

May 26, 2020

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National Organic Program
USDA-AMS-NOP
1400 Independence Ave SW
Room 2642-So., Ag Stop 0268
Washington, DC 20250-0268

Re: Docket: AMS-NOP-20-0037; NOP-20-03

National Organic Program (NOP); Request for Comment on Organic Livestock and Poultry Practices Economic Analysis Report

The following comments are submitted to you on behalf of The Cornucopia Institute, whose mission is, in part, to support economic justice for family-scale farming.

Cornucopia supports the comments of Center for Food Safety's comments in their entirety and agrees with their conclusions.

The Organic Livestock and Poultry Practices (OLPP) rulemaking was the result of more than a decade worth of public and stakeholder input, National Organic Standard Board (NOSB) recommendations, and agency efforts. The OLPP would have leveled *some* of the uneven playing field for poultry producers that would be in line with the intent of both the Organic Foods Production Act of 1990 (OFPA)¹ and the organic regulations (7 CFR Part 205). Ultimately, the OLPP would have helped correct the severe *market failures* indicated by the inconsistent practice standards in the organic egg and poultry industries.

Cornucopia rejects the United States Department of Agriculture's (USDA) conclusions that led to its withdrawal of the OLPP. Specifically, the economic analysis is severely flawed and should be disregarded for the following reasons, which will be analyzed in more detail below:

1. The economic analysis was inadequate to provide a basis for rejecting the OLPP because of the unique status of the organic marketplace as a voluntary certification.
2. Production cost concerns cannot prevent regulatory improvements that ensure the standard established by OFPA, and the USDA inappropriately considered economic impacts to certain producers whose industrialized models are not compatible with the organic standards.
3. The economic analysis does not take into account the deep consumer demand for high-integrity organic eggs and poultry.
4. Damage to the organic label will be severe if action is not taken to ensure consistent animal care standards in organic poultry and egg production systems.
5. The USDA failed to take into account the effect the OLPP would have had on organic import fraud.
6. OFPA authorizes rulemakings for livestock animal care, including the OLPP.

¹ as amended (7 U.S.C. 6501-6524),

Currently, organic poultry producers that adhere to high standards are being undercut in the marketplace by industrial producers that echo conventional cage-free and free range production. Market uncertainty continues because of perceived loopholes in the organic standards and uneven enforcement that has allowed a small number of producers to deny outdoor access to animals. The organic standards require “[y]ear-round access for *all animals to the outdoors*, shade, shelter, exercise areas, fresh air, clean water for drinking, and direct sunlight, suitable to the species, its stage of life, the climate, and the environment...”²

It is essential that the USDA fully consider these points as the withdrawal of the OLPP is re-evaluated.

1. The economic analysis was inadequate to provide a basis for rejecting the OLPP because of the unique status of the organic marketplace as a voluntary certification.

The organic program is unique in the federal landscape. Certification for the organic label is a *voluntary act*, outside the realm of other regulated labeling schemes. Due to this unique status of the organic marketplace, it is nonsensical to presume that the same or similar kinds of economic analysis used within non-voluntary programs are appropriate for rulemaking within the organic program. This is the fundamental underlying problem with the USDA’s economic analysis report.

Because the organic label is voluntary, any requirement that regulation only proceed when there is some kind of market failure is not applicable.³ Businesses voluntarily apply for organic certification and willingly abide by the rules and regulations to meet the standards. Unlike other markets, businesses can choose to leave—or enter—the organic market at any time. *Consistent and unambiguous standards make the voluntary entry into the organic sphere more attractive only to legitimate businesses.*

Producers who are unable to comply with the OLPP have many market outlets and so would not experience great losses. In fact, the very nature of the organic label dictates that not all producers can or should participate in the organic market.

2. Production cost concerns cannot prevent regulatory improvements that ensure the standard established by OFPA. The USDA inappropriately considered economic impacts to producers employing industrialized production models that are not compatible with the organic standards.

When the [OLPP was first published](#) for public comment in April 2016, the USDA asserted that the rule was necessary because the livestock standards "...need additional specificity and clarity to better ensure consistent compliance by certified organic operations and to provide for more

² 7 CFR § 205.239(a)(1) (emphasis added)

³ The USDA noted in their breakdown that that there was no market failure in the organic industry sufficient to warrant the particular regulations established by the OLPP Rule.

effective administration of the [NOP]. One purpose of [OFPA] is to assure consumers that organically produced products meet a consistent and uniform standard (7 U.S.C. 6501)."

The changes proposed in the OLPP were most dramatic for organic poultry, in part because the organic standards currently applicable to livestock carry only basic language regarding poultry.

The USDA explained the withdrawal on the basis that, among other things, the Final RIA had incorrectly calculated the costs and benefits of the OLPP Rule and had wrongly concluded that the benefits of the rule exceeded the costs. However, the data presented suggest that the only negative economic impacts of adopting the OLPP would be to the largest egg producers (and possibly some of the larger factory farm broiler producers). These large egg producers represent a small fraction of total organic egg producers.

In the land calculation, the USDA stated that some aviary operations that could not acquire additional (adjacent) land might be forced to buy land elsewhere and build new facilities to remain in operation. Although aviary systems may constitute approximately 70% of organic egg production, this type of housing is not compatible with organic ideals. By design, aviaries enable producers to pack huge numbers of birds into a smaller space. Under these circumstances, it is impossible for each individual animal to access the outdoors, exhibit natural behaviors, and meet the other requirements of the *current* standards, let alone the OLPP. The fact that approximately two-thirds of aviary producers lack and would be unable to acquire the land required under the OLPP Rule (as the USDA approximates) confirms that these housing structures are incompatible with the organic label.

The USDA also noted that:

In summary, AMS believes that 50 percent of organic production may transition to cage-free egg production, while the remainder would be incentivized to remain in the organic market and obtain needed land.

This statement suggests that industrialized organic egg production would likely pivot to the conventional marketplace with little change in production practices. If these businesses leave the organic market it is due to their choice not to meet label requirements. The choice of businesses within the free market should not be considered reason to withdraw the OLPP. In fact, production cost concerns do not justify refusing to implement regulatory improvements that ensure the organic industry is meeting the integrity standard established by OFPA.

The intent of the OLPP was to *make this marketplace shift occur*, as production that cannot meet the bare-bones outdoor access requirements outlined in the OLPP do not meet the intent of OFPA or the organic standards. The loss of this "50 percent" would have improved the organic market in numerous ways that were not realized in the USDA's economic analysis.

On top of these considerations, the USDA did not consider the economic benefits to the organic broiler industry at all. The organic broiler industry is plagued with similar inconsistencies and marketplace failures to those found in the organic egg industry.

Though the USDA found that the projected costs of the OLPP Rule likely exceeded its benefits, the economic analysis was deeply flawed to the point of nonsense.

It is the role of the NOP to ensure consistent implementation of standards that are aligned OFPA. The regulations proposed in the OLPP would have been fundamental to aligning production practices with OFPA's requirements.

3. The economic analysis does not take into account the great consumer demand for high-integrity organic eggs and poultry.

The USDA's analysis of how animal welfare affects consumer demand was inappropriate and shallow at best. Animal welfare is one of the primary reasons organic consumers choose organic livestock products over conventional alternatives.

The intent of the OLPP was not only to maintain the integrity of the organic label, but to also *better align organic livestock products with consumer expectations.*

Cornucopia is uniquely aware of consumer and producer perceptions of the organic marketplace. Organic consumers are increasingly educated about where their food comes from, and they are often motivated by the promise of greater animal welfare when they purchase organic food. A loss of confidence in that promise would likely move them to make other purchasing choices.

Cornucopia has seen an uptick in questions and complaints regarding animal welfare in organic production. Many of these consumers report they have sought out small, local producers without organic certification or, in the absence of local producers, have sworn off eggs and meat entirely.

Cornucopia hears regularly from organic consumers and producers: both groups see the organic egg industry as a tipping point for the label. If producers who use porches as "outdoor access" continue to qualify for organic certification, consumers will continue to abandon the organic label. If that happens, small producers will disproportionately suffer extreme economic loss, as they are currently meeting the proposed OLPP regulations at their own expense and their production methods would not be remunerated in the conventional marketplace. This loss of more small organic producers would serve to further limit the already low availability of truly ethical livestock products in the organic marketplace, leading to further consumer disillusionment.

The USDA analysis dealt solely with economic considerations, and neither organics nor animal welfare are solely economic issues. In fact, they are both fundamentally social and moral—concepts that affect consumer choice on a level that is difficult to capture through simple economic breakdowns.

In addition, the USDA has the duty to consult with National Organic Standards Board (NOSB) in developing organic standards. The NOSB represents *stakeholder* interests throughout the organic marketplace. Time and again the NOSB has called for better livestock care regulations to reflect consumer expectations and preserve the integrity of the label. In fact, during its April 2017 meeting, the NOSB *unanimously* voted to formally recommend to the Secretary that OLPP not

be delayed and be allowed to go into effect no later than May 19, 2017.⁴ This is another vote of confidence that the OLPP is needed and appropriate for this industry.

4. Damage to the organic label will be severe if action is not taken to ensure consistent animal care standards in organic poultry and egg production systems.

Most organic farmers fully support the OLPP and many already met or exceeded the standards proposed in the rulemaking. Since the rule was drafted, many others producers have modified their operations to comply with the standards that the OLPP would have implemented.

OFPA unambiguously authorizes additional regulations for animal care and welfare, such as the OLPP. In addition, OFPA authorizes the USDA to establish national standards governing the marketing of certain agricultural products as organically produced to assure consumers that those products meet a consistent standard.

Right now there is no consistent standard for organic eggs or organic broilers. As with any label, consumer awareness of label integrity affects consumer demand. All evidence points to the organic consumer becoming more educated and aware of the disparities among products in the marketplace. For those consumers unaware of the details, this lack of consistency causes consumer confusion over the meaning of the organic label. This confusion will lead, without doubt, to the further erosion of the value of the USDA organic label.

The organic egg market is flooded with eggs from big egg companies that are indistinct from conventional cage-free eggs other than the hens' feed. This bifurcated organic market unfairly disadvantages smaller farmers who face higher costs of production and compete for market share.

The USDA did not take into account the losses legitimate businesses would experience should the organic egg (and broiler) market fail due to inconsistent regulations and faltering consumer confidence. The economic analysis leading to withdrawal of the rule is thus, if not faulty, at least *incomplete*.

In fact, the adoption of the OLPP would have led to *significant economic gain* for the majority of organic egg producers and for the future of organic poultry because it would have:

- i. Preserved the integrity of the organic label and increased consumer confidence (and therefore investment), and
- ii. Increased demand for organic eggs (and other poultry products). If producers who cannot meet the standards proposed in the OLPP leave the label, the market saturation of organic eggs that do not meet consumer expectations would end. This would make the market especially lucrative for those already in compliance with the intent of both OFPA and the regulations.

In addition to these concerns, when work of the NOSB is ignored or when the legitimacy of the proposals put forth by the NOSB are underpinned with incomplete or inaccurate economic

⁴ Statement adopted unanimously by the National Organic Standards Board, April 20, 2017. Meeting Transcript at 185:4-191:11.

analyses, their mandate to act as advisors to the NOP is undermined. This is another side to the withdrawal of the OLPP that damages the integrity of the label and the systems that are in place to protect that integrity, such as the NOSB itself.

5. The USDA failed to take into account the effect the OLPP would have had on organic import fraud.

The removal of egg producers who could not meet the minimum standards proposed by the OLPP has would have the benefit of cutting down on the demand for cheap, potentially fraudulent, grain imports. Unlike cattle, chickens and other poultry cannot subsist on pasture alone and need to obtain a large percentage of their diet from grain, seeds, or other farmed inputs.

North American organic grain farmers have lost hundreds of millions of dollars over the past several years as they struggle to compete with imports of fraudulent organic grain used for livestock feed.⁵ Consumer confidence in the organic label has also been shaken following documented cases of import fraud.

The massive egg businesses that the USDA is concerned about pushing out of the marketplace use a significant portion of imported grain to meet feed demands. This feed is frequently illegitimate but has been hard to trace up to this point.

Cornucopia has been at the forefront in petitioning the USDA to close loopholes, inspect high-risk shipments, and investigate foreign companies and certifiers that engage in questionable import and certification practices. We have aggressively tracked suspicious shiploads of “organic” grain, investigated the identity of international supply chains responsible for many of these shipments, and advocated for stronger enforcement measures.⁶ Part of ending this fraud is cutting off the supply chain at the level of purchaser.

The USDA failed to take into account the economic benefit cutting off fraudulent imports at the purchaser level would have on the organic industry *as a whole*. Domestic organic grain suppliers would benefit from the OLPP.

6. The Organic Foods Production Act authorizes rulemakings for livestock animal care, including the OLPP.

The USDA also concluded that it lacked the legal authority under OFPA to promulgate the OLPP Rule and that there was no market failure in the organic industry sufficient to warrant the particular regulations established by the OLPP Rule.

⁵ Anne Ross. 2018. "Against the Grain: Protecting Organic Shoppers Against Import Fraud and Farmers from Unfair Competition." *The Cornucopia Institute*. <https://www.cornucopia.org/against-the-grain-protecting-organic-shoppers-against-import-fraud-and-farmers-from-unfair-competition/>

⁶ Anne Ross. 2018. "The Turkish Infiltration of the U.S. Organic Grain Market." *The Cornucopia Institute*. <https://www.cornucopia.org/wp-content/uploads/2018/06/Turkish-Infiltration-Organic-Grain-Imports.pdf>

OFPA authorizes the USDA to create standards for the health—including welfare and well-being—of organic livestock. When the OLPP was first proposed and throughout its long creation process, the USDA interpreted OFPA as giving it the authority to promulgate additional rules for the care of organic livestock.⁷

This authority stems from at least three provisions in OFPA, including the Secretary’s general rulemaking authority (7 U.S.C. §6503) and, more specifically, the sections for animal production practices and materials (§ 6509 and § 6513).

The ordinary meaning of the term “care” is very broad, clearly encompassing living conditions beyond just the provision or prohibition of certain animal drugs.

Excusing the withdrawal of the OLPP as an overstep of agency authority is a legal untruth on its face. Agencies in general have been granted broad authority to pass regulations, and the USDA has specific authority given to them for this purpose.

Enacting the OLPP is crucial for the organic label. The OLPP is necessary for consistent implementation of OFPA would benefit the organic industry, and community of organic consumers as a whole.

⁷ 82 Fed. Reg. 7042-01 (Jan. 19, 2017) (“AMS affirms that USDA has the authority to conduct this rulemaking; this action falls within our purview to implement the Organic Foods Production Act.”).