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**Re: Organic Livestock and Poultry Practices Final Rule; Docket Number AMS-NOP-15-0012; NOP-15-06**

On behalf of the American Society for the Prevention of Cruelty to Animals (ASPCA), the Animal Welfare Institute (AWI), The Humane Society of the United States (HSUS), and our combined tens of millions of members, the following comments are hereby submitted regarding the National Organic Program: Organic Livestock and Poultry Practices—Withdrawal, docket number AMS-NOP-15-0012; NOP-15-06. Our organizations support higher animal welfare standards for the National Organic Program (NOP) and condemn the US Department of Agriculture’s (USDA’s) efforts to nullify the Organic Livestock and Poultry Practices (OLPP) rule (hereafter referred to as the OLPP Rule), a regulation developed with scientific rigor and lengthy collaboration over two decades.

USDA’s argument in support of its proposed rule is inadequate and is not based in law or in fact. USDA cannot reasonably separate animal health from animal welfare because the two are inextricably linked: Animal welfare reinforces animal health, and animal health reinforces animal welfare. Moreover, USDA’s attempt to separate the two is not based in law. The Organic Foods Production Act (OFPA) does not treat welfare and health as separate concepts, but rather as one overarching issue over which USDA has regulatory authority. That is why USDA has, since the enactment of the OFPA, issued regulations that improve animal welfare. Finally, the OLPP Rule is a necessary correction to a market failure created by the current standards: Consumers expect organic products to include robust animal care standards, and the OLPP Rule ensures that organic products meet those consumer expectations. For these and other reasons outlined below, we oppose withdrawal and urge immediate implementation of the OLPP Rule.

## A. USDA Cannot Reasonably Separate Animal Health from Animal Welfare

USDA now states that it proposes withdrawing the OLPP Rule because under the Agency's "current interpretation of 7 U.S.C. 6905," the Rule "would exceed USDA's statutory authority." 82 Fed. Reg. 59988. Specifically, USDA states:

[I]t now believes OFPA does not authorize the animal welfare provisions of the [Organic Livestock] final rule. Rather, the agency's current reading of the statute, given the relevant language and context, suggests OFPA's reference to additional regulatory standards 'for the care' of organically produced livestock should be limited to health care practices similar to those specified by Congress in the statute, rather than expanded to encompass stand-alone animal welfare concerns. *Id.*

The distinction that USDA seeks to draw between standards for animal care and standards for animal health is erroneous and arbitrary. The Agency has not offered sufficient explanation of the bases for any of these assumptions, and the Agency will not be able to do so in a non-arbitrary way. As described below, USDA cannot reasonably distinguish between animal health care practices and animal welfare practices because according to scientific research, international standards, and USDA's own research and materials, the concepts are intertwined.

### 1. *Animal Welfare is a Well-Established Scientific Concept*

The American Veterinary Medical Association (AVMA) defines *animal welfare* as follows:

Animal welfare means how an animal is coping with the conditions in which it lives. An animal is in a good state of welfare if (as indicated by scientific evidence) it is healthy, comfortable, well nourished, safe, able to express innate behavior, and if it is not suffering from unpleasant states such as pain, fear, and distress. Good animal welfare requires disease prevention and veterinary treatment, appropriate shelter, management, nutrition, humane handling and humane slaughter. Animal welfare refers to the state of the animal; the treatment that an animal receives is covered by other terms such as animal care, animal husbandry, and humane treatment. Protecting an animal's welfare means providing for its physical and mental needs.<sup>1</sup>

The AVMA derived its definition of animal welfare from the World Organization for Animal Health (commonly referred to as "OIE"—Office of International des Epizooties). With 181 member countries, including the United States, the OIE is the intergovernmental organization that coordinates, supports, and promotes animal disease control worldwide. The OIE has set international animal health standards since its founding in 1924. The World Trade Organization (WTO), upon its creation in 1995, recognized the OIE standards as WTO references in the category of sanitary (health) measures.<sup>2</sup>

In 2002, the OIE broadened its mandate to include animal welfare, publishing comprehensive sets of welfare standards three years later. To date, the OIE has established animal welfare

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<sup>1</sup> AVMA, *Animal Welfare: What Is It?* available at <https://www.avma.org/KB/Resources/Reference/AnimalWelfare/Pages/what-is-animal-welfare.aspx>.

<sup>2</sup> World Organization for Animal Health, *Animal Welfare at a Glance*. Available at <http://www.oie.int/en/animal-welfare/animal-welfare-at-a-glance/>.

standards for animal transport, killing for disease control purposes, and slaughter and killing for human consumption, as well as for different animal on-farm production systems, including beef cattle, dairy cattle, and broiler chickens.<sup>3</sup> The OIE's welfare standards for farm animals are contained in Chapter 7 of its *Terrestrial Animal Health Code*.

## 2. Animal Health and Animal Welfare Are Inextricably Linked

According to the OIE, animal welfare standards should be science-based and “should always seek to maintain health as a basis of welfare.”<sup>4</sup> In its *Guiding Principles for Animal Welfare*, the OIE asserts that there is “a critical relationship between animal health and animal welfare.”<sup>5</sup> The *Principles* also note that “improvements in farm animal welfare can often improve productivity and food safety, and hence lead to economic benefits.”<sup>6</sup> Further, in the glossary for its *Terrestrial Animal Health Code*, the OIE defines *animal health management* as “a system designed to optimize the physical and behavioural health and welfare of animals.”<sup>7</sup> Additionally, OIE's *Global Animal Welfare Strategy* states “Animal welfare is closely linked to animal health.”<sup>8</sup>

This link between animal health and animal welfare is recognized by America's largest trading partners for agricultural products. Canada and the European Union (EU), two of our largest trading partners, have adopted national organic regulations that recognize the significance of animal welfare to animal health. The United States has entered into organic equivalency agreements with both of these countries (Canada in 2009 and the EU in 2012).<sup>9</sup> When Canada entered into its equivalency agreement with the United States, it declared that livestock stocking densities for animals other than ruminants were not equivalent to Canadian organic standards because the US organic regulations do not provide stocking densities for this specification.<sup>10</sup> Any US organic meat company desiring to market its non-ruminant products in Canada as organic must meet Canadian space requirements.

Canadian organic regulations recognize the link between animal welfare and animal health as follows:

Under a system of organic production, livestock are provided with living conditions and space allowances appropriate to their behavioural requirements and organically produced feed. These practices strive to minimize stress, promote good health and prevent disease.<sup>11</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> World Organization for Animal Health, *Terrestrial Animal Health Code*, Introduction to the Recommendations for Animal Welfare, Chapter 7.1.1, (2017).

<sup>6</sup> *Id.*

<sup>7</sup> World Organization for Animal Health, *Terrestrial Animal Health Code*, Glossary, (2017).

<sup>8</sup> World Organization for Animal Health, *Global Animal Welfare Strategy*, (2017), available at [http://www.oie.int/fileadmin/home/eng/Media\\_Center/docs/pdf/85SG/AW/EN\\_OIE\\_AW\\_Strategy.pdf](http://www.oie.int/fileadmin/home/eng/Media_Center/docs/pdf/85SG/AW/EN_OIE_AW_Strategy.pdf).

<sup>9</sup> USDA-Agricultural Marketing Service, *International Trade Partners*, <https://www.ams.usda.gov/services/organic-certification/international-trade>.

<sup>10</sup> USDA-Agricultural Marketing Service, *International Trade Policies: Canada*, <https://www.ams.usda.gov/services/organic-certification/international-trade/Canada>.

<sup>11</sup> Government of Canada, *National Standard of Canada: Organic Production Systems*, General Principles and Management Standards, CAN/CGSB-32.310-2015, available at <https://www.tpsgc-pwgsc.gc.ca/oncg-cgsb/programme-program/normes-standards/internet/bio-org/pgng-gpms-eng.html>

The United States is the largest foreign supplier of organic products to Canada.<sup>12</sup> As a result, the Agricultural Marketing Service (AMS) needs to assess what, if any, impact its proposed rule will have on the US/Canada organic equivalency agreement. If USDA continues to insist that it has no authority to impose regulations that contain welfare requirements, it must face the possibility that Canada may determine that U.S. organic standards are no longer equivalent to Canada's. The Agency does not address this in its proposed rule and thus overlooks a significant economic risk.<sup>13</sup>

The EU organic regulations clearly articulate the importance of animal welfare to organic production, as in the following excerpt from the regulations' introduction:

Organic stock farming should ensure that specific behavioural needs of animals are met. In this regard, housing for all species of livestock should satisfy the needs of the animals concerned as regards ventilation, light, space and comfort and sufficient area should accordingly be provided to permit ample freedom of movement for each animal and to develop the animal's natural social behavior. Specific housing conditions and husbandry practices with regard to certain animals, including bees, should be laid down. These specific housing conditions should serve a high level of animal welfare, which is a priority in organic livestock farming and therefore may go beyond Community welfare standards which apply to farming in general...<sup>14</sup>

Again, USDA must assess what impact its statutory determination will have on the EU equivalency agreement, as well as the economic effect of the dissolution of the equivalency agreement.

### 3. *The Link Between Animal Health and Welfare Has Been Scientifically Proven*

Acknowledgement of the link between animal health and animal welfare, by the OIE and many of its Member Countries, is based on more than four decades of scientific research. Two pioneers in the field of farm animal welfare science—veterinarian Andrew Fraser and zoologist Donald Broom—discussed animal welfare and behavior in relation to disease in their veterinary textbook *Farm Animal Behaviour and Welfare* (first published in 1974). They note that husbandry methods affect disease incidence, citing as an example a 1970s study that reported a gradual increase in chronic infections in poultry over a period when the frequency of intensive production practices was increasing.<sup>15</sup>

Fraser and Broom identify reduced resistance to disease as a consequence of poor welfare. They note: "This has been known for a long time in the medical and veterinary professions and is part

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<sup>12</sup> Greene et al., *Growing Organic Demand Provides High-Value Opportunities for Many Types of Producers*, U.S. Dep't of Ag. Economic Research Serv. (2016), available at <https://www.ers.usda.gov/amber-waves/2017/januaryfebruary/growing-organic-demand-provides-high-value-opportunities-for-many-types-of-producers/>.

<sup>13</sup> *Id.* ("Equivalency arrangements improve access to foreign markets by reducing the need for additional inspection, auditing, and other costs.")

<sup>14</sup> Official Journal of the European Union, Commission Regulation (EC) No 889/2008 of 5 September 2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007 on organic production and labelling of organic products with regard to organic production, labelling and control, available at <http://eur-lex.europa.eu/eli/reg/2008/889/oj>

<sup>15</sup> Fraser, A.F. & Broom, D.M. (1997) *Farm Animal Behaviour and Welfare* (3<sup>rd</sup> ed.), New York, NY: CAB International, p. 295.

of the more general process whereby poor welfare, whatever its cause, can lead to increased susceptibility to disease.”<sup>16</sup> In 1988, Broom theorized a welfare-disease feedback effect, in which stressful living conditions lead to poor welfare, which leads to disease, which leads to worse welfare, which leads to more disease, worse welfare, and potentially death.<sup>17</sup>

According to Broom, the scientific evidence linking welfare with susceptibility to disease is of three kinds: 1) clinical data concerning individuals showing signs of disease, 2) experimental studies and surveys comparing levels of disease incidence in different husbandry systems or after different treatments, and 3) studies of immune system function after different treatments.<sup>18</sup>

#### 4. Specific OLPP Rule Provisions Serve to Promote Animal Health

The types of scientific studies identified by Broom demonstrate a relationship between animal health and a number of living conditions specified in the OLPP Rule. Following is a brief summary of the scientific justification for several of the OLPP animal welfare requirements related to avian health care and living conditions.

OLPP RULE REFERENCE	ANIMAL WELFARE REQUIREMENT	ANIMAL HEALTH CORRELATION	SCIENTIFIC REFERENCES
<p><b>205.238 Livestock care and production practices standard.</b></p>	<p><b>(a) The producer must establish and maintain preventive health care practices, including:</b>  <b>(5) Physical alterations ... (ii) The following practices are prohibited: De-beaking... [defined as “The removal of more than one-third of the upper beak or removal of more than one-third of both the upper and lower beaks of a bird.”]</b></p>	<p>Beak trim length effects preening and removal of ectoparasites</p>	<p>Murillo, A.C. &amp; Mullens, B.A. (2016) Timing diatomaceous earth-filled dustbox use for management of northern fowl mites (acari: macronyssidae) in cage-free poultry systems. <i>Journal of Economic Entomology</i> 109:2572-2579.</p>
	<p><b>(c) An organic livestock operation must not:</b></p>	<p>Force molting increases the probability that hens become</p>	<p>Holt, P.S. (2003) Molting and <i>Salmonella Enterica</i> Serovar Enteritidis Infection: The</p>

<sup>16</sup> *Id.*

<sup>17</sup> Broom, D.M. (1988) “The relationship between welfare and disease susceptibility in farm animals,” *Animal Disease—A Welfare Problem*, London: BVA Animal Welfare Foundation, p. 22-29.

<sup>18</sup> *Id.*

	<b>(10) Practice forced molting or withdrawal of feed to induce molting.</b>	infected with <i>Salmonella</i> .	Problem and Some Solutions. Poultry Science 82:1008–1010.
		Feed removal during a molt results in a loss of bone mineralization.	Mazzuco H. & Hester, P.Y. (2005) The effect of an induced molt using a nonfasting program on bone mineralization of white leghorns. Poultry Science 84:1483-1490.
<b>Section 205.241 Avian living conditions</b>	<b>(a) The producer of an organic poultry operation must establish and maintain year-round poultry living conditions that accommodate the health and natural behavior of poultry, including: Year-round access to outdoors; shade; shelter; exercise areas; fresh air; direct sunlight; clean water for drinking; materials for dust bathing; and adequate outdoor space</b>	Movement and the exercise that is associated with providing additional space and outdoor access strengthens muscles and bones.	Knowles, T.G. & Broom, D.M. (1990) Limb bone strength and movement in laying hens from different housing systems. Veterinary Record 126(15):354-356.  Norgaard-Nielsen, G. (1990) Bone strength of laying hens kept in an alternative system, compared with hens in cages and on deep-litter. British Poultry Science 31(1):81-89.  Shipov, A., Sharir, A., Zelzer, E., Milgram, J., Monsonogo-Ornan, E., & Shahar, R. (2010) The influence of severe prolonged exercise restriction on the mechanical and structural properties of bone in an avian model. The Veterinary Journal 183:153-60.
	<b>(b)(2) Producers must monitor ammonia levels at least monthly and implement practices to maintain ammonia levels below 10 ppm. When ammonia levels exceed 10 ppm, producers must implement additional practices and additional</b>	Excessive ammonia levels in chicken houses can lead to ocular abnormalities, eye lesions, structural damage to the lungs, skin and respiratory problems, and blindness.	Al-Mashhadani E.H. & Beck M.M. (1985) Effect of atmospheric ammonia on the surface ultrastructure of the lung and trachea of broiler chicks. Poultry Science 64:2056-61.  Berg, C.C. (1998) Foot-pad dermatitis in broilers and turkeys: prevalence, risk factors and prevention. Doctor's dissertation. Department of Animal

	<p><b>monitoring to reduce ammonia levels below 10 ppm. Ammonia levels must not exceed 25 ppm.</b></p>		<p>Environment and Health, SLU. Acta Universitatis agriculturae Sueciae. Veterinaria 36, p. 16.</p> <p>Wathes, C.M. (1998) Aerial emissions from poultry production. World's Poultry Science Journal 54:241-51.</p> <p>Kristensen, H.H. &amp; Wathes, C.M. (2000) Ammonia and poultry welfare: a review. World's Poultry Science Journal 56:235-45.</p>
	<p><b>(b)(5) Perches—for layers (Gallus gallus), six inches of perch space must be provided per bird. Perch space may include the alighting rail in front of the nest boxes. All layers must be able to perch at the same time except for aviary housing, in which 55 percent of layers must be able to perch at the same time.</b></p>	<p>Perches improve bone strength and increase bone volume.</p>	<p>Struelens, E. &amp; Tuytens, F.A.M. (2009) Effects of perch design on behaviour and health of laying hens. Animal Welfare 18:533-538.</p> <p>Wilson, S., Hughes, B.O., Appleby, M.C., &amp; Smith, S.F. (1993) Effects of perches on trabecular bone volume in laying hens. Research in Veterinary Science 54(2):207.</p>
		<p>Hens prefer elevated perches for roosting at night. Perching is the natural resting position of a bird, and critical functions of rest and sleep include energy conservation and tissue healing and growth.</p>	<p>Campbell, D.L.M., Makagon, M.M., Swanson, J.C. &amp; Seigford, J.M. (2016) Perch use by laying hens in a commercial aviary. Poultry Science 95(8):1736-1742.</p> <p>Blokhuis, H.J. (1984) Rest in poultry. Applied Animal Behaviour Science 12:289-303.</p>
	<p><b>(b)(6) All birds must have access to areas in the house that allow for scratching</b></p>	<p>Dustbathing balances lipid (oil) levels in the plumage,</p>	<p>Van Liere, D.W. &amp; Bokma, S. (1987) Short-term feather maintenance as a function of dust-bathing in laying hens.</p>

	<p><b>and dust bathing. Litter must be provided and maintained in a dry condition.</b></p>	<p>improving its insulative capacity and protecting the skin from injury.</p>	<p>Applied Animal Behaviour Science 18(2):197-204.</p> <p>Olsson, I.A.S. &amp; Keeling, L.J. (2005) Why in earth? Dustbathing behaviour in jungle and domestic fowl reviewed from a Tinbergian and animal welfare perspective. Applied Animal Behaviour Science 93: 259-282.</p>
		<p>Dustbathing removes external parasites, such as mites and lice.</p>	<p>Martin, C.D. &amp; Mullen, B.A. (2012) Housing and dustbathing effects on northern fowl mites (<i>Ornithonyssus sylviarum</i>) and chicken body lice (<i>Menacanthus stramineus</i>) on hens. Medical and Veterinary Entomology 26:323–333.</p> <p>Murillo, A.C. &amp; Mullens, B.A. (2016) Timing diatomaceous earth-filled dustbox use for management of northern fowl mites (acari: macronyssidae) in cage-free poultry systems. Journal of Economic Entomology 109:2572-2579.</p>
	<p><b>(b)(10) For broilers (<i>Gallus gallus</i>), indoor stocking density must not exceed 5.0 pounds of bird per square foot.</b></p>	<p>Rest is important for young, growing animals, and crowding increases the frequency with which birds disturb and walk over each other, interrupting their rest.</p>	<p>Duncan IJH. (2004) Welfare problems of poultry. In: Benson GJ and Rollin BE (eds.), The Well-Being of Farm Animals: Challenges and Solutions (Ames, IA: Blackwell Publishing).</p> <p>Hall A.L. (2001) The effect of stocking density on the welfare and behaviour of broiler chickens reared commercially. Animal Welfare 10:23-40.</p> <p>Buijs S., Keeling L.J., Vangestel C., Baert J., Vangeyte J., and Tuytens F.A.M. (2010) Resting or hiding? Why broiler chickens stay near walls and how density affects this. Applied</p>

			Animal Behaviour Science 124 (3-4):97–103.
		When birds walk over each other, it can cause thigh sores and scabs, and scratches on the back.	Bilgili, S.F. & Hess J.B. (1995) Placement density influences broiler carcass grade and meat yields. <i>Journal of Applied Poultry Research</i> 4:384-289.  Simitzis, P.E., Kalogeraki E., Goliomytis M., et al. (2012) Impact of stocking density on broiler growth performance, meat characteristics, behavioural components and indicators of physiological and oxidative stress. <i>British Poultry Science</i> 53(6):721-730.
		Crowding can decrease overall locomotor activity, one possible cause of poor walking ability.	Simitzis, P.E, Kalogeraki E., Goliomytis M., et al. (2012) Impact of stocking density on broiler growth performance, meat characteristics, behavioural components and indicators of physiological and oxidative stress. <i>British Poultry Science</i> 53(6):721-30.  Sørensen P., Su, G., & Kestin S.C. (2000) Effects of age and stocking density on leg weakness in broiler chickens. <i>Poultry Science</i> 79(6):864-870.
		Overcrowding can decrease growth and increase stress.	Simitzis, P.E., Kalogeraki E., Goliomytis M., et al. (2012) Impact of stocking density on broiler growth performance, meat characteristics, behavioural components and indicators of physiological and oxidative stress. <i>British Poultry Science</i> 53(6):721-730.
		High stocking density results in greater manure accumulation. When birds lie in wet, dirty litter, ammonia may irritate the skin, leading to hock	Arnould, C. & Faure, J.M. (2003) Use of pen space and activity of broiler chickens reared at two different densities. <i>Applied Animal Behaviour Science</i> 84(4):281-296.  Dozier, W.A. III, Thaxton, J.P., Branton, S.L., et al.

		and foot-pad dermatitis.	<p>(2005) Stocking density effects on growth performance and processing yields of heavy broilers. <i>Poultry Science</i> 84:1332-1338.</p> <p>Ventura, B.A., Siewerdt, F., &amp; Estevez, I. (2010) Effects of barrier perches and density on broiler leg health, fear, and performance. <i>Poultry Science</i> 89:1574-1583.</p> <p>Simsek, U.G., Dalkilic, B., Ciftci, M., &amp; Yuce, A. (2009) The influences of different stocking densities on some welfare indicators, lipid peroxidation (MDA), and antioxidant enzyme activities (GSH, GSH-Px, CAT) in broiler chickens. <i>Journal of Animal and Veterinary Advances</i> 8(8):1568-1572.</p> <p>Meluzzi, A., Fabbri, C., Folegatti, E., &amp; Sirri, F. (2008) Effect of less intensive rearing conditions on litter characteristics, growth performance, carcass injuries and meat quality of broilers. <i>British Poultry Science</i> 49(5):509-515.</p> <p>Shepherd, E.M. &amp; Fairchild, B.D. (2010) Footpad dermatitis in poultry. <i>Poultry Science</i> 89(10):2043-51.</p>
		Respirable particle (dust) concentrations increase with stocking density.	<p>Banhazi, T.M., Seedorf, J., Laffrique, M., &amp; Rutley D.L. (2008) Identification of the risk factors for high airborne particle concentrations in broiler buildings using statistical modelling. <i>Biosystems Engineering</i> 101(1):100-110.</p>
		Ammonia concentrations	<p>AL Homidan, A. &amp; Robertson, J.F. (2003) Effect of litter type and stocking density on</p>

		increase with stocking density.	ammonia, dust concentrations and broiler performance. British Poultry Science 44 S7-8.
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5. *USDA Has Acknowledged that Maintenance of Animal Welfare Facilitates Animal Health*

Many USDA agencies, including AMS, which administers NOP, acknowledge a critical, causal link between animal welfare and animal health.

USDA has acknowledged that adequate space allowances impact animal health. The USDA’s regulations under the Animal Welfare Act provide that animals have “sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement,” and that “Inadequate space may be indicated by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior patterns.” 9 C.F.R. § 3.128.

USDA has also acknowledged the link between humane handling and animal health. The Agency’s Food Safety and Inspection Service (FSIS) states in a notice regarding live poultry handling at slaughter “Bruises are likely to result when birds are not treated humanely” and finds that, therefore, “Live poultry must be handled in a manner that is consistent with good commercial practices, which means they should be treated humanely.”<sup>19</sup>

USDA has further acknowledged the connection between ammonia concentration and animal health. The Agency’s National Institute of Food and Agriculture (NIFA) runs an extension program that provides animal welfare information. A 2015 piece titled *Animal Welfare as Related to Egg Production Systems* states “Greater concentrations of ammonia may lead to welfare and health problems, both for the animals and the caretakers. For poultry, chronic exposure to ammonia increases susceptibility to respiratory pathogens and may lead to impaired performance and eye problems.”<sup>20</sup>

USDA’s research arm, the Agricultural Research Service (ARS), has acknowledged the link between animal health and welfare. The mission statement of ARS’s Livestock Behavior Research Unit (LBRU) states, “We will develop scientific measures of animal welfare, through the study of animal behavior, physiology, nutrition, neuroscience and immunology; that will allow an objective evaluation of animal agricultural practices. This holistic method of study will allow the improvement of existing practices and invention of new practices that can enhance animal welfare and increase animal productivity.”<sup>21</sup>

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<sup>19</sup> U.S. Department of Agriculture Food Safety and Inspection Service. *Treatment of Live Poultry Before Slaughter*, Notice, Sept. 28, 2005, available at <https://www.federalregister.gov/documents/2005/09/28/05-19378/treatment-of-live-poultry-before-slaughter>

<sup>20</sup> USDA National Institute of Food and Agriculture Cooperative Extension System, *Animal Welfare as Related to Egg Production Systems*, November 17, 2015, available at <http://articles.extension.org/pages/67111/animal-welfare-as-related-to-egg-production-systems>

<sup>21</sup> U.S. Department of Agriculture, *Mission Statement*, Agricultural Research Service Livestock Behavior Research Unit, July 26, 2017, available at <https://www.ars.usda.gov/midwest-area/west-lafayette-in/livestock-behavior-research/docs/main/>

LBRU's informational publications regularly acknowledge the link between animal health and practices that decrease stress with respect to genetic selection and transport, two areas covered in the OLPP Rule.<sup>22</sup> A summer 2017 piece titled *Improving Poultry Skeletal Health* notes "Skeletal disorders are common in commercial meat (broiler) and egg-laying poultry due to selection for fast growth and daily egg production. Leg bone disorders are particularly concerning as they cause pain, difficulty in walking, and economic loss."<sup>23</sup> A separate summer 2017 piece on piglet weaning, transport, stress and antibiotics states "Weaning, transport, and thermal stress have the potential to increase disease incidence and reduce animal welfare, especially when they occur concomitantly," and finds that "These data suggest that providing L -glutamine at 0.20% of the diet following weaning and transport can improve piglet health and wellbeing similarly to traditional dietary antibiotic treatments."<sup>24</sup>

Similarly, a summer 2011 piece on dairy cow health stress and fetal health warns "Calves born to cows that have experienced heat stress during later pregnancy are generally smaller than those born during thermal neutral environments. Additionally, altered immunity of calves born after heat stressors has been demonstrated."<sup>25</sup> And a summer 2011 piece on laying hen genetic selection states "Genetic selection is a useful tool for improving animal health and welfare. Studies have shown that productivity can be increased while, at the same time, well-being improved. This approach has been verified in poultry breeding applications and has resulted in dramatic improvements in survivability, productivity, and welfare."<sup>26</sup>

Fall 2010 informational pieces include the inherent welfare/health connections involved in transport stress ("Stress reduces the fitness of an animal, which can be expressed through failure to achieve production performance standards or targets, or more drastically, through injury, disease and death. Stress in farm animals can also have detrimental effects on the quality of food products (meat, egg, and milk).");<sup>27</sup> sow lameness ("Older sows are more prone to foot problems than younger sows, likely due to increased time on rough or improper flooring" and "Housing systems can influence the amount of physical trauma to the body and the feet.");<sup>28</sup> and dairy cow lameness ("While many preventative measures have been developed and embraced as good dairy

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<sup>22</sup> See 7 C.F.R. §205.238(1) Selection of species and type of livestock with regard to suitability for site-specific conditions and resistance to prevalent diseases and parasites; 7 C.F.R. § 205.242 Transport and slaughter.

<sup>23</sup> U.S. Department of Agriculture, Agricultural Research Service Livestock Behavior Research Unit, *Improving poultry skeletal health*, Summer 2017, available at <https://www.ars.usda.gov/ARSUserFiles/50201500/LBRU%20Update%20Summer%202017%20final.pdf>

<sup>24</sup> U.S. Department of Agriculture, Agricultural Research Service Livestock Behavior Research Unit, *Alternatives to antibiotics after transport and weaning stress*, Summer 2017, available at <https://www.ars.usda.gov/ARSUserFiles/50201500/LBRU%20Update%20Summer%202017%20final.pdf>

<sup>25</sup> U.S. Department of Agriculture, Agricultural Research Service Livestock Behavior Research Unit, *Pre-natal Heat Stress of Cows Affects the Well-Being of Offspring*, Summer 2011, available at <https://www.ars.usda.gov/ARSUserFiles/50201500/Dairy%20Cow%20Heat%20Stress%20Fact%20Sheet.pdf>

<sup>26</sup> U.S. Department of Agriculture, Agricultural Research Service Livestock Behavior Research Unit, *Laying Hen Welfare Fact Sheet*, Summer 2011, available at <https://www.ars.usda.gov/ARSUserFiles/50201500/Genetic%20Selection%20Fact%20Sheet.pdf>

<sup>27</sup> U.S. Department of Agriculture, Agricultural Research Service Livestock Behavior Research Unit, *Food Safety Fact Sheet: Stress in Farm Animals and Food Safety: Is there a Connection?* Fall 2010, available at <https://www.ars.usda.gov/ARSUserFiles/50201500/Stress%20and%20Food%20Safety%20Fact%20Sheet.pdf>

<sup>28</sup> U.S. Department of Agriculture, Agricultural Research Service Livestock Behavior Research Unit, *Sow Welfare Fact Sheet: Sow Lameness and Longevity*, Fall 2010, available at <https://www.ars.usda.gov/ARSUserFiles/50201500/Sow%20Lameness%20Fact%20Sheet.pdf>

practices, subclinical lameness continues to affect cow comfort, health, and production. Rubber flooring may be part of the solution.”<sup>29</sup>

Finally AMS, which administers NOP, has released materials noting a connection between animal health and animal welfare. AMS’s *Guidelines for Organic Certification of Poultry* states “Animal health is the result of preventative and on-going management efforts to create living soils, provide nourishing forage and feed, and improve the quality of livestock life. Animals must be kept in healthy, low stress environments.”<sup>30</sup> Its *Guidelines for Organic Certification of Livestock Dairy* contain identical language.<sup>31</sup> And the Agency’s webinar introducing the OLPP Rule uses mortality as an illustrator of the health-welfare connection, stating “AMS is aware that mortality is an important measurement, and one of several indicators of animal welfare.”<sup>32</sup>

Though USDA seeks to draw a distinction between “health care practices and “stand-alone animal welfare concerns,” scores of empirical research, international standards, and USDA’s own research and regulations belie this position. The standards promulgated by the OLPP Rule govern animal health *and* welfare, concepts that are intricately linked.

## **B. The Organic Foods Production Act Authorizes the Agency to Institute Animal Welfare Provisions**

USDA’s attempt to separate medical care practices and welfare practices is not only impossible as a matter of fact (as illustrated in Section A, above), it is also wrong as a matter of law. USDA’s new interpretation of the OFPA is unsupported by statutory text, contrary to USDA’s historic treatment of the statute, and contrary to the legislative history. For all of these reasons, the undersigned organizations urge USDA to reconsider its position and allow the OLPP Rule to become effective.

### *1. The OLPP Rule is Within USDA’s Statutory Authority under the Organic Foods Production Act*

As discussed above, USDA now claims that it can regulate only animal health, as distinct from animal welfare. Necessarily implicit in that conclusion are three unsupported and unsupported assertions:

1. Animal health care is categorically and universally distinct from animal welfare;
2. In drafting the OFPA, Congress presumed no overlap between the two; and
3. The OFPA’s text allows standards of “care” that have no connection to animals’ welfare.

When enacting the OLPP Rule, USDA stated that it was “issuing these regulations to strengthen the USDA organic livestock production regulations with clear provisions to fulfill one purpose of

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<sup>29</sup> U.S. Department of Agriculture, Agricultural Research Service Livestock Behavior Research Unit, *Dairy Cow Welfare Fact Sheet: Lameness Impact on Welfare of Dairy Cattle. Fall 2010*, available at <https://www.ars.usda.gov/ARSUserFiles/50201500/Dairy%20Cow%20Lameness%20Fact%20Sheet.pdf>

<sup>30</sup> U.S. Department of Agriculture, *Guidelines for Organic Certification of Poultry*, available at <https://www.ams.usda.gov/sites/default/files/media/Poultry%20-%20Guidelines.pdf>

<sup>31</sup> U.S. Department of Agriculture, *Guidelines for Organic Certification of Dairy Livestock*, available at <https://www.ams.usda.gov/sites/default/files/media/Dairy%20-%20Guidelines.pdf>

<sup>32</sup> U.S. Department of Agriculture, Agricultural Marketing Service, OLPP Webinar Slides Script, slide 52, accessed January 11, 2018 from <https://www.ams.usda.gov/sites/default/files/media/OLPPWebinarSlidesScript.pdf>

OFPA: to assure consumers that organically-produced products meet a consistent and uniform standard.” National Organic Program (NOP); Organic Livestock and Poultry Practices, 82 Fed. Reg. 7,042, 7,043 (Jan. 19, 2017) (quoting 7 U.S.C. § 6501).

USDA made clear at the time that the statutory authority for the Rule was 7 U.S.C. §§ 6509(d)(2) and 6509(g). Section 6509(d)(2) provides: “The National Organic Standards Board shall recommend to the Secretary standards in addition to those in paragraph (1) for the care of livestock to ensure that such livestock is organically produced.” Section 6509(g) provides: “The Secretary shall hold public hearings and shall develop detailed regulations, with notice and public comment, to guide the implementation of the standards for livestock products provided under this section.”

As noted above in Section A, there is no hard and fast distinction between an animal’s physical health and an animal’s welfare, and both fall under the “care of livestock”, which is broad terminology. USDA has not shown, nor can it show, that Congress believed the two were distinct and that the OFPA authorizes only standards pertaining to animals’ physical/medical condition. Subsection (d)(2) of section 6509 falls under the heading “Health care;” the OFPA does not define that term, and thus the dictionary definition controls. *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994). “Health care” is defined as, “efforts made to maintain or restore physical, *mental, or emotional well-being* especially by trained and licensed professionals.” Merriam Webster Dictionary, available at <https://www.merriam-webster.com/dictionary/health%20care> (Dec. 25, 2017) (emphasis added). If Congress had intended to limit the scope of section 6509 solely to the physical health of animals, it would not have authorized the creation of standards to address the “mental or emotional well-being” of animals.

Additionally, the standards authorized by Congress in subsection (d)(2) are even broader than “health care” standards. Subsection (d)(2) contemplates standards “for the *care* of livestock to ensure that such livestock is organically produced.” 7 U.S.C. § 6509(d)(2) (emphasis added). The term “care” is also undefined in the Act, and its dictionary definition is broader than that of “health care.” The pertinent definition of “care” is defined as “[t]he provision of what is necessary for the health, *welfare*, maintenance, and *protection* of someone or something.” Oxford Dictionary, available at <https://en.oxforddictionaries.com/definition/care> (last visited Jan. 16, 2018) (emphasis added). Where Congress uses two distinct terms, here “health care” and “care” a court will not construe them as meaning precisely the same thing. *See Bank of New York v. F.D.I.C.*, 453 F. Supp. 2d 82, 93 (D.D.C. 2006) (“When different terms are used in a single piece of legislation, [a] court must presume that Congress intended the terms to have different meanings.” (internal citation omitted)). Thus “care” must mean something beyond the definition of “health care.” Either term’s plain meaning accommodates consideration of animal welfare. USDA has not shown, and cannot show that Congress intended otherwise.

USDA now resorts to inferences from “context” to avoid the plain and unambiguously broad meaning of “health care” and “care” as used in the statute. Courts will not follow USDA there. *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (“When the words of a statute are unambiguous, ...th[e] first canon [that a legislature says in a statute what it means and means in a statute what it says there] is also the last: judicial inquiry is complete.”)

Similarly, Congress’s use of the terms “*raised* in accordance with this chapter” (sections 6509(a)) and “*raised and handled* in accordance with this chapter” (sections 6509(e)(1), (2)(A)) belie USDA’s new view that the statute authorizes only medical care standards. (Emphasis

added). “Handle” is defined in the statute as “to sell, process or package agricultural products.” 7 U.S.C. § 6502(8). “Raised” is undefined in the statute, and thus, as with “health care,” is to be understood by its dictionary definition. *F.D.I.C.*, 510 U.S. at 476. The relevant definition of raise[d] is “to breed and bring (an animal) to maturity.” Merriam Webster Dictionary, available at <https://www.merriam-webster.com/dictionary/raise> (Jan. 17, 2018).

“Raise” and “handle” are exceedingly broad terms that Congress did not limit in the way USDA now seeks to. With the use of these broad, unqualified terms, the Act contemplates the establishment of standards for bringing animals to maturity; those standards may include caring for the animal’s mental well-being, a critical aspect of an animal’s “health care.” 7 U.S.C. § 6509(d); see also *O & G Indus., Inc. v. Nat’l R.R. Passenger Corp.*, 537 F.3d 153, 161 (2d Cir.2008) (declining to infer express preemption by “ ‘supply[ing] that which [was] omitted by the legislature’ ” when a federal statute “contain [ed] no limitation on its face” and utilized “unambiguous” language) (quoting *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 127 (2d Cir.2003)).

Moreover, the statutory text makes clear that section 6509(d)(2) is distinct from section 6509(d)(1), which bans the use of antibiotics, synthetic parasiticides, and other medication. Section 6509(d)(2) specifically provides that USDA can make livestock standards “for the care of livestock” that are “in addition to” the requirements of section 6509(d)(1). See *Hirschey v. F.E.R.C.*, 760 F.2d 305, 308 (D.C. Cir. 1985) (declining to limit statutory “in addition to” language in part because that reading was not compelled by statutory language.)

Finally, section 6509(g) provides no limiting language that would suggest it pertains only to medical regulations; it sweepingly provides that USDA implement any “standards for livestock products.” Thus, USDA’s newfound attempts to narrowly interpret the OFPA do not pass muster. In its proposed rule, USDA emphasizes that such standards are “to guide the implementation of the standards for livestock products provided under this section.” 7 U.S.C. § 6509(g). Apparently the Agency’s intent is to show that subsection (g) limits its authority to generate standards only as “provided under this section.” But the Agency has not established, and cannot establish, that the plain language of “this section” is limited in the way USDA deems it to be, based on “context” and “structure.” As noted above, “healthcare,” “handle,” “raised,” and “care” are unambiguous and capaciously broad and as such, a court will not read into these terms unexpressed limitations.

## 2. *Since the Beginning of the Organic Foods Production Act, USDA Has Understood That It Had Statutory Authority for Animal Welfare Concerns*

USDA has long enacted organic livestock rules that reflect an interest in animal welfare. For example, in the rule that established the National Organic Program in 2000, USDA stated:

Animals in an organic livestock operation must be maintained under conditions which provide for exercise, freedom of movement, and reduction of stress appropriate to the species. Additionally, all physical alterations performed on animals in an organic livestock operation must be conducted to promote the animals’ welfare and in a manner that minimizes stress and pain.

National Organic Program, 65 Fed. Reg. 80,547, 80,560 (Dec. 21, 2000).

The 2000 rule also provided that organic livestock producers must not only accommodate the health of livestock, but also care for them in a way that accommodates their “natural behavior.” *Id.* at 80,561.

The producer must provide access to the outdoors, shade, shelter, exercise areas, fresh air, and direct sunlight suitable to the species, its stage of production, the climate, and the environment. This requirement includes access to pasture for ruminant animals. The producer must also provide appropriate clean, dry bedding. *Id.*

Additionally,

The producer must provide shelter designed to allow for the natural maintenance, comfort level, and opportunity to exercise appropriate to the species. The shelter must also provide the temperature level, ventilation, and air circulation suitable to the species. *Id.*

These requirements reflect a concern not only for animals’ medical needs, but also for animal welfare. They underscore USDA’s recognition that welfare and health are intertwined, and that USDA has authority to take animal welfare interests into account when promulgating organic regulations.

USDA’s 2010 organic livestock rule, the Access to Pasture Rule, also reflected an agency interest in animal welfare. National Organic Program; Access to Pasture (Livestock), 75 Fed. Reg. 7,154 (Feb. 17, 2010). The primary purpose of the Access to Pasture Rule was “to satisfy consumer expectations that ruminant livestock animals graze on pastures during the grazing season.” *Id.* The rule prohibited continuous confinement of all animals indoors, including confinement of broilers and other poultry. *Id.* at 7,170. Further the rule required that “any feeding area must be large enough to allow all of the ruminant animals to eat simultaneously with no crowding or competition for food.” *Id.*

Notably, the Access to Pasture Rule made clear that “[o]ne of the tenants [sic] of organic production is that animals are able to express their natural behaviors, and exercise and move freely.” *Id.* at 7,171. The rule emphasized that this tenet was designed to align with the expectations of consumers, and noted that thousands of commenters had expressed their support therefor. *Id.*

The general content of the Access to Pasture Rule is not the only evidence that USDA was invested in improving animal welfare via organic regulations: the Agency said as much. When discussing temporary denial of access to the outdoors, the Agency stated “[t]hese exceptions are intended for animal welfare concerns rather than production yields.” *Id.* at 7,170.

It is plain, then, that USDA has long presumed its authority to enact organic livestock regulations which considered animal welfare. The OLPP Rule was the logical outgrowth of those previous regulations.<sup>33</sup> USDA cannot now assert that the statute unambiguously excludes animal welfare as a consideration. It must at the very least turn to the legislative history for guidance.

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<sup>33</sup> The OLPP Rule “would continue the process initiated with the Access to Pasture rulemaking to establish clear and comprehensive requirements for all organic livestock, consistent with recommendations provided by USDA’s Office

### 3. *The Legislative History of the Organic Foods Production Act Makes Clear that USDA Had Authority to Enact the OLPP Rule*

The legislative history of the OFPA confirms USDA's previously long-held understanding of the Act: that it authorizes USDA to consider animal welfare when enacting organic livestock regulations.

When the OFPA was enacted, Congress recognized that there was, at the time, limited consensus on appropriate livestock standards. S. Rep. No. 101-357, at 289 (1990). But Congress also recognized the immense opportunity for growth in the industry, and proposed the National Organics Standard Board (NOSB) to help USDA shape future livestock standards. Congress granted the NOSB expansive jurisdiction: "The Committee regards this Board as an essential advisor to the Secretary on all issues concerning this bill and anticipate that many of the key decisions concerning standards will result from recommendations by this Board." S. Rpt. 101-357 at 296. Congress expected that the NOSB would participate in a wide range of issues, not merely limited to medical care, and thus included a consultation requirement in the statute. 7 U.S.C. § 6503(c).

Congress' intention was always that the NOSB and USDA would work together to formulate animal welfare-related regulations. Congress explained that the "Committee expects that, after due consideration and the reception of public comment, the Board will best determine the necessary balance between the goal of restriction livestock medications *and the need to provide humane conditions for livestock rearing.*" S. Rept. 101-357 at 302-03 (emphasis added).

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 Secretary 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) (emphasis added). The legislative history thus confirms that Congress intended the Agency to enact new livestock standards in addition to those specified in the original language of the OFPA. All evidence suggests that Congress intended USDA's authority on this issue to be expansive, enabling the NOSB and USDA to refine and extend livestock standards as research on the subject grew. Congress "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.*

Given the above, USDA should revert to its decades-long understanding that it has authority to consider animal health and welfare jointly. Indeed, as discussed in detail in Section A above, it is not only infeasible but impossible to consider the two separately. USDA has not demonstrated, and cannot demonstrate, that Congress intended the OFPA to treat the two separately. Withdrawal of the OLPP Rule would therefore be arbitrary and capricious, and not in accordance with law, and thus a violation of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A).

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of Inspector General and nine separate recommendations from the NOSB." National Organic Program; Organic Livestock and Poultry Practices, 82 Fed. Reg. 7,042, 7,044 (Jan. 19, 2017).

### C. The OLPP Rule Corrects a Market Failure Created by the Current Standards

AMS claims that the increase in sales of organic products indicates that the NOP regulatory regime is sufficient to meet consumer expectations and that the benefits of implementing the OLPP Rule cannot outweigh the corresponding additional costs to producers. However, as made clear in the NOSB consultation process, in comments made to AMS relating to the final rule and delay, and in consumer surveys, many products currently certified under the NOP do not meet consumer expectations. In fact, the record suggests that most consumers have a fundamental misunderstanding of the standards for animal care required under the NOP.<sup>34 35</sup> It is this market failure that the OLPP Rule was promulgated to correct.

In the absence of clear standards, consumer confusion reigns. An April 2014 survey of consumers nationwide found that almost seventy percent of consumers (68%) mistakenly believe outdoor access under the organic label means that “[a]ll animals have access to outdoor pasture and fresh air throughout the day.”<sup>36</sup> Consumer confusion is further demonstrated by a class action lawsuit filed on January 8, 2018 in the U.S. District Court for the Northern District of California. The suit seeks reimbursement for consumers who paid higher prices for Walmart’s Organic Marketside store-brand eggs, which the corporation marketed as having come from hens with outdoor access.<sup>37</sup> USDA neglects to acknowledge the market failure inherent in consumers paying premium prices for organic products that do not meet their reasonable expectations for animal care, along with the subsequent waste of judicial and party resources that the OLPP Rule would prevent.

The OLPP Rule was drafted to help mitigate the gap between consumer expectations and the reality of how animals in the care of organic producers are actually raised. 82 Fed. Reg. 7,042. The rule also addresses one of the fundamental purposes of the OFPA: “to assure consumers [organic products] meet a consistent standard.” 7 U.S.C. § 6501(2). While an agency has inherent authority to reconsider rules, it may not do so arbitrarily. 5 U.S.C. § 706(2)(A). Agency reconsideration of a rule by flyspecking an economic analysis conducted and approved by the Agency and the Office of Management and Budget under a previous administration is arbitrary, capricious, and an abuse of discretion. *Id.*

AMS also asserts that implementation of the OLPP Rule will negatively impact producers because they have made “significant investments in facilities and infrastructure” in response to

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<sup>34</sup> Animal Welfare Institute, ASPCA, & Farm Forward, *Animal Welfare in the National Organic Program: The USDA Must Act Quickly to Protect Millions of Animals*, 7 available at

<https://awionline.org/sites/default/files/uploads/documents/FA-AWI-AnimalWelfare-NatOrganicProgram-2017-13.pdf>; CONSUMER REPORTS/NAT’L RESEARCH CTR., *Animal Welfare Survey*, 4 (March 18, 2017) available at <http://greenerchoices.org/wp-content/uploads/2017/04/2017-Animal-Welfare-Survey-Public-Report.pdf>.

<sup>35</sup> The OIG noted in a 2010 audit of the National Organic Program that AMS needed to more effectively identify inconsistent operating practices and clarify program requirements. The OLPP rule addresses this lack of consistency as relating to outdoor access for livestock and clarifies program requirements. U.S. DEP’T OF AGRIC., OFFICE OF INSPECTOR GEN., *Oversight of the National Organic Program*, Audit Report 01601-03-Hy, 21–22 (Mar. 2010).

<sup>36</sup> *Research on Consumer Perceptions of Organic Food Standards for Treatment of Animals*. Edge Research. April 2014. available at [http://www.aspc.org/sites/default/files/aspc\\_organic\\_labeling\\_public\\_memo\\_4-10-14.pdf](http://www.aspc.org/sites/default/files/aspc_organic_labeling_public_memo_4-10-14.pdf).

<sup>37</sup> “U.S. Lawsuit Says Wal-Mart Deceived Buyers of Organic Eggs” Jan. 18, 2018, available at <https://www.nytimes.com/reuters/2018/01/08/business/08reuters-walmart-lawsuit-eggs.html? r=0#story-continues-1>

the growing organic market. While our perspective is that industry investments should not prevent AMS from imposing regulations when necessary or to ensure that statutory purposes are met, the Agency’s assertion ignores the fact that most organic producers want the rule implemented and that many have made changes to their systems based on the requirements of the OLPP Rule. Most of the organic producers resistant to changing their systems are large-scale, industrial egg producers which seek to continue denying laying hens access to the outdoors under the ambiguous NOP regulations. Most organic producers, however, want the Rule implemented and many have made changes to their systems based on the requirements of the OLPP Rule.

Finally, withdrawing implementation of a rule that prevents producers from exploiting existing vague standards to edge out competition does not stifle innovation—rather, it evens the playing field. This is critical, given the mandate of the OFPA to ensure consistent practices across the industry. Therefore, withdrawal of a rule that ensures this consistency under the guise of ensuring innovation is arbitrary and capricious and violates the Administrative Procedure Act. 5 U.S.C. § 706(2)(A).

#### **D. Executive Order 13771 (EO 13771) Should Not Apply to the OLPP Rule**

The NOP is a voluntary program which applies only to producers that choose to be regulated. In exchange for meeting standards, producers reap financial benefits that, as AMS has already determined, outweigh the potential costs. Because producers that voluntarily comply with NOP standards incur costs and reap related benefits on a voluntary basis, the EO should not apply to the OLPP Rule.

Further, the language of the EO itself applies only to new regulations. Sec. 2(a). The OLPP Rule was finalized and promulgated under the previous administration, having undergone final notice and comment and assessment by the OMB. Therefore, the OLPP Rule should not fall under EO 13771. *See Air Council v. EPA*, (D.C. Cir. July 2017)(noting well-settled rule that dates appearing in final rules are part of the final rule and are not ancillary or evidence that the rule is not “final.”)

Finally, EO 13771 explicitly notes that any elimination of agency rules should be performed in accordance with the Administrative Procedure Act and other applicable law. Sec. 2(c). As demonstrated above, the withdrawal of this rule is clearly not in compliance with the Administrative Procedure Act, and would therefore be inappropriate for elimination under EO 13771.

The undersigned believe that by seeking to nullify the OLPP Rule, USDA is prioritizing the economic interests of a handful of industrial organic egg producers and conventional animal agriculture trade groups that do not want the rule go into effect. We call on the USDA to implement the OLPP Rule without modification or further delay.

Sincerely,



**The American Society for the  
Prevention of Cruelty to Animals**



**Animal Welfare  
Institute**

**The Animal Welfare  
Institute**



**THE HUMANE SOCIETY  
OF THE UNITED STATES**

**The Humane Society of  
the United States**