

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

BRIEF OF THE AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF

With leave of the Court¹, the American Society for the Prevention of Cruelty to Animals (“ASPCA”) hereby submits this brief as *amicus curiae* in support of Plaintiff Organic Trade Association’s *Response in Opposition to the Government’s Motion to Dismiss* (Dkt. 16) (hereinafter, “Response”) in the above-captioned matter. For the reasons set forth here, the ASPCA respectfully requests the Court find in favor of Plaintiff and deny Defendants’ *Motion to Dismiss* (Dkt. 14) (hereinafter, “Motion”).

¹ Pursuant to LCvR 7(o), this brief is submitted conditionally along with a Motion for Leave to File *Amicus* Brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1, 29, and LCvR 26.1, the undersigned counsel of record certifies that *amicus curiae* is a non-profit organization with no corporate parents or owners.

Dated: March 1, 2018

/s/ Jennifer H. Chin
Counsel of Record for *Amicus Curiae*

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**STATEMENT OF IDENTITY OF *AMICUS CURIAE*, ITS INTEREST IN THE
CASE, AND SOURCE OF AUTHORITY TO FILE**

Pursuant to FED. R. APP. P. 29(a)(4)(D), *amicus curiae* is identified as the American Society for the Prevention of Cruelty to Animals (“ASPCA”). The ASPCA is a not-for-profit corporation whose mission is to provide an effective means for the prevention of cruelty to animals throughout the United States. Incorporated in 1866 by a special act of the New York State legislature, the ASPCA is North America’s oldest humane organization. Today, it is also one of the largest, with roughly 2.5 million supporters nationwide.

The ASPCA has a well-established farm animal welfare program that seeks to improve the lives of the billions of animals on American farms through outreach with consumers, advocates, farmers, industry, policymakers, and lawmakers. For example, the ASPCA’s “Shop With Your Heart” campaign assists the increasing number of consumers who prefer to purchase meat, eggs, and dairy products derived from more humanely raised livestock.² In addition, ASPCA experts with substantial knowledge of animal welfare science and welfare certification programs help farmers and other companies implement sustainable business models built on more humane practices and participation in meaningful animal welfare certification programs

² As used in this brief, the term “livestock” is the same as defined under the Organic Foods Production Act which states: “The term ‘livestock’ means any cattle, sheep, goats, swine, poultry, equine animals used for food or in the production of food, fish used for food, wild or domesticated game, or other nonplant life.” 7 U.S.C. § 6502(11) (2012).

consumers can trust.³ The ASPCA also advocates for a range of laws, regulations, and policies that promote greater protection for farm animals.

Based on this knowledge and experience, the ASPCA is uniquely well-suited to advise the Court on the public policy problems posed by the USDA's decision to repeatedly delay implementation of the *Organic Livestock and Poultry Practices* rule, which was intended to establish meaningful animal welfare standards for products bearing the USDA Organic label and ensure that those standards are in fact aligned with consumer expectations.

The ASPCA files this brief pursuant to LCvR 7(o) and FED. R. APP. P. 29(a).

STATEMENT OF FUNDING

Pursuant to FED. R. APP. P. 29(a)(4)(E), the ASPCA states that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of the brief; and no person, other than the ASPCA, its members, and its counsel, contributed money that was intended to fund preparing or submitting the brief.

³ The ASPCA's farm animal welfare experts generally recommend that consumers who want higher welfare meat, eggs, or dairy seek out producers who participate in certification programs that have implemented higher welfare practices, such as pasture-based farming and enriched indoor environments, that are verified by third-party auditors including, for example, Animal Welfare Approved, Certified Humane®, and Global Animal Partnership. *See* <https://www.aspca.org/shopwithyourheart/consumer-resources/meat-eggs-and-dairy-label-guide>.

SUMMARY OF ARGUMENT

In failing to implement the *Organic Livestock and Poultry Practices* rule (“Final Rule”), the USDA has abdicated its responsibility under the Organic Foods Production Act of 1990 to establish consistent and meaningful animal welfare standards for businesses using the USDA Organic label on their products. Contrary to the USDA’s argument, the Final Rule is a major step forward from existing regulations, which fail to set clear and consistent standards regarding such basic animal welfare issues as adequate space and outdoor access for most farm animals for products bearing the USDA Organic label. The Final Rule would establish critical protections for millions of animals raised in the USDA Organic program, including: minimum indoor space and air quality for chickens, easy outdoor access for poultry that includes soil and vegetation, pain control and a prohibition on certain painful physical modifications, and transport and slaughter standards for all farm animal species.

With consumer demand for organic products exploding over the last decade or more, spurred in part by the public’s growing support for more humane treatment of farm animals, implementing the Final Rule is not only a legal imperative as OTA contends, but is a public policy imperative as well. Indeed, many of the animal welfare requirements the Final Rule would establish are standards that consumers—who often pay a premium for organic products—believe are already in place. Instead, animals raised under the current USDA Organic program may live under inhumane conditions that are indistinguishable from those on conventional farms. It is perhaps little surprise that the vast majority of organic farmers, some of whom have already adopted more humane practices than those required under the Final Rule, strongly support its implementation. Under current regulations a small but powerful group of large-scale producers

are entirely free to profit from using the USDA Organic label on their products without affording animals on their farms any of the protections consumers expect.

In short, implementation of the Final Rule would help ensure that the USDA Organic label engenders consumer trust rather than erodes it—something that the USDA itself recognized during the rulemaking process but has now suddenly and baselessly disavowed.

ARGUMENT⁴

I. IN FAILING TO IMPLEMENT THE FINAL RULE, THE USDA HAS ABDICATED ITS RESPONSIBILITY TO SET MEANINGFUL ORGANIC STANDARDS THAT ALIGN WITH CONSUMERS' REASONABLE EXPECTATIONS.

Under the Organic Foods Production Act (OFPA) of 1990⁵, one of the stated purposes of which is “to assure consumers that organically produced products meet a consistent standard,” the USDA is responsible for developing and implementing national standards for products bearing the USDA Organic label. In January 2017, the USDA issued the Final Rule after a decades-long collaboration with the National Organic Standards Board (NOSB), an advisory body created by Congress, along with organic producers, consumers, non-governmental organizations, and members of the veterinary and scientific community. The Final Rule establishes stronger protections for the millions of farm animals raised in the USDA Organic program and creates more consistent welfare standards for businesses seeking to use the USDA Organic label on their products. The USDA’s repeated failure to implement the Final Rule constitutes an abdication of its statutory responsibility to consumers under the OFPA.

A. Consumers Expect Products Bearing the USDA Organic Label to Meet Higher Animal Welfare Standards.

⁴ The ASPCA adopts the facts alleged in Plaintiff’s First Amended Complaint (Dkt. 13), and recites only those that pertain directly to the arguments presented in this brief.

⁵ 7 U.S.C. § 6501 *et seq.* (2012).

According to the ASPCA’s research, the vast majority of Americans care deeply about the welfare of the billions of farm animals raised for food in this country. Willing to pay more for higher welfare food products, consumers are increasingly paying attention to labels that indicate how a producer raised an animal. Yet, there are widespread misconceptions about what common labels like “free-range” actually mean when it comes to animal welfare. The ASPCA commissioned a 2014 national survey of more than 1000 consumers conducted by Edge Research. With respect to the USDA Organic program specifically, the survey showed that the majority of organic consumers believe the USDA Organic label indicates humane treatment of farm animals despite the fact that this expectation may not always reflect reality.⁶

The survey revealed wide gulfs between consumer belief and what is actually required. For example, sixty-eight percent of organic food consumers surveyed believe animals raised under the USDA Organic program have access to outdoor pasture and fresh air throughout the day.⁷ However, there is currently no clear requirement for type and length of outdoor access. Similarly, sixty-seven percent of those surveyed believe animals raised under the program have significantly more space to move than on non-organic farms.⁸ In fact, current regulations do not require a numerically expressed minimum amount of space per animal. With respect to physical alterations, close to a majority of those surveyed believe animals do not have their beaks and tails cut off even though current standards permit debeaking and tail docking.⁹

⁶ See *Research on Consumer Perceptions of Organic Food Standards for Treatment of Animals*, Edge Research (April 2014) available at https://www.asPCA.org/sites/default/files/aspca_organic_labeling_public_memo_4-10-14.pdf.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

Conditions on farms that participate in the USDA’s Organic program vary greatly. Despite this fact, both organic and non-organic food consumers overwhelmingly support establishing meaningful and consistent requirements for “outdoor access” as shown by their responses to the following requirements:

Sufficient space for the majority of animals

- 97% of organic food consumers support
- 92% of non-organic food consumers support

Vegetation to graze on

- 93% of organic food consumers support
- 91% of non-organic food consumers support

Access to open pasture

- 94% of organic food consumers support
- 90% of non-organic food consumers support

Natural ground (not concrete)

- 93% of organic food consumers support
- 90% of non-organic food consumers support¹⁰

A nationally-representative survey of consumers conducted by Consumer Reports in 2017 shows a similar result. More than twenty-five percent of Americans “always” or “often” buy food labeled organic.¹¹ Of that group, eighty-six percent say it is highly (“extremely” or “very”) important that the animals used to produce organic food are raised on farms with high standards for animal welfare.¹² For example, with respect to outdoor access, eighty-three percent of organic

¹⁰ *Id.*

¹¹ See *Animal Welfare Survey*, Consumer Reports National Research Center (March 18, 2017) available at <http://greenerchoices.org/wp-content/uploads/2017/04/2017-Animal-Welfare-Survey-Public-Report.pdf>.

¹² *Id.*

consumers responded that it is highly important that eggs labeled “organic” come from hens that are able to go outdoors and move freely.¹³

The USDA itself has repeatedly acknowledged the Final Rule helps the agency meet its responsibility to ensure standards under the USDA Organic program are consistent and meet consumer expectations, stating for example:

- This final rule creates greater consistency in organic livestock and poultry practice standards . . . 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).¹⁴
- The NOSB deliberations on these recommendations revealed that there is considerable support for these recommendations within the organic community and consumers have specific expectations for organic livestock care, which includes outdoor access for poultry.¹⁵
- [The Agricultural Market Service] is conducting this rulemaking to maintain consumer confidence in the USDA organic seal. This action is necessary to augment the USDA organic livestock production regulations with clear provisions to fulfill one purpose of the Organic Foods Production Act (OFPA) (7 U.S.C. 6501-6522): To assure consumers that organically-produced products meet a consistent and uniform standard.¹⁶

The surveys cited above, along with the USDA’s own statements, show consumers expect the USDA Organic label to reflect higher welfare practices. The Final Rule is critical to closing the substantial gap that currently exists between consumer expectations and the actual conditions on some farms that currently participate in the USDA Organic program. Without such change this disparity threatens to completely erode consumer trust in the USDA Organic label.

¹³ *Id.*

¹⁴ Organic Livestock and Poultry Practices Rule, 82 Fed. Reg. 7042, 7042 (Jan. 19, 2017) (hereinafter “Final Rule”).

¹⁵ *Id.* at 7043.

¹⁶ *Id.* at 7082.

B. The Final Rule Provides Significant Protections That Do Not Exist under Current Regulations.

Although current regulations provide certain loose standards under the USDA Organic program, the USDA itself has acknowledged these only include “broad and general requirements for ensuring the well-being of organic livestock and poultry.”¹⁷ Existing regulations, for example, require organic livestock operations establish and maintain living conditions that accommodate the health and natural behavior of animals, including year-round access to the outdoors and shelter designed for maintenance, comfort behaviors, and opportunity to exercise.¹⁸ Although these requirements are a step in the right direction, the language is so vague that it has resulted in inconsistent practices with respect to these critical welfare issues.¹⁹ In order to better align what the USDA Organic program actually requires with consumer expectations, the Final Rule incorporates significant changes with respect to outdoor access and stocking density. The Final Rule also presents significant departures from the Existing Rule for practices such as environmental enrichments (*e.g.*, perches, dustbathing material), restrictions on physical mutilations, transport coverage, and slaughter coverage.

1. Ensuring Meaningful Outdoor Access

The OFPA provides that “[t]he National Organic Standards Board shall recommend to the Secretary standards in addition to those in paragraph (1) for the care of livestock to ensure

¹⁷ See *Organic Livestock and Poultry Practices Final Rule, Questions and Answers*, USDA Agricultural Marketing Service, National Organic Program (January 2017) available at <https://www.ams.usda.gov/sites/default/files/media/OLPPEExternalQA.pdf> (hereinafter, “USDA Final Rule Questions and Answers”), at 2.

¹⁸ See 7 C.F.R. § 205.239 (2002).

¹⁹ See USDA Final Rule Questions and Answers, at 1.

that such livestock is organically produced.”²⁰ In 2000, the USDA followed the NOSB’s recommendations and issued regulations requiring that “[t]he producer of an organic livestock operation must establish and maintain year-round livestock living conditions which accommodate the health and natural behavior of animals, including . . . [y]ear-round access for all animals to the outdoors”²¹ In short, outdoor access has been a requirement for organic producers for the past eighteen years, albeit one with serious shortcomings.

Existing regulations do not define or specify what constitutes “outdoor access.” As a result, producers have adopted a variety of practices. Many such practices are insufficient to meet the basic needs of poultry. For example, some producers use enclosed “porches”—typically enclosed structures with roofs and solid floors—to fulfill the outdoor access requirement. In developing the Final Rule, however, the USDA agreed with the majority of commenters who argued that these types of structures, which thwart natural behaviors, should not satisfy the outdoor access requirement. Accordingly, under the Final Rule, producers that provide only enclosed porches in an attempt to comply with the outdoor space requirement would not be permitted to affix the USDA Organic label to their products.²²

²⁰ 7 U.S.C. § 6509(d)(2). Subsection (1) prohibits subtherapeutic doses of antibiotics; synthetic internal parasiticides on a routine basis; and the administration of medication, other than vaccinations in the absence of illness. 7 U.S.C. § 6509(d)(1).

²¹ 7 C.F.R. § 205.239(a)(1).

²² See Final Rule at 7068 (“In the final rule, AMS has retained a requirement for outdoor access, and AMS has defined the outdoors (§ 205.2) to clarify that birds must be in the open air, outside an enclosed building or housing structure, to be considered outdoors”); see also Final Rule Questions and Answers at 7 (“An **enclosed** ‘porch’ or ‘winter garden’ cannot be considered part of the outdoors in the final rule. . . . To be counted as outdoor space, a roofed area must allow birds to move freely to the rest of the outdoor space. The final rule ensures that birds are provided with access to the outdoors.” (emphasis in original)).

In addition, the Final Rule sets out specific requirements for outdoor access for poultry which the USDA summarizes as follows:

Section 205.241(c)(1) requires that the outdoor space be designed to promote and encourage outdoor access for all birds. Producers are required to provide access to the outdoors at an early age. This section requires door spacing to be designed to promote and encourage outdoor access and requires outdoor access to be provided on a daily basis . . . Outdoor access may only be temporarily restricted in accordance with § 205.241(d).²³

Significantly, the USDA recognized that “[t]his objective is guided by the NOSB recommendations and public and expert comment received during those deliberations that indicated **a risk to the integrity and value of the organic seal from the gap between consumer expectation and current industry practice.**”²⁴ The Final Rule also establishes requirements for, among other things, soil composition in outdoor areas, provision of shade, space requirements, and the limited circumstances under which non-enclosed porches may be considered outdoor space.²⁵ Thus, unlike existing regulations, the Final Rule provides extensive guidance to producers on how to structure their operations in order to comply with organic standards relating to outdoor space for poultry. The Final Rule would give consumers greater confidence that birds used for the production of USDA Organic products in fact have meaningful access to the outdoors.

The USDA’s argument that current outdoor access requirements meet consumer expectations is completely contradicted by the USDA’s prior position on this issue. USDA has noted, for example, that with respect to porches:

²³ See Final Rule at 7061.

²⁴ *Id.* at 7068 (emphasis added).

²⁵ See *id.* at 7061-62.

AMS disagrees with comments that argued that consumers are satisfied with the use of porches, or that demand for organic eggs is evidence of their satisfaction. 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 and the actual practices of some—but not all—organic producers**. One of the key objectives in implementing this final rule is to assure consumers that the practices used to produce organic products meet a consistent standard, including outdoor access for poultry.²⁶

In addition, with respect to outdoor access, the USDA explicitly stated that the agency “disagree[d] with the argument that current regulations could achieve the same results as the regulations revised by this final rule.”²⁷

2. Ensuring Adequate Indoor and Outdoor Space

The Final Rule’s definition of “stocking density” as “the weight of animals on a given area or unit of land” applies to both indoor and outdoor space requirements for organic livestock.²⁸ It builds on current requirements that shelter be designed to allow for natural maintenance, comfort behaviors, and opportunity to exercise.²⁹ The Final Rule also adds the requirement that indoor space be sufficiently spacious to allow all birds to move freely, stretch their wings, stand normally, and engage in natural behaviors.³⁰

The Final Rule further specifies the minimum indoor space requirements for chickens in different types of housing. Specifically, the Final Rule calculates indoor space requirements, or stocking density, based on pounds per bird per square foot.³¹ The USDA has explained that this

²⁶ *Id.* at 7068 (emphasis added).

²⁷ *Id.* at 7074.

²⁸ *See id.* at 7049, 7089.

²⁹ *See* 7 C.F.R. § 205.239(a)(4).

³⁰ *See* Final Rule at 7060.

³¹ *See id.* at 7061.

calculation allows the space requirements to remain more consistent between breeds, where the average weight per bird can vary significantly.³² In other words, larger breeds must be provided with more indoor space than smaller birds. The requirements also specify how to calculate indoor space so that birds have adequate room to meet the requirements.³³ These requirements were adapted from NOSB recommendations and take into account third-party animal welfare standards.³⁴

Similarly, the Final Rule specifies minimum outdoor stocking density, or space requirements, for chickens. Under the Final Rule, laying hens must be provided with at least one square foot of outdoor space for every 2.25 pounds of bird in the flock. For pullets, one square foot of space for every 3.0 pounds of bird is required, and for broilers, one square foot for every 5.0 pounds of bird is required.³⁵

In discussing the purpose of the detailed requirements for stocking density in the Final Rule, USDA points out, with respect to indoor space requirements:

They were designed to balance the need for clear guidance that could be applied across different breeds and types of bird, the goal of safeguarding the value of the organic seal, and the cost of diverging significantly from common practice among organic operations certified to third-party animal welfare standards.³⁶

As with “outdoor access,” the Final Rule thus adds detailed requirements for ensuring adequate space, bringing the USDA’s requirements more closely in line with consumer expectations and reducing inconsistency among producers.

³² *See id.*

³³ *Id.*

³⁴ *See id.*

³⁵ *See id.* at 7062.

³⁶ *Id.* at 7065.

C. The Final Rule Is the Product of Decades of Collaborations with Key Stakeholders Including Organic Farmers.

The Final Rule reflects a decades-long effort involving the USDA, NOSB, organic producers, consumers, non-governmental organizations, and members of the veterinary and scientific communities. Indeed, the process that led to the USDA's issuance of the Final Rule was considered by many to be an exemplar of true collaboration in developing agency regulations. The USDA analyzed tens of thousands of public comments, conducted economic impact calculations, and held at least half a dozen public meetings with stakeholders through its advisory board.³⁷

In an abrupt about-face, the USDA has repeatedly delayed implementing the Final Rule and has proposed withdrawing it altogether. Doing so undermines the collaboration and the years of work that all stakeholders, including the majority of organic producers, devoted to developing substantially improved and much needed regulation of organic products. Organic farmers, who provided many of the comments the USDA received on the Final Rule, expressed the need for greater clarity on organic standards.³⁸ Without the specific requirements set forth in the Final Rule, organic farmers are left with the vague language of existing regulations, which were always intended to be supplemented with more detailed regulations for organic production.³⁹

³⁷ The USDA has publicly acknowledged all of the different parties that weighed in on creating the Final Rule. *See* USDA Final Rule Questions and Answers, at 2.

³⁸ *See* Agricultural Marketing Service, Comments on Organic Livestock and Poultry Practices Second Proposed Rule, available at <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&D=AMS-NOP-17-0031>.

³⁹ *See* USDA Final Rule Questions and Answers, at 1 (“This rule also responds to direction in both the Organic Foods Production Act and the final rule that created the National Organic Program to develop standards for organic livestock.”).

II. CONCLUSION.

For the reasons stated above, *amicus curiae* the American Society for the Prevention of Cruelty to Animals urges the Court to deny Defendants' Motion and direct the USDA to implement the Final Rule as written.

Respectfully submitted,

March 1, 2018

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CERTIFICATE OF COMPLIANCE

I certify the following in accordance with FED. R. APP. P. 29(a)(4)(G) and 32(g)(1), and

Local Rule 7(o):

1. This brief complies with type-volume limits because this brief does not exceed 25 pages.

2. This brief complies with the typeface requirements of Local Rule 5.1(d) because it was prepared in a proportionally spaced typeface using Microsoft Word 2010 in double spaced 12-point Times New Roman type style.

Dated: March 1, 2018

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