UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ORGANIC TRADE ASSOCIATION, **Plaintiff,** **v.** **UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,** **Defendants.**	**Civil Case No. 1:17-cv-01875-RMC** **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** **[Oral Argument Requested]**

Plaintiff OTA respectfully and timely submits this Memorandum of Law in support of its summary judgment request.

INTRODUCTION

This case involves the Congressionally mandated management of our nation's organic food marketplace. In January 2017, the USDA published the *Organic Livestock Production Practices Final Rule* ("the *OLPP*"). The *OLPP* was the product of more than ten years of public process arising from "recommendations provided by USDA's Office of Inspector General and nine separate recommendations from the NOSB." 82 Fed. Reg. 7082. The National Organic Standards Board ("NOSB") recommendations accepted by the Secretary were based on long-standing and well-settled agency constructions of the OFPA with regard to on-farm practices for the care of organically produced livestock, and the role of the NOSB in developing those practice standards. The *OLPP* clarified and extended *existing* animal care practice standards for designating livestock as "organically produced" under Sections 205.238, 205.239 and 205.240. 82 Fed. Reg. 7042 (January 19, 2017). In response to comments USDA carefully posed a six-year implementation period with an effective date of February 20, 2017.

After the transition to the new administration, USDA suddenly reversed course and embarked on a single purpose fourteen-month course of interlocking administrative actions that unfolded across five rulemakings and seven Federal Register publications wherein USDA conducted a rolling, *sua sponte* reconsideration of its *OLPP*.[1] Following receipt of over 63,000 comments to the contrary (and only 50 in support of withdrawal), the *Rescission* was published in March 2018.[2]

Not content to extinguish the *OLPP,* the Secretary went so far as to note nearly all existing regulations governing "organically produced" livestock were now likely *ultra vires.* 83 Fed. Reg. at 10779. The Secretary's novel and erroneous construction of the OFPA conflicted with every prior administration's approach to rulemaking regarding organic livestock since the passage of the Act in the early 1990's and violated multiple requirements of the Administrative Procedure Act ("APA").

STATEMENT OF FACTS

The factual background to this case has been fully set out in prior pleadings and this court's memorandum opinion. *See* ECF No. 34, SAC ¶ ¶ 52-73 (The Organic Foods Production Act, National Organic Program and Role of the National Organic Standards Board); SAC ¶ ¶ 74-79 (Administrative Procedure Act); SAC ¶ ¶ 80-86 (Executive Order 12866); SAC ¶ ¶ 87-92 (Factual Allegations); SAC ¶ ¶ 93-121 (History of Organic Livestock Standards at the National Organic Program); SAC ¶ ¶ 122-132 (The Proposed Organic Livestock and Poultry Practices

[1] "*National Organic Program (NOP); Organic Livestock Production Practices—Withdrawal*". 82 Fed. Reg. 59988-992 (Dec. 18, 2018) (the "*Proposed Rescission*").
[2] "*Final Rule; Withdrawal*" *See* 83 Fed. Reg. 10,775-783 (March 13, 2018) ("*Rescission*"); *see also Proposed OLPP Regulatory Impact Analysis* (May 2016); *Final Regulatory Impact Analysis and Final Regulatory Flexibility Analysis* (January 2017) ("*OLPP RIA*"); *Regulatory Impact Analysis Organic Livestock and Poultry Practices Withdrawal* (March 2018) (*Rescission RIA*)

Rule); SAC ¶ ¶ 133-149 (The Final Organic Livestock and Poultry Practices Rule); SAC ¶ ¶ 150-159 (The Final Regulatory Impact Statement); SAC ¶ ¶ 160-169 (The Three Delay Rules); SAC ¶ ¶ 170-174 (The Three Delay Rules); SAC ¶ ¶ 175-177 (The Three Delay Rules); SAC ¶ ¶ 178-188 (The Three Delay Rules); 189-197 (USDA's Withdrawal of the Final OLPP Violates the APA and the OFPA); SAC ¶ ¶ 198-225 (Withdrawal and the Final Regulatory Impact Analysis ("RIA")); 226-249 (The Final Regulatory Impact Analysis); SAC ¶ ¶ 250-273 (I. Market Failure).

APPLICABLE STANDARD OF REVIEW

Summary judgment is an appropriate mechanism for deciding whether, as a matter of law, an "Secretary action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Hill Dermaceuticals, Inc. v. U.S. Food & Drug Admin*., No. CIV.A. 11-1950 RCL, 2012 WL 5914516, at *1 (D.D.C. May 18, 2012), aff'd sub nom. *Hill Dermaceuticals, Inc. v. Food & Drug Admin*., 709 F.3d 44 (D.C. Cir. 2013) Courts assessing agency actions "sit[ ] as an appellate tribunal," and "[t]he entire case on review is a question of law." *Am. Bioscience, Inc. v. Thompson,* 269 F.3d 1077, 1083 (D.C. Cir. 2001) (internal quotation marks omitted). More specific descriptions and discussion of applicable legal standards appear in the arguments below.

OTA IS ENTITLED TO SUMMARY JUDGMENT ON COUNT TWO
VIOLATION OF OFPA AND APA
(Arbitrary and Capricious Secretary Action and Action in Excess of Statutory Authority)

It is a foundational principle of administrative law that a federal agency's rule that is based on the unjustified assumption that Congress has commanded it, must be invalidated. *Sec. & Exch. Comm'n v. Chenery Corp*., 318 U.S. 80, 94 (1943) ("… an order may not stand if the agency has misconceived the law.); *see e.g. Mozilla Corp. v. Fed. Commc'ns Comm'n*, No. 18-1051, 2019 WL 4777860, at *20 (D.C. Cir. Oct. 1, 2019) (noting the doctrine holds "we must remand a decision when the agency rests its result on a mistaken notion that it is compelled by statute.") Here the Secretary determined the *OLPP* was a "broadly prescriptive animal welfare regulation" that must be rescinded because the, "OFPA does not provide authority for the OLPP…" *Rescission,* 83 Fed. Reg. 10776 This conclusion is wrong.

"[A]n agency's construction of the statute which it administers" is reviewed under the framework of *Chevron, U.S.A., Inc. v. NRDC,* 467 U.S. 837, 842 (1984). *See Air All. Houston v. Envtl. Prot. Secretary,* 906 F.3d 1049, 1060 (D.C. Cir. 2018) *Chevron* requires a two-step inquiry. Under Step 1, if "Congress has spoken directly to the precise question at issue" and "the intent of Congress is clear, that is the end of the matter" *Id. Chevron* Step 1 requires the court "first examine the statute *de novo,* employing traditional tools of statutory construction." *Nat'l. Ass'n. of Clean Air Agencies v. EPA,* 489 F.3d 1221, 1228 (D.C.Cir.2007). The reviewing court is free to consider "the text, structure, purpose, and history of an agency's authorizing statute to determine whether a statutory provision admits of congressional intent on the precise question at issue." *Hearth, Patio & Barbecue Ass'n v. U.S. Dep't of Energy*, 706 F.3d 499, 504 (D.C. Cir. 2013)

Under *Chevron* Step 2, if Congress grants an agency flexibility to flesh out a particular policy, the regulation will be upheld "as long as the Secretary stays within that delegation." *Arent v. Shalala*, 70 F.3d 610, 615 (D.C. Cir. 1995). *Barbecue Ass'n v. U.S. Dep't of Energy*, 706 F.3d 499, 503 (D.C. Cir. 2013) (citation omitted) Under the circumstances where an agency has abrogated a well-settled policy, the Supreme Court has imposed an additional requirement that the agency "must show that there are good reasons for the new policy," and [A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515-16 (2009) *Id.* at 516.

A. The Agency's Construction of the OFPA and Section 6509 Fails Under Step One of Chevron[3]

The agency initially suggested the *OLPP* was unauthorized because of the Act's "unambiguous statutory terms." *Proposed Rescission,* 82 Fed. Reg. at 59989 (Section 6509 extinguishes OLPP because "USDA…lacks the power [to rewrite] "unambiguous statutory terms.") In rescission however the USDA said, "AMS believes that a decision to withdraw the OLPP final rule based on § 6509's language, titles, and position within Chapter 94 of Title 7 of the United States Code; controlling Supreme Court authorities; and general USDA regulatory

[3] The Secretary cited several sections of the OFPA in the *OLPP. See OLPP,* 82 Fed. Reg. at 7088 ("The authority citation for part 205 continues to read as follows: Authority: 7 U.S.C. 6501–6522."); *Id.* at 7043 ("One purpose of the Organic Foods Production Act of 1990 (OFPA) (7 U.S.C. 6501–6522) is to assure consumers that organically produced products meet a consistent and uniform standard (7 U.S.C. 6501)."; *Id.* at 7074 ("As recommended by the NOSB, AMS is implementing this final rule to establish specific regulations for the care of livestock, as authorized under OFPA (7 U.S.C. 6509(d)(2))."); *Id.* at 7085—("OFPA authorizes the further development of livestock production standards (7 U.S.C. 6513(c)); at 7044 ("Further, section 6509(g) directs the Secretary to develop detailed regulations through notice and comment rulemaking to implement livestock production standards.")

policy, would be a permissible statutory construction.") *Rescission,* 83 Fed. Reg. at 10777 It doesn't matter, the *Rescission* fails under either Step 1 or Step 2 of *Chevron*.

1. The Secretary's Construction of Section 6509 Fails under *Chevron* Step 1.

The Secretary loftily began, "[I]n considering its statutory authority, USDA believes the threshold question should be whether Congress has authorized the proposed action" and concluded "[O]FPA does not authorize the animal welfare provisions of the OLPP final rule." *See* 83 Fed. Reg. at 10776 But the Secretary did not review the entire Act, instead he focused on a single section, Section 6509. *See e.g.* 83 Fed. Reg. at 10776; *Id.* ("[N]othing in section 6509 authorizes …the OLPP final rule.") Accordingly, plaintiff begins the *Chevron* analysis by first examining the Secretary's treatment of the text of Section 6509, which turned on the meaning of "organically produced," and then turns to the general authority of the agency to enact organic livestock production practices regulations like the *OLPP*. *Id.* at 10776-78. The first *Chevron* Step 1 question is whether the Act's definition of "organically produced" was permissibly ignored when construing Section 6509? The answer is: No.

In construing Section 6509 the Secretary quite properly said, "[s]tandards promulgated pursuant to section 6509(d)(2) and section 6509(g) must be relevant to ensuring that livestock is ''organically produced," *Rescission,* 83 Fed. Reg. at 10776, but mistakenly added, "Congress did not define the term "organically produced" in the OFPA". *Id.* Relying on a dictionary, the title of paragraph (d)(2) "Health Care"[4] and Section 6509 (d)(1)'s prohibition on certain common conventional livestock *production practices*, the Secretary concluded "[T] he authority provided

[4] The Supreme Court has repeatedly held that "the interpretive role" of a statutory title "may only "she[d] light on some ambiguous word or phrase in the statute itself." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 483 (2001) (formatting altered by plaintiff) Since the Secretary mistakenly overlooked the statutory definition, the title of Section 6509 plays no role at Step 1.

by section 6509(d)(2) does not extend to any and all aspects of animal "care"; it is limited to those aspects of animal care …that relate to ingestion or administration of non-organic substances." As disquieting as it is, the Secretary somehow overlooked that the Act *does* define "organically produced."

> The term "Organically produced" means an agricultural product that is produced and handled in accordance with this chapter. Section 6502 (14)

Congress' definition unambiguously directed the agency to consider the term in the context of the *entire* Act. The definition, and its integrating clause, was repeated in Sections 6509(a) and 6509(e)(1) though these were apparently overlooked as well by the Secretary. The Secretary's far narrower definition conflicts with the Act's unambiguous definition and its direct placement by Congress into several paragraphs of Section 6509. *See e.g. Mozilla Corp. v. Fed. Commc'ns Comm'n*, No. 18-1051, 2019 WL 4777860, at *3 (D.C. Cir. Oct. 1, 2019) ("Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable.") Under *Chevron* there was no Congressional silence or statutory gap to fill with regard to the issue since Congress had defined the operative term and directed the Secretary to always construe it in accordance with the entire Act. *See Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 316 F. Supp. 3d 349, 365 (D.D.C. 2018)("A statute that is unambiguous "means that there is no gap for the agency to fill and thus 'no room for agency discretion."((internal quotation marks omitted)

Nothing in the Act suggests Congress intended or wanted the meaning of "organically produced" to be narrower for Section 6509. *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n,* 316 F. Supp. 3d 349, 395 (D.D.C. 2018) (citing D.C. Circuit authority; internal marks and citations removed) ("To avoid a literal interpretation at *Chevron* step one, a party must show either that, as a matter of historical fact, Congress did not mean what it appears

to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it.") Because the Secretary considered his narrow extra textual definitional construction to be the engine of destruction to the *OLPP,* and to raise serious questions about the continued viability of nearly all existing livestock production regulations, the consequences of this misstep were severe. *See* 83 Fed. Reg. at 10779 (questioning "whether [§§ 205.238, 205.239, and 205.240] are in accordance with AMS's statutory authority.").

Congress requires the term "organically produced" be understood "in accordance with this chapter" and not the statutory cul-de-sac of a single section of the Act, here Section 6509. ("Animal production Practices and materials"). *See Rescission,* 83 Fed. Reg. at 10776-77. Thus, the Secretary's definitional error led to a second conflict with the unambiguous terms used by Congress, and that error removed the definition from the statutory context in which Congress placed it. The Secretary found ambiguity where none existed. *See e.g. FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000) (noting the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" (internal quotation marks omitted)must give effect to the unambiguously expressed intent of Congress."). This general rule of construction must be given particular emphasis when Congress expressly referred to and incorporated additional provisions of the Act in the definition under examination. *See e.g.* Appendix A (listing more than 50 instances in the OFPA of Congresses use of internal references to this "Act" "Chapter" or "title."); *see e.g. King v. Burwell*, 135 S. Ct. 2480, 2492, 192 L. Ed. 2d 483 (2015) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.")

2. The Secretary's Construction of the Act Fails Under *Chevron* Step 1.

The second *Chevron* Step 1 question is whether the Act authorizes the livestock production practices regulations set forth in the *OLPP*. The answer is: Yes.

First, Congress directed the Secretary to establish the "National Organic Production Program" to certify "agricultural products that have been produced *using organic methods as provided in this chapter*." *See* Section 6503(a) ("the Program"). Production by "organic methods" (now organic "standards") is characterized in multiple Sections throughout the statute.[5]

Second, OFPA Section 6512 provides:

> If a production or handling practice is not prohibited or otherwise restricted under this chapter, such practice shall be permitted unless it is determined that such practice would be inconsistent with the applicable organic certification program.

This section plainly and unambiguously authorizes the Secretary to exclude *any* production or handling practice that is inconsistent with the "organic production methods" of the Program authorized under Section 6503, including livestock production practices. A simple example of central significance to this litigation is the *OLPP's* prohibition on the practice of using "porches" in organic poultry and egg production to meet the "outdoor access" requirements of 7 C.F.R. 205.239(a)(1).[6]

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[5] *See e.g.* Section 6504 ("National Standards for Organic Production"); Section 6505 ("Compliance Requirements")' Section 6506 ("General requirements"); Section 6502(14) (definition of "organically produced"); Section 6508 ("Prohibited crop production practices and materials")' Section 6509 ("Animal production practices and materials"); Section 6511 ("Additional guidelines"); Section 6512 ("Other production and handling practices") Accordingly, Section 6503 is a broad authorization to establish organic production practices in accordance with other parts of the Act, including production practices for organically raised livestock. *See e.g.* Section 6502 (1) (definition of "agricultural product" includes livestock.)

[6] *OLPP* also prohibited other substandard practices. *See OLPP,* 82 Fed. Reg. at 7042 (listing summary of rule's provisions)(noting prohibition on certain physical alterations of animals,

> Since [time of the discussed administrative ruling] 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. *OLPP RIA,* at p. 11
>
> Enclosed porches do not …align with consumer expectations about outdoor access conveyed through public comments and NOSB recommendations. * * * 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. *OLPP RIA,* at p. 85

See also OLPP, at 7068-69 (rejecting comments that "porches" are consistent with organic methods)

Section 6512 is an express delegation to the Secretary to make precisely the kind of decisions that were made in the *OLPP,* where he determined that "porches" were inconsistent with the express statutory purposes of the OFPA because their use undermined statutory prerogatives such as consistent standards of identity for organic products, certification and enforcement consistency by ACAs, hampered interstate commerce in certified products, harmed competition between certified organic farmers, and eroded consumer trust in the USDA organic seal. The *OLPP* is separately authorized by Section 6512.

Third Section 6506(a)(11) states express ancillary jurisdiction:

> A program established under this chapter shall—require such other terms and conditions as may be determined by the Secretary to be necessary.

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certain practices that fail to provide enough space for confined animals, and certain record keeping practices that failed to justify certification of a farm's products as "organically produced."); *see e.g.* Prohibited certain practices regarding physical alterations. OLPP at 7045 Prohibited physical alterations except for animal welfare, identification or safety. 7050 Prohibited production systems that do not provide "outdoor space as the default living space, along with shelter. 7047; 7051 Prohibiting forced molting

The *Proposed Rescission* overlooked this statutory section entirely and went so far as to state that the Secretary's reading of the OFPA would be different if Congress had provided precisely this kind of ancillary jurisdiction.[7] *See e.g. Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980–81, 125 S. Ct. 2688, 2699, 162 L. Ed. 2d 820 (2005) (noting similar language is authority to promulgate binding legal rules") Ancillary delegation authorizes regulatory action to ensure the discharge of statutorily mandated duties that are elsewhere set forth in the statute in sections like those described above. *See e.g. Am. Library Ass'n. v. F.C.C.*, 406 F.3d 689, 699 (D.C. Cir. 2005) (construing FCC's ancillary jurisdiction)

After commenters pointed out the existence of the purportedly missing ancillary jurisdiction in the Act, the Secretary's acceptance of it disappeared. *See* OTA Comment, AR at 100132636-38 With regard to Sections 6506 (a)(11) and 6512, the *Rescission* defaulted back to its untethered definition of "organically produced" to conclude these sections were unavailable to sustain the *OLPP*.[8] *Rescission,* 82 Fed. Reg. at 10778 (statutory authority for organic livestock production solely to ensure "minimal administration of chemical and synthetic substances.")

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[7] *See* 82 Fed. Reg. at 59989, fn. 3 ("[U]SDA also believes Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, USDA's discretion. *Compare* 7 U.S.C. 6509(g), with 7 U.S.C. 2151 ("The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter")"; *Id.*, at fn. 6 (The footnote directs the reader to also see "7 U.S.C. 6509(g) (regulations to "guide the implementation of standards for livestock products") with 7 U.S.C. 2151 ("The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter") The *Proposed Rescission* indisputably considered an ancillary jurisdiction provision like Section 6506(a)(11) to be both sufficient for the *OLPP* and *missing.*

[8] After properly concluding ancillary jurisdiction must be exercised in light of "statutory authority for organic production" and a finding of necessity the Secretary declined to consider those other sections of the statute and simply announced that the *OLPP* "is not" necessary. This is an unreasonable dismissal of the operative statutory sections.

Fourth, the Secretary is authorized to "provide for appropriate and adequate enforcement procedures" as are determined "to be necessary and consistent with this chapter." Section 6506 (B) (7) Among the repeatedly stated reasons for promulgation of the *OLPP* was the need for consistently enforced product standards of identity under Section 6501. *See e.g. OLPP,* 82 Fed. Reg. at 7042 (noting need for "consistent and uniform" product standards to enforce); *Id.* 7044 (noting need to clarify regulatory text to ensure "consistent enforcement"); *Id.* at 7066 (purpose of proposed sections was "to clarify the authority of the NOP, certifying agents and state organic programs to initiate compliance action…")

As the foregoing review establishes, Section 6509 not the only section of the OFPA that authorizes the *OLPP*, the breadth of authority that the Secretary suggested would be necessary (but was missing) is in fact expressly granted by the Act. *See* Section 6506(a)(11) The Secretary may act pursuant to either express statutory authority to promulgate regulations to ensure only agricultural products "using organic methods" are designated "organically produced" (including livestock products), Sections 6503(a) and 6512, or pursuant to ancillary jurisdiction under Section 6506 (a)(11) when necessary to ensure statutory purposes. The *Rescission's* conclusion that the agency lacked unambiguous statutory authority to promulgate the *OLPP* fails under *Chevron* Step 1.

B. The Secretary's Construction of Section 6509 Fails under Chevron Step 2[9]

Even if this court finds ambiguity exists with regard to the definition of "organically produced" or Section 6509, the Secretary's elucidation of the relevant sections is arbitrary and

[9] This section must be read in conjunction with Section II which addresses the role of the NOSB in making recommendations and the Secretary's duty to consult regarding them.

entitled to no *Chevron* deference under Step 2. *United States v. Mead Corp*., 533 U.S. 218, 227, 121 S. Ct. 2164, 2171, 150 L. Ed. 2d 292 (2001)

> AMS finds that they [OLPP regulations] are not related to the OFPA's overarching purpose of regulating the use of chemical and synthetic substances in organic farming. Therefore, section 6509 does not provide authority for those provisions. *Id.*

In the space of a few pages of rulemaking the Secretary went from stating Congress did not define the term "organically produced" to concluding his extra-textual definition frames the "overarching purpose" of the OFPA. *Compare* Section 6501 ("Purposes") (no mention of synthetic chemicals) As demonstrated above the Secretary's misunderstanding of the meaning and role in the OFPA of the term "organically produced" produced a flawed statutory analysis that fails even under the deferential standard of Step 2.

1. The Secretary's Construction of Section 6509 is Unreasonable[10]

In harmony with the statutory definition of "organically produced," Section 6509 (a) requires that to be designated "organically produced" livestock "shall be raised in accordance

[10] Section 6509 contains five subsections, (a) –(g). Italics appearing a below are added by plaintiff. Subsection (a) restricts the labeling designation "organically produced" to livestock raised "*in accordance with this chapter.*" Subsection (b) specifically restricts conventional practices regarding the origin of livestock. Subsection (c) prohibits certification of farms *under this chapter* that use specifically disallowed conventional feeding practices. Subsection (d) has two paragraphs. Paragraph (d)(1) prohibits certification of farms *under this chapter* that use specifically disallowed conventional growth promotion practices and paragraph (d)(2) authorizes the NOSB to make recommendations for the "care of livestock to ensure such livestock is organically produced" that are "in addition to those in paragraph (1)". Subsection (e) contains two paragraphs. Paragraph (1) restricts the labeling designation "organically produced" on meat or eggs to poultry "raised and handled *in accordance with this chapter"* for their entire lives) Paragraph (2) restricts the labeling designation "organically produced" on dairy products to animals "raised and handled *in accordance with this chapter* for not less than [twelve months.]" Paragraph (f) prohibits certification of farms *under this chapter* that use conventional recordkeeping practices that fail to provide full trace-back records for each animal. Paragraph (g) mandates the Secretary "[S]hall develop detailed regulations…to guide the implementation of the standards for livestock products provided under this section."

with this chapter." *See* Section 6509 (a) ("In general"); *accord* Section 6509 (e)(1)(poultry "shall be raised and handled in accordance with this chapter"); Section 6502 (14) ("Organically produced means an agricultural product that is produced and handled in accordance with this chapter.")

Two points are immediately obvious. First, to the extent the precise question is the meaning of the term "organically produced" Section 6509 must be read in the context of the relevant provisions of the entire Act and forecloses a construction based solely on selected paragraphs of Section 6509. The Secretary did not discuss Section 6509(a) or 6509(e) at all in the *Rescission* and his substitute definition of "organically produced" conflicts with the plain language of each Section. Second, the words "*raised* in accordance with this chapter" belie constructions relating only to administering medical care substances, suggesting instead observance of the full "system of organic farming" Congress intended. *See* Section 6502(4)("certified organic farm."); *see also* AR, *Comment of ASPCA and AWI* 00127153-00127154.

Next, Congress confirmed this approach in Sections 6509(c)-(d) by barring farms that use certain *practices* common to conventional livestock production from becoming a "certified organic farm" under the Act. *Id.* To be a "certified organic farm" requires that a farm be "certified by a certifying agent" as using "a system of organic farming" (also sometimes designated "organic methods") prescribed by the certification program authorized in Section 6503. *See* Section 6506 (a)(2); 6502(4) (definition of "certified organic farm") To ensure that the products meet the purposes of Section 6501, and that each certified farm uses only "organic methods" the Act requires that a farm have an "organic plan" that is reviewed and accepted by a "certifying agent." *See e.g.* Section 6504 (3)("National standards for organic production")

(requiring "organic plan" and compliance therewith to be determined by certifying agent); *see also* Section 6502 (definitions)

An "organic plan" requires livestock producers do much more than exclude the practices described in Section 6509(d)(1). It is [A] plan of management . . . that includes written plans concerning all aspects of agricultural production…and other practices *in accordance with this chapter.*" *See* Section 6502 (14) (definition "organic plan") (italics by plaintiff) A stand-alone statutory section entitled "Organic Plan" mandates an organic *livestock* plan requires even more, "An organic livestock plan shall contain provisions *designed to foster the organic production of livestock* consistent with the purposes of this chapter." *See* Section 6513 (c) (italics by plaintiff) Examples of livestock production practices that are commonly understood to be "organic methods" and have been recognized and required are described in the current regulations. *See e.g.* 7 C.F.R. §§ 205.238, 205.239, and 205.240 (*e.g.* expression of natural behaviors, access to outdoors, sunlight, fresh water etc.)

An organic livestock operator must include "all aspects of agricultural production" in his or her plan and the plan *cannot* be restricted to one that solely avoids synthetic chemicals. *See e.g.* Section 6504 (requiring organic products to be produced "without the use of synthetic chemicals" *and* "in compliance with an organic plan.") *See Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 316 F. Supp. 3d 349, 391 (D.D.C. 2018) (quoting *Rubin v. Islamic Republic of Iran*, 138 S.Ct. 816, 824 (2018) ("one of the most basic interpretive canons"—that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.")

To construe the restrictions appearing in Section 6509(c) and (d) as the *sole* means by which a farmer could raise "organically produced" livestock, or "foster the organic production of

livestock" or manage "all aspects of agricultural production" would not only write the foregoing sections out of the Act, but would be absurd. No farm is managed solely according to disallowed production practices. Restrictions regarding medicines and their possible misuse, like those appearing in Section 6509 (d)(1) do not state a "system of organic farming as described by this chapter," *See* Section 6502(4). Nor can they be elevated to be the Act's exclusive statement of "using organic methods as provided for in this chapter." *See* Section 6503(a) ("National organic production program")

The legislative history of the Act bolsters this analysis. Congress intended the "organic plan" to be the lynchpin of the federal certification program.

> [D]efining organic food based on production materials and a three-year rule is insufficient. Organically grown food is produced using farming and handling systems that include site-specific farm plans. The Committee viewed the "farm plan" as a "key element that in organic production and, *when used in combination with the strict materials standards in this bill*, will ensure the "organically produced" label indeed signifies that the product has been produced in accordance with the requirements of this title. *Senate Report,* 1990 U.S.C.C.A.N. 4656, 4956 (italics by plaintiff)

See also (Rep. P. DeFazio, and Senator P. Leahy); *See* AR, 00132645-00132647 (OFPA legislative sponsors) Because "organically produced" and "livestock plan" are defined in the Act, the Congressional mandate in Section 6509(d)(2) that the NOSB make standards recommendations "in addition to those in paragraph (1) for the care of livestock to ensure it is organically produced" is limited only by the language that such recommendations for the care of livestock be "in addition to those in paragraph [(d)(1)]." Relying on his misbegotten definition of "organically produced" the Secretary concluded the NOSB's recommendations are "limited to aspects of animal care…that relate to ingestion or administration of non-organic substances…" *See* 83 Fed. Reg. at 10776. This crabbed reading conflicts with the unambiguous meaning of the Section, especially when viewed in context.

First, Congress directed the NOSB to make recommendations "in addition to" the prohibited practices appearing in the preceding paragraph without any restriction except that they relate to the "care" of "organically produced" livestock. Congress did not, as the Secretary suggests, restrict the consultative role to recommendations regarding the specific "healthcare" practices barred by Congress, a view that would transform "in addition to" to mean "restricted to." Such gloss is uncalled for and unreasonable. *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 316 F. Supp. 3d 349, 389–90 (D.D.C. 2018) (quoting *ITT World Commc'ns, Inc. v. FCC*, 725 F.2d 732, 743 (D.C. Cir. 1984) ("The most basic rule of statutory construction requires that courts attribute to the words of a statute their plain meaning.")

Second, whatever differences exist between standards or practices that ensure the "care" of livestock and the "healthcare" of livestock, it is obvious that Congress chose the more capacious term in paragraph (d)(2) and to artificially cabin it as the Secretary did would erase the difference between the terms and render one mere surplusage.

Third, the express inclusion of the defined term, "organically produced" in this paragraph's directive also forecloses any reliance on the Secretary's substitute definition. As demonstrated above, Congress rejected the kind of spinning in place analysis conducted by the Secretary here by insisting that the interlocking parts of the statute be read together. Organically produced livestock means much more than exclusion of chemicals. *See also* Senate Report 101-357 at 292 (July 6, 1990); H.R. Rep. 101-916, at 1777-78 (1989); *see also* 7 C.F.R. § 205.2 (defining "organic production" as "a production system that is managed in accordance with the Act and regulations in this part to respond to site-specific conditions by integrating cultural, biological, and mechanical practices that foster cycling of resources, promote ecological balance,

and conserve biodiversity."); *see also* 75 Fed. Reg. 7154 (February 17, 2010) (*Access to Pasture*)

Fourth, Section 6501 establishes the purposes of the Act, which include ensuring that consistent, national standards be developed and deployed to facilitate interstate commerce. The *OLPP* was promulgated in large part to secure these statutory purposes. NOSB recommendations, such as underpinned the *OLPP* were expressly developed against a backdrop of findings by the OIG that Section 6501's mandate was being incompletely implemented. The use of the Secretary's substitute definition foreclosed any analysis of the NOSB's role in assuring the statutory purposes are met. The *Rescission* arbitrarily overlooked a mandatory statutory component of livestock production standards. A "statutorily mandated factor, by definition, is an important aspect of any issue before an administrative agency, as it is for Congress in the first instance to define the appropriate scope of an agency's mission." *Public Citizen v. Federal Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004); *accord Lindeen v. SEC*, 825 F.3d 646, 657 (D.C. Cir. 2016) ("A rule is arbitrary and capricious if an agency fail[s] to consider * * * a factor the agency must consider under its organic statute.")

Last, the Secretary's substitute definition caused him to misconstrue the plain meaning of 6509(g). Section 6509 (g) directs the Secretary to "develop detailed regulations….to guide the implementation of the standards for livestock production provided under this section." Because the Secretary failed to consider Section 6509(a) and Section 6509(e)(1), which each incorporate the statutory definition of "organically produced," he unreasonably failed to consider and harmonize his construction with other paragraphs of Section 6509. *See* 83 Fed. Reg. at 17777

(Secretary's authority under 6509(g) restricted to standards that "relate to the ingestion or administration of non-organic substances")

The Secretary looked to legislative history and critiqued comments in the record that he believed misleadingly failed to quote the full text of the relevant section. Unfortunately, the Secretary's quotation left out the last line which states precisely the opposite of what the Secretary asserted.

> The Committee expects that, after due consideration and the reception of public comment, the Board will best determine the necessary balance between the goal of restricting livestock medications and the need to provide humane conditions for livestock rearing. *The Board shall recommend livestock standards, in addition to those specified in this bill, to the Secretary.* (italics added by plaintiff) 1990 U.S.C.C.A.N. 4656, 4956-57

The Secretary's exclusion of the last sentence caused him to mistakenly rely on his substitute definition of "organically produced" to conclude the directive to adopt "detailed regulations" was limited to "additional medical standards," *Rescission* 83 Fed. Reg. at 10778, and was unrelated to adopting regulations in light of the full purposes of the Act. *See e.g.* Senate Report 101-357 at 292 (July 6, 1990); H.R. Rep. 101-916, at 1777-78 (1989) The Secretary's authorization and duty to develop "detailed regulations" is substantively co-extensive with that granted under Section 6503 to ensure livestock "have been produced using organic methods as provided in this chapter*." See* Section 6509(a); Section 6502 (4); Section 6502 (14)

In sum, the text of the Act, the placement of relevant sections within it, the legislative history and the repeated direction to consider the Act as a whole when exercising delegated authority regarding development of standards to ensure the designation "organically produced" comports with the entire Act, forecloses the Secretary's conclusion that "organically produced" is solely an exclusion on "production materials" based on a single paragraph within Section 6509.

C. The *Rescission* is an Arbitrary and Capricious Course Change

This is an agency course reversal case. The *OLPP* was adopted in January 2017 and rescinded in April 2018. Upon publication the *OLPP* became the "status quo" or existing policy of the National Organic Program. *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (Secretary is "bound by the rule until that rule is amended or revoked.") In addition to the general decisionmaking requirements imposed by the APA, *Idaho Conservation League v. Wheeler*, 930 F.3d 494, 505 (D.C. Cir. 2019) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29 (1983), the Supreme Court has imposed an additional requirement that the agency "must show that there are good reasons for the new policy," and [A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515-16 (2009); *see also see Encino Motorcars, LLC v. Navarro*, —— U.S. ——, 136 S. Ct. 2117, 195 L.Ed.2d 382 (2016)

The Secretary's *Rescission* ran afoul of these basic requirements of reasoned decision making and procedural regularity under the APA. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (noting "C*hevron* deference is not warranted where the regulation is "procedurally defective"—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation.")

In January 2017 the Secretary announced:

> Based on recommendations from the Office of Inspector General[11] and the National Organic Standards Board, AMS determined that the current USDA organic regulations covering livestock care and production practices and living conditions needed additional specificity and clarity to better ensure consistent compliance by certified organic

[11] 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. *OLPP RIA* at p. 16

> operations and to provide for more effective administration of the National Organic Program (NOP) by AMS. 82 Fed. Reg. at 7042.

The Secretary also found the benefits of the *OLPP* to include:

- Protects the value of the USDA organic seal to consumers.
- Facilitates level enforcement of organic livestock and poultry standards.
- Alleviates the need to maintain additional third- party animal welfare certification and the associated costs and resources. *OLPP RIA* at 9 ("qualitative benefits")

Additional findings constituting or underpinning the "policy" manifested in the *OLPP* and relied upon in this section of the memorandum are excerpted in Appendix B, attached hereto. In addition, several of the arguments in support of the challenge to the cost-benefit analysis identify issues not sufficiently addressed by the *Rescission. See e.g. Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126, 195 L. Ed. 2d 382 (2016) ("A summary discussion may suffice in other circumstances, but here—in particular because of decades of industry reliance on the Department's prior policy—the explanation fell short of the agency's duty to explain why it deemed it necessary to overrule its previous position.")

In sum, the agency's Inspector General found programmatic failures that the agency, with the benefit of multiple hearings and public NOSB meetings, identified in the *OLPP* as impairing compliance with Section 6501's requirements. The Secretary found unfair competition in the organic marketplace and dilution of the meaning of the "organically produced" label under the existing regulations. The benefits attributed to the *OLPP* and the those cited in the *OLPP* and the *OLPP RIA* are significant.[12] Since the *Rescission* extinguished the *OLPP* the agency has an

[12] With regard to organic poultry, the *OLPP* relied on specific findings that were not addressed in the *Rescission*. *OLPP RIA,* at 13 ("Consumer surveys indicate the need for more precise animal welfare standards within the USDA organic regulations."); *OLPP RIA* at 93 ("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"); *OLPP RIA* at 94 ("consumers of organic eggs appear willing to pay higher premiums for production practices than consumers of other types of eggs."); *OLPP RIA* at 94 ("In addition,

obligation to explain why its view had changed regarding its prior economic and programmatic benefit findings. *FCC v. Fox.*

1. The *Rescission* Failed to Explain the Facts and Circumstances that Underpinned the *OLPP* and Contradict the New Policies

The *Rescission* only tangentially addressed the agency's factual findings regarding the need for, and benefits obtained from, the *OLPP.* In fact, the very same programmatic failures and market failures that supported the promulgation of the *OLPP* were simply reinstated by the *Rescission*, and in fact are now worse because the agency posited that nearly all existing organic livestock regulations shared the *OLPP's* infirmity and are *ultra vires* and may be subject to further notice and comment rulemaking to rescind. *Rescission,* 83 Fed. Reg. at 10779 The agency's statement that "USDA is not proposing to withdraw existing organic animal welfare standards or the 2002 NOP policy statement on outdoor access, and they remain in effect," does not address the issue at all. Are "porches" allowed in organic poultry production? If so, where is the explanation that the Section 6501 failures have been abated? It is little more than whistling past the graveyard. *See Mozilla Corp. v. Fed. Commc'ns Comm'n*, 940 F.3d 1 (D.C. Cir. 2019) ("Commission seemed to whistle past the graveyard" by extinguishing a regulatory right and asserting its business as usual)

The *Rescission* did not address the *agency's* reasons that the *OLPP* was promulgated, and thus failed to reasonably establish good reasons for the new policies that underpin the *Rescission.* To be sure, the Secretary discussed its novel statutory constructions, *Rescission, at* Sections

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informal national surveys reveal consumer expectations that organic eggs are produced from hens that went outdoors."); *OLPP RIA* at 95 ("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.")

V(A)(2)(a)-(g), and discussed comments it received regarding its economic analysis, *Rescission* at Section V(B), and discussed comments it received regarding its cost-benefit analysis under applicable Executive Orders, *Rescission* at Section VI. But the vast majority of the discussion is a review of public comments, which does not discharge the duty imposed by the Supreme Court in *Fox* that the agency explicitly address the facts and circumstances that underlay the prior policy and there are good reasons for the new policy. *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515-16 (2009) The fact that during the discussion of the comments received on the proposed *Rescission* the Secretary may have dismissed or analyzed the comments in a manner that relates to the agency's prior findings is unavailing.

2. The Rescission Failed to Address the Section 6501 Statutory Factors and Other Important Questions

A "statutorily mandated factor, by definition, is an important aspect of any issue before an administrative agency, as it is for Congress in the first instance to define the appropriate scope of an agency's mission." *Public Citizen v. Federal Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004); *accord Lindeen v. SEC*, 825 F.3d 646, 657 (D.C. Cir. 2016) ("A rule is arbitrary and capricious if an agency fail[s] to consider * * * a factor the agency must consider under its organic statute.")

The *OLPP* sought to re-establish the primacy of the Act's purposes by ensuring that all organic livestock producers observe the same production practices.[13] *See* Section 6501(a)(single

[13] *See OLPP,* at 7066 ([purpose of proposed sections was "to clarify the authority of the NOP, certifying agents and state organic programs to initiate compliance action…"); *Id.* at 7077 ("The role of Accredited Certifying Agents is to review transport times to verify that certified operations are in compliance…"); *Id.* at 7077 ("New § 205.242(b)(1) requires [certified livestock handlers] … be in full compliance with the Humane Methods of Slaughter Act (HMSA) of 1978 (7 U.S.C. 1901 et seq.) and its implementing FSIS regulations, as determined by FSIS."); *Id.* at 7078 ("New § 205.242(b)(3) requires [farmer] …to provide any FSIS noncompliance records or corrective action record" to its ACA); *Id.* at 7081 ("Section 202.242(c)(1) clarifies the authority

national standard). *See e.g. OLPP,* 82 Fed. Reg. at 7042 (noting need for "consistent and uniform" product standards to enforce); *Id.* 7044 (noting need to clarify regulatory text to ensure "consistent enforcement"); *Id.* at 7066 (purpose of proposed sections was "to clarify the authority of the NOP, certifying agents and state organic programs to initiate compliance action…")

The *OLPP* sought to protect the value of the USDA Organic Seal as a consumer assurance, by responding to consumer confusion, lack of trust and to close the gap between organic livestock production practices and third-party programs with higher welfare standards. *See* Section 6501(b) (assure consumers). The *OLPP* sought to prohibit unfair competition and thereby facilitate interstate commerce. *See* Section 6501(c). Significant record evidence exists regarding these issues, from federal certifying agents, that went largely unaddressed.[14] *See Lilliputian Sys., Inc. v. Pipeline & Hazardous Materials Safety Admin.*, 741 F.3d 1309, 1312 (D.C. Cir. 2014) ("An agency's failure to respond to relevant and significant public comments generally demonstrates that the Secretary's decision was not based on a consideration of the

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of the NOP, certifying agents, and State organic programs to initiate compliance action if certified operations are found to have violated the Poultry Products Inspection Act (PPIA)…"); *Id.* at 7079 ("New § 205.242(c)(2) requires [certified livestock handlers]…provide, during the annual organic inspection, any FSIS noncompliance records and corrective action records related to [good manufacturing practices]."

[14] The Secretary's decision to abrogate the *OLPP* was strongly opposed in the record by federal certifying agents who are in the front line of dealing with the enforcement inconsistencies that were remedied by the *OLPP*. *See e.g.* Comment of Accredited Certifiers Association, at AR 00001571 (noting loss of consumer trust and unfair competition if OLPP is withdrawn); Comment of Accredited Certifiers Association, at AR 00050089 (NOP depends on fairness and consistency); Comment of CCOF, at AR 00086830 (Rescission of OLPP results in unfair competition; products that don't meet organic principles or consumer expectations); Comment of MOSA, at AR 00088036 and AR 00009219 (Rescission of OLPP prevents consistency in enforcement between certifying agents); Comment of PCO, at 00055525 (noting loss of consumer trust and unfair competition if OLPP is withdrawn); Comment of QAI, at AR 00052910 (similar); Comment of Washington State Department of Agriculture Organic Program at 00029572 (similar)

relevant factors.") (formatting modified). The cost of multiple certifications and the paperwork burden was also unaddressed. These failures render the *Rescission* arbitrary and capricious on its face. *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515-15 (2009) (agency may not ignore its prior factual findings that contradict its new policy nor ignore reliance interests); *accord Mozilla Corp. v. Fed. Commc'ns Comm'n*, No. 18-1051, 2019 WL 4777860, at *29 (D.C. Cir. Oct. 1, 2019)

The Secretary is not saved by the anticipated argument that it extinguished the *OLPP* on valid statutory authorization grounds and had no duty to meet the *Fox* requirements. The D.C. Circuit has recently rejected precisely this contention.

> That argument misunderstands the law. To be sure, the analysis of an agency's statutory interpretation at Chevron Step Two has some overlap with arbitrary and capricious review. * * * Nevertheless, the Venn diagram of the two inquiries is not a circle. Each test must be independently satisfied.

Mozilla Corp. v. Fed. Commc'ns Comm'n, No. 18-1051, 2019 WL 4777860, at *29 (D.C. Cir. Oct. 1, 2019) (omitting internal quotation marks and citations)

3. The Agency Arbitrarily Failed to Address the Reliance Interests of Regulated Stakeholders, ACAs, and Consumers on NOSB and Livestock Authority

The Secretary said "outdoor access" requirements "have a significant history of AMS actions based on NOSB recommendations." 7042. This succinctly states the "reliance" interests of organic farmers, certifiers and consumers. Agency precedent, as set by the 2010 *Access to Pasture* rulemaking was neither followed nor distinguished. *See Fogo De Chao (Holdings) Inc. v. United States Dep't of Homeland Sec.*, 769 F.3d 1127, 1141 (D.C. Cir. 2014) (agency's judgment "fails the requirement of reasoned decisionmaking under arbitrary and capricious review" where it "was neither adequately explained * * * nor supported by agency precedent")to ensure adequate "outdoor access" for all poultry, particularly egg layers, and address the

concerns expressed in the OIG report) *See e.g. Encino Motorcars*, 136 S. Ct. at 2126 (describing "decades of industry reliance on the Department's prior policy"); *USTA*, 825 F.3d at 709–710 (crediting 2015 Commission's rebuttal to Petitioners' asserted reliance interests on the basis that "just five years after *Brand X*" the Commission sought comments on reclassifying broadband

D. The Agency's Cost Benefit Analysis Contained Serious Flaws and Failed to Consider Statutory Factors

Between April 2016 and December 2018, the USDA published three separate economic analyses of the *OLPP,* and the computational methodology published was different each time. *See Proposed OLPP Regulatory Impact Analysis* (May 2016) (applying straight line depreciation for both costs and benefits); *see also Final Regulatory Impact Analysis and Final Regulatory Flexibility Analysis* (January 2017) (applying straight line depreciation for benefits only)("*OLPP RIA*"); *Regulatory Impact Analysis Organic Livestock and Poultry Practices Withdrawal* (March 2018)(applying straight line depreciation for both costs and benefits); *Id* at 11 (discussing the changing analyses).

Reviewing its second shot at the economic analysis, the agency said:

> In reviewing the *OLPP* final rule, AMS found the calculation of benefits contained mathematical errors in calculating the present value of estimated benefits using discount rates of 7% and 3%. AMS also found the estimated benefits over time were handled differently than were the estimated costs over time. In addition, the range used for estimating the benefit interval could be replaced with more suitable estimates. *Proposed Rescission,* 82 Fed. Reg. at 59990.

For its third shot, the agency said:

> As a result of reviewing the calculation of estimated benefits, AMS reassessed the economic basis for the rule making as well as the validity of the estimated benefits. On the basis of that reassessment, AMS finds little, if any, economic justification for the *OLPP* final rule. *Rescission,* 83 Fed. Reg. at 10782.

The agency also concluded, "AMS did not identify a market failure in the OLPP final rule RIA and therefore AMS has now concluded that regulation is unwarranted." 83 Fed. Reg. at 10779.

When an agency chooses to conduct a cost-benefit analysis, it opens itself to review of that analysis. *American Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 177 (D.C. Cir. 2010) (Although an agency was not required to perform a cost-benefit analysis, it must defend the analysis because the agency chose to conduct it). An agency must provide sufficient detail of its proposed methodology for analysis and comment. *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 55 (D.C. Cir. 1977) Although Courts must be deferential when reviewing "an agency's cost-benefit analysis," *Am. Trucking Ass'ns, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 254 (D.C. Cir. 2013), the D.C. circuit has held that a serious flaw, or failure to consider the relevant factors or statutory purpose when conducting the cost-benefit analysis renders the rule unreasonable. *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1039–40 (D.C. Cir. 2012); *accord Ctr. For Auto Safety v. Peck*, 751 F.2d 1336, 1342 (D.C. Cir. 1985). *State of Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432, 464 (D.C. Cir. 1989) (challenger's burden "is to show that the imposition of the discount rate was unreasonable or contrary to the statutory purpose.")

Serious flaws are ones that undermine the validity of the analysis and include erroneous and unexplained computational methodologies. *See City of Portland v. EPA,* 507 F.3d 706, 713 (D.C.Cir.2007) (noting that "we will [not] tolerate rules based on arbitrary and capricious cost-benefit analyses"); *Owner–Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.,* 494 F.3d 188, 206 (D.C.Cir.2007) (vacating regulatory provisions because the cost-benefit analysis supporting them was based on an unexplained methodology).

1. The Agency Used an Incorrect Formula for Calculating Estimated Costs and Benefits of the OLPP

The agency used an incorrect analytic methodology when calculating the estimated costs and benefits and in so doing artificially reduced the estimated benefits of the *OLPP* below the estimated costs of the rule. *See Exhibit A,* Declaration of Dr. T. Vukina, at ¶ ¶'s 9-10; *Exhibit B Review of the Cost-Benefit Analysis Conducted by AMS in Support of Rescission of the Organic Livestock and Poultry Practices Final Rule,* at p. 3-4 ("Review") (with accompanying spreadsheet showing calculations). The agency said:

> In initial drafts of the OLPP final rule RIA, AMS applied a straight line reduction in both costs and benefits over time to reflect the economic life of egg and broiler producing structures. * * * In the OLPP final rule RIA, AMS adopted a different approach, inadvertently leading to an inconsistency in the treatment of costs and benefits over time. Costs were instead estimated to be constant over time, but benefits were still straight line reduced over time. The same reasoning should have applied to the benefits to make the calculation of costs and benefits consistent. *Rescission RIA* at 11.

The agency provided no explanation or example of a depreciated "benefit." Nor could it. Straight line depreciation is defined as:

> The system of accounting for depreciation on an asset by taking an assumed life, say *n* years, and charging depreciation at the rate of (1/*n*) of its cost each year until it is fully written down. The system is so named because if the remaining value is plotted against time on a graph the result is a downward-sloping straight line. *See Oxford Dictionary of Economics*, John Black et al. 4th ed. (Oxford University Press 2009) (quick reference definition).

Applying straight line depreciation to future benefit streams is an economic modeling error and conflicts with the accepted approach in economic enterprise budgeting. *See Exhibit A, Vukina Declaration,* at 9-10; *Exhibit B Report* at p. 4-5. This flawed approach is explained solely by the agency's statement that: "The same reasoning should have applied to the benefits to make the calculation of costs and benefits consistent." *Id.* This statement is unsupported by any reference to economic literature nor finds any support in the administrative record. It is a

paradigm of an unreasonable agency action and cannot stand under the controlling D.C. Circuit authority cited above.

The agency's use of straight line depreciation is also in conflict with a principal guideline for agencies regarding cost-benefit analysis, Office of Mgmt. & Budget, Office of the President, OMB Circular A–4 (2003) ("Circular A-4") Circular A-4 does not even discuss much less approve straight line depreciation of present value streams. Only present value discounting is discussed, which appears to have been correctly applied in the *Rescission*. *See* Circular A-4, 31-34. Thus, no likely authority supports the anomalous use of straight line depreciation or discounting here.

Because the government heavily relied on its cost-benefit analysis in its *Rescission*, Fed. Reg. at 10779-82, a serious methodological flaw like this one squarely renders that *Rescission* arbitrary and capricious and subject to vacatur. *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1039-40 (D.C. Cir. 2012); *accord Council of Parent Attorneys & Advocates, Inc. v. DeVo*s, 365 F. Supp. 3d 28, at fn. 11 (D.D.C. 2019), appeal dismissed, No. 19-5137, 2019 WL 4565514 (D.C. Cir. Sept. 18, 2019).

2. Applying the Agency's Formula without the use of Straight Line Depreciation Appears to Reverse the Result.

The formula for calculating the estimated future benefits of the *OLPP* was published in the *OLPP RIA* at fn. 94 and no different formula was published in the *Rescission RIA.* The sources of economic data, including the 12.7% published annual growth rate in the number of eggs, are the same between the *OLPP RIA* and the *Rescission RIA. See e.g. OLPP RIA* (pp. 96-97 and fn. 89 and fn. 94) The correction of the mathematical errors referenced in the *Rescission RIA* did not change the *formula*, it merely changed certain values when applying the formula. Applying the agency's recalculated costs in the *Rescission RIA* and eliminating the use of

straight line depreciation to the future benefits stream, reverses the outcome and the benefits exceed the costs. *See Exhibit A,* Declaration of T. Vukina, at ¶ 13. This calculation conclusively demonstrates the significance of the flawed computational methodology to this case.

3. The Agency Arbitrarily Decreased the Consumer Willingness to Pay Range to Lower the Estimated Future Stream of Benefits from the *OLPP*

The agency concluded an organic consumer's "willingness to pay" for eggs produced under the new poultry standards of the *OLPP* was inflated and in the *OLPP RIA* adjusted it downward in the *Rescission*. This had the effect of lowering the estimated benefits arising from the *OLPP*.

> The range of $0.21-$0.49 reflects consumer willingness to pay for a dozen eggs produced by chickens raised in a cage-free environment, without induced molting, and with outdoor access. The first two items are already required in the production of organic eggs. The OLPP final rule only added specificity to the existing requirement for outdoor access. Therefore, the range of consumer willingness to pay for the changes in the OLPP final rule was inflated to the extent it assumed consumers would pay a premium for practices that are already required in organic production. *Rescission RIA,* at 10.

Based on the foregoing the agency concluded "the appropriate range is $0.16-$0.25 per dozen." *Id.* at 10. The agency reduced the "benefits range" based on its mistaken belief that two of the three factors that influence consumers' willingness to pay ("WTP") were already part of the organic program. *Id.*

Contrary to the agency's statements in the *Rescission*, there is *no* direct prohibition on "forced molting" in the existing organic regulations. Tellingly, the *OLPP* said, "AMS added a new § 205.238(c)(10) that prohibits the practice of forced molting in poultry." 82 Fed. Reg. at 7051; *see also* 82 Fed. Reg. at 7090 (§ 205.238(c)(10): "An organic livestock operation must not: …Practice forced molting or withdrawal of feed to induce molting.) Since the *OLPP* treated the prohibition on forced molting as "new" it should not have been treated as "already required" and

used to reduce the "willingness to pay" range in the *Rescission*. Because the reduction in "willingness to pay" was based on that error, the analysis is seriously flawed rendering the *Rescission* arbitrary and unjustified.

It is also worth noting that in the context of consumer behavior, the agency's conclusion that "outdoor access" for poultry is already required while technically accurate, misses the point that the aviary production systems with porches that sparked the development of the "outdoor access" provision in the *OLPP,* do not provide access to the outdoors. *OLPP RIA,* at 10 ("Currently, organic poultry are required to have outdoor access, but this varies widely in practice."); *see also Id.* at 11 ("[c]ertification 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."); *see also Oversight of the National Organic Program,* OIG Audit Report No. 01601-03-Hy, 22 ("OIG Report") *available at* https://www.usda.gov/oig/webdocs/01601-03-HY.pdf. (finding inconsistent treatment and enforcement of mandatory outdoor access for livestock by accredited certifying agents; lack of regulatory specificity); *see also* infra, Section F (class action cases).

In sum, the reduction in the "willingness to pay" range was unjustified. This fatally distorted the cost-benefit calculations upon which the *Rescission* relied, and it must be vacated as an arbitrary and capricious rulemaking.

4. The Agency Arbitrarily Failed to Fully Disclose its Computational Methodology

The Report of Professor Vukina at p. 5 (attached as Exhibit B), determined "The calculations in the *Rescission* and *Rescission RIA* of the estimated value of the benefits of the *OLPP* cannot be replicated using the published formula that included straight line reduction of

benefits. It appears that either [a] different number of eggs or different formula was used but is nowhere disclosed." Perhaps the agency can clarify for the parties and the court the precise computational methodology in its response. *See* Exhibit A (Declaration at P15-16)

The failure to provide documents with all the necessary computational methodology was an arbitrary and capricious departure from the notice and comment requirements of the APA. "[A]mong the information that must be revealed for public evaluation are the 'technical studies and data' upon which the agency relies [in its rulemaking]." *Chamber of Commerce v. SEC* (Chamber of Commerce II), 443 F.3d 890, 899 (D.C.Cir.2006) (citation omitted); *Owner–Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.,* 494 F.3d 188, 206 (D.C.Cir.2007) (vacating regulatory provisions because the cost-benefit analysis supporting them was based on an unexplained methodology); *see also Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 236 (D.C. Cir. 2008).

5. The *Rescission* Arbitrarily Ignored the Role of Qualitative Benefits and Ignored Important Factors and the OFPA's Statutory Purpose of a Single, Consistently Enforced National Standard

The *OLPP RIA* listed three principal qualitative benefits of the OLPP that directly impacted the cost-benefit analysis: (1) it protects the value of the agency's organic seal to consumers; (2) it facilitates level enforcement of organic livestock and poultry standards; and (3) it alleviates the need to maintain additional third-party animal welfare certification and the associated costs and resources. *See OLPP RIA* at 9. It was also recognized that, "The benefits of this final rule are the real improvements in attributes (*e.g.*, animal welfare) for society.") *OLPP RIA,* at 36. The *OLPP* also repeatedly cited other findings indicating qualitative benefits arising

from the *OLPP.*[15] This approach comports with *OMB's Economic Analysis of Federal Regulations Under Executive Order 12866* at 2, (Jan.1996) ("OMB Guidelines for Analysis") (Regulators should determine whether: "The potential benefits to society justify the potential costs, recognizing that not all benefits and costs can be described in monetary or even in quantitative terms, unless a statute requires another regulatory approach."); *accord see also Mozilla Corp. v. Fed. Commc'ns Comm'n*, No. 18-1051, 2019 WL 4777860, at 47 (D.C. Cir. Oct. 1, 2019) (leaving analysis undisturbed, noting the "Commission's ultimate decision to conduct a qualitative analysis appears consistent with the Circular")

The *Rescission RIA,* at 7, unreasonably dismissed the cited qualitative because it is "uncertain and difficult to quantity benefits of outdoor access and space requirements" and then proposed such benefits "would not justify their quantifiable costs and paperwork burden." *See also Rescission* at 10779 ("the qualitative benefits [are] speculative because it is uncertain that the organic farmers and consumers would see positive impacts from the implementation of the *OLPP* rule.") These statements ignored the many significant statutory factors embedded in the listed benefits – particularly consistent enforcement and consistent product standards of identity, under Section 6501. Last, the clear and non-speculative benefit of eliminating the cost and trouble of a second certification for certified organic producers was completely ignored while the

[15] *See also OLPP RIA,* at 95 ("Several articles describe a positive association between the establishment of uniform regulation of product labels and consumer confidence."); *Id.* at 96 ("[paper author] also observes that governmental standards can address the market failure connected to uncertainty about product quality and prevent consumer deception and fraud."); *Id.* at 11 (("[c]ertification 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."); *see also Oversight of the National Organic Program,* OIG Audit Report No. 01601-03-Hy, 22 ("OIG Report") *available at* https://www.usda.gov/oig/webdocs/01601-03-HY.pdf. (finding inconsistent treatment of outdoor access for livestock by accredited certifying agents)

"paperwork burden" of implementing the OLPP was relied upon to rescind. This is internally inconsistent.

With regard to the widespread belief that livestock that live outdoors are healthier, the *Rescission* simply said that this was not a declared basis for promulgating the *OLPP* and further stated "economic benefits" arising from healthier animals are not demonstrated by "information or research linking outdoor access on pasture or vegetation to improved economic outcomes for producers." *Rescission* at 10779. This conclusion is unreasonable and flawed. First, the record evidence in this rulemaking is to the contrary and is ignored in the *Rescission.*[16] *See Covad* Second, the agency's argument was actually a quantitative benefits response and is internally

[16] Many commenters identified and stated the health and wellbeing benefits of increased outdoor access and access to soil and cited academic studies to that effect. *See* Comment of Health Care Without Harm, at AR 00086839 (Scientific studies indicate that indoor confinement is a risk factor for spreading disease.); Comment of Beyond Pesticides, at AR 00085014 (Nutrients obtained from insects don't need to be supplied by synthetic inputs. Birds with more space and access to soil biology are healthier, requiring less intervention to support their health.); Comment of Center for Food Safety, at AR 00090159 (Organic poultry facilities that provide outdoor access and lower stocking densities for the birds are less susceptible to virulent strains of highly pathogenic avian influenza (HPAI)… Strong organic practices outlined in the final rule, like lower stocking densities and providing outdoor access, are a part of the solution and provide economic benefit in terms of protections for flocks against HPAI.); Comment of NOFA-NY, at AR 00028139 (As organic evolves its standards to reflect these differences, we expect to see a decreasing reliance on conventional systems that are used with organic input substitutions, and an increase in wholly more organic, welfare-based sustainable systems.); Comment of ASPCA, at AR 00045535 (The Rule Does Not Increase the Risk of Animal Disease. Continuing to suggest that outdoor access increases the risk of disease represents an attempt to frighten consumers and to deflect attention from the true issue, which is the need to provide higher-welfare conditions for animals on organic farms.); Comment of CCOF, at AR 00086830 (The OLPP standards do not pose biosecurity risks to poultry.); Comment of Consumers Union, at AR 00046733 (We are aware that some opponents of the new rule argue that outdoor access for chickens increases disease risk. This argument is contradicted by published research.); Comment of CVR, WFF, EI, at AR 00005547 (We do not agree with the unfounded assertions that this final rule will increase biosecurity risks.); Comment of Organic Trade Association, at AR 00026756 (The final rule does not compromise biosecurity measures and food safety requirements.); Comment of Cornucopia Institute, at AR 00089989 (Detailed information about living conditions of animals in relation to animal welfare); Comment of NOSB, at AR00010725

inconsistent and illogical. *See* EO 12866 at Section 1(a)("Costs and benefits should be understood to include. . . . qualitative measures of costs and benefits that are difficult to quantify, but nevertheless *essential to consider* [emphasis added]"); *see also* p. 2 OMB's *Economic Analysis of Federal Regulations Under Executive Order 12866* (Jan. 1996) ("*OMB Guidelines*") (regulators should determine "[T]he potential benefits to society justify the potential costs, recognizing that not all benefits and costs can be described in monetary or even in quantitative terms, unless a statute requires another regulatory approach."); *see e.g. Mozilla Corp. v. Fed. Commc'ns Comm'n*, No. 18-1051, 2019 WL 4777860, at *47 (D.C. Cir. Oct. 1, 2019)(approving qualitative benefits as sole source of rule's benefit; citing OMB Circular A-4 at 10 --"[w]hen important benefits and costs cannot be expressed in monetary units," attempting a quantitative cost-benefit analysis "can even be misleading, because the calculation of new benefits in such cases does not provide a full evaluation of all relevant benefits and costs.".).

6. The Agency Erroneously Concluded there was no Market Failure to Justify OLPP and Failed to Consider Significant Factors and OFPA's Statutory Purpose

In its *Proposed Rescission*, the Secretary noted "the unclear nature of the market failure being addressed by the OLPP final rule." 82 Fed. Reg at 59991 OTA's comment responded that there were three kinds of market failures demonstrated in the *OLPP* record evidence.[17] AR at 00132630-32 Despite this comment the *Rescission* summarily concluded:

[17] *See Comment, Organic Trade Association,* AR at 00132630-43 ("As is demonstrated below, the agency's PRIA overlooked the market failure caused by the absence of a single, consistent definition of "access to the outdoors" and the well-documented failure of the NOP's certifying agents to impose consistent compliance with the regulation's plain terms); *Id.* at 00132632 ("Among the failures described, "Market failures may also result from inadequate or asymmetric information.") *Id.* at 00132634 ("[I]nadequate information can generate a variety of social costs, including inefficiently low innovation, market power, or inefficient resource allocation resulting from deception of consumers.")

"AMS did not identify a market failure in the OLPP final rule RIA and therefore AMS has now concluded that regulation is unwarranted." 83 Fed. Reg. at 10779; *Id. at* 10782. The agency's cursory treatment of the "market failure" issue when directly raised in the record, and its self-serving characterization of the *OLPP* to support its proposed *Rescission* are reason enough to treat this conclusion as unreasonable. *Covad Commc'ns Co. v. FCC,* 450 F.3d 528, 550 (D.C. Cir. 2006) (During a rulemaking, an agency "must respond in a reasoned manner to [rulemaking comments] that raise significant problems.") (internal quotation marks omitted); *see also Lilliputian Sys., Inc. v. Pipeline & Hazardous Materials Safety Admin.*, 741 F.3d 1309, 1312 (D.C. Cir. 2014) ("An agency's failure to respond to relevant and significant public comments generally demonstrates that the Secretary's decision was not based on a consideration of the relevant factors.") (formatting modified in original)

Contrary to the *Rescission RIA* and *Rescission,* the sections quoted in Appendix B flatly state more than one kind of market failure existed. Each of the guidelines discussed below comports precisely with the situation facing certified organic poultry producers *before* the *OLPP* was promulgated and corresponds to the statutory purposes of Section 6501. *See also OLPP RIA,* at 14-15; 51-52.

First, Executive Order 12866 identifies "failures of private markets or public institutions" as grounds justifying regulatory action. *See Executive Order* 12866, 58 Fed. Reg. 51,735, 736 (Sept. 30, 1993) ("EO 12866"). Public institution failures arise when "existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct." *Id.* at Section 1(b)(2). "Modifications to existing regulations should be considered if those regulations have created or contributed to a problem that the new regulation is intended to correct, and if such changes can achieve the goal more efficiently or effectively." OMB

Guidelines for Analysis, at 4. This is precisely what *OLPP* accomplished and it is ignored in the *Rescission RIA.*

Second, the OMB *Guidelines for Analysis* expressly recognize a new regulation may be necessary even in the absence of a market failure upon a "demonstration of compelling public need, such as improving governmental processes…" *Id.* at 3. The OIG Report's findings of inconsistent treatment of outdoor access for livestock by federal certifying agents and a lack of regulatory specificity that are corrected by the *OLPP* which is precisely the kind of solution recommended. The *Rescission RIA* and *Rescission* ignored these counterpoints to the proffered economic analysis.

Third, OMB recognizes that "Market failures may also result from inadequate or asymmetric information." *Id.* at 4. [I]nadequate information can generate a variety of social costs, including inefficiently low innovation, market power, or inefficient resource allocation resulting from deception of consumers." *Id.* OMB goes on to note that "mandatory uniform quality standards for goods and services" is one solution to such consumer deception. [18] *See* 7 U.S.C. § 6504 ("National Standards for Organic Production"); *See also* 7 U.S.C. § 6501 (single national standard)

> AMS received a vast number of comments that indicate that consumers are unaware that porches have been used for outdoor access in organic production. The comments received indicate that there is a gap between how consumers think birds are raised on organic farms

[18] Regarding information market failure: *A Report Summary from the Economic Research Service, Beyond Nutrition and Organic Labels—30 Years of Experience With Intervening in Food Labels*, Report No. 39 (November 2017) at p. 2 ("Setting a national organic standard ended variance among State standards. This gave the organic sector more access to interstate and international markets, increasing sales."); *Id.* at 5 ("OFPA was designed to regulate "competition" and "information."); *Id*. at vi ("[O]rganic labeling cases illustrate the strong role that the Federal Government may play in setting standards, establishing certification, and providing enforcement mechanisms.").

> and the actual practices of some—but not all—organic producers. *OLPP* 82 Fed. Reg. at 7068

See e.g. SAC, ¶ ¶ 257-280 (alleging multiple market failures reinstated by the *Rescission*); *see also Gibson v. WalMart and Cal-Maine Foods*, No. 3:18-cv-00134 (N.D. Cal. Jan. 8, 2018); *Silva v. Walmart et al*., No. 2:18-cv-324 (W. D. Wash. Mar. 2, 2018). (each class action case alleging certified organic eggs are not from birds with "outdoor access" (as required by the NOP))

Congress adopted the OFPA to require that organic products must meet a single, mandatory, national standard consistently applied by the USDA. *See* 7 U.S.C. § 6501. To reduce regulatory variance, and thereby eliminate the informational asymmetry in the marketplace, the *OLPP* defined 'Outdoor space' and "requires that outdoor spaces for organic poultry include soil and vegetation." 82 Fed. Reg. at 7042. The *Rescission* reinstated a market failure that was corrected by the *OLPP* and did so in violation of Sections 6501 and 6504 of the Act.

The *Rescission* explains the *OLPP* is not necessary to sustain consumer and producer trust in the organic seal because the existing organic livestock regulations are not rescinded and "AMS anticipates" consumers and producers will "continue to use the organic label to differentiate their products in the marketplace." *Rescission,* 83 Fed. Reg. at 10780. The agency also relied on past growth of the organic market sector to conclude it "will expand under the current regulations." *Rescission* 83 Fed. Reg. at 10780 (citing marketing statistics). But the agency's rosy predictions don't seem to line up with its analysis.

First, the agency contradicts itself by resting the future success of the regulated marketplace on the continuing vitality of regulations it just concluded are likely to not be in "accordance with AMS' statutory authority." *Rescission,* at 10779 (noting agency may seek

comment on this question). Second, it also found the ‘‘majority of organic producers also participate in private, third-party verified animal welfare certification programs”, *Rescission* at 10782, which in the absence of the *OLPP* will continue. Third, the agency relied on stale economic data from 2016 and made no effort to obtain more current figures. The 2019 Organic Industry Survey shows overall growth of 9%, 6.4%, and 5.9% for the industry as a whole in 2016, 2017 and 2018 respectively. *See Exhibit C, OTA, Organic Industry Survey 2019.* However, the dairy and egg category shows growth of just 6.6%, 0.9%, and 0.8% for 2016, 2017 and 2018 respectively. The agency’s projections about the future behavior of organic farmers and consumers are unreasonably unmoored from the data. This is insufficient under D.C. Circuit authority. *See e.g. Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014) (quotations marks and citations omitted)(“[T]hough an agency's predictive judgments about the likely economic effects of a rule are entitled to deference ... deference to such ... judgment[s] must be based on some logic and evidence, not sheer speculation.”) The agency relied on sheer speculation and the record evidence further controverts the agency’s treatment of consumer trust.[19]

The agency also concluded, “Variance in production practices and participation in private, third-party certification programs, however, do not constitute evidence of significant

[19] *See e.g.* Comment of Accredited Certifiers Association, at AR 00001571 (noting loss of consumer trust and unfair competition if OLPP is withdrawn); Comment of Accredited Certifiers Association, at AR 00050089 (NOP depends on fairness and consistency); Comment of CCOF, at AR 00086830 (withdrawal of OLPP results in inconsistent certification activity; unfair competition; products that don’t meet organic principles or consumer expectations); Comment of MOSA, at AR 00088036 and AR 00009219 (withdrawal of OLPP prevents consistency in enforcement between certifying agents); Comment of PCO, at 00055525 (noting loss of consumer trust and unfair competition if OLPP is withdrawn); Comment of QAI, at AR 00052910 (similar); Comment of Washington State Department of Agriculture Organic Program at 00029572 (similar).

market failure." *Rescission* 83 Fed. Reg. at 10782. "[A] variety of production methods may be employed to meet the same standard. * * * Thus, variation in production practices is expected and does not stand as an indicator of a significant market failure." 83 Fed. Reg. at 10782. This argument, which is in direct conflict with § 7 U.S.C. § 6501's commands for uniform practices and consistent enforcement, misses the point – the failure of the NOP to ensure programmatic compliance with § 6501 is the market failure, not the variation in third-party animal welfare programs. It also fails to explain why it concluded just 14 months before:

> 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. * * * 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. *OLPP RIA* at 15.

The agency's conclusions in the *Rescission* misapply economic guidelines, ignored the market failure recognized and corrected by the *OLPP,* ignored record evidence contrary to its findings and consistently reached conclusions in conflict with the OFPA. Retaining regulatory definitions like "access to the outdoors" that defy consistent application by certifying agents, distort competition, undermine consumer expectations and fail to assure consumers that a consistent national standard is applied, constitute market failure of the types discussed above.

OTA IS ENTITLED TO SUMMARY JUDGMENT ON COUNT THREE
VIOLATION OF THE OFPA AND APA
(Failure to Consult NOSB; Failure to Obtain a Recommendation from NOSB)[20]

[20] The NOSB consultation question is raised in two ways in this case. First, it is raised as a straight violation of the OFPA. *See* ECF No. 34, SAC ¶ 303 Second, it is raised as a violation of the APA. *See* ECF No. 34, SAC ¶ 302. *See e.g.* OTA v. USDA, 370 F. Supp. 98, at 114 (this court recognizing OTA argues there is a "statutory requirement *under the OFPA*, and distinct from the APA…") (emphasis in original)

The Secretary's *Proposed Rescission* did not mention the NOSB or the construction of the Act that the Secretary later advanced in the *Rescission* dismissing any role of the NOSB in this rulemaking. The *Rescission* contained only two paragraphs on the subject, acknowledging and then rejecting comments supporting the historical role of the board.

> OFPA requires USDA to consult with the NOSB on certain matters and to receive recommendations from it, but nothing in OFPA requires AMS to consult the NOSB at every phase of the rule making process or makes the NOSB's recommendations binding on the Secretary, nor could it. *Rescission,* 83 Fed. Reg. at 10778

Initially the agency pillories another straw man. OTA has never argued that the NOSB must be consulted "at every phase of the rulemaking process" (whatever that means) or that "the NOSB's recommendations [are] binding." OTA has argued that in *this rulemaking*, which is a major rulemaking involving organic livestock standards that involved the treatment of formal recommendations previously made to the Secretary by the NOSB, the Secretary was required to consult the NOSB.

OTA makes three arguments. First, the Secretary's construction of the OFPA fails under *Chevron.* Second, that the *Rescission* transgressed the basic requirements of reasoned decision making and procedural regularity under the APA. And third, the new policy constitutes a course reversal for which the agency failed to meet the requirements of *FCC v. Fox.*

A. The Secretary Failed to Discharge a Mandatory Duty to Consult or Seek the Assistance of the National Organic Standards Board Prior to Rescinding the OLPP

The Secretary concluded its mandatory pre-rulemaking duty to consult the NOSB was limited to the sections of the Act where Congress used the word "consult." Accordingly, the Secretary cited Section 6503(c), Section 6505(c) and 6505(6). *Rescission,* 83 Fed. Reg. at 10778 at fn. 6. As is demonstrated *infra,* Section X, and below, Sections 6503, 6509 and 6518 mandate the Secretary consult with the NOSB. Under *Chevron* Step 1, if "Congress has spoken directly to

the precise question at issue" and "the intent of Congress is clear, that is the end of the matter" *Id.* The precise question here is: does the OFPA require the Secretary to consult or seek a recommendation from the NOSB prior to conducting the *Rescission* rulemaking? The answer is: Yes.

1. The *Rescission* Fails under Chevron Step 1

The National Organic Standards Board ("NOSB") was created by Congress, 7 U.S.C. § 6518, to serve two distinct and unambiguous purposes. "[T]o 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 this chapter." *See* Section 6518(a). Congress enacted additional sections "in this chapter" that further elucidated the assistance it intended for the NOSB to provide.[21] Throughout the Act Congress generally used "standards" "methods" and "practices" interchangeably.[22]

First, Congress mandated that the Secretary "shall consult" the NOSB regarding the establishment of the National Organic Production Program[23] which is "an organic certification program for producers and handlers of agricultural products that have been produced using organic methods as provided for in this chapter."[24] *See* Section 6503(a) ("the program") *See e.g.*

[21] *See e.g.*; Section 6504 ("National Standards for Organic Production"); Section 6505 ("Compliance Requirements"); Section 6506 ("General requirements"); Section 6508 ("Prohibited crop production practices and materials")' Section 6509 ("Animal production practices and materials"); Section 6511 ("Additional guidelines"); Section 6512 ("Other production and handling practices"); Section 6517 ("National List")

[22] The NOSB's assistance to the Secretary is unsurprisingly structured much like the Act itself, around allowed and disallowed farming/handling methods or practices and allowed and disallowed farming/handling substances or materials. *See e.g.* Section 6508 ("Prohibited crop production practices and materials"); Section 6509 ("Animal production practices and materials"

[23] This is now known as the National Organic Program, or "NOP."

[24] The role of the NOSB was re-confirmed in 1998 when Congress directed the Secretary to develop organic standards for "wild seafood" and mandated "the Secretary shall consult with…the National Organic Standards Board." *See* 7 U.S.C. § 6506(c)(2)

Chevron, 467 U.S. at 842–843 ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency").

Second, Congress mandated that the certification program "established under" Section 6503 shall require that any agricultural product labeled as "organically produced" must be produced in accordance with the terms of the Secretary's certification program. Section 6506 (B). The Secretary's certification program is to verify the production "methods" or "practices" on farms using trained "certifying agents"[25] that annually inspect the farm[26] and approve its written "organic plan" that itself is required, *inter alia,* to set forth "all aspects of agricultural production described" in the Act and any "other practices as required" under the Act. *See* Section 6502(13) ("organic plan") An "organic plan" is more than a farm management tool, it is the only path for a farmer "desiring to participate" in the Secretary's certification program.[27] *See* Section 6506 (a)(2) Based on this short review of the interlocking sections of the Act, it is inescapably obvious that the Secretary's certification program involves nearly every section of the Act, and the duty to "consult" the NOSB regarding its implementation is co-extensive with Congresses direction that the NOSB "assist on any other aspect of the implementation of this chapter." *See e.g. FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000) (noting the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme")

[25] *See* Section 6502(3) ("certifying agent");
[26] *See* Section 6506(a)(5).
[27] *See* Section 6502(4) ("certified organic farm"); Section 6502(5) ("certified handling operation"); Section 6502(13)("Organic plan"); Section 6502(14) ("organically produced")

The NOSB is a full partner in the design and implementation of the Secretary's certification program and the Secretary's mandatory duty is to "consult" and the NOSB's mandatory duty is to "assist" and the repeated references to the entire Act demonstrate that consultation with the NOSB must precede certification program requirements and, via the organic plan, these requirements include "all aspects of agricultural production." Organic livestock production practices, like those in the *OLPP,* are *always* part of the certification program because they govern the contents of the "organic livestock plan" and are subject to the mandatory consultation requirement.

If there was any doubt regarding the advisory role of the NOSB in light of the breadth of the Secretary's certification program, Congress further specified that the NOSB "[S]hall provide recommendations to the Secretary regarding the implementation of this chapter." *See* Section 6518(k)(1) In the most basic terms possible Congress elucidated the structure of the relationship between Secretary and the NOSB: the NOSB recommends on any programmatic requirement or policy that implements the Act generally and the certification program specifically and the Secretary evaluates the recommendation and decides. From the perspective of the NOSB, even the development of the National List is the same; NOSB recommendations are made pursuant to Section 6517(d), and the Secretary decides. *See Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 316 F. Supp. 3d 349, 365 (D.D.C. 2018)("A statute that is unambiguous "means that there is no gap for the agency to fill and thus 'no room for agency discretion."((internal quotation marks omitted) Additional terms used by Congress to frame other NOSB responsibilities under the Act strongly suggest Congress did not intend draw any subtle distinction between the chosen cognates, each of which comports with the basic directive to "assist the Secretary" in implementing the Act. *Mozilla Corp. v. Fed. Commc'ns Comm'n*, No.

18-1051, 2019 WL 4777860, at *5 (D.C. Cir. Oct. 1, 2019) ("The Court applied a cognate analysis to caching."); *see generally* Section 6518(k)("Responsibilities of the Board") ("shall *develop* the proposed National List"); ("shall *convene* technical advisory panels"); ("shall….*review* all botanical pesticides"); "shall *advise* concerning" residue testing; ("shall *advise..*concerning…emergency pest..program"); ("shall *review* available information" of federal agencies regarding National List substances); ("shall *work with* manufacturers of substances"); ("shall *submit to the Secretary*" the result of technical work); ("shall *consider*"seven categories of information regarding substances proposed for inclusion on the National List; ("shall *establish*" petition procedures.)

This thicket of distinct NOSB statutory responsibilities demonstrates that Congress used many terms interchangeably to describe the NOSB's assistive role. *See e.g. City of Columbus v. Ours Garage & Wrecker Serv., Inc.* 536 U.S. 424, 425 (2002)("The *Russello* presumption—that the presence of a phrase in one provision and its absence in another reveals Congress' design—grows weaker with each difference in the formulation of the provisions under inspection."); *see also* Appendix A (listing more than 50 instances in the OFPA of Congresses use of internal references to this "Act" "Chapter" or "title.")

2. Livestock Production Practice Standards are part of the Secretary's Certification Program and a Mandatory Duty to Consult Exists Under Sections 6503, 6509 and 6517.

In the section of the Act titled, "Animal production practices and materials", Congress again directed an NOSB duty to assist the Secretary: "[the NOSB] *shall recommend* to the Secretary *standards* in addition to those in [the foregoing section] for the care of livestock to ensure that such livestock are organically produced." Section 6509(d)(2) (italics added) This section dovetailed with Section 6509(g) which provided: "[the Secretary]…shall develop

detailed regulations…to guide the implementation of the standards for livestock products provided under this section.") Again, the partnership.

The proper relationship of the subparagraphs of Section 6509 is thoroughly addressed in this Memorandum, in Section I and the argument is incorporated herein. When placed in statutory context, Section 6509 is not ambiguous or silent. *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 481 (2001) (only when a statute is "silent or ambiguous" with respect to the issue may a court defer to a "reasonable" interpretation) Most fundamentally, the Secretary "consult" regarding the certification program under Section 6503 controls with regard to *any* agricultural production practice that must be in the organic plan, even if it is requirement arising from the Secretary's crabbed construction of Section 6509. There is simply no ambiguity arising from the simple phrase "shall consult."

The legislative history of the Act confirms Congress intended the NOSB to be at the center of the development of all organic program requirements. At the time of passage of the OFPA, Congress recognized that limited knowledge or consensus on appropriate organic livestock production standards existed. *Senate Report* at 289. "[T]he Committee expects that USDA, with the assistance of the National Organic Standards Board will elaborate on livestock criteria." *Senate Report* at 289; *id.* at 303 ("The Board shall recommend livestock standards, in addition to those specified in this bill, to the Secretary."). When the House and Senate were reconciling their respective versions of the OFPA, Congress stated that the "Conference substitute adopts the House provision with an amendment which requires the Secretary to hold hearings and develop regulations regarding livestock standards *in addition to those specified in this title*." H.R. Rep. 101-916 at 1177-78 (Oct. 22, 1990) (italics added by Plaintiff). The Conferees, "recognize[d] the need to further elaborate on the standards set forth in the title and

expect[ed] that by holding public discussions with interested parties and with the National Organic Standards Board, the Secretary will determine the necessary standards." *Id.* *See also Senate Organic Report* at 297 ("The Committee is concerned that production materials and practices keep pace with our evolving knowledge of production systems.") The statute was written to ensure the NOSB provided continual updating of organic standards to the Secretary, as occurred here with the OLPP.

Following this approach for nearly ten years after passage of the OFPA, USDA published the National Organic Program Final Rule ("NOP") in December 2000. *National Organic Program*, 65 Fed. Reg. 80,548 (Dec. 21, 2000) (codified at 7 C.F.R. pt. 205) ("2000 Rule").

The Senate's *Organic Report* states: "The Committee regards this Board as an essential advisor to the Secretary on all issues concerning this bill and anticipates that many of the key decisions concerning standards will result from recommendations by this Board." *Senate Organic Report*, at 289 (1990) The *Senate Report* demonstrates confirm a unique and novel public-private partnership. "[M]uch of this title breaks new ground for the Federal government and will require the development of a unique regulatory scheme." *Senate Organic Report*, at 293.

The agency has accepted this arrangement since before the publication of the first rule in 2000. *See e.g.* 65 Fed. Reg. at 80,666 (2000) ("The NOSB has assisted in developing the standards promulgated in this final rule and will play an advisory role for the NOP even after the final rule is in place."); *Id.* at 80,608 ("Anyone may request that a provision of these regulations be amended… amendments submitted to the NOP Program Manager will be forwarded to the NOSB for its consideration*"*) Even today USDA recognizes,

> The unique nature of the NOSB and its relationship with the NOP, as established through OFPA, requires that the volunteer Board, which regularly receives stakeholder input through public comment, must work collaboratively with the NOP. Similarly, the NOP, as required through OFPA, must consult and collaborate with the NOSB. *See NOSB*

Policy Manual, at 9 available at https://www.ams.usda.gov/sites/default/files/media/NOSB-PolicyManual.pdf

3. The *Rescission* Failed to State a Reasoned Basis for the Policy Reversal and Did not Address Reliance Interests Regarding the Duty to Consult the NOSB and Receives no Chevron Deference

The *Rescission* simply announced the course change in response to comments that opposed it and relied solely on the fact that Section 6509 does contain the word "consult." As noted above, since the creation of the NOSB and the inception of the NOP, USDA has observed a well-settled practice of publishing proposed and final organic livestock production practice standards solely upon the receipt and consideration of a recommendation from the NOSB following significant public input. *See e.g. NOSB Policy Manual*, at Pg. 26 ("Similarly, the NOP, as required through OFPA, must consult and collaborate with the NOSB.")

Exhibit D, attached hereto, contains declarations of 12 former NOSB chairs. Together they represent nearly 90% of history of the NOSB. Each declaration is identical.

1. I am aware that USDA rescinded the *Organic Livestock and Poultry Practices Final Rule* ("OLPP") on March 13, 2018 when it published *Organic Livestock and Poultry Practices; Withdrawal.* ("Rescission")
2. I am also aware that the Rescission states "[T]he OFPA does not require the NOP to consult with the NOSB prior to undertaking a rulemaking to withdraw the OLPP final rule." 83 Fed. Reg. at 10778 (March 13, 2018)
3. The quoted statement is inconsistent with my experience and knowledge of the USDA's past practices, with regard to pre-rulemaking consultation with the NOSB. In my experience any action by the NOP or Secretary that required public notice and comment, whether guidance or legislative rulemakings, was conducted solely in the aftermath of consultation with the NOSB.
4. During the time I was on the NOSB, the organic community of stakeholders and the NOP agreed that Congress intended organic livestock production practices to reduce or eliminate the need for synthetic medicines and production aids by development of

organic standards that required livestock be managed as part of the whole system of the organic farming and handling created by the OFPA. For livestock, an organic livestock system plan is required that emphasizes preventive care and includes among other requirements, space for the fullest expression of an animal's natural behavior, reduced stress, and access to the outdoors consistent with that animal's well being.

5. Neither I, nor any other board member that I can recall, nor any USDA staff, has taken the position that Congress intended the NOSB recommend standards to the Secretary regarding organic livestock care only if the recommendation was directly related to the list of three prohibited livestock healthcare practices appearing in the OFPA.

Unexplained course reversals have lead the U.S. Supreme Court to reject such agency action and deny *Chevron* deference.

> This lack of reasoned explication for a regulation that is inconsistent with the Department's longstanding earlier position results in a rule that cannot carry the force of law. See 5 U.S.C. § 706(2)(A); *State Farm, supra,* at 42–43, 103 S.Ct. 2856. It follows that this regulation does not receive *Chevron* deference in the interpretation of the relevant statute.

Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2127, 195 L. Ed. 2d 382 (2016); *see also Id.* ("And though several public comments supported the Department's reading of the statute, the Department did not explain what (if anything) it found persuasive in those comments beyond the few statements above.) Here the Secretary offered only comments opposing the new policy. The *Rescission* fails.

REMEDY

As detailed above, the deficiencies in the Secretary's *Rescission* are such that this regulation is invalid and must be vacated.

FEE REQUEST

Plaintiff renews its request that this court award Plaintiffs their reasonable attorneys' fees, costs and expenses associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 or other authority.

CONCLUSION

For the foregoing reasons the court should grant OTA's motion for summary judgment and vacate the *Rescission*.

Respectfully Submitted:

/s/ William J. Friedman
William J. Friedman
107 S. West Street
Alexandria, Virginia 22314
Phone: 571-217-2190
Email: pedlarfarm@gmail.com

COUNSEL FOR PLAINTIFF ORGANIC TRADE ASSOCIATION