Withdrawal Rule is that the Withdrawal Rule RIA should be revised to show the estimated benefits of the OLPP Rule exceed the costs. See Attachment A. ("Second Vukina Report") This outcome is an alternative that should be fully vetted in the Department's final analysis and shared with the public.

The Second Vukina Report also concludes the Ferrier Report repeats pre-existing and introduces new methodological errors and is based on documentation never previously shared. The Ferrier Report fails to consider applicable peer reviewed literature when updating and refreshing the cost-benefit analysis. That literature demonstrates some of the proposed methodological alterations and baseline value adjustments are inconsistent with best economic data and practices. See *Id.*; see also e.g. OMB Circular A-4 at 17; *Id.* at 39. The Second Vukina Report also offers original and current data that constitutes best evidence regarding organic egg production. This data is superior to and controverts the information used for baseline value adjustments proposed in the Ferrier Report. The Ferrier Report's failure to consider *all*

⁶ OTA submitted to the U.S. District Court an analysis of the Withdrawal RIA prepared by Dr. Vukina. See ECF No. 98-3 (Vukina Declaration) and 98-4 ("First Vukina Report")

of the benefits that are cited in the OLPP and OLPP RIA demonstrates it is one-side and skewed towards final conclusions that overestimate the costs of the OLPP while understating the benefits. *See e.g.* OLPP RIA at p. 5; *Id.* at 9-10; *Id.* at 11-16 (“Need for the Rule”); *Id.* at 88-98 (“Benefits of the Final Rule”); *see also* Attachment E (comments addressing the benefits of animal well-being); Attachment F (declarations). The overall impression left by the Ferrier Report is one written to support a predetermined result. The following sub-sections identify specific examples wherein the Ferrier Report utilizes faulty assumptions to understate the benefits of the OLPP Rule.

1. Ferrier Report Erroneously Reduces Egg Production Rates and Understates Benefits of OLPP

The Ferrier Report raises the issue that baseline egg production figures used in the Final RIA differ from those cited in AMS Market News Reports. As described by the Department in Part 4B of the Ferrier Report, the Final RIA used an annual production value of 24.7708 dozen eggs-per-layer. The rationale for disagreeing with this value as explained in the Ferrier Report is “the data source of egg-per-layer value used is poorly documented,” “significantly exceeds other readily available data collected by the Department at the national level,” and “deviates from the AMS Weekly Report data relied upon in the Final RIA for the layer numbers.” The Ferrier Report instead presents a new (lower) annual production value of 23.0406 dozen eggs-per-layer based solely on data from AMS Market News “Weekly the Department Certified Organic Poultry and Eggs” Reports. The Department also cites the NASS Chickens and Eggs Summary for 2015 and 2016 showing annual averages of 23 dozen and 23.05 dozen eggs-per-layer, respectively.

The proposed reduction in baseline egg production values is based on faulty assumptions. The new (lower) data points cited in the Ferrier Report are based on unrepresentative and unreliable data sources, and the data collection and calculation methodologies are not documented. The estimated weekly organic egg production values published in the AMS Market News are not representative of the industry. The AMS report includes the disclaimer: “does not reflect all organic production; estimates based on data collected from industry cooperators and other sources.” As further explained in the Second Vukina Report (Attachment A), using the AMS Market News is a flawed approach. Furthermore, The NASS Chicken and Eggs Summary cited in the Ferrier Report is not specific to organic (it is a total average of all layers; organic is not specifically mentioned). It would be unwise for the Department to rely on either of the references in the Ferrier Report as a basis for deviating from the Final RIA, especially when it differs from actual industry records.

OTA’s review of actual flock records shows that that actual productivity rates are higher than the values cited in the Ferrier Report. OTA collected business records from OLPP-compliant organic egg producing operations including their actual flock records and performance data for their most recent completed cycle of organic laying hens. In total, these flock records represent 5.62 million laying hens as an observed sample, representing egg production across all geographic regions of the United States. The number of eggs per hen was calculated and the results show a weighted average of 24.689 dozen eggs-per-layer per year. As further explained in the Second Vukina Report (Attachment A), this figure is reliable as a baseline production values for organic eggs.

2. Ferrier Report Lacks Justification for Reduced Willingness to Pay Values and Understates Benefits of OLPP

Section 2 of the Ferrier Report raises the issue that the consumer Willingness To Pay (WTP) value used in the benefits calculation was too high in the Final RIA, and that the new (lower) values in the Withdrawal RIA are correct. The Withdrawal RIA reduced the Final RIA high and low WTP estimates from \$0.49 and \$0.21 respectively to \$0.25 and \$0.16 per dozen eggs. The Ferrier Report justifies the reduction in WTP values by misapplying the results of the Heng study that were cited in the OLPP by eliminating all welfare attributes other than “outdoor access” from the “benefits” calculation. The Ferrier Report’s erroneous WTP value range reduced by half the WTP cited in the OLPP RIA.

The Ferrier Report mistakenly omitted the OLPP’s ban on forced molting from its assessment. As set forth in the Second Vukina Report, if the correct WTP value is used in the “benefits” formula, the result is that the benefits of the OLPP manifestly exceed the costs. Furthermore, the Department relies on only one academic study and overlooks a range of other literature that is directly relevant to WTP, supports the OLPP RIA WTP Findings and supports the OLPP RIA Consumer Trust Benefit Findings. As further explained in the Second Vukina Report (Attachment A), correcting the calculations of the Heng study and conducting a more complete literature review reveal much higher levels of WTP than used in the Withdrawal RIA.

3. Ferrier Report Erroneously Raises Mortality Rates and Understates Benefits of OLPP

The Ferrier Report contends increased flock mortality associated with outdoor access was ignored when calculating the benefits of the OLPP. Relying on the OLPP RIA’s statement that layer mortality was expected to increase from 5% to 8% as a result of the OLPP’s new outdoor access requirement, the Ferrier Report concluded egg production values used in the OLPP RIA were overestimated by 1.4% and this upwardly skewed the benefits calculation. The Second Vukina Report concluded the academic literature conclusively demonstrates that complex production systems that include outdoor access show steady declines in mortality rates over time. Based on this, a static rate of mortality would be methodologically inappropriate and the differences between systems with outdoor access and no outdoor access would approach zero.

Furthermore, the Department’s assumed flock mortality rate of 8% is significantly higher than what is shown in actual industry records. OTA’s review of actual flock records shows that that mortality rates are lower than the values cited in the Ferrier Report. OTA collected business records from OLPP-compliant organic egg producing operations including actual flock records and performance data for their most recent completed cycle of organic laying hens. In total, these flock records represent 5.62 million laying hens as an observed sample, representing egg production across all geographic regions of the United States. The results show a weighted average mortality rate of 6.07%.

4. Ferrier Report Fails to Recognize Growth Opportunity for OLPP Compliant Operations and Understates the Benefits of OLPP

The Final RIA considered three scenarios with different underlying assumptions regarding firm exit and entry (i.e. industry growth). Scenarios A and B assume continued industry growth, for which the Department defined in the Final RIA as 12.7% growth in organic egg production (in the 5 years preceding full compliance date with the OLPP Rule).

- Scenario (A) – Full Compliance – “All producers remain in the organic market; Organic layer and broiler populations continue historical growth rates after the rule.”

- Scenario (B) – Entry and Exit – “50 percent of organic layer production in year 6 (2022) moves to the cage free market. Organic layer and broiler populations continue historical growth rates after the rule.”
- Scenario (C) – Entry and Exit, No Non-Compliant Entry – “50 percent of organic layer production in year 6 (2022) moves to the cage free market. There are no new entrants after publication of this rule who cannot comply.”

The benefit of OLPP was that it provided opportunities for growth that would have been seized by operations that were able to comply with OLPP requirements in an economically efficient manner, without the purchase of new land, and without the economic hardship certain incumbents might face that were described in the withdrawal RIA. However, the three scenarios presented by the Department do not account for compliant operations that will increase production at rates well above the assumed 12.7% growth rate to meet demand after non-compliant operations exit following implementation of the OLPP Rule. The Ferrier Report failed to consider this alternative outcome and it would be error to omit its impact. Numerous written Comments submitted in response to this Docket by presently compliant operations, organic egg marketing operations are poised to fill the gap left by the departure of noncompliant operations as a result of the OLPP Rule. Further analysis on these scenarios is provided in the Second Vukina Report (Attachment A).

Last, because there are no final calculations regarding costs and benefits set forth in the Ferrier Report, it is impossible to check or replicate the calculations and therefore many outcomes from its proposed methodological revisions remain untested and obscure. *See e.g.* 5 U.S.C. § 553(b) (“[g]eneral notice of proposed rulemaking shall be published in the Federal Register” and “shall include ... either the terms or substance of the proposed rule or a description of the subjects and issues involved.”); 553(c). (agency must “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.”) This is particularly so with regard to Section 4’s effort to revise the baseline values of the cost-benefit analysis, and Section 7’s treatment of costs. *See* Section B, *supra.*; Second Vukina Report. Replication of such results is a threshold requirement of cost-benefit analyses. OMB Circular A-4 at 17. In addition, the consideration of reasonable alternatives to withdrawal should be vetted in the Department’s final analysis. More fulsome examinations and conclusions with regard to the Ferrier Report were not able to be completed because the comment period was truncated, thus the responsive analysis was unfortunately and unnecessarily limited. *See* Attachment A (Second Vukina Report).

C. The Ferrier Report Failed to Consider the Costs of Ongoing Delay to the Affected Parties.

The Second Vukina Report found the Ferrier Report did not consider all the benefits cited in the OLPP RIA. The fact that the Withdrawal Rule is currently economically unsubstantiated by the defective Withdrawal RIA renders the harm to producers, consumers and others affected by the Withdrawal Rule a cost that should be considered before rejecting reinstatement of the OLPP as an alternative to withdrawal. *See e.g.* OLPP RIA at p. 5; *Id.* at 9-10; *Id.* at 11-16 (“Need for the Rule”); *Id.* at 88-98 (“Benefits of the Final Rule”) Such analysis is a threshold requirement of a cost-benefit analysis. *See* OMB Circular A-4 at 3 (“A complete regulatory analysis includes a discussion of non-quantified as well as quantified benefits and costs.”)

The unreasonableness of the delays, the extent of the delays and the substandard administrative processes involved have resulted in harm to those interests that would have benefited from the proper and

timely implementation of the OLPP. The prejudice to many stakeholders arising from this drawn out process is well set forth in the attached declarations that are submitted here to update and refresh the administrative record on this topic. *See Attachment F* (declarations of harm arising from denied benefits of the OLPP) The Ferrier Report, while purporting to consider the costs and benefits of the OLPP and the impact on the Withdrawal Rule of the substandard Withdrawal RIA, completely overlooked the costs arising from the delay. To comport with best economic practices, the cost of further delay to those within the statutory zone of interest must be considered.

D. The Department Must Publish its Final Analysis for Public Comment

The Department sought a limited remand for “clarifying and supplementing the record regarding the economic analysis underlying both the OLPP Rule and the Withdrawal Rule.” 85 Fed. Reg. at 22664 Commenters were asked to “clearly indicate the topic to which your comment refers, state your position(s), and include relevant information and data to support your position(s)” and directed to submit them in approximately thirty days. *Id.* The Ferrier Report is the Department’s “initial review of the flaws” appearing in the Withdrawal RIA and the Department promises to publish a “final analysis” before September 8, 2020. 85 Fed. Reg. at 22664.

USDA seeks comment on the findings in the Economic Analysis Report and their impact on the Withdrawal Rule. The public comments will inform a *final* analysis, to be published in the Federal Register in the form of a second document later in 2020, explaining the Department’s final conclusions pertaining to the Economic Analysis Report. 85 Fed. Reg. at 22664. (italics not in original)

The U.S. District Court plainly stated that the Department’s final document must be the subject of public comment. ECF No. 112 at p. 3. The District Court did not intend revised computational assumptions, methodological approaches and new proposed baseline values would be applied in a revised cost-benefit analysis without disclosing the final result and exposing it to public comment. We expect the Department to disclose its final conclusions and provide an opportunity for public comment *prior* to returning to the District Court.

1. Failure to Seek Comment on its Final Revision of the Withdrawal RIA Exacerbates a Record Already Fraught with Delay, Unresponsive Administrative Processes and Unduly Curtailed Public Participation

The U.S. District Court referred to the Department’s inability to get its economic work straight as “the administrative process at its never-ending worst.” *See* ECF No. 112 at p. 1. OTA agrees and believes the Department’s administrative and judicial activities, taken as a whole, strongly suggest they intentionally constrain meaningful public participation and serve as a pretext for a predetermined outcome.

On February 9, 2017 the Department delayed, without notice or public comment, the effective date of the OLPP and began an undefined review of the OLPP and the OLPP RIA. 82 Fed. Reg. 9967 (February 9, 2017) (“First Delay Rule”) On May 10, 2017 the Department again delayed, without notice or public comment, the effective date of the OLPP to continue its undefined review. *See* 82 Fed. Reg. 21677 (May 10, 2017) (the “Second Delay Rule”). On November 14, 2017, the Department issued a third

delay, 82 Fed. Reg. 52,643, to reconsider “the likely costs and benefits of that rule” by a “notice and comment process.” *Id.* A little more than a month later on December 18, 2017, the Department proposed to withdraw the OLPP in part because “the calculation of benefits contained mathematical errors” and because it found “the benefit interval could be replaced with more suitable estimates.” 82 Fed. Reg. at 59,990. the Department also placed on that day a “Workbook” of spreadsheets on the Internet.⁷ The U.S. District court summed up these administrative actions finding: “the Department then three times unilaterally issued a rule delaying the effective date of OLPP Rule”. *See* ECF 112 at p. 1; *see also* ECF No. 34-3 at ¶¶ 160-188 (Second Amended Complaint)(detailing unlawful delays).

The comment period for the flawed Withdrawal RIA was limited to 30 days and fell on the Christmas, Hanukkah and secular New Year holidays. 82 Fed. Reg. at 59,988. Multiple requests for extension were denied. *See e.g.* OTA Extension Request, Attachment D; *see also* 83 Fed. Reg. at 10,775 (discussing denial, noting “Commenters also requested an extension of the public comment period, from 30 to 90 days, specifically noting they needed more time to study the revisions discussed in the Preliminary Regulatory Impact Analysis (PRIA) and develop meaningful comments.”) On March 13, 2018 the Department withdrew the OLPP, 83 Fed. Reg. 10,775- 783 (March 13, 2018) finding, “the costs of the OLPP final rule outweigh potential benefits” and because there purportedly was “a mathematical error in the calculation of benefits.” 83 Fed. Reg. at 10,779. Between April 2016 and March 2018, the Department published three separate economic analyses of the OLPP, and the computational methodology published was different each time.⁸ On April 23, 2020 the Department proposed yet another computational methodology. *See* 85 Fed. Reg. 22664-677; *see fn.* 5 (noting “three key differences”). In sum, the Department has now taken four years to publish a fourth attempt at what it once again claims is the correct computational methodology. Since the publication of the OLPP RIA the public has had a total period of 60 days to comment on the Department’s economic efforts and the Department has had approximately forty months to develop it.

The organic stakeholders are the Plaintiff in *OTA v. Perdue*, Case No. 1:17-cv-1765 (U.S. Dist. Ct. D.C.) (2017). OTA’s case challenged the multiple unlawful delays and the final Withdrawal Rule and its accompanying RIA. OTA requested Summary Judgment in October 2019. *See* ECF No. 98 Following multiple extensions of time and only hours before its response was due, the Department instead requested the case be further delayed so it could, according to Dr. Feather’s declaration, re-examine the “assumptions used to calculate the costs and benefits of the OLPP Rule were methodologically sound.” *See* ECF No. 102-1 (Jan. 3, 2020). OTA objected to the delay request on multiple grounds. *See* ECF No. 105. The U.S. District Court referred to the Department’s unorthodox actions: “after two extensions of

⁷ The Department has since admitted the spreadsheets were unusable by a non-the Department party and the Ferrier Report declined to explain why the spreadsheets did not set forth the final calculations in support of the Withdrawal RIA. Instead the Ferrier Report maps them to the Withdrawal RIA’s inchoate calculations. 85 Fed. Reg. at 22666.

⁸ *See* Proposed OLPP Regulatory Impact Analysis (May 2016) (applying straight line depreciation for both costs and benefits); *see also* Final Regulatory Impact Analysis and Final Regulatory Flexibility Analysis (January 2017) (applying straight line depreciation for benefits only)(“OLPP RIA”); Regulatory Impact Analysis Organic Livestock and Poultry Practices Withdrawal (March 2018)(applying straight line depreciation for both costs and benefits); *Id* at 11 (recognizing the Department’s changing analyses).

time, USDA was expected to file an opposition when it suddenly asked for remand.” ECF No. 112 at p. 1. The Court allowed the delay and authorized the Department to redo its Withdrawal RIA and publish “its updated cost/benefit analysis” not later than 180 days after March 12, 2020. *See* ECF No. 112

The administrative process since the first unlawful delay, up to and including the publication of the Revision and the Ferrier Report, fall short of the requirements of the APA. The proceedings appear to be a pretext for delaying the lawful implementation of the OLPP by repeated administrative proceedings that fail to provide for meaningful participation by the public. *See* 5 U.S.C. § 553(c). Moreover, participation is meaningful only if the Department “remain[s] sufficiently open-minded” in considering comments and adopting a regulatory approach. *Rural Cellular Ass’n v. F.C.C.*, 588 F.3d 1095, 1101 (D.C. Cir. 2009) citing *Fed. Express Corp. v. Mineta*, 373 F.3d 112, 120 (D.C.Cir.2004); *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C.Cir.1988).

E. The Ferrier Report is not an Independent Peer Review of the OLPP RIA and the Withdrawal RIA and its Results are Impermissibly Skewed. The Ferrier Report Should be Re-designated as a Litigation Report.⁹

The Ferrier Report is the Department’s workproduct resulting from a limited remand from the U.S. District Court. The remand was sought by the Department to improve its litigation position. ECF No. 106 at p. 1 (requesting remand to conduct an “internal review of the economic analysis underlying the OLPP and Withdrawal Rules.”) It bears the title “Independent Peer Review” of two published documents, the OLPP RIA and the Withdrawal RIA. 85 Fed. Reg. at 22665. According to the Department it is an “independent perspective on the integrity of the methodology and calculations underlying the prior rulemakings.” 85 Fed. Reg. at 22665. There are several factors that taken together demonstrate the Ferrier Report should not be considered an independent peer review of the economic analyses conducted in the two referenced rulemakings.

The deficiencies the Ferrier Report ascribed to the Withdrawal RIA conclusively demonstrate as it is currently written it cannot be a ground for substantiating the Withdrawal Rule. It is irrelevant that the Ferrier Report attributes errors in the Withdrawal RIA as having been carried over from the OLPP RIA. The OLPP was published and became the governing regulation in January 2017. Under these circumstances the Withdrawal Rule should be discarded and the unlawfully withdrawn OLPP should be reinstated. *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (agency is “bound by the rule until that rule is amended or revoked.”) If the Department wishes to persist in revising its economic analysis it can do so while the OLPP is effective. *Id.*, it should be considered a piece of advocacy rather than an independent review of the Withdrawal RIA’s errors it claimed triggered the request for remand. *See* ECF No. 102 at p. 5. (Department argued to the U.S. District Court that it sought a remand to “reexamine to ensure that the errors USDA sought to address were, in fact, fully addressed.”)

Dr. Ferrier is an employee of the Department. 85 Fed. Reg. at 22664 (“AMS commissioned one its economists...”) An employee of a litigant would not meet the conventional definition of a disinterested peer producing objective work. Dr. Ferrier is unquestionably reviewing the substandard work of his colleagues at the Office of the Chief Economist. The Ferrier Report’s contents, combined

⁹ Dr. Ferrier’s credentials and expertise in the subject area have not been established except by reference to his employment in the Department’s Office of the Chief Economist.

with the truncated opportunity to provide public comment, strongly suggest that work was undertaken for the purpose of substantiating the existing decision to withdraw the OLPP. Moreover, it is also unclear why Dr. Ferrier’s analysis, produced for his employer, would be described as or be presumed to be “independent.”¹⁰ In fact, the court record establishes that Dr. Peter Feather, the Department’s economist whose appearance as witness in support of the Department’s remand request in the OLPP litigation, is Dr. Ferrier’s work superior.¹¹

The Ferrier Report, as discussed in the Second Vukina Report, appears to be skewed towards reducing estimated benefits of the OLPP and increasing the costs. In other words, it appears to be primarily an advocacy piece for revising and thereafter substantiating the Withdrawal RIA’s discredited conclusions. It appears to meet the definition of a biased product because of the relationship between Dr. Ferrier and a party to the lawsuit, his employer. Such bias need not be intentional to discredit the work product, because the employment relationship might lead the witness to slant, unconsciously or otherwise, his analysis in favor of his employer.¹² The Ferrier Report should be redesignated as a litigation report by a party and its results assessed in that light.

Conclusion

For the foregoing reasons the Withdrawal RIA should be revised to conclude that benefits of the OLPP exceed the costs and the issue should be dropped from the pending litigation. Alternatively, the Department should revise the Withdrawal RIA in accordance with these and other applicable public comments and re-publish it with all final calculations disclosed in order to secure meaningful public comment.

Respectfully submitted,



Laura Batcha
Executive Director/CEO
Organic Trade Association

¹⁰ In contrast, Dr. Vukina’s analytic work on this matter has been referred by the Department’s attorneys as “extra-record... privately commissioned analysis of the Withdrawal RIA.” 85 Fed. Reg. at 22664.

¹¹ See ECF No. 102-1 at para. 1 (Dr. Feather is a “senior economist”) Dr. Feather is listed as part of the leadership team of the Office of the Chief Economist. See https://www.usda.gov/oc/about_oc/leadership.htm (last visited May 14, 2020)

¹² The Office of the Chief Economist’s website contains links to other parts of the Department’s website that purport to impose informational “objectivity” requirements. These are nowhere vetted in the Ferrier Report or the Revision. See e.g. USDA Information Quality Activities available at <https://www.ocio.usda.gov/policy-directives-records-forms/information-quality-activities> (last visited May 24, 2020) (requiring USDA to maintain “objectivity” and produce “unbiased” analyses in document preparation)

Attachment A: Second Vukina Report

Comment on the Organic Livestock and Poultry Practices Economic Analysis (Ferrier Report)¹

85 Fed. Reg. 22664-22677 (April 23, 2020)

Prepared by

Dr. Tomislav Vukina
Professor, North Carolina State University
President and Chief Economist, Vukina et al. Consulting

Introduction

My prior analysis of the Withdrawal RIA concluded it was substandard in many identifiable ways. *See* ECF No. 98-3 (Vukina Declaration) and 98-4 (“the Vukina Report”) (Attachment A hereto) I pointed out that the spreadsheets published in support of the Withdrawal RIA contained computational results that could not be replicated using the published formulas. Worse, the computational values appearing in the spreadsheets could not be replicated by in any consistent manner by slight adjustments to the formula or the published values. *Id.* Thus, many of the published spreadsheets appeared to be flawed, each in their own way. Stated plainly the published analysis was incomprehensible.

The Ferrier Report confirmed my findings. 85 Fed. Reg. at 22665 (“Summary”); *see also* Sections 1-3. The Ferrier Report goes on however to identify additional errors in the Withdrawal RIA that could not possibly have been identified before because of inadequate documentation and non-disclosure of USDA’s underlying assumptions and methodology.² *See* Sections 4-7; *see e.g.* 85 Fed. Reg. at 22664 (“This Report identifies four additional categories of errors [in the] Withdrawal RIA.) In fact, the Ferrier Report repeatedly recognizes that not only was a third-party unable to replicate the Withdrawal RIA analysis, but even a USDA employee with access to all of the work product that underpinned the publication of the Withdrawal RIA could not fully explain the methodology or the results. *See e.g.* 85 Fed. Reg. at 22669 (“This Report cannot explain the discrepancy in values.”)

USDA stated the Ferrier Report is an “independent perspective on the integrity of the methodology and calculations underlying the prior rulemakings.” 85 Fed. Reg. at 22665. However, as set forth below the Ferrier Report did not comprehensively review the costs and benefits of the “prior rulemakings.” Moreover, the uniformity of the conclusions (that the costs of the OLPP were understated and the benefits overstated) and the proposed methodological revisions (that lower estimated benefits and increase costs) indicates less than an “independent perspective.”

¹ “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”).

² The Ferrier Report details many demonstrable errors in the Withdrawal RIA. It goes to great lengths to conclude that some of the claimed errors originated in the OLPP RIA analysis. *See* 85 Fed. Reg. at 22665 (“Summary”) The source of the errors in the Withdrawal RIA is irrelevant—the sole question posed by the Federal Register Notice is the “impact on the Withdrawal Rule.” 85 Fed. Reg. at 22664. In economics a computational error may or may not be material, it depends primarily on the role the calculation plays in the targeted assessment.

Given the time constraints imposed by the Department it was not possible to fully respond to the Ferrier Report, or raise a rebuttal to each suggestion of material methodological error or provide an improved analysis or suggest a sounder methodological approach in each circumstance. Taken in this light, and as a matter of public accounting under the preferred federal framework for developing cost-benefit analyses, the Ferrier Report does not provide a fully comprehensible standard against which to measure the costs and benefits of the chosen regulatory course of action, in this case the withdrawal of the OLPP. *See e.g.* OMB Circular A-4; *see also* Executive Orders 12866 and 13563.

Nonetheless, certain errors are identifiable and if the Ferrier Report is corrected in accordance with the following analysis, it is inescapably obvious that the quantifiable benefits of the OLPP easily exceed the quantifiable costs, even without consideration of the many benefits described in the OLPP RIA that were not directly monetized and that the Ferrier Report ignored. Thus, the question of the impact on the proposed withdrawal of the OLPP based on the additional errors in the Withdrawal RIA uncovered in the Ferrier Report is clear: withdrawal is not substantiated by the Ferrier Report just as it was not substantiated by the Withdrawal RIA.

Preliminary Observations Regarding the Ferrier Report

The Ferrier Report Did Not Conduct a Comprehensive Review of the OLPP RIA and Withdrawal RIA and did not Conduct a Cost-Benefit Analysis

The OLPP RIA described numerous benefits of the OLPP that are not addressed in the Ferrier Report. *See e.g.* OLPP RIA at p. 5; *Id.* at 9-10; *Id.* at 11-16 (“Need for the Rule”); *Id.* at 88-98 (“Benefits of the Final Rule”) Many other sections of OLPP RIA describes benefits not addressed by the Ferrier Report. The failure to address all the proposed benefits of the OLPP renders the Ferrier Report more of an expansion of the catalogue of USDA’s admitted methodological and computational errors than a positive or conclusive revisiting of the two rulemakings as USDA suggested. *See* 85 Fed. Reg. at 22665 (stating Ferrier Report is an “independent perspective on the integrity of the methodology and calculations underlying the prior rulemakings.”)

The Ferrier Report first focuses on errors addressed, if incompletely, in the Withdrawal RIA. *Id.* at Sections 1-3. Then it selectively reassesses portions of the OLPP RIA that were not considered at all in the Withdrawal RIA. *Id.* at Sections 4-7. But no final calculations are set forth. Because the Ferrier Report contains no final calculations to review, it is impossible to coherently compare it to the OLPP RIA or the Withdrawal RIA, which contained such calculations. As this is described by USDA as its “initial analysis” it appears that the final calculations have been withheld and when published will require another round of public comment to assess the full impact of the Ferrier Report on the proposed course of regulatory action. 85 Fed. Reg. at 22664 (proposing to publish a “final analysis”)

Review of Section Two of the Ferrier Report

The Ferrier Report Failed to Correct the Computational Methodology Error in the Withdrawal RIA Regarding Willingness to Pay (“WTP”) and Miscalculates the Future Benefits Arising from the OLPP³

The OLPP RIA concluded consumers would be willing to pay more for eggs produced under the practices required under the OLPP. To compute the benefit of consumers’ willingness to pay (“WTP”) for eggs following the implementation of the OLPP, the OLPP RIA relied primarily on a single academic study.⁴ (hereinafter “Heng” or “Heng paper”). The Ferrier Report claims the OLPP RIA derived an “inappropriate estimate for the value of eggs produced” from the Heng paper and that this error was properly corrected in the Withdrawal RIA. *See* 85 Fed. Reg. at 22667. A review of the Heng paper demonstrates the Ferrier Report’s conclusion is incorrect.

The Heng paper concluded:

Our estimates suggest that the majority of consumers are willing to pay an average premium of \$0.21 to \$0.49 per dozen for eggs produced in a cage-free environment with outdoor access or without induced molting. Heng, at 431.

The Ferrier Report focused on a separate statement in the Heng paper that isolated the WTP for “outdoor access”:

[W]ere willing to pay a premium for eggs from hens given outdoor access...with a mean premium of \$0.25 * * * [and a second group of respondents would pay a] mean premium for outdoor accessat \$0.16.” 85 Fed. Reg. at 22667.

Citing this conclusion, the Ferrier Report concluded the appropriate WTP low should be \$0.16 and the high \$0.25. 85 Fed. Reg. at 22667 The Ferrier Report explained the WTP used in the OLPP RIA of \$0.21-- \$0.49 was too high because:

[U]nder existing rules, organic eggs are already required to be produced cage-free” * * [and] the actual benefit attributable to the OLPP Rule should be comprised of only the portion of the WTP” [that can be] ascribed to the addition of new outdoor access requirements to existing organic egg production requirements. 85 Fed. Reg. at 22667.

The flaw in the foregoing statement is that it overlooks the impact of banning forced or induced molting on the WTP of the survey respondents. In fact, the Ferrier Report completely erased the

³ All numerical WTP values refer to payment for a dozen eggs.

⁴ *See* Yan Heng, Hikaru Hanawa Peterson and Xianghong Li (2013): *Consumer Attitudes toward Farm-Animal Welfare: The Case of Laying Hens*. Journal of Agricultural and Resource Economics 38(3): 418-434

significant effect on WTP that the Heng study described.⁵ This oversight is material because it cancelled the effect on consumers' WTP of the OLPP's *new prohibition* on forced molting. Prior to the OLPP no direct prohibition on "forced molting" existed in the organic regulations. This is why the OLPP *added* the prohibition. "AMS added a new § 205.238(c)(10) that prohibits the practice of forced molting in poultry." 82 Fed. Reg. at 7051; *see also* 82 Fed. Reg. at 7090 (§ 205.238(c)(10) ("An organic livestock operation must not: ...Practice forced molting or withdrawal of feed to induce molting.))

The erroneous omission of the "forced molting" prohibition in the OLPP from the computation misstated the WTP benefit attributable to the OLPP. Close examination of the WTP results in Heng's Table 8 discloses the authors separately calculated the mean WTP for the four salient welfare-related attributes, (1) cage free; (2) outdoor access; (3) stocking density and (4) no forced molting.⁶ They then tabulated the results by group.

For the first group the WTP for "outdoor access" was \$0.16 and for the second group it was \$0.25. Heng, at 429. For the first group the WTP for "no forced molting" was \$0.40 and for the second it was \$0.35. *Id.* Accordingly, the correct total WTP benefits associated with the OLPP is the sum of the mean premia for "outdoor access" and "no forced molting." Thus, the incontrovertible and actual WTP benefit range is \$0.56--\$0.60. *Id.*

The Ferrier Report mistakenly concluded that "outdoor access" was the sole benefit of the OLPP and found the WTP range should be solely based on that welfare attribute. The "no forced molting" attribute was entirely and erroneously overlooked. Thus, the approach taken in the Ferrier Report, from a methodological perspective, missed 50% of the relevant data in Table 8 and misstated the WTP by an even greater percentage.⁷ If the correct WTP is plugged into the undisputed benefits calculation formula, the benefits of the OLPP manifestly exceed the costs.

The Ferrier Report Overlooked Recent Literature that Supports the OLPP RIA WTP Findings

Related to benefit transfer exercise discussed above, it is also surprising that Ferrier Report failed to examine contemporaneous and newer peer reviewed literature in the field of animal welfare economics to attempt to verify or improve the precision of benefit estimates that were used to conduct the cost-benefit analysis in the Withdrawal RIA. *See* OMB Circular A-4, at 17 (peer reviewed analysis should be relied upon) As is shown below, this misstep renders the

⁵ Heng found consumers' interest in avoiding "induced molting" was "notable" and a majority of the survey respondents viewed such "conventional management practices" as adverse to a birds' welfare. Heng, at 431. "More than 95% of respondents were willing to pay a premium for eggs from hens that were not forced into molting." *Id.* at 430. Heng also concluded that 85% of the survey respondents were willing to pay a premium for "outdoor access, cage free housing, and non-induced molting." *Id.* at 431.

⁶ Heng segregated the survey respondents into two nearly equal groups that differed solely by certain information they received that was not directly related to animal welfare practices and for reasons that are not material here.

⁷ The foregoing analysis is unaffected by the discussion in the section of the Ferrier Report styled "Weighting of WTP Values." In fact, the key conclusion supports my analysis: "This Report assesses the mean premium as the more appropriate value to apply for rulemakings purposes." 85 Fed. Reg. at 22676.

Withdrawal RIA and the Ferrier Report even further out of step with demonstrated WTP values in this setting.

In a highly regarded and cited text entitled “Compassion, by the Pound: The Economics of Farm Animal Welfare⁸” the authors present WTP premium estimates for eggs of various production systems relative to eggs from cage systems based on a hypothetical auction. *See Id.* at 284 (Table 9.2). Directly relevant for evaluating benefits of the OLPP is the comparison of the WTP for cage-free eggs in an aviary system and the cage-free eggs in an aviary system with outdoor access or free-range. The two production systems are identical in all material aspects (density, beak trimming, room for scratching and dust bathing, nest availability, flock size and the type of feed) *except* for outdoor access. *See Id.* at 272 (Table 9.1) Therefore, the difference in the WTP is solely attributable to outdoor access or free range. The results show that the presence of the outdoor access or free-range aspect raised the average WTP by \$0.59 per dozen eggs.

Another highly probative study should be considered. In 2017 two Dutch economists published “Dutch Consumers’ Willingness to Pay for Broiler Welfare.”⁹ The authors estimated the Dutch consumers WTP for broiler welfare using discrete choice experiment and a random parameters logit model. Their results show the mean WTP estimate for outdoor access of 2.145 Euro (\$2.73) per 500 grams (1.1 pound) of chicken meat. Contrasting this result with the price of regular chicken of \$2.55 per 500 grams, the outdoor access premium amounted to 107.25%.

The Ferrier Report Overlooked Recent Literature that Supports the OLPP RIA Consumer Trust Benefit Findings

Two other peer reviewed studies should be considered because they highlight the importance of consumer trust when it comes to credence attributes claim verification.

In a 2010 study entitled, “Consumer Willingness to Pay for Livestock Credence Attribute Claim Verification” the authors estimated the WTP for pasture for milk cows and pigs.¹⁰ Relying on random parameters logit estimation method and direct questioning protocol (asking survey respondents to select their own preferred alternative) they estimated WTP for pasture access in case of pork chops (in \$/pound) in four verification scenarios. The authors found a WTP of 1.22 where the claim was self-verified by the producer; -1.29 (negative) where the claim was private-party verified; 1.33 where the claim was consumer-group verified and 3.84 in the case of USDA verified pasture access (organic). In the case of milk, the estimated WTP for pasture access (in \$/gallon) was 4.03 for self-verified pasture access; 1.24 for private party verification; 6.12 for consumer group verification; and 10.32 for USDA-verified pasture access (organic). For both pork chops and milk, the results clearly indicate that consumers have the highest trust in government verification of the credence attribute claims related to animal welfare.

⁸ *See* F. Bailey Norwood and Jason L. Lusk: “Compassion, by the Pound: The Economics of Farm Animal Welfare.” Oxford University Press, New York (2011).

⁹ *See* Machiel Mulder and Sigourney Zomer (2017): “Dutch Consumers’ Willingness to Pay for Broiler Welfare.” Journal of Applied Animal Welfare Science, Vol. 20 (n0.2): 137-154.

¹⁰ *See* Nicole J. Olynk, Glynn T. Tonsor and Christopher A. Wolf (2010): “Consumer Willingness to Pay for Livestock Credence Attribute Claim Verification.” Journal of Agricultural and Resource Economics 35(2): 261-280.

Given that the average offered prices in the experiment in both cases were \$4 per a pound of boneless pork chops or per gallon of milk, the animal outdoor access WTP premium substantiated by USDA verification amounted to 96% for pork chops and 258% in case of milk.

In a 2019 study entitled, “Willingness to Pay for Whole Turkey Attributes during Thanksgiving Holiday Shopping in the United States” the authors estimated the WTP for outdoor access (free range) for turkeys during Thanksgiving holiday shopping season in the U.S.¹¹ Similar to the Olynk study results, this study also found that the consumers trust the USDA certification process the most. The WTP for USDA certified free-range turkeys was \$0.74/pound, for retailer certified free-range turkeys \$0.64 and for the industry certified free-range it was \$0.37/pound. As a percentage of the mean base price, these WTP measures amount to 47% premium for USDA certified free range, 41% for the retailer certified outdoor access and 24% for the industry certified outdoor access. In summary, a rather exhaustive survey of extant literature in the field of WTP for outdoor access of farm animals clearly indicates much higher levels of WTP than used in the Withdrawal RIA.

Review of Section Four of the Ferrier Report

In Section 4(A) the Ferrier Report concluded two baseline egg production values were cited in the OLPP RIA and the different values appeared “without explanation.” 85 Fed. Reg. at 22669. It also concluded the Withdrawal RIA used a third and different baseline production value. 85 Fed. Reg. at 22669. The production value cited by the Ferrier Report from the Withdrawal RIA was 24.7708 dozen eggs per bird per year. The production value from the OLPP RIA was not cited. Instead the Ferrier Report calculated a value based on the number of laying hens reported in November 2016 and the highest number of eggs produced from an undisclosed month between April 2016 and January 2017, which was reported as 23.0406.

In Section 4(B) the Ferrier Report proposed to address the inconsistencies by selecting a single baseline production value. Absent intervening reasons, this is a sound methodological approach. OMB Circular A-4 at p. 15¹² It is also widely understood that “the choice of a baseline will significantly affect estimated benefits and costs.” *Id.* Thus, the impact of altering the baseline must be carefully scrutinized to ensure it is not merely a means of preselecting an outcome. The Ferrier Report rejected the baseline values appearing in *both* prior rulemakings, 85 Fed. Reg. at 22669, and concluded the Withdrawal RIA’s 24.7708 dozen eggs per layer was too high because upon further review of statistical sources the correct laying rate should have been 23.0406 dozen. *Id.* Applying this result would alter the OLPP benefits calculation downward by approximately 7%.

¹¹ See Coutney L. Bir, N.J. Olynk Widmar, Melissa K. Davis, Marisa A. Erasmus and Stacy Zuelly (2020): “Willingness to pay for whole turkey attributes during Thanksgiving holiday shopping in the United States.” Poultry Science, <https://doi.org/10.1016/j.psj.201912.047>.

¹² Here however the Ferrier Report overlooked that the OLPP RIA recognized and assessed multiple sources for determining the baseline egg production value. See OLPP RIA, at pgs. 66-69 (describing more than eight sources of information reviewed prior to estimating a baseline production value.)

This approach is flawed for at least two reasons. First, the utilized data has been reported in the secondary literature to be considered among the least reliable of all AMS market reports. *See e.g. Lusk, Jayson, From Farm Income to Food Consumption: Valuing USDA Data Products, Prepared by: Council on Food, Agriculture and Resource Economics (C-Fare) (2003) at p. 18.* When the reliability of the data is questionable it is mere surmise to conclude that one number is better than the other. For example, the laying rate of 23.0406 computed in the Ferrier Report based on the Weekly USDA Certified Organic Poultry and Egg for April 2016 is identical (up to 2 decimal points) to the one found in the same report 4 years later (April 27, 2020). The likelihood that the laying rate was unaltered during a 4-year period is virtually zero. This strongly signals this data is in fact not observed but is determined or constructed using prespecified and undisclosed formulas. *See OMB Circular A-4, at 17 (peer reviewed analysis should be relied upon)*

Despite the restricted time frame provided, I am able to share current data that best reflects baseline production values for organic eggs. Within the short 30-day period allotted, the Organic Trade Association collected data from certified organic poultry operations that maintain production information as part of their routinely maintained business records. This data accounts for 5.62 million birds as an observed sample. The records were collected between May 11 and May 20 and represent farms across all geographic regions including the Northeast, Mid-Atlantic, Midwest, and West Coast. The reporting farms are currently compliant with the OLPP and all farms reporting outdoor access in excess of the OLPP requirement of 2 sq. ft/bird. The results show an average of 24.689 dozen eggs per laying hen per year. This weighted value is very close to the number originally used in the OLPP RIA indicating the production values used in the OLPP RIA are more accurate than the less reliable replacement numbers used in the Ferrier Report. Reducing the estimated number of eggs produced by 7.51%, as proposed in the Ferrier Report, is inconsistent with the best available evidence. I submit these figures as recent reliable data on baseline production values for organic eggs to update the record for USDA to rely on.

In Section 4H Ferrier Report argues that the general specification in Scenario B in the Final RIA is not well-justified. I believe that Scenario B should be modified to assume that 50% of the organic industry that can adapt to the new rules should continue to grow at 12.7% average annual growth rate whereas the second half of the industry that cannot adapt should continue producing organic eggs for 5 years of the transition period at the constant 2017 production level and should exit the organic sector in 2022 and move to cage-free market. What is missing in the Ferrier Report's modification of Scenario B is that 50% benefits eligibility rule for outdoor access argument should apply only to organic eggs produced by incumbents. However, the new growth in organic production during the entire period under consideration (i.e. all eggs and not only half of them) should generate benefits of the regulation due to outdoor access and no forced molting because these eggs are the result of new entry and were not there in 2017.

Review of Section Six of the Ferrier Report

In Section 6 the Ferrier Report argues that the OLPP RIA used production levels that did not account for increased mortality when calculating benefits. The Ferrier Report estimates the benefit calculation was over-estimated by 1.4%. 85 Fed. Reg. at 22673 Having squarely placed the question of increased mortality arising from outdoor access at issue, it was deficient to fail to

consider more recent literature on the subject. Based on such a review I conclude the projected increase in hens' mortality resulting from outdoor access is more than likely inaccurate.

A detailed review of extant literature reveals that the mortality rates vary dramatically from study to study because free range and organic production systems with unrestricted outdoor access are very complex. Almost each farm has a unique combination of location, weather, breed, feed, and management during rearing and laying periods. Because of this complexity, controlled experiments with outdoor systems on experiment stations are difficult to scale up to field situations and the results do not map precisely from one system to the next. In 2014 a discussion paper entitled "Laying hen performance in different production systems; why do they differ and how to close the gap?"¹³ presented a unique set of result. The authors present a comparison of various production indicators (egg production, feed conversion and mortality) across different production systems (cage, barn, free range and organic) over time. Both free-range and organic systems have identical access to a pasture of 4 m² per bird whereas the other two systems confine birds strictly to indoors. The results show significant decline in mortality rates over time for both free-range and organic systems and virtually no improvements over time with barn and cage systems. This strongly suggests a static (fixed) value for mortality rates, particularly when computing benefits of the system, is unwarranted.

For example, the literature demonstrates, mortality rates in 2008/2009 were 15.4% in organic production, 11.9% in free-range, 11.2% in barn and 9.2% in cage systems. In 2010/2011, the mortality in organic systems was 13.1%, in free-range 11.6%, in barns 8.8% and in cages 10.2%. However, by 2012/2013 the mortality rate in organic production systems dropped to 7.9% and was the lowest across all four systems, compared to 9.7% in free-range, 9.0% in barns and 8.8% in cage systems. Based on these results and the nature of the OLPP regulatory proposal, I believe the research compels the use of a zero excess mortality attributable to outdoor access because even if, currently, there is some degree of excess mortality due to outdoor access, by the time this regulation is fully implemented, technological and management advances are likely to eliminate the existing differences. This approach comports more closely to the OMB Circular A-4, that directs baseline values be carefully vetted to ensure "changes in external factors affecting benefits and costs" are recognized. *See Id.* at p. 15

In addition, actual data gathered during the 30-day comment period comports with the literature cited above. The previously mentioned Organic Trade Association survey data shows a present weighted average of 6.07% mortality rate for certified organic poultry operations.

Review of Section Seven of the Ferrier Report

Section 7 of the Ferrier Report purports to uncover various errors in the cost calculations appearing in the OLPP RIA that were uncorrected or completely ignored in the Withdrawal RIA. The discussion presents a thicket of explanations that are very difficult to follow and that cannot

¹³ Ferry Leenstra, Veronika Mauerer, Fabien Galea, Monique Bestman, Zivile Amsler-Kepalaite, Jeroen Visscher, Izak Vermeij and Marinus van Krimpen (2014): "Laying hen performance in different production systems; why do they differ and how to close the gap? Results of discussions with groups of farmers in The Netherlands, Switzerland and France, benchmarking and model calculations." European Poultry Science, Vol. 78, ISSN 1612-9199. DOI: 10.1399/eps.2014.53.

be independently verified without access to the original and corrected calculations.¹⁴ But two problems are easily detectable. First, throughout the OLPP RIA the cost burden of compliance with the OLPP has two components— increased physical cost and reduced revenue. Based on this methodology both categories of costs are meaningful for producers that are assumed to stay in the industry after implementation of the OLPP and should be accounted for. By contrast, for producers who exit the industry, the physical costs of compliance with the OLPP are obviously zero. On the other hand, the “cost” attributable to their reduced revenue should not be calculated as the number of eggs that operation produced before exiting the industry multiplied by the break-even organic price before the OLPP as suggested by the Ferrier Report, because by leaving the industry they will deploy their production resources in their next best alternative and will earn revenue/profits based on that alternative activity. *See* Ferrier Report at 22674; *compare* OLPP RIA, p. 106 (“In the case where aviaries are not able to acquire additional land, AMS assumes that these operations will move to the cage-free market because this would be a lower cost option than reducing the number of birds to comply with the outdoor stocking density and remain in the organic market.”) Conventional analysis suggests the only increase in costs that should be allowed for producers exiting the industry is the difference in profit obtained in the organic egg marketplace compared to their next best alternative. Secondly, some partial equilibrium adjustments may be necessary to reflect the supply change induced differences in the price of organic eggs relative to cage-free eggs in the post-OLPP marketplace.

¹⁴ The Ferrier Report at 22674 refers to calculations completed on “internal spreadsheets” that were not published. Without access to the same data and live spreadsheets as the Department’s analyst, reviewers of this work are unable to replicate or test the results.