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January 17, 2018

Paul Lewis, Ph.D., Director  
Standards Division, National Organic Program  
USDA-AMS-NOP, Room 2646-So., Ag Stop 0268  
1400 Independence Ave. SW  
Washington, DC 20250-0268

Docket No. AMS-NOP-15-0012; NOP-15-06; RIN 0581-AD75

***Submitted electronically via <http://www.regulations.gov>***

**Re: Comments on the USDA's proposal to withdraw the Organic Livestock and Poultry Practices rule.**

Dear Dr. Lewis:

The Carolina Farm Stewardship Association (CFSA) provides the following comments on the Agricultural Marketing Service's (AMS) proposal to withdraw the final rule for Organic Livestock and Poultry Practices.

CFSA is a member-based 501(c)(3) organization representing 2,900 farmers, businesses and consumers in North and South Carolina, with a mission to build, advocate for, and educate about the systems to support a sustainable regional food system centered on organic agriculture and local food.

Founded in 1979, CFSA is the oldest sustainable agriculture organization in the Southeast. Our farm and business members range from the largest organic egg processors in the nation to small-scale operations selling organic eggs and poultry through direct marketing; from mid-scale dairy and grain farms selling in organic commodity markets to slaughter facilities serving independent farmers; and from five-plus-generation farm families to young people from urban backgrounds and second-career farmers who have transitioned from successful businesses in non-food industries.

This diverse membership means that we are able to bring a wide range of farming and food experience and knowledge to bear in forming policy positions related to agriculture's potential role in human and environmental health, including animal welfare issues. CFSA has been

actively involved in bringing animal welfare education to organic farmers in the Carolinas and has supported policies and programs that provide consumers with detailed and accurate information about how livestock are raised.

In general, CFSA has supported the AMS's efforts to increase the integrity of the Organic label by addressing animal welfare. We strongly disagree with the analysis set forth by AMS in the notice referenced above, in which the AMS asserts that it lacks the legal authority under the Organic Foods Production Act (OFPA) to promulgate regulations for animal well-being and living conditions, such as the Organic Livestock and Poultry Practices (OLPP) rule. Maintaining the integrity of the Organic market and the prosperity of Organic farmers requires that AMS enforce strong animal welfare standards under the National Organic Program (NOP).

One of the most remarkable things about the NOP is that it is a voluntary regulatory program. As such, the architects of OFPA prudently designed the NOP to both develop and value input from the businesses that wish to comply with its rigorous standards. The National Organic Standards Board (NOSB), comprised as it is of consumers, farmers, processors, and scientists, was intended by Congress to function as the voice of the regulated industry.

In order for the USDA Organic label to maintain the public's trust, it is essential that the AMS honor the spirit of OFPA by consulting with the NOSB in a good-faith manner before undertaking major regulatory action. Thus, we are deeply disappointed that the AMS decided to withdraw the OLPP absent a recommendation from the NOSB, and, in doing so, squandered the hard work of the NOSB and organic stakeholders that went into developing the OLPP rule.

As an organization committed to the development of a resilient and sustainable food system, CFSA advocates for agricultural policies that encourage the use of agro-ecological farming practices for preventing the occurrence of pests and disease in crops and livestock. Providing farm animals with living conditions that support their health is an essential part of minimizing reliance on off-farm inputs such as antibiotics, hormones, and other medications that are prohibited by the Organic regulations.

Furthermore, we continue to believe that customers of Organic food want additional regulations pertaining to the well-being of poultry and other livestock, including maximum stocking densities and minimum access to outdoor space. We are concerned that the ongoing lack of such regulations may damage the public's trust in the Organic label. Such an outcome would flout the clear intentions of Congress in establishing the NOP.

What follows are CFSA's comments in response to the AMS's stated justifications for proposing to withdraw the OLPP rule.

**Does the scope of the USDA’s authority under OFPA allow for the implementation of the OLPP, as written?**

Without question, OFPA authorizes the USDA to publish and implement the OLPP final rule. In asserting that it does not, the AMS relies on an interpretation that reads into OFPA a requirement that is simply not there—that any additional regulations pertaining to the care of livestock under §6509(d) be “similar” to those already expressly listed by Congress.

It is unclear what the AMS means, exactly, by use of the word “similar.” Does the AMS mean that any additional standards created under §6509(d)(2) must expressly *prohibit* something, like the standards listed under §6509(d)(1)? Does the AMS mean that new regulations must concern healthcare practices which are physically “similar” to the administration of antibiotics, paraciticides, and medication? The AMS has not provided this needed clarification of its statutory interpretation.

In any case, nowhere in OFPA is there any indication that Congress intended the additional standards referred to in §6509(d)(2) to be either different from or similar to those already listed. Rather, the AMS has injected this “similarity principle” on its own, contrary to the plain language of the statute. A reasonable interpretation of the statute leads only to the conclusion that Congress intended that “additional” standards be developed relating to practices of caring for livestock, and that these standards fall under the broad heading of “healthcare.”

In its proposed rule, the AMS itself asserted that “Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, USDA's discretion.” Had Congress intended to limit additional standards written under §6509(d)(2) to those which are “similar” to standards under §6509(d)(1), Congress would have explicitly done so. It appears that the USDA is searching for limitations on its authority where Congress did not intend for them to be.

As any child who dreads visiting the doctor could attest to, “healthcare” does not generally consist of those practices to which patients are *not* subjected. Poultry, no less than people, do not receive healthcare by virtue of a rule that prohibits them from receiving antibiotics. However, people *do* receive healthcare when their primary care doctor says, “Given your condition, in order to stay healthy, you should get more exercise and avoid unnecessary stress.” If this recommendation came from a veterinarian and was codified into a rule for all livestock, it would fall squarely within the category of standards contemplated by §6509(d)(2)—a standard for the provision of healthcare for livestock. This is precisely the type of standards that are provided by the OLPP rule.

A close reading of OFPA indicates that, under §6509(d)(2), Congress intended for the NOSB to propose additional standards for the provision of healthcare to livestock and that, under

§6509(g), Congress intended for the USDA to develop detailed regulations to guide implementation of these standards. The OLPP represents the accomplishment of both directives.

Although we don't believe that OFPA, the Administrative Procedures Act, or any other law requires that the USDA implement the OLPP as written, we do believe that any reasonable interpretation of OFPA grants USDA the requisite authority to do so.<sup>1</sup>

### **Do the regulatory costs of implementing the OLPP rule outweigh the benefits?**

While CFSA acknowledges that addressing a “significant market failure” may be a valid reason for regulatory intervention, we disagree with the AMS's implied assertion that the OLPP cannot be implemented for any other purpose.

Nowhere in OFPA, including §6509(d), is there any indication that Congress intended new USDA Organic regulations to be developed only in the event of a “significant market failure.” Rather, as stated above, OFPA directs the NOSB to develop new standards for the care of livestock under §6509(d)(2) and directs the USDA to develop regulations for implementing them under §6509(g). None of the Executive Orders cited by the AMS affects this legal authority or its obligations under OFPA.

Executive Order 12866 states that “Federal agencies should promulgate only such regulations as are *required by law*, are *necessary to interpret the law*, or are *made necessary by compelling public need*, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people.”

The OLPP rule complies with this sound regulatory principle. OFPA plainly directs the USDA to develop additional regulations “for the care” of Organic livestock. At the very least, such standards are necessary for the interpretation of the law. Although the AMS repeatedly implies that a “significant market failure” is a pre-requisite for issuing new livestock regulations, neither OFPA nor Executive Orders 12866 or 13563 supports this position.

The AMS contends that unless a significant market failure can be identified, any additional regulations must, *a priori*, impose costs that outweigh benefits. Had establishing such a presumption been the goal of OFPA or Executive Orders 12866 and 13563, it would have been stated explicitly. It was not.

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<sup>1</sup> It is worth noting that the AMS has previously exercised its authority under § 6509 of OFPA to publish and implement regulatory standards related to living conditions, preventative health care standards, and access to pasture for ruminant livestock. See 7 CFR §§205.238-240. The AMS's new interpretation of OFPA and the authority it conveys is thus a departure from decades of administrative policy and, moreover, it does not support the ongoing enforcement of a number of essential NOP regulations, further indicating that AMS's proposed action is contrary to the interests of Organic farmers and consumers and contrary to the express purpose of OFPA.

CFSA lacks the relevant expertise to comment on whether the AMS's revisions to the mathematical formulas used in the Regulatory Impact Analysis are either necessary or appropriate. We would simply point out that, once again, the AMS seems to be searching for limitations on its regulatory authority where discretion has been conspicuously granted. The AMS's narrow focus on whether a "significant market failure" exists to justify implementation of the OLPP rule is neither required nor suggested by OFPA or any of the Executive Orders the AMS cites in support of its decision.

It is curious, to say the least, that the AMS appears entirely unconcerned by the possibility that the Organic market may be damaged by its withdrawal of a rule for which there is near unanimous support among Organic farmers and consumers. While CFSA continues to have concerns about the OLPP rule's potential impact on poultry farmers in the Carolinas, we are far more concerned that the failure to establish strong animal welfare protections will rapidly erode consumers' confidence in the Organic label.

### **Conclusion**

OFPA allows for continuous improvement of both the Organic regulations and their enforcement, and indeed, both the NOP and the NOSB have long recognized that continuous improvement is vital to ensuring the integrity of the USDA Organic seal over time. Such improvements should be driven by increases in the knowledge and skill of Organic farmers as well as changes in consumer demand. In this case, Organic farmers and consumers have sent a clear message to the AMS that the NOP needs strong animal welfare standards. While we acknowledge that the AMS has the legal authority to withdraw the OLPP, we are concerned that the AMS is underestimating the impact that the failure to apply strong animal welfare regulations will have on consumers' willingness to pay more of their hard-earned money for USDA Organic livestock products.

CFSA greatly appreciates the opportunity to provide these comments. Regardless of how the AMS proceeds with respect to the OLPP rule, we look forward to being part of any future discussion about the development of additional regulations for the production of Organic livestock.

Sincerely,



Roland McReynolds  
Executive Director  
Carolina Farm Stewardship Association