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Ag Stop 0268, Washington, DC
20250-0268.

Docket: AMS-NOP-15-0012; NOP-15-06
RIN: 0581-AD75

Re: National Organic Program (NOP); withdrawal of the Organic Livestock and Poultry Practices proposed rule

The Cornucopia Institute is a national food and farm policy watchdog group working to uphold the integrity of organic agriculture. Through research and investigations on agricultural and food issues, Cornucopia provides needed information to family farmers, consumers and other stakeholders in the good food movement and to the media.

In its previous comments, The Cornucopia Institute supports letting the Organic Livestock and Poultry Practices (OLPP) rule become effective as proposed.

Our comments, along with thousands of other public comments – the vast majority of which were in favor of enacting the OLPP as proposed – have been ignored by the United States Department of Agriculture (USDA).

The USDA delayed the OLPP’s effective date twice before reopening yet another public comment period May of 2017. The comment page requested input on four options—to enact the rule, suspend it, delay it, or withdraw it. Despite overwhelming public support for enacting the OLPP as planned, the USDA is now proposing the withdrawal the OLPP — seemingly being responsive to powerful industrial interests, primarily engaged in conventional (not organic) production.¹

The Cornucopia Institute opposes the withdrawal of the OLPP.

The OLPP rule would help facilitate the National Organic Program (NOP) in consistently enforcing more defined animal welfare benchmarks on organic farms and ranches. The final rule will also remove some “perceived” loopholes being taken advantage of by some large poultry production operations.

Most importantly, the current proposal to abandon the OLPP would undermine the long-standing influence of the National Organic Standards Board (NOSB) with its long history of engaging organic stakeholders in the rulemaking process. The NOSB’s authority as an advisory board was universally acknowledged by all prior administrations at the USDA and is supported by OFPA’s authority.

¹ The public and organic stakeholders submitted over 40 thousand comments in the allotted 30 day period.

In addition, the OLPP does not, based on our legal analysis, violate or exceed the authority of the USDA under the Organic Foods Production Act (OFPA) and is consistent with established precedent. The USDA's interpretation of the OFPA's language, in such a way that precludes regulations on livestock care from being enacted, is incorrect based on the plain language and history of the statute.

The following comments are a more detailed opinion and analysis from Cornucopia's legal and organic livestock policy experts:

The withdrawal of the OLPP undermines OFPA's requirements for public comment and NOSB guidance.

Withdrawing this rulemaking proposal only serves to weaken the organic label as consumers have a certain perception of organic livestock care that is not the current reality (mostly based on the "lack of will" by the USDA to enforce current regulations). Many consumer, animal welfare groups and family farmers support this rulemaking, highlighting the issue in the eyes of the public. USDA policymakers supported refining the current regulatory requirements – by adding some benchmarks and specific prohibitions – to make organic requirements easier to enforce.

In contrast to most other industries, organic stakeholders and family farmers have asked for strict regulatory oversight². It is this oversight that makes the organic label one consumers seek out and trust more than other labels. One reason consumers choose organic over conventional livestock products is that the organic label provides greater welfare for animals.

The USDA notes that the "industry" would be harmed by the enacting of the OLPP. When considering the impact of the OLPP final rule on producers, the USDA has focused on large industrial egg producers. These businesses produce mostly conventional eggs with a small portion of their production in organics. While the USDA seems to be taking these industrial egg producers word that the OLPP would harm businesses, the organic industry as a whole supports the OLPP. In fact, the USDA's analysis virtually ignores the impacts on family-scale producers if the OLPP is withdrawn. The current interpretation of the term "outdoor access" by some certifiers, that allows for the use of confined chicken porches and not legitimate access to the outdoors, has already had serious economic impact on these farmers. Permitting such faulty interpretation to continue robs economic opportunity for more small businesses.

This inconsistency seems to represent the USDA's bias towards big agribusiness that should not be tolerated in light of OFPA's call to seek guidance from the broader public, the NOSB, and organic producers themselves.

² The organic industry lobbied Congress for what would become the Organic Foods Production Act of 1990.

In addition, industrial interests in “organic” egg production were fully aware that the current standards already require *outdoor access*, and that tougher enforcement provisions have been debated since 2002. Despite this knowledge, they still built infrastructure including giant confinement facilities with tiny porches (as “rule beaters”). They are not the dedicated businesses and family farms that built and sustain the organic label. In the industry vernacular, organic eggs are merely a part of “specialty eggs.” And the houses they constructed can – and do – get switched back and forth between organic and “cage free” production. To delay this rule from being enacted due to the push of conventional agribusiness would harm the organic label.

With this notice of withdrawal, the USDA has ignored the preponderance of comments submitted by the public and true organic stakeholders.

OFPA requires that notice and public comment guides the development of detailed regulations:

“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.”³ [Emphasis added.]

The NOSB’s recommendations and role in the regulatory process is also completely undermined by the withdrawal of the OLPP. OFPA requires that “[t]he National Organic Standards Board shall recommend to the Secretary standards... for the *care of livestock* to ensure that such livestock is organically produced.”⁴ [Emphasis added.]

As stated in Cornucopia’s previous comments on the OLPP, the integrity of the NOSB is an essential element of the organic program. Congress created the NOSB so that a balance of organic interests would have a *seat at the table* in defining, maintaining and enhancing organic standards. Their recommendations cannot be ignored by the USDA.

In fact, the NOSB has made many recommendations regarding livestock health and living conditions since the early 2000s. In 2002, the NOSB made recommendations including prohibiting “porches” to meet the requirement for outdoor access in poultry.⁵ Between 2009 and 2011, the NOSB issued another series of recommendations on animal welfare.⁶ Throughout these recommendations, the NOSB reiterated that true outdoor access is a basic tenant of organic production. These recommendations were ignored by previous administrations – all while corporate interests continued to build confinement operations that were certified as organic.

³ 7 U.S. Code § 6509(g)

⁴ 7 U.S.C. § 6509(d)(2)

⁵ NOSB. 2002. “Recommended Clarification on Access to the Outdoors for Poultry (PDF).”
<https://www.ams.usda.gov/rules-regulations/organic/nosb/recommendations/spring2002>

⁶ NOSB. 2011. “Formal Recommendation by the NOSB to the NOP, Animal Welfare and Stocking Rates.”
<https://www.ams.usda.gov/rules-regulations/organic/nosb/recommendations/fall2011>

Many of these NOSB recommendations were eventually considered for inclusion in the current OLPP. As aforementioned, the NOSB's voice was prominent in asking for better enforcement of the current organic livestock rules, even before the USDA Office of the Inspector General identified inconsistencies in certification practices in 2010.

The interpretation by the current administration, that OLPP is an overreach and burdensome, also breaks the precedent set by the last three administrations. Previous administrations interpreted OFPA to include the creation of regulations applicable to the care of livestock, as understood in common sense definitions and as requested by true organic stakeholders.

The USDA's interpretation of OFPA's provision for the "care of livestock" is incorrect.

In its notice, the USDA says that the OLPP is flawed because organic standards call "for the care" of organic livestock, which the USDA interprets as being "limited to health care practices similar to those specified by Congress in the statute, rather than as reflecting a stand-alone concern for animal welfare."

This is a gross misinterpretation of the purpose of both the provisions in OFPA and the purpose and effect of the OLPP itself.

The USDA is proposing to withdraw the OLPP final rule because it now believes OFPA does not authorize the animal welfare provisions of the OLPP final rule. This is an incorrect interpretation. The phrase "care of livestock" found in OFPA 7 U.S.C. 6509(d)(2) speaks directly to livestock wellbeing and welfare. Since OFPA does not include a definition, common definitions of "care" include:

1. "The provision of what is necessary for the *health, welfare, maintenance, and protection* of someone or something." (Online Oxford Dictionary, <https://en.oxforddictionaries.com>). [Emphasis added.]
2. "The provision of what is needed for the *well-being* or protection of a person or thing." (www.Dictionary.com) [Emphasis added.]
3. "The process of protecting someone or something and *providing what that person or thing needs*." (Cambridge Dictionary, <https://dictionary.cambridge.org>) [Emphasis added.]

These definitions encompass more than just assuring an animal has the bare minimum of food, water, and shelter. Instead, the term "care of livestock" indicates OFPA was always interested in the holistic wellbeing of certified organic animals.

In addition, because many pharmaceutical treatments are banned in certified organic production, it has always been an understood part of organic production that producers try and prevent health problems, rather than remediating them after the fact.

The current regulations call for the maintenance of “living conditions which accommodate the health and *natural behavior* of animals”⁷ As described above, wellbeing also encompasses the ability to express natural behavior – a basic tenant of animal welfare – and to be healthy and free from undue or unnecessary stress (especially given that stress is a known precursor to aggression and illness in flocks and herded species):-

Even if “wellbeing” itself is not referenced in OFPA and the livestock regulations, all of its constituent parts are. Therefore, the OLPP did not go beyond the regulatory authority of the USDA.

The USDA’s argument that neither OFPA nor the current livestock regulations authorize *any* regulations that encompass livestock wellbeing is ignoring the initial intent of the law, any common-sense reading of the plain language of OFPA, and the precedent established by previous administrations.

Recent executive orders should not apply to organic regulations.

While Cornucopia acknowledges the Trump Administrations executive orders were submitted to freeze regulations, the organic standards should not fall under this regulatory freeze. Organic certification and label is not a burden on industries because it is a voluntary label that allows for businesses to opt in or out.

OFPA requires consistent standards which are not being met with the current livestock regulations.

The USDA’s acknowledgment that the Secretary has the authority to issue regulations also fairly extends to those aspects of animal care that are shown to be necessary to meet the congressional objectives specified in 7 U.S.C. 6501

Section 6501 of OFPA requires the USDA:

1. To establish national standards governing the marketing of certain agricultural products as organically produced products;
2. *To assure consumers that organically produced products meet a consistent standard;* and
3. To facilitate interstate commerce in fresh and processed food that is organically produced.⁸ [Emphasis added]

Right now, the current regulations are not being consistently enforced and therefore organic livestock products do not meet a uniform standard. As already discussed, this is particularly true with respect to organic egg and poultry operations. The USDA created the OLPP, at the recommendation by the NOSB and the organic community, to cure these

⁷ 7 C.F.R. § 205.239

⁸ 7 U.S. Code § 6501 - Purposes

inconsistencies as directed by OFPA. Without the OLPP or similar regulation, consumers cannot be assured that organic livestock products meet a consistent standard.

The USDA received thousands of public comments on each iteration of the OLPP in the years 2016 and 2017. The greater consensus of the public and stakeholder is clear: consumers and stakeholders want the OLPP enacted.

One of the chief reasons for this consensus is that the current livestock regulations are being interpreted to allow practices that do not meet the letter and spirit of the current organic regulations. Many hens in industrial-organic operations never touch soil, despite their products being marketed with the organic seal. Given the size of these henhouses, many individual birds never even get a chance to access the porches.

The withdrawal statement alludes to “significant investments” made by egg producers. Industrial interests in “organic” egg production were fully aware that the current standards require outdoor access, and that tougher enforcement provisions were being debated, and they still built into infrastructure (including the porches). In fact, the buildings and infrastructure differ very slightly from ones that would be constructed to house conventional “cage free” production. This means that shifting out of organics would not be overly burdensome to these industrial egg producers.

Conclusion – The OLPP has broad stakeholder support. To withdraw this rule now is unacceptable and undermines the congressional intent for democratic process through which organic regulations are created.

The OLPP rule was designed to facilitate the USDA in consistently enforcing more defined animal care benchmarks on organic farms and ranches. The final rule will also remove some *creative* loopholes being taken advantage of by some industrial-scale operations.

Consistent standards are required by OFPA and withdrawing this rulemaking only serves to weaken the organic label by allowing inconsistent applications of rules to continue. In addition, consumers have a certain perception of livestock “care” under the organic label that is not universally the current reality. The common sense definition of the care of livestock would encompass consumer expectations, and is one reason many consumer and animal welfare groups support the OLPP.

Due to the work and time invested in the issue by the NOSB and the public, including many organic industry stakeholders, the OLPP rule should be enacted as planned. There is also no doubt that inconsistencies in enforcement of the current regulations cannot be allowed to continue. This rule would wipe out the practice of poultry producers using small “porches” to qualify as true outdoor access, facilitating the enforcement of the current regulations as they were intended.

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If you have any questions regarding Cornucopia's current or previously submitted comments or need additional background information, please do not hesitate to contact us.