



## **DEPARTMENT OF AGRICULTURE**

### **Agricultural Marketing Service**

#### **7 CFR Part 205**

**[Doc. No. AMS-NOP-15-0012; NOP-15-06]**

**RIN 0581-AD75**

### **National Organic Program (NOP); Organic Livestock and Poultry Practices--Withdrawal**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule sets forth the U.S. Department of Agriculture's (USDA or Department) intention to withdraw the Organic Livestock and Poultry Practices (OLPP) final rule published in the *Federal Register* on January 19, 2017, by USDA's Agricultural Marketing Service (AMS). The OLPP final rule amends the organic livestock and poultry production requirements in the USDA organic regulations by adding new provisions for livestock handling and transport for slaughter and avian living conditions; and expands and clarifies existing requirements covering livestock care and production practices and mammalian living conditions. The OLPP final rule was originally set to take effect on March 20, 2017. The effective date has been extended to May 14, 2018 under separate actions.

**DATES:** Interested persons are invited to submit written comments on this proposed rule on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** We invite you to submit comments on the proposed rule by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Paul Lewis Ph.D., Director, Standards Division, National Organic Program, USDA-AMS-NOP, 1400 Independence Ave., SW, Room 2642-So., Ag Stop 0268, Washington, DC 20250-0268.

Instructions: All submissions received must include the docket number AMS-NOP-15-0012; NOP-15-06, and/or Regulatory Information Number (RIN) 0581-AD75 for this rulemaking. You should clearly indicate the reason(s) for your stated position. All comments received and any relevant background documents will be posted without change to <http://www.regulations.gov>.

Document: For access to the document and to read background documents or comments received, go to <http://www.regulations.gov>. Comments submitted in response to this proposed rule will also be available for viewing in person at USDA-AMS, National Organic Program, Room 2642-South Building, 1400 Independence Ave., SW., Washington, DC, from 9 a.m. to 12 noon and from 1 p.m. to 4 p.m., Monday through Friday (except official Federal holidays). Persons wanting to visit the USDA South Building to view comments received in response to this proposed rule are requested to make an appointment in advance by calling (202) 720-3252.

**FOR FURTHER INFORMATION CONTACT:** Paul Lewis, Ph.D., Director, Standards Division, Telephone: (202) 720-3252; Fax: (202) 720-7808.

## **SUPPLEMENTARY INFORMATION:**

### I. Background

The Organic Foods Production Act of 1990 (OFPA), as amended (7 U.S.C. 6501 - 6522), authorizes the United States Department of Agriculture (USDA) to establish national standards

governing the marketing of certain agricultural products as organically produced to assure consumers that organically produced products meet a consistent standard and to facilitate interstate commerce in fresh and processed food that is organically produced. USDA's Agricultural Marketing Service (AMS) administers the National Organic Program (NOP) under 7 CFR part 205.

On April 13, 2016, AMS published the OLPP proposed rule in the Federal Register (81 FR 21956).

On January 19, 2017, AMS published the OLPP final rule in the Federal Register (82 FR 7042). This rule was scheduled to take effect on March 20, 2017.

On January 20, 2017, the Assistant to the President and Chief of Staff sent a memorandum titled "Regulatory Freeze Pending Review" to USDA and other federal executive departments and agencies. Accordingly, on February 9, 2017, AMS published a notice in the Federal Register (82 FR 9967) delaying the OLPP final rule's effective date until May 19, 2017.

On May 10, 2017, AMS published two documents regarding the OLPP final rule in the Federal Register. The first document delayed the OLPP final rule's effective date until November 14, 2017 (82 FR 21677). The second document presented four options for agency action (82 FR 21742). Interested parties were invited to submit comments on the four options on or before June 9, 2017.

On November 14, 2017, AMS published a final rule in the Federal Register (82 FR 52643) delaying the effective date of the OLPP final rule until May 14, 2018 to allow AMS the opportunity to gather additional public comments on important questions regarding USDA's statutory authority to promulgate the OLPP final rule and the likely costs and benefits of the rule.

## II. Overview of Action Being Considered

By this notice, AMS is proposing to withdraw the OLPP final rule. *See* 82 FR 7042 (January 19, 2017). USDA has reviewed the OLPP final rule and is initiating this action based on the outcome of that review. Specifically, USDA proposes withdrawing the OLPP rule based on its current interpretation of 7 U.S.C. 6905, under which the OLPP final rule would exceed USDA's statutory authority. Withdrawal of the OLPP rule also is independently justified based upon USDA's revised assessments of its benefits and burdens and USDA's view of sound regulatory policy. If this withdrawal is finalized, the existing organic livestock and poultry regulations now published at 7 CFR part 205 would remain effective. AMS seeks comments on the proposal to withdraw the OLPP final rule.

### III. Related Documents

Documents related to this OLPP final rule include: OFPA (7 U.S.C. 6501 – 6524) and its implementing regulations (7 CFR part 205); the Organic Livestock and Poultry Practices proposed rule published in the Federal Register on April 13, 2016 (81 FR 21956); the OLPP final rule published in the Federal Register on January 19, 2017 (82 FR 7042); the final rule delaying the OLPP final rule's effective date until May 19, 2017, published by AMS in the Federal Register on February 9, 2017 (82 FR 9967); the final rule delaying the OLPP final rule's effective date until November 14, 2017, published by AMS in the Federal Register on May 10, 2017 (82 FR 21677); a second proposed rule presenting the four options for agency action listed in Section I, *supra*, published by AMS in the Federal Register on May 10, 2017 (82 FR 21742); and a final rule further delaying the OLPP final rule's effective date until May 14, 2018, published by AMS in the Federal Register on November 14, 2017 (82 FR 52643).

### IV. Legal Authority

The basis for the proposed withdrawal of the OLPP final rule is USDA's current

interpretation of OFPA, which is discussed in this notice and USDA’s revised assessment of the regulatory benefits and burdens of the OLPP rule.<sup>1</sup> USDA invites comment generally on the regulatory and other policy implications of the legal interpretation of OFPA proposed in this action.

OFPA is the statutory authority for the OLPP final rule as well as for this rulemaking. AMS believes that withdrawing the Organic Livestock and Poultry Practices final rule is appropriate in light of its interpretation of the scope of authority granted to USDA by OFPA and to maintain consistency with USDA regulatory policy principles. If this proposed rule to withdraw is finalized, the existing organic livestock and poultry regulations now published at 7 CFR part 205 would remain effective.

#### V. Rationale for Withdrawing Organic Livestock and Poultry Practices OLPP final rule

This section provides AMS’ primary reasons for proposing to withdraw the OLPP final rule.

##### A. Authority under the OFPA to Issue Animal Welfare Regulations

The OLPP final rule consisted, in large part, of rules clarifying how producers and handlers participating in the National Organic Program must treat livestock and poultry to ensure their wellbeing (82 FR 7042). AMS is proposing to withdraw the OLPP final rule because it now believes OFPA does not authorize the animal welfare provisions of the OLPP final rule. Rather, the agency’s current reading of the statute, given the relevant language and context, suggests

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<sup>1</sup> USDA’s legal authority to revisit the OLPP final rule is well-established. As an initial matter, agencies have broad discretion to reconsider a regulation at any time. *Clean Air Council v. Pruitt*, 862 F.3d 1, 8–9 (D.C. Cir. 2017). Furthermore, USDA’s interpretation of OFPA “is not instantly carved in stone,” but may be evaluated “on a continuing basis.” *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 863–64 (1984). This is true when, as is the case here, the agency’s review is undertaken in response to a change in administrations. *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005).

OFPA’s reference to additional regulatory standards “for the care” of organically produced livestock should be limited to health care practices similar to those specified by Congress in the statute, rather than expanded to encompass stand-alone animal welfare concerns. 7 U.S.C. 6509(d)(2).

USDA believes that the Department’s power to act and how it may act are authoritatively prescribed by statutory language and context; USDA believes that it may not lawfully regulate outside the boundaries of legislative text.<sup>2</sup> Therefore, in considering the scope of its lawful authority, USDA believes the threshold question should be whether Congress has authorized the proposed action. If, however, a statute is silent or ambiguous with respect to a specific issue, then USDA believes that its interpretation is entitled to deference and the question becomes simply whether USDA’s action is based on a permissible statutory construction.<sup>3</sup>

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<sup>2</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

<sup>3</sup> See *Chevron, U.S.A.*, 467 U.S. at 843; *City of Arlington*, 133 S. Ct. at 1871. USDA believes that fidelity to the Constitution and to the rule of law are better served when regulatory authority is firmly grounded in plain statutory text. *Id.* at 1876 (Scalia, J.) (“The fox-in-the-henhouse syndrome is to be avoided...by taking seriously, and applying rigorously, *in all cases*, statutory limits on agencies’ authority”) (emphasis added); *id.* at 1879 (Roberts, CJ., dissenting) (“the danger posed by the growing administrative state cannot be dismissed”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593 – 94 (1952) (Frankfurter, J., concurring)(“The accretion of dangerous power does not come in a day....[but] slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority”); *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (the administrative state “has deranged our three-branch legal theories”). USDA generally believes that it may promulgate rules that are reasonable in light of the text, nature, and purpose of the relevant statute in cases of gaps or ambiguity. *United States v. Mead Corp.*, 533 U. S. 218, 229 (2001). However, USDA 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”), 15 U.S.C. 1823(c) (“The Secretary shall prescribe by regulation requirements...to detect and diagnose a horse that is sore...”), 35 U. S. C. 316(a)(4) (the Patent Office has the authority to issue “regulations...establishing and governing inter parties review under this

USDA believes 7 U.S.C. 6509 is the relevant authority for OFPA-related regulations governing animal production practices. USDA further believes that it should adhere to this legislative text and that it lacks the power to tailor legislation to policy goals, however worthy, by rewriting unambiguous statutory terms. Rather, USDA believes it may properly exercise discretion only in the interstices created by statutory silence or ambiguity and must always give effect to the unambiguously expressed intent of Congress.<sup>4</sup>

The OLPP final rule is a broadly prescriptive animal welfare regulation governing outdoor access and space, transport, and slaughter, among other things. (82 FR 7042, 7074 7082). USDA’s general OFPA implementing authority was used as justification for the OLPP final rule, which cited 7 U.S.C. 6509(g) as “convey(ing) the intent for the USDA to develop more specific standards....” (82 FR 7043), and 7 U.S.C. 6509(d)(2) as authorizing regulations for animal “wellbeing” and the “care of livestock.” (82 FR 7042, 7074, 7082).

But nothing in Section 6509 authorizes the broadly prescriptive, stand-alone animal welfare regulations contained in the OLPP final rule.<sup>5</sup> Rather, section 6509 authorizes USDA to

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chapter”), and 49 U.S.C. 40103(b) (FAA shall “prescribe air traffic regulations”); *see generally Cuzzo Speed Technologies, LLC v. Lee*, 136 S.Ct. 2131, 2142-43 (2016); *City of Arlington*, 133 S. Ct. at 1868.

<sup>4</sup> *See generally Utility Air Regulatory Group v. Environmental Protection Agency*, 134 S. Ct. 2427, 2441, 2445 – 46 (2014) (citations omitted).

<sup>5</sup> Congress directed USDA to establish national standards governing the marketing of certain agricultural products as organically produced products; to assure consumers that organically produced products meet a consistent standard; and to facilitate interstate commerce in fresh and processed food that is organically produced, assure consumers that organically produced products meet a consistent standard, among other things. 7 U.S.C. 6501. However, OFPA’s plain language does not mandate, and arguably limits, the Secretary’s authority to promulgate prescriptive rules governing how producers meet programmatic standards. Instead, USDA believes a contextual reading of OFPA suggests a regulatory approach based on market-based solutions is more appropriate. *See* 7 U.S.C. 6503-11 (setting standards); 7 U.S.C.

regulate with respect to discrete aspects of animal production practices and materials: breeder stock, feed and growth promoters, animal health care, forage, and record-keeping. Section 6509(d) is titled “Health Care.” Subsection 6509(d)(1) identifies prohibited health care practices, including subtherapeutic doses of antibiotics; routine synthetic internal parasiticides; and medication, other than vaccinations, absent illness. Reading the plain language in context, AMS now believes that the authority granted in section 6509(g) for the Secretary to issue regulations fairly extends only to those aspects of animal care that are similar to those described in section 6509(d)(1) *and* that are shown to be necessary to meet the congressional objectives specified in 7 U.S.C. 6501.<sup>6</sup> The Secretary’s authority to promulgate rules under section 6509(g) is similarly circumscribed: he may “develop detailed regulations” only to “guide the implementation of the standards for livestock products *provided under this section.*” 7 U.S.C. 6509(g) (emphasis added).

AMS finds that its rulemaking authority in section 6509(d)(2) should not be construed in isolation, but rather should be interpreted in light of section 6509(d)(1) and section 6509(g). Furthermore, even if OFPA is deemed to be silent or ambiguous with respect to this issue, AMS believes that a decision to withdraw the OLPP final rule based on section 6509’s language, titles,

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6509(g)(authorizing promulgation of regulations to “guide implementation of standards...”); 7 U.S.C. 6512 (“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”).

<sup>6</sup> Compare 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”), 15 U.S.C. 1823(c) (“The Secretary shall prescribe by regulation requirements...to detect and diagnose a horse that is sore...”), and 49 U.S.C. 40103(b) (FAA shall “prescribe air traffic regulations”).



and position within Chapter 94 of Title 7 of the United States Code;<sup>7</sup> controlling Supreme Court authorities; and general USDA regulatory policy, would be a permissible statutory construction.

AMS seeks comment on this issue.

B. Impact of OLPP final rule on Producers

AMS notes that organic producers have already made significant investments in facilities and infrastructure to support the growing organic market under the current USDA organic regulations, and there has been significant growth in the organic market under the existing regulatory regime. This suggests that the present regulatory regime is meeting statutory objectives of reassuring consumers of organic integrity and facilitating interstate commerce in organic products, which coincides with the growth in the organic poultry sector. From 2007 to 2016, the organic egg market grew 12.7 percent annually which shows consumer confidence in the products produced under the current standards. The organic industry continues to grow domestically and globally, with USDA's Organic Integrity Database listing 24,650 certified organic operations in the United States, and 37,032 around the world, at the end of 2016. The 2016 count of U.S. certified organic farms and businesses reflects a 13% increase between the end of 2015 and 2016, continuing a trend of double-digit growth in the organic sector. The number of certified operations has continuously increased since the count began in 2002; the 2015-2016 increase was one of the highest annual increases since 2008. According to the Organic Trade Association's (OTA's) 2017 Organic Industry Survey, organic sales reached almost \$47 billion in 2016, reflecting an increase of almost \$3.7 billion above the \$43 billion mark achieved in 2015.

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<sup>7</sup> See *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015).

Furthermore, as a policy matter and a general principle, USDA is concerned that the OLPP final rule's prescriptive codification of current industry practices in the dynamic, evolving marketplace could have the unintended consequence of preventing or stunting future market-based innovation in response to rapidly evolving social and producer norms. Overly prescriptive regulation can discourage technological and social innovation, especially by small firms and consumers, distorting or even preventing technological development. Lacking evidence of the material market failure to justify prescriptive regulatory action, AMS is concerned that the OLPP rule may hamper market-driven innovation and evolution and impose unnecessary regulatory burdens. AMS welcomes comment on these concerns.

C. Executive Orders 12866, 13563, and 13771

This section provides an Executive Summary of the Preliminary Regulatory Impact Analysis (PRIA). Copies of the full analysis are available on the Regulations.gov Web site. This rulemaking has been designated as an "economically significant regulatory action" under Executive Order 12866, and, therefore, has been reviewed by the Office of Management and Budget (OMB).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives, and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Executive Order 13771 directs Agencies to identify at least two existing regulations to be repealed for every new regulation unless prohibited by law. The total incremental cost of all

regulations issued in a given fiscal year must have costs within the amount of incremental costs allowed by the Director of the Office of Management and Budget, unless otherwise required by law or approved in writing by the Director of the Office of Management and Budget. This proposed rule is expected to be an EO 13771 deregulatory action. Details on the estimated cost savings of this proposed rule can be found in the rule's PRIA, posted separately and summarized below.

The estimated costs in the OLPP final rule were based on three potential scenarios. First, if the OLPP final rule were implemented and if all organic livestock and poultry producers were to come into compliance, the estimated cost to the industry would have been \$28.7 to \$31 million each year. Second, if 50 percent of the organic egg producers moved to the cage-free egg market and the organic industry continues to grow at historical rates, the costs would be \$11.7 - \$12.0 million. Third, if 50 percent of the organic egg producers moved to the cage-free egg market and there were no new entrants that could not already comply, the costs would be \$8.2 million. These costs do not include an additional \$1.95-\$3.9 million associated with paperwork burden.

The OLPP final rule estimated the benefits from the rule's implementation as \$4.1 to \$49.5 million annually. The estimated benefits spanned a wider range than the estimated costs and were based on research that measured consumers' willingness-to-pay for outdoor access for laying hens. The OLPP final rule acknowledged that the benefits were difficult to quantify.

In reviewing the OLPP final rule, AMS found that the calculation of benefits contained mathematical errors in calculating the 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. The revised calculations of benefits are presented in the accompanying PRIA.

As a result of reviewing the calculation of estimated benefits, AMS reassessed the economic basis for the rulemaking 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.

The RIA for the OLPP final rule did not identify a significant market failure to justify the need for rule. The RIA for the OLPP final rule noted that there is wide variance in production practices within the organic egg sector and asserted that “as more consumers become aware of this disparity, they will either seek specific brands of organic eggs or seek animal welfare labels in addition to the USDA organic seal.” AMS also found the “majority of organic producers also participate in private, third-party verified animal welfare certification programs.” OLPP final rule RIA

(<https://www.ams.usda.gov/sites/default/files/media/OLPPSupplementalDocAnalysis.pdf>) at 14. Variance in production practices and participation in private, third-party certification programs, however, do not constitute evidence of significant market failure.

First, while AMS recognizes that the purpose of the OFPA is to assure consumers that organically produced products meet a consistent and uniform standard, that purpose does not imply that there should be no variation in organic production practices. Rather, a variety of production methods may be employed to meet the same standard. Some may be more labor intensive and others more capital intensive, and some may be appropriate for small operations while others are appropriate for large operations. Importantly, producers will adopt different production methods over time as technology evolves and enables operations to meet the same standard more efficiently. Thus, variation in production practices is expected and does not stand as an indicator of a significant market failure.

Second, private, third-party certification programs are common in the dynamic food sector. The fact that organic suppliers participate in such programs does not indicate a market failure with respect to the standards promulgated under the USDA NOP. Rather, the use of third-party certifications in addition to the USDA organic seal merely indicates that participants in the food sector seek ways to differentiate their products from those of their competitors. The fact that some aspects of a private certification may overlap with the requirements underlying the USDA organic seal demonstrates that food producers, manufacturers, and retailers use multiple methods to communicate with consumers about the attributes of the foods that they produce and sell. Private, third-party certifications reflect attributes that food sellers wish to emphasize, and the existence of such certifications on organic products provides no evidence of a significant market failure relating to USDA organic standards.

Notwithstanding the lack of a market failure justification for the OLPP final rule, the accompanying PRIA explains several calculation errors associated with the OLPP final rule RIA. The PRIA also provides additional information regarding the estimated benefits and explains why they likely were overstated in the OLPP final rule RIA. In any case, withdrawing the OLPP final rule would prevent the negative cost impacts from taking effect, resulting in substantial organic poultry producer cost savings of \$8.2 to \$31 million annually, plus additional cost savings of \$1.95-\$3.9 million from paperwork reduction.

### *Consideration of Alternatives*

AMS considered three alternatives in developing this proposed rule. The first alternative considered was to implement the Organic Livestock and Poultry Practices final rule on May 14,

2018, which is the current effective date. The second alternative was to further delay the final rule. The third alternative, which is the selected alternative, was to withdraw the final rule.

For the first alternative, if the OLPP final rule were to become effective on May 14, 2018, the costs and transfers described in the PRIA would be expected to occur, resulting in requirements with substantial costs not supported by evidence of significant market failure.

The second alternative considered was to further delay the OLPP final rule. This alternative, however, would defer the decision on whether to implement or withdraw to a future date, despite the agency having performed its review and received comments from the public. This alternative fails to achieve USDA's goal of reducing regulatory uncertainty.

AMS is proposing the third alternative, to withdraw the OLPP final rule as the preferred alternative. This alternative estimates cost savings for poultry producers of \$8.2 to \$31 million per year (based on 15-year costs). In addition, \$1.95-\$3.9 million in annual paperwork burden would not be incurred. As described in the PRIA, the range of benefits could be expected to be lower than shown in the OLPP final rule RIA. Moreover, *a priori*, the benefits associated with any government intervention without there being an identifiable market failure will be lower than the required costs of imposing such an intervention. Given the unclear nature of the market failure being addressed by the OLPP final rule, AMS would give clear preference to the lower end of the benefit range, which consistently fall below the costs associated with the OLPP final rule.

## VI. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires agencies to consider the economic impact of each rule on small entities and evaluate alternatives that would accomplish

the objectives of the rule without unduly burdening small entities or erecting barriers that would restrict their ability to compete in the market.

Data suggest nearly all organic egg producers qualify as small businesses. OLPP Final Rule RIA (<https://www.ams.usda.gov/sites/default/files/media/OLPPSupplementalDocAnalysis.pdf>) at 140-141. Small egg producers are listed under NAICS code 112310 (Chicken Egg Production) as grossing less than \$15,000,000 per year, and AMS estimates that out of 722 operations reporting sales of organic eggs, only four are not small businesses. However, the RIA found that some small egg producers and small chicken (broiler) producers will be affected by the poultry outdoor access and space provisions. *See* OLPP Final Rule RIA at 136-138, 142, 145-146. Furthermore, the RIA of the OLPP final rule notes that some producers were particularly concerned about limited land availability for outdoor access requirements and the potential for increased mortality attendant to the new regulatory demands. These were identified as sources of burdensome costs and/or major obstacles to compliance for some small businesses. *See id.* at 26-28. Based on surveys of organic egg producers, AMS believes approximately fifty percent of layer production will not be able to acquire additional land needed to comply with the OLPP final rule. *Id.* at 142. Also, certain existing certified organic slaughter facilities could surrender their organic certification as a result of the OLPP final rule and certain businesses currently providing livestock transport services for certified organic producers or slaughter facilities may be unwilling to meet and/or document compliance with the livestock transit requirements. *Id.* at 149.

Withdrawing the OLPP final rule would avoid these economic impacts, without introducing any incremental burdens or erecting barriers that would restrict the ability of small

entities to compete in the market. This conclusion is supported by the historic growth of the organic industry without the regulatory amendments. The demand for organic food has continued to grow over the past ten years under the current regulatory regime.

This proposed rule would relieve producers of the costs of complying with the Organic Livestock and Poultry Practices final rule. The effects would be beneficial, but not significant. A small number of entities may experience time and money savings as a result of not having to change practices to comply with the OLPP final rule. Affected small entities would include organic egg and organic broiler producers. The proposed rule would not have a significant economic impact on a substantial number of small entities.

Under these circumstances, the Administrator of the Agricultural Marketing Service has determined that this action would not have a significant economic impact on a substantial number of small entities.

## VII. Executive Order 12988

Executive Order 12988 instructs each executive agency to adhere to certain requirements in the development of new and revised regulations to avoid unduly burdening the court system.

Pursuant to section 6519(f) of OFPA, if finalized, this rule would not alter the authority of the Secretary under the Federal Meat Inspection Act (21 U.S.C. 601-624), the Poultry Products Inspection Act (21 U.S.C. 451-471), or the Egg Products Inspection Act (21 U.S.C. 1031-1056), concerning meat, poultry, and egg products, nor any of the authorities of the Secretary of Health and Human Services under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301-399) or the Public Health Service Act (42 U.S.C. 201-300), nor the authority of the Administrator of the U.S. Environmental Protection Agency under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136-136(y)).



#### VIII. Paperwork Reduction Act

No additional collection or recordkeeping requirements would be imposed on the public by withdrawing the OLPP final rule. Accordingly, OMB clearance is not required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501), Chapter 35. Withdrawing the OLPP final rule will avoid an estimated \$1.95-\$3.9 million in costs for increased paperwork burden associated with that final rule.

#### IX. Executive Order 13175

This rule has been reviewed in accordance with the requirements of Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

AMS has assessed the impact of this rule on Indian tribes and determined that this rule would not, to our knowledge, have tribal implications that require tribal consultation under EO 13175. If a Tribe requests consultation, AMS will work with the Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions and modifications identified herein are not expressly mandated by Congress.

#### X. Civil Rights Impact Analysis

AMS has reviewed this draft rule in accordance with the Department Regulation 4300-4, Civil Rights Impact Analysis, to address any major civil rights impacts the rule might have on

minorities, women, and persons with disabilities. AMS has determined that withdrawing the OLPP final rule would not affect producers in protected groups differently than the general population of producers.

#### XI. Conclusion

In compliance with USDA's interpretation of the OFPA and consistent with USDA regulatory policy, AMS is proposing to withdraw the OLPP final rule.

Dated: December 14, 2017

Bruce Summers  
Acting Administrator  
Agricultural Marketing Service

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