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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 205

[Document Number AMS-NOP-20-0037; NOP-20-03]

RIN: 0581-AD75

National Organic Program (NOP); Final Decision on Organic Livestock and Poultry Practices Rule and Summary of Comments on the Economic Analysis Report

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice.

SUMMARY: On April 23, 2020, the United States Department of Agriculture Agricultural Marketing Service (AMS) published the Economic Analysis Report related to the Organic Livestock and Poultry Practices final rule (OLPP Rule), published on January 19, 2017, and the final rule withdrawing the OLPP Rule (Withdrawal Rule), published on March 13, 2018. AMS sought comment to evaluate the analysis in the Economic Analysis Report and to decide whether additional action should be taken in regard to the OLPP Rule. The public comment process for the Economic Analysis Report is being conducted consistent with an Order of the United States District Court for the District of Columbia, which granted USDA's Motion to Remand a legal challenge to the Withdrawal Rule for purposes of clarifying and supplementing the record regarding the economic analysis underlying both the OLPP Rule and the Withdrawal Rule. (*See Organic Trade Association v. USDA*; Civil Action No. 17-1875 (RMC) (March 12, 2020), ECF No. 112). After reviewing the Economic Analysis Report and the public comments on it, AMS is issuing this Final Decision concluding that no additional rulemaking action with respect to the OLPP Rule is necessary.

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SUPPLEMENTARY INFORMATION: The Final Decision may be accessed under the following docket number available via Regulations.gov: AMS-NOP-20-0037; NOP-20-03.

Additional supporting documents and related materials may also be referenced under this docket number.

Documents related to this Final Decision include: Organic Food Production Act (OFPA) (7 U.S.C. 6501-6524) and its implementing regulations (7 CFR part 205); the Organic Livestock and Poultry Practices (OLPP) proposed rule published in the Federal Register on April 13, 2016 (81 FR 21956); the OLPP Rule published in the Federal Register on January 19, 2017 (82 FR 7042); the final rule delaying the OLPP Rule's effective date until May 19, 2017, published in the Federal Register on February 9, 2017 (82 FR 9967); the final rule delaying the OLPP Rule's effective date until November 14, 2017, published 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 in the Federal Register on May 10, 2017 (82 FR 21742); a final rule further delaying the OLPP final rule's effective date until May 14, 2018, published in the Federal Register on November 14, 2017 (82 FR 52643); a proposed rule explaining AMS' intent to withdraw the OLPP final rule, published in the Federal Register on December 18, 2017 (82 FR 59988); the Withdrawal Rule, published in the Federal Register on March 13, 2018 (83 FR 10775); a request for comment on the OLPP Economic Analysis Report published in the Federal Register on April 23, 2020 (85 FR 22664).

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Background

The OFPA authorizes the United States Department of Agriculture (USDA or Department) to establish national standards governing the marketing of certain agricultural products as organically produced. The national standards are 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 January 19, 2017, AMS published the OLPP Rule. After delaying the effective date of the OLPP Rule until May 14, 2018, AMS published the Withdrawal Rule on March 13, 2018, which withdrew the OLPP Rule. In the Withdrawal Rule, AMS explained that it had discovered three mathematical and methodological errors in the Regulatory Impact Analysis for the OLPP Rule

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(Final RIA), and that the Final RIA was thus incorrect in its assessment of the costs and benefits of the OLPP Rule. In connection with promulgating the Withdrawal Rule, AMS published a modified Regulatory Impact Analysis (Withdrawal RIA) that sought to correct for the three identified errors in the Final RIA while otherwise holding that analysis constant. Based on the modified analysis in the Withdrawal RIA, AMS projected that the costs of the OLPP Rule likely exceeded its benefits, and that projection was one of the factors on which AMS based its withdrawal of the OLPP Rule. AMS also concluded in the Withdrawal Rule that there was no market failure in the organic industry sufficient to warrant the particular regulations established by the OLPP Rule. Separate and apart from these economic and market-based considerations, AMS determined in the Withdrawal Rule that the statutory authority under OFPA did not permit the agency to regulate the organic industry based solely on concerns regarding animal welfare, and that the OLPP Rule thus exceeded the scope of AMS's authority under the statutory scheme.

In the fall of 2017, the Organic Trade Association (OTA) filed a lawsuit in the U.S. District Court for the District of Columbia, challenging AMS's delay of the OLPP Rule's effective date; OTA subsequently amended its complaint to challenge the Withdrawal Rule. On October 31, 2019, OTA filed a motion for summary judgment accompanied by several extra-record attachments, including a privately commissioned analysis of the Withdrawal RIA performed by Dr. Thomas Vukina, a consultant and professor of economics at North Carolina State University. In the course of reviewing Dr. Vukina's analysis, AMS independently discovered that the Withdrawal RIA had failed to fully correct for one of the previously identified flaws and that the Final RIA contained additional flaws that had not previously been discerned or corrected.

In light of that discovery, on January 3, 2020, USDA filed a motion to suspend the summary judgment proceedings and requested voluntary remand to determine how to address the

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additional methodological flaws discovered in the prior RIAs. On March 12, 2020, the District Court granted that request. *See Organic Trade Association v. USDA*; Civil Action No. 17-1875 (RMC) (March 12, 2020), ECF No. 112 (the Order). In the Order, the District Court set a deadline of 180 days for the USDA to complete the action(s) that it was going to take on remand. The District Court also set a September 8, 2020 deadline for AMS to report back to the Court on the outcome of these proceedings.

Consistent with these developments, AMS directed a methodological review of the Final RIA and Withdrawal RIA, which was undertaken by an AMS economist that was not involved in the promulgation of the OLPP Rule or the Withdrawal Rule. That review resulted in the preparation of a report that summarized and explained its findings (Economic Analysis Report or Report). In the Economic Analysis Report, AMS first provided a backdrop by explaining the three errors that had been identified in the Withdrawal RIA: (1) the incorrect application of the discounting formula; (2) the use of an incorrect willingness to pay value for eggs produced under the new open access requirements; and (3) the incorrect application of a depreciation treatment to the benefit calculations. The Report explained that although the Withdrawal RIA correctly identified these errors and properly addressed the first two errors (incorrect discounting methodology and willingness-to-pay values), it had not fully removed the incorrect depreciation treatment from the cost and benefit calculations, which erroneously reduced the calculation of both costs and benefits.

The Report went on to identify and discuss four categories of additional errors in the Final RIA that were previously undetected and therefore inadvertently carried forward to the Withdrawal RIA. These are: (1) inconsistent or incorrect documentation of key calculation variables; (2) an error in the volume specification affecting benefits calculations in two of three

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scenarios considered; (3) the incorrect use of production values in the benefits calculations that do not account for projected increased mortality loss; and (4) aspects of the cost calculations that resulted in certain costs being ignored, underreported, or inconsistently applied. In addition, the Report described certain minor errors that did not have a material impact on the cost and benefit calculations. On April 23, 2020, AMS published the Economic Analysis Report, with a request for public comment, in the Federal Register (85 FR 22664). AMS sought public comment to evaluate the analysis in the Economic Analysis Report and to decide whether additional action should be taken in regard to the OLPP Rule in light of the issues identified. The public comment period ended on May 26, 2020.

After reviewing the public comments, AMS is affirming the findings in the Economic Analysis Report, modifying its economic analysis of the OLPP Rule to the extent discussed herein, and issuing this Final Decision concluding that no additional rulemaking action with respect to the OLPP Rule is necessary as a consequence of those findings. This Final Decision explains AMS' rationale for these determinations in light of the findings contained in the Economic Analysis Report and the public comments received.

Summary of and Responses to Comments Received

AMS received 551 comments responding to the request for comment on the Economic Analysis Report. Several commenters provided substantive comments on the Economic Analysis Report and AMS addresses those comments in detail below. Many commenters addressed matters that were not related to the issues outlined in the Economic Analysis Report but rather pertained to policy considerations that, in the commenters' view, weighed in favor of

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the OLPP rule and against its withdrawal. These comments generally were beyond the scope of this proceeding.

1. Costs Were Inflated and Benefits Were Discounted

One commenter stated that the Economic Analysis Report appeared to inflate the costs of the OLPP Rule by front-loading them so that they were discounted less, while also minimizing or disregarding the benefits by heavily discounting them in the future. The commenter did not provide additional detail as to why he believed the costs and benefits of the OLPP Rule were improperly allocated, and AMS is thus limited in its ability to provide a meaningful response to the comment. However, AMS believes that it is important to clarify that the purpose of the Economic Analysis Report was simply to identify errors in the previous RIAs, including as to methodological choices that appeared unreasonable or inadvertent, and assess the materiality of those errors. Importantly, the Report did not attempt to redo the cost-benefit analysis in the prior RIAs or recalculate the costs and benefits of the OLPP Rule based on any assessment about the impact of those errors. It also did not evaluate any costs or benefits themselves, or independently assess when those costs and benefits would be realized. Therefore, the commenter's disagreement with the allocation of costs and benefits would appear to be a methodological critique of the Final RIA, rather than the Economic Analysis Report itself, or—in other words—a perceived additional flaw in the Final RIA not identified by the Economic Analysis Report.

To the extent that is the commenter's intent, AMS disagrees with the critique. AMS believes that, after correcting for the improper depreciation methodology and the other flaws outlined in the Economic Analysis Report, the Final RIA's approach to allocating costs and

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benefits over the 15-year analysis period was methodologically reasonable. The costs were allocated to different years of the analysis period based on the dates on which regulatory reforms were required to be implemented, as well as an assessment of the steps necessary for producers to come into compliance by those dates. Those allocations reflect the age of various capital investments across the industry, and distinctions between one-time, up-front land acquisition costs (on the one hand) and recurring annual costs (on the other). The benefit allocations were similarly based upon the assumption that producers not already in compliance would not come into compliance until the date they were required to do so, and the Final RIA assessed benefits flowing from that date forward based on the projected output of those producers. Beyond the errors already identified in the Withdrawal RIA and Economic Analysis Report, AMS believes that this approach to allocating costs and benefits was reasonable, and the commenter has not provided sufficient detail for AMS to conclude otherwise.

The same commenter also stated that the Economic Analysis Report improperly corrected for any errors in the RIAs, skewing the results in the opposite direction. He also stated that AMS's explanation of the depreciation error schedule was not transparent and verifiable, and that AMS did not make available the workbooks showing the raw data and formulas used to calculate the costs and benefits. With regard to the assertion that the Report skewed results in the opposite direction, AMS reiterates that the intent of the Economic Analysis Report was not to undertake a correction of the errors in the prior RIAs but simply to identify them and discuss how they may have impacted the prior economic analyses. AMS acknowledges that such discussion, in some places, may have suggested that the errors could have been addressed in various ways and discussed how such corrections would change the analysis, and is subject to criticism in that regard. However, the commenter did not provide any information regarding why he believes that

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the Economic Analysis Report skewed the results in the opposite direction, or explain the method he thought AMS should have used instead or why, or even specify the methodological components that he believed were improperly corrected. AMS is therefore unable to respond to this comment further. With respect to the commenter's assertion that AMS did not made its underlying workbooks and analysis available, AMS disagrees. These documents were published in the Federal Register and posted on regulations.gov when AMS published the Economic Analysis Report.

2. Benefit Calculations Do Not Include Broiler Submarket

Another commenter stated that AMS failed to consider benefits in the broiler sub-market arising from the OLPP Rule. As this comment reflects, the Final RIA quantified the costs to broiler producers to comply with the OLPP Rule but did not attempt to quantify or otherwise estimate any benefits that may have resulted from such compliance. AMS did not identify this as an error in either the Withdrawal RIA or the Economic Analysis Report. AMS notes that no reliable numbers for benefits attributable to the broiler sub-market existed in the literature that was available at the time that the OLPP Final Rule was published. The commenters cite to a 2006 McVittie, Moran and Nevison paper, a 2014 Vukina, Andersen, and Muth paper on broilers, and a 2017 Mulder and Zomer paper for estimates of the welfare benefits of increased indoor space for broilers. However, these papers were based on working paper research that had not been peer reviewed and thus were not suitable for use as an official estimate in a regulatory analysis.¹ Furthermore, the 2017 Mulder and Zomer paper was not published until after the

¹ One commenter cited the 2014 Vukina, Andersen, and Muth paper on broilers, which in turn referenced the 2012 "Phase 2 Report in USDA, Agricultural Marketing Service, National Organic Program", that estimated a

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Final RIA was published and was focused on the preferences of Dutch consumers generally, whose preferences might not be reflective of those of U.S. organic consumers.² However, to the extent that existing research suggests that American consumers are willing to pay a price premium for organic broilers produced in compliance with the indoor stocking density requirements of the OLPP Rule, AMS acknowledges that the Final RIA may have underestimated the benefits of the OLPP Rule by assigning a \$0 value to those benefits. If so, AMS agrees that this is another flaw in the Final RIA in addition to the errors described in the Economic Analysis Report.

3. Value of Prohibition on Forced Molting Not Included in Willingness to Pay Calculations

Some commenters stated that the Economic Analysis Report failed to explain why the reduced willingness to pay (WTP) values utilized in the Withdrawal RIA were justified. These commenters also claimed that the Economic Analysis Report failed to consider the benefits of the OLPP Rule's ban on forced molting. One commenter argued that the correct WTP value should be the sum of WTP values for outdoor access and the prohibition on forced molting that were found in the 2013 Heng, et al. study. The commenter further argued that because these two values are positive, the sum of both WTP values is greater than the outdoor access WTP value by itself.

30 percent increase in WTP for broiler indoor space. Both these papers ultimately rely primarily on the 2006 McVittie, Moran and Nevison working paper to construct their WTP estimate for broiler indoor space.

² Similarly, the 2006 McVittie, Moran and Nevison paper studied the preferences of British consumers, not U.S. consumers. As noted by AMS, a 2012 Vukina, Anderson, Muth, and Ball paper on broilers stated, "British consumers are probably somewhat different than U.S. consumers. They have different levels of real disposable income, and they are likely to have different sets of preferences. For example, there is ample casual evidence that European consumers are, on average, more concerned with animal welfare than their U.S. counterparts," Economic Impact Analysis of Proposed Regulations for Living Conditions for Organic Poultry—Revised Phase 2 Report at 2-2, prepared for Agricultural Marketing Service (Aug. 2012)

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The value of the OLPP Rule's prohibition on forced molting was not separately considered in the WTP analysis in either the Final RIA or the Withdrawal RIA. In the Final RIA, AMS used an estimated WTP range from the 2013 Heng et al. study that attempted to assess consumers' willingness to pay for eggs produced in a cage-free environment, with outdoor access, and without induced molting, among consumers that were and were not given information about the environmental impacts of those practices. In the Withdrawal RIA, AMS explained that this range was overstated as a measure of benefits attributable to the OLPP Rule because a cage-free environment was already required for organic egg production under regulations pre-dating the OLPP Rule. Thus, in the Withdrawal RIA, AMS used the estimated value range for the consumer WTP for outdoor access alone, found in the 2013 Heng et al. study, to calculate the benefit of the rule (per dozen eggs produced). AMS acknowledges that the Withdrawal Rule incorrectly stated that the prohibition on induced molting was already included in existing regulations and did not attempt to measure or include the benefits that might flow from that prohibition. However, AMS does not believe that this error materially affected the benefits calculation. First, AMS notes that the molting prohibition was not considered on either side of the cost-benefits calculation; that is, just as AMS did not attribute any benefits to this provision, nor did it measure the provision's costs. If AMS were to separately consider the benefits of this provision, it would also need to consider its costs, which would likely include the higher cost of acquiring replacement pullets, lower production, and lost opportunities to take advantage of seasonal increases in egg demand.

AMS believes, however, that it was methodologically appropriate to exclude the molting prohibition from both components of the analysis, because most organic producers were likely already complying with this prohibition prior to the promulgation of the OLPP Rule. Molting,

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which is synonymous with forced molting³ in a production setting, is induced in a flock by restricting the birds' diet and daily light exposure for two to three weeks. In this period, the birds molt, or lose and replace their feathers. Several weeks after their regular diet and access to light exposure are restored, a second egg production cycle begins with a reduced peak and duration compared to the first cycle. In general, the tradeoffs between whether to molt existing flocks or replace them consider the cost of acquiring new hens and the timing of increased production of eggs (a product with very seasonal demand). However, this choice is severely constrained in the context of organic production, even without the prohibition contained in the OLPP Rule. Under the existing regulations (i.e., those that were in effect prior to the promulgation of the OLPP Rule and after its withdrawal), induced molting practices would be operationally difficult. Under these provisions, organic laying hens are required to have outdoor access, a condition that prevents the farmer from limiting light exposure through most of the year. Similarly, organic laying hens are required to be cage-free, a situation that allows layers to potentially acquire additional nutrition from the feed of other layers, the manure of other layers, and outdoor foraging. Because the farmer cannot entirely control the bird's light exposure or nutrient consumption, induced molting, under current organic rules, is economically impractical.⁴

³ Forced molting is an industry practice that restores the egg-laying productivity of egg-laying hens. Following their hatching, young egg-laying hens (pullets) are raised in specialized facilities that restrict the bird's exposure to light, which stimulates egg production. At 18 weeks of age, layers are moved to egg production facilities. At 20 weeks, hens begin laying small, undersized eggs. Eggs increase in size throughout the layer's life, but peak production (in terms of number of eggs produced) occurs at 20 weeks and then gradually declines. Without molting, at approximately 80 to 85 weeks, the first cycle of production is complete and layers are replaced with new hens acquired from pullet-raising operations. By molting birds for approximately 7 weeks when the layers are approximately 68 weeks old, the first cycle of production is shortened but allows for a second cycle of production that typically ends lasts 35 weeks or until the birds are 105 to 115 weeks old.

⁴ Jacquie Jacob and Tony Pescatore, "Molting Small-scale Commercial Egg Flocks in Kentucky", 2018 Univ. of Kentucky Cooperative Extension Service, ASC-236 ("A molt . . . probably cannot be done with small flocks that are exposed to natural daylength.")

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Furthermore, AMS has no data indicating that induced molting is commonly used in organic farming. AMS thus believes that this practice is likely rare in organic flocks even absent an express prohibition,⁵ and that considering this prohibition in the economic analysis would do little to create new costs or benefits. AMS therefore concludes that independent consideration of the molting provision would not have materially changed the WTP value and that it was appropriate to exclude these costs and benefits from the assessment of costs and benefits in the Withdrawal RIA.⁶

4. Sample Bias

Another commenter argued that the Final RIA and the Withdrawal RIA introduced sample bias error in their estimation of organic consumers' WTP because the 2013 Heng study on which AMS based these estimations considered the entire consumer market for eggs rather than just the consumers in the existing market for organic eggs, which the commenter argued

⁵ In 2016, approximately 4.8 percent of all 7.4 billion table eggs produced in the United States were organically certified (NASS, Survey of Organic Agriculture, 2017, NASS, Monthly Chicken and Egg Report, February 28, 2017). In that year, the maximum share of laying flocks that had been molted was 21.3 percent (NASS, Monthly Chicken and Egg Report, February 28, 2017).

⁶ However, AMS notes that even if it were appropriate to separately consider the costs and benefits of the molting prohibition, it would be inappropriate to adopt the commenter's suggestion that AMS simply sum the values of the WTP for outdoor access and the WTP for forced molting in the 2013 Heng et al study. First, the 2013 Heng et al. study did not find a significant effect of a prohibition on forced molting on consumer WTP within its analysis. While the 2013 Heng et al. study reported positive WTP values for different subsets of the average consumer, it also stated that "the means for welfare-related attributes Access, CageFree, and NoMolting were statistically not-different from zero." In general, the lack of significance for a parameter estimate for a variable in a statistical model indicates that the variation seen in the data capturing the effect of that variable cannot be distinguished from that which would occur from ordinary, random effects. Second, the consumer choice experiment of the Heng et al. (2013) article may have exhibited scope insensitivity. See Alaya Spencer-Cotton, Marit E. Kragt and Michael Burton "Spatial and Scope Effects: Valuations of Coastal Management Practices" *Journal of Agricultural Economics* 69(2018)3:833-851 . Scope insensitivity occurs when a consumer's stated valuation of a product with different socially beneficial attributes does not increase as more socially beneficial attributes are added to the product. Notably, Heng et al. (2013) observed that "few differences are seen in the WTP distributions because of perceived differences in product quality" regarding induced molting and explained that WTP differences in this category generally flowed from assessments regarding social and animal welfare benefits.

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were the true beneficiaries of the OLPP Rule. Whether the relevant market consists solely of existing consumers of organic eggs or encompasses both existing and potential future consumers is not well established in the literature. The market growth rate assumed by the Final and Withdrawal RIAs was 12.7% per annum, which was based on growth rates in the years preceding the OLPP Rule. AMS notes that if this growth rate continued as projected, it would mean that the organic market would grow 81% in five years and 105% within six years, a value which substantially exceeds U.S. population growth. Such growth therefore assumes that either new organic consumers are entering the market from the non-organic market or, in a far less likely scenario, that existing organic egg consumers are dramatically increasing their egg consumption every year. It is inconsistent to assume that markets grow at extraordinarily high rates based on suggestions that some previously conventional egg consumers are now purchasing organic, while simultaneously assuming that only the preferences of consumers previously purchasing organic products should be considered in the calculation of WTP values. Moreover, the commenter did not provide any reason to differentiate between the WTP of existing organic consumers and organic consumers that might enter the market as a result of the OLPP Rule, or to assume that existing organic customers would have a higher WTP than the new organic customers for the characteristics considered in the RIAs. Indeed, the opposite could be true if the new customers are motivated to enter the market by the additional regulation encompassed by the OLPP Rule. Thus, AMS disagrees with this commenter's suggestion that the WTP values should have been based solely on literature studying existing organic consumers.⁷

⁷ However, to the extent WTP of existing consumers were to materially differ from those of future consumers, it would affect the benefits calculation in potentially complex ways, given that a core assumption underlying the benefits calculation was the projection that the market for organic eggs would more than quadruple over the analysis period.

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5. Increase in Mortality Rates of Layers from 5% to 8%

Several commenters stated that the Final RIA t erroneously projected that mortality rates of organic layers would rise from 5% to 8% as a result of the OLPP Rule, and thus erroneously lowered egg production rates in light of that projection. They argued that the Economic Analysis Report's finding that the projected increase in mortality was not fully incorporated into the benefits calculation and thus led to an overestimation of benefits by 1.4 percent was in error because the Economic Analysis Report did not examine the original projected increase. In support of this critique, some of these commenters opined that actual flock records show lower mortality rates and provide better data than the sources cited by the Economic Analysis Report. However, they did not provide any flock records in support of this claim.

In the Final RIA, AMS projected that mortality rates of organic layers would rise by three percentage points, from a mortality rate of 5 percent to a mortality rate of 8 percent, as a result of the new outdoor access requirements that would expose layers to increased risks of disease and predation. This mortality allowance responded to public comments on the Final RIA and was guided by data from the Animal and Plant Health Inspection Service (APHIS) National Animal Health Monitoring and Surveillance (NAHMS) 2013 Layers study.⁸ The Economic Analysis Report made reference to this component of the Final RIA's analysis, but it did not itself make or modify any projections regarding increased mortality rates because doing so would disturb the baseline levels of production. Rather, the Economic Analysis Report simply noted that AMS failed to fully incorporate the projected mortality increase into the Final RIA. While the Final RIA's cost estimates did reflect the lower egg production level based on projected higher

⁸ https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/monitoring-and-surveillance/nahms/nahms_poultry_studies/

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mortality, the benefits were calculated on the unadjusted production levels without considering the lower production levels resulting from the mortality adjustment.

Regarding the accuracy of the mortality rate increase used by AMS, one commenter cited a survey by the Organic Trade Association conducted during the Economic Analysis Report's public comment period as showing that the mortality rate for laying hens was 6.07 percent. However, AMS does not have access to this data or the details of how it was collected, and the Agency thus cannot assess its methodological soundness or rely on it as being representative of the industry for the purposes of these proceedings. Furthermore, AMS finds support for its prior assumption of a 3 percent mortality increase in a 2020 study by Bestman and Bikker-Ouwejan⁹, which finds that, "on average, 3.7 percent of hens in organic/free-range flocks were estimated to be killed by predators, while total mortality is 12.2 percent." This suggests that AMS's assumed 3 percentage point increase in mortality under the OLPP Rule accurately captures the likely increase in layer mortality from predation under the new open access requirement.

The commenter also cites Leenstra et al (2014) as showing different rates of hen mortality by farm types, including organic, free-range, barn, and caged, and argues from these trends for the "use of a zero excess mortality attributable to outdoor access because even if, currently, there is some degree of excess mortality due to outdoor access, by the time [the OLPP Final Rule] is fully implemented, technological and management advances are likely to eliminate the existing differences" OTA comment on the Economic Analysis Report at 8. However, the commenter provided no data or information in supporting this argument and AMS finds it to be being highly speculative about the future direction of technology, as well as inconsistent with the

⁹ Monique Bestman and Judith Bikker-Ouwejan "Predation in Organic and Free-Range Egg Production" *Animals* 2020 10,177.

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Bestman study. More importantly, although AMS acknowledges that a range of viewpoints regarding the impact of the outdoor access provisions on the mortality levels of organic layers is supported by differing literature, for purposes of this Economic Analysis Report, AMS continues to believe that the loss rate projections in the Final RIA were methodologically sound and reasonable.

6. Correction to Lay Rates

A commenter stated that the Economic Analysis Report erred by concluding that annual egg production rates should be reduced from 24.7708 dozen eggs per layer to 23.0406 dozen eggs per layer because the lower figure relies on AMS Market News Report data rather than other data that the commenter believes to be more representative of the industry. AMS disagrees with this comment. Although the Final RIA assumed the average number of eggs laid per hen was 24.7708 dozen, that figure was used without citation and, based on AMS market data available, it overestimates the number of eggs produced by 7.51 percent compared to the estimates provided in the contemporaneous Market News Report. The 24.7708 dozen estimate in the Final RIA was also larger than the estimate used in the Preliminary RIA, which cited a rate of 284 eggs/hen/year from pasture production, which is equivalent to 23.67 dozen per year. The Economic Analysis Report noted that this error may be related to the fact that, although the Final RIA stated that AMS Market News data reported 14 million organic layers in production in 2016 based on April data, that statement was incorrect. AMS Market News actually reported an estimated 11,350,500 organic layers in each of the four reporting weeks in April of 2016 in its “Weekly USDA Certified Organic Poultry and Eggs” report. It was not until the November 2016 report that the estimated flock was increased to 14,087,500 layers. Additionally, the Economic

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Analysis Report explained that the highest level of organic egg production reported between April 2016 and January 2017 was 207,497 multiplied by 30-dozen cases, or 6,224,910 dozen eggs per week. The Economic Analysis Report calculated the laying rate at this highest level of weekly production, based on 52.143 weeks per year, and a laying flock 14,087,500 birds, to equal 324,584,359 dozen eggs produced per year, which yields an average of 276.49 eggs, or 23.0406 dozen, per laying hen per year. AMS believes that this methodology was appropriate.

A commenter stated that the AMS Market News Weekly USDA Certified Organic Poultry and Eggs Report should not be considered representative of the industry because the USDA report includes the disclaimer “does not reflect all organic production; estimates are based on data collected from industry cooperators and other sources.” An alternative higher production rate 24.689 dozen was suggested by the commenter. That estimate, however, is based on a sample of 5.62 million layers and is not publicly available. Because the size of this sample is only 40 percent of the size of the AMS data surveying 14.087 million layers, it is an even less robust sample of egg production than the AMS Market News Weekly Report and thus is likely to be less representative of the industry than the figures on which AMS relied.

7. Assumptions on Future Growth of Production

Finally, multiple commenters disagreed with the Final RIA’s assumption that organic egg production will grow at the 12.7 percent rate that is applied in two of the three scenarios considered in the Final RIA. These commenters stated that by failing to recognize growth opportunities presented by new OLPP compliant operations, the growth rate assumptions in the Final RIA are too low. They further argued that, under the three scenarios considered by the Department, there was no reason for the Final RIA to assume that some organic producers would

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exit the market rather than comply with the OLPP Rule, given the strong demand and a growing market. They further contended that, even if some producers did exit the market, other OLPP compliant producers would replace them and that the Final RIA underestimated these new entrants' effects on the assumed growth rate of 12.7% per annum.

The Economic Analysis Report did not critique the soundness of either the Final RIA's assumption that the industry would continue to grow by 12.7 percent annually over the 15-year period or its assumption that some organic producers would exit the industry rather than comply with the rule. Based on comments to the preliminary RIA, AMS increased its assumed rate of industry growth when it issued the Final RIA and it maintained that rate unchanged in the Withdrawal RIA. AMS continues to believe that this assumed rate appropriately incorporated industry information and expectations that were available at the time of the Final RIA's publication, which suggested an average growth rate of 12.7 percent across the preceding decade. The Economic Analysis Report addressed only the lack of consistency in the calculated production levels based on the assumed rate of growth and industry exit under the three scenarios considered in the Final RIA. For example, the Economic Analysis Report found that the Final RIA had multiple instances where the production levels used in the benefits and cost calculations of the RIA did not reflect the production levels implied by the assumed growth rates. AMS notes that even the 12.7 percent value assumed robust growth far exceeding annual growth in other sectors and was based on explosive growth in the organic industry that may have been due, in part, to independent factors not attributable to the organic label, such as lack of supply in the conventional markets. AMS believes that there is no reason to assume that growth would exceed that average rate 12.7 percent per year across the entire 15-year period, especially in light of the increased costs expected to result from the OLPP Rule and considerations of market maturation.

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Comments on General Policy or Beyond the Scope of the Request for Comments

The limited purpose of this notice-and-comment proceeding was to assist AMS in forming a final assessment regarding the methodological soundness of the OLPP Final RIA and Withdrawal RIA and any policymaking conclusions that flow from that assessment. Most commenters provided their views on other aspects of the OLPP rulemaking, namely legal and policy arguments in favor of the OLPP Rule that do not relate to the methodology of the RIAs. Those views include opinions regarding AMS's legal authority to promulgate the OLPP Rule, the role of the NOSB in the rulemaking process, the support of stakeholders for the OLPP Rule, and the perceived benefits of the OLPP Rule. Although AMS appreciates these comments, they are beyond the scope of the request for comment and thus AMS is not providing responses to them in light of the limited scope of this proceeding. This proceeding was not intended to fully reopen the legal and policy discussion regarding the OLPP Rule. Those issues have already been the subject of three notice-and-comment proceedings in the last four years. To the extent the comments reiterate opinions already expressed during the rulemaking proceedings on the OLPP Rule, the delay of its effective date, and the Withdrawal Rule, AMS refers to the discussions of those rulemaking documents that provide its analysis and responses to those comments.

Commenters also made assertions regarding benefits of the OLPP that did relate, in some respect, to the soundness of AMS's analysis of costs and benefits but were speculative and difficult, if not impossible, to validate and/or quantify. For example, commenters argued that the Economic Analysis Report underestimated the importance of animal welfare to organic consumers, how the OLPP Rule would increase consumer knowledge of animal welfare practices in organic production, and how such knowledge could, in turn, increase organic consumer's willingness to pay organic price premiums. However, these asserted benefits are highly

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speculative and their proponents proffered no data or studies supporting or quantifying the alleged relationships between animal welfare practices, consumer knowledge of the same, and the impact of such knowledge on organic consumers' WTP. Furthermore, AMS believes that the Final RIA and, by extension, the Withdrawal RIA, expressly considered this idea by relying on research that attempted to measure consumer WTP for animal welfare attributes. Thus, AMS does not agree that these critiques identify any additional errors in the Final RIA or the Withdrawal RIA. Moreover, AMS notes that the organic regulations existing prior to the OLPP Rule set standards for livestock and poultry healthcare, feed, and living conditions. The significant expansion of the organic egg laying flock, organic egg production, and reported sales under these regulations demonstrate consumer trust in current practices and requirements.

Some commenters similarly argued that other alleged benefits of the OLPP Final Rule should have been considered in the Economic Analysis Report, including increased consumer confidence in the organic label; greater uniformity in organic practices; a more level playing field among producers; the promotion of soil fertility and nutrient recycling; a reduction or prevention of certain external costs generated by factory farms such as pollution; a reduction in import fraud; and a preservation of organic equivalency arrangements with foreign trading partners. However, the existence and scope of those benefits are speculative at best and the commenters proffered no data or studies quantifying or otherwise supporting the purported benefits. Thus, AMS believes that the opinions in these comments reflect policy disagreements regarding the possible consequences of the OLPP Rule, rather than methodological flaws in the economic analyses. AMS has already responded to the substance of these comments in the prior rulemaking proceedings.

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Some commenters disagreed with USDA's use of the cost benefit analysis generally, stating that such analyses should not apply to programs in which participation is entirely voluntary. However, as noted in the proposed rule explaining AMS's intent to withdraw the OLPP Final Rule, published in the Federal Register on December 18, 2017 (82 FR 59988), the Office of Management and Budget designated withdrawal of the OLPP Final Rule an economically significant regulatory action, thereby necessitating a cost benefit analysis undertaken pursuant to Executive Orders 12866 and 13563, and these Executive Orders make no distinction between mandatory and voluntary programs. Other commenters said that AMS wrongly considered the costs and benefits to large factory farms,¹⁰ whose industrialized production models the commenters asserted were innately non-organic. However, AMS regulates organic processes and it permits a variety of organic production practices. It does not presume the compatibility of certain production practices and models with organic requirements, and if a factory farm is able to develop and adhere to an approved organic system plan that complies with existing regulations, then AMS will deem it organic, regardless of its size or structure.

Some commenters stated that AMS should issue a corrected Regulatory Impact Analysis for the OLPP Withdrawal Rule instead of preparing a report cataloguing and explaining the errors in both the Final RIA and the Withdrawal RIA. However, after AMS identified the additional errors in December 2019, it determined that the prudent course was to proceed

¹⁰ Another commenter said that AMS was incorrect to use the Small Business Administration's (SBA) threshold of \$15 million in annual revenue as the cut-off for small organic farms in the Final RIA, given the size differences between the organic and non-organic submarkets. However, this comment falls well outside the scope of the request for comments on the Economic Analysis Report and AMS will not address it further.

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incrementally by first identifying the errors and then deciding what to do about them. Had AMS decided that further policymaking was necessary, AMS agrees that preparation of a new RIA might have been appropriate, but AMS has decided against such further preparation for the reasons stated below. AMS disagrees that it should have attempted to correct the errors in the Final RIA. The errors in that RIA were so pervasive and intertwined with the rest of the analysis, and certain methodological choices so poorly documented, that it would be difficult to attempt to isolate and fully correct for each documented error. In light of the pervasive errors discovered to date and the failure to document certain methodological choices, AMS could not be confident that other errors may not later come to light, thus necessitating further corrections. Furthermore, even if the errors could be isolated from the rest of the analysis and fully corrected, the data underlying the cost benefit calculations date back to at least 2014 or earlier and thus may no longer be valid, especially in light of the economic changes occasioned by the COVID-19 pandemic. The only way that USDA could confidently address all of the errors and account for changing economic conditions would be to start the cost benefit analysis over from scratch. However, AMS believes that it would not have been possible to complete a new regulatory impact analysis, seek and address comments on that analysis, and finalize it within the time constraints imposed by the Court's order.

Additionally, as explained in the Withdrawal Rule, USDA does not believe that the OFPA provides statutory authority for the OLPP Rule or (even if it did) that there has been a market failure that makes an intervention in the market necessary and thus warrants the use of limited agency resources to complete a new RIA. As noted in the discussion of market failure or the lack thereof in the Withdrawal Rule (83 FR 10775), a variety of organic production practices may be employed to meet organic production standards and the existence of such variety is not

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an indication of a significant market failure. Moreover, as shown by the Organic Trade Association's annual 2019 Organic Industry Survey, demand for organic eggs and poultry was strong in the years prior to the promulgation of the OLPP Rule and has remained so since its withdrawal.

Finally, when USDA sought remand of the OLPP Withdrawal Rule from the District Court for the District of Columbia, it explained that it was doing so "to address *whether* [the identified flaws] require changes to the economic analysis," and did not commit that it would necessarily undertake a new or corrected cost benefit analysis for the rule. As explained in this Final Decision, AMS has determined that it would not be feasible or prudent to attempt to correct the prior economic analyses and that preparation of a new analysis would not be an appropriate use of agency resources in light of AMS's other bases for withdrawing the OLPP Rule. Instead, USDA has produced the Economic Analysis Report and this final decision, which conclude that the RIAs for the OLPP Rule and Withdrawal Rule are seriously flawed and thus did not produce a reliable projection of costs and benefits, and AMS is withdrawing its prior conclusions regarding the economic impacts of the OLPP Rule to reflect these assessments without initiating further policy changes.

Another commenter questioned the integrity of the Economic Analysis Report, stating that its author, Dr. Peyton Ferrier, did not conduct an independent peer review of the OLPP Rule and Withdrawal Rule RIA's because he is an AMS employee who was tasked with reaffirming the agency's withdrawal decision. It stated that the Economic Analysis Report should be more properly considered a Litigation Report. AMS acknowledges that Dr. Peyton Ferrier is currently an AMS economist, but he was not involved in, nor was he an AMS economist at the time of, the development, drafting, or review of the OLPP RIA, the OLPP Rule, the Withdrawal RIA, or the

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Withdrawal Rule. Therefore, he was able to provide an independent perspective on the integrity of the methodology and calculations used by other USDA economists and organic program who were involved in the preparation of the RIAs for the prior rulemakings, and he did in fact conduct an independent peer review of those RIAs. Furthermore, Dr. Ferrier was not asked to opine on what the USDA's final decision on the OLPP rulemaking should be, and he did not advocate for a particular outcome in the Economic Analysis Report. Rather, he supplied underlying data and his analysis of that data, which USDA has considered in making and explaining this Final Decision.

Commenters also criticized Dr. Ferrier's reliance upon a 2013 article by Yan Heng, Hikaru Hanawa Peterson, and Xianghong Li (Heng et al.) for its values of consumer WTP for outdoor access. AMS actually considered estimates of consumer WTP from several studies, but Heng et al. (2013) was specifically cited in the Economic Analysis Report because that study supplied the figures that AMS relied upon in projecting the anticipated benefits of the OLPP in the Final RIA and Withdrawal RIA. As previously noted, the narrow purpose of the Economic Analysis Report was to review and critique the two prior RIAs and the errors in those RIAs revolved around the 2013 Heng study. Thus, it was relevant to the discussion of certain identified flaws or weaknesses in those analyses and Dr. Ferrier appropriately made it his focus.

Other comments challenged the Economic Analysis Report on the ground stated that the RIAs and Economic Analysis Report were not transparent and that the data and formulas that were used to prepare them had not been made publicly available or were inconsistent with the available private sector data, thus rendering them unreproducible and unverifiable. While the previous RIAs may not have been fully transparent in their modeling, AMS disagrees with commenter assertions that the Economic Analysis Report is not transparent in its modeling. The

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Economic Analysis Report comprehensively catalogues and explains errors presented in the previous RIAs, particularly those in the cost calculations and depreciation schedules.

Furthermore, when AMS published the Economic Analysis Report, it also published several supporting documents and files explaining the report's data and formulations in the rulemaking docket on regulations.gov. AMS is unaware of the private sector data referenced in specific comments and the commenters did not provide those data.

One commenter stated that USDA failed to give commenters sufficient time to review and comment on the Economic Analysis Report because USDA did not expand the comment period on the report from 30 days to 60 days, as requested. However, a 60 day comment period would not have allowed AMS to complete the necessary steps to draft and publish the Economic Analysis Report, review and analyze the comments on the report, and complete this Final Decision by the deadline set by the District Court in the District of Columbia. Additionally, the Regulatory Impact Analysis for the OLPP Final Rule has been available since January 2017, and the Regulatory Impact Analysis for the OLPP Withdrawal Rule has been publicly available since March 2018. Furthermore, USDA identified and described concerns regarding those RIAs in public litigation filings on January 3, January 24, and February 21, 2020. Thus, although the Economic Analysis Report was not itself published until April 23, 2020, AMS believes that commenters had ample opportunity to familiarize themselves with the Final RIA and the Withdrawal RIA and that 30 days was sufficient to review a report analyzing specific flaws in those documents.

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AMS Final Decision

The purpose of the remand was to clarify and supplement the record regarding the OLPP and Withdrawal Rules in light of new facts and information that came to USDA's attention in December 2019, and for AMS to make a decision on whether further rulemaking action or economic analysis is warranted in light of that new information. USDA accomplished this goal by commissioning Dr. Peyton Ferrier to review the RIAs for the OLPP Final Rule and OLPP Withdrawal Rule and to articulate the impact of his findings on the existing regulatory framework under the Withdrawal Rule. Pursuant to this process, Dr. Peyton produced the Economic Analysis Report setting forth his conclusion that there were significant methodological flaws in both RIAs, and AMS solicited public comment on the findings in the Report. After careful consideration of the Economic Analysis Report and the comments received thereupon, USDA finds nothing in those comments that would cause it to reject or modify the findings of that report, and it affirms the findings of the report.

The Economic Analysis Report discredits the Final RIA because that RIA contained multiple methodological errors that were carried forward to the Withdrawal RIA and conclusively demonstrate its untrustworthiness. The Final RIA incorrectly applied a discounting formula to future benefits, used an inappropriate WTP for the value of eggs produced under the OLPP Rule's outdoor access requirements, and applied depreciation to the benefits of the rule but not the costs. The Withdrawal RIA corrected the first two errors, but it only partially corrected the third because it attempted to remove the depreciation treatment from the benefits calculation but did not fully do so. The Economic Analysis Report also found four other significant errors in the Final RIA that went undiscovered until they were brought to light by a review that was prompted by Dr. Thomas Vukina's extra-record analysis, and which thus carried

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over into the Withdrawal RIA. These results indicate that the Final RIA was significantly flawed and caused the Withdrawal RIA to be flawed. To the extent the Withdrawal Rule formed an assessment of the likely costs and benefits of the OLPP Rule based on that flawed analysis, AMS hereby modifies that assessment and concludes simply that the Final RIA does not support promulgation of the OLPP Rule in light of its significant flaws. Implementing the OLPP Rule based on such a flawed economic analysis is not in the public interest. AMS makes no changes to the conclusions set forth in the Withdrawal Rule that did not rely on the flawed RIAs and leaves the remainder of the Withdrawal Rule intact. In light of these findings and conclusions, USDA sees no basis for, and thus has decided not to take, any further regulatory actions or to make any policy changes with respect to the OLPP Rule.

Bruce Summers, Administrator,
Agricultural Marketing Service.