**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| ORGANIC TRADE ASSOCIATION,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,<br><br>Defendants. | Case No. 1:17-cv-01875 (RMC) |

**DEFENDANTS' REPLY BRIEF**
**IN SUPPORT OF MOTION TO DISMISS**

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## INTRODUCTION

In the opening memorandum in support of their motion to dismiss, defendants (collectively, "USDA") demonstrated that this lawsuit challenging the delay of an organic livestock regulation (the "OLPP Rule") presents no justiciable case or controversy because plaintiff Organic Trade Association ("OTA") fails to allege facts plausibly suggesting that the delay harms it or its members in any concrete way. In response, OTA withdraws it assertion of organizational standing but continues to press its claim of associational standing based on a series of newly-submitted declarations. But nothing in these new materials satisfies OTA's burden to identify specific facts plausibly suggesting that postponement of the OLPP Rule has caused or will imminently cause any injury to OTA's members. Rather, they merely identify voluntary business decisions that OTA's members have made to differentiate their products and make abstract assertions of customer confusion and litigation risk without connecting those alleged risks to any specific, imminent harm.

In addition, OTA fails to offer any meaningful explanation why its claims challenging now-expired agency actions present a justiciable case or controversy. Instead, it attempts to invoke the mootness exception for cases that are capable of repetition yet evade review, but it cannot show a reasonable likelihood that USDA will again extend the OLPP Rule's effective date absent notice and comment. USDA has already provided notice and solicited comment on the extension in connection with the present final rule extending the effective date of the OLPP Rule to May 14, 2018. Furthermore, USDA has now proposed to withdraw the OLPP Rule in its entirety, thus rendering any further extensions exceedingly unlikely.

If the Court decides that OTA has standing to raise its challenges to the operative final rule issued on November 14, 2017, it should dismiss this case in its entirety for failure to state a claim on which relief can be granted. OTA's claim in count one, that the delay enacted by the November

14 Rule was not a logical outgrowth of the proposed rule, is belied by the fact that USDA specifically identified "delay" as one of four options in the proposed rule and invited comment on any legal or policy issue that might inform those options. OTA's theory in count two, that USDA failed to take action it was legally required to take, is meritless because USDA was not required to let the OLPP Rule take effect after it expressly postponed the effective date of the Rule through notice and comment rulemaking. Any challenge to the validity of that postponement is a challenge to agency action under 5 U.S.C. § 706(1), not a claim to compel agency action unlawfully withheld under 5 U.S.C. § 706(2). OTA's claim in count three, that USDA was required to explain its purported change of policy in the November 14 Rule, likewise fails because USDA did not change its position on the legal and policy issues discussed in that Rule, but rather notified stakeholders of its intent to conduct further rulemaking on those issues. OTA's claim in count four, that USDA was required to consult the National Organic Standards Board ("NOSB") before delaying the effective date of the OLPP Rule, must be dismissed because nothing in the OFPA required such consultation. Finally, OTA has withdrawn its claim in count five, thus conceding the lack of merit to that theory.

For these reasons and those discussed more fully below, the case should be dismissed in its entirety.

## ARGUMENT

### I. The Court Lacks Jurisdiction over OTA's Claims

#### A. OTA Fails to Allege Any Plausible Injury Caused by the Delay

In its opening brief, USDA addressed OTA's standing based on the allegations in OTA's amended complaint and associated declarations. In response, OTA has expanded its claims to allege new theories of harm based on statements asserted in additional declarations that find no

support in OTA's amended complaint. Even if it were proper to consider these new theories and allegations absent an amendment to the complaint, they fail on their merits.

**1. OTA's Investment Theory Fails to Establish Standing**

In its effort to demonstrate the requisite constitutional injury to invoke the Court's jurisdiction, OTA first repeats its assertion that its members have been injured because they allegedly made investments in reliance on the OLPP Rule. Pl.'s Opp'n at 10, ECF No. 16. In support of this theory, OTA relies on the new declaration of George Siemon, Chief Executive Officer of CROPP Cooperative, a farmer-owned cooperative that sells organic eggs and dairy under the Organic Valley label, who describes investments that his company allegedly undertook in anticipation of the OLPP Rule's animal welfare standards, such as the alteration and expansion of livestock housing, acquisition of land, and adaptation of management practices. *See* Decl. of George Siemon ("Siemon Decl.") ¶¶ 2, 20, ECF No. 16-1. Mr. Siemon's declaration establishes, however, that these investments are attributable to CROPP's self-imposed business decisions, not USDA's delay of the OLPP Rule or even the OLPP Rule itself. As Mr. Siemon explains, CROPP chose to incur these expenses before the OLPP Rule was promulgated, *id.* ¶¶ 12, 20, even when it had no assurance that any specific provision in the Rule would be finalized (or when),[1] and CROPP chose to continue incurring those same expenses after USDA delayed the effective date and proposed to withdraw the Rule when it was plainly under no legal compulsion to do so. *Id.* ¶ 19. CROPP's voluntary choice to invest in business practices that it believes are "an important next

[1] Mr. Siemon contends that "[i]t is common for organic businesses to act in reliance on detailed NOSB recommendations that USDA has accepted, but not yet rendered into a final rule." Siemon Decl. ¶ 12. However, USDA is required to engage in notice and comment before it finalizes organic livestock regulations. 7 U.S.C. § 6509(g). Until that process has been completed and a final rule has been issued, there is no final agency action. If a producer nevertheless chooses to act on tentative recommendations of the NOSB that have not yet been codified into a final rule, that is a voluntary choice done at the producer's own peril, not a harm attributable to USDA.

step in the process of continual improvement of organic standards," *id.* ¶ 20, and which help distinguish CROPP's brand from lower-priced competitors is not an Article III injury caused by USDA's delay of the OLPP Rule and cannot support standing. *See, e.g.*, *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) (affirming dismissal because "self-inflicted injuries" cannot support standing (citing *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1151-53 (2013)).

OTA's investment theory also fails for lack of redressability. As USDA pointed out in its opening brief, Defs.' Mot. at 17, ECF No. 14-1, no relief that the Court could enter would refund CROPP's alleged expenditures. Rather than addressing this point, OTA contends, circularly, that "the reason compliance costs are a *harm is because of the unlawful delay*." Pl.'s Opp'n at 10 (emphasis in original). In a similarly oblique statement, Mr. Siemon contends that CROPP's "incurred and ongoing expenses can only be redressed by implementation of the OLPP." Siemon Decl. ¶ 20. But it is far from clear how implementation of a rule requiring further ongoing expense and regulatory oversight would "redress" investments already made, and neither OTA nor Mr. Siemon identifies any facts suggesting that it would.

To the extent Siemon and OTA mean to suggest that, if the OLPP Rule were implemented, CROPP's investments would be expected to pay dividends in the form of "fair competition" in ways they now will not, *see id.* ¶ 21, this theory is entirely unsupported. Siemon fails to explain what competitive benefits CROPP might have received under the OLPP Rule, why those benefits were certain and imminent, why they can no longer be realized due to the postponement of the effective date, and why they would likely be realized if the effective date were reinstated. Indeed, because the OLPP Rule did not require implementation of its outdoor access requirements until 2022 and thus largely maintained the same competitive conditions that presently exist, OLPP Rule, 82 Fed. Reg. 7042, 7042 (Jan. 19, 2017), CROPP could not have expected to begin reaping any

competitive advantage from the Rule—if at all—for several years, thus rendering any such expectation remote and unaffected by the minor delay at issue here.

Moreover, it is speculative, at best, whether CROPP would ultimately realize any competitive benefit from the OLPP Rule. Any such benefit would necessarily depend on the behavior of other market actors, whose voluntary actions under a new and different regulatory scheme the Court "cannot presume either to control or predict." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992). If, for example, CROPP's competitors elected to comply with the OLPP Rule and thereby continue doing business in the organic sector, the OLPP Rule might not have conferred any competitive advantage on CROPP at all. In that scenario, implementation of the OLPP Rule would strip CROPP of the ability to differentiate its product based on animal welfare standards without bestowing any benefit. Alternatively, if CROPP's competitors chose not to invest the resources necessary to comply with the Rule and instead departed the market, USDA has predicted that the potential reduction in supply may have caused higher prices, leading some consumers to exit the market for lower priced alternatives. *See* Ex. A, Regulatory Impact Analysis and Final Regulatory Flexibility Analysis, OLPP Rule ("OLPP Rule RIA"), AMS-NOP-15-0012; RIN 0581-AD44, at 36-51 (Jan. 2017). It is thus far from clear that CROPP would have realized any competitive benefit as a result the OLPP Rule. *See United Transp. Union v. I.C.C.*, 891 F.2d 908, 914 (D.C. Cir. 1989) (holding that "indeterminacy" of competitive impact was "enough to defeat petitioner's standing" and noting that "[r]educed competition is often associated with decreased output, which could translate into" negative effects for plaintiff); *Am. Soc'y of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145, 150 (D.C. Cir. 1977) (affirming dismissal for lack of standing where appellees "rel[ied] solely on speculation in their attempt to assert that their business or profits would improve in the event that appellees [took the desired regulatory action]").

Because CROPP's competitors may legitimately have chosen to act in ways that deprived CROPP of any competitive return on its investments, OTA fails to satisfy its burden of "adduc[ing] facts showing that [the] . . . choices [of its competitors] have been or will be made in such manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562; *see also Renal Physicians Ass'n v. U.S. Dep't of Health & Human Servs.*, 489 F.3d 1267, 1275 (D.C. Cir. 2007) ("to establish redressability at the pleading stage, we require[] more than a bald allegation; we require[] that the facts alleged be sufficient to demonstrate a substantial likelihood that the third party directly injuring the plaintiff would cease doing so as a result of the relief the plaintiff sought."); *Pub. Citizen v. Lockheed Aircraft Corp.*, 565 F.2d 708, 715 (D.C. Cir. 1977) ("A plaintiff may not rely on 'the remote possibility, unsubstantiated by allegations of fact, that [his] situation might have been better had respondents acted otherwise, and might improve were the court to afford relief.'" (citations omitted)).[2]

**2. OTA's Competitive Harm Theory Fails to Establish Standing**

OTA next asserts that its members have suffered direct competitive harm as a result of the delay in two ways: first, that the delay generally permits operation of lower-priced competitors who otherwise would have been barred by the OLPP Rule, thereby exposing OTA member Applegate to increased competition; and second that the delay caused an increase in the supply of organic eggs in 2017, which drove down profits for CROPP. Pl.'s Opp'n at 10-11. Both theories

[2] OTA also cites the Declaration of Gina Asoudegan ("Asoudegan Decl."), a vice president for Applegate, an organic meat products company. However, Ms. Asoudegan only describes investments that her company has made "to remain abreast of *organic policy making*." Asoudegan Decl. ¶ 12, ECF No. 16-12 (emphasis added). Kyla Smith, for the Accredited Certifier's Association ("ACA"), contends that unidentified ACA members have "expended resources to . . . be ready to conduct inspections" under the OLPP Rule, but she provides no detail about the nature or timing of these expenditures that would permit the Court to infer causation or redressability. *See* Decl. of Kyla Smith ¶ 13, ECF No. 16-5. Consequently, these members also have not established standing under an investment-of-resources theory.

fail because OTA has not plausibly alleged that delay exposed any member to increased competition or caused the decline in egg profitability observed in 2017.

The D.C. Circuit has recognized that, in certain circumstances, standing may be "premised on the federal government's favorable regulatory treatment of a plaintiff's competitor," such as "the lifting of a regulatory restriction on a 'direct and current competitor,' or regulatory action that enlarges the pool of competitors." *Arpaio v. Obama*, 797 F.3d 11, 23 (D.C. Cir. 2015) (citations omitted). This doctrine stands in tension, however, with the foundational principle that standing is "substantially more difficult to establish" where it depends on "the unfettered choices [of] independent actors not before the courts." *Scenic Am., Inc. v. U.S. Dep't of Transp.*, 836 F.3d 42, 50 (D.C. Cir. 2016). Thus, and "[b]ecause of the generally contingent nature of predictions of future third-party action," the D.C. Circuit has cautioned that, in evaluating claims of standing premised on competitive harm, courts should "remain[] sparing in crediting claims of anticipated injury by market actors and other parties alike." *Arpaio*, 797 F.3d at 23. Accordingly, a plaintiff seeking to establish competitor standing must show that the government's action "will 'almost certainly cause an injury in fact' to participants in the same market," *id.*, and it may not rest on allegations that raise only "some vague probability" that increased competition will occur. *DEK Energy Co. v. FERC*, 248 F.3d 1192, 1196 (D.C. Cir. 2001); *see also Associated Gas Distribs. v. FERC,* 899 F.2d 1250, 1259 (D.C. Cir. 1990) (plaintiff must show "the clear and immediate potential" for competitive harm). Furthermore, as in all cases, a plaintiff must provide specific "factual allegations to link the [alleged harm] to" the governmental action being challenged and cannot rest on mere "speculation about the complex decisions" of third parties. *Arpaio*, 797 F.3d at 21. OTA's theories fail this standard.

OTA's first claim of competitive harm rests on the statements of Applegate's Gina Asoudegan, who contends that the current regulatory scheme "allow[s] some organic operators to achieve lower production costs," which "distorts the marketplace for organic livestock products by making these products less expensive than ones from operations that observe[] the strictest organic welfare standards." Asoudegan Decl. ¶¶ 2, 8. However, the regulations do not allow "some organic operators to achieve lower production costs"; they apply the same standards to all organic producers. Applegate incurs higher production costs, not because it is compelled to do so by USDA's regulatory scheme, but because its customers desire the "strictest organic welfare requirements" and, presumably, are willing to pay for them. *Id.* ¶ 8; *see also id.* ¶ 6 ("Our consumers have for many years been telling us that they support and seek products from farms that follow verified animal welfare practices."). Thus, not only do Applegate's higher costs result from its own voluntary business decisions, those expenditures purportedly benefit Applegate in the form of market differentiation and the ability to cater to a niche group of consumers. If, at any time, Applegate believes it can improve its business strategy by lowering its animal welfare standards consistent with the regulatory scheme, it is free to do so without government interference. Thus, to the extent that Applegate's voluntary decision to incur higher production costs can be considered an injury at all, it is a self-imposed one that cannot support standing. *See Grocery Mfrs. Ass'n v. E.P.A.*, 693 F.3d 169, 178 (D.C. Cir. 2012) (rejecting claim of standing where regulated entities' choice to incur additional costs was "one they make in their own self-interest, not one forced by any particular administrative action"); *Metro. Wash. Chapter v. D.C.*, 57 F. Supp. 3d 1, 19 (D.D.C. 2014) (finding that an agency regulation that "applies to all actors in the market, and does not

differentiate between [them]" could not support claim for competitor standing); *see also Food & Water Watch*, 808 F.3d at 919 ("self-inflicted injuries" cannot support standing).[3]

In its second theory of competitor standing, OTA contends that CROPP has been harmed by "a rapidly expanding supply arising from the use [of] organic production systems that were set to be disallowed under the OLPP." Pl.'s Opp'n at 11. This theory relies on the declaration of John Lee, a retail team manager for CROPP who explains that, while organic egg sales grew from 2016 to 2017, the "per egg sales contribution declined from $0.42 in 2016 to $0.40 in 2017." Decl. of John F. Lee ("Lee Decl.") ¶¶ 1-2, 8, ECF No. 16-4. Lee attributes this decline in profitability "to a rapidly expanding supply arising from the use of organic production systems that were set to be disallowed under the OLPP." *Id.* ¶ 10. This attribution of causation, however, is not supported by any specific factual allegations, and it therefore cannot meet OTA's burden to plead causation.

First, even assuming that a rapid expansion in the supply of organic eggs was the reason for the observed decline in egg profitability in 2017 (a fact that neither OTA nor Lee independently alleges), the mere fact that such an increase occurred in the same year as the delay of the OLPP Rule does not support the inference that the latter caused the former. *See Arpaio*, 797 F.3d at 21 (rejecting similar argument as "suffer[ing] from the logical fallacy post hoc ergo propter hoc (after this, therefore because of this)."). Indeed, Lee fails in any way to explain how the mere postponement until May 2018 of a rule that would not bar existing egg production systems until 2022 could plausibly cause a "rapidly expanding supply" in 2017. Nor does he consider several likely alternative explanations for the decline in organic egg profitability, such as competition from

[3] For similar reasons, OTA's members cannot establish standing based on the additional costs they pay to ensure their members conform to high animal welfare standards. *See, e.g.*, Siemon Decl. ¶ 25; Asoudegan Decl. ¶ 9. These costs are voluntary and therefore can only amount to a "self-imposed" harm. *Grocery Mfrs. Ass'n*, 693 F.3d at 177.

the conventional and cage-free sectors, industry consolidation, and an increase in supply stemming from the recovery of the market from the avian flu virus in 2015. *See* Ex. B, Feedstuffs, Egg market conditions lead to losses for Cal-Maine Foods, at 2-4 (July 24, 2017) (noting "volatile and challenging egg market fundamentals that have prevailed throughout this fiscal year" such as "increased production levels as producers repopulated their flocks after the 2015 avian influenza," lower demand resulting from the avian flu-related price spike in 2015, and "recent low prices of conventional eggs" leading to "a higher supply of specialty eggs.").[4]

Thus, to find the requisite causation between the decline in organic egg profitability and the delay of the OLPP Rules, the Court would have to ignore numerous plausible alternative explanations and infer instead that, after USDA delayed the effective date of the OLPP Rule, new producers rushed into the market or existing producers rapidly expanded production using production systems that would eventually be prohibited if and when the time-limited postponement expired. *See* Ex. A, OLPP Rule RIA, at 47 ("there is no economic rationale for a producer to incur the licensing and construction expenses associated with organic production, only to be out of compliance within a few years"). Moreover, the Court would have to infer that CROPP's competitors made these choices to enter the market or expand production *because* of the postponement, even though they would have been free to continue using these systems for three to five more years under the OLPP Rule in any event. *See* OLPP Rule, 82 Fed. Reg. at 7042. Such inferences are speculative and illogical, and they cannot support standing. *See, e.g.*, *DEK Energy,* 248 F.3d at 1195-96 (finding no competitive injury where there only was "some vague

[4] Indeed, the decline observed in 2017 continues a trend reported in CROPP's 2016 annual report, in which CROPP described "months of oversupply" with concomitant reduced "pay price in both the egg and dairy pools" and "significant pricing pressures . . . as a result of continued market consolidation in the organic industry coupled with lower conventional farm prices," all before the delay of the OLPP Rule. Ex. C, CROPP Cooperative Annual Report, 2016, at 3, 8.

probability that any [competitor product] will actually reach that market and a still lower probability that its arrival will cause [plaintiff] to lose business or drop its prices"); *Delta Air Lines, Inc. v. Exp.-Imp. Bank of United States*, 85 F. Supp. 3d 250, 266 (D.D.C. 2015) (finding lack of competitor standing where plaintiffs pleaded "facts that only demonstrate market conditions historically and generally," suggesting "only hypothetical [competitive impacts] that may or may not materialize"); *Arpaio*, 797 F.3d at 21 ("the Supreme Court's precedent requires more than illogic or 'unadorned speculation' before a court may draw the inference [plaintiff] seeks." (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976)). In sum, OTA fails to plausibly allege that the delay of the OLPP Rule caused an expansion of supply in the organic egg market or otherwise has the "clear and immediate potential" to cause competitive harm. OTA's claim of standing under the competitor standing doctrine should therefore be rejected.

**3. OTA's Consumer Trust Theory Fails to Establish Standing**

OTA next reiterates its vague claims that the delay of the OLPP Rule is causing a loss of consumer trust in the organic label. But although OTA has now adduced additional declarations in support of this theory, these declarations still fail to meet OTA's burden to plausibly demonstrate through concrete facts that any OTA member has been or will be imminently harmed by a loss of consumer confidence attributable to the delay.

In support of this theory, OTA first relies on the statement in the OLPP Rule that "AMS is conducting this rulemaking to maintain consumer confidence in the USDA organic seal" and similarly generalized concerns cited by the NOSB. Pl.'s Opp'n at 11. AMS's belief that the OLPP Rule could help "maintain" or bolster consumer confidence, however, is a far cry from suggesting that, absent immediate implementation of the Rule, a harm-inflicting loss of consumer confidence would directly ensue. *Cf. Northwest Airlines, Inc. v. FAA*, 795 F.2d 195, 201 (D.C. Cir. 1986)

(standing requirements not "satisfied simply because a chain of events can be hypothesized in which the action challenged eventually leads to actual injury"). Indeed, AMS clearly believed that a loss of confidence was sufficiently remote that the agency could extend implementation of the outdoor access requirements for five years without materially increasing the risk that consumers might abandon the organic market. *See* OLPP Proposed Rule, 81 Fed. Reg. 21,956, 21,980 (Apr. 13, 2016) ("AMS is choosing a five- year compliance period to reduce the economic burden on existing organic producers, *without unduly delaying*. . . implementation[.]" (emphasis added)).

Nor did the "Inspector General . . . recognize[] the risk" of consumer confusion "and act[] to abate it," as OTA suggests. Pl.'s Opp'n at 11. The Inspector General merely noted, in his 2010 audit report, that producers did not follow uniform practices with respect to outdoor access for livestock and suggested that USDA "[d]evelop and issue guidance regarding outdoor access for livestock[.]" Ex. D, USDA, Office of the Inspector General, Oversight of the National Organic Program, Report No. 01601-03-Hy, at 22, 26 (Mar. 2010). Nothing in the Inspector General's report mentions consumer confidence or consumer trust or suggests that failure to enact a regulation requiring uniform space requirements (much less a time-limited delay of such requirements) would have any impact on consumer confidence. Moreover, notwithstanding the inconsistencies observed by the Inspector General, it is indisputable that in the seven-plus years since that report was issued, the market for organic livestock products has experienced unprecedented growth. *See* Defs.' Mot. at 20-21. Thus, nothing in the OLPP Rule or the Inspector General's report plausibly suggests that the delay in the effective date of the OLPP Rule will have any observable impact on consumer confidence, much less the bottom line of OTA's members.

OTA also relies on the declarations of its members, such as Ms. Asoudegan of Applegate who states that "[o]ur consumers, via social media, have expressed dismay and a growing distrust

of the federal organic program because of the delay." Asoudegan Decl. ¶ 11. These declarations are similarly deficient to establish standing. As a preliminary matter, USDA's position on outdoor access remained unchanged for over a decade prior to the promulgation of the OLPP Rule. *See* Ex. E, AMS Policy Memorandum, "Access to the Outdoors for Livestock" (Jan. 31, 2011) (reissuing 2002 guidance on the meaning of "access to the outdoors"). To the extent consumers are just now beginning to question that standard, there is no indication that this change is attributable to the delay rules. A far likelier explanation is OTA's and its members' own attempts to undermine the label in their advocacy for the OLPP Rule.[5] OTA fails to identify any case in which a plaintiff trumpeted the very message about its brand that it claimed caused its harm, yet the court nevertheless found a constitutional injury based on that message. Indeed, "it is well-settled in this jurisdiction that self-inflicted injuries—injuries that are substantially caused by the plaintiff's own conduct—sever the causal nexus needed to establish standing." *Ellis v. Comm'r of Internal Revenue Serv.*, No. 14–0471(ABJ), 2014 WL 4557643, at *9 (D.D.C. Sept. 16, 2014).

In any event, Ms. Asoudegan does not suggest that Applegate has been impacted by the "growing distrust" she alleges. Indeed, she notes that Applegate invests in measures to assure its consumers "that our organic suppliers are not operating under lower organic welfare requirements." *Id.* ¶ 9. Thus, even crediting Ms. Asoudegan's assertion that some of Applegate's

[5] *See, e.g.*, Ex. F, George Siemon, Chicago Tribune, Commentary: Organic Farmers Want their Industry Regulated: What's the Holdup?, at 3 (Jan. 17, 2018) (characterizing USDA's actions as "a direct attack on American families who value organic food"); Ex. G, OTA, Press Release, Organic Trade Association Sues USDA over Failure to Advance Organic Standards, at 5 (Sept. 13, 2017) (asserting "an assault on the trust in the organic process"), Ex. H, Organic Trade Association, Media Alert, Public Tells USDA: Don't Derail Organic Standards (Jan. 19, 2018) (characterizing withdrawal of OLPP Rule as a "weaken[ing]" of organic standards); Ex. I, Organic Trade Association Dismayed at USDA Proposed to Withdraw Animal Welfare Rule, Media Alert, at 2 (Dec. 15, 2017) (suggesting that "the Organic seal [will no longer] stand[] for a meaningful difference in production practices"); Ex. J, Organic Valley, If you eat food, you should read this, at 3 (Jan. 16, 2018) ("Eliminating the rule . . . undermines the faith people have in" organic).

customers are growing distrustful of "the federal organic program" generally, there is no evidence, and Ms. Asoudegan does not contend, that they are growing distrustful of *Applegate*. *See Cornucopia Inst. v. U.S. Dep't of Agric.*, 260 F. Supp. 3d 1061, 1069-70 (W.D. Wis. 2017) (rejecting as "too speculative" plaintiffs' claims of "'reputational' and 'economic' harm arising out of an undermining of the integrity of organic food standards" because plaintiffs "allege[d] no facts at all supporting their claim that these injuries are occurring presently"). Ms. Asoudegan therefore has not demonstrated any imminent injury *to Applegate* based on a loss of consumer trust.

Robynn Shrader, CEO of National CO+OP Grocers ("NCG") also makes assertions about a loss of consumer confidence, contending that "consumers are hearing that organic chickens, both broilers and egg layers, do not have true outdoor access," which "is contributing to consumer confusion and degrading confidence in the USDA Certified Organic label." Decl. of Robynn Shrader ("Shrader Decl.") ¶ 5, ECF No. 16-7. Like Ms. Asoudegan, however, Ms. Shrader fails to show that the alleged loss of confidence in the USDA label is actually harming, or will imminently harm, *NCG*. The only inkling of such harm is Ms. Shrader's statement that "[s]ales of organic eggs have shown significant decline in 2017 compared with sales growth in years past." *Id.* ¶ 6. But nothing in Ms. Shrader's declaration suggests that this decline has anything to do with NCG's customers' concerns about outdoor access or USDA's decision to delay the OLPP Rule.[6] Indeed, if NCG's customers' newfound understanding of USDA's outdoor access standards *were* causing the decline, one would expect to see a parallel decline in the sale of organic broilers, but Ms.

[6] It is unclear whether Ms. Shrader is describing a decline in *sales* or sales *growth*, as she refers to both. To the extent Ms. Shrader is referring to sales, NCG's experience differs from that of the organic egg industry as a whole, which experienced overall growth in 2017, Lee Decl. ¶¶ 8-9, suggesting that factors unique to NCG caused the decline. To the extent Ms. Shrader is referring to sales growth, the fact that growth continues, even if more slowly than in past years, suggests consumers continue to purchase more organic eggs than in the past. This is not evidence of harm.

Shrader makes no mention of such a decline. In any event, it appears equally plausible that any of several other hypothetical factors are driving this trend, a possibility that Ms. Shrader neglects to consider. As the D.C. Circuit has repeatedly recognized, "it is not enough simply to plead the causative link. . . . [E]ven at the pleading stage, a party must make *factual allegations*" plausibly demonstrating this link. *Renal Physicians Ass'n*, 489 F.3d at 1276; *see also Nat'l Treasury Emp. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996) ("[T]here is a difference between accepting a plaintiff's allegations of fact as true and accepting as correct the conclusions plaintiff would draw from such facts[.]"). Because Ms. Shrader's declaration fails to demonstrate, through facts, that any observed decline in egg sales or sales growth is attributable to a decline in customer confidence resulting from USDA's delay of the OLPP Rule, this theory cannot support standing.

Finally, Mr. Lee of CROPP states that industry-wide organic dairy sales declined from $2.334 billion in 2016 to $2.330 billion in 2017, a decline of $4 million, or less than two tenths of a percent. Lee Decl. ¶ 4. Mr. Lee further states that the "sharpest drop in the growth rate . . . occurred in January 2017 and coincided with the administration's announcement that it would delay the [OLPP] rule." *Id.* ¶ 6. To the extent Mr. Lee, like Ms. Shrader, is speculating that this minor decline was caused by USDA's delay of the OLPP Rule, the Court should reject it for largely the same reasons discussed above: the mere fact that two events occurred in succession cannot support the inference that one caused the other. *Arpaio*, 797 F.3d at 21.[7] Thus, like Ms. Asoudegan

[7] By Mr. Lee's logic, the Court could infer that promulgation of the OLPP Rule itself caused the decline, since the sharpest drop occurred in January 2017, the same month the Rule was promulgated. The available evidence, however, overwhelmingly suggests that the decline had nothing to do with USDA's delay of the OLPP Rule and is instead attributable to other market factors. *See* Ex. K, Fortune, Dairy Farmers Experiencing an Organic Milk Surplus as Sales of Almond, Soy Milk Rise (Jan. 2, 2018); Ex. L, Kalona Farms; Organic Market Update, at 2 (Feb. 7, 2017) (noting "perfect storm" of factors creating challenges in organic dairy market, including low conventional dairy prices, high organic prices, international trade developments, and increased supply). Moreover, in promulgating the OLPP Rule, USDA noted its expectation that the OLPP

and Ms. Shrader, Mr. Lee fails to identify facts supporting the inference that the delay of the OLPP Rule caused any reduction of growth in the organic market. OTA's consumer confidence theory should therefore be rejected.

**4. OTA's Litigation Risk Theory Fails to Establish Standing**

Finally, OTA cites *Gibson v. Wal-Mart and Cal-Maine Foods*, No. 18-134 (N.D. Cal.), a recently filed class action lawsuit, and contends that "[f]urther delay in implementing the OLPP clarifications increases the risk of civil liability for OTA and its members[.]" Decl. of Laura Batcha, Organic Trade Association ¶ 21, ECF No. 16-6. This new theory fails as well.

First, it is firmly established in this Circuit that an increased risk of injury is not sufficient to support standing unless the alleged injury is "certainly impending." *See, e.g.*, *Kingman Park Civic Ass'n v. Gray*, 27 F. Supp. 3d 142, 157 (D.D.C. 2014) ("Allegations of possible future injury do not satisfy the requirements of Article III. A threatened injury must be certainly impending to constitute injury in fact." (citing *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1294 (D.C. Cir. 2007) (quotation marks and brackets omitted)); *In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 28 (D.D.C. 2014) ("[A]n increased risk or credible threat of impending harm is plainly different from certainly impending harm, and certainly impending harm is what the Constitution and *Clapper* require."). Accordingly, courts in this Circuit have consistently rejected litigation risk as a viable ground for standing. *See, e.g.*, *Wheaton Coll. v. Sebelius*, 887 F. Supp. 2d 102, 108-09 (D.D.C. 2012) ("it is well-established that the theoretical possibility of harm from future litigation does not, without more, confer standing" (citing cases)), *vacated on other grounds*, No. CV 12-1169 (ESH), 2013 WL 5994617

Rule would "largely codify existing industry practices" for mammalian livestock. OLPP Proposed Rule, 81 Fed. Reg. at 21,989. Thus, there would be no reason to expect any impact on the organic dairy market resulting from the delay.

(D.D.C. Aug. 19, 2013); *Nat'l Cmty. Reinvestment Coal. v. Nat'l Credit Union Admin.*, 290 F. Supp. 2d 124, 136-37 (D.D.C. 2003) (rejecting "threat of potential litigation" as basis for standing).

Moreover, OTA has not even plausibly demonstrated that its members face an increased risk of litigation. The *Gibson* lawsuit has little to do with organic certification. Rather, the plaintiff in that case sued Wal-Mart and its egg supplier for false advertising and other state law claims based on their use of the phrase "outdoor access" on marketing materials. *See generally* Ex. M, *Gibson* complaint. The National Organic Program, however, does not oversee such advertising; it merely requires compliance with its outdoor access standard for purposes of organic certification. A producer's use of the USDA organic seal, or a certifier's decision to authorize that use, by contrast, cannot be challenged under the theories asserted in *Gibson*, as such claims are preempted by the OFPA. *See, e.g.*, *In re Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litig.*, 621 F.3d 781, 795 (8th Cir. 2010) (state law claims that "interfere with or second guess the certification process" under the National Organic Program are preempted); *Segedie v. Hain Celestial Grp., Inc.*, No. 14-CV-5029 NSR, 2015 WL 2168374, at *5 (S.D.N.Y. May 7, 2015) (same). Thus, OTA's members can easily avoid the type of claims asserted in *Gibson* by either providing the level of outdoor access they believe should be required (which they purport to do in any event) or declining to advertise their products based on outdoor access. *See Grocery Mfrs. Ass'n*, 693 F.3d at 178 (where risk of liability could be avoided by "choosing safer methods than required," failure to choose those methods would be "self-inflicted" injury that could not support standing). OTA's generalized concerns about litigation risk thus fail to state a claim for standing.

For all of the foregoing reasons, OTA fails to plausibly allege any viable theory of standing.[8] Accordingly, the Court should dismiss its claims for lack of jurisdiction.

**B. OTA's Challenges to the February 9 and May 10 Rules Are Moot**

OTA's claims challenging the February 9 and May 10 Rules should also be dismissed because they are moot. OTA's opposition brief, at 13-14 & 17, is largely nonresponsive to this point; instead, it rehashes standing and merits arguments that are irrelevant to the mootness inquiry. *See, e.g.*, *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1212 (10th Cir. 2005) (dismissing on mootness grounds and holding that any "alleged procedural deficiencies of the Roadless Rule are now *irrelevant* because the replacement rule was promulgated in a new and separate rulemaking process" (emphasis added)). Critically, OTA fails to explain how invalidation of the February 9 and May 10 Rules, which neither affected any implementation deadline under the OLPP Rule nor are presently operative, will provide any meaningful relief to its members. *See Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 79 (D.C. Cir. 2011) (a claim is moot if "it becomes impossible for the court to grant any effectual relief"); *Wyoming*, 414 F.3d at 1212 ("'The crucial question is whether granting a present determination of the issues offered will have some effect in the real world.'" (citation omitted)).[9] Nor does OTA distinguish the numerous authorities cited in USDA's opening brief holding that an agency's promulgation of a new regulation is an intervening event that can moot a challenge to a prior regulation. *See* Defs.' Mot. at 22-23. Thus, OTA's only

[8] OTA also reiterates—throughout its opposition brief and member declarations—its assertion that its members have been injured by USDA's failure to consult with the NOSB. As discussed in USDA's opening brief, allegations of such procedural injuries do not relieve OTA of demonstrating that its members have suffered actual harm, Defs.' Mot. at 13, and OTA cites no authority suggesting otherwise.

[9] OTA's suggestion that the Court could grant meaningful relief because the "agency did not follow the Priebus memo's procedural requirements for assessing whether a regulation should be excluded from the memo's purview" misses the mark. Pl.'s Opp'n at 15. This argument confuses the merits with the mootness inquiry.

relevant argument on this point is its invocation of the mootness exception for "cases that are capable of repetition yet evading review," Pl.'s Opp'n at 15. Here too, OTA's arguments fall short.

To invoke this exception, OTA must demonstrate that "the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration" and that there is a "reasonable expectation" that OTA will be subject to "the same action" again. *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (citation and quotation marks omitted). To satisfy the second requirement, a mere "'physical or theoretical possibility' of recurrence" is not sufficient; rather, there must be a "'reasonable expectation' if not a 'demonstrated probability' that [a plaintiff] will be subject [again] to the same action." *Pub. Utilities Comm'n of the State of Cal. v. F.E.R.C.*, 236 F.3d 708, 714-15 (D.C. Cir. 2001) (citations omitted). Moreover, the wrong that is "'capable of repetition' must be defined in terms of the *precise* controversy it spawns." *People for Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416, 422 (D.C. Cir. 2005) (emphasis added)).

The exception does not apply here because OTA has not shown any likelihood that it will be subject to the same alleged "wrong" again. Indeed, OTA does not even try to show that USDA will again delay the effective date of the OLPP Rule without notice and comment. Nor could it make such a showing given that USDA has now provided two opportunities for notice and comment with respect to the outcome of the OLPP Rule. Instead, OTA argues that "the use of serial, fixed periods of short delay . . . could recur . . . [and] should not be countenanced for future administrators[.]" Pl.'s Opp'n at 16-17. This merely establishes that OTA seeks an advisory opinion on an abstract issue that "could recur" under unknown circumstances before a different administrator. This is insufficient. *See People for Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416, 423 (D.C. Cir. 2005) ("[T]here must be . . . 'a *reasonable expectation* that the *same*

*complaining party* would be subjected to the *same action* again.'" (emphasis added)).[10] The Court should therefore dismiss OTA's challenges to the February 9 and May 10 Rules as moot.

## II. OTA Fails to State a Claim on Which Relief Can Be Granted

OTA's theories should also be dismissed because they fail as a matter of law.

### A. The Court Should Dismiss Count One Because the November 14 Rule Was a Logical Outgrowth of the Proposed Rule and Was Rational

As OTA concedes, the November 14 Rule did exactly what the proposed rule said it might do: "Further delay the effective date of the Organic Livestock Rule." Pl.'s Opp'n at 18 (citing May 10 Proposed Rule, 82 Fed. Reg. 21,742, 21,742 (May 10, 2017)). OTA fails to cite a single case in which the agency did precisely, and in verbatim terms, what it proposed to do and yet the court invalidated the rule on logical outgrowth grounds. Likewise, OTA fails to explain why it could not "have anticipated" that USDA would choose to delay the OLPP Rule, *City of Waukesha v. E.P.A.*, 320 F.3d 228, 245 (D.C. Cir. 2003), when USDA proposed to do precisely that. Instead, it merely cites, at length, excerpts from the OLPP rulemaking that have no relevance to whether the November 14 Rule was a logical outgrowth of the May 10 Proposed Rule. Pl.'s Opp'n at 18-19.

At best, OTA's theory in this count is not that it was unable to anticipate the action taken by the agency on November 14, but that it could not have predicted certain issues discussed in that Rule, such as errors in the OLPP Rule's cost/benefit analysis. However, the November 14 Rule did not finalize the agency's position on those issues. Rather, it merely flagged those concerns as a few of the "significant policy and legal issues" that had emerged from the November 14 rulemaking that warranted additional analysis through further notice and comment rulemaking.

[10] To the extent OTA frames the wrong as "willful exclusion" of the NOSB from the rulemaking process, this theory fails to establish an exception to mootness because OTA has not shown that such harm is inherently "too short to be fully litigated prior to cessation or expiration." *Cierco v. Mnuchin*, 857 F.3d 407, 415 (D.C. Cir. 2017).

November 14 Rule, 82 Fed. Reg. at 52,643. As OTA acknowledges, it received an opportunity to comment further on those issues in connection with the Proposed Withdrawal Rule, which is not at issue in this case. Pl.'s Opp'n at 20-21.

Thus, the only question here is whether the May 10 Proposed Rule provided adequate notice that USDA might undertake a broad reanalysis of the issues aired by the OLPP Rule and rely on the results of that review to further delay the Rule's effective date. There can be no question that it did, as the Proposed Rule specifically grounded its request for comment on the agency's opinion that there were "*significant policy and legal issues addressed within the [OLPP Rule] that warrant further review by USDA*." 82 Fed. Reg. at 21,742 (emphasis added). OTA's own comment, as well as the thousands of other comments received, did *in fact* comment on the policy and legal issues underlying commenters' various beliefs that the Rule should be withdrawn, delayed, suspended, or put into effect—a point OTA fails to address. *See* Defs.' Mot. at 25-26. Indeed, OTA's claim that "[t]here was no reason to believe [the statutory authority question] would be revisited sub silentio," Pl.'s Opp'n at 22, ignores the fact that its *very own comment* addressed this issue. *See* Ex. A to Defs.' Mot. (OTA comment dated June 9, 2017), at 2, 8-11, ECF No. 14-3 (addressing allegedly "flawed legal process argument" that "USDA *does not have the statutory authority* to impose animal welfare requirements . . . ." (emphasis added)). The assertion that OTA lacked meaningful notice of the November 14 Rule should therefore be rejected.

OTA's claim that the November 14 Rule was "facially arbitrary" because only one commenter supported delay is likewise baseless. Pl.'s Opp'n at 20. An agency is neither required to select the policy that is most popular with commenters nor prohibited from selecting the one that is least popular. Rather, the agency need only "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and

the choice made." *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 214 (D.C. Cir. 2013); *see also, e.g.*, *Newspaper Ass'n of Am. v. Postal Regulatory Comm'n*, 734 F.3d 1208, 1211, 1215 (D.C. Cir. 2013) (upholding agency action that comments were "overwhelmingly against" because the agency's decision was "rational and one the statutory language can bear").

Here, while only one commenter supported delay, a number of commenters supported withdrawal or suspension, citing concerns such as economic costs, compliance burdens, increased price, and reduced availability of organic products, among other things. November 14 Rule, 82 Fed. Reg. at 52,643. The agency also explained that its independent review revealed additional concerns, such as a mathematical error in the cost/benefit analysis underlying the OLPP Rule. *Id.*; *see Nat'l Ass'n of Home Builders v. E.P.A.*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) ("[W]hen an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable." (citing cases)). Selecting the delay option allowed USDA to further evaluate these considerations and weigh them against the views expressed by supporters of the OLPP Rule before making a final decision on whether to withdraw the Rule. Thus, the delay was a reasonable approach that allowed USDA to conduct further notice and comment on a set of complex issues while preserving the status quo in the interim. OTA's substantive challenge to that decision finds no support in law or logic, and it should be rejected.

### B. The Court Should Dismiss Count Two Because USDA Has Not Failed to Take Action It Is Required to Take

Count two should be dismissed because, as USDA pointed out in its opening brief, Defs.' Mot. at 27-28, OTA fails to identify any action that USDA is legally required to take. OTA's only response to this point is to contend that USDA "ignored a lawful deadline" in the OLPP Rule. Pl.'s Opp'n at 24. USDA did no such thing. Rather, it published a new rule after notice and comment that altered the deadline in the OLPP Rule. *See* November 14 Rule, 82 Fed. Reg. at 52,643. As

OTA acknowledges, USDA was not "obligated to act in accordance with its published effective date, [once] it conducted notice and comment rulemaking to alter the date." Pl.'s Opp'n at 24.

OTA's invocation of *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017), Pl.'s Opp'n at 25, is therefore misplaced. That case held only that an agency could not stay a regulation *without* notice and comment, while affirming the agency's "obviously . . . broad discretion" to do so *with* notice and comment, as USDA did here. Moreover, *Clean Air Council* was not a case under section 706(2); rather, that case invalidated agency action (the stay) under 5 U.S.C. § 706(1), just as OTA seeks to do here. If the Court were to grant similar relief here, nothing further would be required for the OLPP Rule to become effective. If the Court were to decline such relief, OTA cannot claim that USDA "ignored a lawful deadline." Either way, the agency has not failed to take action that it is legally required to take, and therefore count two should be dismissed.

### C. Count Three Should Be Dismissed Because USDA Has Not Departed from Any Prior Policy Decision

OTA's assertion in count three that USDA was required to explain its purported "reversal of the policy position taken in January 2017" is mistaken because USDA has not yet reversed that decision. If and when USDA finalizes its proposal to withdraw the OLPP Rule, it will explain its decision at that time. Until then, USDA need only have explained its decision to delay the effective date of the OLPP Rule, a decision it has more than adequately explained for the reasons discussed in section II.A above. Count three should therefore be dismissed.

### D. Count Four Should Be Dismissed Because USDA Was Not Required to Consult with the NOSB Before Delaying the OLPP Rule

Finally, the Court should reject OTA's novel claim in count four that USDA's actions were invalid because it did not formally consult with, and receive a "recommendation" from, the NOSB, even though the NOSB had ample opportunity to provide its views on the OLPP Rule during the

years-long process that led to its adoption and did in fact weigh in on the delay by passing a formal resolution on that very topic. *See* Defs.' Mot. at 31 n.13; Am. Compl. ¶¶ 3, 79, ECF No. 13.

To support its cramped construction of the OFPA, OTA first invokes "past practice of the [NOSB]," the NOSB "Vision Statement," and the NOSB "Policy and Procedures Manual." Pl.'s Opp'n at 27. However, the NOSB is an advisory committee, not a governmental entity, and its internal policy materials do not impose legally binding consultation obligations on USDA.

Nor, contrary to OTA's assertions, did the OFPA impose the burdensome consultation requirement that OTA posits. Pl.'s Opp'n at 27-28. The NOSB is an uncompensated body of private professionals that meets only twice per year. *See* 7 U.S.C. § 6518(b), (e), (f).[11] Requiring USDA to consult with the NOSB on every matter touching on the implementation of organic standards would severely hamper USDA's ability to carry out its day-to-day functions under the OFPA. Nor is there anything in the OFPA indicating that Congress intended such a result. Section 6518(a) merely describes the role and responsibilities of the NOSB and does not purport to limit USDA's functions under the Act. Likewise, section 6518(k)(1) describes the "Responsibilities of the *Board*," not USDA, and in no way suggests that the Department is bound to await an NOSB recommendation before it may act. 7 U.S.C. § 6518(k)(1) (emphasis added). Similarly, while section 6503(c) requires consultation between USDA and NOSB in "develop[ing]" the National Organic Program, 7 U.S.C. § 6503(c), USDA satisfies that requirement by participating in NOSB's twice-yearly meetings, and generally receiving and responding to its recommendations. That is a far cry from the restrictive, and unprecedented, interpretation urged by OTA, which would prohibit USDA from acting on any matter, large or small, until the NOSB elected to make a formal

[11] *See also* https://www.ams.usda.gov/rules-regulations/organic/nosb (last visited Mar. 1, 2018) ("The NOSB generally meets twice per year[.]").

recommendation, thereby giving an advisory committee expansive veto power over a federal agency.

Finally, while section 6509(d)(2) requires the NOSB to "recommend" additional livestock standards to USDA, it does not suggest that USDA is forbidden from acting on such standards absent a recommendation from NOSB. By contrast, other provisions of the OFPA pertaining to the creation and amendment of the National List do prohibit USDA from acting absent a recommendation from NOSB, demonstrating that Congress knew how to tie USDA's hands when it wanted to, but elected not to do so in section 6509. *See* 7 U.S.C. §§ 6517(d)(1), (d)(2); *compare also, e.g.*, 42 U.S.C. § 7417(c) ("Prior to [issuing specified standards and criteria] . . . the Administrator *shall*, to the maximum extent practicable . . . consult with appropriate advisory committees[.]" (emphasis added)). Finally, Section 6509(g) confirms USDA's broad discretion to enact regulations regarding the implementation of livestock standards, subject only to the notice and comment provisions in that subsection and the APA.

In sum, OTA's theory that USDA could not delay an organic livestock regulation on which it had already received copious input from the NOSB, without formally soliciting a further official recommendation from the NOSB, finds no support in the statute, and it should be rejected as a matter of law.[12]

**CONCLUSION**

For the foregoing reasons, USDA respectfully requests that OTA's First Amended Complaint be dismissed in its entirety.

[12] OTA has withdrawn count five, Pl.'s Opp'n at 6 n.4, and therefore that claim should be dismissed for the reasons set forth in USDA's opening brief.

Dated: March 1, 2018

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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|---|---|
| ORGANIC TRADE ASSOCIATION,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,<br><br>Defendants. | Case No. 1:17-cv-01875 (RMC) |

**EXHIBIT A TO DEFENDANTS' REPLY**
**IN SUPPORT OF MOTION TO DISMISS**

# Regulatory Impact Analysis and Final Regulatory Flexibility Analysis

## ORGANIC LIVESTOCK AND POULTRY PRACTICES FINAL RULE
## AMS-NOP-15-0012; RIN 0581-AD44

JANUARY 2017

## I. Executive Summary

AMS is conducting this rulemaking to maintain consumer confidence in the USDA organic seal. This action is necessary to augment the USDA organic livestock production regulations with clear provisions to fulfill one purpose of the Organic Foods Production Act (OFPA) (7 U.S.C. 6501-6522): to assure consumers that organically-produced products meet a consistent and uniform standard. OFPA mandates that detailed livestock regulations be developed through notice and comment rulemaking and intends for the involvement of the National Organic Standards Board (NOSB) in that process (7 U.S.C. 6508(g)). In 2010, AMS published a final rule (75 FR 7154, February 17, 2010) clarifying the pasture and grazing requirements for organic ruminant livestock, which partially addressed OFPA's objective for more detailed livestock standards. This rule extends that level of detail and clarity to all organic livestock and poultry, and would ensure that organic standards cover their entire lifecycle, consistent with recommendations provided by USDA's Office of Inspector General and nine separate recommendations from the NOSB.

This rule adds requirements for the production, transport, and slaughter of organic livestock and poultry. The provisions for outdoor access and space for organic poultry production are the focal areas of this rule. Currently, organic poultry are required to have outdoor access, but this varies widely in practice. Some organic poultry operations provide large, open-air outdoor areas, while other operations provide minimal outdoor space or use screened and covered enclosures commonly called ''porches'' to meet outdoor access requirements. This variability perpetuates an uneven playing field among producers and sows consumer confusion about the meaning of the USDA organic label.

This final rule will resolve the current ambiguity about outdoor access for poultry and address the wide disparities in production practices among the organic poultry sector. Greater clarity about the significance of the USDA organic seal in the marketplace will help to maintain consumer confidence in the organic label, which drives the $43 billion in sales of organic products, and support a fair, viable market for producers who chose to pursue organic certification.

The economic impact analysis describes the potential impacts for organic egg and broiler producers, because these types of operations will face additional production costs as a result of this rule, and the potential benefits of greater clarity in the requirements for organic poultry. The following provisions will require producers to incur costs to provide:

- Additional indoor space for broilers;
- Additional outdoor space for layers;

To project costs, AMS assessed current, or baseline, conditions and considered how producers might respond to the above requirements. Based on public comment, NOSB deliberations and surveys of organic poultry producers, we determined that the indoor stocking density requirements for broilers and the outdoor access/stocking density requirements for layers drive the costs of this rule. For organic layers, the key factor affecting compliance is the availability of land to accommodate all birds at the required stocking density. We considered two potential scenarios of how producers would respond: (1) All affected organic egg producers make operational changes to comply with the rule and maintain current levels of production; or, (2), 50 percent of organic egg operations move to the cage-free market because they choose to leave the organic market.

Based on public comment, AMS assumed that organic broiler producers would build new facilities to maintain their current production level and remain in the organic market. In this analysis, AMS accounts for costs that accrue to legacy producers and new entrants; the full compliance costs recur annually and are included in the total. Legacy producers are producers who decided to go into the organic business with no knowledge of the costs that would be imposed by this rulemaking. Costs do not accrue until this rule is fully implemented, i.e., three years after publication for broiler producers and five years after publication for layer producers.

In summary, AMS estimates that production costs will range between $8.2 million to $31 million annually. This range spans three producer response scenarios, which are summarized in the table below.

- We estimate that the annualized costs for organic broiler and egg producers are $28.7 to $31 million (over 15 years), if all certified organic egg production in 2022 complies with this rule and all certified organic broiler production in 2020 complies with this rule. The timeframe corresponds to the end of the implementation period for the outdoor access requirements for layers and indoor space requirements for broilers. In this scenario, the potential reduced feed efficiency and increased mortality from greater outdoor access are the key variables that impact costs for layers.
- We estimate the annualized costs for organic broiler and organic egg production is $11.7 to $12.0 million if 50 percent of organic egg production in 2022 transitions to the cage-free egg market. Under the latter

scenario, the shift would also result in foregone profits of nearly $80 to $86 million (annualized) for productions that moves from organic to cage-free egg production. (Because foregone revenues are not a direct cost of compliance with the rule, they are totaled separately from estimated compliance costs). In this scenario, the difference in price between organic and cage-free eggs accounts for the transfer impact.

- We estimate the annualized costs for organic broiler and organic egg production is $8.2 million if 50 percent of organic egg production in 2022 transitions to the cage-free egg market and producers who cannot comply with the rule do not enter organic production during the implementation timeframe.
- In the above scenarios, we estimate the annualized costs for organic broiler production account for $3.5 million to $4.0 million of the above totals. This reflects costs to build additional housing for more space per bird to meet the indoor stocking density requirement.

This rule will have broad, important benefits for the organic sector as a whole which are difficult to quantify. Clear and consistent standards, which more closely align to consumer expectations, are essential to sustaining demand and supporting the growth of the $43 billion U.S. organic market. Clear parameters for production practices will ensure fair competition among producers by facilitating equitable certification and enforcement decisions.

To monetize the benefits of this rule, AMS used research that has measured consumers' willingness to pay for outdoor access between $0.21 and $0.49 per dozen

eggs. Based on this, AMS estimates that the annualized benefits would range between $4.1 million to $49.5 million annually. The range in benefits accounts for several producer response scenarios, which correspond to those described above for the cost estimates.

In the Regulatory Flexibility Analysis, we report that large poultry operations would have significantly higher compliance costs than small operations on average. Larger organic layer operations, in particular, will have demand for greater land areas for outdoor access.

A summary of the estimated costs and benefits associated with this rule is provided in the summary table below.

Summary of benefits, costs, and distributional effects of final rule.

| **Assumed conditions** | **Affected population** | **Costs, millions[a]** | **Benefits, millions** | **Transfers, millions** |
|---|---|---|---|---|
| All producers remain in organic market; Organic layer and broiler populations continue historical growth rates after rule. | Organic layer and organic broiler production at full implementation of rule, i.e., 2022 for layers; 2020 for broilers. | $28.7 - $31.0 | $16.3 - $49.5 | N/A |

| | | | | |
|---|---|---|---|---|
| 50% of organic layer production in year 6 (2022), moves to the cage-free market. Organic layer and broiler populations continue historical growth rates after rule. | Organic layer and organic broiler production at full implementation of rule, i.e., 2022 for layers; 2020 for broilers. | $11.7 - $12.0 | $4.5 - $13.8 | $79.5 - $86.3 |
| 50% of current organic layer production moves to the cage-free market in year 6 (2022). There are no new entrants after publication of this rule that cannot comply. | Current organic layer production; organic broiler production at full implementation of rule in 2020. | $8.2 | $4.1 - $12.4 | $45.6 - $49.5 |
| Other impacts: Estimated paperwork burden: $3.9 million | | | | |

[a] All values in the costs, benefits and transfer columns of this table are annualized and discounted at 3% and 7% rates.

## II. Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives, and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This rulemaking has been designated as an "economically significant regulatory action" under section 3(f) of Executive Order 12866, and, therefore, has been reviewed by the Office of Management and Budget (OMB). A summary of the estimated costs and benefits associated with this rule is provided in Table 1. Summary of benefits, costs, and distributional effects of final rule.

Table 1. Summary of benefits, costs, and distributional effects of final rule.

| Category | | Primary Estimate | Low Estimate | High Estimate | Units | | | Notes |
|---|---|---|---|---|---|---|---|---|
| | | | | | Year Dollars | Discount Rate | Period Covered | |
| Benefits | Annualized Monetized $millions/year- All producers remain in organic market | | $21.2 | $49.5 | 2016 | 7% | 15 years | |
| | | | $16.3 | $39.2 | 2016 | 3% | 15 years | |
| | Annualized Monetized $millions/year – 50% of production exits in year 6 (2022) | | $5.8 | $13.6 | 2016 | 7% | 15 years | |
| | | | $4.5 | $10.8 | 2016 | 3% | 15 years | |
| | Annualized Monetized $millions/year 50% of current production exits in year 6 (2022); no new entry | | $5.3 | $12.4 | 2016 | 7% | 15 years | |
| | | | $4.1 | $9.9 | 2016 | 3% | 15 years | |
| | Annualized Quantified | | | | | 7% | | |
| | | | | | | 3% | | |
| | Qualitative | Protects the value of the USDA organic seal to consumers.<br><br>Facilitates level enforcement of organic livestock and poultry standards.<br><br>Alleviates the need to maintain additional third-party animal welfare certification and the associated costs and resources. | | | | | | |
| Costs | Annualized Monetized $millions/year All producers remain in organic market | $28.7 | | | 2016 | 7% | 15 years | |
| | | $31.0 | | | 2016 | 3% | 15 years | |
| | | $11.7 | | | 2016 | 7% | 15 years | |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | Annualized Monetized $millions/year – 50% of production exits in year 6 (2022) | $12.0 | | | 2016 | 3% | 15 years | |
| | Annualized Monetized $millions/year 50% of current production exits in year 6 (2022); no new entry | $8.2 | | | 2016 | 7% | 15 years | |
| | | $8.2 | | | 2016 | 3% | 15 years | |
| | Annualized Quantified | | | | | 7% | | |
| | | | | | | 3% | | |
| | Qualitative | Transition of some egg production to cage-free may shift organic feed purchases towards domestic rather than imported sources. | | | | | | |
| Transfers | Annualized Monetized $millions/year – 50% of production exits in year 6 (2022) | $86.3 | $0 | | 2016 | 7% | 15 years | |
| | | $79.5 | $0 | | 2016 | 3% | 15 years | |
| | | From: | | | To: | | | |
| | Annualized Monetized $millions/year 50% of current production exits in year 6 (2022); no new entry | $43.7 | $0 | | 2016 | 7% | 15 years | |
| | | $47.4 | $0 | | 2016 | 3% | 15 years | |
| | Other Annualized Monetized $millions/year | | | | | 7% | | |
| | | | | | | 3% | | |
| | | From: | | | To: | | | |

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|---|---|
| Effects | State, Local or Tribal government: None estimated.<br>Small Business: This action will have cost impacts for organic poultry producers. Larger organic egg operations will likely bear higher costs because they face greater constraints in providing adequate outdoor areas that comply with the new minimum space requirements for birds outdoors.<br>Administrative costs: The total in this table do not include the estimate costs associated with reporting and recordkeeping requirements as described in the Paperwork Reduction Act. AMS estimates that the undiscounted value of these costs will be $3.9 million annually. |

A. Need for the Rule

AMS is conducting this rulemaking to maintain consumer confidence in the standards represented by the USDA organic seal. Specifically, this action is necessary to augment the USDA organic livestock production regulations with clear provisions to fulfill one purpose of the OFPA: to assure consumers that organically-produced products meet a consistent and uniform standard (7 U.S.C. 6501). OFPA mandates that detailed livestock regulations be developed through notice and comment rulemaking and intends for NOSB involvement in that process (7 U.S.C. 6508(g)). In 2010, AMS published a final rule (75 FR 7154, February 17, 2010) clarifying the pasture and grazing requirements for organic ruminants, which partially addressed OFPA's objective for more detailed standards. This present rulemaking would extend that level of detail and clarity to all organic livestock and ensure that organic standards cover their entire lifecycle, consistent with recommendations provided by USDA's Office of Inspector General and nine separate recommendations from the NOSB.

AMS issued an administrative appeal decision in 2002 that allowed the certification of one operation that used porches as outdoor access to protect water quality. This decision served to address a fact-specific enforcement issue. Some certifying agents used this appeal decision to grant certification to poultry operations using porches to

provide outdoor access. Thereafter, certification and enforcement actions have remained inconsistent and contributed to wide variability in living conditions for organic poultry, as well as consumer confusion about the significance of the organic label with regard to outdoor access. In accordance with OFPA, this action will clarify USDA statutory and regulatory mandates and establish consistent, transparent, and enforceable requirements. Further, it will align regulatory language and intent to enable producers and consumers to readily discern the required practices for organic poultry production and to differentiate the products in the marketplace.

This rule adds requirements for the production, transport, and slaughter of organic livestock. Most of these align with current practices of organic operations (e.g., prohibiting or restricting certain physical alterations, euthanasia procedures, housing for calves and swine). These provisions were recommended by the NOSB in consideration of other third-party animal welfare certification programs, industry standards, input from organic producers, and input from public comment.[1] According to a survey by the Organic Egg Farmers of America, 76 percent of organic egg production in the U.S. participates in private animal welfare certification programs.[2] Therefore, AMS expects that many of the requirements in this rule are already implemented and will not produce significant costs. The following provisions account for the estimated costs in this rule:

[1] NOSB, December 2011. Formal Recommendation of the National Organic Standards Board to the National Organic Program, Animal Welfare and Stocking Rates, Available at: http://www.ams.usda.gov/rules-regulations/organic/nosb/recommendations. At the NOSB meeting in November 2010, the NOSB explained how the recommended handling, transport and slaughter provisions aligned with the American Meat Institute's animal handling guidelines. These guidelines cover handling, transportation and slaughter and are standard industry practices. The transcripts from that meeting are available at: http://www.ams.usda.gov/rules-regulations/organic/nosb/meetings.
[2] Organic Egg Farmers of America (OEFA), Organic Poultry Industry Animal Welfare Survey, 2014.

- Outdoor access and door spacing for avian species must be designed to promote and encourage outdoor access for all birds on a daily basis;
- Indoor stocking density for broilers;
- Outdoor stocking density for layers;
- At least 50 percent of outdoor access space for avian species must be soil and include maximal vegetation.

This action includes provisions to facilitate consistent practices regarding stocking densities and outdoor space at organic poultry operations. Currently, outdoor access and minimum indoor and outdoor space requirements vary widely among organic poultry operations. This variability leads to consumer confusion about the meaning of the USDA organic label and perpetuates an uneven playing field among producers. This rule enables AMS and certifying agents to efficiently administer the NOP. In turn, the consistency and transparency in certification requirements will facilitate consumer purchasing decisions.

Consumer surveys indicate the need for more precise animal welfare standards within the USDA organic regulations. A 2014 Consumer Reports Organic Food Labels Survey noted that half of consumers believe that organic chicken living space must meet minimum size requirements; 68 percent believe there should be minimum size requirements. Further, 46 percent believe organic chickens go outdoors; 66 percent believe the chickens should go outdoors.[3] A second survey, designed by the American Society for the Prevention of Cruelty to Animals, showed that 63 percent of respondents

[3] Consumer Reports National Research Center, Organic Food Labels Survey, March 2014. Nationally representative phone survey of 1,016 adult U.S. residents.

believe that organic livestock have access to pasture and fresh air throughout the day and 60 percent believe that organic livestock have significantly more space to move than non-organic animals.[4]

The majority of organic producers also participate in private, third-party verified animal welfare certification programs.[5] These certification programs vary in stringency, particularly for outdoor access requirements. Such widespread participation among organic poultry producers indicates that producers believe that consumers want additional label claims to provide information about production practices.

The broad latitude of the existing USDA organic regulations leads to wide variance in production practices within the organic egg sector (e.g., a porch in contrast to extensive outdoor area with diverse vegetation). The USDA organic label alone does not enable consumers to discern these differences in organic production practices, and as more consumers become aware of this disparity, they will either seek specific brands of organic eggs or seek animal welfare labels in addition to the USDA organic seal. Information gleaned through public comment, the media and input from the NOSB other sources suggests that consumers seek specific brands of organic eggs based on their knowledge of poultry living conditions or seek animal welfare labels in addition to the USDA organic seal.

After reviewing NOSB recommendations and public comments, AMS believes that many livestock and poultry producers would prefer to use the organic label to convey information about their livestock practices to consumers rather than undergoing two

[4] This phone survey was administered to 1,009 adults in October 2013.
[5] Organic Egg Farmers of America, 2014.

separate certification processes. While sales of organic products, including eggs and poultry, continue to increase annually, surveys designed to measure consumer trust in the organic label reveal consumer confusion about the meaning of the label. A 2015 report on organic food and beverage shoppers states that one-third of the respondents indicated that the term "organic" has no real value or definition.[6] The study concludes that consumers are confused by the various marketing terms, such as "natural," and advises organic brands to convey more information to consumers. AMS believes that in the context of organic livestock and poultry production, particularly egg production, variations in practices result in consumers receiving inadequate and inconsistent information about livestock products. This is supported by the consumer survey results described above.

Consumers' understanding of the organic label is informed by various sources, such as the media, trade and advocacy groups, retail-level marketing, marketing by farmers, and USDA outreach. Currently, the absence of clear standards and inconsistent practices across organic livestock and poultry producers are critical barriers to informing consumers and effectively marketing organic products. By establishing clear organic livestock and poultry standards, this rule will shape what information is being conveyed to consumers about organic livestock products. Clear standards and consistent production practices are necessary to clearly and accurately illustrate to consumers the meaning of the organic seal on these products, and to differentiate organic products from other products in the market. This final rule (1) establishes clear standards that will create the foundation necessary to present clear and consistent information to consumers about animal living conditions to distinguish organic products from competing labeling terms in

[6] Mintel Group Ltd., "Organic Food and Beverage Shoppers – US – March 2015." March 2015.

the market, (2) alleviates the need for multiple certifications, which is assumed to result in the elimination of duplicative paperwork, on-site inspections, and additional costs of third party certifications.

In 2009 and 2011, the NOSB issued recommendations, as authorized by OFPA, for additional requirements to support animal welfare. In the process of developing these recommendations, the NOSB consulted with and received numerous public comments from authorities in the fields of animal welfare, consumers, livestock producers, and certifying agents. AMS developed this final rule in response to the NOSB recommendations and stakeholder feedback.

This action also responds to the 2010 USDA Office of Inspector General (OIG) audit findings of inconsistent applications of the USDA organic regulations for outdoor access for livestock. OIG noted the absence of regulatory provisions covering the duration (i.e., hours per day) of outdoor access and the size of the outdoor area. Among organic poultry producers, OIG observed wide variation in the amount of outdoor space provided. As recommended by OIG, AMS published draft guidance, Outdoor Access for Organic Poultry, for public comment (75 FR 62693, October 13, 2010).[7] The draft guidance advised certifying agents to use the 2002 and 2009 NOSB recommendations as the basis for certification decisions regarding outdoor access for poultry. The draft guidance informed certifying agents and producers that maintaining poultry on soil or outdoor runs would demonstrate compliance with the outdoor access requirement in § 205.239. However, after extensive comments by producers, certifying agents, and other

[7] The draft guidance was published on March 10, 2013 and posted on the NOP website.

stakeholders, including the request for rulemaking, AMS determined to pursue rulemaking to clarify outdoor access for poultry and did not finalize the guidance.

B. Discussion of Comments Received

1. Percentage of Production from Aviary/Porch Systems

(Comment) AMS received some comments that challenged our assumption that aviary systems account for 50 percent of organic egg production. These comments, primarily from egg producers, assert that aviary systems account for 70–80 percent of organic egg production. In addition, some comments indicated that the estimated proportion of organic egg production that might transition to cage-free (45 percent in the proposed rule) should be adjusted to reflect a higher percentage of eggs produced in aviary systems.

(Response) The proportion of organic eggs from aviary systems is a critical data point in this analysis because we expect that these operations will have more difficulty in complying with the rule. Given that aviary houses with multiple interior levels house a higher density of birds than single-story houses, these operations would need to acquire comparatively more land to maintain current production levels. We believe that operations that cannot acquire sufficient land are more likely to transition to cage-free egg production.

In consideration of comments about the proportion of organic eggs produced in aviary systems and the lack of data for a precise estimate, AMS is revising our estimate to assume that aviaries account for 70 percent of organic egg production.[8] In addition to

[8] AMS is not aware of any data that categorizes and quantifies organic egg production by housing type. To inform our baseline assumption about the prevalence of aviary systems, AMS relied on surveys of organic egg producers which

public comments, AMS considered data points from two surveys that were conducted independently by producer-related organizations in anticipation of this rulemaking. The surveys, conducted in 2014, accounted for a combined 10.89 million layers and had some overlap in the producers that they surveyed.[9] These survey results show the proportion of organic eggs that are produced in operations that use porches as outdoor access versus direct soil contact. Since aviaries are more likely to use porch systems because they can house more birds, AMS is using this as additional information to inform our estimate of the proportion of eggs produced in aviary systems. The survey results support the use of a range of 70 percent for this estimate.

- The Organic Egg Farmers of America survey accounted for 157 producers and 8.33 million layers. This study reported that 76 percent of the operations surveyed provide outdoor access with direct soil contact while 24 percent provide outdoor access with a porch.
- The Egg Industry Center (EIC) Survey accounted for 8 producers and 5.07 million layers.[10] The survey reported that 42 percent of respondents provide outdoor access with a poultry porch. This survey population also reported that they planned to expand their layer production by 50 percent over the next 24 months.

In April 2016, AMS Market News reported 14 million organic layers currently in production. In consideration of the growth in the organic layer population, particularly

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asked whether outdoor access is provided by porches/enclosed areas. AMS assumes that the use of a porch is more indicative of aviary-style housing, and therefore used porches as an indicator of housing type.

[9] The NASS 2014 Organic Producer Survey reported a peak inventory of layers in 2014 at 9.59 million.

[10] The EIC survey population only included producers with more than 30,000 hens. According to the EIC Survey, the producers (8) which also responded to the OEFA survey accounted for 2.51 million layers; those that did not respond to the OEFA survey accounted for 2.56 million layers.

from 2014 to 2016, we attribute most of that increase to the expansion of larger, aviary-style operations and are therefore revising our estimated proportion of eggs from organic aviaries.

Despite this increase in aviary operations, the main driver of costs related to this final rule is the availability of land. In this analysis, AMS equated aviary systems with insufficient land and most single-story or pasture systems with adequate land. Therefore, changing the proportion of egg production from aviaries changes the assumption of the proportion of organic egg production that has adequate land. However, as discussed below, AMS did not significantly revise the percentage of production that may transition to cage-free egg production because AMS expects that there are other factors which will determine whether a specific operation which cannot obtain adjacent land for outdoor access will remain in the organic market. In terms of the cost impacts, where we expect producers will be able to acquire sufficient land and sustain current production levels, changing the proportion of egg production from aviaries to 70 percent increases the annual costs by 41 percent or $2.5 million over the estimate in the proposed rule, however, there are other factors that contribute to the cost increase.

2. Mortality Rate

(Comment) AMS received comments addressing the estimated increase in mortality rate. In the proposed rule, we anticipated that mortality rate would increase from 5 percent to 8 percent because of increased predation, disease, and parasites from outdoor access. Multiple comments projected that mortality rates would jump to the 20 to 30 percent range, and that this would be unacceptable. Some comments cited research indicating that poultry raised indoors have lower mortality than free-range birds due to

lower incidence of predation and cannibalism. Another comment urged AMS to conduct more research to understand a correlation between outdoor access and increased mortality and questioned why we did not use 10 percent at the baseline mortality rate.

AMS also received comments that the 2013 National Animal Health Monitoring Survey stated that average mortality in organic production was 4.9% compared to 5.2% for conventional production. The comment noted that the 2014-2015 avian influenza outbreak affected 211 indoor poultry operations. The comment also suggested that the costs be recalculated without assuming that mortality would increase.

(Response) AMS is aware that mortality is an important measurement, and one of several indicators of animal welfare. In addition, AMS recognizes that mortality rate is affected by various factors, including outdoor access. There are few studies that examine whether access to outdoors results in increased mortality among poultry, and the findings of these studies vary tremendously, with some studies finding no correlation between access to outdoors and increased mortality and others noting a 10 to 20 percent increase in mortality. These studies often examine several performance indicators and were not designed to specifically study mortality rates.

Many studies comparing caged, cage-free, and free-range systems (with outdoor access) sample from the same breeds of layers in order to compare each system for productivity, feed conversion, mortality, and other factors. By using the same breed for each system, studies are able to limit at least one factor of variation between operations; however, this does not take into account that breeds may be suited for one type of system, but suboptimal for another situation.

A 2014 study of commercial organic egg farms in the Netherlands (Bestman & and Wagenaar, 2014) found that there was no relation between the amount of time spent outdoors during the laying period and mortality rate at 60 weeks.[11] The findings also showed an average mortality rate of 7.8 percent. The breeds of birds and husbandry practices were controlled by individual farmers. In addition to mortality, the authors addressed several other indicators of animal welfare, including feather pecking damage, parasites, body weight, and other physical attributes. The authors concluded that in terms of feather pecking, organic flocks show less damage with greater use of outdoor areas, and that the organic flocks perform about the same or worse than other commercial systems for several other factors.

AMS maintains that USDA's Animal and Plant Health Inspection Service (APHIS) published statistics on organic egg production for 2013 (APHIS, 2014) is the best resource to estimate how the requirements for outdoor access in this final rule would impact mortality rates because this captures mortality rates among organic egg operations. In the proposed rule, AMS assumed that only 10 percent of organic operations would not see a change in mortality rate as a result of this rule. We now believe that is actually an underestimate and that a substantially higher proportion of organic producers would not see an increase in mortality rates under this rule.

APHIS found that average mortality in U.S. organic layer flocks was 4.9 percent at 60 weeks and 6.8 percent over the useful life of the flock. It also found that on more than half of all farms, mortality at 60 weeks was below 4 percent, while only 11 percent

[11] Bestman, Monique, and Jan-Paul Wagenaar. "Health and Welfare in Dutch Organic Laying Hens." *Animals* 4 (2014): 374−390. http://www.louisbolk.org/downloads/2908.pdf.

of farms experienced mortality rates greater than 10 percent. This same survey reported that about 66 percent of organic production is raised on pasture or with uncovered outdoor access while 35 percent had porches or covered outdoor access; however, the survey does not report mortality rate based on type of outdoor access.[12] Therefore, AMS is maintaining that the baseline mortality rate for organic layers is 5 percent; in the final rule, we are assuming that this rate represents organic operations generally and are not differentiating mortality rates for pastured organic operations. We are also retaining the projection that mortality will rise to 8 percent with the implementation of this rule. While there are various studies that predict higher rates, we are aligning more closely with the NAHMS data because we believe this is the closest approximation for mortality rates in organic egg production systems.

3. Costs to Prevent Disease Outbreak

(Comment) AMS received comments advising that this analysis include costs for an increased potential for disease outbreak among organic poultry due to increased outdoor access.

(Response) AMS carefully considered commenters' concerns about disease risks when birds have access to the outdoors. AMS consulted with APHIS and FDA in the development of this final rule to ensure that the practices support minimizing disease risks in outdoor poultry operations. We have not estimated such costs because various factors contribute to risk of disease outbreak and while these costs are not zero, they are not calculable. The Animal and Plant Health Inspection Service (APHIS) continues to conduct epidemiological investigations to identify the transmission pathways for highly

[12] AMS obtained the data on the percentage of organic production by outdoor access through request to the NAHMS.

pathogenic avian influenza HPAI. At this point, APHIS concludes, there is not conclusive evidence to point to a specific pathway or pathways for the current spread of the virus.[13]

4. Costs to Build Additional Houses

(Comment) AMS received comments noting that the analysis did not include the costs to build additional houses or the costs that producers would incur if they needed to decrease the number of birds in their operation. One comment referenced the study conducted by Vukina et al., which projected that large egg producers (over 100,000 layers) would need to reduce flock size by 13.5 percent to comply with the NOSB recommendations and that flock size in current facilities would decrease by 56 percent in total.

(Response) In this rulemaking, the availability of the land, rather than the indoor area of existing houses, is the limiting factor for compliance. AMS set the indoor stocking density to match the existing practices of numerous organic producers who participate in a widely recognized third-party animal welfare certification program. Therefore, the underlying premise is that organic egg producers would not need to build additional houses or reduce the number of birds to comply with the indoor space requirements.[14] The Vukina et al., study was based on the implementation of the indoor

[13] USDA-APHIS (2015). Epidemiologic and Other Analyses of HPAI-Affected Poultry Flocks: September 9, 2015 Report. Available at: https://www.aphis.usda.gov/animal_health/animal_dis_spec/poultry/downloads/Epidemiologic-Analysis-Sept-2015.pdf.

[14] In developing the regulatory impact analysis for the proposed rule, AMS considered implementing the more stringent indoor stocking densities for layers, recommended by the NOSB. In order to understand the cost impacts of the indoor stocking density as recommended by the NOSB, we projected costs for producers to maintain their current level of production. This would have entailed a significant upfront cost to construct new facilities and would have cost the industry an estimated $114 million per year.

stocking rates recommended by the NOSB, which were 2.0 square foot per bird (layers); 2.0 – 3.0 pounds per square foot (pullets); 1.0 – 5.0 pounds per square foot (broilers).[15]

AMS acknowledges that some producers may opt to remain in organic production by obtaining non-adjacent land and constructing new facilities. While AMS is not estimating aggregate costs based on assumptions about what proportion of organic producers may decide to remain in organic production by constructing new facilities, we are providing some parameters of such costs. Based on information from the organic egg producers, AMS estimates that the costs of aviary housing is $70/hen. Further, we believe that larger organic operations have a minimum of 100,000 hens; medium scale have between 30,000 – 100,000 birds and smaller scale less than 30,000 birds. Therefore, the corresponding estimates for housing costs for producers of each size category: $7 million minimum (large scale); $2.1 - $7 million (medium); $2.1 million maximum (smaller scale). In addition, producers that construct new aviary facilities to house 100,000 birds would need approximately 6.12 acres of land for housing and outdoor space. This amounts to nearly $28,000 in land costs.

Since AMS deviated from those provisions, we are not utilizing the associated cost projections.

5. Costs for Swine Producers Implementing Outdoor Access Requirements

(Comment) AMS received comments stating that we had failed to account for costs to swine producers to implement the proposed requirements for year-round, soil-based outdoor access.

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[15] For a 4.5 pound layer, which is the average mature weight for the ISA Brown breed, this converts to 2.25 pounds per square foot.

(Response) As discussed above, AMS has deferred implementing more specific outdoor access requirements for swine in order to further consider the unique needs and behaviors of swine in an outdoor environment. In consideration of comments about environmental impacts and disease pressures, we are not requiring soil-based outdoor access areas. Swine producers must continue to comply with existing requirements to provide outdoor access; such access may consist of areas that have concrete or other impermeable surfaces. Therefore, we are not estimating additional costs will accrue to swine producers as a result of this rule. As ruminant and avian livestock have been the focus of this rulemaking and the NOSB deliberations on animal welfare recommendations, this deferral will provide time for a detailed look at organic swine production.

6. Costs for Alternatives

(Comment) Some comments pointed out that AMS discussed alternatives to the proposed action, but did not provide costs for these alternatives and specifically stated that some costs were not estimated in the analysis. These include: (1) the proposed requirement that the outdoor access area have at least 50 percent soil; (2) maintenance for the proposed outdoor area (e.g., fencing); (3) requiring accommodation for 10 percent or 50 percent rather than 100 percent the birds at one time; and (4) allowing porches as outdoor access.

(Response)

In the proposed rule, AMS included cost estimates for minimum soil content in the outdoor access areas. This estimate included the total cost to purchase additional land for the estimated production that would not have adequate outdoor space. That estimate

was calculated using average real estate values for farm land, so we can reasonably expect that area would already have the minimum soil coverage.

7. Assumption about Two Barn Footprints

(Comment) In the proposed rule, AMS made assumptions about the amount of land for outdoor access areas. We generalized that poultry houses have 2 barn footprints of outdoor space per house and requested comments on the validity of that assumption. Some comments argued that basing an assumption about land availability on aerial photography is flawed. We also received comments explaining limited land availability due to site-specific conditions, such as the location of existing driveways and buildings (e.g., feed mills, feed system equipment), spacing between poultry houses, water body and property line setbacks, and topography. In addition, a few comments indicated that the available land may not be near the farm where the poultry are housed or that acquisition of additional land is impossible.

(Response) AMS understands that individual operations may face various impediments to land acquisition and that the availability of land will vary. These costs may include obtaining land which is not adjacent to existing housing, capital costs to construct new housing adjacent to the land for the outdoor access area, and/or moving existing roads or structures in order to clear land for outdoor access. AMS is not quantifying the costs for overcoming such constraints or combinations of constraints because this would entail several additional assumptions that introduce a high degree of uncertainty into the estimated values. AMS expects that in some situations, these constraints would be insurmountable and operations would move to the cage-free market. The analysis accounts for barriers to land acquisition by estimating the costs for a portion

of organic operations to transition to cage-free egg production due to the lack of available land. This potential scenario is discussed below in the section on Costs of the Final Rule.

In response to the descriptions in public comment, AMS is modifying the estimated proportion of organic operations that have adequate land to comply with this rule. In the proposed rule, we estimated this could be 50 percent of organic egg production. As discussed above, AMS is assuming that all aviary operations, which account for an estimated 70 percent of organic egg production, would need to acquire additional land. Based on public comments, we are also projecting that a portion, 17 percent, of single-story (non-aviary) operations, which account for an estimated 5 percent of all organic egg production, would also need to acquire additional land because they may not have two barn footprints of outdoor space due to various conditions specific to the operation. In summary, AMS assumes that operations representing 75 percent of organic egg production could incur costs for purchasing and maintaining additional land to comply with the outdoor stocking density requirement.

AMS expects that these producers will face different impediments to acquiring additional land and will not respond uniformly. Therefore, while AMS is assuming that aviary operations do not currently have the land base to comply, not all of this production would move to the cage-free market as a result of this constraint. AMS is estimating that about two-thirds of the aviaries, equivalent to 45 percent of organic egg production, and that a portion of non-aviary production, which accounts for 5 percent of organic egg production, will not be able to acquire additional land and will move to the cage-free market. 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. Of note, in the proposed rule we estimated that 45 percent of organic egg production would make the transition to the cage-free market. The 45 percent estimate was supported by several comments from organic producers.

8. Consumer Willingness-to-Pay

(Comment) AMS received comments questioning assumptions made in the proposed rule about consumer expectations and willingness–to-pay increased costs associated with providing livestock with outdoor access. Some commenters questioned AMS's view that consumer expectations around organic livestock production practices are not being met under the current regulations. Commenters asserted that significant growth in the organic egg industry in recent years demonstrates that consumer expectations are in fact being met. They argued that, since consumer expectations appear to be satisfied, it is questionable whether they would actually be willing to pay more for eggs produced by hens with access to the outdoors once this rule is implemented.

Other commenters questioned the statement that adequate outdoor access is a core concern among organic consumers and the assumption that they would be willing to pay more for outdoor access alone. Commenters argued that consumer expectations with respect to organic livestock practices are not only about access to the outdoors, but about overall animal welfare and food safety. This includes concerns over suffering associated with increased morbidity, higher mortality rates, and increased food safety risks that may be associated with outdoor access.

Some commenters did not support the surveys that AMS relied on in the proposed rule to determine consumer expectations and willingness to pay. One commenter noted that the surveys cited in the proposed rule did not verify whether respondents consider

porches to be acceptable outdoor access, since porches provide access to fresh air and sunlight. Three commenters opposed AMS's reliance on surveys conducted by Consumer Reports and the American Society for the Prevention of Cruelty to Animals (ASPCA) claiming that the surveys are likely flawed, used leading questions and biased against larger farming operations. The comment contended that AMS must rely on unbiased, peer-reviewed research.

A number of commenters reinforced AMS's evaluation of consumer expectations and willingness-to-pay for improved animal welfare practices in organic production. Consumer Reports shared the results of a 2015 consumer survey which were similar to those from the 2014 survey cited in the proposed rule. In 2015, 54 percent of participants responded that they think that the organic label means that animals went outdoors, and 46 percent think that it does not mean that animals went outdoors. Meanwhile, slightly more than two-thirds (68 percent) of participants think that the organic label should mean that animals went outdoors. Similarly, one animal welfare group (Food Animal Concerns Trust) submitted the results of a survey that showed that 73.1 percent of respondents believe that organic should mean outdoor access for livestock. These and various other commenters stated that the survey results suggest confusion in the marketplace under the current standards, and clearly indicate that consumer expectations are not being met. These commenters agreed that consumers who expect outdoor access for organic livestock would be willing to pay a premium for these products if the standards are strengthened.

(Response) Consumer perceptions of organic claims are critical to characterizing the benefits of this rule. For the proposed rule, AMS cited data to gauge the expectations

of consumers with respect to outdoor access for organic livestock. AMS is aware that consumers generally are becoming more interested in livestock practices and that an increasing number of organic consumers are seeking to understand organic claims in the context of various animal welfare certification programs in the marketplace. Information collected through years of public comment to the NOSB and the proposed rule, indicates that there is a gap between what consumers expect about the uniformity of outdoor access practices for poultry and the actual diversity in practices on organic farms. AMS understands that the proportion of organic eggs from birds that have only a porch for outdoor access is increasing.[16] Given consumer preferences cited in the survey above and conveyed in public comments, the continual shift towards minimizing soil-based outdoor access for organic poultry widens the gap between consumer expectations. Public comment and the NOSB recommendations have led AMS to determine that if this gap persists and becomes more visible, consumer confidence in the organic label broadly could waver.

The continued growth in the sales of organic eggs is driven by a range of factors that influence consumer purchasing decisions, some of which reflect the expectation that organic birds have outdoor access. AMS cited several publications, including peer-reviewed journal articles and consumer surveys designed by animal welfare organizations, to understand consumer perceptions and preferences about production practices for laying hens. The consumer surveys cited in the rule help to approximate the

[16] This conclusion is based on the Egg Industry Center Survey of U.S. Organic Egg Production in December 2014. This questionnaire was administered to producers with at least 30,000 hens. Forty-two percent of the survey respondents reported using porches for outdoor access. In addition, the survey respondents collectively indicated they planned to expand the number of layers by 50 percent over the next 24 months. The survey accounted for 5.07 million organic layers.

level of consumer interest in certain production practices and inform of the available information on consumer perception of the organic label. AMS did not selectively cite studies, but shared the data from the limited information that is available on this subject. In order to more fully characterize these surveys, AMS has added information about the methodology in the section below, Benefits of the Final Rule. Further, AMS did not use the results from these surveys to quantify the potential benefits of this rule. In summary, there is limited quantitative data available on consumer expectations and willingness to pay for the various attributes of organic products. AMS believes that the research and survey data that we used to inform this rule is accurate and was drawn from diverse sources.

*Porches may fall under willingness-to-pay for outdoors numbers*

AMS acknowledges that surveys evaluating consumer expectations and willingness to pay for outdoor access for organic livestock do not clarify consumer expectations about whether porches meet consumer expectations for outdoor space. Based on numerous public comments on this proposed rule and to the NOSB in developing their recommendations on animal welfare we are aware of the prevalent perception among consumers that a porch, or other enclosed structure, is not equivalent to open access to the outdoors. In this final rule, AMS has maintained that enclosed porches and lean-to type structures (e.g. screened in, roofed) cannot be considered outdoor space. In response to comments, AMS has revised this final rule to allow porches that are not enclosed (e.g. with a roof, but with screens removed) and allow birds to freely access other outdoor areas to be counted as outdoor space. AMS believes that this requirement provides flexibility for producers, yet still aligns with consumer expectations that

providing access to enclosed porches is not equivalent to providing open access to the outdoors.

(General) AMS did not receive specific comments on the quantitative estimates used in the proposed rule for consumer willingness to pay for outdoor access. Based on the more general comments that AMS did receive in this area, we determined that no change to the estimates of consumer willingness to pay was necessary for the final rule.

9. Impacts on Feed Suppliers

(Comment) AMS received a number of comments contending that this action will cause a disruption of the market for domestic organic feed grains if a significant number of organic egg producers exit production. One comment submitted an analysis which concluded that the organic poultry sector would no longer need 43 percent of organic feed corn and 98 percent of organic soybeans, relative to 2014 production, due to decreased feed efficiency and reduced flock size among large producers. Another comment estimated that the impact on organic grain would be a $71 million loss for organic corn and a $26.4 million loss for organic soybeans.[17] Some comments also asked AMS to consider impacts on organic grain producers and their organic rotation crops, such as beans.

(Response) It is unlikely that domestic markets for organic feed will be seriously affected by the regulation. Demand for organic feed grains (primarily corn and soybeans) far exceeds domestic production. USDA's Economic Research Service (ERS) states that

[17] The comment calculated this using the following variables: the estimated organic layer population in the proposed rule (13.5 million); consumption of 4 pounds of feed each year per hen; $10/bushel for organic corn and soybeans; 45% reduction in organic layer population.

"Despite the strong interest in organic food in the United States, overall adoption of organic corn, soybeans, and wheat remains low, standing at less than 1 percent of the total acreage of each crop."[18] According to a report[19] by the Sustainable Food Laboratory, "Organic grain supply is an identified bottleneck for value-added processes. Growth in grain production lags other organic commodities and remains a negligible amount of total U.S. cropland." In addition to use by organic egg and poultry producers, organic feed is also used by organic dairy, beef, pork, and other organic animal agriculture producers.

According to ERS data, Wisconsin accounted for 14 percent of total domestic production acreage in 2011—the largest producer of organic corn in the U.S. Minnesota, Iowa, New York, and Texas were the next largest and the top five states accounted for 52 percent of domestic organic corn acreage. The state with the greatest acreage in organic soybean production was Minnesota, with 14 percent of the total, followed by Iowa, Michigan, Arkansas, and New York, with these five states accounting for 50 percent of total acreage in 2011.

The deficit in domestic production is made up for by imports of organic feed grains. Imports of feed corn, the most important feed ingredient, accounted for 26 percent of total domestic consumption in 2015. Imports of soybeans, the second most important feed ingredient, accounted for 71 percent of domestic consumption in 2015. Because of the high proportion of imports in the organic feed grains markets, prices for domestically

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[18] *Despite Profit Potential, Organic Field Crop Acreage Remains Low*. by William D. McBride and Catherine Greene. Amber Waves, November 2015 (http://www.ers.usda.gov/amber-waves/2015-november/despite-profit-potential,-organic-field-crop-acreage-remains-low.aspx#.VyzvEhKs0Sn).

[19] *Barriers and Opportunities: The Challenge of Organic Grain Production in the Northeast, Midwest and Northern Great Plains*. by Elizabeth Reaves, Sustainable Food Lab and Nathaniel Rosenblum, Stonyfield Inc. http://wlstylr.com/sustainablefoodlab/wp-content/uploads/2015/12/Organic-Grain-Report_Final_9.28.14_Short.pdf.

produced feed closely follow world prices. Overall domestic demand for organic feed may decrease as a result of operations exiting the organic market, but any decrease would result in reductions of imported feed. Any decreases in demand caused by lower organic egg production would be unlikely to lead to changes in the price of domestically produced organic feed. Of note, one analysis of the potential impacts to the organic feed grain market submitted via comment was based on the projection that organic producers would need to drastically reduce flock size in order to comply with indoor stocking density requirements that are more stringent than those in this action. Therefore, those projections are not based on requirements in this final rule and are likely overestimated.

10. Impacts on Other Entities in Supply/Production Chain

(Comment) Some comments stated that this rule would have adverse impacts on businesses that service organic egg producers, such as feed haulers, transporters, suppliers, service providers, etc. Comments also asked whether AMS would incorporate impacts on secondary markets for organic products that use breaker eggs or poultry products as ingredients and requested impacts on price and supply in this area.

(Response) AMS expects that these entities would continue to have a market for their services once this rule is implemented. Producers that cannot comply with this rule may transition to the cage-free market and therefore will still need these services to obtain feed and transport eggs and animals. Regarding the market impacts for products that use organic eggs or poultry products as ingredients, AMS believes that the supply projections for organic eggs as provided below in the section Costs of the Final Rule, are relevant to the impacts on the breaker egg market. AMS developed enterprise budgets for organic egg and broiler producers to estimate the costs of this rule and considered that 20

percent of the eggs go to the breaker market to be used as ingredients in processed products. We expect that the proportion of breaker eggs to total production will hold constant after the implementation of this rule. AMS does not have data on whether breaker eggs from organic operations retain their organic status for further processing.

We do not expect adverse impacts for entities that use poultry products as ingredients because, as discussed below in the Costs of the Final Rule, we expect that organic broiler producers will maintain production levels after this rule is implemented.

11. Impact on Employees of Organic Egg Producers

(Comment) AMS received comments from employees of some organic egg producers expressing concerns that this rule threatens their jobs.

(Response) AMS expects that some portion of organic egg producers, particularly those that do not have the land available for the outdoor access space, will leave the organic egg market, but will maintain or increase their current production volume in the expanding cage-free market. Therefore, AMS contends that this rule does not jeopardize employment status as these egg operations can serve a diversified market.

12. Impacts on Consumers – Prices and Accessibility

(Comment) AMS received comments that predicted that this rule would significantly raise consumer prices and decrease consumer demand. One comment reasoned that prices would rise by the same amount that supply decreases, leading to a $1.79 increase in the price of one dozen eggs (based upon the price of $4.16 per dozen and an estimated 43% reduction in the supply of organic eggs, as stated in the proposed rule). Another comment stated that this rule would cause prices of organic eggs to double and shift consumption patterns. In addition, a few comments mentioned concerns about

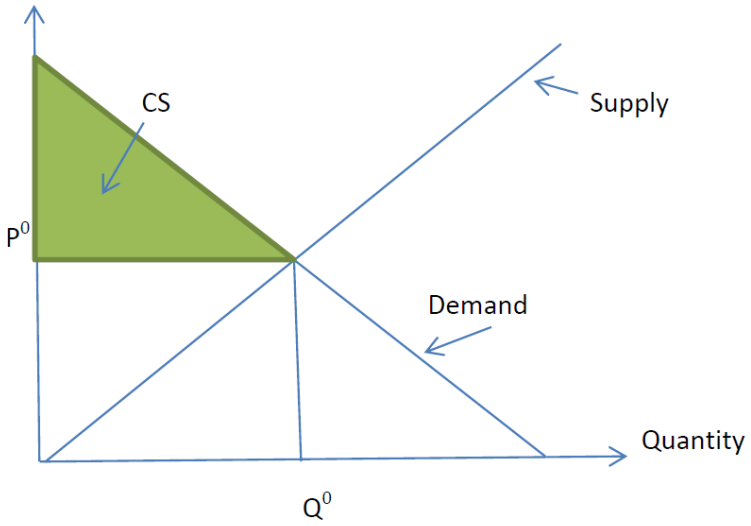
how this rule would impact the accessibility of organic eggs to disadvantaged communities due to expected price increases.

(Response) AMS considered the potential impact that the rule could have on egg prices and consumer welfare. AMS is expecting that some organic egg producers will move to the cage-free market, decreasing the supply of organic eggs and increasing the supply of cage-free eggs. Generally, when the supply of a product in the market is less than the quantity that consumers want to purchase, prices will increase. To predict changes in retail prices for both organic and cage-free eggs, AMS projected future prices for these products in the absence of this rule. To project prices after this rule, we examined how consumers might respond to price increases and producers might respond to that reduced demand.

Figure 1 shows a general depiction of consumer surplus. Price (P) is on the vertical axis; Quantity (Q) is on the horizontal axis. The demand function is a downward sloped line that reflects consumer's willingness to demand more of the good at low prices than at high prices. The supply function is an upward sloping line that reflects a producer's willingness to supply more of a good at higher prices than at lower prices. Both demand and supply functions are for the overall market.

Market equilibrium occurs where the supply and demand functions intersect. Equilibrium price is $P^0$ and equilibrium quantity is $Q^0$. Some consumers in the market would have been willing to pay a higher price than $P^0$ for a unit of Q and realize a benefit referred to as consumer surplus. The shaded area in Figure 1 below the demand curve and above price $P^0$ is the consumer surplus (CS).

Figure 1. Consumer surplus.



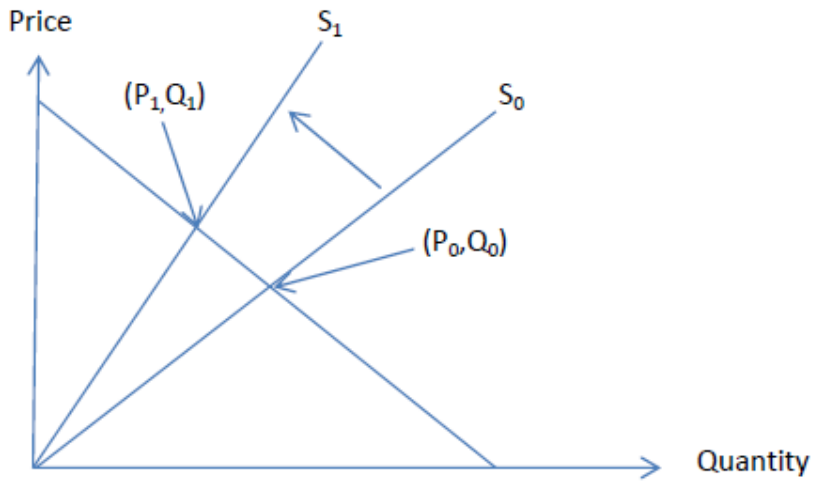

As a result of this rule, some producers who currently market their eggs as organic will no longer be able to do so. Presumably, these producers will sell their eggs in the cage-free market. In this analysis AMS is accounting for costs among "legacy" producers, i.e., producers who obtained organic certification prior to the publication of this rule without knowledge of the potential costs of these requirements. Producers who need to be in compliance with this rule within 3 years are those who would obtain certification concurrent to or after publication of this rule and therefore have full knowledge of the costs of complying with these requirements. The decision to voluntarily enter or continue organic production in consideration of those costs is a business decision and the costs of that action are not solely attributed to this rule. AMS assumes a 50 percent drop in organic egg production in 2022, when the implementation period is expected to end. The 50 percent of the eggs that would no longer be sold as organic are then assumed to be sold as cage-free eggs following the implementation period.[20] That

[20] See sections below on benefits and costs of the final rule.

shift in supply would increase organic egg prices and decrease cage-free egg prices, resulting in changes in consumer and producer welfare in both markets.

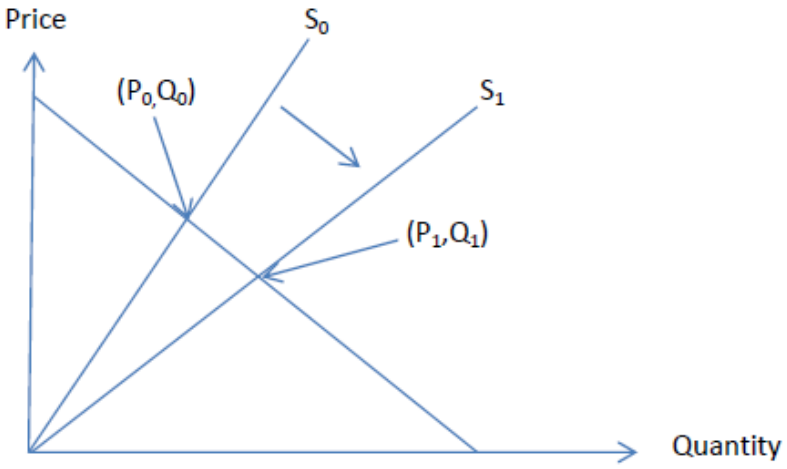
Figure 2 shows the impact of the rule on the organic market. Initial supply is $S_0$, equilibrium price is $P_0$ and equilibrium quantity is $Q_0$. When producers exit the market supply shifts to $S_1$, equilibrium quantity falls to $Q_1$, and equilibrium price rises to $P_1$. The consumer demand function is assumed to be unaffected by the rule because this rule aligns production practices with consumer expectations of those practices.

Figure 2. Impact on the organic egg market.




Producers who cannot comply with the rule are assumed to sell their eggs in the cage-free market. In that market, the supply function shifts outward and again the demand curve for cage-free eggs is not expected to change (see Figure 3).

Figure 3. Impact on the cage-free market.




By using estimates of the own price elasticity of demand from the academic literature (discussed below), we can determine an estimate of the price after the rule takes effect. The elasticity of demand is defined as the percentage change in quantity resulting from a one percent change in price.

$$\varepsilon = \% \text{ Change in } Q / \% \text{ Change in } P$$

For example, if the elasticity of demand equals -2, then a ten percent increase in price results in a twenty percent decrease in the quantity demanded. Using the elasticity of demand, the price after the rule takes effect, $P_1$ can be determined:

$$P_1 = P_0 + [(Q_0 - Q_1)/Q_0]*P_0*\varepsilon$$

The linear demand functions are:

$$\text{Demand: } P = \beta_0 + \beta_1 Q$$

Consumer surplus (CS) is then:

$$CS = \int(\beta_0 + \beta_1 Q)dQ - PQ = \beta_0 Q + (\beta_1/2)Q^2 - PQ$$

For both consumers of organic eggs and cage-free eggs, the change in consumer surplus ($\Delta CS$) is:

$$\Delta CS = (\beta_0 Q_1 + (\beta_1/2)Q_1^2 - P_1 Q_1) - (\beta_0 Q_0 + (\beta_1/2)Q_0^2 - P_0 Q_0)$$

Various sources were used to estimate a range of demand elasticities for organic and cage-free eggs. The elasticity of demand represents the response of the quantity of eggs demanded to the market price and is used to characterize the degree to which consumers reduce their egg consumption as price rises. One factor influencing demand elasticity is the price and availability of substitutes. If an item has several close substitutes that are similar in price, then the elasticity of demand would be large (in absolute value). When the price of the good in question rises, consumers switch to a substitute, resulting in a significant quantity response. A lack of close substitutes would indicate a lower elasticity where price changes would result in less significant quantity changes.

Another factor influencing elasticity of demand is the share of the consumer's total expenditures, or budget the good represents. If the budget share is relatively small, then the price elasticity is low. Even significant price changes (in terms of percentages) of low cost goods will not significantly reduce the quantity consumed. When the elasticity of demand is less than one (in absolute value), it is referred to as "inelastic" because a one percent change in price results in a less than one percent change in the quantity demanded. If the elasticity is greater than one, it is referred to as "elastic" because a one percent change in price results in more than a one percent change in the quantity demanded.

Conventionally produced eggs have no close substitutes and account for a very small share of a consumer's budget. For these reasons, we would expect the elasticity of

demand to be low. Sumner et al.[21] reviewed the economic literature to evaluate the impact of alternative egg production systems found that (p. 247):

> The retail demand elasticities in the literature generally range from about −0.15 to −0.3. Representative studies, which vary in relevance of the data and statistical analysis, include the following: Kastens and Brester,[22] You et al,[23] Huang and Lin[24], and Yen et al.[25] None of the econometric estimates use data from the last 15 yr. There is a need for more research to confirm the small elasticity of demand in the current market.

Two recent studies have treated different types of eggs (e.g. organic, conventional) as separate goods and estimated their elasticities (see Table 2). Lusk[26] examined the demand for cage, organic, conventional, and "other"[27] types of eggs in two markets (San Francisco and Dallas/Ft. Worth). The data Lusk analyzed consisted of weekly volume sales, dollar sales, and average price per egg by stock keeping units aggregated across stores in the two markets from the time period January 1, 2007 to January 25, 2009.

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[21] D. A. Sumner , H. Gow , D. Hayes , W. Matthews , B. Norwood , J. T. Rosen-Molina , and W. Thurman "Economic and market issues on the sustainability of egg production in the United States: Analysis of alternative production systems" 2011 Poultry Science 90 :241–250.

[22] Kastens, T., and G. Brester. 1996. Model selection and forecasting ability of theory-constrained food demand systems. Am. J. Agric. Econ. 78:301–312.

[23] You, Z., J. Epperson, and C. Huang. 1996. A composite system of demand analysis for fruits and vegetables in the United States. J. Food Distrib. 27:11–22.

[24] Huang, K. S., and B. Lin. 2000. Estimation of Food Demand and Nutrient Elasticities from Household Survey Data. Technical Bulletin, Number 1887. USDA, Economic Research Service, Food and Rural Economic Division, Washington, DC.

[25] Yen, S., B. Lin, and D. Smallwood. 2003. Quasi- and simulated likelihood approaches to censored demand systems: Food consumption by food stamp participants. Am. J. Agric. Econ. 85:458–478.

[26] Lusk, Jayson. 2010. "The Effect of Proposition 2 on the Demand for Eggs in California". Journal of Agricultural & Food Industrial Organization. Volume 8. No. 3: 1-18.

[27] Egg types that included claims such as omega 3, vegan fed, pasteurized, and fertile.

Table 2. Own price elasticity estimates from demand systems.

| **Lusk**[28] | | | **Heng and Peterson**[29] | |
|---|---|---|---|---|
| Egg Type | Market | | Egg Type | |
| | San Francisco | Dallas/Ft Worth | | |
| Conventional | -1.01 | -0.99 | Conventional | -0.11 |
| Organic | -1.13 | -1.52 | Organic | -1.07 |
| Other* | -1.70 | -1.89 | Nutrient Enhanced* | -0.95 |
| Cage Free | -2.26 | -2.99 | | |
| | | | Additive Free | -0.43 |
| | | | Brown | -1.55 |
| *These designations are roughly comparable. Lusk describes "other" to include claims such as omega 3, vegan fed, pasteurized, and fertile. Heng and Peterson[30]describe nutrient enhanced to include claims such as omega-3 and vitamin added. | | | | |

Heng and Peterson[31] examined the demand for organic, nutrient fortified, additive free, brown and conventional eggs. The data include weekly sales of over 300 brands encompassing 2,287 products nationwide from April, 2008 to March, 2010. Observed product characteristics include brand name (private labels and specific brands), egg size, package size, shell color, and labeled attributes, such as organic, nutrient-enhanced (including omega-3 and vitamin-added), and additive-free.

[28] Lusk, Jayson. 2010. "The Effect of Proposition 2 on the Demand for Eggs in California". Journal of Agricultural & Food Industrial Organization. Volume 8. No. 3: 1-18.
[29] Heng, Yan and Hikuru Peterson. "Estimating Demand for Differentiated Eggs Using Scanner Data" Selected paper presented at the Agricultural & Applied Economics Association's 2014 AAEA Annual Meeting, Minneapolis, MN, July 27-29, 2014.
[30] Ibid.
[31] Heng, Yan and Hikuru Peterson. "Estimating Demand for Differentiated Eggs Using Scanner Data" Selected paper presented at the Agricultural & Applied Economics Association's 2014 AAEA Annual Meeting, Minneapolis, MN, July 27-29, 2014.

The magnitude of several of the price elasticity estimates in the Lusk[32] study are much larger than the Heng and Peterson study. That study finds the price elasticity of conventional eggs to be approximately -1.0. This is an order of magnitude larger than the estimate from the Heng and Peterson[33] study, and several times larger than what Sumner et al.[34] found in a literature review. The 2010 Lusk study contains an egg product labeled as "other" which coincides to the "nutrient enhanced" egg product in the Heng and Peterson[35] study. The Lusk estimate for the price elasticity is almost double what Heng and Peterson concluded. Estimates of the price elasticities of organic eggs are closer in the two studies, but the Lusk estimates are significantly higher for the Dallas/Fort Worth market.

The largest price elasticity estimate in the Heng and Peterson study is for brown eggs. An elasticity of this size is plausible because conventional eggs are a close substitute for brown eggs, making consumers more sensitive to price changes for brown eggs. The largest price elasticity estimates in the Lusk study are for cage-free eggs. Organic eggs may be considered as a substitute for cage-free eggs if priced competitively, but the converse is probably not true.

The daily average production of cage-free eggs has grown from 3.5 million in 2007 to an estimated 12.4 million in 2016. Organic eggs have seen a similar rise in

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[32] Lusk, Jayson. 2010. "The Effect of Proposition 2 on the Demand for Eggs in California". Journal of Agricultural & Food Industrial Organization. Volume 8. No. 3: 1-18.
[33] Heng, Yan and Hikuru Peterson. "Estimating Demand for Differentiated Eggs Using Scanner Data" Selected paper presented at the Agricultural & Applied Economics Association's 2014 AAEA Annual Meeting, Minneapolis, MN, July 27-29, 2014.
[34] D. A. Sumner , H. Gow , D. Hayes , W. Matthews , B. Norwood , J. T. Rosen-Molina , and W. Thurman "Economic and market issues on the sustainability of egg production in the United States: Analysis of alternative production systems" 2011 Poultry Science 90 :241–250.
[35] Heng, Yan and Hikuru Peterson. "Estimating Demand for Differentiated Eggs Using Scanner Data" Selected paper presented at the Agricultural & Applied Economics Association's 2014 AAEA Annual Meeting, Minneapolis, MN, July 27-29, 2014.

production from 3.4 million eggs produced daily in 2007, to an estimated 10.1 million eggs per day in 2016. Organic and cage-free egg production is shown in Figure 4. The rate of growth in both types of eggs has been nearly identical over the past decade. Figure 5 shows quarterly prices of organic and cage-free eggs over the same period. Over the past decade, the price for a dozen organic eggs has gone from slightly over $3.00 to slightly over $4.00. Cage-free egg prices are lower than organic egg prices, but the trend in price is very similar. Figure 5 also shows the ratio of organic to cage-free price. Organic eggs are typically 35% more expensive than cage-free eggs. That relationship in price has been nearly constant for a decade.

Similar changes in prices and quantities over time argue that the elasticities of these two types of eggs should be approximately equal. Both studies used data collected at roughly the same time period: Lusk[36] from 2007 to 2009, and Heng and Peterson[37] from 2008 to 2010. The data set Heng and Peterson used was a nationwide data set consisting of over 2000 different products. Lusk examined data for two localized markets consisting of approximately 100 different products. The purpose of the Lusk study was to examine how consumer information impacts demand in two different markets, not to characterize the national egg market as Heng and Peterson did.

[36] Lusk, Jayson. 2010. "The Effect of Proposition 2 on the Demand for Eggs in California". Journal of Agricultural & Food Industrial Organization. Volume 8. No. 3: 1-18.
[37] Heng, Yan and Hikuru Peterson. "Estimating Demand for Differentiated Eggs Using Scanner Data" Selected paper presented at the Agricultural & Applied Economics Association's 2014 AAEA Annual Meeting, Minneapolis, MN, July 27-29, 2014.

Figure 4. Eggs produced per day (in millions).

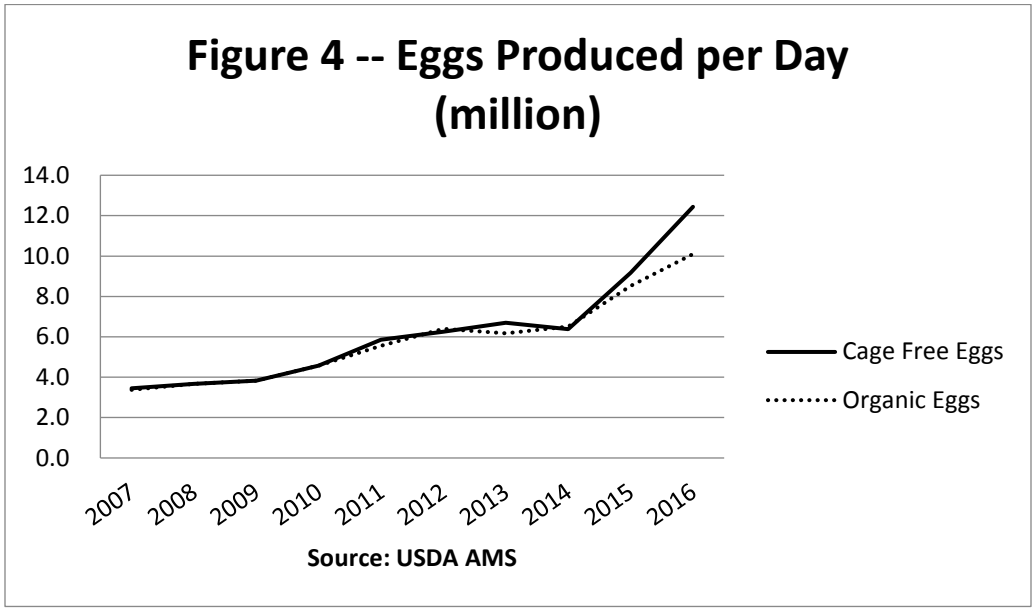
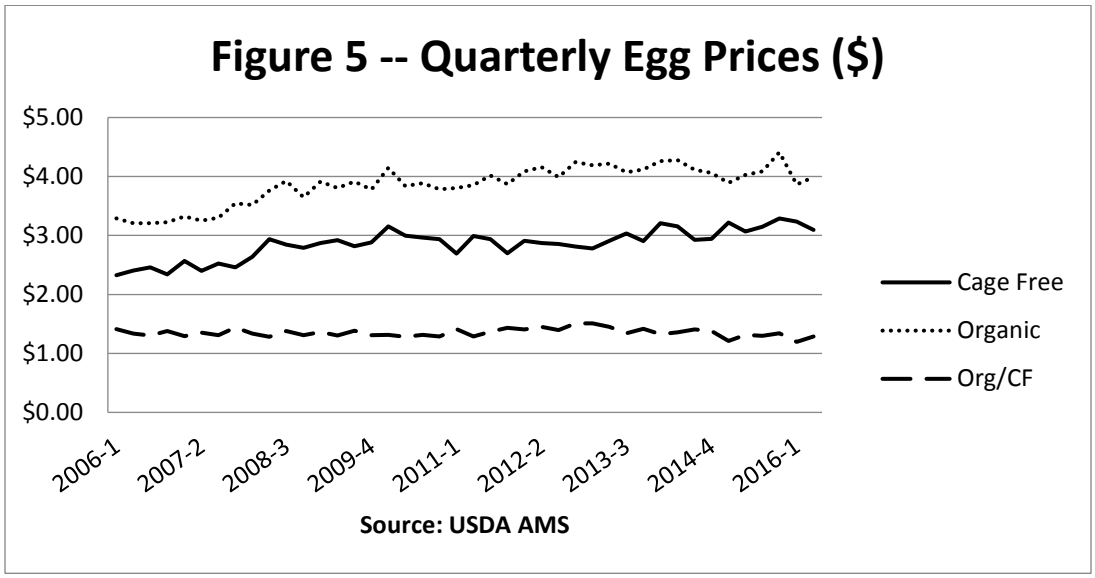



Figure 5. Quarterly egg prices.




To calculate potential price changes and changes in consumer welfare we need to determine prices and quantities for organic and cage-free eggs in the absence of this rule. Baseline prices and annual quantities for cage-free and organic eggs from 2016 to 2022 appear in Table 3. Cage-free quantities are based on current usage rates of pledged

companies and reflect the sum of these usage rates for each year. Estimates are provided by the AMS Agricultural Analytics Division based on AMS Market News Organic Egg and Poultry Reports.[38]

Table 3. Baseline prices and quantities.

| Year | Cage-Free Quantity (million dozen) | Cage-Free Price ($/dozen) | Organic Quantity (million dozen) | Organic Price ($/dozen) |
|---|---|---|---|---|
| 2016 | 460.37 | 3.16 | 325.83 | 3.93 |
| 2017 | 571.16 | 3.26 | 367.21 | 4.02 |
| 2018 | 572.04 | 3.36 | 413.85 | 4.11 |
| 2019 | 605.14 | 3.45 | 466.41 | 4.21 |
| 2020 | 840.45 | 3.56 | 525.64 | 4.30 |
| 2021 | 922.80 | 3.67 | 592.40 | 4.40 |
| 2022 | 1,005.16 | 3.78 | 667.63 | 4.50 |
| 2023 | 2,177.96 | 3.89 | 752.42 | 4.61 |
| 2024 | 3,089.73 | 4.01 | 847.98 | 4.71 |
| 2025 | 4,523.57 | 4.13 | 955.67 | 4.82 |
| 2026 | 4,913.27 | 4.25 | 1,077.04 | 4.93 |
| 2027 | 5,306.33 | 4.38 | 1,213.82 | 5.04 |
| 2028 | 5,730.84 | 4.51 | 1,367.98 | 5.16 |
| 2029 | 6,189.30 | 4.65 | 1,541.71 | 5.28 |

Organic egg quantities are projected from an assumed annual growth rate of 12.7% based on information from AMS Market News. This is the compound annual growth rate in the number of organic layers from 2007 to 2016.[39] Nominal organic egg and cage free egg prices are based on the historical growth in these prices which is 2.7% and 3.0% respectively.

[38] Estimates are based on the AMS Market News Organic Egg and Poultry Reports which provide weekly organic table egg production data and retail prices. https://www.ams.usda.gov/market-news/organic-market-news-reports. AMS Market News also provides a Monthly USDA Cage-Free Shell Egg Report which has production estimates and retail data, https://www.ams.usda.gov/market-news/egg-market-news-reports.

[39] USDA Livestock, Poultry and Grain Market News, 2016.

Next we need to determine what the production changes will be for organic and cage-free eggs following the implementation of the final rule. Existing producers face a five year phase-in period which will end in 2022. AMS projects that 50% of the organic 'legacy' production that existed prior to the publication of this rule may not be able to comply and will shift to the cage-free market at the end of the phase-in period (a shift of 162.9 million dozen eggs from organic to cage-free). After publication of the rule, AMS projects continued entry into the organic egg market (see Table 3). The implementation dates of the rule as drafted would give those operations – certified after the publication of the rule but prior to 3 years after publication – 5 years to comply. This is intended to provide additional time to producers who had intended to enter organic production near the time this rule is published to prepare land to meet the organic requirements (the required preparation time lasts three years). Given that the proposal was published early in 2016, the majority of new entrants from publication (2017) until three years later (2020) would be aware of the new requirements and construct facilities that comply with the outdoor space requirements. Because there is no economic rationale for a producer to incur the licensing and construction expenses associated with organic production, only to be out of compliance within a few years, late entrants into the market are assumed to comply. However, in the cost estimates below, AMS considered that there may be new entrants up until full implementation for layers and that there may be costs to these entrants. We believe this could significantly overestimate the costs, but are providing this to capture a range of potential outcomes given uncertainties in the underlying assumption.

To estimate the change in expected prices and consumer surplus in 2022, we use a range of elasticities derived from the Heng and Peterson study (see Table 4). We allow demand elasticities to range from -0.75 to -1.25. First, we can see that the higher the elasticity of demand, the larger the increase in price would be expected for organic eggs and the lower the price would be for cage-free eggs. For example, under an assumed -1.0 demand elasticity, changing quantities in both markets in 2022 results in price increase in the organic market (from $4.50 to $5.74 in 2022), and a price decrease in the cage-free market (from $3.78 to $3.09 in 2022). The change in prices is not symmetrical because the cage-free market is larger than the organic market. In terms of economic welfare measures, consumers of eggs see both increases in consumer surplus and losses in surplus. Assuming a demand elasticity of -1.25 would suggest prices increase of $1.55 for organic eggs and price decline of $0.86 for cage-free eggs.

Table 4. Egg prices and consumer surplus change in 2022.

| | **Organic Eggs** | | **Cage-Free Eggs** | |
|---|---|---|---|---|
| | **Organic Price ($/dozen)** | **Change in surplus ($million)** | **Cage-Free Price ($/dozen)** | **Change in surplus ($million)** |
| Baseline | $4.50 | $0.00 | $3.78 | $0.00 |
| Demand elasticity | | | | |
| -1.25 | $6.05 | -$891.19 | $2.92 | $946.26 |
| -1.00 | $5.74 | -$712.95 | $3.09 | $757.01 |
| -0.75 | $5.43 | -$534.71 | $3.26 | $567.75 |
| -0.50 | $5.12 | -$356.47 | $3.43 | $378.50 |

In general, the increase in consumer surplus for consumers of cage-free eggs outweigh the loss in consumer surplus for consumers of organic eggs. For example, cage-free eggs benefit (+$757.0 million in 2022) while consumers of organic eggs lose welfare (-$713.0 million in 2022) under the assumption of a -1.0 demand elasticity.

Many caveats apply to this analysis. First, the use of elasticity estimates to examine price and quantity changes is best suited for small changes. The elasticity of demand changes as one moves along the demand curve. The range of estimates chosen might be reasonable for initial analysis, but perhaps not as appropriate for the scenario which involves large changes in quantity in two markets. Second, if the demand elasticity of cage-free egg consumers is different from organic egg consumers, the result that consumer welfare is increased may not necessarily hold. Also, due to an assumed increase in both prices and quantities, changes in consumer surplus will increase over time. Third, within the timeframe of this rule, cage-free eggs are expected to largely replace conventional eggs. When that happens, the elasticity of demand for cage-free eggs would likely decline significantly, which would erode some of the consumer benefits. For example, suppose that consumer demand elasticity for cage-free eggs is -0.50 and the demand elasticity for organic eggs is -1.0. The loss in consumer welfare from organic egg consumers would outweigh gains from cage-free consumers. Fourth, once this rule is finalized, more producers might enter the organic market in excess of what is assumed in the baseline in anticipation of a shortage of organic eggs in starting in 2022. Addressing any of these caveats is purely speculative, so this analysis should be considered illustrative of the distribution of welfare impacts rather than an accurate accounting of them.

In addition, we acknowledges that achieving consistent organic practices is critical to maintain consumer trust in the organic sector and may necessitate that some producers leave the organic market and use alternate labeling claims. In addition to constraining the performance of existing organic operations, these conditions could

discourage participation in the NOP as producers seek alternate certification to better convey their management practices to consumers.

On the other hand, organic livestock production standards that are relevant and responsive to consumer preferences should drive demand for organic products and attract new entrants to the organic livestock market. This would have positive monetary impacts for organic livestock producers and other organic operations that produce/handle animal feed. We have not quantified the potential broader implications for not pursuing this action.

As discussed above, some consumers are likely to respond to price increases by substituting non-organic eggs for organic eggs. There are many factors independent of this rule, such as the price of feed that historically have temporarily affected the availability of organic eggs in the market. Likewise, while this rule may constrain the supply of organic eggs and affects local markets differently, we expect that this impact will be short-term. Over the long term, this regulation is expected to foster market stability by setting clear standards for livestock and poultry practices which will ensure equitable market participation and enforcement. Clear standards will also help to maintain consumer demand for organic livestock products as consumers become aware of the changes. Greater market stability will entice new producers to enter organic production and encourage some certified organic producers to expand and maintain the availability of organic eggs to U.S. consumers. For example, once this rule is implemented new producers might begin to enter the organic egg market during the implementation period in anticipation of supply shortages as producers that cannot

comply leave the market. This would lessen the projected drop in supply and increase in prices.

AMS acknowledges that implementing consistent organic livestock practices may affect consumers' organic egg consumption for a period of time. Yet we anticipate that clarifying organic livestock standards and aligning them with consumer expectations reduces the vulnerability to a shift in consumption patterns towards labels that more align with consumer preferences. There were comments from consumers and producers urging AMS to finalize this rule to ensure consistent production practices which encompass the criteria of various certification programs. The welfare analysis presented above does not include those additional consumer benefits. As discussed in more detail below, AMS estimates that the annual benefits to organic egg consumers would range between $13.8 million to $ 32.1 million annually with a mean value of $22.9 million over a 15 year period.[40,41]

13. Impact of Consumer Confusion

(Comment) Some comments challenged (1) the existence of consumer confusion around production practices for organic egg and poultry production and (2) the aim to meet consumer expectations as a primary justification for this rule. These comments noted the steady growth in demand for organic eggs and the shortage of organic eggs to

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[40] The 13 year period accounts for the time needed to fully depreciate layer houses. We use a 13 year timeframe to align with the methodology used to calculate the costs, below. The 13-year average includes five years of zero benefits, reflecting the five years before compliance with the new, more stringent standard is required, and eight years of positive benefits.

[41] If there were a decrease in animal welfare associated with producers switching from the baseline level (considered organic under the current standard) to the level provided under the cage-free standard, a necessary next step in the benefits calculation would be subtraction of the monetized decline in welfare. However, given AMS's understanding of management practices, the agency believes that there would be no such decline in animal welfare associated with switching label claims from organic to cage-free. [42]
http://www.poultrytimes.com/poultry_today/article_1fb7e224-43a6-11e6-b8d7-c7420f870aec.html

meet current demand as evidence that consumers are satisfied with current organic egg production methods. A comment advised that minimizing impacts on producers should be more persuasive than consumer expectations.

(Response) Sustained consumer demand for organic eggs drives the markets for these products. One of the central purposes of the Organic Foods Production Act of 1990 (OFPA) is to assure consumers that organic products meet a consistent standard. This rule creates consistency in production and certification practices and better aligns with the prevalent consumer assumption that organic poultry is outdoors. If these assumptions are not validated in the production standards for these products, consumers would likely shift purchases to alternate products certified under private, third-party standards that clearly delineate outdoor access requirements. This assertion is supported by research showing that consumers are willing to pay a premium for outdoor access, referenced in the section, Benefits of the Final Rule. Based on that research AMS predicts that the organic label could lose market share if consumers cannot readily discern whether the organic label signifies outdoor access but can discern that information from other labels. By establishing clear organic livestock and poultry standards, this rule will shape what information is being conveyed to consumers about organic livestock products through the media, advocacy and trade groups, USDA or AMS outreach, and other sources. With the implementation of this rule, the information conveyed to consumers about the organic label and animal welfare practices will shift to reflect the new requirements and consumers will be better informed.

14. Cage-Free Market Inaccessible

(Comment) AMS received a few comments from egg producers stating that they would face challenges in accessing the cage-free egg market because of the small scale of their operation or the location.

(Response) While AMS cannot assure that every producer of organic eggs who intends to transition to cage-free egg production will be able to find a buyer for cage-free eggs, it is clear that the cage-free market is facing a near-term supply shortage that is unprecedented for the industry.[42] At the time of this writing, cage-free egg production accounts for 7.2 percent of total egg production in the United States. AMS projections estimate that the share of the total egg market for cage-free eggs in 2022, the year this rule will be fully implemented, will be approximately 14.4 percent. Based on an analysis of commitments made by retailers, restaurants, food manufacturers and other buyers to shift to sourcing only cage-free eggs, AMS estimates that the cage-free share will need to grow to 76.6 percent of the total U.S. layer flock by 2026 in order for these buyers to fulfill their commitments. Producers currently operating in the organic market who transition to the cage-free market will face much smaller transition costs than will conventional (caged) producers, since organic operations are already producing without cages. AMS acknowledges that there will be localized barriers to this transition, including a lack of local cage-free buyers or a need for individual producers to identify and connect with these new markets, but on average we expect that the need for two-thirds of the U.S. layer flock to transition to cage-free by 2026 will present ample opportunity for most producers interested in transitioning.

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[42] http://www.poultrytimes.com/poultry_today/article_1fb7e224-43a6-11e6-b8d7-c7420f870aec.html

15. Costs to Comply With CAFO Regulations

(Comment) A number of commenters stated that the requirement for outdoor open access could affect compliance with U.S. Environmental Protection Agency (EPA) regulations for concentrated animal feeding operations (40 CFR 122.23).[43] The comments explain that lack of clarity about whether the proposed rule intended to require vegetation in the outdoor area makes it difficult to gauge the impacts of this rule with respect to compliance with regulations for concentrated animal feeding operations. Comments from producers expressed concern that managing runoff from outdoor areas in order to comply with the Clean Water Act would necessitate costly upgrades to existing nutrient management systems. The costs would entail constructing storm water containment for outdoor areas (e.g. creating berms), additional land acquisition, and administrative and environmental compliance costs.

(Response) In consideration of these comments, AMS has revised § 205.241(c) to require maximal vegetation in outdoor areas to minimize impacts to soil and water quality. Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit requirements for concentrated animal feeding operations do not encompass outdoor areas that maintain vegetation in the normal growing season (see 40 CFR 122.23(b)(1)(ii)). Therefore, if outdoor areas are maintained in compliance with the USDA organic regulations, AMS does not believe this rule would adversely alter an organic operation's status or costs of compliance with respect to EPA regulations for

[43] 40 CFR 122.23 describes the criteria which characterize animal feeding operations: (1) Animals have been, are or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period; (2) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

concentrated animal feeding operations, nor does it expect the rule to subject operations to additional requirements. We have not estimated any costs related to CWA compliance in this analysis. This rule also does not affect NPDES compliance requirements for other aspects of the poultry growing areas, and other federal, state, or local regulatory requirements may apply to the facilities as well.

16. Impact on Mammalian Livestock

(Comment) Many commenters stated that some of the proposed mammalian living conditions would have imposed new compliance costs on these producers. Commenters identified that the following provisions would result in compliance costs:

- Year-round outdoor access areas with 50 percent soil;
- Soil-based outdoor access areas for swine;
- At least one stall per animal in confined housing with stalls;
- The requirement that livestock be able to lay down in full lateral recumbence without touching the enclosure.

Comments from organic dairy producers stated that their operations were designed using outdoor hardened surfaces and would need significant resources to redesign their systems. They cited Natural Resource Conservation Service (NRCS) funding to construct hardened surfaces for livestock to use during the winter and other times when turning cattle out on pasture could damage soil or water quality. Other comments said that they could not comply with the proposed minimum soil requirement and would have to exit organic production because of degradation to soil and water quality.

Swine producers explained that they would need to rebuild their facilities to allow the pigs to have access to soil in the outdoor areas. Other commenters noted that putting

hogs on to soil would increase the risk of feral swine transmitting pseudorabies or other diseases to the organic swine, which could shut U.S. pork products out of many foreign markets, affecting both organic and nonorganic pork producers.

Other commenters noted that scientific research has shown that requiring one stall per animal in free stall barns does not improve animal welfare. These comments noted that some producers constructed free stall barns with less than one stall per animal and would incur costs if required to change that configuration. Dairy producers also stated that stalls were purposely designed to not allow cattle to lie down in full lateral recumbence or turn around in order to prevent injury to the animal and ensure that urine and manure were not deposited where they could contaminate the udder.

(Response) In the final rule, AMS has revised the provisions listed above. We removed the requirement that outdoor access areas have 50 percent soil with the requirement for vegetation to minimize impacts soil and water quality. Under the existing USDA organic regulations, the grazing provisions for ruminant livestock require that the animals be maintained on pasture during the grazing season. Therefore, we expect that the outdoor access areas for ruminant livestock currently meet the new requirement for vegetation. Under the existing regulations, livestock may be maintained on impermeable surfaces rather than on pasture or soil when conditions threaten soil or water quality.

We are also omitting the requirement for soil in outdoor access areas for swine. AMS needs additional time to more fully understand the impacts of altering outdoor access requirements for swine and turkeys.

For mammals, AMS is making two changes from the proposed rule in order to avoid unintended costs. We omitted the requirement for one stall per animal in confined

housing. This will permit the use of free stall barns, which are common among organic dairy operations in certain regions of the country. In addition, AMS removed the requirement that shelter for mammalian livestock must allow animals to lie down in full lateral recumbence. Tie stall barns, which do not allow for this movement, are designed for animal safety and cleanliness. AMS expects that with the above revisions, this action will not impose costs on producers.

17. Organic Egg Supply

(Comment) Some comments addressed AMS's projected impact of this action on the organic egg supply. One comment explained that if aviaries account for 70 percent of organic production and 90 percent of these leave the organic market, this would result in a 60 percent decrease in organic production. Another comment projected that the departure of 90 percent of aviaries would reduce the organic egg supply by 63 percent. One comment noted AMS's statement that new organic egg producers would likely enter the market as a result of this action and asked that we specify the number of new producers and expected production volume.

(Response) In the final rule, AMS is updating the projections on the impacts of this rule on the organic egg supply. The revised projections are based on new data on the organic egg layer population[44], a revised assumption about the land availability for organic egg operations based on public comment, and general economic principles of supply and demand. Based on public comments, we are confident that the organic egg

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[44] USDA AMS LPS Market News (Market News) 2010-2016 Egg Market News report. Available on the Market News website at: http://1.usa.gov/1vlDNgy.
USDA AMS LPS Market News (Market News) 2010-2015 Broiler Market News report. Available on the Market News website at: http://1.usa.gov/1uHsme1.

market will continue to grow through a combination of new entrants and expansion of existing operations.

Between 2007 and 2016, the organic egg market grew 12.7 percent (compound annual growth rate). We expect the organic egg sector will sustain this growth until the year 2020, when any new entrants (i.e., noncertified producers) would need to comply with the outdoor access requirements in this rule to obtain certification. Growth will continue until the year 2022, when all organic producers must comply with the outdoor access requirements. As discussed below, we predict that up to 50 percent of the organic market could transition to cage-free, creating a temporary dip in the supply of organic eggs. The historical growth rate in the organic egg market demonstrates avid and increasing consumer interest in these products and this projected drop would create an opportunity for new producers to enter and for remaining organic producers to expand to fulfill unmet consumer demand.

18. Average Age of Layer Houses

(Comment) AMS received a comment that noted that in the proposed rule AMS acknowledged a 39 percent increase in the number of organic layers between 2013 and 2015, but did not factor any new houses built to house these birds into the average age of a layer house. The comment asked whether, based on this information, AMS intended to adjust the average age and depreciation schedule, and ultimately the implementation timeframe.

(Response) AMS revised the average age of layer houses, the depreciation schedule, and the implementation timeframe based on updated information about the organic layer population. In the proposed rule, AMS used data from the National Animal

Health Monitoring Service 2013 Layers study. That survey provided a breakdown of the age of layer houses through 2013 and AMS calculated the average age of layer houses that were less than 20 years old to be 7.6 years. We calculated the average age among houses that had not fully depreciated in order to set an implementation timeframe wherein the average layer house would fully depreciate.[45]

Between 2014 and 2016, the population of organic layers grew 72 percent.[46] In terms of cost impacts, AMS is concerned with the percentage of production that has not fully depreciated. Therefore, AMS calculated the average age of layer houses among this subgroup. We assumed that the expansion in the organic layer population between 2014 and 2016 was housed in new barns. AMS's recalculation of layer houses shows a bimodal distribution: over 20 percent of layer houses are 20 years or older; 35 percent are 2 years old or less. The revised estimate of the average age of organic layer houses is 2.85 years. This means that the average organic layer house will need about 10 years to fully depreciate.[47]

As discussed below, AMS is not altering the five year implementation period for the outdoor access provisions for layers. Extending the implementation period to 10 years in order for the average organic layer barn to fully depreciate is not tenable for this industry. A longer implementation period, during which time divergent practices would persist, could be detrimental to the majority of organic producers who already comply

[45] AMS calculated the average age among layer houses that were less than 20 years old. We focused on this subgroup in order to more accurately estimate the age of aviary style houses, which are newer systems and likely to be younger structures.
[46] This growth is based on the number of layers reported by AMS Market News between April 2014 and April 2016. Some of this growth was due to operations newly reporting to Market News.
[47] Given the large increases in the organic layer population between 2014 and 2016, the structures that were built in 2016 will need approximately 12-13 years to fully depreciate. AMS estimates that nearly 25 percent of organic layer housing was constructed in 2016.

with this rule but operate at a competitive disadvantage, since it would extend the period during which they incur higher operating costs relative to porch-based systems.

19. Depreciation versus Useful Life of House

(Comment) AMS received comments questioning why AMS based the implementation period on the depreciation timeframe rather than useful life of the house. A number of comments noted a wide discrepancy between the age of some organic layer houses and depreciation timeframe. Comments reported poultry houses that are in good condition and either have been or are expected to be in use for at least 25 years. Therefore, a few comments argued that AMS should base costs on the useful life of the house rather than the depreciation timeframe.

(Response) Depreciation begins when a taxpayer places property in service for use in a trade or business or for the production of income. The property ceases to be depreciable when the taxpayer has fully recovered the property's cost, or when the taxpayer retires it from service, whichever happens first. The IRS defines depreciation schedules for assets, which are usually a set number of years. At the end of the time period, the asset is considered fully depreciated. This differs from the useful life of the structure, which may exceed this time period. A depreciation schedule is a conservative estimate of the useful life. Typically, the depreciation schedule is shorter than the useful life so that expenses are recognized earlier. In that way, if the structure does not live out its expected life, the owner does not incur an unexpected accounting loss. Therefore, it is not unusual for a fully depreciated structure to still be capable of operating for several more years.

The IRS depreciation schedule is thirteen years for a layer house and fifteen years for a broiler house. At the end of the depreciation period, the business owner has recouped his or her investment and the structure is fully depreciated. In this rule, AMS account for costs that accrue to "legacy producers" and new entrants. "Legacy producers" are those individuals who decided to go into the organic business with no knowledge of the costs imposed by this rulemaking. Their assets are in the 1–13 year depreciation window for layer operations, and 1-15 year depreciation window for broiler operations. Given the uncertainty in forecasting impacts in the organic egg market and to capture a range of potential impacts, we have retained the discussion below about reducing costs associated with this rule over the depreciation timeframe for poultry houses. However, for the primary cost estimates, AMS is including the costs for new entrants and legacy producers and has not reduced the reported costs within the depreciation timeframe.

20. Broilers

(Comment) AMS received comments identifying errors in AMS's baseline assumptions about organic broiler production in the cost analysis. One comment explained that AMS (1) underestimated the total organic broiler production used as the baseline, and (2) assumed the indoor stocking density for organic broiler producers was lower (5.37 lbs/sq ft) than that used in practice. According to descriptive data provided in the comment, the vast majority of organic broiler production meets an indoor stocking density of 6.0 lbs/sq ft.[48] The comment estimated that it would cost $25 million for this operation to construct facilities to comply and could cost the entire sector two to three

[48] The comment further explained that the majority of organic broiler producers participate in the Global Animal Partnership (GAP) certification program and are certified at GAP Step 3 which requires an indoor stocking rate of 6 lbs/sq ft.

times that amount. While supportive of the proposed requirements, the comment requested that the implementation period be extended for 3 years to allow time for expanding the existing operations and bringing in new farmers.

(Response) AMS has revised the estimated costs for organic broiler operations by adjusting the following assumptions based on public comment: (1) the baseline organic broiler population is updated from 16 to 80 million; and (2) the baseline indoor stocking rate is updated from 6.5 to 6.0 lbs/sq ft. Based on those variables, AMS projects that the annual cost for organic broiler producers is $2.2 million over 15 years. Most of this cost, $29 million, is a one-time cost to construct housing; AMS has spread this cost over the 3-year implementation period.

AMS expects to mitigate these costs by providing a three-year implementation period for indoor stocking densities for broilers and other meat-type birds. We do not expect that organic broiler producers will need to reduce flock size because they may use the three year implementation period to construct the facilities needed to maintain their production levels.

21. Turkeys

(Comment) A number of comments objected to the proposed requirements for organic turkey production. Specifically, comments objected to the outdoor access requirements and stocking densities for turkeys on the basis that these would impose a significant cost burden and increase disease risk at the expense of animal welfare. One comment projected that compliance with the outdoor access requirements would cost the sector over $200 million for land acquisition and construction of new barns, and additional annual feed costs due to reduced feed efficiency ($8 million) and higher

mortality ($2.7 million). Other comments mentioned that the reduced feed efficiency and increased mortality rate for turkeys would cost about $250,000 per year on a typical farm.

(Response) AMS is not finalizing indoor or outdoor stocking density requirements for turkeys in this rule. In the proposed rule, the stocking densities for turkeys were the same as those for broilers and other meat-type birds. These rates were based on stocking density ranges that the NOSB recommended for broilers. The NOSB did not recommend specific ranges for turkeys. Based on information received in public comment and examination of the administrative records leading to the proposed stocking densities, AMS is deferring the establishment of indoor and outdoor stocking densities for turkeys. This will allow for the equivalent public, deliberative process that led to NOSB recommended stocking densities specific to layers and broilers. Organic turkey producers must continue to comply with the pre-existing requirement in the USDA organic regulations that all livestock have access to the outdoors.

22. Implementation Period

(Comment) AMS received comments about the proposed implementation scheme and schedule. Some comments suggested alternate implementation periods, specifically:

- 5–10 years to allow more time to pay off existing buildings before investing additional money for operational changes.
- 3 years for certified poultry operations;
- No implementation time for noncertified poultry operations that apply for certification;
- Grandfathering existing operations (i.e., existing organic operations would not be subject to the new requirements but could continue to produce organic products);

- 3 years for avian indoor space requirements, to avoid a disruption in the supply of organic chicken;
- 2 year phase-in for indoor stocking density for pullets because of rapid weight changes during 18 weeks;
- At least 1 year for the indoor space requirements to avoid renovating houses when birds are present, since the lifespan of a layer exceeds one year;
- 18 months to implement all provisions other than outdoor access for poultry;
- 3 years for outdoor space requirements for mammalians, especially swine.
- Some comments urged AMS not to delay the implementation of this rule and explained that producers who currently comply with the rule have incurred costs from years of unfair competition that should be factored into the analysis.

(Response) AMS is making one change to the implementation period: we are providing a 3–year implementation period for the indoor space requirements for broilers. For broilers, the indoor space requirements are the main hurdle to full compliance with this rule. AMS understands from comments that three years would provide time for these producers to expand facilities at existing farms and for the certification of new operations. We agree that this timeframe is warranted and adequate for producers to make structural changes and assure consumers of continual progress towards consistent practices in this sector.

AMS is maintaining a 5 year implementation period for the outdoor space requirements for poultry. AMS is concerned that extending this timeframe would perpetuate the issues that drove the NOSB to make its recommendations, including continued divergent practices and a lack of consistency and clarity in the industry. In

addition, grandfathering existing operations would indefinitely perpetuate the inconsistencies in practices that this rule seeks to address.

The proposed rule indicated that the provisions of this rule, with the exception of the outdoor space requirements for poultry, would need to be implemented one year after the publication of the final rule. We expect mammalian operations already comply with this rule, particularly after changes to certain provisions concerning housing and soil in outdoor access areas. We believe this timeframe is responsive to commenters' requests. We are not providing an extended implementation period for swine because we are not amending the outdoor access requirements for those species and do not expect these swine producers will need to change practices to comply with this rule.

While AMS acknowledges the request for more urgent implementation, AMS understands that this rule has wide-ranging implications and that an aggressive and rapid implementation timeline could be destabilizing. We believe that three years would not provide sufficient time for producers who need to expand the outdoor access areas to acquire additional land and potentially convert that land to organic production.

23. Pasture-Raised Labels

(Comment) Some comments have urged AMS to create separate labeling categories such as pasture-raised organic or free-range organic. These comments argue that premium labeling categories would preserve the existing market for organic eggs and create additional markets based on more stringent standards and higher premiums.

(Response) AMS is not creating any additional labeling category to differentiate production practices for organic poultry. The terms "pastured" and "free-range" are commonly used within the industry but are not currently regulated. The Organic Foods

Production Act of 1990 authorizes the USDA to establish standards governing the marketing of certain agricultural products as organically produced. Establishing regulations for the use of production-based marketing claims in addition to organic is not within the authority of the USDA organic regulations. Further, AMS expects that trying to define and regulate these terms in the context of organic poultry production would be problematic and would likely cause confusion in the marketplace.

24. Access to Credit

(Comment) A few comments stated that this rule would make it difficult for producers to secure credit for future capital improvements or expansion. These comments explained that lenders would be wary of extending credit because of the potential for further regulatory changes.

(Response) Current disparities in organic livestock production practices and the lack of clarity in the regulations have created uncertainty among producers about the current and future requirements for organic livestock production. They have also created confusion among consumers about the attributes of organic products, which could negatively affect demand. AMS expects that this regulatory change will bring greater stability and security to the market for organic livestock products. The addition of detailed requirements to the organic livestock regulations has been anticipated for years as the NOSB focused on recommendations for this action; the NOSB recommendations issued between 2009 and 2011concluded those deliberations and are the core sources for this rule. AMS does not consider this rulemaking action to be an indication of a succession of regulatory changes that would affect organic livestock producers.

25. Transport Requirements – Consistency with Requirements of Other Countries

(Comment) AMS received a comment that the transport requirements for livestock in Australia would not be consistent with the requirement that producers must make arrangements for livestock to have water and organic feed if transport time exceeds twelve hours (§ 205.242). The comment states that the Australian Animal Welfare Standards for the Land Transportation of Livestock ensure animal welfare and require that cattle over 6 months old which have been off water for 48 hours must have "a spell" for 36 hours before starting another journey. The comment also described a remote region within Australia where cattle are transported long distances. The comment did not describe any costs associated with complying with the transport requirements in this rule.

(Response) AMS understands that the transport requirement in this rule is more stringent than the transport requirement in Australia described above. According to the Organic Integrity Database, there are 245 certified operations in Australia that produce cattle, and one producer is located in the remote region referenced in the comment. Given that there is no description of potential impacts/costs and no similar comments from other potentially affected entities, we are not including estimated costs for compliance with § 205.242.

C. Baseline

1. Data Sources

This baseline focuses on the current production of organic eggs and the market for this commodity. AMS used multiple data sources, listed below, to describe the baseline and inform our assumptions for the cost analysis:

- 2011-2016 Organic Industry Surveys, published by the Organic Trade Association (OTA). The Nutrition Business Journal conducts this annual survey on behalf of

OTA to summarize market information and trends within the organic industry across food and non-food sectors.[49]

- 2014 Organic Survey, National Agricultural Statistics Service (NASS).[50] This survey reports acreage, production, and sales data for organic crops and livestock.
- 2011 Organic Production Survey, National Agricultural Statistics Service (NASS).[51] This survey reports acreage, production, and sales data for organic crops and livestock.
- The National Animal Health Monitoring and Surveillance (NAHMS) 2013 Layers study.[52] This study includes a section on organic egg production in the U.S., which provides an overview of various practices on organic layer operations.
- AMS also used summary information from the USDA Livestock, Poultry and Grain Market News Service (Market News) egg and broiler reports from 2010 to 2016.[53,54]
- Organic Egg Farmers of America (OEFA), Organic Poultry Industry Animal Welfare Survey, 2014. OEFA independently conducted and submitted the results

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[49] Organic Trade Association (OTA)/Nutrition Business Journal, 2014 Organic Industry Survey. Nutrition Business Journal conducted a survey between January 7, 2016 and March 25, 2016 to obtain information for their estimates. Over 200 organic firms responded to the survey. NBJ used secondary data from SPINS, IRI Group, Natural Foods Merchandiser's annual industry survey, public company financial filings and media reports to supplement the survey and build market statistics.
[50] The NASS 2014 Organic Survey is accessible at: http://www.agcensus.usda.gov/Publications/Organic_Survey/.
[51] The NASS 2011 Organic Production Survey is accessible at: http://usda.mannlib.cornell.edu/MannUsda/viewDocumentInfo.do?documentID=1859.
[52] The NAHMS Layers 2013 Part IV: Reference of Organic Egg Production in the United States, 2013, may be found at the following link: http://1.usa.gov/1IkWw22https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/monitoring-and-surveillance/nahms/nahms_poultry_studies.
[53] USDA AMS LPS Market News (Market News) 2010-2016 Egg Market News report. Available on the Market News website at: http://1.usa.gov/1vlDNgy.
[54] USDA AMS LPS Market News (Market News) 2010-2015 Broiler Market News report. Available on the Market News website at: http://1.usa.gov/1uHsme1.

of a survey of organic egg and broiler producers. There were 157 survey responses, representing 8.33 million organic layers and 12 million organic broilers. The survey was distributed to certified organic poultry producers in July 2014.

- Egg Industry Center (EIC) Survey of U.S. Organic Egg Production. EIC independently conducted and submitted this survey which was distributed to organic egg producers with at least 30,000 hens. There were 23 respondents to this survey representing 5.07 million hens.
- Economic Impact Analysis of Proposed Regulations for Living Conditions for Organic Poultry, Phase 3 Report by T. Vukina, K. Anderson, M.K. Muth and M. Ball. This report, prepared for the NOP, estimated the costs for implementing the NOSB recommendation on avian living conditions. The analysis in this proposed rule essentially updates and expands the model used by Vukina et al., to estimate current costs and different producer response scenarios.

2. The Organic Egg and Poultry Market

According to the 2015 Organic Trade Association (OTA) Industry Survey, U.S. sales of organic food, fiber, and agricultural products totaled over $43 billion in 2015, up 10.8 percent from 2014.[55] Sales of organic eggs reached $678 million in 2015, an increase of 32 percent over the previous year. This sector has experienced continued double-digit sales growth since 2010, as shown in Table 5. The rate of growth may be

[55] OTA, 2016 Organic Industry Survey. According to this source, the marked increase in sales of organic eggs was attributed to high prices for conventional eggs, which narrowed the price gap for organic eggs and boosted demand for those products.

affected by several factors, including: (1) the price gap between organic and non-organic eggs based, for example, the cost of organic and non-organic feed – this may slow or increase growth depending on size of the gap[56]; (2) factors other than price driving consumer purchasing decisions, e.g., concerns about production practices; (3) competition from cage-free labels; and (4) accuracy in forecasting consumer demand.

In 2015, poultry sales ($494 million) grew nearly 13 percent and accounted for the greatest portion (60 percent) of the organic meat, poultry and fish market sector. As shown in Table 5, annual sales of organic poultry have climbed steadily since 2010, while retail prices for organic boneless, skinless breasts have fallen.[57] In comparison to beef, pork, and other meat products, poultry faces fewer obstacles to growth because feed for poultry is cheaper and time to market is shorter.[58]

[56] Other factors may affect the price gap between organic and nonorganic eggs. The outbreak of high pathogen avian influenza in 2015 caused prices of conventional eggs to spike and narrow the price gap.
[57] Retail prices for organic whole fryers per pound have fluctuated between 2010 and 2014, peaking in 2012 and falling the following two years.
[58] OTA, 2010-2016 Organic Industry Surveys.

Table 5. Organic eggs and broilers market—retail sales.

| Subcategory | Year | Annual Sales (million $)[a] | Percent growth | Average retail price[b] (dozen eggs[c]/boneless, skinless breast) |
|---|---|---|---|---|
| | 2015 | 678 | 32% | $4.19 |
| *Eggs* | 2014 | 514 | 17% | $4.16 |
| | 2013 | 439 | 16.9% | $4.16 |
| | 2012 | 375 | 17.5% | $4.11 |
| | 2011 | 319 | 20.2% | $3.90 |
| | 2010 | 266 | 10.4% | $3.85 |
| *Poultry* | 2015 | 494 | 9.2% | $7.45/lb |
| | 2014 | 453 | 12.9% | $7.37/lb. |
| | 2013 | 401 | 9.3% | $7.20/lb. |
| | 2012 | 367 | 10.8% | $7.38/lb. |
| | 2011 | 331 | 12.5% | $7.49/lb. |
| | 2010 | 294 | 6.3% | $7.54/lb. |

[a] Organic Trade Association, 2016 Organic Industry Survey.
[b] Based on supermarket advertised sale prices reported by AMS Livestock, Poultry and Seed Market News.
[c] Brown, Large, Grade A.

Table 6 shows the geographical distribution of organic egg and broiler production in the U.S., based on the USDA 2014 Organic Survey. According to that survey, there are an estimated 722 organic egg producers and 245 organic broiler operations. Five states are responsible for over one-third of organic egg production.[59] Pennsylvania and

[59] Given the growth in organic egg production between 2014 and 2016, AMS expects that geographical distribution of production has also shifted. Based on current data from AMS Market News, the top four ranking states for organic egg

California operations comprise only 7.5 percent of the total number of organic poultry producers, but produce 35 percent and 32 percent, respectively, of organic eggs. California also has 6.5 percent of U.S. organic broiler operations, which produce about 54 percent of organic broilers. Conversely, the production from states which report higher numbers of broiler operations, such as Wisconsin and Maine, is less than 1 percent of production. Several states do not report total production volume for broilers in order to protect confidentiality. Given these omissions, the data does not provide details of nearly 50 percent of state-wide production levels for organic broilers.[60]

production are: California, Michigan, Kansas and Missouri. The ranking in the above table is based on percent of organic egg operations, so there may be states that have more organic egg operations but do not produce as many eggs as other states with fewer, large-scale producers.

[60] For the cost analysis, AMS relied upon industry data provided in public comments to estimate baseline population of organic broilers. In this final rule, we updated the baseline number of broilers used in the proposed rule from 16 million to 80 million. Therefore, the data above serves to inform about the geographical distribution of organic egg and poultry production, but is not used as the baseline data for the cost analysis.

Table 6. Top states with organic egg and poultry operations compared to production.

| **Organic Eggs[a]** | | | | |
|---|---|---|---|---|
| | **Number of Organic Egg Operations** | **Percent of US Organic Egg Operations** | **Total Production (dozens)** | **Percent of US Organic Egg Production** |
| United States | 722 | | 166,313,847 | |
| *Top 5 States*[b] | 334 | 46.1% | 61,157,980 | 36.7% |
| Wisconsin | 97 | 13.3% | 7,450,488 | 12% |
| Iowa | 74 | 10.2% | 8,628,066 | 14% |
| Maine | 55 | 7.6% | 4,051,040 | 7% |
| Pennsylvania | 54 | 7.5% | 21,623,599 | 35% |
| California | 54 | 7.5% | 19,449,787 | 32% |
| **Organic Broilers[a]** | | | | |
| | **Number of Organic Broiler Operations** | **Percent of US Organic Broiler Operations** | **Total Production (birds)** | **Percent of US Organic Broiler Production[d]** |
| United States | 245 | | 43,255,401 | |
| *Top 5 States*[b] | 130 | 53% | 23,319,734[c] | 53.9% |
| Wisconsin | 32 | 13% | 21,104 | 0% |
| Pennsylvania | 30 | 12.2% | N/A | N/A |
| New York | 28 | 11.4% | N/A | N/A |
| Maine | 24 | 9.8% | 23,134 | 0% |
| California | 16 | 6.5% | 23,275,496 | 53.8% |

[a] Source: National Agricultural Statistics Service, "2014 Organic Survey."
[b] States ranked by both number of farms and total production.
[c] This total does not include production for Pennsylvania and New York. The 2014 Organic Survey does not disclose the broiler production data for those states. In order to protect confidentiality, any tabulation which identifies data reported by a respondent or allows a respondent's data to be accurately estimated is not disclosed.
[d] There were other states that had higher production than the states reporting in this table, but had fewer organic broiler operations. Kentucky produced 27,685 broilers, but only had 7 organic broiler operations. Michigan produced 13,018 broilers, but had only 6 organic broiler operations.

D. Alternatives Considered

AMS considered alternatives to this action that ranged from non-rulemaking initiatives to adopting practice requirements that varied from those recommended by the NOSB, specifically varying the stringency of certain requirements for avian living conditions. AMS attempted to use performance standards to clarify the requirements for outdoor access for poultry by issuing guidance in 2010. Based on public comments on that guidance, AMS determined that the organic poultry sector needed more prescriptive

guidelines to clarify the intent of the requirement for outdoor access than could be conveyed in guidance. Given that guidance would continue to permit broad variations in outdoor access practices among organic poultry producers, and would not fulfill the statutory objective of the organic certification program to ensure consumers that organically produced products meet a consistent standard (7 U.S.C 6501(2)). Because guidance would not necessarily compel significant changes in practice, there would be no costs to producers. However, this option would not realize potential benefits of sustained consumer trust in a standard that is clear and consistently applied and enforced. The continuation of inconsistent practices, particularly regarding outdoor access for poultry, facilitates broader, negative publicity about the organic label which can dissuade consumers from this market. Therefore, AMS conceded that a stronger, regulatory option was necessary.

We acknowledge here, and have discussed above, that some comments on the proposed rule encouraged AMS to conduct more consumer education about the meaning of the term “organic” rather than pursue regulation changes. While AMS acknowledges the value of and is committed to ongoing consumer education and transparency about organic production, certification and labeling practices, we understand that consumer interest in organic products is a key factor that prompted NOSB action for more descriptive organic livestock production standards. In addition, the NOSB and AMS have heard from numerous organic poultry producers throughout the U.S., representing various sizes of operations that support clarifying outdoor access requirements for organic poultry in a manner that would require that birds be on vegetated ground. A number of

these producers contend that it is difficult to compete with operations that do not provide full, open outdoor access areas, but still use the organic label on their products.

Ultimately, a consumer education campaign about the meaning of organic while disparities in practices persist would have limited effectiveness, since it would not help consumers more clearly discern the attributes of organic claims on specific products. This rule will shape information, which is conveyed to consumers through various means, about the organic label on livestock products. As this rule permits a clear and narrow set of practices, specifically for outdoor access for poultry, the information that reaches consumers and impacts consumer perception and purchasing decisions will reflect greater consistency. The use of informational measures alone would have minimal costs but would preclude accrual of benefits. Therefore, in the interest of a transparent marketplace, AMS is pursuing rulemaking as the most effective intervention on behalf of consumers, organic producers, and producers who may consider entering the organic poultry market.

AMS also received comments urging that the agency develop standards for additional descriptive terms on organic labels for poultry, such as “pasture-raised organic” and “free-range organic” in this rulemaking. AMS has authority to establish organic standards but does not have the authority to establish standards for “pasture-raised” or “free range” under the USDA organic regulations. However, this rule does not impede organic producers from using those additional labeling claims, as applicable. While such labels may provide more information to consumers, AMS does not have authority to establish standards for these terms.

In regards to alternatives to the practice standard requirements, AMS reviewed options for indoor stocking density, outdoor space requirements for layers, and implementation timeframes. For each alternative, AMS examined how the provision aligned with the animal welfare objectives supported by the organic community and the potential costs and benefits to organic producers. These options are presented and discussed below.

Table 7. Indoor stocking density options—laying hens.

| Alternative | Basis |
|---|---|
| Option 1 – Minimum of 2.0 $ft^2$ per layer | Consistent with the NOSB recommendation. This would provide more space per bird than private animal welfare standards. |
| Option 2 – Minimum of 1.8 $ft^2$ per layer | Provides increased space for birds while curtailing costs. On par with most stringent private third-party animal welfare standard. |
| Option 3– maximum 2.25 to 4.5 lbs/$ft^2$- depending upon the housing system.[a] (Final rule) | Consistent with current industry practice for many organic egg producers. Aligns with the majority of private third-party animal welfare certification programs. |

[a] This is equivalent to 1.0 – 1.5 $ft^2$ per bird. The reasoning and method for converting to pounds per square foot is discussed in the preamble section for Avian Living Conditions.

The NOSB recommended indoor and outdoor space metrics for poultry as a component of broad measures to enhance animal welfare practices on organic livestock operations. Citing consumer demand for humane treatment of livestock, the proliferation of animal welfare certification labels, organic standards of major trading partners (e.g., Canada, the European Union), and varying practices among organic producers, the NOSB determined it was necessary to set maximum stocking densities for organic poultry.[61] The

[61] The European Union Organic Standards and the Canadian Organic Regime Standards specify indoor and outdoor stocking densities for various types of livestock, including laying hens: 6 birds/$m^2$ indoors; 4 birds/$m^2$ outdoors. After

NOSB aimed to develop stringent, comprehensive, and consistent animal welfare requirements for organic livestock and poultry production that would meet consumer demand and foster equitable certification decisions and fair competition among producers, consistent with the objectives of OFPA. The costs and benefits of the proposed alternatives are discussed in more detail in the next section below.

1. Indoor Stocking Density

AMS considered a range of indoor stocking densities, including 2.0 $ft^2$/bird or 1.8 $ft^2$/bird for all layer operations, or 1.0–1.5 $ft^2$/bird depending on the housing system. The NOSB recommended a minimum of 2.0 $ft^2$ per hen indoors and explained that the metric could be adjusted during colder months to allow producers to increase the density to maintain heat in poultry houses. In order to examine the difference in costs, AMS also considered setting the indoor stocking density at 1.8 $ft^2$ to parallel the most stringent indoor stocking density of a private animal welfare certification standard.

AMS is not pursuing the 2.0 $ft^2$/bird or 1.8 $ft^2$/bird options for all housing types. The estimated costs to implement a 1.8 $ft^2$/bird indoor stocking density range between $70 million to $260 million annually depending on various producer response scenarios.[62] AMS determined that the estimated costs associated with the alternatives for

converting the units for the stocking densities recommended by the NOSB, the NOSB would require slightly more space per bird indoors and significantly less outdoors. This rule would adjust the indoor stocking density to allow more birds to occupy a given unit of indoor area.

[62] In developing the likely producer responses to the proposed rule, AMS evaluated the costs for 4 different producer response scenarios: (1) all producers incur costs to maintain their current level of production; (2) some producers maintain their current level of production and some transition to the cage-free egg production; (3) all producers comply with the proposed rule by maintaining their existing facilities (and reduce the number of birds to meet the indoor stocking density); and, (4) some producers comply by maintaining existing facilities while other producers transition to cage-free egg production. Producers who exit to the cage-free market would be expected to have lower net returns, compared to organic eggs, as discussed below in the Costs section. The most costly scenario would be when producers maintain their existing facilities and reduce production to comply with more stringent indoor stocking rates that would permit fewer birds. The estimate for maintaining current levels of production included estimated costs for constructing additional facilities ($70/hen), except for a feed mill.

reduced stocking densities would be unduly burdensome on individual organic egg producers and could cause a sizeable reduction in the supply of organic eggs. We believe that requiring 2.0 $ft^2$ or 1.8 $ft^2$ per bird would adversely impact most organic egg production and cause approximately 80 percent of current organic egg production to exit the organic market. A reduced number of layers as a result of market exit would result in lost revenue and increased marginal operating costs from the reduced number of birds or compel producers to incur high capital costs for building additional housing to accommodate existing production levels. AMS did not consider a less stringent option in this case (e.g. 0.5 – 1.0 $ft^2$) because we believe that it would have little impact on the costs or the benefits of this action. Based on public comments and knowledge of the industry, AMS is aware that the indoor stocking densities under this rule are in line with the current industry standard. A less stringent option would likely not impact production practices and associated costs to producers, as most would continue current practices to meet other third party standards.

AMS is setting the indoor stocking density based on housing systems as follows: 4.5 lbs/$ft^2$ (equivalent to 1.0$ft^2$ per bird) for poultry in mobile housing and aviary/multi-level housing; 3.75 lbs/$ft^2$ (1.2 $ft^2$ per bird) for poultry houses with slatted/mesh flooring systems and 3.0 lbs/$ft^2$ (1.5 $ft^2$ per bird) for floor litter housing. These metrics are consistent with the standards of a common third-party animal welfare certification program. Based on public comments and knowledge of the industry, we expect that most organic poultry producers currently meet or exceed those levels. The tiered indoor stocking densities will foster a consistent level of poultry living conditions. It will also ease any disparate burden on producers in colder climates while maintaining consistency

throughout the industry and meeting consumer expectations for organic poultry production. In addition, we did not receive comments about adverse cost implications for adopting the indoor stocking density metrics for layers as proposed.

2. Outdoor Stocking Density

The USDA organic regulations require that livestock have year-round access to the outdoors, fresh air, direct sunlight, and shade (§ 205.239(a)). Other than identifying circumstances when livestock may be temporarily confined (§ 205.239(b)), the regulations prior to implementation of this final rule did not provide details on the frequency or duration of outdoor access or size of the outdoor space. AMS is establishing outdoor stocking densities for poultry and clarifying requirements for outdoor areas.

AMS is requiring that layers must have a maximum of 2.25 pounds of bird/$ft^2$ (approximately to 2.0 $ft^2$ per bird) in the outdoor area.[63] Under this rule, outdoor areas need to be large enough to hold all birds in the flock simultaneously, with a maximum of 2.25 pounds of bird/$ft^2$. This is consistent with the NOSB recommendation for minimum outdoor stocking density.[64] The NOSB selected that minimum threshold to protect soil quality and minimize parasite loads.

3. Vegetation Requirement

AMS considered whether to have a vegetation requirement in the outdoor access area for poultry. The NOSB stipulated that outdoor access areas be soil-based and have at

[63] As discussed above, this is approximately equivalent to 2.0 square feet per bird. AMS changed the units to pounds per square foot so that the actual space per bird is similar across birds of different species or breeds.
[64] The NOSB recommended a range of 2.0 $ft^2$ – 5.0 $ft^2$ per bird in the outdoor areas, explaining that a minimum of 5 $ft^2$ would ensure the availability of vegetation to birds during the growing season. In addition, we believe that a minimum 5.0 $ft^2$/ bird outdoor stocking density would be untenable because of the additional land needed.

least 50 percent vegetation cover. The proposed rule required that outdoor access areas have at least 50 percent soil, but did not require vegetation in that area.

Based on public comments, AMS understands that the absence of vegetation could be costly for producers in two key ways: (1) organic producers that have an NRCS-approved conservation plan would risk the loss of financial and technical assistance for conservation practices; and (2) maintaining livestock on soil without vegetation could jeopardize compliance with the regulations for concentrated animal feeding operations under the Clean Water Act. Both of these costs are linked to the potential adverse impacts to soil and water quality from having a group of livestock on bare soil. To avert these costs, AMS is requiring that outdoor access areas have maximal vegetation. This means that outdoor areas should have sufficient vegetation to protect soil and water quality, and meet any relevant requirements, such as those of NRCS or the Clean Water Act. The exact amount of vegetation may vary depending on the unique circumstances of each operation. AMS expects that this will entail minor costs for reseeding and fencing the outdoor access areas and we have included outdoor area maintenance expenses in the costs estimates. AMS estimates that the total costs for establishing and reseeding pastures will be about $85,000. This is based on estimates: $130/acre; 657 additional acres needed to accommodate all layers at the required outdoor stocking density.[65] The benefits of maintaining vegetation to support soil and water quality and encourage birds to use outdoor areas include avoided costs to producers of noncompliance with requirements

[65] To obtain the estimated cost per acre, AMS used a source on the costs to establish and maintain pasture with grass-legume mix for ruminants. The costs for the initial establishment is nearly $100/acre and about $115/acre for annual maintenance. AMS added 10 percent to these costs to account for organic seeds. Iowa State University Extension, 2000, AG-96, available at: http://www2.econ.iastate.edu/faculty/duffy/Pages/pastureandhay.pdf

under the Clean Water Act. NRCS also offers financial assistance to improve environmental and animal welfare outcomes that is tied to producer compliance with maintaining vegetation and other beneficial practices.

AMS considered minimum space requirements of 2.25 pounds/$ft^2$ to accommodate either 10 percent, 50 percent, or 100 percent of layers in a house to be outdoors at one time and received comments supporting this as a less costly alternative. AMS examined the 10 and 50 percent alternatives based upon information that only a portion of a flock is outdoors at any given time; comments cited research which concludes that the percent of a flock that ventures out of the house is generally under 35 percent. AMS acknowledges that only a portion of the flock will likely be outdoors at a given time, and other birds will remain in the indoor space even when outdoor space is accessible. A number of public comments urged AMS to adopt lower outdoor stocking densities, requiring more space per bird, to allow freedom of movement and natural behaviors, such as stretching wings and scratching and pecking without denuding the soil. AMS received ample public comments comparing the stringency of the proposed outdoor access requirements with those of other third-party certification programs. Under the 10 and 50 percent scenarios, the maximum stocking density would be exceeded whenever more than 10 percent or 50 percent of the flock is outdoors and would impede a producer's ability to maintain maximal vegetation in the outdoor space. When all birds do not use the outdoor area simultaneously, the birds that are outdoors will effectively have more space per bird which will assist producers in maintaining adequate vegetated cover.

AMS estimates that the monetary costs of a 10 percent or 50 percent alternative would be lower than the estimated costs of this rule, since outdoor space requirements are

the main constraint to compliance. Costs under a 10 percent alternative would be significantly lower because operations would need to acquire less land for outdoor space. As shown in Table 8 below, AMS estimates that the costs associated with acquiring and maintaining land for layers could be reduced by as much as 90 percent. In this scenario outdoor access for birds would also be scaled back significantly which would reduce costs associated with variables such as production volume, mortality rate, and feed costs, however data is not available to quantify these outcomes or total costs under this alternative. While this scenario would be associated with lower cost, AMS notes that requiring outdoor space for just 10 percent of the flock would fail to achieve a key objective of this rule and would not produce the intended benefits.

Requiring that outdoor areas accommodate 50 percent of the flock would have a smaller impact on overall costs. Under this alternative, AMS estimates that land costs would be reduced by roughly 50 percent. Again, additional differences under the 50 percent alternative that could affect total cost of the rule include lessened impacts on production volume and operating expenses (outside of land costs) due to changes in factors such as feed costs, mortality, lay rate, etc. However, AMS notes that any cost reductions associated with these factors would likely be small because the 50 percent alternative mainly impacts the requirement, and would likely not have as much of an impact on bird behavior (how many birds go outside).

Under these 10 percent or 50 percent alternatives, AMS expects that most organic producers would not need to acquire additional land and birds would have reduced exposure to predators and parasites. A lower land requirement may also impact the number of operations that remain in organic production compared with those that move

to cage-free production, however AMS is unable to estimate what this number may be. On the other hand, higher densities of birds in outdoor areas would be detrimental to soil and water quality, and parasite loads. Moreover, the success of the organic label depends upon practices that reflect the preferences of the participants and consumers who chose organic eggs in the marketplace. Outdoor access requirements that are lenient in comparison to other third-party certification could negatively impact consumer confidence. Adequate outdoor access is a core concern among organic consumers, and outdoor areas that accommodate relatively few birds would not align with consumer expectations and would perpetuate divergent practices that result in an uneven playing field among producers.

Table 8. Percent of flock indoors and cost

| Percent of flock outdoors | Land costs | Other impacts |
|---|---|---|
| 100% | 3,812,000 | Meets consumer expectations and protects value of organic label; optimal protection for soil and water quality and minimized parasite loads; increased mortality rates; reduced feed efficiency; reduced lay rate, etc. |
| 50% | 1,906,000 | Adverse impacts on soil and water quality when more than 50% of flock is outdoors at one time; small improvements in mortality rates, feed efficiency, lay rate, etc; fewer operations move to cage-free market. |
| 10% | 381,200 | Adverse impacts on soil and water quality when more than 10% of flock is outdoors at one time; reduced mortality rates, improved feed efficiency; improved lay rate, etc.; fewer operations move to cage-free market. |

4. Porches as Outdoor Areas

AMS is aware that the use of porches for outdoor access on organic operations is contentious, and the Agency deliberated extensively over whether porches should count as outdoor space. In general, a porch is a screened-in area with a solid floor and roof overhead. Although the vast majority of organic poultry operations do not use porches,

AMS estimates that about 70 percent of organic egg production comes from operations that use porches exclusively to provide outdoor access. The practice of using porches to provide outdoor access in organic poultry operations gained traction among producers following a 2002 AMS administrative appeal decision that allowed the certification of one poultry operation planning to provide outdoor access via porches. This appeal decision was used by some poultry producers to justify that porches may satisfy the requirement to provide outdoor access for poultry under the USDA organic regulations. Organic production systems utilizing porches to provide outdoor access have increased since that time. In 2011, the NOSB, with the support of numerous producer and consumer stakeholders, unanimously recommended that enclosed, covered porches should not be considered outdoor access. Consistent with that recommendation, enclosed porches are not adequate to provide the sole means of outdoor access under this final rule. However, AMS has revised the final rule to allow porches to be counted as either indoor space or as part of the calculation of outdoor space, provided that they meet certain parameters for both uses.

Proponents of porches state that they are essential for biosecurity to protect poultry from predation and disease that could result from contact with wild animals or feces. However, producers and other stakeholders who oppose porches state that porches provide a competitive advantage – for example, through decreased feed conversion rates (less feed to produce a dozen eggs) – and that organic consumers expect that birds will have direct access to soil and vegetation. Opponents have challenged the contention that porches are essential to biosecurity, citing other disease control methods, such as the use of netting over outdoor areas and placing footbaths at the entrances to houses. Further,

they note that the outbreak of Highly Pathogenic Avian Influenza (HPAI) that began in December 2014 in the U.S. was detected in 211 commercial flocks, which are primarily exclusively indoor operations, and in 21 backyard flocks, which generally provide ample outdoor access.[66] AMS, after consulting with sister agencies, interprets the data above to mean that there are biosecurity risks associated with any type of operation, and those risks can be managed to minimize risk in outdoor poultry operations.

Enclosed porches do not provide contact with soil or vegetation nor align with consumer expectations about outdoor access conveyed through public comments and NOSB recommendations. Allowing enclosed porches to provide outdoor access would not address the disparity in outdoor access provisions within this sector. This disparity leads to consumer confusion about husbandry practices and may place the vast majority of organic producers, who currently provide outdoor access through soil and vegetation, at a competitive disadvantage. It would not meet the OFPA's intent to assure consumers that organically produced products meet a consistent and uniform standard. AMS is concerned that allowing porches as the sole area for outdoor access could erode consumer demand for organic eggs and lead to an exodus of consumers and producers for other labeling programs. In comparison to the outdoor space needed for outdoor access, porches cover a small portion, so a producer would still need to provide access to land that extends beyond the porch area. Therefore, this final rule prohibits enclosed porches to be counted as outdoor space. However, to provide flexibility, the final rule does clarify

[66] USDA APHIS reports and data can be found at the following site: https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/animal-disease-information/avian-influenza-disease/!ut/p/z1/04_iUlDg4tKPAFJABpSA0fpReYllmemJJZn5eYk5-hH6kVFm8X6Gzu4GFiaGPu6uLoYGjh6Wnt4e5mYG7mam-l76UfgVFGQHKgIAz0VrTQ!!/

under § 205.241(c)(7) that porches that are not enclosed (e.g. with a roof, but with screens removed) and allow birds to freely access other outdoor areas can be counted as outdoor space.

5. Implementation Period

AMS considered different implementation periods to mitigate the costs of this rule. In the proposed rule, AMS allotted a five year implementation period for outdoor access requirements for poultry for certified operations; up to three years for operations that become certified after publication of the final rule; and one year to implement all other requirements. We concluded with a five-year implementation period in consideration of balancing cost mitigation and the need to provide clarity and address divergent practices in the industry.

While we expect that organic egg producers will bear a greater cost burden for this final rule, this implementation period should also align with upgrades or new construction for broiler houses for approximately 16 percent of production, based on the number of birds that could not be accommodated under the new indoor stocking density requirements. We note that 15 percent of broiler houses generally are 5 years old or less and have a depreciation rate of 15 years, per the OEFA survey or 10 years per IRS Publication 225.[67] While organic broiler houses are likely to be newer on average, given that the NOP was not established until 2002, we anticipate that the majority of organic broiler houses would be nearing the end of useful life when this rule is implemented.

[67] This reflects the percentage of broiler houses in the U.S., not specific to organic operations that were 15 years old or less in 2006. We applied that proportion to this analysis because the population of broilers has grown since that time, so houses that were older than 15 years are likely to have been upgraded or renovated in the interim. This data was reported in MacDonald, James M. *The Economic Organization of U.S. Broiler Production.* Economic Information Bulletin No. 38. Economic Research Service, U.S. Dept. of Agriculture, June 2008. The depreciation rate was reported in the Organic Egg Farmers of America Survey conducted in July 2014 and cited above.

Further, AMS understands from public comments that broiler producers need 3 years to transition land or construct additional facilities to maintain production levels and comply with this rule, and that this will cost the industry $50 to $75 million. These commenters supported the broiler indoor and outdoor space requirements but requested a 3-year implementation period. AMS is granting this request for a 3-year implementation period to implement the indoor space requirements for broilers.

AMS also considered a 3-year period to fully implement all provisions. We considered this as a minimum because it aligns with the 3-year period that is required to transition land to organic production if there have been applications of prohibited substances (§ 205.202(b)).[68] We estimate that 50 percent of organic egg production may need additional land to meet the outdoor access requirements. This short timeframe would impose an unduly immediate cost burden and deter producers from exploring options to remain in organic egg production, potentially causing a sharp reduction in the supply of organic eggs.

Conversely, a 10-year implementation period could erode consumer demand for organic eggs if the organic label requirements do not keep pace with growing consumer preferences for more stringent outdoor living conditions. Further, it is ambiguous whether this would result in substantial cost reduction as costs are linked to the population of layers. Given the growth in the organic egg market, particularly in the capacity of aviary operations, a longer implementation period is unlikely to substantially reduce costs.

[68] Section 205.202(b) of the USDA organic regulations requires that land from which harvested crops will be represented as organic must have had no prohibited substances, as listed in § 205.105, applied to it for a period of 3 years immediately preceding harvest of the crop. Further, organic livestock are required to have organically produced feed (§ 205.237(a)).

Prolonging the disparity in organic egg production practices and the resulting consumer confusion would be detrimental to the numerous organic egg producers who could readily comply with this rule. They would continue to operate at a competitive disadvantage to operations that provide less outdoor access and have greater feed efficiencies and lower mortality rates.

E. Consumer and Producer Responses as Drivers of Benefits and Costs

Table 9 shows the various scenarios from producer and consumer responses to the provisions and the impact on costs/benefits for the organic industry.

Table 9. Consumer and producer responses and connection to cost.

| **Consumer and Producer Responses** | **Cost/Benefit Impact** |
|---|---|
| Producers change their practices to meet the new, more stringent organic standards; consumers continue consuming organic agriculture products | Costs: incremental cost of producing to new, more stringent organic standards, relative to existing organic standards<br>Benefits: incremental credence benefits of consuming products produced according to new, more stringent organic standards, relative to existing organic standards* |
| Producers discontinue (or avoid newly achieving) organic certification; consumers switch from products meeting existing organic standards to non-organic versions of similar products | Cost savings: incremental savings of producing with non-organic practices, relative to existing organic standards, foregone profits<br>Benefits (reduced): incremental credence benefits of consuming products produced according to non-organic practices, relative to existing organic standards* |
| Producers discontinue (or avoid newly achieving) organic certification; consumers switch to dissimilar products | Impacts (may be positive or negative): incremental production costs, foregone profits, incremental credence benefits, incremental non-credence attributes |
| * The price premium that consumers are willing to pay for certified organic products correspond to benefits, as that term is used for purposes of analysis under Executive Orders 12866 and 13563, only if organic production practices yield real improvements in areas such as animal welfare, human health or environmental outcomes. | |

F. Benefits of the Final Rule

This rule will bring specificity and clarity to the regulations relating to animal welfare practices for organic livestock and poultry. Greater clarity and specificity will

foster the uniform application of the practice standards in organic production, animal transport, and slaughter. This, in turn, will maintain consumer confidence driving organic purchases and facilitate market access for producers. By tightening the requirements for outdoor access, this rule will improve the clarity of information in the marketplace about the significance of the organic label on livestock products. It is essential that the seal is supported by clear regulations that ensure uniformity in production practices. Organic products cannot be distinguished from non-organic products based on appearance; consumers rely on process verification methods, such as certification to a uniform standard, to ensure that organic claims are true. For this reason, organic products have been described as "credence goods" in the economics literature. [69,70] Credence goods have properties that are difficult to detect, both before and after purchase. Organic livestock products are an example of a "credence good" for which consistent verification to a common production standard across the sector supports continued consumer confidence.

Consumers are increasingly interested in the treatment of animals raised for food, as evidenced by the proliferation of animal welfare certification labeling claims. This rule will ensure that organic producers are competitive in this market and may alleviate the need to pursue additional certification to communicate the use of strict animal welfare practices to consumers. The existing animal welfare certification programs have varying requirements, even within individual programs, creating a range of standards in the

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[69] Caswell, Julie A. and Eliza M. Mojduszka. 1996. "Using Informational Labeling to Influence the Market for Quality in Food Products." American Journal of Agricultural Economics. Vol. 78, No. 5: 1248-1253.
[70] Zorn, Alexander, Christian Lippert, and Stephan Dabbert. 2009. "Economic Concepts of Organic Certification." Deliverable 5 for Project CERTCOST: Economic Analysis of Certification Systems in Organic Food and Farming. http://www.certcost.org/Lib/CERTCOST/Deliverable/D11_D5.pdf.

marketplace.[71] For example, these programs may include standards for pastured, cage-free and free-range production. However, high participation rates among organic livestock and poultry producers in these third-party animal welfare certification programs indicates that the organic label does not provide the level of information consumers need to assess whether a specific brand meets their expectations for animal welfare practices. We expect that private animal welfare certification labels on organic products serve as supplementary information that provides consumers with assurance of certain product attributes, such as minimum space requirements, which are not currently guaranteed through organic certification. Consumers who purchase these doubly certified products would likely not be satisfied with private animal welfare certification alone because organic certification addresses other unique attributes they seek, e.g., animals receive only organic feed.

Establishing clear practice standards for organic products which meet or exceed most of the private animal welfare certification requirements will foster a more efficient market for organic products. Narrowing the range of acceptable practices within organic egg production would bolster consumer confidence in the information conveyed by an organic label claim on these products. As the requirements in this final rule would meet or exceed most of the private animal welfare certification standards, we expect that producers would find organic certification sufficient and reduce participation in other certification programs. This would streamline the business practices of organic livestock

[71] The Humane Farm Animal Care program has compiled a table comparing the requirements of selected third-party animal welfare certification programs for laying hens. This includes stocking density and outdoor standards. The comparison table is available at: http://certifiedhumane.org/how-we-work/fact-sheet/.

producers by reducing redundant and duplicative paperwork, verification processes for organic certification, and a need for separate animal welfare certification.

Several studies show a correlation between consumer preferences/demand for products associated with higher animal welfare standards and higher price premiums. We believe these studies may be applicable in predicting consumer behavior in the organic egg market, particularly for consumers who regularly purchase organic eggs. Sustained consumer demand for organic eggs could mitigate some costs associated with this rulemaking and incentivize producers to comply with this proposed rule and remain in the organic market.

A study by Heng examined whether consumers are willing to pay a premium for livestock products associated with improved animal welfare.[72] The results identified the basic living needs of hens (including providing outdoor access) as the most important factors for their welfare. The estimates also indicated that on average consumers placed a higher value on animal welfare issues than on potential environmental issues in their egg choices. In addition, the estimated Willingness to Pay (WTP) parameters suggested that consumers were willing to pay a premium in the range of $0.21 to $0.49 per dozen. Such premiums could serve as an incentive for farmers to pursue a labeling claim that signifies improved animal welfare practices.

[72] Yan Heng, "Three Essays on Differentiated Products and Heterogeneous Consumer Preferences: The Case of Table Eggs" (PhD diss., Kansas State University, 2015).

Another study by Heng et al[73] estimated the values of certain attributes of eggs, including outdoor access and stocking density. [74, 75] This study included a survey to assess general perceptions of animal welfare. Respondents with favorable perceptions of pro-animal welfare products rated cage-free and outdoor access as more important factors affecting egg quality than adjusting stocking density or not inducing molting. [76] WTP parameters revealed that 89 percent of respondents in one cohort were willing to pay a premium of $0.25 per dozen for eggs from hens given outdoor access; 11% of those respondents were not willing to pay a premium for outdoor access.[77] We believe that organic consumers generally have high regard for animal welfare-friendly products. Therefore, we expect that focus on parity will resonate positively with consumer preferences for definitive outdoor access practices for organic layers. Further, it will be associated with a willingness to pay a premium for more consistency in how this practice is implemented.

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[73] Yan Heng, et al., (2013). Consumer Attitudes toward Farm-Animal Welfare: The Case of Laying Hens. Journal of Agricultural and Resource Economics 38(3):418-434.

[74] Yan Heng, et al., (2013). Consumer Attitudes toward Farm-Animal Welfare: The Case of Laying Hens. Journal of Agricultural and Resource Economics 38(3):418-434.

[75] The study used 2 levels for outdoor access: access or none. The study used three levels for stocking density: 67 square inches per bird (United Egg Producers standards); 138 square inches (average space needed for hens to fully stretch their wings) and 1.5 square feet (third-party animal welfare standards, e.g., Certified Humane and Animal Welfare Approved).

[76] Respondents were asked whether they agreed that food products produced in an animal-friendly environment are: from healthier and happier farm animals, healthier for humans, better quality, better for the environment, and taste better.

[77] Respondents in this study were provided with additional information about potential environmental consequences of different management practices to understand how environmental concerns could influence consumers' valuation of layer management practices. The additional information suggested that cage-free and outdoor access systems could contribute to poorer air quality and use more energy to regulate temperatures. The $0.25 premium was measured among the group that had the environmental information. We believe this group is more descriptive of organic consumers generally because their purchases are driven by some awareness of production practices underlying the organic claim. The mean premium among respondents without that information was $0.16 for hens given outdoor access. Because the willingness-to-pay distributions for more outdoor access and space shifted positively with the additional information on potential environmental impacts of different housing systems, the study noted that consumer concerns for animal welfare issues surmount environmental concerns.

Sumner et al.[78] looked at the potential market impacts of shifting egg production from caged housing to alternative non-cage systems.[79] The authors note that the analysis could be extended to other alternatives such as free-range and pasture-based production. While not focusing on organic eggs, these results are illustrative of the impacts of mandated housing changes on supply and demand for eggs.[80] The research concludes that farm price increases of 40 percent for eggs would likely reduce consumption by less than 10 percent. The authors note that in the U.S., egg consumption is relatively unresponsive to price change and egg expenditures are a very small share of the consumer budget. Based on other research, the study surmised that consumers are willing to pay more for animal welfare-related attributes (e.g., ample space per hen, safe outdoor access) when they have more information about the housing systems. These results support the expectation for consumer willingness to pay for eggs perceived to be produced using alternative housing. We believe that the space and outdoor access requirements in this final rule would enable consumers to better differentiate the animal welfare attributes of organic eggs and maintain demand for these products.

Chang et al. (2010) examined prices for eggs with various labels about production (e.g., cage-free, free-range, organic) to assess how consumers value certain product attributes.[81] This study noted that price premiums for cage-free and free-range eggs are

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[78] D. A. Sumner , H. Gow , D. Hayes , W. Matthews , B. Norwood , J. T. Rosen-Molina , and W. Thurman "Economic and market issues on the sustainability of egg production in the United States: Analysis of alternative production systems" 2011 Poultry Science 90 :241–250.

[79] Ibid.

[80] Specifically, this study looks at four parameters: price elasticity of demand; willingness to pay for price increases for eggs produced under alternative housing systems; price elasticity of supply; and, change in the marginal per unit cost of production due to shifting to an alternative housing.

[81] Chang, Jae Bong, et al., (2010). The Price of Happy Hens: A Hedonic Analysis of Retail Egg Prices. Journal of Agricultural and Resource Economics 35(3):406-423.

56.7 percent and 87.5 percent higher, respectively, than conventional egg prices (the price premium for organic over conventional was 85 percent). Free-range eggs are distinguished from cage-free, for the purposes of this study, by the provision of outdoor access for the laying hens in free-range systems.[82] This data demonstrates that consumers value living conditions that reflect improved animal welfare for hens, even more so when the birds are able to go outdoors. The findings of this study show that consumers of organic eggs appear willing to pay higher premiums for production practices than consumers of other types of eggs. We believe these findings could be persuasive in an organic egg producer's decision to comply with this final rule in order to remain in the organic market.

In addition, informal national surveys reveal consumer expectations that organic eggs are produced from hens that went outdoors. A 2014 Consumer Reports Labeling Survey noted that 55 percent of consumers believe that the organic label on meat and poultry means that the animals went outdoors.[83] Further, the survey measured that 72 percent of consumers believe the organic label should mean that the animals went outdoors. A second survey, designed by the American Society for the Prevention of

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[82] The study notes that organic production requires that hens be given outdoor access and concludes that free-range can be synonymous with organic.

[83] Consumer Reports National Research Center, Food Labels Survey, 2014. . The Consumer Reports National Research Center conducted a nationally representative phone survey to assess consumer opinion regarding the labeling of food. Opinion Research Corporation (ORC) of Princeton, New Jersey administered the survey to a nationally representative sample of 1,004 adult U.S. residents (half of the respondents were women) through its CARAVAN Omnibus Survey. Respondents were selected by means of random-digit dialing and were interviewed via phone. The data were statistically weighted so that respondents in the survey were demographically and geographically representative of the U.S. population. The survey was conducted April 17-21, 2014. These are the survey questions that are relevant to the data cited above: (1) Do you think that the 'ORGANIC' label on meat and poultry means any of the following? A range of practices are listed including, "The animals went outdoors." (2) Should the 'ORGANIC' label on meat and poultry mean any of the following? A range of practices are listed including, "The animals went outdoors." Consumer Reports National Research Center, Food Labels Survey, 2014. Nationally representative phone survey of 1,004 adult U.S. residents.

Cruelty to Animals, showed that 63 percent of respondents believe that organic livestock have access to pasture and fresh air throughout the day and 60 percent believe that organic livestock have significantly more space to move than non-organic animals.[84] This final rule aligns consumer expectations and the production practices required to make an organic label claim regarding animal welfare for poultry.

We expect that clear, consistent requirements for avian living conditions can sustain consumer demand and support the growth in the market for organic poultry products. Several articles describe a positive association between the establishment of uniform regulation of product labels and consumer confidence. Van Loo, et al, (2011) asserts that uniform organic standards and certification procedures are essential to maintain consumer trust in the validity of organic labels and willingness to pay for such products.[85] They found that the magnitude of consumers' willingness-to-pay for organic chicken breast depended on the type of organic label: a 35 percent premium for general organic labeled (not USDA organic) chicken breast versus a 104 percent premium for a chicken breast labeled as USDA certified organic. Smith (2009) states that governmental regulatory oversight of credence-type claims, such as "organic," can facilitate the availability of improved information on food quality, deter irresponsible practices and

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[84] This phone survey was administered to 1,009 adults in October 2013. ASPCA designed the survey and this survey and it was conducted via phone by caravan ORC International between October 1 and 3, 2013. The sample of 1,009 adults included 659 respondents that were reached via landline and 350 respondents reached on cell phones, as well as 347 adults who buy half or more of their food products as organics. The data are weighted slightly to ensure it is representative of the general population nationwide. The margin of error for the total sample is +/- 3.1 percentage points. The survey posed the following question: "To the best of your knowledge, which of the following facts are true of animals raised on organic farms?" Respondents were presented with a set of assumptions to rate, including, "Animals have access to pasture and fresh air throughout the day," "Animals have significantly more space to move than on non-organic farms." This phone survey was administered to 1,009 adults in October 2013.[85] Van Loo, Ellen J., Caputo, Vincenzina, Nayga Jr., Rodolfo M. (2011). Consumers' willingness to pay for organic chicken breast: Evidence from choice experiment. Food Quality and Preference, 22(2011), 603-613.

[85] Van Loo, Ellen J., Caputo, Vincenzina, Nayga Jr., Rodolfo M. (2011). Consumers' willingness to pay for organic chicken breast: Evidence from choice experiment. Food Quality and Preference, 22(2011), 603-613.

provide a mechanism to prosecute violations.[86] Smith also observes that governmental standards can address the market failure connected to uncertainty about product quality and prevent consumer deception and fraud. The prevalent participation among organic poultry producers in private animal welfare certification programs demonstrates that the organic certification alone does not provide the quality assurances that consumers expect for animal welfare attributes. Adding specificity to the USDA organic regulations for poultry living conditions would fill that void and add stability to a market sector that has widely varying production characteristics.

The benefits of this final rule are the real improvements in attributes (e.g., animal welfare) for society.

To monetize the benefits, AMS is using previous research, referenced above, that has measured that consumers are willing to pay between $0.21 and $0.49 per dozen eggs for outdoor access.[87] [88] AMS estimates the benefits by multiplying the low ($0.21), mid ($0.35), and high ($0.49) points of that range by the projected number (in dozens) of organic eggs produced by layers that are estimated to newly have outdoor access as a result of this rule being implemented.[89] The National Animal Health Monitoring Survey (NAHMS) reports that 36 percent of organic hens covered in the surveyed have at least 2

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[86] Smith, G. (2009). "Interaction of Public and Private Standards in the Food Chain", OECD Food, Agriculture and Fisheries Working Papers, No. 15, OECD Publishing. Retrieved from http://search.proquest.com/docview/189840535?accountid=26357

[87] Heng, 2015.

[87] Heng, 2015.

[88] Some quantity of organic egg production is diverted to processed foods. Applying the outdoor access price premium for table/shell eggs to organic eggs used in processed foods introduces some uncertainty into the benefits analysis.

[89] AMS projects that the number of organic eggs produced when this rule is fully implemented would reach 710,578,652 dozen. We assume that organic egg producers remain in the organic market and that 50 percent of this production would newly have access to the outdoors when this rule is implemented. The organic egg supply projections are discussed in the costs section below.

square feet per bird (equivalent to 2.25 lbs/ft$^2$) of outdoor space and 35 percent of hens have outdoor access via a porch system or covered area.[90] AMS does not know what percentage of total organic egg production this represents, so we assume a range from 35 percent at the lower bound to 64 percent (=100%-36%) at the upper bound.[91] AMS estimates that the annual benefits would thus range between $13.77 million to $ 32.1 million annually with a mean value of $23 million over a 15-year period.[92,93, 94] The estimated benefits would not begin to accrue until the rule is fully implemented beginning in year 6, which would be 2022.

In addition, AMS estimated the benefits for the scenario in which we assume that 50 percent of organic egg production may move to cage-free production as a result of this rule. For this estimate, we used the assumptions mentioned above for the range of consumers willingness-to-pay for eggs from birds with outdoor access ($0.21/dozen to $0.49/dozen) and that 50 percent of production would newly have outdoor access as a

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[90] AMS obtained this data through a special tabulation from the APHIS National Animal Health Monitoring System. The report was provided to AMS on May 12, 2015.

[91] For the estimated costs, we assume that 50% of organic layers do not comply with the proposed outdoor access requirements and will newly have outdoor access under these requirements. This is consistent with the estimated range of organic poultry production that would newly have access to the outdoors, which is used to calculate benefits.

[92] The 13 year period accounts for the time needed to fully depreciate layer houses. We use a 13 year timeframe to align with the methodology used to calculate the costs, below. The 13-year average includes five years of zero benefits, reflecting the five years before compliance with the new, more stringent standard is required, and eight years of positive benefits.

[93] If there were a decrease in animal welfare associated with producers switching from baseline organic practices to practices associated with other production standards, including cage-free, a necessary next step in this analysis would be to calculate the monetized decline in welfare. However, AMS does not have sufficient information to estimate this animal welfare decline, if any, at this time.

[94] The benefits were calculated using the following steps:

1. We used the year 6 (2022) projection for the number of eggs – when this rule is fully implemented: about 711 million dozen eggs.
2. We assume that 50% of this production will be from birds that newly have access to the outdoors: about 355 million dozen eggs.
3. Multiply #2 by $0.21. This is the lower bound of the estimated premium that consumers are willing to pay for outdoor access.
4. Apply straight line reduction of that amount over 13 years; total the amount for years 6-13.
5. The average of years 6-13 is the lower end of the benefit estimate.
6. For the upper bound – multiply #2 by $0.49 premium. This is the upper bound of the estimated premium that consumers are willing to pay for outdoor access Repeat steps 4 & 5.

result of this rule. We assumed that 50 percent of current production would exit the organic market in 2022 and that there would be no new entrants until that time. AMS expects that this underestimates the benefits because a scenario with no new entrants is highly unlikely. Under these conditions, the benefits of this scenario range from $3.79 million to $8.84 million per year.

AMS also considered a scenario in which the 50 percent of producers move to cage-free egg production in 2022. In addition, the organic egg market continues to grow at the historic compound annual growth rate of 12.7% between 2017 and 2022. Under these conditions, the benefits would range from $6.93 million to $16.17 million per year.

In summary, considering various scenarios, the estimated benefits range from $3.79 to $32.1 million annually.

G. Costs of the Final Rule

AMS considered various alternatives for the stocking density and outdoor space provisions for organic egg production. AMS also considered how these producers might respond to the stocking densities and outdoor access requirements and how this would impact the supply and demand for organic eggs. In addition, AMS also estimated impacts of this rule on organic broiler operations. In summary, AMS expects that impacts on the organic poultry sector will drive the costs of this rule, and we estimate those production costs will range between $8.2 million to $31 million annually, plus $3.9 million for documentation/recordkeeping practices. As explained above, we do not expect the mammalian health care, mammalian living conditions, transportation, or slaughter provisions to impose additional costs, as we expect that these sections will largely codify

existing industry practices. Therefore, we do not project costs for the implementation of those provisions of this final rule that pertain to mammalian livestock.

1. Assumptions – Layers

To estimate the costs to comply with minimum indoor and outdoor space requirements for organic layers, AMS made assumptions about the current facilities and practices for organic egg production. The indoor stocking requirements align with current practices in organic egg production. Table 10 provides the indoor stocking rates by housing type. AMS is aware that many organic egg producers participate in third-party animal welfare certification programs, in particular, the Certified Humane label program.[95] The indoor stocking rates for layers match the standards for the Certified Humane certification program which has ample organic producer participation across various operation sizes and housing types. Therefore, we believe that most organic egg producers could comply with the indoor stocking rates with minor or no changes to their current operation.

The Humane Farm Animal Care standards[96] for egg laying hens specify minimum indoor and outdoor space requirements for four types of housing systems: pasture-based (where birds have unlimited access to pasture and low outdoor stocking density, approximately 40 $ft^2$ per bird); loose-housing systems, which include floor litter and slatted/mesh floor systems (both single-story houses) and aviaries (multi-level platforms

[95] The Organic Egg Farmers of America (OEFA) survey reported that 87 percent of organic egg production is also certified to private animal welfare standards. The survey results do not indicate which animal welfare certification programs organic egg producers participate in, but AMS is aware that the Certified Humane label is a common choice.
[96] Producers who meet the Humane Farm Animal Care (HFAC) standards, as verified through an application and inspection, may use the Certified Humane Raised and Handled logo. Participants are inspected and monitored by Humane Farm Animal Care. The minimum indoor and outdoor space requirements cited here are published in the 2014 HFAC Standards for Production of Egg Laying Hens. They are available at: http://certifiedhumane.org/how-we-work/our-standards/. Accessed July 7, 2015.

and perches). AMS also estimated the distribution of organic production among the housing types as shown in Table 10.

Table 10. U.S. organic layers by housing type.

| **Housing system** | **Baseline minimum indoor space ($ft^2$ per bird)** | **Percent of U.S. organic laying flock** |
|---|---|---|
| Pasture housing | 1.0 | 10% |
| Floor litter housing | 1.5 | 10% |
| Slatted/mesh floor housing | 1.2 | 10% |
| Aviary housing | 1.0 | 70% |

In this analysis, the outdoor space is the key constraint that drives the costs of compliance. This final rule requires an outdoor stocking density of a maximum of 2.25 pounds/$ft^2$ for layers. Many organic poultry producers currently provide an outdoor stocking density of 2.25 pounds/$ft^2$ for layers; for these producers, the maximum outdoor stocking density will not pose additional costs. However, AMS expects that a greater percentage of production will need to make operational changes to comply with the outdoor stocking density. In addition to land costs, these operations could incur costs for fencing, installing more exits, and other measures that make the area usable as outdoor space. In order to estimate the potential costs, AMS made assumptions about the availability of land for two different potential producer responses. We expect that these scenarios serve as upper and lower bound estimates of the potential costs of this rule.

AMS assumes that layer operations have the equivalent of two layer house footprints of outdoor space available for each house, although we are aware that not all operations conform to this assumption and have accounted for this in our cost estimate by increasing the proportion of organic operations for which access to land may present an barrier to continuing in organic egg production. We considered that the land available for

outdoor access could be the areas between and alongside of the houses and extending from the ends of the houses. For this analysis, we assumed that pasture housing, floor litter housing, and slatted/mesh floor housing systems collectively account for 30 percent of organic egg production and that nearly all of these either currently comply with the outdoor space requirements or have the land available to comply with the outdoor stocking rate without significant changes to the number of birds or facilities. AMS is not assuming that all of these operations currently provide outdoor access for layers at the required stocking density, but that they have the space available to do so.

In addition to the above assumptions, a few producer survey results are notable. The National Animal Health Monitoring Survey (NAHMS) reports that 36 percent of organic hens covered in the survey have at least 2 $ft^2$ per bird (equivalent to 2.25 $lbs/ft^2$) of outdoor space and 35 percent of hens have outdoor access via a porch system or covered area. We do not know what percentage of total organic egg production this represents, however, two additional surveys of organic egg producers provide some context. The EIC survey reports that 15.5 percent of all organic layers have at least 2.0 $ft^2$ outdoors and access to soil; the OEFA survey, reports that 59 percent of organic layers reportedly have at least 2.0 $ft^2$ outdoors.

In this analysis, AMS postulates that a producer will consider two options in response to this rule: (1) comply with the rule and remain in the organic egg market; or (2) transition to the cage-free egg market. Using those potential responses, AMS constructed two scenarios to project how the organic egg sector would behave and estimated the costs for each scenario. This section explains the assumptions and variables used to build our estimates.

AMS constructed enterprise budgets for representative organic egg operations by housing type (i.e., pasture housing, slatted floor/mesh, floor litter housing, aviary housing).[97] For each representative operation, we identified a baseline cost structure which included estimated fixed and variable costs to determine the cost to produce one dozen eggs. We then made assumptions about how and if these values would change under the rule. The fixed and variable costs are listed in Table 11.

Table 11. Fixed and variable costs for enterprise budget.

| **Fixed Costs** |
|---|
| House |
| Composter |
| Equipment – total |
| Cooler |
| Generator |
| |
| Organic Certification |
| Insurance (0.5% of the value of the assets) |
| Property tax (0.8% of the value of the assets) |
| **Variable costs** |
| Pullets |
| Feed |
| Wood Chips |
| Utilities |
| Labor |
| Process and Packaging Fee |
| Manure cleanout |
| Maintenance of outdoor space (e.g., seeding, fencing) |
| Miscellaneous |

[97] This analysis mirrors the cost estimation methodology used by Vukina, et al., to prepare a cost analysis for the National Organic Program on implementing the National Organic Standards Board recommendations on stocking densities and outdoor access for organic poultry. Vukina et al., developed the baseline cost structure by interviewing organic layer and broiler producers and using existing literature. We have used most of their assumed values for fixed and variable costs in this analysis. The results of that analysis were reported in the following articles: Tomislav Vukina, et al., "Economic effects of proposed changes in living conditions for laying hens under the National Organic Program," *Journal of Applied Poultry Research* 23 (1) (March 2014): 80-93. Accessed February 5, 2016. doi:10.3382/japr.2013-00834. Also, Tomislav Vukina, et al., "Proposed changes in living conditions for broilers under the National Organic Program will have limited economic effects," *Journal of Applied Poultry Research* 23 (2) (June 2014): 233-243. Accessed February 5, 2016. doi:10.3382/japr.2013-00896.

To complete the cost estimates for complying with this rule, AMS employed the following basic assumptions and values:

- Simple linear (straight line) depreciation of assets with zero salvage value.
- Annual opportunity cost of capital of 3 percent.
- Homogenous labor hired at $13.25 per hour.[98]
- Price variability for inputs (e.g., feed, pullets), according to the size of the flock.[99]
- Feed costs per ton of $462 ($525 for pasture operations).[100]
- Lay rate (eggs/hen/year) of 308 (284 for pasture operations).
- Feed conversion rate of 4.0 pounds per dozen.[101]
- Operations can purchase additional land if needed.
- Annual rental rate per acre of land of $135.[102]

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[98] Labor costs were estimated using data obtained on hourly wages for farming, fishing, and forestry occupations published by the Bureau of Labor Statistics for states with high concentrations of organic broiler and egg production. We calculated an average hourly wage rate using wage rates from eight states—California, Iowa, Massachusetts, Michigan, New York, North Carolina, Oregon, and Pennsylvania—resulting in an average hourly wage rate of $13.25. Organic certification costs were calculated as the average of California Certified Organic Farmers (CCOF) and Iowa Organic Certification Program posted fees for each organic production sales range category.

[99] AMS used the following estimates for birds placed per cycle to calculate costs for the representative operation for each housing type: aviaries - 100,000 birds; slatted/mesh floor and floor litter – 16,000 birds; pastured – 15,000 or less.

[100] To estimate feed costs, we assumed the feed portion of the ration contains 70 percent corn and 30 percent soybean meal and that these make up 90 percent of the ration. We assumed the remainder is vitamins, minerals, etc. We used prices reported in the AMS Market News report on organic feed prices, August 3, 2016. That report contained the following prices: corn - $8.28/bushel; soybean meal $855/ton. In the proposed rule, the estimated feed costs were $574/ton. We adjusted the feed ration for pasture operations proportionally.

[101] AMS estimates increased feed costs per bird due to increased energy expenditure outdoors. We project the feed conversion rate will move from the baseline 3.8 pounds per dozen to 4.0 pounds per dozen.

[102] Prices for land were constructed based on average real estate values for farm land per acre in 2016 (National Agricultural Statistics Service [NASS], Land Values, 2016 Summary, August 2016). Land prices were calculated as the average of the published land prices in the top five states for organic egg production. The prices for land in New York, Massachusetts, Michigan, North Carolina, and California were averaged to obtain a land price of $4.495 per acre. The annual rental rate was obtained by multiplying the value of land with the 3 percent interest rate, resulting in an annual rate of $135 per acre.

- Building costs of $70 per hen.[103]
- Baseline layer population: 14 million in 2016.[104]

AMS assumes that the mortality rate for hens would increase to 8 percent from 5 percent when this rule is fully implemented.[105] The increased mortality would chiefly be attributed to increased predation, disease and parasites from greater outdoor access.

The NOSB recognized mortality rates as a key indicator of animal welfare and important to the economic viability of an operation. In addition, the NOSB has discussed specific practices to prevent and manage predation and disease in a production environment where outdoor access is an integral part. These include predator deterrents (electrified fencing, overhead netting), rotation of land, well-drained soil, lower stocking density, and selection of breeds that are suited to free range conditions.[106] While the tradeoff between a higher mortality rate for greater outdoor access generally reflects the preferences of the organic community, organic producers will be required to use practices to effectively minimize mortality and correct excessive and preventable loss.

The key factors that influence the enterprise budgets—and magnitude of the impacts to operations—are feed conversion rates, production volume, and cost of land. Under the rule, feed is the variable cost that will shift most notably. The cost of feed will increase due to lower feed conversion as birds expend more energy outdoors.[107] Lower

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[103] This includes poultry houses, pullet housing, processing equipment and infrastructure improvement, but does not include costs to construct a new feed mill. These costs are based on information from organic egg producers for existing housing costs.
[104] AMS Market News, April 2016.
[105] The National Animal Health Monitoring Survey Layers 2013, reports that about half of organic egg producers have a 60-week mortality of less than 4 percent. About 20 percent of organic egg producers have a 60-week mortality of 7 percent or higher.
[106] At its May 2012 meeting, the NOSB discussed a guidance document for assessing animal welfare of poultry. This included a description of management practices that support animal welfare and a target mortality rate of 3 to 5 percent.
[107] In the enterprise budget, some of the variable costs (labor, processing and packaging fee) would decline slightly under the proposed rule.

feed conversion plus higher mortality will ultimately reduce production volume, relative to the baseline with the same number of birds.

In regards to land, AMS assumes that single-story housing systems (pasture, floor litter, and slatted/mesh floor housing), have the land area to meet the outdoor stocking density for their current production. Aviary operations will require a larger land area for outdoor access than other housing types because these are multi-level structures that hold more birds than single-story poultry houses. We assume that aviaries have an indoor space roughly three times larger than the footprint of the barn. Therefore, aviary houses will on average require the equivalent of six house footprints of outdoor space to meet the minimum outdoor space requirement.[108] AMS assumes that as a baseline, aviaries have the land to accommodate 33 percent of current production at the proposed outdoor stocking rates and will need to acquire additional land. AMS calculates that an aviary operation will need an additional 3 acres of land per 100,000 birds. In this analysis, we consider circumstances in which operations may not be able to acquire adequate land.

In summary, the marginal cost to produce one dozen eggs will increase for each type of housing system except pasture. For floor litter and slatted/mesh floor housing, AMS estimates the marginal costs to produce one dozen eggs would increase by 2.9 percent; for aviary systems the marginal costs would increase by 3.4 percent (assuming that aviaries can obtain land for outdoor access) or 35 percent for aviaries that cannot

[108] Aviaries generally have two to four levels; for this analysis we chose the midpoint - three levels. Aviaries, while more prevalent in larger scale egg operations, are also used for small and mid-size egg laying operations.

obtain additional land.[109] The section below discusses how these costs to individual operations will impact the organic egg sector.

2. Assumptions – Broilers

This rule contains indoor and outdoor space requirements specific to broiler and other meat-type avian species. Similar to organic egg production, AMS expects that the space requirements for broilers are the provisions that would have cost implications. This rule, consistent with the NOSB recommendation, sets a maximum of 5.0 lbs./$ft^2$ for indoor and outdoor stocking density for broilers. According to the OEFA survey, 100 percent of responding broiler operations participate in private, third-party animal welfare certification. In order to estimate the potential costs to comply with the stocking density, AMS made the following key assumptions:

- The baseline indoor stocking density for broilers is 6.0 lbs./$ft^2$.[110] That metric is based on public comment which affirms that the majority of organic poultry producers participate in a third-party animal welfare certification program which has indoor stocking density standards set at 6.0 lbs/sq ft.
- Operations which can meet the indoor stocking density can also meet the outdoor stocking density. We expect that the land area around a broiler house is equivalent to the footprint of two broiler houses. Since broilers are not housed in multi-level

[109] In the case where aviaries are not able to acquire additional land, AMS assumes that these operations will move to the cage-free market because this would be a lower cost option than reducing the number of birds to comply with the outdoor stocking density and remain in the organic market.
[110] In the proposed rule, AMS assumed that the baseline stocking density for organic broilers was 5.37 lbs/sq ft, which was calculated as the weighted average of a range of likely indoor stocking densities based on third-party animal welfare certification programs.

aviaries like laying hens, the outdoor space could accommodate the same number of birds at the indoor stocking density.[111]

- Current annual organic broiler production is roughly 80 million birds and the average live weight of organic broilers at slaughter is 5.84 pounds.[112]
- An organic broiler house will have 6 production cycles per year; each cycle is 6-8 weeks long.[113]

In addition, we applied the same assumptions for layers, specifically mortality rates, depreciation of assets, property tax, labor, insurance, etc., to the cost estimates for broilers.

3. Cost Estimate for Organic Egg and Poultry Production

AMS assumes that in response to this rule, affected producers will make operational changes to comply with the rule and continue organic egg and poultry production. The projected net returns shown in Table 12 support this projection; under this rule the net returns for organic eggs will exceed the net returns of selling to the cage-free market, provided additional land can be obtained. Table 12 shows the difference in net returns per 100,000 dozen eggs for organic eggs under the current USDA organic regulations and projection for this final rule, and for cage-free eggs. The net returns vary based on housing systems, i.e., aviary and single-story houses.[114]

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[111] Vukina et al., also assumed for their analysis that the representative broiler producer is in a position to buy or lease one acre of additional land to expand outdoor access and meet the proposed stocking density.
[112] The AMS Livestock, Poultry and Grain Market News Report, Weekly USDA Certified Organic Poultry and Eggs, is available at: http://www.ams.usda.gov/market-news/organic-market-news-reports. AMS Market News reported that 16 million organic broiler chickens were slaughtered under Federal Inspection in 2014.
[113] A 6 week production cycle is more common.
[114] This comparison of net returns has changed from the proposed rule, chiefly because we updated the costs of organic feed which resulted in a reduction of $574/ton in the proposed rule to $462/ton in the final rule. Organic feed accounts for the highest percentage of production costs for organic poultry. In addition, the updated prices for organic eggs

Table 12. Comparison of net returns by label claim.[115]

| **Label claim** | **Net Return ($) – Aviaries** | **Net Return ($) – Single-story houses** |
|---|---|---|
| Certified Organic - Current Baseline | 62,962 | 56,681 |
| Certified Organic (projected for final rule) - | 57,375[b] | 51,720 |
| Certified Organic (operations which cannot obtain additional land) | 6,481 | 51,720 |
| Cage-Free | 14,861 | 8,550 |

[a]All values in table are per 100,000 dozen eggs.

AMS assumes that producers would seek to maintain their current level of production (i.e., the same number of layers) and would seek additional land to meet the outdoor stocking density. The estimated total costs for the organic egg sector are the sum of increased operating expenses and reduced production. AMS is calculating the costs over a 15-year timeframe. These estimates represent recurring, increased costs for poultry producers to participate in the organic market relative to their current costs in the absence of this regulation. The "costs" include both increased operational costs and lost revenue.

To estimate costs, AMS accounts for potential impacts to legacy organic egg producers, i.e., producers certified when this rule is published, as well as new entrants, i.e., producers who enter the organic egg market after this rule is published. While AMS uses the above methodology for the primary estimate of the potential costs associated

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moved from $2.64/dozen in the proposed rule to $2.83/dozen in this final analysis. Therefore, reducing the price of feed significantly increases the returns and widens the gap between returns for organic versus cage-free eggs.

[115] The net return estimates use the following data values/sources: (1) Wholesale value of organic eggs ($2.83/dozen) and wholesale value of cage-free eggs ($1.65/dozen). These are the values reported to AMS Market News for Free on Board organic and cage-free eggs in June 2015. (2) We assumed that 20% of the eggs would go the breaker egg market priced at $1.00/dozen. This is the price reported to AMS Market News in 2015. In the final rule, the gap in estimated net returns between certified organic production under the existing regulations and cage-free has increased from the estimates in the proposed rule. In the final rule, AMS updated the costs for organic feed which is the key factor that widened the gap in net returns. The estimated cost of organic feed declined from the proposed rule which increases the net returns for organic but does not impact the cage-free net returns.

with this rule, AMS has considered alternative methods. The following describes a method that would yield lower costs. Given the uncertainty in the cost estimate and projecting the impacts on the egg market, the use of both methods should capture the range of likely impacts of this rule.

The methodology described above reflects an assumption that costs accrue to legacy organic producers and new entrants. Another plausible calculation model, assumes that costs only accrue to legacy organic producers. As an example for which this assumption seems plausible, consider a producer with a fairly new house, located in a spot without open land; such a producer would likely choose to switch to cage-free eggs until the time when the house gets close to needing replacement, and then might build the new house at a location spacious enough to allow for organic production. The costs associated with this type of case would decrease over time as current producers fully depreciate their poultry houses with estimates approaching zero by year 13, when all houses in operation when this rule was published have fully depreciated. At that point, a producer's decision to maintain organic certification, in consideration of the costs compared to other alternatives, is a cost of doing business in the organic market and is not solely tied to this rule.

There are no outdoor space costs for the first five years because layer operations are not required to make any changes to the outdoor space during that time period.

As discussed above, the operating expenses for most organic egg operations will increase chiefly due to decreased feed efficiency, and the purchase of additional land. There may be added costs for maintenance of outdoor areas (e.g., reseeding, fencing) which will vary depending on site-specific conditions. The one-time expenditure for the

purchase of additional land is projected to be about $3.8 million for the organic egg sector.

The reduced volume of eggs going to the market due to higher mortality and decreased lay rate and feed conversion, all associated with more outdoor access, will also lower net returns. In Table 13, AMS estimated how the rule would affect total egg production while holding the layer numbers constant for each housing type.

Table 13. Proposed rule impact on organic egg production by housing type.

| **Housing type** | **Difference in total egg production after rule (percent decrease)** [a] |
|---|---|
| Pasture | No change |
| Floor litter | 1.5 percent |
| Slatted/mesh floor | 1.5 percent |
| Aviary | 1.5 percent |

[a] AMS estimated how the rule would affect total egg production while holding the layer numbers constant for each housing type.

For the organic egg sector, AMS estimates that the costs of this rule will average $15 million to $21.9 million annually, over 15 years, if all producers comply (the discounted, annualized estimated costs are $24.7 million to $27.5 million)[116] The compliance costs that would occur in year 1 if all organic egg producers had to comply at that time is $24.3 million. In this analysis, AMS did not calculate costs to egg producers in years 1 to 5 because the outdoor access requirements do not need to be fully implemented until year 6. Therefore, the total costs are calculated from the values in years 6 to 15. To calculate the estimated costs, AMS used the projected population of layers after year 6 (28,686,101). This accounts for producers who enter the organic egg

[116] These average annual costs and annualized costs are discounted at 3 percent and 7 percent. Using the alternative method described above, i.e., including costs for legacy producers only and linearly decreasing costs over the depreciation period, the estimated, annual cost for layers are $8.6 million (undiscounted value).

market after the publication of this rule until full implementation. AMS expects that this may overestimate the costs, because the growth in the organic egg market may moderate after publication of this rule.

To calculate costs for organic egg production, we devised 3 cohorts based on the distribution of layer houses by age: (1) production in houses 4 years or older; (2) production in houses that are 2 years old (constructed in 2015); (3) production in houses that are 1 year old or less (constructed in 2016).[117] AMS constructed these cohorts by updating the distribution of the ages of poultry houses based on organic layer data for 2014 through 2016.[118] Using this data, we estimate that 12 percent of organic layers houses were built in 2015; 24 percent were built in 2016; and 64 percent were built at least 4 years ago. These proportions also reflect the distribution of costs among the cohorts.

For each cohort, AMS applied the full compliance costs for each year after the rule must be fully implemented. These recurrent costs are incurred through year 15, relative to the without-regulation baseline. Given the uncertainty in these cost estimates and forecasting impacts in the organic egg market, AMS is presenting estimates without deprecation to capture the full range of potential impacts. If all currently certified organic egg producers comply with this rule and the organic egg production continues to grow at

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[117] When AMS published the proposed rule, we did not have information on the ages or capacity of poultry houses that entered into organic production from 2014 to 2016. We did have information on the distribution of ages of poultry houses that were constructed in 2013 and earlier. In order to calculate the costs we assumed that the ages of those houses were uniformly distributed.

[118] AMS Market News tracks the growth in organic egg production biannually. Based on this data, AMS is reporting that the organic layer population increased from 2014 to 2015 by 18.5 percent and from 2015 to 2016 by 37.5 percent. Using the existing data from NAHMS on age of organic layer houses through 2013, AMS estimated the distribution of organic poultry houses by age. Given that recent growth in organic layers, we estimate that 12 percent of organic layer houses are 2 years old and 24 percent of layer houses are 1 year old or less. As the reported number of organic layers dropped from 2013 -2014, we are not recording any new facilities that would have been constructed in that timeframe and therefore there is not cohort for 3 year old houses.

12.7% each year, we estimated that the annual cost of the rule is $32.3 million ($17 million at 7 percent discount; $24.2 million at 3 percent discount. While AMS is presenting the costs associated with this methodology as the primary costs estimates, we discuss the rationale for an alternative methodology based on linearly reducing costs over the depreciation time period for poultry houses.

The following description of applying the deprecation to the cost estimates would yield a lower cost estimate. This also assumes that costs only accrue to legacy organic producers. Within the 'older' cohort, we continue to assume that the age distribution of poultry houses is uniform and that each year $1/13^{th}$ of the houses fully depreciate. For this group, the estimated costs decrease linearly by $1/13^{th}$ annually until they reach zero in year 10. When this rule is published in 2017 (year 1), 4/13ths of the layer barns will have been fully depreciated based on federal tax returns. Thus, the estimated compliance costs for year 1 ($27.8 million) are reduced by 4/13ths (to $19.2 million). No costs are reported during the implementation period in years 1 through 5. By year 6 when this rule is fully implemented, 9/13ths of the barns in this cohort have fully depreciated. Therefore, only the remaining costs for the barns that have not fully depreciated in years 6 through 9 are reported in this rule.

We estimate that the cohorts for houses 2 years old and 1 year old account for 12 percent and 24 percent, respectively, of the total costs for layers. For these cohorts, the same costs are reported each year throughout the remaining depreciation period (11 years for houses 2 years old) and 12 years for houses 1 year old. No costs are reported during the 5 year implementation period. Therefore, the costs which accrue in years 6 through 13 for all cohorts contribute to the totals reported in this rule.

For this analysis, AMS assumes that organic broiler producers would build new facilities to maintain their current production to comply with the indoor stocking density and remain in the organic market.[119] In this scenario, costs are driven by expenses to construct new facilities. AMS is projecting costs based on public comment and research about the costs of broiler houses.[120] For this analysis, AMS calculated a one-time upfront cost for facilities and land as $35.3 million plus additional annual costs of $989,000. AMS is providing a 3-year implementation period for the indoor stocking density requirements for broilers so we expect construction costs would actually be incurred in that timeframe. Consistent with the methodology for layer cost estimates, we account for new entrants to organic broiler production until the full implementation of requirements for broilers in year 4 (2020). Based on AMS Market News data on the growth in organic chicken slaughter from 2015 to 2016, we estimate that organic broiler production will grow 4.9 percent annually. The estimated compliance costs ($988,886) recur annually over a 15-year period. AMS is presenting cost estimates without deprecation to capture the full range of potential impacts. If all currently certified organic broiler producers comply with this rule and the growth/new entrants is 4.9 percent annually until full implementation of broiler requirements at year 4, we estimate the average annual costs are $2.5 million to $2.8 million (the discounted, annualized values are $3.5 million (3 percent) to $4.0 million (7 percent)).

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[119] In the proposed rule, we assumed that organic broiler producers would maintain their current facilities and reduce the number of birds. Based on public comment, we have altered our assumption about how broiler producers will likely respond to this rule.

[120] The public comment projected that this rule would cost the organic broiler sector between $50 and $75 million to invest in new facilities. AMS's estimate is lower for mainly two reasons: (1) we estimate that to maintain current production levels, new facilities would need to accommodate 15% rather than 20 % of the current production that would be excluded by the indoor stocking density requirements; and, (2) we estimate that a broiler house costs $300,000 rather than $385,000.

While AMS is presenting the costs associated with this methodology as the primary costs estimates, we also describe the rationale for an alternative methodology based on linearly reducing costs over the depreciation time period for broiler houses, 15 years. That methodology would apply the deprecation to the cost estimates would yield a lower cost estimate. In this scenario, the annual costs would be reduced by 1/15$^{th}$ each year throughout the 15-year period because broiler houses depreciate over 15 years.[121] Annual costs during the 3-year implementation period for indoor space requirements for broilers would not be included in the total. In summary, the costs for organic broiler production under these assumptions is estimated to average $2.23 million annually (undiscounted value).[122]

In summary, the average annual costs for the organic poultry sector are estimated to range from $17.4 million to $24.7 million annually over 15 years.[123, 124] AMS estimates that the increased operating costs and lost revenue from decreased production volumes would result in a 3 to 3.4 percent increase in the break-even price for one dozen

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[121] The OEFA survey reported that depreciation rate for broiler houses as reported on Federal Tax Schedule F is 15 years.

[122] In the proposed rule, AMS estimated that the annual costs for the organic broiler production would be between $3.3 million to $6.8 million. The estimated costs for the final rule are less than the upper bound of the proposed rule despite two key changes that would contribute to increased costs: (1) increasing the baseline population of broilers from 16 million to nearly 97 million based on new data and to account for new entrants, and (2) adjusting the assumed baseline stocking density to a higher density. The estimated costs fell in the final rule because based on public comments, we assumed that producers would seek to maintain current levels of production. In the proposed rule we assumed that producers would reduce production in order to avoid building new facilities and therefore incur high annual costs from lost revenue due to the decreased production. In the final rule, based on public comment, we assume that producers will build additional housing capacity to maintain production levels. They will incur higher one-time costs, spread over the-year implementation period, and minimal increased costs throughout the remainder of the 15-year period related to the operation of additional housing.

[123] AMS averaged aggregate costs over a 15-year period because this is the depreciation period for broiler houses.

[124] In the proposed rule, we estimated that the average annual costs for layers in this scenario was nearly $9.5 million over 13 years, using the methodology of linearly reducing costs over the deprecation period. The average annual costs for layers have increased in the final rule for several reasons: (1) we applied an estimated annual growth rate of 12.7%, rather than 2%, to project the number of layers/eggs in the future. AMS acknowledges that 12.7% growth may not be sustainable throughout the 5 year implementation period for layers and beyond. As production increases, costs rise and this contributes to the higher estimates. In addition, we accounted for the significant growth in the U.S. organic layer population between 2014 and 2016 and assumed that most of these birds were housed in new barns. Therefore, we divided the layer production into cohorts based on age of the poultry house.

organic eggs ($2.12 to $2.18 per dozen for non-aviary operations; $2.04 to $2.11/dozen for aviaries).

AMS is providing a summary in Table 14 to show the expected timing of when producers will incur various costs.

Table 14. Implementation timeline and related costs.

| Year | Legacy Producers | New Entrants[a] |
|---|---|---|
| 2017 (1) | | *Land Acquisition* (requires 3 year transition if not organic) |
| 2018 (2) | | *Seeding outdoor access area* |
| 2019 (3) | Land Acquisition (requires 3 year transition if not organic) | |
| 2020 (4) | | **Full compliance** *Increased feed costs* *Increased mortality* |
| 2021 (5) | Preparation of outdoor area (pasture maintenance costs) | |
| 2026 (6) | **Full compliance** Increased feed costs, increased mortality | |

[a] For the purposes of this table, new entrants are producers that obtain organic certification within 3 years of the publication of this rule. These producers have a 3-year implementation period for the new outdoor access requirements. In year 4, they must fully comply with the rule and will be subject to enforcement action for noncompliance.

Table 15. Estimated costs for organic egg and poultry sector—full compliance.

| Year | Broilers[a] | Layers[b] | Total[c] | 3% Discounted Values | 7% Discounted Values |
|---|---|---|---|---|---|
| 2017 | $11,761,083 | $0 | $11,761,000 | $11,419,000 | $10,992,000 |
| 2018 | $11,761,083 | $0 | $11,761,000 | $11,086,000 | $10,273,000 |
| 2019 | $11,761,083 | $3,812,000 | $15,573,000 | $14,252,000 | $12,712,000 |
| 2020 | $989,000 | $0 | $989,000 | $879,000 | $754,000 |
| 2021 | $989,000 | $0 | $989,000 | $853,000 | $705,000 |
| 2022 | $989,000 | $44,133,000 | $45,122,000 | $37,789,000 | $30,067,000 |
| 2023 | $989,000 | $44,133,000 | $45,122,000 | $36,688,000 | $28,100,000 |
| 2024 | $989,000 | $44,133,000 | $45,122,000 | $35,620,000 | $26,261,000 |
| 2025 | $989,000 | $44,133,000 | $45,122,000 | $34,582,000 | $24,543,000 |
| 2026 | $989,000 | $44,133,000 | $45,122,000 | $33,575,000 | $22,938,000 |
| 2027 | $989,000 | $44,133,000 | $45,122,000 | $32,597,000 | $21,437,000 |
| 2028 | $989,000 | $44,133,000 | $45,122,000 | $31,648,000 | $20,035,000 |
| 2029 | $989,000 | $44,133,000 | $45,122,000 | $30,726,000 | $18,724,000 |
| 2030 | $989,000 | $44,133,000 | $45,122,000 | $29,831,000 | $17,499,000 |
| 2031 | $989,000 | $44,133,000 | $45,122,000 | $28,962,000 | $16,354,000 |
| **TOTAL** | **$47,150,000** | **$445,144,000** | **$492,294,000** | **$370,506,000** | **$261,395,000** |
| 15-year average | **$3,143,000** | **$29,676,000** | **$32,820,000** | **$24,700,000** | **$17,426,000** |
| | | | **Annualized** | **$31,036,000** | **$28,700,000** |

[a] Broiler producers would incur one-time costs in years 1 through 3 for land and facilities (totaling $35,283,000); the remaining annual costs, amount to $988,886 in year 1, and recur annually in years 4-15. Only the one-time costs for land/buildings in years 1-3 are included in the total; the annual costs in years 1 through 3 are not included in the total because broiler producers do not need to fully comply until year 3.

[b] Full compliance costs for layers in years 1 through 5 are not included in the total because producers would not need to fully comply until year 6 (when the outdoor access requirements must be implemented). The total does include a one-time land cost of $3.81 million

[c] This table does not include the administrative costs for the additional reporting and recordkeeping requirements associated with this rule. Those are described in the section, Paperwork Reduction Act, and are included in the Table 1, Summary of Costs and Benefits.

In addition to the estimated costs described above, the total estimated costs for this rule include an amount for recordkeeping and reporting. This rule requires that organic producers describe specific practices as part of an organic system plan and maintain specific records to assist in the verification of compliance with the requirements of this rule. These costs are described in detail in the Paperwork Reduction Act section below. The total estimated recordkeeping and reporting burden for this rule is $3.9 million.

4. Impact of Egg Operations Leaving Organic Production

Alternatively, a number of organic egg operations may consider leaving organic production for the cage-free market. AMS estimates that up to two-thirds of organic aviaries, accounting for 45 percent of total organic egg production, may transition to cage-free egg production due to marketing opportunities and challenges of complying with the outdoor space requirements.[125] Our assumptions about land availability, described above, and the projected net returns for organic eggs and cage-free eggs informed our prediction of how organic producers may respond. The estimated two-thirds of organic aviaries that may not have the land available would need to reduce the number of birds to meet the stocking density. That reduced production volume would result in significant net loss and would not be economically viable. Therefore, we project that this production, which accounts for an estimated 45 percent of total organic egg production, would likely transition to the cage-free egg market. In addition, AMS expects that a small portion of non-aviary organic operations may not have the land available; this would account for an estimated 5 percent of total egg production.[126] As shown in Table 12, these producers will be able to sell their eggs as cage-free which has a lower cost of production but also lower premiums compared to the organic egg market.

For this analysis, we estimate the foregone profit as the difference in net returns for cage-free and organic eggs for a 15-year period. This covers the time needed to fully depreciate layer houses (13 years), and aligns with the timeframe over which we are

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[125] AMS based this assumption on a review of Organic System Plans for organic egg operations which have more than one level of living space and at least 16,000 hens. We set this criteria to capture aviaries. We reviewed 62 OSPs to visually gauge whether the land area adjacent to the houses could be sufficient to comply with the proposed outdoor stocking density.

[126] This is equivalent to 17 percent of the nonaviary operations under the revised assumption that aviaries account for 70 percent of organic egg production and other systems account for 30 percent of organic egg production.

accounting for estimated costs of this rule. Reported profit effects recur annually throughout the 15-year period. The two cost estimates for this scenario are based on different assumptions about the amount of affected production. We base costs on (1) the projected layer population in 2022 assuming 12.7% growth in the organic egg market, i.e. new entrants, during the 5-year implementation period for the outdoor access requirements for layers; and, (2) the layer population in 2017, and no new entrants to the organic egg market during the implementation period for this rule. For the estimate described under the conditions in (1), AMS assumes that the reported layer population continues to increase at the compound annual growth rate of 12.7%, to reach 28,686,000 layers producing nearly 711 million dozen eggs. For the estimate described under the conditions in (2) above, AMS expects that organic egg producers who cannot obtain additional land now will not be able to do so after this rule is published and will remain in organic production for 5 years to maximize profits under the existing regulations. In addition, we expect that any producers who cannot comply with this rule will not enter the organic egg market during the implementation period. Given the uncertainty in the projecting impacts on the organic egg market, we believe these scenarios will cover the range of potential costs if producers that cannot obtain sufficient land move to cage-free egg production.

In the final rule, we separate transfers, which result from organic producers moving to the cage-free market, from costs which accrue to producers who remain in organic production. The transfer impacts for the first five years after publication of the rule are zero. This is because we expect that producers will seek to maximize profits by remaining in the organic market until the outdoor access requirements will be enforced,

in year six.[127] In year years 6 through 15, the annual transfer impacts is $170 million when we assume that 50 percent organic production volume in 2022 transitions to the cage-free egg market. If we assume that: (1) 50 percent of current organic egg production will move from the organic to cage-free egg production in 2022; and that (2) between publication and full implementation of this rule there will be no entrants to organic egg production who cannot comply with this rule, then the estimated transfer impacts are $93.5 million annually. Given uncertainties in quantifying the effects of this rule, AMS is presenting these various scenarios to cover the likely range of potential impacts of this rule.

While AMS is presenting the costs associated with the above methodology (i.e., recurring annual costs relative the without-regulation baseline) as the primary costs estimates, we also describe the rationale for an alternative methodology based on linearly reducing over the depreciation time period for broiler houses, 15 years, and assuming that there are no new entrants after publication of this rule who cannot comply with the new requirements. That methodology of applying the deprecation to the estimated costs would yield lower cost estimates. For example, when the rule is fully implemented in year 6, 5/13$^{ths}$ of these aviary layer barns would have been fully depreciated, so none of the transfers incurred in years one through five are included in the total. In year six, 5/13ths of actual costs are removed leaving a reported transfer of $58 million. Each subsequent year, an additional 1/13$^{th}$ of the actual costs are removed until reported transfers reach $0

[127] As discussed, above, this is a substantial increase from the proposed rule, because AMS used updated data on feed costs which widened the gap in net returns between organic under the existing regulations and cage-free production.

in year 14. Using these assumptions, we estimate that the foregone profit from the transition to the cage-free egg market would average $17 million over 15 years.[128]

These profit effects encompass real costs and cost savings, such as the savings resulting from a switch from organic feed to less expensive conventional feed; however, the highest-magnitude aspect of the profit effect is very likely the non-collection of the differential price premiums for organic eggs relative to cage-free eggs. As discussed previously, consumers pay this premium largely because they place a value on laying hens having access to the outdoors.

To complete the estimate for this exit scenario we assume that organic egg producers, including the 50 percent of production (66 percent of the organic aviaries and 83 percent of the non-aviaries) that do not exit to the cage-free market, have the land base to meet the outdoor access requirements and will maintain organic egg production. As described in the above scenario, these producers will incur increased expenses for higher feed costs due to decreased feed efficiency and maintenance of outdoor access areas (e.g., fencing). In addition, we expect that remaining aviaries will need additional land to comply with the outdoor stocking density and will face increased annual rent for land. These organic producers would also experience reduced profits resulting from decreased lay rate and higher mortality with increased outdoor access. The average annual,

[128] In this scenario, particularly where we assume that 50 percent of the organic production volume in 2022 moves to cage-free production, the transfer projections are significantly above the proposed rule. This is because: (1) AMS calculated costs using a higher baseline layer population, 12.5 million in the proposed rule versus nearly 27 million in the final rule; (2) AMS updated the price of organic feed which decreased from the proposed rule final rule. In the proposed rule, we estimated that the cost of feed was $574/ton. In the final rule, we updated that cost, as described above to $462/ton. Because the cost of feed is the largest variable cost for organic production, a reduction in this cost increases the net returns. These factors chiefly contributed to a larger gap between cage-free and organic net returns over larger production volumes. (3) AMS altered the methodology by carrying the full value of the transfer impacts each year, rather than reducing these values linearly throughout the depreciation period.

estimated costs of complying with the rule, for those producers who do not transition to cage-free, will average $7.5 million (50 percent of market in moves to cage-free on 2022; no new entry after publication of rule) to $13.8 million (50 percent of market moves to cage-free in 2022; new entrants after publication of rule). [129] In aggregate, this scenario would result in estimated annual costs of $5.0 million ($2.5 million annualized at 7 percent discount; $5 million at 7 percent discount) to $9.6 million ($6.8 million annualized at 3 percent discount) for the organic poultry sector. In addition, this estimated annual transfer impacts range from $26.5 million to $37.8 million ($43.7 million annualized at 7 percent discount; $47.4 annualized at 3 percent discount) at the lower bound, and $48.3 million to $68.6 million annually at the upper bound ($79.5 million annualized at 3 percent discount; $86.2 million annualized at 7 percent discount) annually in transfers.

[129] AMS averaged aggregate costs over a 15-year period because this is the depreciation period for broiler houses.

Table 16. Estimated cost for organic egg and poultry production-some operations move to cage free in year 6 (2022).

| Year | Cost: Broilers[a] | Cost: Layers (stay in organic production)[b] | Cost: Total[c] | 3% Discounted Value | 7% Discounted Value |
|---|---|---|---|---|---|
| 2017 | $11,761,000 | $0 | $11,761,000 | $11,419,000 | $10,992,000 |
| 2018 | $11,761,000 | $0 | $11,761,000 | $11,086,000 | $10,273,000 |
| 2019 | $11,761,000 | $0 | $11,761,000 | $10,763,000 | $9,601,000 |
| 2020 | $989,000 | $0 | $989,000 | $879,000 | $754,000 |
| 2021 | $989,000 | $0 | $989,000 | $853,000 | $705,000 |
| 2022 | $989,000 | $7,541,000 | $8,530,000 | $7,144,000 | $5,684,000 |
| 2023 | $989,000 | $7,541,000 | $8,530,000 | $6,936,000 | $5,312,000 |
| 2024 | $989,000 | $7,541,000 | $8,530,000 | $6,734,000 | $4,965,000 |
| 2025 | $989,000 | $7,541,000 | $8,530,000 | $6,538,000 | $4,640,000 |
| 2026 | $989,000 | $7,541,000 | $8,530,000 | $6,347,000 | $4,336,000 |
| 2027 | $989,000 | $7,541,000 | $8,530,000 | $6,162,000 | $4,053,000 |
| 2028 | $989,000 | $7,541,000 | $8,530,000 | $5,983,000 | $3,788,000 |
| 2029 | $989,000 | $7,541,000 | $8,530,000 | $5,809,000 | $3,540,000 |
| 2030 | $989,000 | $7,541,000 | $8,530,000 | $5,640,000 | $3,308,000 |
| 2031 | $989,000 | $7,541,000 | $8,530,000 | $5,475,000 | $3,092,000 |
| **TOTALS** | **$47,150,000** | **$75,414,310** | **$122,564,000** | **$97,767,000** | **$75,042,000** |
| **Annual average** | **$3,143,000** | **$5,028,000** | **$8,171,000** | **$6,518,000** | **$5,003,000** |
| | | | **Annualized** | **$8,190,000** | **$8,239,000** |

[a] Broiler producers would incur one-time costs in years 1 through 3 for land and facilities (totaling $29,138,000). The remaining annual costs, amount to $989,000. The annual costs in years 1 through 3 are not included in the total because producers would not need to comply until year 3. Although organic broiler producers do not need to implement the indoor stocking density until year 4, we expect they will begin incurring costs immediately to construct new facilities. The values listed in year 6 are the full compliance costs for layers after the implementation period. This amount/cost recurs annually.

[b] The years with $0 value have no costs because producers would not need to comply with the rule during these years.

[c] The total annual costs are based on 15-year annual costs for broiler and layers.

Table 17. Estimated cost for organic egg and poultry production–some operations move to cage-free in year 6 (2022); new entry continues after rule.

| Year | Cost: Broilers[a] | Cost: Layers (stay in organic production)[b] | Cost: Total[c] | 3% Discounted Value | 7% Discounted Value |
|---|---|---|---|---|---|
| 2017 | $11,761,000 | $0 | $11,761,000 | $11,419,000 | $10,992,000 |
| 2018 | $11,761,000 | $0 | $11,761,000 | $11,086,000 | $10,273,000 |
| 2019 | $11,761,000 | $0 | $11,761,000 | $10,763,000 | $9,601,000 |
| 2020 | $989,000 | $0 | $989,000 | $879,000 | $754,000 |
| 2021 | $989,000 | $0 | $989,000 | $853,000 | $705,000 |
| 2022 | $989,000 | $13,784,000 | $14,773,000 | $12,372,000 | $9,844,000 |
| 2023 | $989,000 | $13,784,000 | $14,773,000 | $12,012,000 | $9,200,000 |
| 2024 | $989,000 | $13,784,000 | $14,773,000 | $11,662,000 | $8,598,000 |
| 2025 | $989,000 | $13,784,000 | $14,773,000 | $11,322,000 | $8,035,000 |
| 2026 | $989,000 | $13,784,000 | $14,773,000 | $10,992,000 | $7,510,000 |
| 2027 | $989,000 | $13,784,000 | $14,773,000 | $10,672,000 | $7,018,000 |
| 2028 | $989,000 | $13,784,000 | $14,773,000 | $10,361,000 | $6,559,000 |
| 2029 | $989,000 | $13,784,000 | $14,773,000 | $10,060,000 | $6,130,000 |
| 2030 | $989,000 | $13,784,000 | $14,773,000 | $9,767,000 | $5,729,000 |
| 2031 | $989,000 | $13,784,000 | $14,773,000 | $9,482,000 | $5,354,000 |
| **TOTALS** | **$47,150,000** | **$137,840,000** | **$184,990,000** | **$143,701,000** | **$106,303,000** |
| **Annual average** | **$3,143,000** | **$9,189,000** | **$12,333,000** | **$9,580,000** | **$7,087,000** |
| | | | **Annualized** | **$12,037,000** | **$11,671,000** |

[a] Broiler producers would incur one-time costs in years 1 through 3 for land and facilities (totaling $29,138,000). The remaining annual costs, amount to $989,000. The annual costs in years 1 through 3 are not included in the total because producers would not need to comply until year 3. Although organic broiler producers do not need to implement the indoor stocking density until year 4, we expect they will begin incurring costs immediately to construct new facilities. The values listed in year 6 are the full compliance costs for layers after the implementation period. This amount/cost recurs annually.

[b] The years with $0 value have no costs because producers would not need to comply with the rule during these years.

[c] The total annual costs are based on 15-year annual costs for broiler and layers.

Table 18. Estimated transfers (foregone profit) for organic egg and poultry production; some operations move to cage-free in year 6 (2022).

| Year | Transfers: Layers (exiting the organic market) - reduced returns | 3% Discounted Value | 7% Discounted Value |
|---|---|---|---|
| 2017 | $0 | $0 | $0 |
| 2018 | $0 | $0 | $0 |
| 2019 | $0 | $0 | $0 |
| 2020 | $0 | $0 | $0 |
| 2021 | $0 | $0 | $0 |
| 2022 | $170,042,000 | $142,408,000 | $113,306,000 |
| 2023 | $170,042,000 | $138,260,000 | $105,894,000 |
| 2024 | $170,042,000 | $134,233,000 | $98,966,000 |
| 2025 | $170,042,000 | $130,323,000 | $92,492,000 |
| 2026 | $170,042,000 | $126,527,000 | $86,441,000 |
| 2027 | $170,042,000 | $122,842,000 | $80,786,000 |
| 2028 | $170,042,000 | $119,264,000 | $75,501,000 |
| 2029 | $170,042,000 | $115,791,000 | $70,561,000 |
| 2030 | $170,042,000 | $112,418,000 | $65,945,000 |
| 2031 | $170,042,000 | $109,144,000 | $61,631,000 |
| **TOTALS** | **$1,700,423,000** | **$1,029,648,000** | **$723,947,000** |
| **Annual Average** | **$113,361,000** | **$68,643,000** | **$48,263,000** |
| | **Annualized** | **$86,250,000** | **$79,485,000** |

[a] AMS averaged aggregate transfer impacts over a 15-year period because this is the depreciation period for broiler houses. For the annual 15-year transfer impacts, we used zero value in years 1 through 5 because we expect producers will maximize profits and remain in the organic sector until year six, when the new outdoor access requirements are enforced.

Table 19. Estimated transfers (foregone profit) for organic egg and poultry production; some operations move to cage-free in year 6 (2022); no entry after rule.

| Year | Transfers: Layers (exiting the organic market) - reduced returns | 3% Discounted Value | 7% Discounted Value |
|---|---|---|---|
| 2017 | $0[a] | $0 | $0 |
| 2018 | $0 | $0 | $0 |
| 2019 | $0 | $0 | $0 |
| 2020 | $0 | $0 | $0 |
| 2021 | $0 | $0 | $0 |
| 2022 | $93,527,000 | $78,327,000 | $62,321,000 |
| 2023 | $93,527,000 | $76,046,000 | $58,244,000 |
| 2024 | $93,527,000 | $73,831,000 | $54,434,000 |
| 2025 | $93,527,000 | $71,681,000 | $50,872,000 |
| 2026 | $93,527,000 | $69,593,000 | $47,544,000 |
| 2027 | $93,527,000 | $67,566,000 | $44,434,000 |
| 2028 | $93,527,000 | $65,598,000 | $41,527,000 |
| 2029 | $93,527,000 | $63,687,000 | $38,810,000 |
| 2030 | $93,527,000 | $61,832,000 | $36,271,000 |
| 2031 | $93,527,000 | $60,031,000 | $33,898,000 |
| **TOTALS** | **$935,270,000** | **$566,329,000** | **$398,187,000** |
| **Annual Average** | **$62,351,000** | **$37,755,000** | **$26,546,000** |
| | **Annualized** | **$47,439,000** | **$43,719,000** |

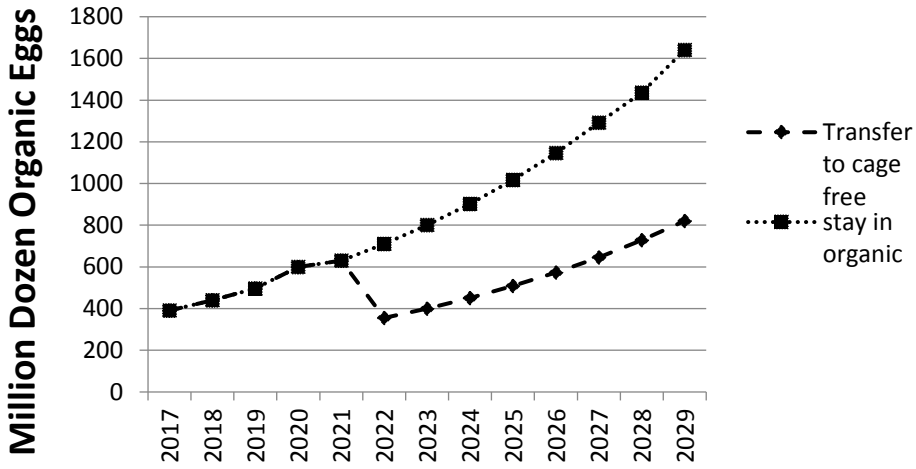
[a] AMS averaged aggregate transfer impacts over a 15-year period because this is the depreciation period for broiler houses. For the annual 15-year transfer impacts, we used zero value in years 1 through 5 because we expect producers will maximize profits and remain in the organic sector until year six, when the new outdoor access requirements are enforced.

5. Impact on Organic Egg Supply

AMS also considered the impact of this rule on the organic egg supply if 50 percent of organic production transitions to cage-free production. We are using the number of layers as an indicator of organic egg supply. Between 2007 and 2016, the

compound annual growth rate of organic layers was 12.7 percent.[130] We used this growth rate to project that the number of organic layers over the 13-year period that we are accounting for costs.[131] Figure 6 shows the projected growth trajectory for each producer response scenario.

Figure 6. Actual and projected growth in the organic egg supply.




We estimate that up to 50 percent of organic egg producers could exit to the cage-free market. In this case, we expect that the number of layers would drop by 50 percent relative to peak production. Peak production would occur five years after publication of the final rule and the drop in production would occur six years after publication when the rule must be fully implemented. After the projected decline, AMS expects that the organic layer population would resume growth at the 12.7 percent annual rate. This is

[130] USDA Livestock, Poultry and Grain Market News, 2016. This reflects the most recent numbers reported on the organic layer population in April 2016. The growth from one-year to the next could have been higher or lower than the 12.7 percent average.

[131] In the proposed rule, AMS used a projected growth rate of 2 percent. That figure was based on historical growth in the conventional eggs between 2007 and2015. Given updated data that showed significant growth in the number of organic layers between 2014 and 2016, AMS determined that the 2 percent conventional growth rate is not indicative of the organic market.

likely a conservative estimate as unmet consumer demand for organic eggs would be an incentive for operations to enter organic egg production and for existing organic operations to expand. Therefore, we expect that for some interval immediately after the drop in organic egg production, the growth rate could be faster than 12.7 percent. For the scenario assuming that all organic producers can comply with this rule and maintain organic production, we expect that the number of organic layers will grow 12.7 percent annually throughout and after the implementation period.

AMS is providing that this final rule, except for the outdoor access provisions for avian species and indoor space provisions for broilers, be implemented one year after publication. The avian outdoor access provisions will be implemented in two phases: (1) Operations/ facilities/ poultry houses which are initially certified 3 years after publication need to comply with the outdoor stocking density to obtain certification; and (2) all operations certified before the 3-year mark need to comply with the proposed outdoor stocking density five years after the publication of the final rule. For broilers, the indoor space requirements need to be fully implemented three years after publication of the final rule.

For the final rule, AMS also evaluated the impact on consumers by projecting the potential impacts on prices. The following analysis considers the price impacts if 50 percent of organic egg production moves to the cage-free market when this rule is fully implemented.

H. Impacts on Other Entities

AMS expects that the handling requirements for organic livestock, including transit and slaughter, are common industry practice and would not substantially affect producers or handlers. During the development and deliberation of the NOSB's animal welfare recommendations in 2009 and 2011, there were numerous public comments. Those comments did not inform of any substantial impacts of provisions pertaining to mammalian livestock.

USDA's Animal and Plant Health Inspection Service (APHIS) already has requirements to support animal health during transit. With regard to slaughter, USDA's Food Safety and Inspection Service (FSIS) already requires that mammalian slaughter facilities meet similar requirements as those recommended by the NOSB, per the Humane Methods of Slaughter Act within the Federal Meat Inspection Act.

Some small mammalian slaughter facilities may not currently be inspected by FSIS; for example, those operations that sell meat intra-state only. However, AMS understands that humane slaughter practices in compliance with the Humane Methods of Slaughter Act are industry standard. AMS expects that costs incurred to comply with the rule would not be a substantial barrier. Such costs could include those related to training staff, developing record-keeping materials, making minor facility renovations, and documenting and analyzing the facility's compliance with the rule. Therefore, AMS does not expect that existing organic slaughter facilities would incur substantial costs or make onerous changes to current facilities or procedures in order to comply with this rule. In addition, AMS did not receive comments regarding costs for these facilities.

AMS understands that it is possible that a subset of the existing certified organic slaughter facilities could surrender their organic certification as a result of this action,

which could impact organic livestock producers. However, AMS cannot predict the number of such entities, if any, that would surrender organic certification and the corresponding impact to organic producers. Similarly, certain businesses currently providing livestock transport services for certified organic producers or slaughter facilities may be unwilling to meet and/or document compliance with the proposed livestock transit requirements. In the proposed rule, AMS requested comments specifically on the proposed regulations for slaughter, but did not receive any descriptive information.

As discussed below in the Paperwork Reduction Act section, this rule would impose additional paperwork requirements. Organic livestock and poultry producers and handlers must develop and maintain an organic system plan. This is a requirement for all organic operations, and the USDA organic regulations describe what information must be included in an organic system plan (§ 205.201). This rule describes the additional information (§§ 205.238, 205.239, 205.241, and 205.242) that will need to be included in a livestock operation's organic system plan in order to assess compliance. AMS expects that as producers adapt to the requirements introduced by the amendments at §§ 205.238, 205.239, 205.241, and 205.242, the number of labor hours per year for currently certified operators will decrease.

This rule would also impose a minor burden on certifying agents. These entities will need to become familiar with the requirements of the rule and update organic system plan forms.

AMS does not expect that this rule would impose any unique cost burdens on foreign-based livestock operations that are USDA certified organic due to the extremely

limited number of foreign certified poultry operations. There are less than 5 producers and handlers of USDA certified egg or chicken operations outside of the U.S. according to the NOP's Organic Integrity database. There about 250 USDA certified organic operations that have mammalian livestock and operate outside of the U.S.; most of these are cattle operations in Australia.[132]

AMS did not estimate costs for impacts to third-party animal welfare certification programs. As discussed above, we expect that organic producers may opt to no longer participate in these certification programs once this rule is fully implemented. AMS believes that these private certification programs have a participant base that is broader than organic producers and offer a unique service for producers who want to convey specific information about animal welfare practices to consumers.

I. Retrospective Analysis

Within 3-5 years of full implementation, the Administrator shall conduct and make publicly available a retrospective analysis of the impacts of this rulemaking. This analysis will include a retrospective evaluation of the benefits, costs and transfers of the rule, along with a comparison of these impacts to the prospective estimates contained in this final regulatory impact analysis. The retrospective analysis should include consideration of factors such as: the impacts on exit and entry of affected entities; market shares of affected entities, as well as market competition and concentration; the impacts on the number of producers participating in the organic program; impacts on organic egg

[132] The Organic Integrity Database reports that there are 359 operations certified for livestock outside of the U.S. Excluding the operations located in Australia, nearly all of the other foreign operations are engaged in honey production. Bees are defined as livestock under the USDA organic regulations.

production volume, impacts on secondary (e.g., feed/grain) markets; impacts on supply and price of eggs; and impacts on consumer understanding. An opportunity for public comment on this analysis will be provided.

J. Conclusions

By resolving the ambiguity about outdoor access for poultry, this action furthers an objective of OFPA: consumer assurance that organically produced products meet a consistent standard. In turn, it also provides assurance to producers that organic certification standards reflect the expectations of the consumer base. Augmenting the animal welfare practice standards for organic livestock would provide a foundation for efficient and equitable compliance and enforcement, and facilitate fair competition among organic livestock producers. AMS is providing a 5-year implementation period for the outdoor access provisions for existing organic poultry operations in consideration of the average time needed to finish depreciating the capital costs of aviary houses, production realities and cost to producers who invested in organic production facilities. AMS is also providing a 3-year implementation period for the indoor space requirements for poultry in consideration of the time needed to build facilities to accommodate current production levels.

III. Regulatory Flexibility Act.

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612) requires agencies to consider the economic impact of each rule on small entities and evaluate alternatives that would accomplish the objectives of the rule without unduly burdening small entities or

erecting barriers that would restrict their ability to compete in the market. The purpose is to fit regulatory actions to the scale of businesses subject to the action.

The RFA permits agencies to prepare the initial RFA in conjunction with other analyses required by law, such as the Regulatory Impact Analysis (RIA). AMS notes that several requirements to complete the RFA overlap with the RIA. For example, the RFA requires a description of the reasons why action by the agency is being considered and an analysis of the rule's costs to small entities. The RIA describes the need for this rule, the alternatives considered and the potential costs and benefits of this rule. In order to avoid duplication, we combine some analyses as allowed in section 605(b) of the RFA. The RIA explains that the scope of that analysis is the impact on organic egg and broiler production. AMS believes that other types of organic livestock and poultry production would not face significant costs to comply with this rule because the proposed provisions generally codify current practices. As explained below, AMS expects that the vast majority of organic egg producers and broiler producers that could be impacted by this rule may qualify as small businesses. In the RIA, the discussion of alternatives and the estimated costs and benefits pertain to impacts upon all entities, including small entities. Therefore, the scope of those analyses is applicable to the RFA. The RIA should be referred to for more detail.

A. Discussion of Comments Received

1. Small Farmers Opposed to an Implementation Period

(Comment) AMS received comments voicing small farmer objections to an implementation period for poultry. These comments explained that this would prolong

unfair market conditions in which small farmers cannot compete with larger operations that provide outdoor access solely via porches.

(Response) AMS is providing an implementation period because the specific requirements in this rule for outdoor access for organic poultry will require some organic producers, regardless of size, to make changes. We expect that there are small organic egg producers that will need time to make operational changes to comply with the outdoor access requirements.

2. Small Farmer Participation in Rulemaking

(Comment) A comment claimed that AMS did not engage with small-scale producers in the decision making for this rulemaking and observed that many of the provisions in the NOSB recommendations had been significantly modified or revised in the proposed rule.

(Response) AMS understands and values the public engagement and transparency in the development of NOSB recommendations and rulemaking for the USDA organic regulations. While AMS did make some deviations from the NOSB recommendations, on balance, these were incorporated into the proposed rule. In cases where there were deviations, these were explained in the proposed rule.

3. Impact on Small Grain Farmers

(Comment) A few comments described that small farmers who provide grain as poultry feed would be adversely impacted by this rule. These comments explained that they would be negatively affected because the poultry operation(s) to which they supply feed would not be able to comply with this rule.

(Response) In the RIA above, AMS addressed comments about potential impacts of this rule on organic grain producers. In summary, given that demand for organic feed exceeds domestic supplies, AMS does not anticipate that organic feed grain producers would be unable to find another buyer for their grain.

4. Impact on Small Farmers – Mammalian Living Conditions

(Comment) Some comments explained that several proposed requirements specific to mammalian livestock would be burdensome and costly for small producers to implement. The comments identified the following proposed requirements as problematic for small producers: (1) for housing with stalls, at least one stall must be provided for each animal in the facility at a given time, (2) animals must be able to turn around and lie down in full lateral recumbence in a stall, and (3) at least 50 percent of outdoor access area must be soil and that animals have outdoor access year-round.

(Response) In this final rule, AMS has responded to these concerns by revising or clarifying the requirements listed above. The changes and justification are discussed more fully in the Mammalian Living Conditions section and the RIA. In summary, in response to these concerns AMS has changed several proposed requirements for organic mammalian livestock producers to mitigate costly infrastructure changes and ensure that organic producers can continue to maintain environmental and animal health stewardship practices.

5. Stringency of Rule

(Comment) AMS received comments claiming that this rule would not protect small farmers and was more advantageous to larger producers. These comments remarked that the indoor and outdoor stocking density requirements for layers are weak

which threatens consumer confidence in the organic label and continues the economic disadvantage for farmers using more stringent practices. On the other hand, AMS also received comments stating that provisions in this rule are too burdensome for small farmers and urged AMS to provide more time to study the impacts on these entities. In particular, comments referenced limited land availability for outdoor access requirements and potential for increased mortality as sources of burdensome costs and/or major obstacles to compliance.

(Response) AMS observes that the diversity in perspectives that represent small farmers, as conveyed in public comments, is evidence that factors other than size of the operation, such as location and configuration of poultry houses, may be more significant in determining whether an operations can readily comply with this rule. AMS maintains that the clearer requirements on outdoor access for poultry will bring a baseline consistency in poultry production practices that will support consumer demand for these products. Organic producers who exceed these requirements and want to convey that information to consumers have options for making additional labeling claims through other labeling programs.

6. Key Changes from Proposed Rule to Final Rule

In response to comments on the proposed rule, AMS changed a number of provisions in order to alleviate potential costs imposed on stakeholders. Below is a summary of the provisions changed in the final rule which affect the estimated costs to small businesses.

Table 20. Changes from proposed to final rule affecting cost estimates for small businesses.

| | |
|---|---|
| Porches as Outdoor Space | The final rule maintains that enclosed porches must not be counted as outdoor space. However, to provide |

| | |
|---|---|
| | flexibility, the final rule clarifies that porches that are not enclosed (e.g. with a roof, but with screens removed) and allow birds to freely access other outdoor areas can be counted as outdoor space. |
| Mammalian Outdoor Requirements - Soil | In the final rule, AMS removed "soil" as part of the outdoor requirements but requires that ruminants have access to pasture during the grazing season. Operations must provide year-round outdoor access, using either hardened surfaces or soil based areas unless the livestock are temporarily confined indoors. |
| Mammalian Outdoor Requirements – Space for Swine | The final rule does not include an outdoor space requirement for swine. AMS removed this requirement for further review by the National Organic Standards Board (NOSB). |
| Mammalian Indoor Requirements – Space and Stalls | AMS revised the mammalian indoor space requirements to remove the requirement that animals must have adequate space for full lateral recumbence and turning around without touching the enclosure. The final rule requires that over a 24-hour period, mammalian livestock must have the opportunity to move, turn around, and exhibit natural behaviors, providing more flexibility for producers.<br><br>The final rule also clarifies that tie stalls, free stalls, stanchion barns, compost pack, and bed pack barns are all suitable facilities for cattle. |
| Indoor Space Requirements - Turkeys | AMS has removed the indoor space requirements for turkeys in the final rule. |
| Avian Living Conditions - Temporary Confinement | AMS removed the provision that would have required a documented occurrence of disease in the region or migratory pathway to temporarily confine animals. The final rule allows producers to temporarily confine birds because of conditions under which health, safety, or well-being of the animal could be jeopardized, providing producers with additional options to protect animal health. |

B. Small Entities Affected by the Rule

AMS has considered the economic impact of this action on small entities. Small entities include avian and mammalian livestock producers and slaughter facilities that currently hold or are pursuing USDA organic certification, as well as organic certifying

agents. While this action will affect all operations involved in the production, handling, and certification of organic livestock, AMS believes that the cost of implementing this rule will fall primarily on current and prospective organic egg and broiler producers, including: (1) egg and broiler producers that are seeking organic certification for that operation, and (2) egg and broiler producers that are currently certified organic under the USDA organic regulations.

The RFA requires, with some exception, that AMS define small businesses according to its size standards. The Small Business Administration (SBA) sets size standards for defining small businesses by number of employees or amount of revenues for specific industries. These size standards vary by North American Industry Classification System (NAICS) code (13 CFR part 121.201). For the RFA analysis, AMS focused on estimating how different size organic layer and broiler operations (small versus large) would be impacted as a result of meeting the indoor and outdoor space requirements.

AMS does not expect that this rule would substantially affect other stakeholders, including (1) operations that produce other types of organic poultry, (2) operations that produce mammalian livestock, (3) operations that handle organic livestock, and (4) organic certifying agents. These determinations are based on a number of assumptions described below and explained in the RIA. This analysis focused on the impact of this rule on small businesses in the United States.

The table below shows the number of small business that may be affected by this rule. AMS believes that small egg producers and small chicken (broiler) producers will

be most affected, while others will likely not experience substantial impacts. An explanation of how these numbers were estimated is provided in the sections below.

Table 21. Small businesses affected by rule.

| Small Business Type | NAICS Code | Number Affected by Rule |
|---|---|---|
| Small egg producers (grossing less than $15,000,000 per year) | 112310 | 718 |
| Small chicken producers (grossing less than $750,000 per year) | 11230 | 218 |
| Small livestock slaughter facilities<br>Small poultry slaughter facilities (grossing less than ($500,000,000 per year) | 311611<br>311615 | 114 |
| Organic certifying agents (annual receipts less than $7,500,000) | NAICS Subsector 115 | 41 |

C. Why is AMS Implementing This Rule?

The Organic Food Production Act (OFPA) provides general requirements for organic livestock production, and directs USDA to provide more detailed provisions through rulemaking. The current USDA organic regulations have broad and general requirements for ensuring the welfare of certified organic livestock and poultry. Organic livestock and poultry must be raised in a way that accommodates their health and natural behavior and reduces stress. Specifically, organic livestock and poultry producers must provide access to the outdoors, shade, clean and dry bedding, shelter, space for exercise, fresh air, clean drinking water, and direct sunlight (§ 205.239(a)). Additionally, the organic regulations describe allowed and prohibited livestock care practices and specify requirements for organic livestock living conditions (§ 205.239(b)). AMS began the process of adding more specificity to the livestock provisions with the publication of the 2010 final rule on access to pasture for ruminants (75 FR 7154). This action fulfills the

expectations set forth in OFPA and anticipated by the organic community for more clarity on production practices for poultry and other livestock species.

The USDA organic regulations for livestock and poultry are general and provide latitude for varying interpretations that may result in different practices, particularly concerning outdoor access for poultry. One of the main disparities in practice is the use of porches as the sole area for outdoor access versus an unenclosed area with soil and/or vegetation. This disparity in outdoor access has economic implications for producers and jeopardizes consumer confidence in the organic label.

Operations that provide soil- or pasture-based outdoor access have cited that they are at a competitive disadvantage compared to operations that are providing more limited access to the outdoors.[133] To clarify the parameters on acceptable outdoor access and to resolve the divergence in practices, organic producers, the NOSB, organic trade groups, and consumer groups have pressed AMS to intervene and set clear guidelines regarding outdoor access, minimum space requirements, and other livestock and poultry provisions. With this rule, AMS is adding more specific requirements for organic livestock and poultry, including specific minimum indoor and outdoor space requirements for organic poultry, and provisions for handling during transportation and slaughter. These requirements are largely based on recommendations from the NOSB which were developed with substantive input from stakeholders, including producers and consumers. In the RIA, AMS explains that the outdoor access requirements for poultry are expected to have cost impacts for organic egg and broiler producers. Therefore, this RFA analysis focuses on those production sectors. The other proposed requirements for mammalian

[133] Increased outdoor access is associated with increased mortality due to predation and decreased feed efficiency.

living conditions, care and production practices and handling during transport and slaughter would not entail compliance costs because they essentially codify existing practices. The scope of the analysis is also explained in the RIA.

Consumers have become increasingly interested in how their food is produced and in the case of livestock products are considering animal husbandry practices in their purchasing decisions. Based on public comments received in response to the proposed rule and the public comments during the NOSB's deliberations on animal welfare, AMS understands that a majority of consumers expect, and may be willing to pay more for, animal welfare requirements that are more stringent than conventional products. This includes requiring outdoor access for organic poultry. AMS believes that the costs incurred by producers in complying with this action are necessary to reflect consumer expectations for organic products and to sustain a market for numerous organic producers. As discussed in the RIA, the benefits of action are derived from supporting consumer expectations related to practices for organic livestock. AMS believes that the long-term economic impact of not addressing the ambiguity about how the USDA organic regulations should be applied across the organic livestock and poultry sector would undermine the integrity of the USDA organic seal more broadly.

D. What are the Estimated Costs for Organic Layer Operations?

Small egg producers are listed under NAICS code 112310 (Chicken Egg Production) as grossing less than $15,000,000 per year. AMS estimates that out of 722

operations reporting sales of organic eggs, 4 exceed that threshold.[134] However, we estimate that large producers account for 25 percent of organic egg production.

The availability of adjacent land for egg laying operations to meet the outdoor access requirements and the indoor stocking density for broilers are the chief obstacles for compliance and therefore the source of costs to implement this rule. In order to determine costs, AMS assumes that producers will seek to maintain current levels of production, i.e., raising the same number of birds. For layers, the estimated costs vary depending on how producers respond to maintain production: will they obtain additional land or transition to cage-free egg production if land is not available? For broilers, how much will it cost producers to build additional facilities for the indoor space needed to accommodate current production levels?

In the RIA, we describe the costs for two producer response scenarios for layers. (1) Producers generally have or can acquire adequate outdoor space to meet the proposed outdoor stocking density and stay in organic production. In this scenario, the increased costs for layers are due primarily to increased mortality and reduced feed efficiency associated with increased outdoor access. The reported cost estimates for this scenario are provided in the RIA in Table 15. We project the reported total costs would total $168 million to $246 million for small layer operations and $56 million to $82 million for large layer operations. Per operation, we estimate the total annual cost would be nearly $26,000 to $29,000 for small operations and $1.5 million to $17 million for large operations.[135]

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[134] The National Agricultural Statistics Service's 2014 Organic Survey provides the number of farms reporting sales of organic eggs and those reporting sales of organic broilers. AMS requested a special tabulation from NASS to obtain the number of organic egg and organic broiler operations which exceed the Small Business Administration sales criterion for small businesses in each of these production categories.

[135] The per operation totals are calculated using 722 as the total number of organic layer operations; 718 qualify as small and 4 qualify as large per the SBA size standards.

AMS estimates that business revenues for small organic layer operations are $736 million, or about $1.03 million per firm. For small egg producers, business revenues would need to be less than $867,000 to $967,000 per firm for the rule to cost more than 3% of revenue. The estimated business revenue is calculated from the projected organic egg production from small producers using AMS Market News data on the U.S. organic layer population, estimated lay rate of 308 eggs/hen/year and the wholesale price for organic eggs $2.83/dozen (AMS Market News).

Table 22. Estimated costs for organic layers operations based on size - producers remain in organic production.

| | Small operations (less than $15 million in sales) | Large operations ($15 million or more in sales) |
|---|---|---|
| Number of operations | 718 | 4 |
| Total annualized cost ( million)[a] | $168,427,000 - $246,332,000 | $56,142,000 - $82,111,000 |
| Average total cost per business | $235,000 - $343,000 | $14,036,000 - $20,528,000 |
| Average annualized cost per operation[b] | $26,000 - $29,000 | $1,541,000 - $17,195,000 |

[a] The total costs for layers are the Net Present Value discounted at 3 percent and 7 percent.
[b] These are the 15-year annualized costs for layers, discounted at 3 percent and 7 percent.

Approximately 50 percent of layer production will not be able to acquire additional land and therefore moves those birds to cage-free production. In this scenario, the increased costs are driven by the difference in net revenue between cage-free and organic production. AMS estimates that if a 100,000-dozen-egg, aviary facility transitioned from the current USDA organic regulations to the cage-free label, the operation would, on average, have reduced annual profits ($14,861 versus $62,962). The

reported cost estimates for this scenario are provided in the RIA in Tables 16 and 17**Error! Reference source not found.**.

In this scenario, the costs vary depending on whether or not we assume that producers will continue to enter the organic market after publication of this rule. Therefore we project cost for (1) 50 percent of the current organic egg market moves to cage-free egg production when the rule is fully implemented in 2022; and (2) 50 percent of the egg market in 2022 moves to cage-free egg production, which includes a portion of producers who entered the market during the implementation period. We believe that these scenarios are lower and upper bound estimates and that the likely impacts will fall within this range.

For egg producers that remain in the organic market, we project the costs would range between $28 million to $76 million for small layer operations and $9.4 million to $23 million for large layer operations that remain in organic production. Per operation, we estimate the total annual cost would be between $11,500 to $24,000 for small operations and $518,000 to $1 million for large operations. As noted below, the transfer impacts which estimate the amount of forgone profit from transitioning from the organic to the cage-free egg market, are calculated separately. We project the annualized, discounted transfer impacts would total between $45.6 million to $86. 2 million. This equates to $34 million to $64.7 million annually for small layer operations and $11.4 million to $22 million for large layer operations that move to cage-free egg production. Per operation, we estimate the total annual transfer would be about 95,000 to $180,000 for small operations and $5.7 million to $10.8 million for large operations.

In this scenario, AMS estimates that business revenues for small organic layer operations are $368 million, or about $1.03 million per firm. For small egg producers, business revenues would need to be less than $385,000 to $800,000 per firm for the rule to cost more than 3% of revenue. As small layer revenue exceeds this amount, AMS concludes that this rule will not significantly impact small businesses. The estimated business revenue is calculated from the projected organic egg production from small producers using AMS Market News data on the U.S. organic layer population (14 million in 2016), estimated lay rate of 308 eggs/hen/year and the wholesale price for organic eggs $2.83/dozen (AMS Market News).

Table 23. Estimated costs for organic layer operations based on size - producers transition to cage-free.

| | Small operations (less than $15 million in sales) | Large operations ($15 million or more in sales) |
|---|---|---|
| Number of operations | 359 | 2 |
| Total costs (million)[a] | $28,324,000-$76,069,000 | $9,441,000 - $23,356,000 |
| Average total cost per operation | $79,000 - $212,000 | $75,530,000 - $202,850,000 |
| Annualized cost (million)[b] | $4,146,000 - $8,496,000 | $1,036,000 - $2,124,000 |
| Average annual cost per operation | $11,548 - $24,000 | $518,000 - $1,062,000 |

[a] The total costs for layers are the Net Present Value discounted at 3 percent and 7 percent.
[b] These are the 15-year annualized costs for layers, discounted at 3 percent and 7 percent.

We carried the full compliance costs each year. The reported costs in this analysis include only costs that accrue after the implementation period, in years 6 through 13. AMS expects that the costs to comply with the outdoor space requirements would be more burdensome for larger organic layer producers and would increase the likelihood for these operations to transition to a cage-free label. These operations would require

significantly more land and would be less likely to have that area available for expansion. Since nearly all of the organic producers qualify as small businesses, we expect that there is considerable variation in the size of operations in this category.

As previously stated, producers could choose to surrender their organic certification and move to alternate labels such as cage-free, which would reduce both their annual profits and their annual operating costs. AMS estimates –two-thirds of organic aviary operations and 17 percent of non-aviary operations (which equals 50 percent of total organic egg production) transition to the cage-free market in response to this rule. Because aviary houses hold more birds, these operations will require a larger land base to comply with the outdoor stocking density. Therefore, we expect that any operations which exit the organic egg market would be less likely to qualify as small businesses per SBA criteria. Furthermore, AMS received public comment which indicates that numerous small organic farmers support clear regulations that require outdoor access for poultry.

E. What are the Estimated Costs for Organic Broiler Producers?

Small chicken producers are listed under NAICS code 11230 (Broilers and Other Meat Type Chicken Production) as grossing less than $750,000 per year. According to the NASS special tabulation, AMS estimates that 27 of the 245 operations reporting sales of organic broilers would not qualify as small businesses.[136] We expect that organic broiler producers that do not currently provide the indoor space to meet this regulation will build additional facilities.[137] As shown in the RIA, we expect that organic broiler

[136]The per operation totals are calculated using 245 as the total number of organic layer operations; 218 qualify as small and 27 qualify as large per the SBA size standards.
[137] AMS estimates that 5.3 percent of organic broilers are pasture-raised and already comply with this rule, which equates to about 4 million birds.

houses currently hold a higher density of birds than is permitted by this rule. For broilers, the costs are driven by up-front capital costs for additional buildings to create more indoor space.

AMS estimates that the large businesses represent 50 percent of the organic broiler market.[138] AMS reports that the proposed indoor and outdoor space requirements would impose total costs of nearly $17 million per year for small organic broiler operations and nearly $17 million for large organic broilers operations.

AMS estimates that business revenues for small organic broiler operations are $211 million, or about $964,000 per firm. For small broiler producers, business revenues would need to be less than $267,000 to $300,000 per firm for the rule to cost more than 3% of revenue. The estimated business revenue is calculated from the NASS Certified Organic Survey 2015 Summary which reports the value of sales for organic broilers.

Table 24. Estimated costs for organic broiler operations based on size.

| | Small operations (less than $750,000 in annual sales)[a] | Large operations (over $750,000 in annual sales) |
|---|---|---|
| Number of operations | 218 | 27 |
| Total costs (million)[a] | $18,638,000 - $21,138,000 | $18,638,000 - $21,138,000 |
| Average total cost per business | $85,000 - $97,000 | $690,000 - $783,000 |
| Annualized cost (million)[b] | $1,771,000 - $2,047,000 | $1,771,000 - $2,047,000 |

[138] In the proposed rule, AMS estimated that the ratio of small to large organic broiler operations was 75 percent to 25 percent. Based on public comment, we are adjusting that ratio to 50 percent for small and large because we understand that larger producers account for a greater share of organic broiler production.

| | | |
|---|---|---|
| Average, 15 year annualized, reported cost per operation | $8,000 - $9,000 | $66,000 - $76,000 |

[a] The total costs for broilers are the Net Present Value discounted at 3 percent and 7 percent.
[b] These are the 15-year annualized costs for broilers, discounted at 3 percent and 7 percent.

For broilers, the costs are calculated over a 15-year period based on the time period to depreciate a broiler house for federal tax returns. The total costs are based on the full compliance costs which recur annually. The reported costs in this analysis include only costs that accrue after the implementation period, in years 4 through 15.

AMS also expects that organic producers may have some increased costs to meet the reporting and recordkeeping requirements associated with this rule. These are described in the Paperwork Reduction Act section and are included in the Summary Cost and Benefits table. In general, this rule asks producers to maintain specific documents and records as part of their organic system plan in order to verify compliance with the requirements of this rule. AMS estimates these costs would total $3.9 million.

F. Would Other Organic Livestock Producers and Handlers be Substantially Affected?

Based on available data, AMS does not expect that other organic livestock producers and handlers would be substantially affected by this action. As explained in the RIA and above, we made changes to some of the requirements for mammalian living conditions and livestock care and production practices, and handling and transport to slaughter, to mitigate unintended costly impacts and in effect, to codify existing industry practices. The determination that this rule would not impact other sectors is based on a series of assumptions described below.

1. Organic Mammalian Livestock Producers

AMS believes that the clarifications for organic mammalian livestock, including provisions related to living conditions, animal treatment and physical alternations, are

common industry practice and would not have a substantial impact on such producers. AMS previously addressed major living condition changes for ruminant livestock in its final rule, Access to Pasture (Livestock) (75 FR 7154, February 17, 2010).

2. Organic Livestock Handling Operations

Based on available information, AMS understands that, in practice, all handling operations for organic livestock are small businesses. We expect that the handling requirements for organic livestock, including transit and slaughter, are common industry practice and would not substantially affect handlers. USDA's Animal and Plant Health Inspection Service (APHIS) already has requirements to support animal welfare during transit. AMS understands that the additional requirements related to transit are of industry standard. Also, operations providing transit services for organic livestock are not required to be certified to the USDA organic standard. Therefore, while operations providing transit services would need to comply with the proposed transit requirements, they would not be directly subject to additional certification requirements.

Both small livestock slaughter facilities (NAICS code 311611) and poultry slaughter facilities (NAICS code 311615) are defined as those grossing less than $500,000,000 per year. AMS understands that most of the approximately 114 U.S.-based livestock slaughter facilities certified to the USDA organic regulations are small businesses. With regard to slaughter, USDA's Food Safety and Inspection Service (FSIS) already requires that mammalian slaughter facilities meet similar requirements as those recommended by the NOSB, per the Humane Methods of Slaughter Act within the Federal Meat Inspection Act. Some small mammalian slaughter facilities may not currently be inspected by FSIS; for example, those operations that sell meat intra-state

only. However, AMS understands that humane slaughter practices in compliance with the Humane Methods of Slaughter Act are industry standard. In addition, some small poultry slaughter facilities which are exempt from FSIS inspection already observe the good commercial practices that would align with the Poultry Products Inspection Act and FSIS regulations. AMS expects that costs incurred to comply with this rule would not be a substantial barrier. Such costs could include those related to training staff, developing record-keeping materials, making minor facility renovations, and documenting and analyzing the facility's compliance with the rule. Therefore, AMS does not expect that existing organic slaughter facilities would incur substantial costs or make onerous changes to current facilities or procedures in order to comply with the rule.

AMS understands that it is possible that a subset of the existing certified organic slaughter facilities could surrender their organic certification as a result of this action, which could impact organic livestock producers. However, AMS cannot predict the number of such entities, if any, that would surrender organic certification and the corresponding impact to organic producers. Similarly, certain businesses currently providing livestock transport services for certified organic producers or slaughter facilities may be unwilling to meet and/or document compliance with the livestock transit requirements.

3. What Is the Impact for Organic Certifying Agents?

This rule would also affect certifying agents that certify organic livestock operations. The Small Business Administration (SBA) defines small agricultural service firms, which includes certifying agents, as those having annual receipts of less than $7,500,000 (North American Industry Classification System Subsector 115—Support

Activities for Agriculture and Forestry). There are currently 79 USDA-accredited certifying agents; based on a query of the NOP certified organic operations database, there are approximately 41 certifying agents who are currently involved in the certification of organic livestock operations. AMS believes that these certifying agents would meet the criterion for a small business, though some are agencies of state governments. While certifying agents are small entities that will be affected by this rule, we do not expect these certifying agents to incur substantial costs as a result of this action. Certifying agents must already comply with the current regulations, e.g., maintaining certification records for their clients. Their primary new responsibility under this proposal would be to determine if organic livestock producers are meeting the requirements in this rule, including but not limited to the minimum indoor and outdoor space requirements for organic poultry.

G. How Would the Proposed Implementation Period Affect Small Businesses?

AMS considered alternatives to this action that ranged from non-rulemaking initiatives to adopting practice requirements that varied from those recommended by the NOSB, specifically varying the stringency of certain requirements for avian living conditions. The table, Changes from Proposed to Final Rule Affecting Cost Estimates for Small Businesses, describes changes that were made to mitigate cost impacts. In addition, AMS examined alternatives specific to organic poultry and egg production, because these requirements drive the costs of this rule.

AMS attempted to clarify outdoor access for poultry through guidance which reinforced an outcome-based standard. This was insufficient to achieve consistency in outdoor access practices across the industry. AMS also considered a consumer education

campaign to explain the requirements of organic livestock production in lieu of regulation. While these non-regulatory actions would have minimal to no cost, neither option would realize potential benefits of sustained consumer trust in a standard that is clear and consistently applied and enforced. The continuation of inconsistent practices, particularly regarding outdoor access for poultry, facilitates broader, negative publicity about the organic label which can dissuade consumers from this market.

AMS also considered less stringent requirements for certain provisions that apply to poultry:

1) Outdoor access areas that accommodate 10 or 50 percent of the flock at one time versus the entire flock. While this would reduce the costs of this rule by 50 to 90 percent, because the outdoor access requirements drive the cost of this rule, this would have no benefits and be potentially detrimental to the organic industry overall allowing inconsistent practices among organic producers to cause confusion about how to implement, enforce and interpret the requirements for organic egg production.

2) Adding a vegetation requirement for outdoor access areas. AMS expects that the absence of a vegetation requirement would be costly to producers because it could jeopardize compliance with the regulations for concentrated animal feeding operations under the Clean Water Act and result in expensive operational changes to divert and contain runoff. To avert these costs, AMS is requiring that outdoor access areas have maximal vegetation. AMS expects that this will entail minor costs for reseeding and fencing the outdoor access areas and we have included outdoor area maintenance expenses in the costs estimates. AMS estimates that the total costs for establishing and reseeding pastures will be about $85,000. This is based on estimates: $130/acre; 657

additional acres needed to accommodate all layers at the required outdoor stocking density.[139]

3) Allowing porches as the sole area for outdoor access. This final rule prohibits enclosed porches to be counted as outdoor space. However, to provide flexibility, the final rule does clarify under § 205.241(c)(7) that porches that are not enclosed (e.g. with a roof, but with screens removed) and allow birds to freely access other outdoor areas can be counted as outdoor space. Allowing porches to count as outdoor access would nullify several requirements that are tied to outdoor access, such as maximum outdoor stocking density and soil-based outdoor access space with vegetation. AMS expects that the allowance of porches for outdoor access would essentially maintain baseline requirements for producers and therefore eliminate estimated costs for organic egg producers. However, prolonging the status quo would have potentially detrimental impacts for the organic sector by drifting from the statutory objectives for consistent standards.

1. Minimum Outdoor Space Requirements.

AMS understands that, based on the analysis above, both small and large organic layer operations and broiler operations may incur costs in order to comply with the proposed minimum indoor and outdoor space requirements. While our analysis demonstrates that large poultry operations would have significantly higher compliance costs than small operations on average, we understand that small producers that are closer

[139] To obtain the estimated cost per acre, AMS used a source on the costs to establish and maintain pasture with grass-legume mix for ruminants. The costs for the initial establishment is nearly $100/acre and about $115/acre for annual maintenance. AMS added 10 percent to these costs to account for organic seeds. Iowa State University Extension, 2000, AG-96, available at: http://www2.econ.iastate.edu/faculty/duffy/Pages/pastureandhay.pdf

to the size thresholds may still incur substantial costs to comply with the proposed rule. Therefore, AMS is seeking to reduce the economic burden to organic producers, including small businesses, without unduly delaying the improved animal conditions.

AMS is proposing a 5-year implementation period for the minimum outdoor space requirements for poultry. Producers and poultry houses which are not certified prior to 3 years after publication of this rule would need to meet all of the requirements in order to obtain organic certification. Such new operations and poultry houses would include: (1) all poultry houses that first became certified organic 3 years or more after the final rule was published; and (2) new or replacement poultry houses operated by existing organic layer operations if such facilities were built 3 years or more after the final rule was published.

AMS is also providing a 3-year implementation period for the indoor space requirements for broilers. A facility which is certified before 3 years after publication of this rule would have 5 years to come into compliance with the outdoor space requirements for poultry. A facility must comply with the indoor space requirements for broilers before 3 years after publication of this rule in order to continue or obtain organic certification. Based on public comment, this is the length of time necessary for the majority of organic broiler operations to build additional facilities and expand the number of producers.

By providing an implementation period, both large and small existing organic producers would have additional time to implement the necessary changes in order to comply with this rule. For example, operations choosing to expand will need land for the outdoor space. This new land would need to be certified organic before organic poultry

could have access to it. Since land that has been treated with a prohibited substance in the past 3 years is not eligible for organic certification, the implementation period would allow organic producers to transition additional land to organic production. AMS is maintaining a 5-year implementation period for the outdoor space requirements for poultry. AMS believes this provides adequate time for producers to fully consider their options and implement needed changes. AMS is concerned that extending this timeframe would be detrimental to numerous organic producers who already comply with this rule and have expected AMS to act on the NOSB recommendations and standardize the requirements for organic poultry. A lengthy implementation time period could erode consumer demand for organic products in favor of other labels that have clear, definitive standards for outdoor space for poultry.

2. All Other Requirements

For all other provisions of the proposed rule, AMS is providing an implementation date of one year after the publication of the final rule. AMS chose a one-year period because all livestock and slaughter operations will need to change their Organic System Plans (OSPs) to meet the requirements. During the one-year implementation period, certifying agents will need to update their OSP forms and make modifications to their certification processes in order to evaluate compliance with the new requirements. This would include training staff and inspectors. AMS believes one year is adequate for organic operations, including for small businesses, to implement these changes.

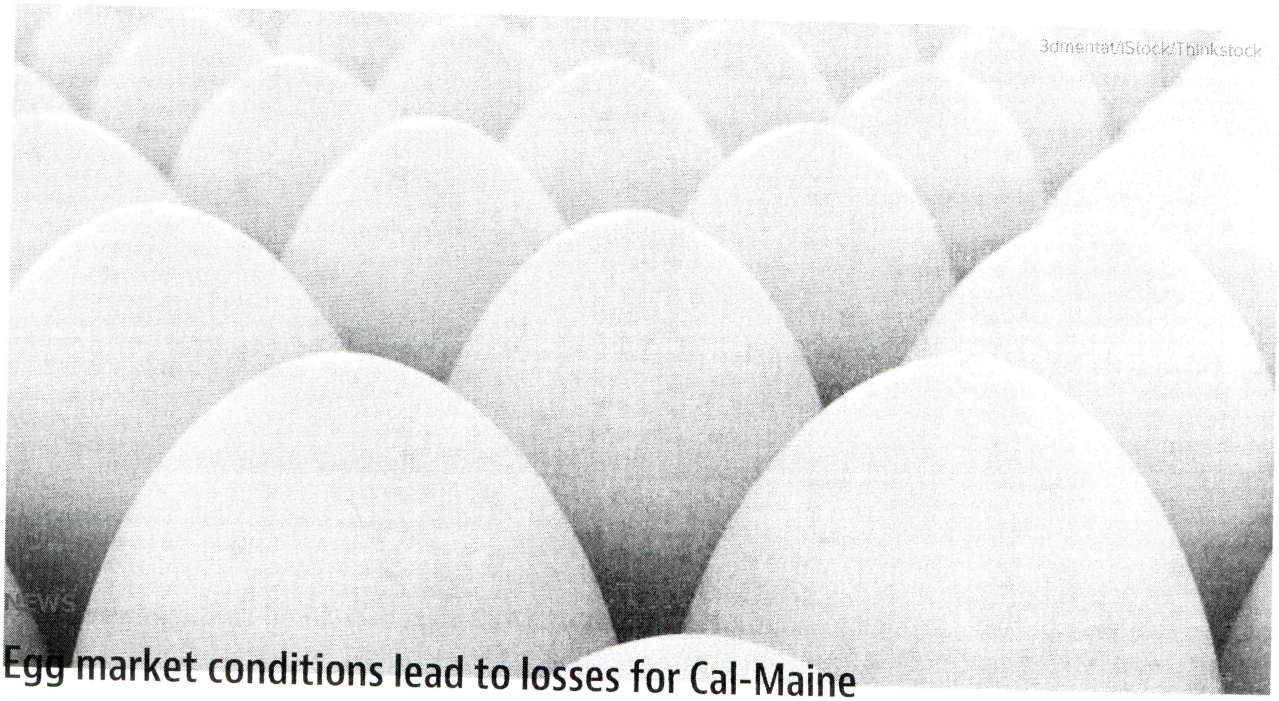
H. Do These Requirements Overlap or Conflict with Other Federal Rules?

AMS has not identified any relevant Federal rules that are currently in effect that duplicate, overlap, or conflict with this proposed rule. AMS has reviewed rules administered by other Federal agencies, including FDA, EPA, APHIS and FSIS, and revised the rule to avoid duplication or conflict. This action provides additional clarity on the animal welfare requirements for organic livestock that are specific and limited to the USDA organic regulations.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| ORGANIC TRADE ASSOCIATION,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,<br><br>Defendants. | Case No. 1:17-cv-01875 (RMC) |

**EXHIBIT B TO DEFENDANTS' REPLY**
**IN SUPPORT OF MOTION TO DISMISS**




NEWS

# Egg market conditions lead to losses for Cal-Maine Foods

Company reports slowing demand for cage-free eggs.

Krissa Welshans 1 | Jul 24, 2017

Fourth-quarter results for Cal-Maine Foods Inc. reflect the volatile and challenging egg market fundamentals that have prevailed throughout this fiscal year, according to Dolph Baker, chairman, president and chief executive officer.

Net sales for the fourth quarter and 53 weeks ended June 3, 2017, were $274.6 million, down 9.4% from $303.0 million for the fourth quarter of fiscal 2016. The company also reported a net loss of $24.5 million, or 51 cents per basic and diluted share, for the fourth quarter of fiscal 2017, compared with net loss of $376,000, or 1 cent per basic and diluted share, for the fourth quarter of fiscal 2016. These results include a payment of $5.5 million included in other income for the final BP settlement from the Deepwater Horizon oil spill in 2010, the company said. In addition, the 2017 fourth quarter was a 14-week period compared with 13 weeks for the same period in fiscal 2016.



For the 53-week period, net sales were $1.075 billion, compared with $1.909 billion for the prior-year period. Cal-Maine reported a net loss of $74.3 million, or $1.54 per basic and diluted share, for 2017, compared with net income of $316.0 million, or $6.56 per basic share and $6.53 per diluted share, for the year earlier. Fiscal 2017 included 53 weeks, compared with 52 weeks for fiscal 2016.

Baker said while volumes were up due to the extra week of sales, the company's average customer selling prices for the fourth quarter were down 15.5% from the same period a year ago. For fiscal 2017, average customer selling prices were down 42.0% compared with fiscal 2016, he added.

"The egg markets have been affected by increased production levels as producers repopulate their flocks after the 2015 avian influenza (AI)-related laying hen losses, and the younger, more productive hen population has produced a higher number of eggs. Overall, market demand trends have not kept pace with these production levels," Baker said.

According to Nielsen data, retail customer demand for shell eggs has remained seasonal. However, Baker said relatively weak institutional and export demand have placed additional pressure on the egg markets.

"During the AI-related price spike, institutional egg customers reformulated their products to use fewer eggs, and while egg prices have since come down, these customers have not returned to their previous usage levels," he explained.

The U.S. Department of Agriculture reported that egg export demand has improved since the beginning of fiscal 2017, but Baker said U.S. egg exports are still below the peak levels prior to the AI outbreak.

"Together, these factors have created an oversupply and market prices have fallen accordingly. We do not expect to see any meaningful improvement until there is a better balance of supply and demand," he said.

Recent USDA reports do indicate a lower chick hatch for the last 10 out of 11 months, which Baker said suggests that the size of the laying hen flock may be moderating moving forward.

Specialty eggs, excluding co-pack sales, accounted for 22.7% of the company's total sales volume for the 2017 fourth quarter, compared with 23.3% for the same period a year ago. Specialty egg revenue was 42.0% of total shell egg revenues, compared with 40.2% for the fourth quarter of 2016.

The average selling price for specialty eggs, which is typically higher and less volatile than conventional eggs, was down 9.3% over the fourth quarter of last year. For the year, specialty eggs accounted for 43.6% of total shell egg revenues,

compared with 29.1% last year, and specialty egg prices were down 12.1% versus fiscal 20



"Our specialty egg business has continued to be a primary focus of our growth strategy. We have made significant investments across our operations to meet anticipated demand for cage-free eggs as foodservice providers, national restaurant chains and major retailers, including our largest customers, have stated objectives to exclusively offer cage-free eggs by future specified dates," Cal-Maine explained.

According to Baker, however, the recent low prices of conventional eggs and typical seasonal fluctuations have led to slowing demand trends for cage-free eggs in the fourth quarter, resulting in a higher supply of specialty eggs.

"We have adjusted our production levels to meet the demands of our customers who still prefer cage-free eggs, and we are well positioned to serve our customers as demand trends change," he said. "In addition to cage-free eggs, our product mix provides a wide variety of healthy choices for consumers, including conventional, nutritionally enhanced and organic eggs."

Baker continued, "In spite of challenging market conditions, we have remained focused on managing our operations in an efficient and responsible manner. We were able to benefit from lower grain costs for the past year due to favorable harvest results."

Feed costs for 2017 have been lower and overall farm production costs per dozen were at the same level as the prior year, even with higher capital expenditures for recent conversion and other improvement projects. Looking ahead, Baker said the company expects to have an adequate supply of primary feed ingredients in fiscal 2018 while grain prices remain volatile.

"While we faced extraordinary market conditions in fiscal 2017, we continued to demonstrate consistent execution of our growth strategy. We will follow this same

direction in the year ahead, and we believe Cal-Maine Foods is well positioned to benefit from [illegible] conditions," he said. "As always, our top priority is to meet the demands of our customers with exceptional service."

Baker concluded, "Importantly, our strong balance sheet provides us with the flexibility to pursue acquisitions and additional growth opportunities that add value to our operations. Together, we believe these efforts will reward both our customers and shareholders in fiscal 2018."

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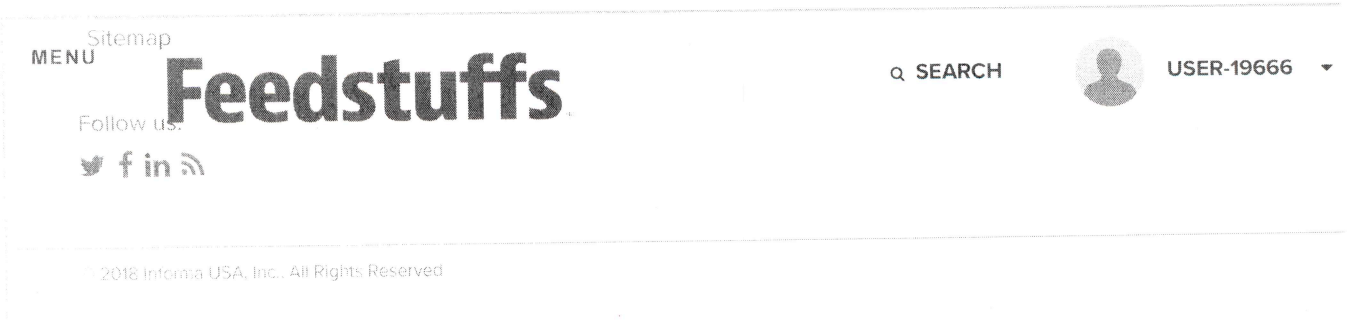

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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**EXHIBIT C TO DEFENDANTS' REPLY**
**IN SUPPORT OF MOTION TO DISMISS**

# WORKING TOGETHER


# 2016 ANNUAL REPORT

# 2016 CROPP COOPERATIVE ANNUAL REPORT

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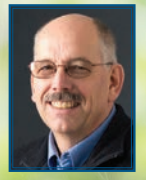

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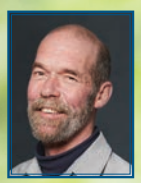

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*Front Cover: Dan & Erica Elsenpeter Family, Minnesota.*

*Vosberg Family Farm, Wisconsin*

# WORKING TOGETHER

**By Arnie Trussoni, President of the Board**

My dad, Adolph Trussoni, was one of the forces behind CROPP back in the late '80s. When we were growing up on our farm, he would wonder about all the activities we were involved in off-farm, like 4-H and the county fair. They're all based on competition, not cooperation, dad would say. Growing up with 13 brothers and sisters, I learned to cooperate. So I'm really proud of the way we work hard to work together here at CROPP. It's just like home.

More than 2,000 farmer-owners of our cooperative work hard at it every day, in the communities where we live and in our bigger community across the country. We ask ourselves what matters most: how many bushels to the acre I got versus my neighbor, or what I'm getting paid per bushel? Through our collective bargaining power, we will all be paid appropriately for what we do. That's what matters.

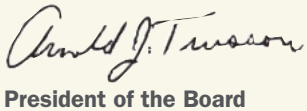
There's more in this picture than what we do on our farms. There are a lot of people working hard throughout the co-op to make sure what we produce gets to families who trust our brands. Pools, Operations, Marketing, Sales, Sustainability, Mission, Facilities, and Food Services staff are all with us, elbow to elbow, to make sure this good thing we started will succeed for generations to come. We all need to shake hands with each other and say, "Thank you for what you do." It only gets done when we're working together.

We're taking our good work global. Longtime Director of Dairy Pools Jim Wedeberg has transitioned into a new role that focuses on an initiative he's been building for a decade, which is international cooperative development. He always says no matter what farmer's table he puts his feet under, we all have the same problems. Farms in Germany or the Netherlands or France have the same issues as we do. How do we keep our farms profitable? How do we transition to the next generation? But what he hasn't found is a cooperative like ours where the farmers have this transparency and voice to the market. And they are excited about it.

Just because we're building relationships overseas doesn't mean we've lost sight of the work we have yet to do here. So many American farmers haven't been fortunate enough to learn the lesson I did as child and we have learned as a cooperative. They think that survival means fending for themselves. We must continue to shine the light across this country. Build relationships. That's what cooperation is all about.

When we're working together and have a year like 2016 where our profits weren't extraordinary as they usually are, we stand by each other and say: We'll do better next year. We'll all work harder to stay focused, find efficiencies, grow the business and take care of each other. A lot of 2016 was about doing exactly that. We established several new partnerships that will enable us to get our products to more consumers and support more and more farmers as we grow.

So I'll leave it at that for now. I've got cows to milk, chickens to feed, and grandbabies to play with—but not before I thank every farmer and employee of this co-op that my dad and a handful of other farmers dreamed into daylight. We're doing great work. Together. ■



**President of the Board**


*Welsh Family Farm, Iowa*

# CEO REPORT

**By George Siemon, Chief Executive Officer**

In 2016, more than ever, we saw the importance of the partnership between all stakeholders in the cooperative—farmers, employees, investors, haulers, processors, customers and consumers. We are recognizing this focus of cooperation within our relationships, and our theme of "Working Together" brings this forward.

## SHORT-TERM NEEDS: PROTECTING A STABLE PAY PRICE

2016 was a hard year, with minimum profits following 2015, our highest profit year. The business actually did very well except for the fact that we had strain and cost around not having the right supply and demand balance. That balance is always our biggest challenge as we forecast into the future what the demand will be. It is not a simple art or science.

In reaction to this imbalance, we always uphold our cooperative principle that we do not lower our selling or target price so that we maintain the potential to achieve our future sustainable pay price goals. Weathering these cycles of over- and undersupply and maintaining our stable pay price goal is a challenge in which our cooperative is a national leader. Being able to withstand these cycles is critical, and our strength and size helps us do that. After months of oversupply in 2016, we reduced the pay price in both the egg and dairy pools. In dairy, we had raised the pay price as a market adjustment during the shortages 2015 due to competitive pressure. This year's pay price reduction took us back to the sustainable goal that we feel we need to support in our strategy.

Fortunately, we have seen feed costs go down, which helped soften the decreases for both pools. These pay price decreases have funded the conventional sales that were required due to the oversupply and underdemand. Even with that, the cooperative took the brave stand to sell more milk conventionally. This robbed us of our profits so that 2016 saw our lowest profit in a long time. We could have lowered the pay price sooner or more, but as a farmer cooperative, we are always cautious. It is very fortunate that our cooperative is as big as it is and has the ability to influence the market as it does, and that our goal is to maintain a stable pay price.

As we look forward to 2017, we now have declared a 100 percent quota to assure that we will hit our profit goal. These experiences show why it is so important that the members have developed policies on how to address these challenges. The respective executive committees have been actively involved in these strategies.

Our most notable actions this past year include forming relationships with non-traditional partners in an effort to solidify our place in the broader marketplace. By working with larger, multinational companies, like Dean Foods and General Mills, we can ensure our organic products expand beyond the historical marketplace into newer arenas, such as convenience stores and other "small-format" markets. (See sidebar pg. 4.) We expect that these diverse, long-term relationships will help us weather future supply and demand curves, as our partners will work with us to determine future needs more accurately, allowing us to plan and grow with more information and buy-in.

## LONG-TERM PLANNNG: SUCCESSION & COOPERATIVE STEWARDSHIP

While there are other successions happening around the co-op, the one of long-term concern is my retirement in six years. That seems like a long time away, but it requires us to continually address it to assure a successful transition. The board has developed a process for long-term succession as well as a plan to address an emergency replacement. We are increasing our investment in leadership development for our employees to enhance our ability to have future leaders come from within our own employee pool.

One critical question is how to keep the cooperative devoted to its mission and its members while running a sound business with respected employees. In light of this, I see it as critical that the next CEO be mission-oriented. So this year we formed the new role of Chief Business Officer, which will manage the day-to-day operations of the business. We were very fortunate to be able to hire our long-time friend and partner, Bob Kirchoff. Bob was the CEO of our primary Midwest fluid bottler—the Schroeder family—which became part of Agropur. Bob is a welcome addition to our management team. This addition has allowed me to focus more on sales, long-term planning, farmer relations, marketing, government affairs, human resources and financial structures. I am turning more toward preparing for my succession and securing a future that stays true to our mission.

ORGANIC VALLEY Fresh

In 2016, we laid the groundwork for a 50/50 joint venture between Organic Valley and Dean Foods to grow our fresh milk business, beginning in mid-2017. The new business is called Organic Valley Fresh (OV Fresh), and it will allow our independent, farmer-owned cooperative to save more family farms and to reach more shopping carts with Organic Valley dairy products. By partnering with Dean, we will use a competitive production and distribution method (direct-to-store distribution) for the HTST pasteurized milk portion of our milk business.

From the beginning of our co-op in 1988, our farmers have relied on good relationships with the existing network of milk handlers, processors and co-packers. Today, almost 30 years later, organic food is a $39.7 billion industry because families all over the country are demanding it wherever they live and shop. The OV Fresh joint venture lets more people have that access to organic dairy, and it helps more Organic Valley family farms sustainably grow our supply to meet that demand—while staying an independent cooperative.

*Holter Family Farm, Maryland*

Studying cooperative models and theory has been very helpful for us to learn from others and to make informed choices on how to move forward. The board and employees were blessed to work with the University of Missouri's Dr. Mike Cook and tap into a wealth of knowledge from the many cooperatives he and his researchers have studied and served on the boards of, and from the many classes they teach. I went to an enlightening educational conference they offered to CEOs from most of the bigger cooperatives in the nation. There were many very successful cooperatives of all types represented, and it was inspiring to see the value of the cooperative structure.

Another educational journey we went on was to visit the Mondragon Cooperative network in the Basque region of Northern Spain. We studied their model when we started CROPP, so now that we are a grown cooperative, it was great to rediscover Mondragon and see what we need to do to be a stronger cooperative. The Mondragon Cooperative network was founded and inspired by a Catholic priest, so their foundation is strong in serving the community and learning how humans can work together for a common good. See the sidebar for some quotes that reflect his wisdom. (Also read more about this year's other international education and cooperation activities on page 22.)

This need to focus on our cooperative future provided the theme of "working together" for our Cooperative Stewardship Forum summit in the fall. We reviewed what has really worked as a cooperative and what we need to work on for a strong future. The participants included an equal number of farmer-owners and employees, plus the board and management team. The forum was well-planned and used experienced facilitators, proving the value of group processes to assure that we maximized the outcome of a common vision. We discussed the different roles of our stakeholders, what governance means, and the importance of employees and farmers working together. Hosting the forum event was the first step in the board-sponsored Cooperative Stewardship Program's goal to reinvigorate the cooperative's democracy to guarantee a strong foundation for the future. Following the event, the attendees were eager to extend this experience to an expanded group of farmers and employees. (Read more about the Cooperative Stewardship Forum from the participants' point of view on page 10.)

Our cooperative has always been a learning organization, and 2016 brought us lots of opportunities to become a better cooperative. As we look forward to our future, it is critical that we become the best member cooperative and dynamic business possible. The focus is a long-term challenge that we all need to participate in. We are very successful, and we need to seek continued improvement so that we continue to be a vibrant business for future generations.

We can only be in wonder and thankful for the good we do and for the position that our cooperative has. We provide millions of people with excellent-quality organic food. We provide a sustainable market to more than 2,000 family farms. We provide meaningful employment to more than 900 employees. We provide contract work to a large group of folks, including milk haulers, labs, co-packers, truckers, and many other services. We have a first-class relationship with our ingredient customers and with the nation's retailers. Our brands are the top tier in their categories. We are an amazing cooperative, and we should not hesitate to recognize that and take time to be thankful. ■

**The following quotes from Father Jose Maria Arizmendiarrieta, the founder of the Mondragon Cooperative network, inspired us when we created CROPP, and they continue to inspire us today.**

"Invest in *people* first."

"Cooperative enterprises must not be *static.*"

"There is no room for detached people in *Cooperation;* it is not a nest for migrating birds."

"We must *act with our heart* but maintaining our head in its place."

"It is not a luxury but a *necessity* to live for the future more than for the present."

*John Gannon, Cheese Room Team Member*

# BUSINESS REPORT

**By Bob Kirchoff, Chief Business Officer**

Reflecting back on 2016, we accomplished much, and we have much to be thankful for. We grew the Organic Valley brand 12% to $550.6 million, launched outstanding new products (pg. 15), produced award-winning marketing campaigns (page 16), entered into a joint venture with Dean Foods providing significant growth opportunities through a huge distribution channel, continued our march into the large consumer packaged goods (CPG) category with the addition of General Mills as a customer, and made two important capital investments that will reduce costs, improve regional efficiencies and increase production of profitable items. Yes, it was a busy year.

On top of all of the accomplishments, we also made a strong commitment to our business by adding my new position of Chief Business Officer. This role will further emphasize our focus on the strategies and goals of the business for 2017 and for years to come. Although I have had association with CROPP for many years, becoming an official employee and a part of the management team was definitely a learning journey in 2016.

We also made forward progress on instituting systems and software to support our complicated supply chain. This is critically important for us as we continue to grow and service all of our customers, both internal and external.

To ensure our success, we must maintain our exceptional product quality and a cost model that keeps us competitive. Operationally, we continued our hard work with our processing partners to reduce costs, reduce line losses and increase efficiency, resulting in outstanding measurements of quality and higher product yield. Our competition is keen, so in 2017 we will need constant focus on making further improvements in efficiency and cost of goods if we're to achieve our growth goals.

Another strategy employed in 2016 was the addition and acquisition of plant assets: the Conversion and Labeling Facility (CALF) in Cashton, and the former FCC facility in Oregon, which we have renamed the Organic Valley McMinnville Creamery. These strategic investments protect our supply chain by improving our ability to balance our milk in a region (Oregon), reduce our costs in growing categories, and increase the production of high-margin products like shredded cheeses and ghee. These projects take planning, time and a tremendous amount of effort—they were not easy decisions or small undertakings. I have been impressed by the abilities of our teams to bring these ideas to fruition, and we will get even better at it with each new opportunity. We will continue to refine our future investment needs and strategy this coming year while ramping up production at both the Cashton and McMinnville facilities.

Organic Logistics contributed net profits slightly above 2015 despite maintaining the same gross margin and losing their largest client, which had reached a size where they chose to manage their own freight. To make up for that loss, Organic Logistics staff worked hard to add 15 new clients, and they look forward to additional new clients in the new year. Fuel costs were lower than planned, which also eased the pressure. In addition to Organic Logistics' profit contribution, the subsidiary provides value to the cooperative by offsetting freight and warehouse costs for our own products.

I want to thank everyone for their support in 2016. I have been so impressed by the culture and passion around our co-op, love of our brand and respect for each other. We have engagement among our employees at levels I have never experienced. We have a brand that is iconic and farmers on a mission. I thought I had a pretty good idea of these things before I came aboard, but I was wrong. I had no idea. I am looking forward to working with this amazing team of employees and farmers to achieve great things! ■

## CONVERSION AND LABELING FACILITY (CALF)


Production to begin in spring **2017**

**22,300** sq. ft. facility

**30** EMPLOYEES (three shifts) 24/7 M-F

**BROKE GROUND JUNE 1, 2016**

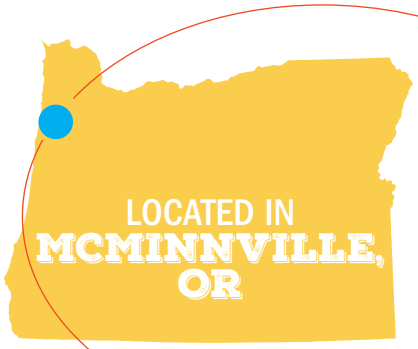
### PRODUCTS

- **Ghee**
  Ghee makes up 30% of our butter profits.
- **Cheese cutting for deli blocks, sticks, and shreds**
  Stringles/sticks and shreds make up 52% of our cheese revenue and 58% of total cheese profits.

### FAST FACT

- Facility enables us to **reduce costs and increase production** of these high-margin products.

## ORGANIC VALLEY MCMINNVILLE CREAMERY




Production to begin in spring **2017**

**27,000** sq. ft. facility

**35** EMPLOYEES

**PURCHASED NOVEMBER 1, 2016**

### PRODUCTS

- **Powders**
- **Butters**

### FAST FACTS

- Organic Valley has processed milk at this creamery for more than **20 years.**
- 15 of our 23 Oregon and Washington routes are within a **100-mile radius** of McMinnville.
- Will keep the milk of **71** Oregon and Washington farmer-owners within the region.
- The state of Oregon has the **second greatest volume** of milk in our supply chain, after Wisconsin.

### HISTORY OF FACILITY

- **Built in 1939** by Farmers Cooperative Creamery.
- Started organic products in **mid-'90s.**

*Martin Family Farm, Ohio*

*Brannen-Spangenberg Family Farm, New York*

# FINANCIAL SUMMARY

**By David Poremba, Chief Financial Officer**

I am proud to say that our strength and resiliency throughout this past year came from our ability to consistently and proactively meet challenges head-on. This quality is important because with passing the billion-dollar sales threshold, the financial implication of each challenge now becomes greater.

This year, we had to combat lower conventional prices, industry consolidation and serious national oversupply of nonfat dry milk, to name a few. Yet despite the challenges, we joined together, found solutions and ended the year with growth.

Gross sales in 2016 exceeded $1.1 billion—an all-time high and up 5.8 percent from 2015. Net income was $2.4 million before tax and $6.3 million after tax, due to accounting for deferred taxes.

We faced significant pricing pressures this year as a result of continued market consolidation in the organic industry coupled with lower conventional farm prices. We met this by increasing our sales trade allowances by 71.5 percent over 2015 (from $26 million to $44.6 million) and by increasing other marketing costs by almost 25 percent, primarily to amplify our brand awareness and to introduce new products.

Taking bold steps to meet market challenges was a theme this year, and it will continue to be a theme in coming years. In 2016, we entered into a joint venture with Dean Foods. In this partnership we will process, market, distribute and sell our HTST products together through Dean's direct store delivery system. The joint venture begins with a phased approach throughout 2017 and should strongly position us in the marketplace to get Organic Valley products to our consumers across the country in a more efficient and cost-effective manner, thereby enabling our continued growth.

Although the cooperative's profit level was lower than our 2015 record year, dairy pay prices achieved a national average pay price of $35.67 per hundredweight, delivering once again a record organic premium of $19.32 over the average conventional price. This marks the second consecutive year that our organic dairy pay price was more than double the average conventional pay price.

We also continue investing in our future. For the first time ever, we have invested in two large manufacturing-related capital expansions. (Read more about CALF and the McMinnville Creamery on page 7.) These translated to $28.9 million in capital spending—all invested to improve our internal capabilities and efficiencies for the future.

The cooperative's balance sheet continues to be very strong. Equity is at its highest level ever. Although outside debt increased over the prior year, it was used solely to fund increased working capital and the capital additions mentioned above.

Overall, I'm confident our spending decisions will position us for long-term gains in the years to come. Our financial condition has us poised to continue to be leaders in the organic industry. ■

**$1.1**
BILLION IN SALES

**$6.3**
MILLION IN PROFIT

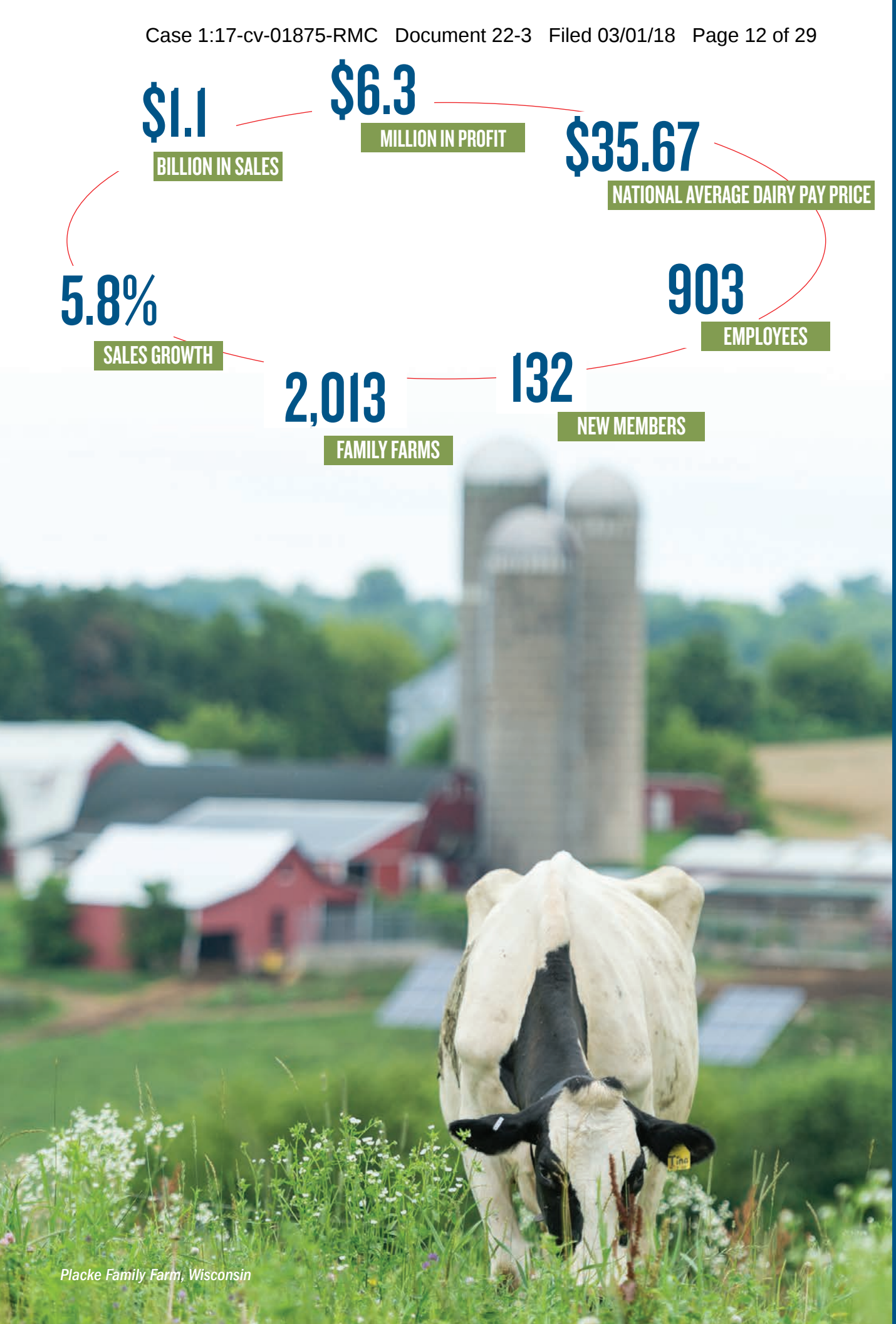
**$35.67**
NATIONAL AVERAGE DAIRY PAY PRICE

**903**
EMPLOYEES

**132**
NEW MEMBERS

**2,013**
FAMILY FARMS

**5.8%**
SALES GROWTH



*Placke Family Farm, Wisconsin*

# COOPERATIVE STEWARDSHIP

## WORKING TOGETHER

### PURPOSE:

To envision a system of governance that meets the needs of the co-op in five to ten years.

### THEMES:

- The need to care for the farmer/employee relationship
- The importance of embedding values into actions
- The need to be involved, engaged and dedicated to the cooperative

In November 2016, a group of 30 farmers and 30 employees, along with CROPP's board of directors and management team, gathered for the Cooperative Stewardship Forum (CSF). The discussions were vibrant, engaging and thoughtful, and centered on several themes. Farmers and employees were paired up and spent 90 minutes interviewing each other. Together, they explored their personal experiences in their communities and within CROPP, looking for moments of brilliance and connection to a shared purpose. The connections forged during these interviews set the framework for much of the forum work that followed during the three days.

The following essays come from two participants who were paired up, and they share some of their personal takeaways from the CSF experience.

"When I see firsthand . . . the intensity of the employees' work ethic, it puts a little more *spring in my step* to know they are there for us. They're like extended family."

– Rick Fonder

**By Michelle M. Pedretti,**
**Farmers in Marketing manager and CSF participant**

As with everything I've experienced in my 13 years with the co-op, we continue to improve, and the 2016 Cooperative Stewardship Forum was no exception. The forum was a powerful, thought-provoking and connecting experience on many levels shared between farmers and employees. I heard new snippets of founding history I hadn't heard before, I recognized my own passion for building community during my interview session with farmer Rick Fonder, and I now understand more deeply the roots and governance of our cooperative model.

Most inspiring for me was our Cooperative Vision for 2022 exercise, where we were asked, "How does our cooperative democracy harness the collective wisdom, energy and commitment of the whole?" We offered a vision encompassing many qualities. Here are a few that resonated with me:

Our vision is of a co-op where wisdom is not defined based on age, position or length of time with the co-op; instead, where wisdom is seen as something to which everyone contributes and there is ample opportunity for diverse voices to be heard.

We envision a co-op that has farmer-member engagement at an all-time high, with clear involvement choices and an expectation to participate; and that has employees who are fully engaged in the governance and operational decisions, who are equally invested and accountable for the cooperative's success.

We envision a co-op that places a high value on transparency, trust and respect, which is apparent at all levels of the organization.

Our vision trusts in our ability to continue to make choices and decisions as much with our hearts as with our minds.

Most important, as we go forward working together—farmers, employees, partners, customers and consumers—we must hold onto and tell our stories even as the faces around us change. The telling and re-telling of our collective stories will connect us to our past, inform our present and guide us into the future.

**By Rick Fonder,**
**Farmer-owner from South Dakota and CSF participant**

The Cooperative Stewardship Forum brought two things into clear focus for me.

First, my brothers and sons and cousins and extended community who farm organic here in South Dakota know for certain we can never go back to the way farming was before we transitioned to organic. Our philosophy on this is very strong. I'm sure most CROPP farmers feel the same way. We know we're doing it right when other farmers across the country continue to come on the truck with us. Sure, we have bad patches, but when you're confident you're doing the right thing, you get through it and move on. This is our strength as a cooperative community.

Second is that I don't believe the employees of CROPP will let us or the business down. We farmers rely on employees in so many ways. When I see firsthand, like at the Stewardship Forum, the intensity of their work ethic, it puts a little more spring in my step to know they are there for us. They're like extended family. As a farmer, I can't help using a farmer-like analogy to explain it, but it's like having a 4-wheel drive vehicle: You don't always need it, but when you do and it's there at your fingertips, you cannot be more grateful for the support. ■

"We envision a co-op that places a high value on transparency, *trust and respect,* which is apparent at all levels of the organization."
– Michelle Pedretti

*van Tol Family Farm, Washington*

# AWARDS AND RECOGNITION

## NATIONAL & REGIONAL FARMER AWARDS

**Ron Holter,** Jefferson, MD, received the inaugural **Farmer of the Foodshed Award** for his willingness to mentor others and host numerous field days furthering sustainable agriculture in the Chesapeake Region.

**Allen and Karen Bathalon, Troy, VT,** won the **Vermont Highest Quality Milk Award,** presented to one farm annually by the Vermont Dairy Industry Association.

The following farmer-owners were recognized for producing top-quality milk by the **National Mastitis Council's National Dairy Quality Awards:**

David Hochstetler, Wolcottville, IN
Wayne Martin, Trenton, KY
Raymond Yoder Jr., Middlebury, IN
Jack Gourley, Scio, OR

The following farmer-owners received the **New York Super Milk Award:**

Norman and Pamela Parent, Burke, NY
Doug Rielhman, Cortland, NY
Andy D. Schlabach, Oneida, NY

CROPP had five Midwest members place in the top five of their categories at the World Dairy Expo **World Forage Analysis Superbowl.** In total, the competition received 373 entries in eight categories.

Jack Stamschror, Kellogg, MN (2nd place, Dairy Hay and Grass Hay)
Nathan Yoder, Little Suamico, WI (2nd place, Baleage)
Joe Beachy, Bonduel, WI (2nd place, Dairy Hay)
Kevin & Trisha Wilke, Sturgeon Bay, WI (4th place, Dairy Hay)
Dan Olson, Lena, WI (5th place, Baleage)

## CROPP FARMER AWARDS

**Mike Bedessem** was awarded CROPP's **Ray Hass Organic Pioneer Award** in thanks for 22.5 years of dedication to sustainable family farming, wholesome organic food and a cooperative approach to business as CROPP's chief financial officer. Mike retired from this position in 2016 and currently serves the co-op as VP of Business Development.

**Steve Russell,** Winslow, ME, received the **Cooperative Leadership Award** for 17 years of service as a Dairy Executive Committee member—the longest in CROPP history thus far. We thank him for the time and leadership.

**John and Meghan Palmer** of Waukon, IA, received the **2016 Generation Organic Recognition Award** for their perseverance in building a successful farm business without having a family farm to step into, and for their involvement in CROPP leadership roles and as organic ambassadors within their community. The Palmers have dairy farmed since 2002 and joined CROPP in 2006.

**Sarah (Holm) Korte,** Elk Mound, WI, and **Kelly Mahaffy,** Coos Bay, OR, each received a **Gen-O Years of Service Award.**

**Gerrit and Karen van Tol,** La Center, WA, were honored with the inaugural **Farmers in Marketing Farmer Ambassador of the Year Award** recognizing an individual or couple who has been an exemplary ambassador for the co-op. In 2016, the van Tols took part in a wide variety of marketing activities ranging from simple to complex, including starring in the spring half & half campaign commercial and being ambassadors at the pop-up coffee shop in New York City. They are quick to respond, easy to work with and have a great attitude.

**Rick Langland,** Waukon, IA, was awarded the **Leadership in Sustainability Award.** Rick is an early adopter of on-farm energy improvements and enthusiastically shares the message that efficiencies are just as important as renewable energy installations. In addition, he is transitioning his 400-acre farm to a managed intensive grazing system to improve the feed quality for his herd and to reap the carbon sequestration benefits achieved through rotational grazing.

## CROPP 2016 HIGHEST QUALITY AWARDS

**Cream of the CROPP Milk: East**
JASA Family Farm, Newport, VT

**Cream of the CROPP Milk: Mideast**
Daniel & Rebecca Miller, West Farmington, OH

**Cream of the CROPP Milk: Midwest**
Mahalko Dairy, Gilman, WI

**Cream of the CROPP Milk: West**
Lagerwood Farms, Inc., Burlington, WA

**Pickiest Produce**
R & R Farm, Cashton, WI

**Best Beans in the Field**
Marvin & Joia Eales, Mount Vernon, IA

**Highest Grower Pool Crop Quality**
Randy & Karen Strey, Hortonville, WI

**Award of EGG-cellence: Midwest**
Ben Borntreger, Readstown, WI

**Award of EGG-cellence: Midwest Omega-3**
Lucky H Acres, Coon Valley, WI

**Award of EGG-cellence: Northeast**
Daniel Kauffman, Spring Glen, PA

**Award of EGG-cellence: Southern Iowa**
Harley Miller, Harper, IA

**Award of EGG-cellence: Colorado**
Yoder Farms, Trinidad, CO

**Award of EGG-cellence: Ohio**
Paul & Emma Yoder, Fredericktown, OH

**Best Bessie: Midwest**
R & G Miller and Sons, Inc., Columbus, WI

**Best Bessie: East**
Rene J. Fournier and Sons Farm, Inc., Swanton, VT

**Choicest Side O'Beef**
The Pedretti Family, Genoa, WI

**Perfect Pork**
Tom & Irene Frantzen, New Hampton, IA

**Terrific Turkey**
Jewell Enterprises, Inc., Decorah, IA


*Lay Family Farm, Tennessee*

## BUSINESS & STAFF AWARDS

**Emma Grinde (below),** product development, received two awards this year. She received the **Cultivating Excellence Award for Continuous Improvement** for making process improvements that nearly doubled attendance per day at sensory panels, which increased CROPP's confidence in product development decision-making. And she received the **Customer Service Annual Award** for going above and beyond to provide superior customer service to her customers and colleagues.

**Noelle Kehoe** was recognized with this year's **Green Spirit Award** for her dedication to incorporating environmental sustainability and green living into her work and personal life.

**Gloria Joseph** received **CROPP's Saved Our Hide Award (formerly the Penny Pincher Award)** by coordinating with a cross-functional group to increase the code dating on powder from 15 to 18 months, which saved CROPP millions of dollars and should pay dividends for years to come.

## PRODUCT AWARDS

**American Cheese Society**
1st place: Salted Butter
1st place: Colby Cheese



**Wisconsin Dairy Expo**
3rd Place: Cream Cheese
2nd Place: Dark Chocolate Organic Balance

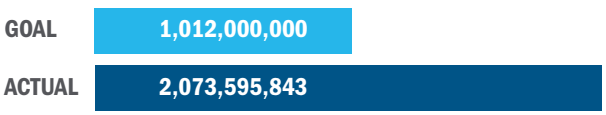
**Wisconsin State Fair**
3rd Place: European Style Cultured Butter


## MEDIA RECOGNITION

2016 was a great year for the Media Relations Department. We exceeded our goals by every measure and got a great deal of earned (not paid) media coverage. We're especially proud of features in Conscious Company magazine, The Wall Street Journal, and The New York Times. Our cooperative story continues to resonate with the media from regional newspapers to national outlets. We're gaining voluminous coverage, and we thank all of our farmer-owners and CROPP staff who've answered the call to speak so engagingly with the media whenever we've needed you.

In our work, we focus on quality over quantity—but in 2016 we had quantity, too!


## 2016 IMPRESSIONS




## 2016 FEATURE STORIES



**Eggnog** named #2 out of 10 eggnogs sampled by the Huffington Post.

**Eggnog** named "Best Flavor" out of 14 eggnogs sampled by Bon Appetit magazine.


**Omega-3 XL Eggs** voted #1 for building muscle by Men's Health magazine.

# MARKETING AND SALES HIGHLIGHTS

## NEW PRODUCTS

Ultra-pasteurized Grassmilk was introduced after strong grocery channel customer demand and complements the HTST pasteurized line.

The **only** organic sharp cheddar shredded cheese on the market.


ORGANIC PRAIRIE
Mighty™
ORGANIC


While not a new product, Organic Prairie Jerky enjoyed an update to nearly every aspect of the product: a packaging refresh, rebranding under the Mighty brand, and a reformulation to improve the flavor and make the jerky easier to chew.

## PRODUCT PERFORMANCE HIGHLIGHTS

After only 8 months on the market, **Organic Valley Ultra-Pasteurized Whole Grassmilk** mainstream channel sales exceeded sales of our nationally distributed Lactose Free, Omega-3, and Chocolate milks, and at the end of the year, the product was already at 25% of the sales of our plain ultra-pasteurized whole milk.

In its 15th season, **Organic Valley Eggnog** had a record-setting year by selling more than 66,000 cases, resulting in a 60% increase in retail sales and volume growth over 2015.

**Mighty Bar** sped into the million-dollar club, generating more than $1 million in just its first year on the shelf—and with only 2 SKUs!

**Organic Prairie 100% Grassfed Hot Dogs** increased 32% over last year.

**Organic Valley Potatoes** had record sales of nearly $1 million, representing 3 times the volume sold in 2015.

# CAMPAIGN HIGHLIGHTS

## The Real Morning Report

This campaign focused on building awareness and driving trial for our Organic Balance milk protein shakes by talking to women in an authentic and direct way, connecting with their lives and what matters to them.

**The Opportunity:** More women do not get a nutritious start to their day—and that's where Organic Valley could "bring the good" with Organic Balance.

We formally surveyed 1,000 women about what their mornings were really like and used those results to create five humorous videos that we promoted online. Consumers could also take the survey at RealMorningReport.com to see how their mornings compared.

**Goal:** Get 3 million views, and get people to try Organic Balance (and make them laugh along the way.)

**Results?** We hit the mark!

**4.9 MILLION VIEWS**

**132 MEDIA MENTIONS**

**90%** WATCHED THE REAL MORNING REPORT ON YOUTUBE ALL THE WAY THROUGH (73% FOR THE 2015 SAVE THE BROS CAMPAIGN)

**80 MILLION IMPRESSIONS**

A SINGLE FACEBOOK POST OF THE PRIMARY VIDEO RECEIVED **1 MILLION VIEWS AND 53,000 SHARES!**

**402,000 WEBSITE VISITS** 4X THE AVERAGE MONTHLY VISITORS OF ORGANICVALLEY.COOP

**12,626 COUPONS REDEEMED**

ORGANIC BALANCE SALES INCREASED BY **10%-13%** DURING THE CAMPAIGN PERIOD!

## Award Winning Campaign:

Winner of a Femvertising Award by SheKnows Media, recognizing brands that "are challenging gender norms by building stereotype-busting, pro-female messages and images into ads that target women."


## The World's Best Coffee

The goal of this campaign was to highlight the passion behind our half & half while reinforcing the Organic Valley brand's halo of high-quality products. The campaign video featured Washington farmer-owner Gerrit van Tol, who was so comfortable with the camera that we received numerous comments that he had to have been an actor! The video brings the goodness of Organic Valley Half & Half from the happy cows on organic pastures to a pop-up coffeeshop in New York City—because "great coffee isn't just made. It's milked."


- 22.2 million views
- 3-month NPR radio campaign
- 218,000 website visits
- 19.9 million impressions from TV replacement/streaming services
- 100 million impressions (surpassed goal by 100%!)


## The War on Butter is Over!

This campaign was created to promote our award-winning butters with a video that called out the increasing scientific evidence that butter (and fat) is not the enemy. The video took a humorous stance and featured some of our farmer-owners!

- 10.4 million video views
- 32 million impressions
- 226,000 visits to the campaign landing page

## FARM DISCOVERY TOURS

In 2016, the **Farm Discovery Program** saw a 48% increase in overall attendance and an exciting 84% increase in consumer attendance over 2015!

### 2016 FARM DISCOVERY

**39 FARM TOURS | 3,904 GUESTS**

**CONSUMERS**
4 TOURS
3,365 GUESTS

**RETAILERS**
12 TOURS
183 GUESTS

**GOVERNMENT RELATIONS**
6 TOURS
101 GUESTS

**EMPLOYEES**
11 TOURS
161 GUESTS

**MEDIA**
4 TOURS
66 GUESTS

**STRATEGIC PARTNERS**
2 EVENTS
28 GUESTS

*U.S. Senator for Wisconsin Tammy Baldwin with CROPP Board Member Keith Wilson.*

*Milking educational station at Burkholder Farm Discovery event.*


*Farmer & Employee Michele Trussoni live-streaming to Facebook during DeGroot Farm Discovery event.*

## FARMERS IN MARKETING HIGHLIGHTS

**292**

farmer ambassadors represented the co-op at

**286**

marketing, organic education and advocacy activities in

**37**

states nationwide.

*Benson Family Farm, New York*

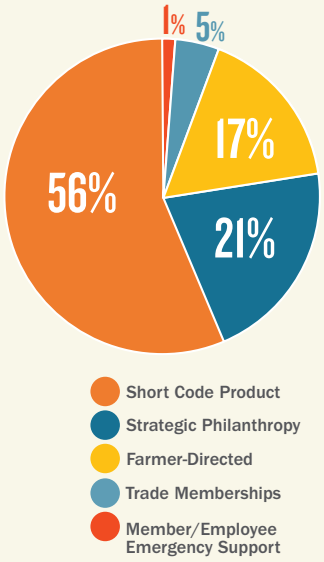
# POWER OF WE

**44%**
OF CONSUMERS
*are willing to*
**PAY MORE**
*for products from*
**COMPANIES THAT GIVE BACK**

CROPP supported more than
**1,000**
organizations across the country.

**FARMERS ADVOCATING FOR ORGANIC (FAFO) AWARDED**
***25 grants***
**TOTALING**
**$780,000**

**$4.9 million in total philanthropic donations and sponsorships.**




**TOP 10 NON-PROFIT ORGANIZATIONS** *Supported in* **2016**

The Sustainability Consortium
Organic Voices Action Fund
Children's Environmental Health Network
Rodale Institute
Vernon Memorial Healthcare Foundation's Center for Special Children
Future Farmers of America
Pennsylvania Association for Sustainable Agriculture
FoodTank
National Farmers Union
Midwest Organic & Sustainable Education Service (MOSES) Organic Farming Conference

## NEW ENDOWED CHAIR IN ORGANIC PLANT BREEDING PROMISES NATIONAL IMPACT

In 2015, Organic Valley and the Farmers Advocating for Organic fund, in cooperation with Clif Bar and the University of Wisconsin - Madison, created the nation's first endowed chair for organic research of any kind. In 2016, UW-Madison Professor William F. Tracy of the College of Agricultural and Life Sciences was named the recipient of the grant, and he and his students will conduct research to develop crop varieties adapted to organic systems.

The endowed chair was created in recognition that organic research receives less than one percent of public agricultural research dollars despite the fact that consumer demand for organic products has never been higher. This imbalance has hindered organic agricultural innovation and slowed the growth of organic production in the United States. This endowed chair is a big step toward advancing organic crop development and distribution and promises to have national impact.

# FARMERS ADVOCATING FOR ORGANIC

Farmers Advocating for Organic (FAFO) is a grant program funded entirely by annual, voluntary contributions from CROPP farmers. It's the largest farmer-funded grant program in the U.S. and one of the few focused solely on organic.

Since 2007, more than 200 grants have been awarded to research, education and advocacy projects that advance FAFO's mission: to protect and promote the organic industry and the livelihood of organic farmers.

Simply said, FAFO is organic farmers helping organic farmers.

## 2016 GRANTS

In 2016, FAFO awarded the following 25 grants totaling $780,000.

**California Certified Organic Farmers (CCOF) Foundation**
Provide educational grants to students and teachers of organic agriculture.

**Cloud Mountain Farm Center**
Expand an incubator farm program for beginning organic farmers in northwest Washington.

**Croatan Institute**
Develop and implement a strategic plan for economic revitalization through organic agriculture in North Carolina.

**Dairy Grazing Apprenticeship**
Facilitate succession of organic dairies by recruiting and supporting organic dairy farmers to become Master Dairy Graziers.

**Kitchen Table Advisors**
Provide business advising, financial education and support to low-income organic family farmers.

**Land Stewardship Project**
Provide organic farmers with tools, resources and networks that aid in farm transition planning.

**National Sustainable Agriculture Coalition**
Cultivate and educate organic champions at the executive, legislative and agency levels of the federal government.

**National Young Farmers Coalition**
Train young farmers how to become effective community leaders and policy advocates.

**Northwest Center for Alternatives to Pesticides**
Provide organic food and farming education through newsletters and events.

**Northwest Wisconsin Technical College Foundation**
Produce a documentary film focused on organic and sustainable farming in Wisconsin.

**Organic Farming Research Foundation**
Educate policymakers and researchers of the top research needs identified by organic farmers.

*Klaphake Family Farm, Minnesota*

**Organic Growers School**
Provide training, land-access and mentoring systems to beginning organic farmers in the Southeast.

**Organic Voices**
Educate consumers on the difference between organic and natural or non-GMO.

**Oregon State University**
Provide scholarships for low-income, organic farmers to attend the National Women in Sustainable Agriculture Conference.

**PCC Farmland Trust**
Support natural resource conservation projects on organic, trust-conserved farmland.

**The Organic Center**
Improve the dissemination and adoption of scientific research focused on challenges in organic production.

**Tri-County CALF**
Support an Amish-community-based mentorship program for beginning organic farmers in Indiana.

**University of Wisconsin - Madison**
Research organic alternatives to conventional celery powder as a curing agent in organic meat.

**Wisconsin School for Beginning Dairy and Livestock Farmers**
Expand a distance education program for beginning grass-based and organic dairy and livestock farmers.

## CROPP PROJECTS:

**Expanding member engagement**
Support the attendance of 25 CROPP members who have never attended the cooperative's Annual Meeting.

**Farmer connections**
Provide an online platform to CROPP farmers that will facilitate connections for farm opportunities.

**Milk fluorescence testing validation**
Evaluate milk florescence testing as a tool for measuring dry-matter intake from grass.

**Organic grain collaboration**
Build the domestic organic grain supply through a pre-competitive initiative among organic food companies.

**Organic resource guide**
Develop organic agriculture resources for high school educators.

**Power of We online giving challenge**
Support local, community-based nonprofits focused on growing the organic food and farming movement.

***CROPP Members: More detail on the FAFO program is available on Farmers.coop.***

***Members of the Public: Interested in applying for a grant? Visit ov.coop/fafo to learn more.***

# INTERNATIONAL COOPERATION

Why are CROPP farmers and employees traveling overseas? Jim Wedeberg will say the answer is simple: to develop relationships, which has been CROPP's focus from day one. We have never seen farmers or farm groups in the U.S. as our competitors. Any farm group that wanted to come in and talk about CROPP's organic model found an open door. In the last decade, we've taken that openness global.

## GERMANY

In February 2016, CROPPies from Sales and Pools made their 9th annual trek to BIOFACH in Nuremburg, Germany. BIOFACH is the largest organic trade show in the world, a venue where we can establish relationships and take the pulse of organic markets worldwide.

In August 2016, several CROPP employees engaged in an Organic Market 101 tour to Germany, compliments of The Organic Trade Association (OTA) and the German American Chamber of Commerce (GACC). This well-rounded tour covered everything from supply chain to policy. Participants met with many groups, including the Federal Ministry of Food and Agriculture (BMEL, the German counterpart to America's USDA), and members of the International Foundation for Organic Agriculture (IFOAM, an organic think tank). Participants also met with distributors and went on store tours.

## SPAIN

July 2016 was our very own international month of co-ops. CROPP CEO George Siemon, VP of Farmer Affairs Travis Forgues, Mission Executive Theresa Marquez and unofficial CROPP Mayor Jerome McGeorge traveled to northern Spain's magnificent Basque region to experience firsthand how the Mondragon cooperative system works. Many may already know that CROPP's cooperative model was based on the Mondragon model of cooperative societies. Whereas employees at other Spanish companies must answer to shareholder needs—often by sacrificing their jobs—that is not true at Mondragon, which acts as the parent company to 111 small, medium-sized and larger co-ops, making it the world's biggest worker's cooperative. Business moves are considered carefully and conservatively by large groups of invested individuals before action is taken. This has resulted in longevity, stability and quality of life. This careful, conservative approach is something CROPP leaders continually work to emulate for the benefit of our own co-op. There was much to take in on this learning trip, and we plan to continue the dialogue on a regular basis.

## CUBA

Also in July, the National Cooperative Business Association (NCBA) sponsored an educational trip to Cuba. Jim Wedeberg and Pools Director David Bruce joined representatives of American cooperatives like the National Rural Electrification Cooperative Association (NRECA), True Value and many others. Co-ops are a hugely popular business model on the island. Out of economic necessity over the past 50 years, Cuba has been a hotbed of organic innovation. In return, four representatives from the Cuban agricultural sector joined us at the Midwest Organic & Sustainable Education Service (MOSES) 2017 Organic Farming Conference to learn and share.

## REGIONAL UNDERSTANDING TOURS

CROPP's Regional Understanding Tours (RUT) have been crucial, real-time learning sessions when it comes to demonstrating that we all have a lot in common. In September 2016, 48 CROPP farmers and employees embarked on the first international RUT. When visiting farms in France, Germany and Holland, the same thing happened as on the U.S. tours: American farmers sat down with European farmers and said in amazement, "Whoa, they're just like us!" The world became smaller and less threatening. The more you know about it, the less you fear it.

- In the western **Netherlands,** farmers learned that growing corn below sea level causes the land to subside at nearly twice the normal rate.
- **Germans** are the largest producers of organic milk in Europe and consume the most organic products per capita. The tour also visited CLAAS, one of the world's largest international agricultural equipment manufacturers (tractors galore!).
- In the Black Forest region of **Germany,** farmers have elevated drying hay to a science. Grass is chopped and put into enormous bins where solar-powered blowers pump warm air and the grass is churned to bring moisture levels down.
- In **France,** American farmers toured three Biolait farms. Biolait is the French organic milk collective with nearly 1,000 members and a similar structure to CROPP.
- In **England,** the travelers visited one of CROPP member OMSCo's farms, where they saw anaerobic digesters that created both gas and heat to run the farm; they also attended the OMSCo Annual Meeting dinner.

"I've felt for a long time that there are too few of us farmers left in this world to fight over marketplaces. We need to learn how to *cooperate for markets.*"

- Jim Wedeberg, Director of
International Cooperative Development

*A Cuban farmer cultivates a field planted with tobacco.*


*Kenneth Mahalko, Mahalko Family Farm, Wisconsin*

ORGANIC PRAIRIE® FARMER-OWNED

ORGANIC VALLEY®

Organic Logistics LLC

# CROPP COOPERATIVE

*organic and farmer-owned since 1988*

*Campbell Family Farm, Wisconsin*

*Campbell Family Farm, Wisconsin*

This annual report contains discussion of some of our expectations regarding CROPP Cooperative's future performance. These forward-looking statements are based on our current views and assumptions. Actual results could differ materially from these current expectations and projections and from historical performance. For example, our future results could be affected by factors including but not limited to the competitive dynamics in the markets for organic dairy products; the cost and supply of organic milk; the cost of organic farm products and organic feed; the mix of sales of our branded and non-branded products; the application of, and changes in, the United States Dairy Support and Federal Milk Marketing Order programs; and the adoption of regulations pursuant to the Food Safety Modernization Act. Discussions of these matters and other risks to which CROPP Cooperative is subject can be found in the Offering Circular(s) (and any associated supplements or amendments) we distribute from time to time in connection with the offer and sale of our Class E, Series 1 Preferred Stock. A copy of such Offering Circular and any current supplements or amendments can be obtained for informational purposes by contacting Diane Gloede, investor relations manager, by mail at CROPP Cooperative, ATTN: Diane Gloede, One Organic Way, La Farge, WI 54639, or by telephone at 608-625-3310.

ORGANIC PRAIRIE® FARMER-OWNED

ORGANIC VALLEY®

Organic Logistics LLC

# CROPP COOPERATIVE

*organic and farmer-owned since 1988*

*Milky Way Café staff members (from L to R) Liz Levendoski, Jake Michaels, Jingles Karuga, and Jason Trahan.*

**One Organic Way • La Farge, WI 54639**
**1.888.444.MILK • WWW.OV.COOP**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| ORGANIC TRADE ASSOCIATION,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,<br><br>Defendants. | Case No. 1:17-cv-01875 (RMC) |

**EXHIBIT D TO DEFENDANTS' REPLY**
**IN SUPPORT OF MOTION TO DISMISS**

**U.S. Department of Agriculture**

**Office of Inspector General**

# Oversight of the National Organic Program

**Audit Report 01601-03-Hy**
**March 2010**

U.S. Department of Agriculture
Office of Inspector General
Washington, D.C. 20250

DATE: March 9, 2010

REPLY TO
ATTN OF: 01601-03-Hy

TO: Rayne Pegg
Administrator
Agricultural Marketing Service

ATTN: Kevin L. Richardson
Director
Planning and Accountability Staff
Compliance and Analysis Program

FROM: Gil H. Harden /s/
Acting Assistant Inspector General
for Audit

SUBJECT: Oversight of the National Organic Program

This report presents the results of our audit of the National Organic Program. Your response to the official draft report, dated February 25, 2010, is included as exhibit B. Excerpts of your response and the Office of Inspector General's (OIG) position are incorporated into the Findings and Recommendations section of the report. Based on your response, we have reached management decisions on all of the report's 14 recommendations, and no further response to us is necessary. Please follow your agency's internal procedures in forwarding documentation for final action to the Office of the Chief Financial Officer.

We appreciate the courtesies and cooperation extended to us by members of your staff during this audit.

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# *Oversight of the National Organic Program*

## Executive Summary

### Results in Brief

We conducted this audit to assess the effectiveness of the Agricultural Marketing Service's (AMS) corrective actions implemented in response to our prior audit[1] of the National Organic Program (NOP). We also conducted this audit because of the size and growth of the organic industry as well as the public's increased interest in purchasing organic products. In 2008, the organic industry had sales of $24.6 billion and had grown between 14 and 21 percent annually over the past decade. The NOP, created in October 2002, has the responsibility to assure consumers that organic products meet uniform standards and that they are appropriately labeled. NOP regulations require that agricultural products labeled as organic originate from farms or handling operations certified by a State or private entity that has been accredited by the U.S. Department of Agriculture (USDA).

In our prior audit, we reported that AMS had not (1) established protocols for working with the National Organic Standards Board[2] (Board) or resolving conflicts with them, or (2) fully developed internal operating procedures, particularly for resolving complaints and investigations and for providing guidance to certifying agents and their organic operators to ensure consistency in implementing program requirements. We found that AMS officials made improvements to the program since our prior audit, and implemented corrective actions for 8 of the 10 recommendations issued in our prior audit report (see Exhibit A). Members of the Board stated that AMS' implementation of the protocol for resolving conflicts with the Board had improved the relationship between the Board and AMS. In addition, during our audit, NOP officials completed restructuring their complaint handling process and established procedures for receiving, tracking, and processing complaints. These officials stated they secured additional funding which, in part, enabled them to implement the structural and operational changes to improve the program.

However, we believe that NOP officials need to further improve program administration and strengthen their management controls to ensure more effective enforcement of program requirements when serious violations, including operations that market product as organic while under suspension, are found. In addition, they need to strengthen their oversight of certifying agents and organic operations to ensure that organic products are consistently and uniformly meeting NOP standards.

We found that NOP officials need to improve their enforcement of program regulations and their resolution of complaints, as noted in our prior report. NOP officials did not have adequate procedures or a system for tracking the receipt, review, and disposition of complaints and any subsequent enforcement actions. We identified the following:

[1] Report 01001-02-Hy, *Agricultural Marketing Service's National Organic Program*, dated July 2005.
[2] The Board assists in developing standards for substances to be used in organic production, and advises the Secretary on any other aspects of the implementation of the NOP laws and regulations.

- Between January 2006 and February 2008, AMS' Compliance and Analysis Program provided the results of its investigations of five certified organic operations to NOP. Although AMS recommended that NOP officials take enforcement actions against these operations, we found that NOP did not respond to these in a timely or effective manner. In addition, in those cases where enforcement actions were issued, NOP did not monitor the organic operations to ensure compliance with those actions. As a result, NOP never issued the recommended enforcement action against one of the five organic operations, one that improperly marketed nonorganic mint under USDA's organic label for 2 years; in the other four cases, the enforcement actions took between 7 and 32 months to issue. During this time the operations continued to improperly market their products as certified organic. One of these four, even after signing a compliance agreement[3] that it would not apply for and receive organic certification for a period of 5 years, continued to market its product as organic without AMS' knowledge.

- NOP officials did not resolve 19 of 41 program complaints[4] within a reasonable timeframe for cases opened since 2004. These 19 complaints went unresolved for an average of about 3 years. In January 2009 we brought this condition to the attention of management officials. They stated they were unaware of the status of the unresolved complaints. At this time they began to take action on the unresolved complaints. As of June 2009, we found that NOP had resolved 13 of the 19 complaints.

We also noted that NOP officials need to address ongoing issues with California's State Organic Program (SOP). The Act allows any State to apply to the Secretary to implement a program for regulating organic products produced and handled within that State. The State must have compliance, mediation, and appeal procedures that meet NOP regulations to become an SOP. When officials of the California Department of Food and Agriculture applied to have an approved SOP, they did not have the required compliance and enforcement procedures in place. NOP officials approved California's program because they wanted to allow California the opportunity to operate and develop procedures as they progressed. California has the most organic acreage in the country, with over 2,000 certified organic operations and organic product sales of over $1.8 billion in 2007. Although NOP officials believed that the State would address these issues following its initial approval, they discovered in a 2005 review that the California SOP continued to lack these required procedures. NOP officials have continued to work with California officials to comply with program requirements; however, as of November 2009, the procedures have yet to be finalized. As a result, the California SOP is not equipped to properly enforce the requirements of the NOP.

Although the Organic Foods Production Act[5] of 1990 requires certifying agents to conduct periodic residue testing[6] of organic products, we found that NOP officials did not incorporate these provisions into NOP regulations. None of the four certifying agents we visited conducted periodic residue testing of the approximately 5,000 certified operations for which they were responsible, and there is no assurance that certifying agents performed regular periodic testing at any of the approximately 28,000 certified organic operations worldwide. Without such testing,

[3] A compliance agreement is an enforcement action accepted by all parties that brings an operation into compliance with NOP regulations.
[4] NOP-related complaints can result in enforcement actions against certifying agents and/or organic operations.
[5] Section 2107(a) (6).
[6] This testing determines whether agricultural products contain any residues of pesticides, or of nonorganic or natural toxicants.

the potential exists that an operation's products may contain substances that are prohibited for use in organic products.

The former NOP director[7] stated that the decision not to require regular residue testing was based on officials' concerns about the cost of testing, and their position that the NOP regulations are process-based rather than a zero tolerance standard. The former director also stated that certifying agents did not want to pay for the cost of residue testing and that residue testing raises complex issues that must be addressed on an operation-by-operation basis. The former director also stated that the Office of the General Counsel (OGC) cleared the regulations before issuance. We discussed this issue with an OGC official who agreed that a legal review was performed before the regulations were issued. However, OGC could not provide a written opinion. We believe that AMS officials should seek a written legal opinion from OGC on whether the agency needs to require its certifying agents to perform periodic residue testing of all certified organic operations.

We found that NOP officials did not assemble a peer review panel to annually evaluate their accreditation procedures. NOP regulations require the AMS Administrator to establish a peer review panel pursuant to the Federal Advisory Committee Act[8] (FACA) to complete this evaluation. NOP officials attributed this inaction to budget constraints and the difficulties in forming a panel each year. NOP officials did not request a waiver from the Administrator or additional funding to form a panel.

Our review of 4 certifying agents and 20 organic operations found that NOP officials need to more effectively improve their oversight of program operations. We found that NOP reviewers did not make required onsite assessments and did not identify inconsistencies in the implementation of the NOP regulations, reducing assurance that products labeled as organic are meeting a uniform standard. We noted that:

- NOP officials did not ensure consistent oversight of organic operations by certifying agents. For example, the four certifying agents we visited had different criteria for determining whether noncompliances were major or minor and not all had them clearly defined. One of the certifying agents we visited developed outdoor access dimension requirements for poultry based on organic industry standards while the other three did not. We also found that three certifying agents did not ensure that six split operations[9] adequately described procedures to prevent the commingling of organic products with nonorganic substances. These inconsistencies occurred because the review guide that AMS used to evaluate certifying agents' compliance with the NOP regulations was not sufficiently focused to identify the types of problems we noted. In addition, NOP staff did not summarize the problems that they did find to identify trends or notify upper management of actions needed to correct the problems. Finally, NOP did not always provide adequate guidance to certifying agents, and at times the certifying agents were not aware of guidance that was issued. All of these factors reduce NOP's assurance that products labeled as organic meet a uniform standard.

[7] On October 1, 2009, AMS appointed a new Deputy Administrator to lead NOP.
[8] FACA requires that a panel be established through a formal process, including filing a charter prior to convening.
[9] Split operations produce or handle both organic and nonorganic products.

- We found that NOP did not timely complete onsite reviews[10] involving 5 of the 44 foreign certifying agents. This occurred because NOP did not establish specific timeframes for performing onsite reviews. In addition, they did not have a policy describing how to handle agents located in countries where travel may be hazardous. As a result, NOP cannot assure that the nearly 1,500 operations certified by these 5 agents are in compliance with NOP regulations.

## Recommendation Summary

We are issuing 14 recommendations to NOP officials to improve program administration and internal controls. We recommend that NOP strengthen its enforcement procedures to determine what actions should be imposed on program violators, including civil penalties, and to timely issue the appropriate actions. We also recommend that officials timely resolve and track complaints from receipt through disposition. In addition, we recommend that NOP implement a plan for achieving compliance from California's SOP, obtain an OGC opinion on residue testing, and establish a mechanism for conducting annual evaluations of its accreditation process as required. Finally, we recommend that oversight of certifying agents and operations be strengthened to ensure that all onsite reviews of foreign certifying agents are performed, internal reviews are conducted more effectively, and guidance is provided as necessary to improve overall program operations.

## Agency Response

AMS agreed with the report's 14 recommendations. We have incorporated AMS' response in the Findings and Recommendations section of the report, along with OIG's position. AMS' response to the report is incorporated as Exhibit B.

## OIG Position

Based on AMS' responses, we have reached management decisions on each of the report's 14 recommendations.

[10] NOP relies upon AMS' Audit, Review, and Compliance (ARC) division to conduct the onsite reviews of accredited certifying agents. Following completion of its review, ARC submits a report to NOP, which then issues the AMS Administrator's accreditation decisions.

## *Background & Objectives*

## Background

In 1990, the Organic Foods Production Act (Act) established national standards for the production and handling of organic products and required the Secretary of Agriculture (Secretary) to issue regulations to implement the legislation. The Secretary delegated the functions of the Act to the Agricultural Marketing Service (AMS), and through regulations effective in October 2002, the National Organic Program (NOP) was created to administer these standards and to require mandatory certification of organic production. The Act also required the Secretary to establish the National Organic Standards Board (Board) to assist in the development of standards for substances to be used in organic production and to advise the Secretary on any other aspects of the implementation of the Act.

The Act also allows States to apply to the Secretary to implement a program for regulating organic products produced and handled within that State. The State must have noncompliance, mediation, and appeal procedures that meet NOP regulations to become a State Organic Program (SOP). If approved, the SOP is responsible for the enforcement of NOP regulations within the State. SOPs may also contain more restrictive requirements because of environmental conditions or the necessity for specific production or handling practices particular to that State. Currently, California and Utah are the only two approved SOPs.

NOP currently is led by an AMS Deputy Administrator and is organized into three branches.[11] The Standards Development and Review Branch is responsible for NOP's rulemaking functions; the Accreditation, Auditing, and Training Branch manages the accreditation of certifying agents; and the Compliance and Enforcement Branch ensures continued compliance with the regulations. Two other AMS program areas assist NOP. AMS' Compliance and Analysis Program (AMS Compliance) manages all NOP-related appeals and also conducts investigations of alleged willful violations of the regulations.[12] Finally, AMS' Audit, Review, and Compliance (ARC) conducts audits of potential and current certifying agents.

NOP requires organic products to originate from farms or handling[13] operations certified by State or private entities referred to as "certifying agents." Agents must be accredited by the U.S. Department of Agriculture (USDA) and may be State, private, or foreign organizations that grant organic certification upon determining that an operation's procedures comply with the Act and NOP regulations. NOP relies on these agents to ensure that certified organic operations continue to comply with the Act and NOP regulations. As of July 2009, there were 98 accredited certifying agents (54 domestic, 44 foreign) that certify approximately 28,000 certified organic operations.

To become accredited, agents must first submit an application with supporting documentation to NOP. ARC conducts a review of these documents to evaluate the agent's compliance with NOP regulations and provides a report to NOP. NOP forms an accreditation committee to review

[11] Prior to October 2009, NOP was part of AMS' Transportation and Marketing Programs and was led by a program director.
[12] Prior to October 2008, AMS Compliance also handled program complaints, with the exception of those that needed to be forwarded to NOP for a policy interpretation. NOP's Compliance and Enforcement Branch now manages the entire complaint process.
[13] A handling operation is any operation that receives, processes, packages, or stores organic products.

ARC's report and to provide a recommendation of conditional approval or denial to the AMS Administrator. If approved by the AMS Administrator, the agent can begin certifying operations, although the accreditation process is not complete until the successful completion of an onsite review which further ensures that certifying agents are following NOP regulations. ARC is charged with scheduling and completing the onsite evaluations of all agents, foreign and domestic, within a reasonable amount of time following initial accreditation. In addition, every 5 years following the initial accreditation date, agents must reapply for the program and have another document review and site evaluation completed.

An operation that wishes to become certified can apply for certification to any of the 98 certifying agents located anywhere in the world. Organic operations must maintain an organic system plan (OSP) that has been agreed to by the certifying agent. This plan must include descriptions of how the operation will meet NOP regulations, including descriptions of monitoring practices, materials to be used in organic production or handling, and procedures to prevent the commingling or contamination of products in a split operation.[14] The agent reviews the OSP and other application materials to determine whether the operation complies with the Act. If so, the agent will perform an onsite inspection to verify that the documents submitted with the application reflect the actual practices being used. Following successful completion of an onsite inspection, the operation is issued an organic certificate by its certifying agent.[15]

USDA products may be labeled as organic only if the product has been produced and handled in accordance with NOP regulations. Organic products must be labeled based on their percentage of organic composition. For instance, the USDA organic seal can be displayed only on products at least 95 percent organic. Products with 70 to 95 percent organic ingredients can have this reflected on their labels, but they cannot display the organic seal.

In the last decade, the organic industry has grown between 14 and 21 percent annually. The U.S. had organic sales of $24.6 billion in 2008, up from $3.6 billion in 1997.

In July 2005, we reported on our first review of NOP.[16] Overall, we concluded that AMS needed to strengthen its management controls for administering NOP. For example, AMS did not establish procedures for receiving, reviewing, or implementing Board recommendations for adding materials to the National List of Allowed and Prohibited Substances. We also found that AMS needed to develop and implement protocols for evaluating and resolving complaints. Finally, we found that AMS did not have procedures for creating and issuing guidance to agents when clarification of program regulations was needed. Certifying agents stated during our prior review that there might be inconsistencies among agents regarding their certifications of organic operations due to the lack of uniformity in AMS' program guidance.

## Objectives

The objective of our audit was to determine whether products marketed as organic met the requirements of NOP. In addition, the audit evaluated the adequacy and consistency of the

[14] Split operations produce or handle both organic and nonorganic products.
[15] Once certified, an organic certificate is valid until surrendered by the organic operation, or suspended or revoked by the certifying agent, SOP, or NOP.
[16] Report 01001-02-Hy, *Agricultural Marketing Service's National Organic Program*, dated July 2005.

oversight provided by AMS personnel and certifying agents to ensure that NOP met its objectives. Finally, this audit followed up on the effectiveness of corrective actions implemented in response to our prior OIG audit report.

To accomplish these objectives, we performed fieldwork at AMS Headquarters, the California Department of Food and Agriculture's (CDFA) SOP, and four USDA-accredited certifying agents. We also conducted site visits to 20 organic operations, 5 from each of the 4 agents we visited. Our audit focused on enforcement actions, accreditation of foreign certifying agents, and certification activities of the agents and operations since implementation of the NOP in 2002. In addition, we focused on corrective actions implemented for the 10 audit recommendations from our prior NOP audit in 2005.

## *Section 1: Administration of the National Organic Program*

## Finding 1: NOP Needs to Improve Its Enforcement of Organic Operations That Violate Regulations

Between January 2006 and February 2008, AMS Compliance provided its results from five investigations of certified organic operations to NOP. Although they recommended that NOP officials take enforcement actions against these operations, we found that NOP did not respond to these in a timely or effective manner. In addition, in those cases where enforcement actions were issued, NOP did not monitor the organic operations to ensure compliance with those actions. This occurred because NOP officials had not developed written procedures to determine what enforcement actions should be imposed, to ensure their timely issuance, or to perform subsequent monitoring to ensure that enforcement actions are complied with. As a result, NOP never issued the recommended enforcement action against one of the five organic operations, which had marketed nonorganic mint under USDA's organic label for 2 years; in the other four cases, the enforcement actions took between 7 and 32 months to issue. During this time the operations continued to improperly market their products as certified organic. One of these four, even after signing a compliance agreement that it would not apply for and receive certification as an organic handler or producer for a period of 5 years, continued marketing its product as organic without AMS' knowledge.

NOP is responsible for enforcing standards of production, handling, and labeling for farming and handling operations that are certified to market their products under USDA's organic label.[17] Some actions, up to and including the revocation of an operation's certified organic status, may be taken by the accredited certifying agent without direct involvement by NOP. However, through its enforcement actions, NOP plays a central role in maintaining the validity of the program and ensuring public trust in USDA's certified organic labels. These enforcement actions can include compliance agreements[18] to correct the problems that led to the need for enforcement, as well as stronger actions such as proposed suspensions and revocations of an operation's organic certification, and civil penalties up to $11,000 per violation. For actions where legal sufficiency is an issue, NOP may consult with the Office of the General Counsel (OGC).

### Process for Imposing Enforcement Actions

AMS Compliance conducted eight investigations of certified organic operations and provided its reports to NOP between January 2006 and June 2008. For five of these investigations, AMS Compliance recommended that NOP officials take enforcement actions. However, we found that NOP never issued the recommended enforcement actions against one of the five operations, while the enforcement actions for the other four operations were delayed for significant periods of time.

The AMS Compliance investigation found that one operation knowingly marketed nonorganic mint as organic on 22 separate occasions and used a prohibited pesticide.[19] The certifying agent

[17] NOP Procedure 4002, Complaint Handling Standard Operating Procedures, dated January 9, 2009.
[18] A compliance agreement is an enforcement action accepted by all parties that brings an operation into compliance with NOP regulations.
[19] The prohibited pesticide was paraquat. Paraquat is a highly toxic compound used to inhibit the growth of weeds.

revoked the operation's organic certification in November 2005. However, at the completion of its investigation in February 2008, AMS Compliance also recommended that NOP issue additional enforcement actions, such as civil penalties, against this operation for willfully violating the regulations. NOP regulations[20] state that in addition to suspension or revocation, any certified operation that knowingly sells or labels a product as organic shall be subject to a civil penalty of not more than $11,000 per violation.

However, we found that NOP had not implemented a formal process for determining whether civil penalties – which may require concurrence from OGC - can be assessed based on investigative results. In this instance, an NOP official stated that they did not assess civil penalties because OGC did not believe there was sufficient evidence to do so. However, OGC was unable to corroborate this; and NOP officials could not provide documentation, including contacts with OGC, of how they made their determination not to pursue further enforcement actions.

In addition, OGC officials stated that the regulations do not clarify the authority of the program director for issuing civil penalties or provide directions for how civil penalties should be assessed. Finally, NOP did not have controls for properly maintaining documentation related to its decisions.

We found that NOP officials did issue enforcement actions to the other four organic operations, three of which had knowingly marketed nonorganic product as certified organic and one that marketed its product as certified organic while its AMS certification was suspended. However, it took NOP an average of 15 months to issue these actions, including one action that took over 2 ½ years to issue. These enforcement actions included compliance agreements with two of the operations and revocations of the operations' certified organic status in two other cases.[21]

Although the former NOP director attributed the agency's inability to effectively act on investigations and issue enforcement actions to a lack of resources, we determined that several other factors contributed to this deficiency. We noted, for instance, that NOP lacked procedures for receiving, reviewing, and maintaining reports of investigations from AMS Compliance. In addition, NOP did not establish a specific written process, including timeframes, for determining which enforcement actions are appropriate and for initiating and completing such actions in a timely manner. Although enforcement actions may need input and concurrence from OGC, NOP did not have procedures in place to guide officials on when and how such referrals should take place. In addition, we could not evaluate NOP officials' decisions because NOP did not implement protocols for properly maintaining documentation related to these enforcement actions, including contacts made with OGC and decision documents supporting the issued enforcement actions.

[20] Title 7 Code of Federal Regulations (C.F.R.) §3.91 (b)(1)(xxxvii), January 1, 2008.

[21] These two operations appealed their proposed revocations. While their appeals are being processed, these two operations maintain valid certification under NOP and can continue to market their products as organic.

**Process for Monitoring Compliance**

During our review, we also found that one of the two operations entered into a compliance agreement but continued to operate in violation of the regulations.[22] This operation agreed not to apply for and receive certification as an organic handler or producer for a period of 5 years, from August 2006 to August 2011. However, on July 2, 2009, we found that this operation was selling its fruits and vegetables on the internet and still claiming to be a certified organic operation. On July 3, 2009, we notified NOP of our findings and, as a result, AMS Compliance initiated a new investigation into this operation. NOP officials were unaware of this operation's questionable activities because agency officials had not implemented any procedures for monitoring operations after the issuance of enforcement actions to ensure compliance.

When we began our audit work, NOP officials acknowledged that they did not have a system in place for processing and issuing enforcement actions related to investigations. However, based on our discussions during the audit, officials began taking significant steps to improve NOP's handling of investigations conducted by AMS Compliance. In January 2009, to address some of our concerns, NOP issued procedures for receiving, tracking, and issuing enforcement actions from investigations completed by AMS Compliance. However, AMS needs to further strengthen its procedures to ensure that recommendations for enforcement actions are acted upon in a timely and consistent manner, and that all determinations related to such actions are adequately documented. In addition, NOP officials also need to implement procedures to ensure that organic operations abide by the terms of compliance agreements or other enforcement actions once they are issued.

### Recommendation 1

For the operation on which NOP did not issue an enforcement action, consult with OGC to determine whether the violations AMS Compliance reported warrant the issuance of civil penalties. Pursue enforcement actions based on OGC's determination.

### Agency Response

AMS officials concurred with this recommendation. In December 2009, NOP consulted with OGC on the identified operation and decided to pursue enforcement actions based on their recommendation. NOP has requested that OGC file an administrative complaint and assess civil penalties against the operation for willful violations of organic standards. NOP will collaborate with OGC to pursue enforcement actions with the goal of issuing an administrative complaint by April 2010.

### OIG Position

We accept AMS' management decision.

[22] While this operation violated the NOP regulations by operating as a handler without certification, technically the operation did not violate its compliance agreement.

### Recommendation 2

Once AMS Compliance completes its followup investigation of the operation that potentially breached its agreement with NOP, review and determine whether any of the violations reported warrant the issuance of civil penalties. NOP's determination should include a properly supported decision document for the actions to be implemented.

### Agency Response

AMS officials concurred with this recommendation. AMS Compliance completed its followup investigation in December 2009 and determined that the agreement had not been breached. However, violations of the NOP regulations were identified and NOP has requested that OGC file an administrative complaint and assess civil penalties against the operation. NOP will collaborate with OGC to pursue enforcement actions with the goal of issuing an administrative complaint by April 2010.

### OIG Position

We accept AMS' management decision.

### Recommendation 3

Amend NOP regulations to clarify the authority of the NOP director for issuing civil penalties.

### Agency Response

AMS officials agreed that clarifying NOP's authority for issuing civil penalties is critical to administering the Program, and stated that NOP is developing policies for administrative sanctions to identify factors that should be considered in determining what type or combination of sanction(s) is warranted. NOP will consult with OGC to clarify the authority of the NOP Deputy Administrator for issuing civil penalties. AMS will ensure that these policies comply with the NOP regulations or, if necessary, amend the regulations. NOP will implement an administrative sanctions policy by September 2010. Amendments to the NOP regulations will be initiated by December 2010, if amendments to the NOP regulations are needed to clarify the NOP's authority to levy civil penalties.

### OIG Position

We accept AMS' management decision.

### Recommendation 4

Implement a formal process for determining when civil penalties or other enforcement actions should be imposed in response to AMS Compliance investigations. This process should, at a minimum, ensure that actions are taken in a timely manner and that the basis of all determinations are adequately documented, including advice and opinions received from OGC.

### Agency Response

AMS officials concurred with this recommendation. The NOP Compliance and Enforcement Division is developing an administrative sanctions policy that will specify when civil penalties or other enforcement actions are warranted in response to violations of the NOP regulations. The policy will include performance measures for ensuring that NOP takes action in a timely manner, as well as procedures for documenting enforcement actions, including advice and opinions received from OGC. The policy will be implemented by September 2010.

### OIG Position

We accept AMS' management decision.

### Recommendation 5

Develop and implement procedures for monitoring organic operations' compliance with enforcement actions once these are issued.

### Agency Response

AMS officials concurred with this recommendation. The NOP Compliance and Enforcement Division is developing procedures for monitoring organic operations' compliance with enforcement actions, to be implemented by September 2010.

### OIG Position

We accept AMS' management decision.

## Finding 2: Processing of Program Complaints Needed More Timely Action

NOP officials did not resolve 19 of 41 program complaints[23] within a reasonable timeframe for cases opened since 2004. This occurred because NOP officials were not aware of the status of outstanding complaints and did not have controls to track them. As a result, the 19 complaints went unresolved for an average of 3 years. During the audit, when we brought this condition to the attention of management officials, they issued a new complaint procedure and resolved all but 6 of the 19 complaints.

In our prior audit report, we identified complaints against certifying agents and organic operations that were not resolved because NOP did not have procedures for processing them. In response to our recommendation, NOP agreed to implement a protocol to alleviate this weakness. When we began this audit, AMS officials were in the process of restructuring their operations and revising their 2007 operating procedures for managing complaints. AMS Compliance managed each complaint, assigned a case number, and conducted a preliminary review. AMS Compliance received complaints by telephone hotline, fax, electronic mailbox,

[23] NOP-related complaints can result in enforcement actions against certifying agents and/or organic operations.

postal address, in person, or by AMS compliance officers doing retailer monitoring of stores. Under the revised procedures, AMS reassigned the responsibility for managing the complaint process from AMS Compliance to NOP's Compliance and Enforcement Branch in October 2008. Once an initial review is made, the Compliance and Enforcement Branch refers the complaint to an SOP, a certifying agent in a State where there is no approved SOP, or a Compliance Specialist.[24]

During this audit, we found that since 2004, NOP received 41 complaints from AMS Compliance. We reviewed documentation related to these complaints to determine whether NOP personnel adequately implemented corrective actions in response to our prior audit. We found that 19 complaints were unresolved and that the average age of the 19 unresolved complaints was 3 years. The average time to close the other 22 complaints averaged 10 months.

Of the 19 unresolved complaints, we learned that NOP referred 3 complaints to OGC for assistance, while the other 16 complaints were assigned to multiple NOP personnel without delegating responsibility to anyone for resolution. We found that although NOP implemented a procedure for processing complaints in response to our previous audit, these procedures did not include instructions for handling complaints when referred to NOP. For example, the NOP procedures did not establish timeframes for resolving complaints or implement a system for receiving, tracking, and monitoring these complaints, including instances when AMS Compliance and OGC are involved. However, the revised January 2009 procedures corrected these weaknesses.

During this audit, we brought to the attention of NOP officials the 19 complaints that were still unresolved. We discussed this condition with NOP officials who acknowledged that a process was not in place for tracking and processing complaints, and stated that they were unaware of the unresolved backlog. They also stated that they received increased funding and were now able to hire additional staff. From January 2009 to June 2009, NOP provided documentation supporting the resolution of 13 of the 19 complaints. As a result of this effort to improve their operations, NOP personnel reduced the number of unresolved complaints to six.

Besides revising the complaint handling process and reassigning the responsibility of processing all complaints to NOP's Compliance and Enforcement Branch, NOP also requires staff to enter and track all relevant information in the NOP Complaint Database. This will help track complaints from receipt to disposition. We also believe that NOP needs to periodically obtain standard reports on the status of outstanding complaints for monitoring purposes.

### Recommendation 6

Take action to timely resolve program complaints, including the six unresolved complaints noted in the finding. Obtain standard reports periodically on the status of outstanding complaints from the Complaint Database to monitor resolution, including cases awaiting OGC assistance.

[24] Compliance specialists receive complaints that involve an SOP or a certifying agent, or those where a certifying agent cannot be located.

### Agency Response

AMS officials concurred with this recommendation. NOP has taken a number of steps to improve the timeliness of resolving compliance and enforcement cases by increasing the size of the staffs involved, establishing standard operating procedures, increasing accountability, and enhancing the use of tracking and monitoring systems. NOP has established standard operating procedures to timely resolve complaints, has established a complaint database, and regularly reviews the status of outstanding complaints. Of the six unresolved cases cited by OIG, two have since been closed. One involved a minor labeling issue regarding font size and the other involved a dispute between an operator and a certified agent where no violations of NOP regulations were found. NOP has established March 1, 2010 as the target deadline to resolve the remaining four complaints.

### OIG Position

We accept AMS' management decision.

## *Finding 3: NOP Did Not Properly Approve and Manage the California State Organic Program*

NOP approved the California SOP and allowed it to operate without required compliance and enforcement procedures since 2004. Although NOP officials believed that the State would address these issues following its initial approval, the agency discovered in 2005 that the SOP continued to lack these required procedures. NOP officials have continued to work with California officials to obtain compliance with program requirements; however, no timelines for completion were established, and as of November 2009, the procedures have yet to be finalized. As a result, the California SOP is not equipped to properly enforce the requirements of the NOP. Although California has the most organic acreage in the country with over 2,000 certified organic operations, and organic product sales of over $1.8 billion in 2007, the SOP's identified deficiencies likewise resulted in reduced assurance that the State's certified organic operations and their products meet regulatory requirements.

According to NOP procedures,[25] SOPs must have noncompliance, mediation, and appeal procedures that meet NOP regulations before being approved.

In March 2003, the CDFA applied to become an SOP. Despite not having the required compliance and enforcement procedures in place, NOP officials approved California's program in February 2004. An NOP official stated that they made this decision because they wanted to allow California the opportunity to operate and develop procedures as they progressed. In addition, the officials planned to conduct an onsite review to ensure that the SOP came into compliance.[26]

[25] State Organic Program Approval Procedures, dated March 11, 2002.

[26] In our prior audit, we identified that NOP approved the California SOP without compliance and enforcement procedures. However, because NOP was allowing the State an opportunity to develop and implement these procedures as they began operating, we did not report on this issue in 2005 and planned to examine this area as part of the current audit.

In 2005, an NOP official conducted an onsite review and found that CDFA had still not established enforcement and compliance procedures related to (1) receiving and processing program complaints, (2) handling complaint investigations, (3) conducting compliance surveillance, (4) issuing noncompliances, and (5) referring disputes regarding adverse action to mediation and appeal proceedings. According to its procedures, after an onsite review, NOP is to issue a report to the State detailing the review's findings and identifying actions to be taken by the State to maintain approval.[27] Although these findings were documented in a report and provided to the NOP director at the time, the report was never issued to CDFA and the State was not required to initiate corrective action. The former NOP director stated that at the time, other priorities (including a significant lawsuit against NOP) took precedence over requiring California's SOP to meet program requirements.

We visited the CDFA in 2009 to evaluate the State's oversight of organic products, and found that the California SOP still did not have the required procedures identified in NOP's 2005 review. As part of our review, we attempted to determine the total number of organic-related complaints the SOP had received since it was approved in 2004. However, we were unable to determine this because CDFA had not implemented an adequate system to track these complaints. This problem, which NOP had been aware of since the 2005 review, makes it impossible for either us or NOP to evaluate how CDFA is tracking and resolving complaints – a key component in evaluating the overall effectiveness of the SOP.

CDFA, with NOP involvement, has been in the process of improving its SOP since November 2008 by developing enforcement-related procedures. Initially, CDFA established a target date of April 2009 for having these new procedures implemented. However, as of November 2009, the procedures have yet to be finalized.

The California SOP has been operating without enforcement and compliance procedures, an NOP requirement, since 2004. This reduces NOP's assurance that California – which had over 2,000 organic operations whose sales exceeded $1.8 billion in 2007 - was producing organically labeled products that met NOP regulatory requirements. Therefore, we believe that NOP officials need to promptly reassess California's SOP to ensure that it meets requirements and to initiate appropriate enforcement actions as needed.

### Recommendation 7

Implement a time-phased action plan for the California SOP to fully comply with NOP regulations. If the program does not improve within established timeframes, initiate appropriate enforcement actions against the California SOP.

### Agency Response

AMS officials concurred with this recommendation. NOP conducted an assessment of the California SOP in December 2009. The assessment noted that while significant improvements had been made by the State, including establishing compliance and enforcement procedures, there were also areas that remained to be addressed in order for the

[27] State Organic Program Approval Procedures, dated March 11, 2002.

California SOP to fully comply with the NOP regulations. Officials stated that NOP will notify the California SOP that corrective actions to fully comply with the NOP regulations need to be fully implemented by June 2010. NOP will initiate appropriate enforcement actions if the California SOP does not fully comply with SOP requirements by June 2010.

### OIG Position

We accept AMS' management decision.

## Finding 4: AMS Needs to Determine Whether NOP Regulations Should Require Periodic Residue Testing

Although the Organic Foods Production Act of 1990 (Act) requires certifying agents to conduct periodic residue testing of organic products,[28] we found that NOP did not incorporate these provisions into its regulations. The former NOP director stated that the decision not to require regular residue testing was based on officials' concerns about the cost of testing, and on their position that the NOP regulations are process-based rather than a zero tolerance standard. The former director also stated that certifying agents did not want to pay for the cost of residue testing and that residue testing raises complex issues that must be addressed on an operation-by-operation basis. None of the four certifying agents we visited conducted periodic residue testing of the approximately 5,000 certified operations for which they were responsible, and there was no assurance that certifying agents performed regular periodic testing at any of the approximately 28,000 certified organic operations worldwide. Without such testing, the potential exists that an operation's products may contain substances that are prohibited for use in organic products.

The Act contains several requirements for residue testing of agricultural products to be performed by NOP officials and certifying agents. For example, section 2107 requires that each certifying agent perform periodic residue testing for pesticides or other nonorganic toxic substances in products produced or handled by their certified operations. In addition, these agents are required to report residue testing violations related to food safety to the appropriate health officials. Section 2112 sets forth residue testing provisions to assist certifying agents, as well as NOP, in the enforcement of the Act. If any of these officials suspect that an operation is harboring contaminants in the soil or crops, this section provides them with the authority to perform residue testing, conduct investigations to determine if the operation has any liability and prohibit the use of the organic label.

Although NOP regulations[29] do implement the provisions of section 2112, which require residue testing when the certifying agent has reason to suspect a problem, they do not fully implement the requirement of section 2107 requiring certifying agents to perform periodic residue testing of products from organic operations. Instead, the regulations state only that the AMS Administrator or certifying agents may require residue testing of agricultural materials[30] or products for

[28] Section 2107(a)(6).

[29] Title 7 C.F.R. §205.670, January 1, 2009.

[30] For purposes in this report, "materials" refers to anything used in the production or handling of organic agricultural products, including substances appearing on the National List.

prohibited substances. We question whether the regulatory text is consistent with the wording of the Act.

According to the former NOP director, it was the consensus of all participants in the process -including NOP officials, certifying agents, representatives of the organic industry, and OGC -not to incorporate periodic residue testing in the regulations. The former director stated that one concern raised by the certifying agents involved the costs of testing that they would incur. The former director also stated that the NOP is not a "zero tolerance program," and stated that since trace residues may be present in the ground due to past agricultural practices, residue testing raises complex issues that must be addressed on an operation-by-operation basis. However, the Act is clear in its requirement for periodic residue testing. In addition, the preamble[31] to the NOP regulations explains that residue testing is part of the cost of doing business and that certifying agents should make provisions in their certification fees for this cost.

OIG's Office of Counsel reviewed both the Act and the NOP regulations, and expressed the opinion that the current regulations are not in compliance with the requirements of the Act. The former NOP director stated that OGC had cleared the regulations before they were finalized in 2002 and determined that they fully implemented section 2107 of the Act. NOP was unable to provide any written evidence that OGC had specifically reviewed this particular provision and concurred with its interpretation of the Act's wording. In a meeting on October 22, 2009, an OGC official stated that, at the time the regulations were finalized, OGC did in fact state that the wording of the regulations complied with the Act. However, neither OGC nor NOP officials could provide a written legal opinion explaining the legal justification for this conclusion.

In our visits to four certifying agents as part of our audit, we confirmed that none of them were conducting regular periodic residue testing of the more than 5,000 certified organic operations for which they were responsible. Each of the certifying agents stated that this was not required by agency regulations. These agents explained that their residue testing was based on other factors, such as complaints. We have no information on residue testing that may be performed by other certifying agents worldwide on approximately 28,000 organic operations for which they are responsible. However, without a clear regulatory requirement or agency policy to require this, there is no assurance that any of the certified organic products being marketed worldwide are being tested on a periodic basis as called for in the Act.

Currently, residue testing of organic products is generally limited to instances where certifying agents have specific cause to suspect product contamination. Without the periodic testing that OIG believes is required by the Act, the potential exists that prohibited substances could appear in organic products.

OIG concurs that OGC has the final authority to make legal interpretations in matters involving USDA programs. However, given the apparent discrepancies between the Act and the NOP regulations, we believe that AMS officials should seek a written legal opinion from OGC on whether the agency needs to require its certifying agents to perform periodic residue testing of all certified organic operations.

[31] Residue Testing Preamble.

### Recommendation 8

Obtain a written legal opinion from OGC on whether NOP regulations, as currently written, comply with the requirement of the Act for periodic residue testing of organic operations by certifying agents. If OGC determines that the regulations are not in compliance, develop a time-phased plan to amend the regulations and implement the required testing provisions.

### Agency Response

AMS officials concurred with this recommendation. Residue testing is an important tool to monitor compliance with the NOP regulations. NOP is planning to implement periodic residue testing of agricultural products by accredited certifying agents by September 2010. NOP has requested a written legal opinion from OGC on whether the current NOP regulations comply with the pesticide residue testing requirements within the Act. If OGC determines that the regulations are not consistent with the Act, NOP will develop a plan to amend the regulations. NOP plans to receive a written legal opinion by March 2010 and, if necessary, initiate rule making in December 2010.

### OIG Position

We accept AMS' management decision.

## Finding 5: Evaluations of NOP's Accreditation Process Were Not Performed Annually

Although NOP regulations require that NOP assemble a peer review panel to annually evaluate its adherence to accreditation procedures, we found that this has not been done since the creation of the program in 2002. NOP officials attributed this to budget constraints and the associated difficulties in forming a panel each year. However, NOP did not request either a waiver from the Administrator, or additional funding to form a panel. As a result, there is reduced assurance that the overall integrity of the program is being maintained and that products certified as organic by accredited certifying agents are meeting NOP standards.

NOP regulations require the AMS Administrator to establish a peer review panel pursuant to the Federal Advisory Committee Act (FACA).[32] The panel, which is to be composed of not less than three members, is required to annually evaluate both the NOP's accreditation decisions and its adherence to the accreditation procedures within the regulations. The peer review panel is to report its findings in writing to the NOP director.[33]

Since the implementation of the program in 2002, NOP has not established a peer review panel to annually evaluate its accreditation decisions and adherence to regulations. In 2004, NOP contracted with the American National Standards Institute (ANSI) to assess its accreditation process to address the peer review panel requirement. Overall, ANSI determined that NOP lacked documented policies and procedures for managing the accreditation of certifying agents.

[32] FACA requires that a panel be established through a formal process, including filing a charter prior to convening.
[33] Title 7 C.F.R. §205.509, January 1, 2009.

However, we determined that the ANSI review was not a substitute for the required peer review panel because the review was not performed annually by a panel pursuant to FACA.

Since 2005, the Board – which assists in developing standards for substances to be used in organic production and advises the Secretary on any other aspects of the implementation of the organic laws and regulations – has expressed concerns with NOP's accreditation of certifying agents and the accreditation process not being reviewed at 5 of the last 10 NOSB meetings. NOP officials stated that insufficient funding prevented them from establishing a FACA panel but instead have requested the Department of Commerce's National Institute of Standards and Technology (NIST) to annually review NOP's accreditation procedures and decisions. According to the information provided by NOP, NIST will conduct onsite visits to observe NOP's accreditation process and, if recognition is granted, further assure that NOP's accreditation process is effective. During the Board's May 2009 meeting, several public comments encouraged the use of NIST for evaluating NOP.

Although the NIST review has merit as a viable option to evaluate NOP's accreditation procedures and decisions, we concluded that these reviews will not comply with the regulations because NIST is not a panel pursuant to FACA. NOP needs either to revise its regulations to conform to its proposed action or establish a panel in accordance with NOP regulations.

### Recommendation 9

Beginning in fiscal year 2010, conduct annual evaluations of NOP's accreditation process using a peer review panel pursuant to FACA, which will report its findings to the NOP director. If this is not feasible, determine whether the NOP regulations should be amended to allow the use of equivalent third-party evaluations in place of the peer review panel.

### Agency Response

AMS officials stated that under the Act, the Secretary may establish a peer review panel to evaluate the NOP accreditation program, and that the regulations specify that the Peer Review Panel will be established as per FACA and report its findings to the NOP Deputy Administrator.

In its May 2009 Business Meeting, the Board, the FACA Advisory Board to NOP, recommended that NOP develop a quality management system that complies with the criteria set forth in NIST's National Voluntary Conformity Assessment Evaluation Program (NVCASE) as well as the requirement of ISO/IEC 17011:2004. The NOSB stated that the NIST NVCASE program evaluation is a viable and effective alternative to establishing a separate FACA-compliant Peer Review Panel that still meets the intent of the Act.

The first NVCASE evaluation of the NOP accreditation process is expected to be completed by September 2010. Due to higher priorities such as rule making to implement the NOSB recommendations on the Origin of Livestock, Apiculture, Aquaculture and Mushrooms, NOP estimates a FY 2012 timeframe for initiating an amendment to the NOP regulations to remove the FACA requirement.

### OIG Position

We accept AMS' management decision.

## *Section 2: AMS Oversight of Certifying Agents*

### Finding 6: AMS Needs to More Effectively Identify Inconsistent Operating Practices and Clarify Program Requirements

AMS did not ensure consistent oversight of organic operations by its certifying agents. We visited 4 agents and 20 of their certified organic operations and found that all 4 agents were enforcing different requirements on their organic operations. This occurred because the guide that AMS used to evaluate a certifying agent's compliance with the NOP regulations was not sufficiently focused to identify the types of problems we found. In addition, NOP staff did not summarize the problems that they did find to identify trends or notify upper management of actions needed to correct the problems. Finally, NOP did not always provide adequate guidance to the certifying agents, and certifying agents were not always aware of guidance that had been issued. As a result, NOP has reduced assurance that the organic operations which these certifying agents oversee are producing organic products that uniformly meet regulatory requirements.

NOP was enacted to facilitate the domestic and international marketing of organic products and to assure consumers that such products meet consistent, uniform standards.[34] To become accredited, an agent must submit an application with supporting documentation to NOP. AMS' Audit, Review, and Compliance (ARC) Branch staff reviews these documents to evaluate the agent's compliance with NOP regulations and provides a report to NOP. ARC reviewers conduct onsite reviews within a reasonable time of accreditation and every 5 years thereafter for accreditation renewal purposes. In addition, in 2008, ARC began conducting periodic reviews of certifying agents every 2 ½ years. Organic operations must maintain an organic system plan (OSP) that has been agreed to by the agent. This plan must include descriptions of how the operation will meet NOP regulations, including descriptions of monitoring practices, materials to be used in organic production or handling, and procedures to prevent the commingling or contamination of products in a split operation.[35]

We visited 4 agents and 20 organic operations. The conditions we noted are described in the following paragraphs.

- Procedures to Prevent Commingling of Conventional and Organic Products on Split Operations

  NOP regulations require that an OSP contain a description of the management practices and physical barriers established to prevent commingling of organic and nonorganic products on a split operation.[36] This requirement establishes protective practices to prevent organic products from contacting prohibited substances that could compromise the integrity of the organic products. Neither the regulations nor NOP guidance required a specific section in the OSP for this item.

[34] NOP Final Rule as of January 1, 2009.
[35] Split operations produce or handle both organic and nonorganic products.
[36] Title 7 C.F.R. §205.201(a)(5), January 1, 2009.

We found that 6 of the 16 split operations that were certified by 3 of the agents we reviewed did not have adequate descriptions of these practices in their OSPs. These operations produced organic beef, poultry, flour, tea, and tofu. One of these agents agreed that the split operations did not have a specific section in their OSP to describe the management practices and physical barriers required, although the agent believed that several sections in the OSP addressed management practices and physical barriers. Although we did not see any evidence that commingling occurred during our visits to organic operations, these three agents did not ensure that split operations had plans that described the measures in place to prevent organic products from coming into contact with prohibited substances.

- Outdoor Access for Livestock

  For organic operations that handle live animals, NOP regulations require access to the outdoors, shade, shelter, exercise areas, fresh air, and direct sunlight suitable to each species, its stage of production, the climate, and the environment.[37] The regulations did not specifically state how long access should be provided and how much area should be accessible to the animals. Two of the four agents we visited believed that more guidance is needed in this area.

  For example, one of the agents we visited had developed dimension requirements for poultry while the other three agents did not. This agent based the dimension requirements on organic industry standards that were consistent with animal welfare standards. One poultry facility we visited had considerably less outdoor access compared to the other two poultry facilities we visited. This facility had a total of 300 square feet of outdoor access for approximately 15,000 chickens. Two other poultry facilities we visited had large pastures for the birds to access and had significantly fewer birds at their facilities. In addition, none of the four agents required specific dimensions for pasture access for cattle. AMS officials explained that the subject of outdoor access for livestock is a topic of discussion in the organic community and agreed that additional guidance would be beneficial.

- Noncompliance Procedures

  NOP regulations require an agent to notify an operation when a noncompliance occurs, including a notification of the date by which the certified operation must rebut or correct each noncompliance.[38] However, the regulations and NOP guidance did not describe criteria for major and minor noncompliances, or the consequences for each. In addition, there are no clear timeframes established by NOP for correcting noncompliances.

  The four agents we visited had different criteria for determining whether non-compliances were major or minor and not all had them clearly defined. For example, three agents defined a major noncompliance in their procedures while another agent allowed its staff to decide if a major noncompliance existed. We also found that agents

[37] Title 7 C.F.R. §205.239(a)(1), January 1, 2009.
[38] Title 7 C.F.R. §205.662(a)(3), January 1, 2009.

were not consistent in the corrective actions they required. For some noncompliances that agents considered more important they required that operations respond within a certain time period; for others, they simply instructed operations to correct the noncompliances before the next annual review. The agents also allowed different amounts of time for operations to correct noncompliances. For example, one agent allowed 90 days for an operation to correct a minor noncompliance, while the other three agents gave their operations until the following year's inspection to address them.

To ensure consistent treatment of noncompliances, we believe that NOP officials should develop guidance for agents to use in categorizing noncompliances based on their severity and their impact on the organic status of the product.[39]

- Changes in Ownership of Operations

  NOP requirements state that an operation must immediately notify the agent concerning any change in a certified operation or any portion of a certified operation that may affect its compliance with the Act and the regulations.[40]

  We found that two of the four agents we visited did not require new certifications when there was a change in ownership of a certified operation. For example, we visited an operation associated with one of these agents and confirmed that the certifying agent did not perform a new certification after this operation was purchased by a corporation in 2008. The agent stated that NOP requirements are unclear in this area and believed that more guidance is needed.

- OSPs

  OSPs are written plans provided by certified organic operations to their respective certifying agent, describing in detail how an operation will achieve, document, and sustain compliance with NOP regulations. An organic operation must develop an OSP that is agreed to by a certifying agent and that meets organic production and handling requirements.[41] In addition, to continue to be certified, an operation must annually submit an updated OSP to its agent.[42]

  We found that 7 of the 20 sampled organic operations did not have their OSPs available during our site visits. Although we obtained these OSPs from the certifying agents, we question how well these operations can follow their OSPs to ensure the integrity of the organic products they produce without having an OSP onsite. We also found that none of the 20 operations we visited submitted updated OSPs to their agents on an annual basis as required. This occurred because the 4 agents that certified these 20 operations only required an annual summary of changes to an operation's OSP, which they felt met the requirement.

[39] AMS' Meat Grading and Certification Branch has already done this for meat products based on a prior OIG audit.
[40] Title 7 C.F.R. §205.400(f)(2), January 1, 2009.
[41] Title 7 C.F.R. §205.201, January 1, 2009.
[42] Title 7 C.F.R. §205.406, January 1, 2009.

We also found that 2 of the 20 operations did not list the substances they used in organic production on their OSPs and therefore, did not obtain the required approval to use them. In addition, we witnessed an operation producing meatless burgers as organic even though it did not list this product on its OSP. Consequently, this product was labeled as certified organic even though the operation did not obtain prior approval from its certifying agent.

- Inadequate Records

  NOP regulations require operations to maintain records that fully disclose all activities and transactions of the certified operation in sufficient detail as to be readily understood and audited.[43] However, the regulations did not specifically state the types of records that are needed to support an operation's compliance with organic requirements, and NOP had not specified this in its written guidance to the certifying agents.

  We found that 7 of the 20 organic operations visited did not implement an adequate recordkeeping system or have the required records available for our review. For example, five livestock operations had inadequate records to document that animals had access to the outdoors, had received appropriate health care using approved practices and substances, and had been fed only organic feed. We also found that two handling operations did not maintain records to support how organic product was prevented from commingling with nonorganic product and how organic product was prevented from contacting prohibited substances.

- Organic Certificates

  We found that all four agents were inconsistent in their requirements for updating organic certificates. For example, one agent did not immediately require an update to the organic certificate when an operation changed the products it produced, while the other three agents required immediate updates.

  We also found that organic certificates did not contain the same information. For example, only one agent required its certified operations to display the specific products the operation produced on its certificate. The other three agents only required their operations to list the general type of product, such as crops or livestock.

  Finally, we noted that although all of the organic certificates we reviewed listed the initial effective date of certification, many of the certificates did not display expiration dates or renewal dates as a way of knowing whether an operation is currently certified. In October 2006, the Board identified the lack of expiration dates on organic certificates as an issue of concern and recommended that NOP amend the regulations to require expiration dates on organic certificates. However, NOP has not formally responded to the Board's recommendation. The Board felt that the absence of expiration dates on certificates prevents inspectors, certifying agents, and regulatory enforcement officials from determining if suppliers are still certified at the time of sale of organic products.

[43] Title 7 C.F.R. §205.103(b)(2), January 1, 2009.

As part of AMS' oversight responsibilities, ARC staff conducts reviews of agents every 2 ½ years. Over the past 3 calendar years, the staff conducted an average of 42 reviews a year. At the completion of each review, the ARC staff provides a report to the NOP's Accreditation, Auditing, and Training Branch. We determined that while staff from this Branch reviewed individual reports and required corrective actions on problems cited, they did not conduct an overall analysis to determine if systemic problems existed in the program.

We reviewed 18 ARC reports and found that the reviewers identified major deficiencies at agents, such as failure to identify noncompliances. These included mislabeled product and the use of uncertified organic feed at certified organic operations, as well as the application of antibiotics to young calves on the farm. However, the agency's corrective actions were limited to the specific deficiencies noted in the reports, and did not include any determination of whether these indicated larger, systemic problems such as those we identified in our reviews of several ARC reports. NOP officials need to summarize this information and analyze the results to identify systemic weaknesses.

We also reviewed the guide that ARC reviewers used to conduct the onsite assessments. We found that the review steps were general in nature and were not focused sufficiently to detect important program issues. For example, the review guide was not specific enough to identify the certifying agents' lack of outdoor access dimension requirements for livestock at the four agents we visited. Three of the agents did not have any dimension requirements, while one had only defined these requirements for poultry. In this case, the agent used industry standards that were consistent with animal welfare standards. We also noted that some of the review guides used by the agents during their certification reviews were more specific than AMS' review guide. AMS needs to use its review guide to identify ways to improve program operations. This could entail additional training, guidance, or an information memorandum to all agents and operations alerting them to the problems noted during ARC reviews.

In our prior audit report, issued in July 2005, we found that NOP did not have a standardized, written method for providing program information to agents and did not use a consistent strategy to notify the agents of program updates. However, in this audit, we found that NOP did not adequately implement our prior recommendation. According to an NOP official, insufficient resources hindered NOP from implementing these procedures. NOP also did not establish a centralized location, such as a single website location or a published listing of issuances, where agents or other interested parties could readily access any guidance that NOP had issued to clarify its program regulations. All of the agents we visited expressed concerns that program guidance was not always clear or timely and noted that there was no centralized location for them to access the guidance that does exist.

NOP needs to ensure that all agents are applying uniform standards in their certifications to ensure the purpose of the program is met. To accomplish this, NOP needs to develop a more effective review program[44] and analyze the results to identify areas where the program can be improved. NOP needs to provide clear, standardized guidance that is readily available in one location for certifying agents to easily access and review.

[44] NOP issued informal guidance via email to ARC in 2008 and 2009 to look at some of the areas we found; however, they still need to formally incorporate these areas in the ARC review guide.

### Recommendation 10

Revise the review guide to incorporate the areas we identified as problems to make the reviews more effective. Develop a procedure requiring the Accreditation, Auditing, and Training Branch to summarize, at least annually, the results of onsite reviews to identify problem areas involving the program and make recommendations to upper management for program improvement.

### Agency Response

AMS officials concurred with this recommendation. NOP will revise the review guide to include specific criteria for outdoor access for livestock, organic certificates, procedures to prevent commingling, noncompliance procedures, changes in ownership, Organic System Plans, and inadequate records. The revision of the review guide provided to ARC reviewers will be completed by September 2010. NOP will annually evaluate accreditation audits and make recommendations for improvement of the accreditation program. The first annual evaluation of accreditation audit will be completed by September 2010.

### OIG Position

We accept AMS' management decision.

### Recommendation 11

Develop and issue guidance regarding outdoor access for livestock, categorizing of noncompliances, reporting changes in an operation's ownership, the updating of certificates and OSPs, and records maintenance.

### Agency Response

AMS officials concurred with this recommendation. They stated that the NOSB has worked on recommendations for animal welfare and outdoor access for livestock for many years, and in November 2009 passed a final animal welfare recommendation that included recommendations for outdoor access. On February 17, 2010, NOP published a final rule that specifies pasture requirements for organic ruminant livestock. They also stated that NOP will publish a Program Manual by September 2010 for accredited certifying agents (ACAs) and certified operations to provide guidance on the regulations. The NOP Program Manual will include guidance on outdoor access for livestock, categorizing of noncompliances, reporting changes in an operation's ownership, updating of certificates, updates to OSPs, and records maintenance. The NOP Program manual will be distributed to ACAs and be available on the NOP website. NOP will continue to work with the NOSB in developing guidance on the NOP regulations and incorporating the NOSB recommendations into the NOP Program Manual.

### OIG Position

We accept AMS' management decision.

### Recommendation 12

Formally respond to the Board's recommendation to amend the NOP regulations to require expiration dates on organic certificates.

### Agency Response

AMS officials responded that under the Act and the NOP regulations, certifications do not expire but instead remain valid until surrendered, suspended, or revoked. However, they stated that the NOSB has recommended standardized language on certificates. They also state that NOP concurs that such language, including language referencing current inspection dates or renewal dates, is needed. NOP will provide guidance to ACAs on this NOSB recommendation within the NOP Program Manual that will be published in June 2010. NOP will respond to the NOSB recommendation regarding expiration dates on certificates at the April 2010 NOSB meeting.

### OIG Position

We accept AMS' management decision.

### Recommendation 13

Develop and implement a process to issue and disseminate guidance in a standardized method to assist agents in applying uniform processes for certifying organic operations.

### Agency Response

AMS officials concurred with this recommendation. NOP will implement a document control policy and procedure that will include a distribution policy on how guidance is disseminated to ACAs, SOPs, and foreign governments that have recognition or equivalency agreements in accordance with the Office of Management and Budget's Final Bulletin for Good Guidance Practices. The document control policy and distribution policy will be completed by September 2010. The NOP website is being revised to improve clarity and consistency. The revisions to the website are scheduled to be completed by September 2010 and will include a complete list of guidance documents in an easily accessible format and will properly archive guidance and policy statements as they are superseded or rescinded.

### OIG Position

We accept AMS' management decision.

## Finding 7: NOP Oversight of Foreign Certifying Agents Needs Significant Improvement

NOP did not complete required onsite reviews[45] at 5 of 44 foreign certifying agents. This occurred, in part, because NOP officials underestimated the number of applications they would receive when the program began in 2002 and had not made adequate provisions to perform the necessary onsite reviews within reasonable timeframes. In addition, NOP officials did not develop a policy for handling applicants located in countries where conditions may make travel hazardous. As a result, there is reduced assurance that these certifying agents followed NOP regulations, policies, and procedures when certifying organic operations for program participation. Likewise, NOP has reduced assurance that the approximately 1,500 organic operations certified by these 5 agents were marketing product that complied with the regulatory standards for certified organic products.

NOP regulations require an initial site evaluation be performed when an applicant receives a notification of accreditation[46] from NOP. To become accredited, potential certifying agents submit documentation to NOP that shows their compliance with program regulations. If NOP determines that the documentation is adequate, the agent is conditionally accredited and can begin certifying organic operations. However, in order to evaluate the agent's actual certification process and to assure that all regulatory and other requirements are being met, NOP must complete an onsite review at the certifying agent within a reasonable timeframe after initial accreditation has taken place. However, NOP procedures do not provide specific timeframes for these reviews to be performed, or address situations where onsite reviews are hazardous to perform.

Our review of a judgmental sample of 14 of the 44 foreign certifying agents illustrates the importance of performing onsite reviews once a new certifying agent has begun certifying organic operations for program participation. Of these 14 agents, 10 had received initial onsite reviews while the other 4 did not.[47] NOP identified major noncompliances during the initial onsite reviews of 7 of these 10 agents. Some of the major noncompliances included:

- Failure to identify noncompliances, such as mislabeled product and the use of uncertified organic feed, at its certified operations (NOP regulations require certifying agents to have adequate expertise to ensure its certified operations are complying with the regulations[48]);
- Failure to maintain complete certification files as part of the initial accreditation process. (NOP regulations require certifying agents to maintain all records related to their certification activities[49]);
- Onsite inspections and certification decisions being made by the same person. (NOP regulations require agents to ensure that the decision to certify an operation is made by a person different from the person who conducted the onsite review[50]); and

[45] NOP charges AMS' ARC division to conduct the onsite reviews of accredited certifying agents. Following completion of its review, ARC submits a report to NOP, which then issues the AMS Administrator's accreditation decisions.
[46] Title 7 C.F.R. §205.508(b), January 1, 2009.
[47] These were four of the five agents discussed earlier in the finding.
[48] Title 7 C.F.R. §205.501(a)(4), January 1, 2009.
[49] Title 7 C.F.R. §205.510(b), January 1, 2009.
[50] Title 7 C.F.R. §205.501(a)(11)(VI), January 1, 2009.

- Failure to maintain conflict of interest disclosures for all certifying agent employees (NOP regulations require certifying agents to prevent conflicts of interest and complete annual disclosure reports[51]).

Issues such as those described above can only be identified after the certifying agent has actually begun issuing certifications to operations applying for certified organic status**.** However, as described below, we found that the necessary reviews were not always being performed.

**Onsite Reviews Not Performed At 5 Foreign Certifying Agents**

We found that 5 of the 44 foreign accredited certifying agents had not received onsite reviews from NOP personnel since they were conditionally accredited. In three of the five cases, NOP officials stated that it had not been possible to perform visits because these agents were located in countries with travel warnings issued by the U.S. Department of State. NOP officials stated that they had difficulties scheduling the onsite reviews at the two remaining agents. NOP allowed these 5 agents, who had been participating in the program for up to 7 years as of November 2009, to remain accredited despite the lack of onsite reviews. This occurred because there was no policy in place for determining when or if an agent's continued program participation should be called into question or allowed for these reasons.

Three foreign certifying agents, who had been accredited for periods of between 6 to 7 years, did not receive onsite reviews because of travel warnings issued by the U.S. Department of State after the agents were conditionally accredited. These warnings, which had not been known to NOP officials at the time of initial accreditation, alerted travelers to dangerous conditions occurring in these countries even though they did not officially prohibit travel.[52] These three agents, located in Israel, Bolivia, and Turkey, have collectively certified over 1,400 organic operations since they began participating in the program. The organic operations they certified produce various types of fruits and vegetables as well as organic beef and poultry products.

NOP consulted with OGC in April 2008 to determine if they could revoke accreditation for these three certifying agents because they could not conduct onsite reviews. NOP officials stated that at an informal discussion with OGC in December 2008, OGC determined that it would be difficult to justify a suspension or revocation because American tourists traveled safely to all three countries. OGC therefore encouraged NOP to consider traveling to these areas to conduct onsite reviews. However, NOP officials noted that onsite reviews may require travel to more rural and potentially dangerous areas of these countries, rather than to populated areas where tourists usually travel. Therefore, NOP did not conduct these onsite reviews due to safety concerns for its audit staff. However, NOP did not implement policies or procedures for handling these cases, and instead allowed them to continue participating for an indefinite period.

It should be noted that NOP does not issue preliminary accreditations in cases where officials are aware that such travel restrictions exist. In January 2009, NOP denied accreditation to an applicant in Colombia based on U.S. State Department warnings about travel to that country

[51] Title 7 C.F.R. §205.501(a)(11), January 1, 2009.
[52] We could only obtain the 2003 warning for Turkey, the 2008 warning for Bolivia, and the 2009 warning for Israel.

because of reported violence in some rural areas a well as large cities. These warnings did not prohibit travel, but encouraged tourists to register with the U.S. embassy in that country.

We also noted two other cases where NOP did not conduct onsite reviews due to scheduling issues. These foreign agents were located in Australia and Canada and have been accredited without onsite reviews for periods of approximately 2 and 5 years, respectively. Officials cited difficulties including the timing of growing seasons and auditor availability. Collectively, these two agents certified 38 organic operations. These operations produced organic fruits, vegetables, beef, and poultry products.

**Timeframes for Performing Onsite Reviews**

We noted that the reviews performed at 24 of the 44 foreign agents did not occur until over 2 years after being conditionally accredited. According to NOP officials, a number of factors contributed to delays in scheduling these onsite reviews, including growing seasons, language barriers, and issues involving international travel.

Currently, NOP procedures do not include specific timeframes for completing onsite reviews, beyond stating that these need to be performed within a reasonable period of time. An NOP official stated that this occurred because NOP underestimated the number of accreditation applicants that would require onsite reviews at the time the program began in 2002. For example, in April 2002, 36 domestic and foreign certifying agents were granted conditional accreditation, creating an immediate backlog of agents needing onsite reviews. NOP implemented a goal in 2008 to conduct onsite reviews within 15 months of the accreditation date.

The five agents we identified that have not had an onsite review have operated in the program for up to 7 years during which time major noncompliances could potentially have existed. This, in turn, reduces NOP's assurance that either the certifying agents or the 1,500 organic operations they certified were operating in accordance with NOP regulations. NOP needs to develop and implement controls to ensure that all applicants have onsite reviews completed within clearly-defined timeframes following accreditation. In those cases where visits cannot be performed due to factors beyond NOP's control – such as travel restrictions issued by the U.S. State Department - NOP also needs to develop procedures for revoking accreditations if an onsite review cannot be completed within the timeframes NOP establishes.

### Recommendation 14

Develop and implement written policies and procedures requiring that all certifying agent applicants, as well as the five certifying agents that have not yet been visited, have onsite reviews completed within clearly-defined timeframes. The policy should require revoking accreditations if onsite reviews cannot be timely completed because of government-issued travel restrictions and other factors beyond the agency's control.

### Agency Response

AMS officials concurred with this recommendation. They stated that onsite audits have been completed for four out of the five foreign certifying agents identified in the report, while the final onsite audit is scheduled for spring 2010. The NOP is developing a Quality Manual to

comply with international accreditation norms such as ISO 17011. Policies and procedures within the NOP Quality Manual will specify clearly-defined timeframes and processes for accreditation. The NOP will be adopting policies that require on-site reviews prior to accreditation and will develop policies on revoking accreditation if travel restrictions beyond the agency's control prevent onsite reviews from being conducted. The Quality Manual will be complete by September 2010.

### OIG Position

We accept AMS' management decision.

## *Scope and Methodology*

We performed our review at AMS Headquarters in Washington, D.C., the California SOP, 4 accredited certifying agents, and 20 certified organic operations between December 2008 and August 2009. To accomplish our objectives, we evaluated NOP's implementation of its policies and procedures between October 2003 and July 2009.

AMS Headquarters

To evaluate the oversight of NOP, we held discussions with officials at NOP, AMS Compliance, ARC, and OGC in Washington, D.C. We also reviewed accreditation records at ARC in Fredericksburg, Virginia to evaluate its reviews of foreign certifying agents. In addition, we reviewed program investigations and complaints, directives and guidance to certifying agents, and policies and procedures related to program oversight and administration.

We also held a discussion with the Board to obtain an understanding of its current role with respect to NOP.

State Organic Program

We visited CDFA in Sacramento, California to evaluate its compliance and enforcement activities for organic products produced in California.

Accredited Certifying Agents

We conducted site visits to four accredited certifying agents. We selected these four agents because they certified all four types of organic operations; crop, wild crop, livestock, and handling. We also selected these agents because they collectively certified approximately 30 percent of the organic operations certified by domestic agents.

- Organic Crop Improvement Association, Lincoln, Nebraska;
- Pennsylvania Certified Organic, Spring Mills, Pennsylvania;
- Quality Assurance International, San Diego, California; and
- Quality Certification Services, Gainesville, Florida.

We evaluated the consistency of these agents' oversight activities and their implementation of NOP regulations. To accomplish this objective, we interviewed certifying agent personnel and reviewed policies and procedures related to each agent's certification and oversight of operations. This included reviewing documents related to agents' prevention of conflict of interest, processing of complaints, corrective actions from NOP audits, communication with NOP officials, and certifications of organic operations.

Certified Organic Operations

We visited a total of 20 organic operations certified by the 4 certifying agents we selected. Our selection included six crop, five livestock, and nine handling operations that produced, handled,

and sold large quantities of organic and nonorganic products. Collectively, these operations sold over $85 million of organic products in 2008.

We reviewed OSPs and other documentation to evaluate whether these operations complied with NOP regulations. In addition, we toured each of the operations to validate their written procedures.

Our audit was conducted in accordance with *Government Auditing Standards*. These standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions. In addition, AMS provided to OIG NOP complaint system data and data related to certified organic operations. We make no representations regarding the accuracy or reliability of this data as it was not assessed and information system controls were not part of our audit objective.

## *Abbreviations*

| | |
|---|---|
| Act | Organic Foods Production Act of 1990 |
| AMS | Agricultural Marketing Service |
| AMS Compliance | AMS Compliance and Analysis |
| ANSI | American National Standards Institute |
| ARC | Audit, Review, and Compliance |
| Board | National Organic Standards Board |
| CDFA | California Department of Food and Agriculture |
| C.F.R. | Code of Federal Regulations |
| FACA | Federal Advisory Committee Act |
| NOP | National Organic Program |
| OIG | Office of Inspector General |
| OGC | Office of General Counsel |
| OMB | Office of Management and Budget |
| OSP | Organic System Plan |
| Secretary | Secretary of Agriculture |
| SOP | State Organic Program |
| USDA | United States Department of Agriculture |

## *Exhibit A: Prior Recommendations*

| **Agricultural Marketing Service's National Organic Program, Report Number 01001-02-Hy (July 2005)** | | |
|---|---|---|
| **Recommendation Number** | **Recommendation** | **Recommendation Implemented (Yes or No)** |
| 1 | Develop and implement a protocol for working with the Board as an advisory committee. Ensure that the protocol defines the scope of the Board's responsibility and explains their role under FACA. | Yes |
| 2 | Develop and implement a protocol for resolving conflicts between the Board and NOP staff. | Yes |
| 3 | Develop and implement procedures for receiving, reviewing, and implementing recommendations from the Board on revisions to the National List. | Yes |
| 4 | Develop and implement procedures for reviewing and validating ARC recommendations on the accreditation of certifying agents. | Yes |
| 5 | Develop and implement procedures for creating and issuing clarifications to program regulations. These procedures should standardize the method that will be used to provide guidance to certifying agents and other interested bodies. | No |
| 6 | Develop and implement procedures for reviewing and adjudicating appeals of noncompliance decisions. | Yes |
| 7 | Develop and implement a protocol for evaluating and resolving complaints, including circumstances when a NOP policy interpretation is required. This should include procedures for informing affected parties of the status of their complaints. | No |
| 8 | Resolve the eight complaints from FY 2003 that require an interpretation of NOP regulations. | Yes |
| 9 | Develop and implement procedures for maintaining and controlling cost-share programs. | Yes |
| 10 | Develop and implement procedures for making equivalency determinations. | Yes |

Exhibit A presents the ten recommendations from our prior audit report; Agricultural Marketing Service's National Organic Program, Report Number 01001-02-Hy, released July 2005. There are three columns in this exhibit. The first column lists the recommendation number. The second column describes what we recommended. The third column indicates whether or not each recommendation was implemented.

***Exhibit B: Agency Response***

# USDA'S

# AGRICULTURAL MARKETING SERVICE'S

# RESPONSE TO AUDIT REPORT

USDA Agricultural Marketing Service

**1400 Independence Avenue, SW.**
**Room 3071-S, STOP 0201**
**Washington, DC 20250-0201**

DATE: February 25, 2010

TO: Rod DeSmet
Acting Assistant Inspector General for Audit
Office of Inspector General

FROM: Rayne Pegg /s/
Administrator

SUBJECT: AMS' Response to OIG Audit #01601-03-Hy: Oversight of the National Organic Program

We have reviewed the subject audit report and agree in principle with the findings and recommendations. Our detailed response, including actions already taken and actions to be taken to address the recommendations, is attached.

If you have any questions or need further information, please contact Frank Woods, Internal Controls and Audits Branch Chief, at 202-720-8836.

Attachment

# Agricultural Marketing Service – Response to OIG Audit Recommendations OIG Audit Report No. 01601-03-Hy

## Overview

The Inspector General's review of the National Organic Program (NOP) provides valuable information and feedback that we plan to use to make continuing improvements to ensure the integrity of organic agricultural products. As the OIG notes, the U.S. organic industry has grown significantly since the NOP was implemented. Sales reached nearly $25 billion in 2008, growing at double digits annually. In 2009 the NOP budget increased to $3.87 million and staff increased to 16 positions. A $3.1 million dollar budget increase in 2010 will enable the program to grow to 31 staff members by the end of the year. These budget and staff increases have enabled significant strides in program improvement, which the OIG has noted in its audit and serve as a foundation to advance further improvements during 2010 and beyond. As a result of these significant increases in resources at our disposal, NOP anticipates addressing all of the recommendations made by the Inspector General in FY 2010.

## Finding 1: NOP Needs to Improve Its Enforcement of Organic Operations That Violate Regulations

***Recommendation 1***

For the operation on which NOP did not issue an enforcement action, consult with OGC to determine whether the violations AMS Compliance reported warrant the issuance of civil penalties. Pursue enforcement actions based on OGC's determination.

Agency response –

AMS concurs with this recommendation. In December, 2009, the NOP consulted with OGC on the identified operation and decided to pursue enforcement actions based on their recommendation. The NOP has requested that OGC file an administrative complaint and assess civil penalties against the operation for willful violations of organic standards. The NOP will collaborate with OGC to pursue enforcement actions with the goal of issuing an administrative complaint by April 2010.

***Recommendation 2***

Once AMS Compliance completes its followup investigation of the operation that potentially breached its agreement with NOP, review and determine whether any of the violations reported warrant the issuance of civil penalties. NOP's determination should include a properly supported decision document for the actions to be implemented.

Agency response –
AMS concurs with this recommendation. AMS Compliance completed its follow-up investigation in December 2009 and determined that the agreement had not been breached. However, violations of the NOP regulations were identified and the NOP has requested that OGC file an administrative complaint and assess civil penalties against the operation. The NOP will collaborate with OGC to pursue enforcement actions with the goal of issuing an administrative complaint by April 2010.

***Recommendation 3***
Amend NOP regulations to clarify the authority of the NOP director for issuing civil penalties.

Agency response –
AMS agrees that clarifying the NOP's authority for issuing civil penalties is critical to administering the Program. The NOP is developing policies for administrative sanctions to identify factors that should be considered in determining what type or combination of sanction(s) is warranted. The NOP will consult with OGC to clarify the authority of the NOP Deputy Administrator for issuing civil penalties. Administrative policies will be developed to ensure these policies comply with the NOP regulations or if necessary, amend the regulations. The NOP will implement an administrative sanctions policy by September 2010. Amendments to the NOP regulations will be initiated by December 2010, if amendments to the NOP regulations are needed to clarify the NOP's authority to levy civil penalties.

***Recommendation 4***
Implement a formal process for determining when civil penalties or other enforcement actions should be imposed in response to AMS Compliance investigations. This process should, at a minimum, ensure that actions are taken in a timely manner and that the basis of all determinations are adequately documented, including advice and opinions received from OGC.

Agency response –
AMS concurs with this recommendation. The NOP Compliance and Enforcement Division is developing an administrative sanctions policy that will specify when civil penalties or other enforcement actions are warranted in response to violations of the NOP regulations. The policy will include performance measures for ensuring that NOP takes action in a timely manner, as well as, procedures for documenting enforcement actions, including advice and opinions received from OGC. The policy will be implemented by September 2010.

***Recommendation 5***
Develop and establish procedures for monitoring organic operations' compliance with enforcement actions once these are issued.

Agency response –
AMS concurs with this recommendation. The NOP Compliance and Enforcement Division is developing procedures for monitoring organic operations' compliance with enforcement actions, to be implemented by September 2010.

## Finding 2: Processing of Program Complaints Needed More Timely Action

***Recommendation 6***
Take action to timely resolve program complaints, including the six unresolved complaints noted in the finding. Obtain standard reports periodically on the status of outstanding complaints from the Complaint Database to monitor resolution, including cases awaiting OGC assistance.

Agency response –
AMS concurs with this recommendation. The NOP has taken a number of steps to improve the timeliness of resolving compliance and enforcement cases by increasing the size of the staffs involved, establishing standard operating procedures, increasing accountability, and enhancing the use of tracking and monitoring systems. The NOP has established standard operating procedures to timely resolve complaints, has established a complaint database, and regularly reviews the status of outstanding complaints. Of the six unresolved cases cited by OIG, two have since been closed. One involved a minor labeling issue regarding font size and the other involved a dispute between an operator and a certified agent where no violations of NOP regulations were found. The NOP has established March 1, 2010 as the target deadline to resolve the remaining four complaints.

## Finding 3: NOP Did Not Properly Approve and Manage the California State Organic Program

***Recommendation 7***
Implement a time-phased action plan for the California SOP to fully comply with NOP regulations. If the program does not improve within established timeframes, initiate appropriate enforcement actions against the California SOP.

Agency response –
AMS concurs with this recommendation. The NOP conducted an assessment of the California State Organic Program in December 2009. The assessment noted that while significant improvements had been made by the State, including establishing compliance and enforcement procedures, there were also areas that remained to be addressed in order for the California SOP to fully comply with the NOP regulations. The NOP will notify the California SOP that corrective actions to fully comply with the NOP regulations need to be fully implemented by June 2010. The NOP will initiate appropriate enforcement

actions if the California SOP does not fully comply with State Organic Program requirements by June 2010.

## Finding 4: AMS Needs to Determine Whether NOP Regulations Should Require Periodic Residue Testing

***Recommendation 8***

Obtain a written legal opinion from OGC on whether NOP regulations, as currently written, comply with the requirement of the Act for periodic residue testing of organic operations by certifying agents. If OGC determines that the regulations are not in compliance, develop a time-phased plan to amend the regulations and implement the required testing provisions.

Agency response –

AMS concurs with this recommendation. Residue testing is an important tool to monitor compliance with the NOP regulations. The NOP is planning to implement periodic residue testing of agricultural products by accredited certifying agents by September 2010. The NOP has requested a written legal opinion from OGC on whether the current NOP regulations comply with the pesticide residue testing requirement within the Act. If OGC determines that the regulations are not consistent with OFPA, the NOP will develop a plan to amend the regulations. The NOP plans to receive a written legal opinion by March 2010 and, if necessary, initiate rule making in December 2010.

## Finding 5: Evaluations of NOP's Accreditation Process Were Not Performed Annually

***Recommendation 9***

Beginning in fiscal year 2010, conduct annual evaluations of the NOP's accreditation process using a peer review panel pursuant to FACA to begin, which will report its findings to the NOP director. If this is not feasible, determine whether the NOP regulations should be amended to allow the use of equivalent third-party evaluations in place of the peer review panel.

Agency response –

The OFPA states that the Secretary may establish a peer review panel to evaluate the accreditation program of the NOP. The NOP regulations specify that the Peer Review Panel will be established as per FACA and report its findings to the NOP Deputy Administrator.

In its May 2009 Business Meeting, the National Organic Standards Board (NOSB), the FACA Advisory Board to the NOP, recommended that the NOP develop a quality management system that complies with the criteria set forth in the National Institute of Standards and Technology (NIST) National Voluntary Conformity Assessment Evaluation Program (NVCASE) as well as the requirement of ISO/IEC 17011:2004. The NOSB stated that the NIST NVCASE program evaluation is a viable and effective

alternative to establishing a separate FACA-compliant Peer Review Panel that still meets the intent of OFPA.

The first NVCASE evaluation of the NOP accreditation process is expected to be completed by September 2010. Due to higher priorities such as rule making to implement the NOSB recommendations on the Origin of Livestock, Apiculture, Aquaculture and Mushrooms, NOP estimates a FY 2012 timeframe for initiating an amendment to the NOP regulations to remove the FACA requirement.

## Finding 6: AMS Needs to More Effectively Identify Inconsistent Operating Practices and Clarify Program Requirements

***Recommendation 10***

Revise the review guide to incorporate the areas we identified as problems to make the reviews more effective. Develop a procedure requiring the Accreditation, Auditing, and Training Branch to summarize, at least annually, the results of onsite reviews to identify problem areas involving the program and make recommendations to upper management for program improvement.

Agency response –

AMS concurs with this recommendation. The NOP will revise the review guide to include specific criteria for outdoor access for livestock, organic certificates, procedures to prevent commingling, noncompliance procedures, changes in ownership, Organic System Plans, and inadequate records. The revision of the review guide provided to ARC reviewers will be completed by September 2010. The NOP will annually evaluate accreditation audits and make recommendations for improvement of the accreditation program. The first annual evaluation of accreditation audit will be completed by September 2010.

***Recommendation 11***

Develop and issue guidance regarding outdoor access for livestock, categorizing of noncompliances, reporting changes in an operation's ownership, the updating of certificates and OSPs, and records maintenance.

Agency response –

AMS concurs with this recommendation. The NOP will publish a Program Manual by September 2010 for accredited certifying agents (ACAs) and certified operations to provide guidance on the regulations. The NOP Program Manual will include guidance on outdoor access for livestock, categorizing of noncompliances, reporting changes in an operation's ownership, updating of certificates, updates to OSPs, and records maintenance. The NOP Program Manual will be distributed to ACAs and be available on the NOP website.

The NOP notes that the NOSB has worked on recommendations for animal welfare and outdoor access for livestock for many years. In November 2009 the board passed a final recommendation on animal welfare that included recommendations for outdoor access. On February 17, 2010 the NOP published the Access to Pasture final rule that specifies pasture requirements for organic ruminant livestock. The NOP will continue to work with the NOSB in developing guidance on the NOP regulations and incorporating the NOSB recommendations into the NOP Program Manual.

***Recommendation 12***

Formally respond to the Board's recommendation to amend the NOP regulations to require expiration dates on organic certificates.

Agency response –

Under the OFPA and the NOP regulations, certification does not expire. Certification remains valid until surrendered, suspended, or revoked. However, the NOSB has recommended standardized language on certificates and the NOP concurs that such language, including language referencing current inspection dates or renewal dates, is needed. NOP will provide guidance to ACAs on this NOSB recommendation within the NOP Program Manual that will be published in June 2010. The NOP will respond to the NOSB recommendation expiration dates on certificates at the April 2010 NOSB meeting.

***Recommendation 13***

Develop and implement a process to issue and disseminate guidance in a standardized method to assist agents in applying uniform processes for certifying organic operations.

Agency response –

AMS concurs with this recommendation. The NOP will implement a document control policy and procedure that will include a distribution policy on how guidance is disseminated to ACAs, state organic programs, and foreign governments that have recognition or equivalency agreements in accordance with the Office of Management and Budget's Final Bulletin for Good Guidance Practices. The document control policy and distribution policy will be completed by September 2010. The NOP website is being revised to improve clarity and consistency. The revisions of the website are scheduled to be completed by September 2010 and will include a complete list of guidance documents in an easily accessible format and will properly archive guidance and policy statements as they are superseded or rescinded.

## Finding 7: NOP Oversight of Foreign Certifying Agents Needs Significant Improvement

***Recommendation 14***

Develop and implement written policies and procedures requiring that all certifying agent Applicants, as well as the five certifying agents that have not yet been visited, have onsite reviews completed within clearly-defined timeframes. The policy should require revoking accreditations if onsite

reviews cannot be timely completed because of government-issued travel restrictions and other factors beyond the agency's control.

Agency response –

AMS concurs with this recommendation. Onsite audits have been completed for four out of the five foreign certifying agents identified in the report. The final onsite audit is scheduled for Spring 2010. The NOP is developing a Quality Manual to comply with international accreditation norms such as ISO 17011. Policies and procedures within the NOP Quality Manual will specify clearly-defined timeframes and processes for accreditation. The NOP will be adopting policies that require on-site reviews prior to accreditation and will develop policies on revoking accreditation if travel restrictions beyond the agency's control prevent onsite reviews from being conducted. The Quality Manual will be complete by September 2010.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

ORGANIC TRADE ASSOCIATION,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,

Defendants.

Case No. 1:17-cv-01875 (RMC)

**EXHIBIT E TO DEFENDANTS' REPLY**
**IN SUPPORT OF MOTION TO DISMISS**

United States Department of Agriculture
Agricultural Marketing Service
National Organic Program

1400 Independence Avenue SW.
Room 2646-South Building
Washington, DC 20250



# Policy Memorandum

**To:** Stakeholders and Interested Parties

**From:** Miles McEvoy, Deputy Administrator

**Subject:** Retained Memo: "Access to the Outdoors for Livestock"

**Date:** Original Issue Date – January 31, 2011

Attached is the "Access to the Outdoors for Livestock" memo issued by the National Organic Program (NOP) on October 29, 2002. This memo is being retained by the NOP as a new policy memo and remains in effect. This document has been assigned the control number "PM 11-5".

Enclosure: "Access to the Outdoors for Livestock" October 29, 2002 memo

**Access to the Outdoors for Livestock**

7 C.F.R. 205. 239 sets forth the living condition requirements for livestock seeking to be certified as organic under the National Organic Standards (NOS). This section requires that accommodation of an animal's health and natural behavior form the foundation of any organic livestock management strategy. Producers are required to balance the accommodation of an animal's health and natural behavior with ensuring an animal's health, safety or well-being is not jeopardized. Because livestock operations are inherently complex and determining the proper balance difficult on a daily basis, the National Organic Program has received numerous inquiries from producers and accredited certifying agents (ACA) regarding the documentation required to justify the use of temporary confinement.

**A. What is access to the outdoors?**

Access to the outdoors simply means that a producer must provide livestock with an opportunity to exit any barn or other enclosed structure. Access to the outdoors does not require a producer to comply with a specific space or stocking rate requirement. Neither does the requirement mandate that an entire herd or flock have access to the outdoors at any one time nor does the requirement supercede the producer's responsibility for providing living conditions that accommodate livestock health, safety or well-being.

**B. Documenting and justifying the use of temporary confinement.**

To provide evidence of compliance, producers must submit to an ACA a clear and verifiable organic production system plan. Producers and ACAs should remember that the organic system plan forms the fundamental basis for compliance with the NOS. Hence, producers and ACAs must closely consult with each other to ensure any vagueness or uncertainties are removed from the plan so that potential enforcement actions occur with minimal contention or confrontation.

The conditions in which temporary confinement will occur should be supported and documented through historical data, research literature, educational material and/or producer experience with the applicable species. For example, historical weather data could be used to justify temporary confinement during certain months in order to ensure an animal's health, safety or well-being is not jeopardized. Further, a producer could use research literature to show that a decision to limit access to the outdoors until sufficient feathering has occurred is rational, prudent and in keeping with humane animal management practices. In the same vein, a producer could utilize his or her own experience supported by research data to show that confinement during peak water fowl migration is a reasonable approach in preventing catastrophic health problems caused from outside exposure to disease vectors.

October 29, 2002

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

ORGANIC TRADE ASSOCIATION,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,

Defendants.

Case No. 1:17-cv-01875 (RMC)

**EXHIBIT F TO DEFENDANTS' REPLY**
**IN SUPPORT OF MOTION TO DISMISS**

# Commentary: Organic farmers want their industry regulated. What's the holdup?

Regulations for organic farming are necessary, and the organic industry supports them. (Markus Heine / EPA-EFE/REX/Shutterstock)

By **George Siemon**

JANUARY 17, 2018, 5:51 PM

The National Pork Producers Council griped bitterly in January 2017 about "midnight" regulations approved by then-U.S. Department of Agriculture Secretary Tom Vilsack. Despite the whining of the Big Ag trade group, which regularly opposes organics, Vilsack was simply enacting the long sought after organic regulation clarifying the standards for animal welfare for organic livestock. Known as the Organic Livestock and Poultry Practices, these standards — 20 years in the making — would not in any way apply to the NPPC's conventional operations.

Repeat after me: The organic movement — farmers, consumers and retailers — wanted this regulation. The NPPC, terrified by the concept of any animal welfare regulation in U.S. agriculture, interfered by complaining that the regulation could "pave the way for more regulation of all of food production, possibly placing the entire industry in a box tightly sealed by those wanting to see its

obliteration." In December, not even a year later, the NPPC and the rest of Big Ag got its Christmas wish when the Trump administration's USDA withdrew the new rule completely. Make no mistake: This is a direct attack on American families who value organic food, and the family farmers who make a living growing it under the National Organic Program.

The USDA organic seal is a process-based seal, which means regulations govern the process by which certified organic food is grown, handled and manufactured. Consumers have come to rely on the USDA organic seal as the gold standard of labels. This seal represents not only the USDA, but the public participatory process, third-party verification, and criminal sanctions for those daring to use the seal improperly. Some reporters and self-appointed "watchdogs" have lately enjoyed showing the chinks in organic's armor, but all those chinks do is demonstrate that a strong standard means something. With a few battle scars to show for it, organic has grown to a $50 billion marketplace.

Consumers expect that livestock raised and labeled organic has been grown in a certain way — with no antibiotics, no hormones and eating feed that is pesticide-free and GMO-free. They also expect the livestock to have access to outdoors, including soil, grass and sunlight. In a word, they expect strong animal-welfare standards, and the new regulation clarifies and makes consistent the requirements for animal welfare that are already in the organic system. Years of public process, including the recommendation of a citizen panel, the National Organic Standards Board, resulted in regulations that not only met the needs of consumers but also had the clear and undeniable support of organic farmers. The USDA organic seal is not stagnant. It represents continuous improvement in all aspects of farming and manufacturing. It means finding ways to do things better, and then building the standards to include that improvement.

As a cooperative of 2,000 organic farmers — the largest organic livestock company in the United States — Organic Valley acts on behalf of its farmers and its consumers. As CEO, and an animal scientist, I have long advocated for consistent standards that require organic farms to allow animals to exhibit their natural behaviors — chickens need soil to scratch in and sunlight to bathe in, pigs need dirt to root in. Being on pasture is good for a cow's health — her feet, her four stomachs and her milk. This is not, as some cynics say, "poor science." This is farming. A farmer can tell right away from touching a cow's ear if it has a fever, or is uncomfortable. A consumer can tell right away if the milk or eggs are something they want to feed their children.

Big Ag groups that have lobbied against organic animal-welfare standards are afraid it is a first step toward regulation outside of organic. Apparently, they are worried about losing business if consumers really understand how their operations treat animals. It's no wonder they are concerned; we have all watched the politics of how Big Ag avoids transparency. We watch them fight against labels such as "cage-free" and concerns about overuse of antibiotics. They implement gag rules, prohibiting

revealing videos (not coincidentally often about animal welfare) from being aired. We watch them fight against GMO labeling.

Their actions suggest they would like to see American farmers and families lose the organic choice. More to the point, they would prefer to see organic family farms go out of business, and concerns about animal welfare erased from the public conversation.

We have consumer trust, and we intend to keep it. We tried to work with the USDA to implement the regulations we wanted, and now we are suing the USDA to make it happen. Regardless of what happens next, Organic Valley, in cooperation with other trusted organic brands, will continue to provide the integrity consumers are looking for. As for Big Ag producers, let them fight their fears and live with their consciences.

*George Siemon is a founding farmer and CEO of CROPP Cooperative, the organic farmers' co-op that owns the Organic Valley brand. He is also former chairman of the Global Animal Partnership.*



**This article is related to:** U.S. Department of Agriculture, Tom Vilsack

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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**EXHIBIT G TO DEFENDANTS' REPLY**
**IN SUPPORT OF MOTION TO DISMISS**



# Farmers, businesses, certifiers and consumers lock arms in lawsuit to defend organic

## Organic Trade Association sues USDA over failure to advance organic livestock standards

Contact: Maggie McNeil (mmcneil@ota.com, (202) 403-8514 or (202) 615-7997)

Washington , DC US (September 13, 2017) — Taking action to defend the organic seal and organic standards, the Organic Trade Association on Wednesday is filing a lawsuit against the U.S. Department of Agriculture over its failure to put into effect new organic livestock standards.

"We are standing up on behalf of the entire organic sector to protect organic integrity, advance animal welfare, and demand the government keep up with the industry and the consumer in setting organic standards," said Laura Batcha, Executive Director and CEO of the Organic Trade Association.

The suit alleges the U.S. Department of Agriculture violated the Organic Foods Production Act, and unlawfully delayed the effective date of the final livestock standards that were developed by industry and in accordance with the processes established by Congress, and with abusing the agency's discretion by ignoring the overwhelming public record established in support of these organic standards. The trade association

further contends that the Trump Administration's Regulatory freeze order issued to federal agencies on Jan. 20, 2017, should not apply to organic standards because they are voluntary and are required only of those farms and businesses that opt in to be certified organic.

Supporting the Organic Trade Association in the suit, as groups harmed by this protracted government inaction, are organizations representing organic livestock farmers, organic certification agencies, and organic retailers and consumers.


Batcha said the Organic Trade Association's duty to protect the U.S. organic sector and enable it to advance, to uphold the integrity of the organic seal and to honor the consumer trust in that seal compelled the association – on behalf of the organic industry -- to take the legal action against the Administration.

"The organic industry takes very seriously its contract with the consumer and will not stand aside while the government holds back the meaningful and transparent choice of organic foods that deliver what the consumer wants," said Batcha. "The government's failure to move ahead with this fully-vetted regulation calls into question the entire process by which organic regulations are set – a process that Congress created, the industry has worked within, and consumers trust."

"The viability of the organic market rests on consumer trust in the USDA Organic seal, and trust that the organic seal represents a meaningful differentiation from other agricultural practices," said Batcha, who noted that the Board of the Organic Trade Association voted unanimously to initiate the lawsuit.

**What the organic livestock standard says**

The Organic Livestock and Poultry Production rule, commonly referred to as the Organic Animal Welfare Rule, is the result of 14 years of public and transparent work within the process established by Congress, and reflects deep engagement and input by organic stakeholders during multiple administrations, both Republican and Democrat.

It addresses four broad areas of organic livestock and poultry practices, including living conditions, animal healthcare, transport, and slaughter. The OLPP represents a refinement and clarification of a series of organic animal welfare recommendations incorporated into the Organic Foods Production Act of 1990, which established the federal regulations overseeing the U.S. organic sector.

The rule:

- Establishes minimum indoor and outdoor space requirements for poultry,
- Clarifies how producers and handlers must treat livestock and chickens to ensure their health and well-being throughout life, including transport and slaughter,

- Specifies which physical alterations are allowed and prohibited in organic livestock and poultry production,
- Provides more than ample timelines for producers to come into compliance including:
  - five years to establish outdoor access requirements for egg operations
  - three years for broiler operations to establish indoor space requirements
  - one year for all other adjustments.
- Levels the playing field by clarifying the existing organic standards.

**Fourteen years of engagement culminate in over 47,000 comments in 30 days against second delay**

After extensive public input and a thorough vetting process that included the transparent review and recommendation process of the National Organic Standards Board, an audit by the Agriculture Department's Office of Inspector General and solid economic analysis by the National Organic Program, the National Organic Program released the final rule on Organic Livestock and Poultry Practices on January 19, 2017, and published it in the *Federal Register* on that day. Due to a White House Memorandum to federal agencies released on January 20, 2017, requesting a regulatory freeze on rules recently published or pending, the effective date of the rule was delayed to May 19,2017.

On May 10, 2017, the USDA delayed the effective date again by an additional six months to November 14, 2017, and opened a 30-day comment period asking for responses to four possible options for the Final Rule: (1) let the rule become effective, which would mean the rule would become effective on Nov. 14, 2017; (2) suspend the rule indefinitely, during which time the Agriculture Department would consider whether to implement, modify or withdraw the Final Rule, (3) delay the effective date of the rule further, beyond Nov. 14, (4) withdraw the rule.

***More than 47,000 comments were received during the 30-day comment period, with 99 percent of those comments in support of the rule becoming effective as written without further delays, on Nov. 14, 2017.***

"Producers are organic because they choose to be. It's a voluntary system, and the organic sector welcomes clear and fair standards under which to operate," said Batcha. "Organic regulations apply only to certified organic producers, and those organic producers are overwhelmingly in favor of this new regulation. Most of the criticism of the new organic animal welfare rule has come from outside the sector, and by special interest groups not impacted by the regulation, but which would like to override the will of our members."

"It is important to note this issue did not just arise in 2017, rather it is the result of many years of failure of good government," Batcha added.

"The organic industry has been fighting for this rule for years," said Jesse Laflamme, owner and CEO of organic egg producer Pete and Gerry's Organics. "Certified organic egg, dairy and animal producers hold their operations to a higher standard of animal welfare than is required, because it is the right thing to do and it is what our customers expect. The organic industry works hard to live up to the expectation of its consumers, and we expect the USDA to live up to its mandate to oversee the industry in a way that is fair and will enable us to continue to prosper."

Organic farmer cooperative Organic Valley CEO George Siemon said that the government's failure to allow

this regulation to be implemented could jeopardize consumer trust in organic.

"The organic consumer and community have worked closely with USDA to help craft this sound regulation, and have followed the established rulemaking process. For the Administration to now let political pressure derail that progress is an assault on the trust in the organic process that the organic industry works so hard every day to earn," said Siemon. "Organic Valley works with thousands of organic dairy, laying hen, beef, hog and poultry producers, and has long advocated for action to clarify the living conditions and expectations for animal care in organic. Animal living conditions and welfare are a critical part of an organic livestock system. We in organic need to lead on this front, and the consumer's trust in organic needs to be respected."

**What the lawsuit alleges**

- That USDA has violated the Administrative Procedure Act because the repeated delays were issued without any public process.
- That USDA has violated the Administrative Procedure Act and abused its discretion by proposing action to indefinitely delay or kill the rule, in stark contrast to the established public process.
- That USDA has violated the Organic Foods Production Act and its consultation provisions enacted to apply in just these circumstances for industry and public stakeholders to revise, refine, and advance organic standards via a well defined process.
- That the Trump Administration Executive Order freezing regulations should not apply to the voluntary industry-driven organic standards that allow for businesses to opt in or out.

The lawsuit also describes the extensive public process and overwhelming record used to develop the standards, and details the faulty appeals decision from USDA on the use of "porches" to comply with the existing outdoor access requirements of the standard that have resulted in an uneven playing field.

***The Organic Trade Association asks the court to reverse the agency's decisions to delay and eliminate options proposed by USDA to further delay, rewrite, or permanently shelve the rule -- thereby making the final livestock rule effective immediately, as written.***

Supporting the Organic Trade Association are groups harmed by USDA action including:

- Organic Valley/CROPP Cooperative owned by more than 2,000 organic farm families;
- Jesse Laflamme of Pete & Gerry's Eggs partnering with over 100 independent, family-owned and operated farms across 14 states;
- National Co+op Grocers and its 200 retailer food co-ops owned by over 1.3 million consumers;
- The Accredited Certifiers Association non-profit educational organization whose members include 53 accredited certification agencies working to ensure the integrity of organic certification in the United States.

**Consumers buying organic because they know it makes a difference**

American consumers are eating more organic food than ever before, show the findings of the Organic Trade Association's *2017 Organic Industry Survey*. Organic food sales in the U.S. totaled $43.1 billion in 2016, marking the first time organic food sales in this country have broken through the $40 billion mark. Organic food now accounts for more than five percent of total food sales in this country, another significant first for organic

Organic meat and poultry sales posted new records in 2016, increasing by more than 17 percent to $991 million, for the category's biggest-ever yearly gain. Sales are expected to surpass the $1 billion mark for the first time in 2017. Growing awareness of organic's more encompassing benefits over natural, grass-fed or hormone-free meats and poultry is spurring consumer interest in organic meat and poultry aisles.

In March 2017, Consumer Reports National Research Center conducted a national phone survey on the opinions of Americans regarding the organic label. The survey found that six out of ten Americans said it is highly important that the animals used to produce organic food are raised on farms with high standards for animal welfare. For consumers who always or often buy organic, this number rose to 86 percent. Also, more than half of Americans say it is highly important that eggs labeled organic come from hens able to go outdoors and move freely outside. Among consumers who always or often buy organic, that number rises to 83 percent.

"Consumers rely on organic livestock and poultry being raised according to the highest standards, and they trust that the organic seal is an assurance of those high standards," said Batcha. "The organic sector does not take for granted the trust of the consumers we serve, and we work hard every single day to maintain it. Organic is an opt-in regulated marketing program that ensures products bearing the USDA Organic seal meet strict consistently applied standards and provide the consumer a meaningful choice. The future of the organic market rests on consumer trust, and the organic sector depends on the USDA to set organic standards fairly and according to the law."

*The Organic Trade Association (http://www.ota.com/)(OTA) is the membership-based business association for organic agriculture and products in North America. OTA is the leading voice for the organic trade in the United States, representing over 9,500 organic businesses across 50 states. Its members include growers, shippers, processors, certifiers, farmers' associations, distributors, importers, exporters, consultants, retailers and others. OTA's Board of Directors is democratically elected by its members. OTA's mission is to promote and protect ORGANIC with a unifying voice that serves and engages its diverse members from farm to marketplace.*

*The Organic Trade Association does not discriminate on the basis of race, color, national origin, sex, religion, age, disability, political beliefs, sexual orientation or marital/family status. Persons with disabilities, who require alternative means for communication of program information, should contact us (mailto:info@ota.com).*



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**FOR THE DISTRICT OF COLUMBIA**

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**EXHIBIT H TO DEFENDANTS' REPLY**
**IN SUPPORT OF MOTION TO DISMISS**



# The public tells USDA: Don’t derail organic standards

## *Media Alert*

Contact: Maggie McNeil (mmcneil@ota.com, (202) 403-8514 or (202) 615-7997)

Washington , DC US (January 19, 2018) — **Organic Trade Association statement:**

The American public has again spoken out loudly and clearly that it wants the U.S. Department of Agriculture to immediately implement the final Organic Livestock and Poultry Practices rule and to stop derailing this fully vetted, industry-supported and voluntary organic standard.

The over 70,000 comments filed over the holidays, during a brief 30-day comment period, in response to USDA’s announcement that it is withdrawing this important regulation, show the deep public support for the organic standards that have so successfully guided the organic industry and earned the public trust. The comments also are solid proof of the widespread public concern that the opt-in organic standards not be weakened or called into question by the government’s refusal to follow the public/private rule-making process established by Congress.

Please see the full comments (https://ota.com/sites/default/files/indexed_files/OTA_AMS-NOP-15-0012%253b%20NOP-15-06.pdf) submitted by the Organic Trade Association.

The Organic Trade Association is fighting to uphold the integrity of the USDA Organic seal and of organic

standards and is calling upon the USDA to explain why it is acting against the overwhelming support of organic farmers, businesses, and consumers to advance animal welfare standards in organic. The Organic Trade Association in September filed a lawsuit against the USDA seeking judicial review of their groundless action. Our case is strong and we believe we will prevail in court.



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**REASONS TO JOIN OTA**

JOIN OTA to receive the information you need to run your organic business.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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**EXHIBIT I TO DEFENDANTS' REPLY**
**IN SUPPORT OF MOTION TO DISMISS**



# Organic Trade Association dismayed at USDA proposal to withdraw organic animal welfare rule

## *Media Alert*

Contact: Maggie McNeil (mmcneil@ota.com, (202) 403-8514 or (202) 615-7997)

(December 15, 2017) — The Organic Trade Association on Friday issued the following statement in response to the U.S. Department of Agriculture's announcement to withdraw the Organic Livestock and Poultry Practices final rule, which will be published in the Federal Register on Monday.

"The Organic Trade Association is dismayed at the action by the U.S. Department of Agriculture to withdraw the Organic Livestock and Poultry Practices final rule.

This groundless step by USDA is being taken against a backdrop of nearly universal support among the organic businesses, and consumers for the fully vetted rules that USDA has now rejected. By the department's own count, out of the more than 47,000 comments the department received in the last public comment period for the regulation, 99 percent were in favor of the rule becoming effective without further delay on Nov 14. USDA noted that of those 47,000 comments, only 28 supported withdrawing the rule.

It is against this overwhelming public input that USDA ignores growing consumer demands for food transparency. Consumers trust that the Organic seal stands for a meaningful difference in production practices. It makes no sense that the Trump Administration would pursue actions that could damage a marketplace that is giving American farmers a profitable alternative, creating jobs, and improving the economies of our rural areas. Most striking is the administration's continued confusion that organic standards are mandatory rather than voluntary. Farmers, ranchers and businesses choose to be in the organic marketplace, and Congress intended that industry and consumers work together to develop organic standards. This action undermines that goal.

The Organic Trade Association has turned to the courts to uphold organic standards. In anticipation of the USDA's continued attempts to kill this regulation, the Organic Trade Association last Friday filed an amended complaint in Federal Court. We will continue our fight to uphold organic standards, that this Administration continues to willfully ignore by repeatedly delaying this fully vetted and final voluntary organic standard, and now proposing to withdraw it. We will see the department in court and are confident that we will prevail on this important issue for the organic sector."



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**EXHIBIT J TO DEFENDANTS' REPLY**
**IN SUPPORT OF MOTION TO DISMISS**

# It's Time for Washington D.C. to Listen

We want chickens on all organic farms to get sunlight and fresh air.

Glick Farm, PA

For 20 years, we've worked to get animal welfare regulations enacted so that all organic farms have the same high standards Organic Valley farmers already follow. Through the public process, Organic Valley teamed up with other organic leaders and asked people to write to the USDA in support of the Organic Livestock and Poultry Practices (OLPP) Final Rule.

**47,000 of you spoke up for higher animal welfare standards.** But the USDA isn't listening. They ignored the voices of the people, of farmers and consumers like you.

**We don't want hens to be confined to barns and concrete patios. We want organic eggs from hens that have ample room indoors and outdoors, perches to roost on, and the ability to forage and scratch in the dirt and grass**.

They didn't listen the first time, so we took over a full page in the Washington Post that was hard to ignore—especially when combined with the voices of people who have a heart for animal welfare. And though the USDA refused to implement the rules we wanted, we intend to keep fighting.

# If you eat food, you should read this.

The Honorable Sonny Perdue
Secretary of Agriculture

Dear Secretary Perdue,

We are deeply disappointed by your proposal to eliminate the new organic standard on animal welfare.

This is an affront to the many people and organizations engaged in a multi-year, transparent, and highly participatory process that resulted in an animal welfare standard overwhelmingly supported by organic farmers, organic companies, humane animal care advocates, and consumers.

Please remember that farmers choose to be organic and adhere to strict standards. We support this voluntary regulatory program on which the $50 billion organic industry depends. The program is an outstanding example of how private initiatives can marry public process and it has had strong bipartisan approval from its inception.

Organic farmers have pioneered new practices to enhance animal welfare because consumers demand it and because it makes farms more resilient and profitable. Eliminating the rule not only fails to acknowledge innovation in the organic farming sector and provide fair and transparent rules, it also undermines the faith people have in how organic agriculture is governed.

We implore you to restore the organic animal welfare standard. Businesses depend upon it, and consumers expect nothing less.

Sincerely,

We published this letter to United States Secretary of Agriculture Sonny Perdue in the Washington Post on January 16.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| ORGANIC TRADE ASSOCIATION,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,<br><br>Defendants. | Case No. 1:17-cv-01875 (RMC) |

**EXHIBIT K TO DEFENDANTS' REPLY**
**IN SUPPORT OF MOTION TO DISMISS**

FORTUNE

# Dairy Farmers Experiencing An Organic Milk Surplus As Sales of Almond, Soy Milk Rise


Simple Truth Organic brand milk is displayed for sale inside a Kroger Co. grocery store in Louisville, Kentucky on June 14, 2017. Luke Sharrett—Bloomberg via Getty Images

By **GRACE DONNELLY** January 2, 2018

After responding to increased demand from consumers, dairy farmers have now found themselves with a surplus of organic milk. Shoppers have been opting for plant-based alternatives like almond milk more often than organic cow's milk, leaving the industry with more of the very perishable organic product than retailers can sell.

Though the total volume of milk sold in United States retail between 2010 and 2015 declined by 13%, organic milk sales increased by 22.5%, according to industry tracker Euromonitor.

The rise in popularity of organic milk — driven by health-conscious consumers and the popularity of trends like the paleo diet — led producers to expand. But sales slowed as more and more consumers view cows' milk as less healthy than options like almond and coconut milk — common dairy substitutes for diets like Whole30.

The decline in demand comes just as the industry's efforts to increase production created a greater supply. Many organic milk producers are now planning to make butter, cheese, yogurt, or creamers out of the surplus.

The number of cows producing organic milk grew by more than one third between 2011 and 2016, according to the U.S. Department of Agriculture. But the price dairy farmers received for 100 pounds of organic milk fell from nearly

$40 at the start of 2016 to about $27 late last year, according to data from the government and dairy-cooperatives collected by Rabobank [reported by the Wall Street Journal].

Companies that previously invested heavily in organic milk production are looking for ways to cope with the drop off in demand. French dairy company Danone, maker of Dannon yogurt, bought WhiteWave Foods in 2016, which makes both Silk soy milk and Horizons organic milk. Meanwhile, Organic Valley, the largest farmers' organic cooperative in the U.S., opened a $16 million plant in Oregon in August to turn organic milk into butter and skim-milk powder.

"The market slowed way down," Organic Valley's chief executive George Siemon said. "There are a lot of signals I may have missed in hindsight."

But he said he expects prices for organic milk to stabilize this year and improve in 2018.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

ORGANIC TRADE ASSOCIATION,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,

Defendants.

Case No. 1:17-cv-01875 (RMC)

**EXHIBIT L TO DEFENDANTS' REPLY**
**IN SUPPORT OF MOTION TO DISMISS**

Subr 319-656-3992 kalonafarms@opengatesgroup.com





# News



Posted by Admin | February 7, 2017

## Organic Market Update

Last year the organic dairy market has been fairly challenging for many reasons. Historically, organic dairy prices at the retail shelf have steadily increased due to the fact that supply had always been outstripped by demand. There just wasn't enough organic dairy farmers to meet the demand of customers wanting food without harmful chemicals and dubious genetic claims.

Now, things have changed! There is a growing contingent of organic dairy farmers (especially in the Amish/Mennonite communities) nationwide, with more coming. Conventional dairy prices have fallen dramatically, due to many factors that have produced a "perfect storm." Russia has stopped buying NATO countries dairy products, Europe has eliminated their dairy quotas, New Zealand is importing grain to boost dairy production, and China is bringing on a national dairy program – all leading to a glut of dairy (raw milk) in the United States. When supply exceeds demand, things get very challenging in the dairy industry.

With conventional dairy prices so low and organic dairy prices being so high at the retail shelf, there is a percentage of customers that have switched to conventional dairy products, backing up organic dairy supply throughout the supply chain.

**So what does this mean?**

Organic farmers are seeing a drop in their price. In some cases, organic dairy farmers are being asked to cut production or even worse, being cut from contracts. It is extremely hard to start up dairy farms, especially organic dairy farms, so farmers being cut is the option of last resort.

At the retail shelf, large organic dairy brands are promoting heavily to drive down the price and entice organic shoppers. This ultimately finds its way to the price paid to farmers. Organic dairy farms have enjoyed a couple of years of record prices, but economic factors are dampening that outlook in the near future.

At the same time, manufacturers and processors are constantly struggling to balance the milk supply. One way to capture milk and store it for a more favorable future is to make organic non-fat dry milk and cheese. Right now, these inventories are at an all-time high. On one hand, it is advantageous to capture milk in these forms during times of low prices. On the other hand, when inventories build money is also tied up, but farmers must be paid. Making powder and cheese can only go on for a certain amount of time.

**Our Prediction of the Market Future**

It looks like 2017 may be even worse than 2016 in terms of an oversupply of organic milk. There are many movements in the market that will hopefully help the situation, but might not be the best for the farmer. Danone, a large French yogurt maker purchased White Wave Foods in 2016 (White Wave owns the Horizon brand). This will potentially shake up supply agreements, especially in the Northeast at some point. Organic Valley has agreed to strategic joint ventures with Dean Foods and General Mills (to mention a few), all with the intent of supplying more organic milk in various venues.

For the small organic processors, too much milk is potentially a catastrophic situation (because milk comes every day and must go somewhere). What is being done by most everyone is new relationships are being cultivated and new outlets are being developed for milk in ways that have never been considered before. More than likely the most innovative and flexible organizations will be the ones that survive.



← Winter on a Small Dairy Farm Small, Family Farms; Large Amish & Mennonite Families! →

## Leave a Reply

Your email address will not be published. Required fields are marked *

**Comment**

**Name** *

**Email** *

**Website**

Post Comment

## Latest News

Kalona Farms Newsletter: December 2017

Kalona Farms Newsletter: October 2017

Kalona Farms Newsletter: September 2017

Kalona Farms Milk Receiving Facility Now SQF Certified

Kalona Farms Newsletter: July 2017

## Organic Standards

## Contact and Location

Physical Address:
2206 540th Street SW
Kalona, IA 52247
319-656-3992
Office Address:
5195 Farmers Ave SW
Kalona, IA 52247
319-646-4061
Email Us
Milk Receiving Hours:
12 p.m. - 12 a.m. 7 days a week

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| ORGANIC TRADE ASSOCIATION,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,<br><br>Defendants. | Case No. 1:17-cv-01875 (RMC) |

**EXHIBIT M TO DEFENDANTS' REPLY**
**IN SUPPORT OF MOTION TO DISMISS**

Attachment 3

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*Attorneys for Plaintiff and the Proposed Class*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DONNIE LEE GIBSON II, on behalf of himself and all others similarly situated,

Plaintiff,

v.

WAL-MART STORES, INC., a Delaware corporation, CAL-MAINE FOODS, INC., a Delaware corporation,

Defendants.

Case No. 3:18-cv-00134

CLASS ACTION

**COMPLAINT**

DEMAND FOR JURY TRIAL

**TABLE OF CONTENTS**

Plaintiff Donnie Lee Gibson II (plaintiff) brings this action on behalf of himself and all others similarly situated against Wal-Mart Stores, Inc., and Cal-Maine Foods, Inc., both Delaware corporations (collectively, defendants). Plaintiff's allegations against defendants are based upon information and belief and upon investigation of plaintiff's counsel, except for allegations specifically pertaining to plaintiff, which are based upon his personal knowledge.

## I. OVERVIEW

1. America's largest and most profitable food companies should be honest and forthright in their dealings with consumers. When these food companies fail to uphold their responsibility for ensuring truthful advertising to consumers, such consumers are deceived into paying more for products or buying products that they otherwise would not have. Such food companies should be required to make restitution to the consumers they have deceived.

2. Walmart is the largest and most profitable retailer in the world. Walmart is responsible for the marketing and sale of shell eggs to consumers across the United States, including in California, under various store brands, including its own private label.

3. Cal-Maine is one of the largest and most profitable shell egg companies in the United States. Cal-Maine is responsible for the production and marketing of shell eggs to consumers nationwide, including in California, under various store brands, including a private label for Walmart.

4. Defendants market these private label eggs as having provided the laying hens "with outdoor access." Consumers typically pay a significant premium for such eggs, due to the perceived improvements to the welfare of laying hens.

5. A recent investigation performed by plaintiffs' counsel, however, demonstrates that the Cal-Maine hens supplying these private label eggs for Walmart do not actually have access to the outdoors.

6. Instead, Cal-Maine confines its laying hens to industrial barns without outdoor access. Upon counsel's investigation of one such industrial barn complex, there was not a single hen outside on the grounds. Rather, the hens are kept inside enclosed structures, never stepping foot out onto the

pasture surrounding the industrial barns. The industrial barns have two main parts: the central interior and the enclosed porches that run along the side. The enclosed porches, which purportedly provide outdoor access, are fully roofed and screened. A reasonable consumer would not consider this barred and screened porch to be outdoor access:


7. And each porch can hold only a small fraction of the flock housed in the industrial barn. Indeed, inside one porch, only about one hundred of tens of thousands of hens—less than 1% of the flock—were visible. And inside another porch, there were fewer still. This is not outdoor access for the laying hens, as promised by defendants to the consumers paying a premium for it.

8. Thus, consumers paying more for these eggs have been deceived. Defendants falsely advertise their "farm fresh" eggs as having been laid by hens "with outdoor access," such that they have failed to meet their basic obligation of truthfulness to consumers. A recent survey demonstrates that a reasonable consumer believes outdoor access to mean that all animals have access to outdoor pasture and fresh air throughout the day. Had plaintiff and class members known the truth, they would not have purchased these private label eggs or paid as much for them.

9. Accordingly, defendants' conduct described herein violates the (i) California's Business & Professions Code §§ 17200, *et seq.* (the Unfair Competition Law or UCL); (ii) California Civil Code §§ 1750, *et seq.* (the Consumers Legal Remedies Act or CLRA); and (iii) California's

Business & Professions Code §§ 17500, *et seq.* (the False Advertising Law or FAL). Plaintiff brings this action on behalf of a California class for restitution, injunctive relief, and any other relief deemed appropriate by the court to which this case is assigned.

## II. PARTIES

10. Plaintiff Donnie Lee Gibson II is a resident of Pittsburg, California. During the year preceding the filing of this complaint, plaintiff regularly purchased Organic Marketside private label shell eggs from Walmart in the state of California. Prior to purchase, plaintiff saw the product packaging stating that the hens were provided "with outdoor access." Plaintiff Gibson would not have purchased the shell eggs or paid as much for them had defendants disclosed the truth. Plaintiff seeks restitution and injunctive relief requiring defendants to cease their deceptive marketing and sale of private label eggs marketed as providing hens "with outdoor access."

11. Wal-Mart Stores, Inc., is a Delaware company with its principal place of business in Bentonville, Arkansas. Wal-Mart is responsible for the marketing and sale of shell eggs to consumers under its Organic Marketside private label.

12. Cal-Maine Foods, Inc., is a Delaware corporation headquartered in Jackson, Mississippi. Cal-Maine is responsible for the production, processing, and marketing of shell eggs to consumers throughout the United States, including in California, under various store brands, including Organic Marketside for Walmart.

## III. JURISDICTION AND VENUE

13. This Court has diversity jurisdiction over this action pursuant to 28 U.S.C. § 1332(d), because the amount in controversy for the Class exceeds $5,000,000, and the class includes members who are citizens of a different state than defendant.

14. This Court has personal jurisdiction over defendant because the injury to plaintiff and class members arises from the marketing and sale of shell eggs in California.

15. Venue is proper in this Court under 28 U.S.C. § 1391(b), because Wal-Mart Organic Marketside shell eggs are sold throughout the State of California, including in this judicial district.

## IV. FACTUAL ALLEGATIONS

### A. Defendants Are Responsible for the Marketing and Sale of Store-Brand Eggs for Walmart, Labeled as Having Come From Hens "With Outdoor Access."

16. According to its website, Cal-Maine is the "largest producer and marketer of shell eggs in the United States."[1] It operates in a single segment, "which is the production, grading, packaging, marketing and distribution of shell eggs."[2] In 2016, Cal-Maine sold over twelve billion shell eggs, representing approximately 23% of domestic shell egg consumption.[3] Besides its own brands, Cal-Maine "produce[s], market[s], and distribute[s] private label specialty shell eggs."[4]

17. Walmart (including Sam's Club) is Cal-Maine's top customer, representing almost 30% of Cal-Maine's total sales in 2016.[5] Cal-Maine produces and packages eggs to be sold under Walmart's store brands. One of those private labels is Organic Marketside.

18. Walmart is the "largest retailer in the world," with over 260 million customers and revenue of $485.9 billion for fiscal year 2017.[6] Its supercenters "offer a one-stop shopping experience by combining a grocery store with fresh produce, bakery, deli and dairy products with electronics, apparel, toys and home furnishings."[7] Likewise, its neighborhood markets "offer fresh produce, meat and dairy products, bakery and deli items, household supplies, health and beauty aids and a pharmacy."[8] Wal-Mart markets and sells shell eggs to consumers under its Organic Marketside private label, including those produced and packaged by Cal-Maine.

19. These private label shell egg cartons are each marked with a USDA plant number associated with the egg processor. For example, P1100 is the USDA plant number for one of Cal-Maine's major industrial complexes, located in Chase, Kansas[9]:

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[1] http://calmainefoods.com/company/.

[2] *Id*.

[3] *Id*.

[4] *Id*.

[5] http://calmainefoods.com/media/1133/calm-october-2016.pdf, at 12.

[6] https://corporate.walmart.com/our-story.

[7] https://corporate.walmart.com/our-story/our-business.

[8] *Id*.

[9] https://apps.ams.usda.gov/plantbook/Query_Pages/PlantBook_Query.asp#PlantNumber.


20. P1100 is a certified organic operation for the handling of shell eggs.[10] Cal-Maine also owns certified organic production facilities in Chase, Kansas. Accordingly, Cal-Maine produces shells eggs at its facilities in Chase, Kansas, and then packages them at its plant in Chase, Kansas, for marketing and sale under private label for Walmart.

21. As depicted, defendants advertise these store brand "farm fresh" eggs as laid by hens "free to roam, nest and perch in a protected barn with outdoor access":[11]


22. As described below, however, Cal-Maine's hens are confined to industrial barns and do not actually have access to the outdoors.

[10] https://organic.ams.usda.gov/Integrity/Search.aspx.

[11] And plaintiff notes that the abstract packaging is, in part, grass green, with a hen in mid-step.

**B. The Hens Producing Cal-Maine's Store-Brand Eggs for Walmart Are Actually Confined to Industrial Barns, Without Outdoor Access.**

23. Along with Cal-Maine's 24,000 square foot packing plant (P1100) on Avenue K in Chase, Kansas, Cal-Maine's neighboring parcel on 6th Road has eight industrial poultry houses, each measuring 370 feet by 113 feet and each housing tens of thousands of hens, as partially depicted in this picture taken before the completion of construction:


24. In 2014, Cal-Maine completed its acquisition of Delta Egg Farm, LLC, which included the above-depicted "organic egg production complex with capacity for approximately 400,000 laying hens located near Chase, Kansas."[12] As stated in its 2014 annual report, after its acquisition of Delta Egg Farm, Cal-Maine embarked on an "organic facility expansion" in Chase,

[12] http://www.businesswire.com/news/home/20140217005423/en/Cal-Maine-Foods-Announces-Agreement-Acquire-Remaining-Interests. Property records show that Delta Egg Farm, LLC, was the prior owner of this parcel 080-067-26-0-00-00-005.00-0.

Kansas.[13] Since that time, Cal-Maine has doubled the industrial barns at this location from four to eight.

25. In September and October of 2017, on days when it was 84°F and 70°F, respectively, counsel investigated this Cal-Maine industrial egg farm. Outside on the grounds, there was not a chicken in sight. Instead, Cal-Maine confines its laying hens to industrial barns without outdoor access. The hens are kept inside these enclosed structures, never stepping foot out onto the pasture surrounding the industrial barns. The industrial barns have two main parts: the central interior and the enclosed porches that run along the side. The porches, which purportedly provide outdoor access, are fully roofed and screened, without access to the soil and vegetation surrounding the industrial barns. A reasonable consumer would not deem this outdoor access.

26. In addition, each porch can hold only a small fraction of the flock housed in the industrial barn. Indeed, inside one porch, only about one hundred of tens of thousands of hens—less than 1% of the flock—were visible. And inside another porch, there were fewer still. This is not outdoor access for the hens, as promised by defendants to the consumers paying a premium for it

27. Pictures taken during counsel's investigation document the lack of outdoor access for the laying hens. In the below picture, you can see in the distance the completed construction of the eight industrial barns:


[13] http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MjQ5NjU3fENoaWxkSUQ9LTF8VHlwZT0z&t=1, at 13.

28. As you get closer, you can see that each barn has fans at the end to circulate air inside the barn, with screened porches running along each side:


29. Viewed head on, with trucks parked to the right, you can see that the porches are completely enclosed—with the same roof as the interior part of the industrial barn, an enclosing wall on one side and enclosing bars with screening on the other side:

30. A closer view of the enclosed porches confirms that they are without access to non-enclosed space or to the pasture surrounding the industrial barns. The theoretical ability to view the outdoors is not the same as having access to it:


31. The man standing in the porch provides perspective on the vast size of these industrial barns—the screened side is three times his height:

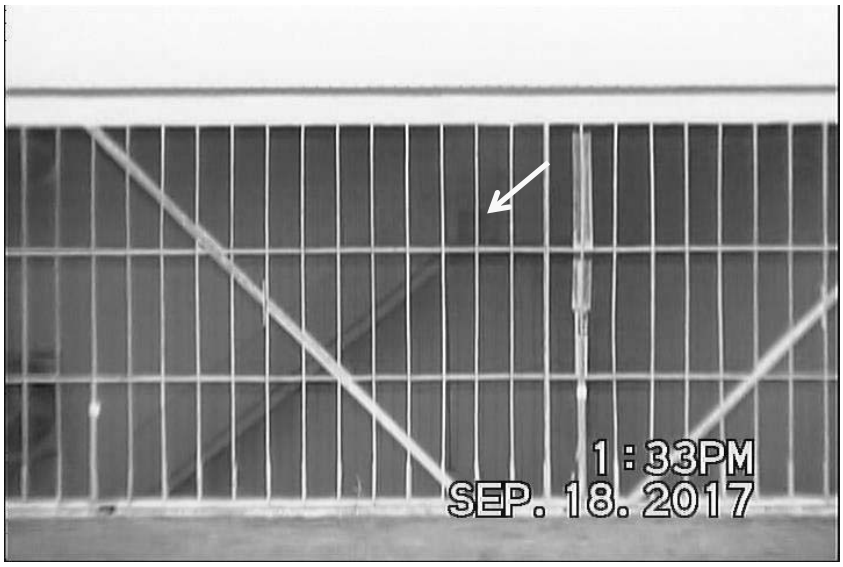
32. Here is a close up of the individual, who is maneuvering an interior door, which separates the enclosed porch into sections:


33. To the right of the man's feet, you can see one of the lower popholes that provide access for a small fraction of the laying flock to the enclosed porch:

34. And this picture also shows points of debris on the screen that runs across the vertical slats and keeps the hens on the enclosed porch:


35. The below picture shows another of the approximately four lower popholes along each side of the vast industrial barn:

36. And because this is a multi-tiered barn, there are also approximately four upper popholes along each side. You can see the little door at the top of the ramp (recall that the man was one third the height of the screened side):




37. And here is a close up of an upper pophole:

38. When counsel's investigation continued in October, the man shown above to demonstrate proportion was no longer working on the interior door of the porch. Yet inside the porch visible from the road, there were only about one hundred of the tens of thousands of laying hens housed in the barn—or less than 1% of the flock. And none were actually outside the enclosure pecking in the soil and vegetation surrounding the industrial barns.

39. Here are a few hens at one end of the screened and barred porch:


40. And here is a closer view of hens at one end of the enclosed porch:

41. Here are hens seen at the base of the long ramp/steps:


42. And here is a closer view of hens at the base of the ramp/steps. None is able to leave the industrial barn or peck and scratch in the soil and vegetation surrounding the industrial barn:

43. Here are hens clustered near a lower pophole:


44. And here are some hens scattered in between popholes. None have outdoor access—they can only look out at it:


45. At a second enclosed porch, even fewer hens were present:


46. Of the twenty or thirty seen along the length of this porch, here is a hen on the platform at the top of the ramp/steps:


47. And here is a hen near the base of the ramp/steps. This is not access to the outdoors:

48. Thus, each of these eight industrial barns, together housing hundreds of thousands of hens, has roofed porches running along both sides, enclosed by bars and screening, without any access to the soil and vegetation surrounding the industrial barns. A reasonable consumer would not consider this to be "outdoors."

49. Moreover, each porch can hold only a tiny fraction of the tens of thousands of hens housed in the central interior of the structure.

50. Further, only a tinier fraction still—less than 1% of the flock—was seen out on the enclosed porches. There are multiple reasons for this.

51. Each enclosed porch has popholes through which some hens can enter from the central portion of the barn into the porch and later exit the porch back into the central portion of the barn. For each of these barns, however, there is only two porches with about eight popholes each, including both lower and upper, such that any one of the tens of thousands of hens inside each industrial barn would need to travel over an immense quantity of birds to get to a pophole. But hens are not naturally inclined (or even physically capable) of trampling or flying over much of a massive flock to get to pophole. Rather, the natural behavior of chickens precludes them from aggressively encroaching on the space of other birds in an effort to reach a door. In addition, the hens entering the enclosed porch from the upper pophole need to walk down a long, steep ramp to reach the bottom. For these reasons, a reasonable consumer would not consider the popholes of industrial barns to provide meaningful access to the enclosed porches—and certainly not access to the outdoors.

52. Thus, a claim that hens housed in such a manner are provided "with outdoor access" is false and misleading both as to "access" and as to "outdoors." Instead, Cal-Maine's hens are confined to industrial poultry houses and do not have actual outdoor access, rendering defendants' packaging of the eggs false and misleading.

**C. The "With Outdoor Access" Label Is Material to Consumers.**

53. Surveys consistently demonstrate that consumers have become increasingly interested in farm animal welfare. According to an online survey of 1,000 Americans dated June 29, 2016, more than three in four (77%) consumers say that they are concerned about the welfare of animals

that are raised for human food, including laying hens.[14] In addition, "more than two-thirds (69%) of consumers pay some or a lot of attention to food labels regarding how the animal was raised."[15] And consumers' concern "about how animals are raised has increased over time, as 74% of consumers say they are paying more attention to the labels that pertain to how an animal was raised than they were five years ago."[16]

54. Part of raising animals in a way beneficial to their welfare includes maintaining living conditions and health care practices in a way that accommodates the health and natural behavior of the animals, including laying hens. True outdoor access is intended to ensure a production system that provides living conditions that allow the chickens to satisfy their natural behavior patterns and provides preventative health care benefits. Such true outdoor access contributes to preventative health care management by enabling hens to develop and reproduce under conditions that reduce stress, strengthen immunity, and deter illness. And true outdoor access affords hens the freedom of choice to satisfy natural behavior patterns. Being outside in the sunlight to engage in natural behaviors like scratching in the soil and pecking in the grass thus improves the welfare of laying hens. Here is an example of a large-scale egg farm with hens that are actually outdoors:

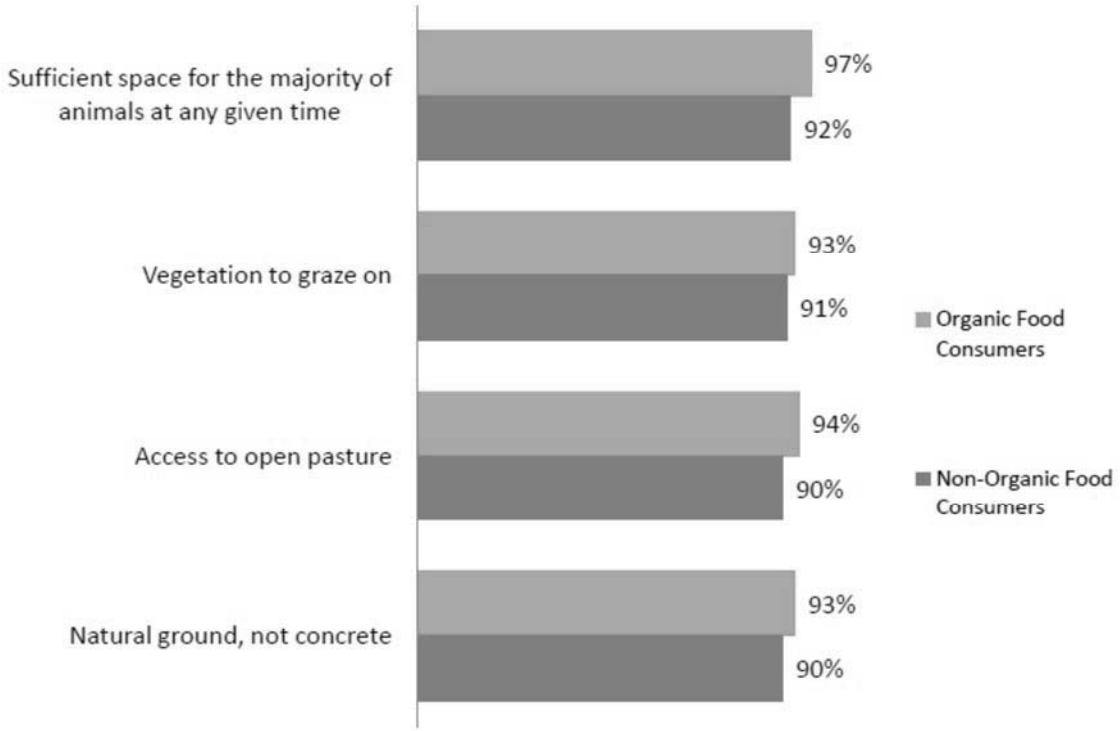
[14] https://www.aspca.org/animal-cruelty/farm-animal-welfare/aspca-farm-surveys; https://www.aspca.org/sites/default/files/publicmemo_aspca_labeling_fi_rev1_0629716.pdf.

[15] *Id.*

[16] *Id.*

55. Accordingly, the "with outdoor access" claim is material to consumers, and defendants therefore use that purported attribute to tout its product. But, as set forth above, that claim is false and misleading to consumers.

56. Indeed, an April 2104 survey of 1,000 consumers nationwide conducted by the American Society for the Prevention of Cruelty to Animals, found that almost seventy percent of consumers (68%) believe outdoor access to mean that "[a]ll animals have access to outdoor pasture and fresh air throughout the day."[17] Moreover, consumers believe the following should be conditions of outdoor access:[18]




57. Thus, it is materially misleading for defendants to claim that the hens are provided "with outdoor access" when a reasonable consumer believes that to mean there is access for the majority of animals at any given time to open pasture and vegetation throughout the day.

[17] http://www.aspca.org/sites/default/files/aspca_organic_labeling_public_memo_4-10-14.pdf.

[18] *Id.*

58. Another recent article asks its readers: "Does 'outdoor access' mean claws on grass? Or are screened-in porches acceptable?"[19] The overwhelming response was that porches are not acceptable. For example, consumers had the following to say:

- Yes, of course! How can they call them free range if they can't even go outside?
  Tracylekels (9/17/17)
- Yes. If labeled organic and free range, they must eat organic feed and roam outside at will.
  BDSmith (9/17/17)
- This is a no brainer.....let the chickens or hens graze outdoors in large fields if you want to be able to call them free range, and organic. The poultry industry has been playing word games with the wording a vast majority of all their products. The public truest has no idea what their [sic] purchasing based on these misleading labels, and this is wrong.
  Brad (9/17/17)
- Yes! We pay more for the eggs and chicken meat with the belief that these animals are treated humanely and with as natural a diet as possible only to find out they are treated as terribly as most factory farmed animals. If I'm gonna pay extra I want them to be out there enjoying outside, eating bugs and being free range!
  Abbi (9/17/17)
- 'Porches'? Give me a break--this cute name obscures the fact that this is just a way of reintroducing factory farming for organic hens. Truth in advertising! The standard is about

[19] https://www.countable.us/articles/1114-organic-chickens-outdoor-access.

> ensuring that consumers know what they are buying, without having to be detectives and visit personally every farm that claims its hens are organic. 100,000 hens in each coop, smack up against another coop, with no outside access, should not be called 'organic.' The whole point of organic regulations is to reconnect the animals with nature. A concrete floor with screening, aka 'porch,' with no grass, sun, natural water source, or room to move is not nature.
>
> Jerise (9/18/17)

- Should free range mean free range? Of course! The real issue seems to be that corporate interests will pay lawyers a huge amount of money to try to twist common language and get around the meaning of the labels in the hopes that the profit they make with delays and arguments and getting away with abuses.

  Lucinda (9/18/17)

59. So it is materially misleading for defendants to claim that laying hens are provided "with outdoor access" when reasonable consumers believe this to mean that the hens can put their claws in the grass—not be confined to enclosed porches.

60. To be sure, under new, clarifying regulations issued during the Obama administration but presently postponed under the Trump administration until May 14, 2018,[20] defendants would not even qualify for use of the "organic" label under the National Organic Program (NOP), which governs use of the term "organic."[21] Use of "organic" on the label requires, *inter alia*, that there is "access for all animals to the outdoors,"[22] but the comments received by USDA demonstrated "there is a gap between how consumers think birds are raised on organic farms and the actual practices of

[20] 82 Fed. Reg. 52643.

[21] 7 C.F.R. §205.102.

[22] 7 C.F.R. § 205.239.

some—but not all—organic producers"[23] using the porch system, because "consumers expect that organic birds come into contact with soil and vegetation and can exhibit natural behaviors."[24]

61. Indeed, a recent Los Angeles Times article describes the porch system as a "loophole in organic regulations that has allowed factory egg farms, some with 100,000 hens to a barn, to earn an organic imprimatur without much more than a nod to letting chickens leave their coop—that is, attaching a gated, screened porch to their barns."[25] And, as an industry insider notes, when you put hens in "a building with no windows, no natural light and a screened porch and label it as 'organic,'" consumers are "going to be a little bit ticked off."[26]

62. Thus, under the clarifying regulation if and when it becomes effective, Cal-Maine's private label eggs for Walmart here at issue would not even qualify as "organic."[27] But defendants take their marketing one step further—beyond the purview of the NOP—and affirmatively describe the hens as free to roam "with outdoor access" though that description is false and misleading to a reasonable consumer.

**D. Eggs Touting Animal Welfare Attributes Command a Significant Price Premium Over Conventional Eggs.**

63. As further evidence of its materiality to consumers, consumers usually pay a significant price premium for eggs touting animal welfare attributes. The Cal-Maine eggs marketed

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[23] 82 Fed. Reg. 7042, 7068.

[24] USDA Agricultural Marketing Service, National Organic Program, *Organic Livestock and Poultry Practices Final Rule: Questions and Answers* (Jan. 2017), at 1, available at https://www.ams.usda.gov/sites/default/files/media/OLPPExternalQA.pdf.

[25] http://www.latimes.com/business/la-fi-organic-eggs-20171121-story.html.

[26] *Id*.

[27] The clarifying regulation at § 205.241 includes, *inter alia*, the following outdoor space requirements: "(1) Access to outdoor space and door spacing must be designed to promote and encourage outside access for all birds on a daily basis…. (2) At least 50 percent of outdoor space must be soil. Outdoor space with soil must include maximal vegetative cover appropriate for the season, climate, geography, species of livestock, and stage of production…. (4) For layers (Gallus gallus), outdoor space must be provided at a rate of no less than one square foot for every 2.25 pounds of bird in the flock…." 82 Fed. Reg. 7042, 7091. Outdoor access need not be provided for pullets under 16 weeks of age or during nest box training not to exceed five weeks. *Id*. at 7092.

And § 205.2 defines soil as the "outermost layer of the earth comprised of minerals, water, air, organic matter, fungi, and bacteria in which plants may grow roots," and vegetation is defined as "[l]iving plant matter that is anchored in the soil by roots and provides ground cover." *Id*. at 7089.

and sold at Walmart are no exception. There is a premium for cage-free eggs as compared to conventional eggs, and a further premium still for cage-free eggs "with outdoor access":

| Shell Egg Product | Specialty Description | Cost |
|---|---|---|
| Great Value (Walmart Brand) | No | $1.86 |
| Marketside (Walmart Brand) | Yes, cage free | $2.98 |
| Organic Marketside (Walmart Brand) | Yes, cage free with outdoor access | $3.97 |

For a premium price:


And for a further premium still:

64. Thus, consumers pay a significant premium for Cal-Maine's private label eggs for Walmart, and in particular for "outdoor access," which further supports the materiality of their marketing claim to consumers.

65. Indeed, defendant Cal-Maine acknowledges that prices for such specialty eggs are generally higher because their perceived benefits are important to consumers. As it reports online, "We are one of the largest producers and marketers of value-added specialty shell eggs in the U.S." and "we classify nutritionally enhanced, cage-free, organic and brown eggs as specialty products."[28] As of 2017, specialty eggs represent 24.69 percent of dozens sold and 50.3 percent of Cal-Maine's sales revenue.[29] As it explains: "Prices for specialty eggs…are generally higher due to consumer willingness to pay for the perceived increased benefits from those products."[30]

66. Survey data supports Cal-Maine's acknowledgement: 81% of respondents to a poll of 1,204 adults nationwide stated that they were "willing to pay more for eggs from chickens" that they know were "raised in a humane manner."[31]

## V. CLASS ACTION ALLEGATIONS

67. Under Rule 23 of the Federal Rules of Civil Procedure, plaintiff seeks certification of a class defined as follows:

> All consumers who purchased Cal-Maine shell eggs sold under the Organic Marketside private label for Walmart in California during the four years prior to the filing of the complaint.

68. Excluded from the class are defendants; the officers, directors or employees of defendants; any entity in which any defendant has a controlling interest; and any affiliate, legal representative, heir or assign of defendants. Also, excluded from the class are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

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[28] http://calmainefoods.com/company/.

[29] http://calmainefoods.com/media/1133/calm-october-2016.pdf, at 24.

[30] http://calmainefoods.com/company/.

[31] *U.S. Public Supports Humane* Treatment *for Hens*, Zogby International for Farm Sanctuary (Sept. 2000), accessible at http://www.isecruelty.com/poll.php.

69. Plaintiff does not know the exact number of class members at the present time. However, due to the nature of the trade and commerce involved, there appear to be tens if not hundreds of thousands of class members such that joinder of all class members is impracticable.

70. The class is defined by objective criteria permitting self-identification in response to notice, and notice can be provided through techniques similar to those customarily used in other consumer fraud cases and complex class actions.

71. There are questions of law and fact common to the class. Defendants' deceptive marketing and sale of shells eggs similarly impact class members, all of whom purchased and paid more than they should have for shell eggs.

72. Plaintiff asserts claims that are typical of the class. Plaintiff and all class members have been subjected to the same wrongful conduct because they all have purchased deceptively advertised shell eggs. As a result, and like other members of the class, plaintiff purchased and paid an amount for shell eggs which he otherwise would not have paid.

73. Plaintiff will fairly and adequately represent and protect the interests of the class. Plaintiff is represented by counsel competent and experienced in both consumer protection and class action litigation.

74. Class certification is appropriate because defendants have acted on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

75. Class certification is also appropriate because common questions of law and fact substantially predominate over any questions that may affect only individual members of the class, including, *inter alia*, the following:

a. Whether defendants advertised their shell eggs as providing the laying hens with access to the outdoors;

b. Whether these laying hens did not in fact have access to the outdoors;

c. Whether the lack of access to the outdoors would be material to a reasonable consumer purchasing shells eggs advertised as providing hens with access to the outdoors;

d. Whether defendants' shell eggs label was likely to deceive a reasonable consumer;

e. Whether defendants' conduct violates the UCL, FAL and CLRA;

f. Whether the challenged practices harmed plaintiff and members of the class; and

g. Whether plaintiff and members of the class are entitled to restitutionary, injunctive, or other relief.

76. A class action is superior to other available methods for the fair and efficient adjudication of this controversy, since joinder of all the individual class members is impracticable. Furthermore, because the injury suffered by each individual class member may be relatively small, the expense and burden of individual litigation would make it very difficult or impossible for individual class members to redress the wrongs done to each of them individually and the burden imposed on the judicial system would be enormous.

77. The prosecution of separate actions by the individual class members would create a risk of inconsistent or varying adjudications, which would establish incompatible standards of conduct for defendants. In contrast, the conduct of this action as a class action presents far fewer management difficulties, conserves judicial resources and the parties' resources, and protects the rights of each class member.

## VI. CAUSES OF ACTION

### FIRST CAUSE OF ACTION

### VIOLATION OF THE CALIFORNIA UNFAIR COMPETITION LAW (CAL. BUS. & PROF. CODE § 17200, *et seq.*)

78. Plaintiff realleges and incorporates by reference all paragraphs alleged herein.

79. Cal. Bus. & Prof. Code § 17200 prohibits any "unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Defendants have engaged in unlawful, and unfair, and fraudulent business acts and practices and unfair, deceptive, untrue, and misleading advertising in violation of the UCL.

80. Defendants have violated the unlawful prong by virtue of their violations of the CLRA, as described in the second cause of action.

81. Defendants have violated the unfair prong of section 17200 because the acts and practices set forth herein offend established public policies supporting truth in advertising to consumers. Defendants' deceptive use of the "with outdoor access" packaging is unethical, oppressive, unscrupulous and injurious to consumers. The harm that these acts and practices cause greatly outweighs any benefits associated with them. Defendants' conduct also impairs competition within the market for shell eggs, and prevents plaintiff and class members from making fully informed decisions about the kind of shell eggs to purchase and the price to pay for such products.

82. Defendants have violated the deceptive prong of section 17200 because, as set forth above, they deceptively marketed shell eggs sold under private label for Walmart as providing hens "with outdoor access." This misrepresentation of material information was likely to deceive a reasonable consumer.

83. Plaintiff has suffered injury in fact, including the loss of money, as a result of defendants' unlawful, unfair, and/or deceptive practices. Plaintiff and members of the class were directly and proximately injured by defendants' conduct and lost money as a result of defendants' material misrepresentations, because they would not have purchased or paid as much for the shell eggs had they known the truth.

84. All of the wrongful conduct alleged herein occurred, and continues to occur, in the conduct of defendants' business. Defendants' wrongful conduct is part of a general practice that is still being perpetuated and repeated throughout the State of California.

85. Plaintiff requests that this Court enter such orders or judgments as may be necessary to enjoin defendants from continuing their unfair and deceptive business practices, to restore to plaintiff and members of the class the money that defendants acquired from them by this unfair competition, and to provide such other relief as set forth below.

86. Plaintiff is entitled to an award of reasonable attorneys' fees under California Code of Civil Procedure Section 1021.5 for the benefit conferred upon the general public of the State of California by any injunctive or other relief entered herein.

**SECOND CAUSE OF ACTION**

**VIOLATIONS OF THE CONSUMERS LEGAL REMEDIES ACT (CAL. CIV. CODE § 1750, *et seq.*)**

87. Plaintiff realleges and incorporates by reference all paragraphs alleged herein.

88. Defendants are each a "person" under Cal. Civ. Code § 1761(c).

89. Plaintiff is a "consumer," as defined by Cal. Civ. Code § 1761(d), who purchased Cal-Maine's shell eggs sold under private label for Walmart.

90. Cal. Civ. Code § 1770(a)(5) prohibits "[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have…."

91. Defendants violated this provision of the CLRA with their material misrepresentations set forth on the egg carton packaging.

92. As set forth above, defendants deceptively marketed shell eggs sold under private label for Walmart as providing hens "with outdoor access."

93. Plaintiff and members of the class were directly and proximately injured by defendants' conduct and lost money as a result of defendants' material misrepresentations, because they would not have purchased or paid as much for the shell eggs had they known the truth.

94. In accordance with Civil Code § 1780 (a), plaintiff and class members seek restitutionary, injunctive and equitable relief for defendants' violations of the CLRA. Plaintiff requests that this Court enter such orders or judgments as may be necessary to restore to any person in interest any money which may have been acquired by means of such unfair business practices, and for such other relief, including attorneys' fees and costs, as provided in Civil Code § 1780 and the prayer for relief. In addition, after mailing appropriate notice and demand in accordance with Civil Code § 1782(a) & (d), plaintiff will amend this complaint to include a request for damages.

95. Plaintiff includes an affidavit with this complaint reflecting that venue in this district is proper, to the extent such an affidavit is required by Cal. Civ. Code § 1780(d) in federal court.

**THIRD CAUSE OF ACTION**

**VIOLATIONS OF THE FALSE ADVERTSING LAW**
**(CAL. BUS. & PROF CODE §§ 17500, *et seq.*)**

96. Plaintiff realleges and incorporates by reference all paragraphs alleged herein.

97. California Business & Professions Code §§ 17500, *et seq.* broadly proscribes deceptive advertising in this State. Section 17500 makes it unlawful for any corporation intending to sell products or perform services to make any statement in advertising those products or services concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or not to sell those products or services as advertised at the price stated therein, or as so advertised.

98. As alleged herein, defendants deceptively marketed shell eggs sold under private label for Walmart as providing its hens "with outdoor access." As described above, this misrepresentation of material information was likely to deceive a reasonable consumer.

99. Defendants knew or reasonably should know that such marketing of shell eggs was and is deceptive.

100. Plaintiff has suffered injury in fact, including the loss of money, as a result of defendants' false advertising. Plaintiff and members of the class were directly and proximately injured by defendant's conduct and lost money as a result of defendants' material misrepresentations, because they would not have purchased or paid as much for defendants' shell eggs had they known the truth.

101. All of the wrongful conduct alleged herein occurred, and continues to occur, in the conduct of defendants' business. Defendants' wrongful conduct is part of a general practice that is still being perpetuated and repeated throughout the State of California.

102. Plaintiff requests that this Court enter such orders or judgments as may be necessary to enjoin defendants from continuing their deceptive advertising, to restore to plaintiff and members of the class the money that defendants unlawfully acquired, and to provide such other relief as set forth below.

103. Plaintiff is entitled to an award of reasonable attorneys' fees under California Code of Civil Procedure Section 1021.5 for the benefit conferred upon the general public of the State of California by any injunctive or other relief entered herein.

**FOURTH CAUSE OF ACTION**

**BREACH OF CALIFORNIA COMMON LAW OF UNJUST ENRICHMENT**

104. Plaintiff realleges and incorporates by reference all paragraphs alleged herein.

105. To the detriment of plaintiff and class members, defendants have and continue to be unjustly enriched as a result of the wrongful conduct alleged herein. Defendants have unjustly benefited by receiving higher prices for their shell eggs than would have been possible absent the wrongful conduct. Between the parties, it would be unjust for defendants to retain the benefits attained by its wrongful actions. By reason of the foregoing, defendants have violated California's common law of unjust enrichment.

106. Accordingly, plaintiff and class members seek full restitution of defendants' enrichment, benefits, and ill-gotten gains acquired as a result of the wrongful conduct alleged herein.

**PRAYER FOR RELIEF**

WHEREFORE, plaintiff, individually and on behalf of all others similarly situated, respectfully requests that this Court enter a judgment against defendant and in favor of plaintiff, and grant the following relief:

A. Determine that this action may be maintained as a class action with respect to the class identified herein and certify it as such under Rules 23(b)(2) and/or 23(b)(3), or alternatively certify all issues and claims that are appropriately certified, and designate and appoint plaintiff as class representative and his counsel as class counsel;

B. Declare, adjudge and decree the conduct of defendants as alleged herein to be unlawful, unfair and/or deceptive;

C. Enjoin defendants from continuing the unfair and deceptive marketing of its shell eggs;

D. Award plaintiff and the class restitution of all monies paid to defendants as a result of its unfair and deceptive business practices;

E. Award plaintiff and the class reasonable attorneys' fees, costs, and pre- and post-judgment interest; and

F. Award plaintiff and the class such other further and different relief as the nature of the case may require or as may be determined to be just, equitable, and proper by this Court.

**JURY TRIAL DEMAND**

Plaintiff, by counsel, requests a trial by jury for all claims so triable.

DATED: January 8, 2018

HAGENS BERMAN SOBOL SHAPIRO LLP

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**DECLARATION RE CLRA VENUE**

I, Jennifer Brolliar, do hereby declare and state as follows:

1. I am a party plaintiff in the above captioned action. Pursuant to Cal. Civ. Code § 1780(d), I make this declaration in support of the Class Action Complaint and the claim therein for relief under Cal. Civ. Code § 1780(a).

2. This action for relief under Cal. Civ. Code § 1780(a) has been commenced in a county that is a proper place for trial of this action because Wal-Mart Organic Marketside shell eggs are sold throughout the State of California, including in this county.

This declaration is signed under penalty of perjury under the laws of the State of California this 23 day of December 2017.

Donnie Lee Gibson II