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Kael Bowling
Friday, Eldredge & Clark, LLP

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WHY DID THE ORGANIC CHICKEN CROSS THE ROAD? TO SEE THE PROPOSED LIVESTOCK WELFARE RULES IN THE NATIONAL ORGANIC PROGRAM

Kael Bowling*

I. INTRODUCTION

The U.S. organic industry saw 11 percent total growth from 2014–15.1 Certified organic acreage accounted for 4.4 million acres in 2015 — a 20 percent rise from 2014 — approximately 45 percent of which was used in organic livestock production.2 Organic livestock production grew consistently with overall organic production from 2014 to 2015. Organic livestock and poultry products, such as milk and eggs, accounted for $1.9 billion in sales in 2015, up 27 percent from 2014.3 Specifically, organic egg production increased 74 percent, while organic milk production grew 8 percent.4 Organic livestock and poultry production grew 13 percent in the same span of time.5 In this sector, organic turkey saw the largest growth at 41 percent, followed by broiler chickens at 13 percent, and cattle at 8 percent.6 Yet even with this growth, “supply issues persisted to dominate the industry, as organic production in the U.S. lagged

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*Associate Attorney, Friday, Eldredge & Clark, LLP, Fayetteville, AR, J.D., University of Arkansas School of Law, LL.M. in Agricultural & Food Law, University of Arkansas School of Law expected May 2017. This Note was completed in conjunction with the author’s LL.M. coursework for Professor Nate Rosenberg’s Animal Law class. The author thanks Professor Rosenberg and his classmates for their feedback, his wife for her incredible support, and the editors and staff at the Kentucky Journal of Equine, Agriculture, and Natural Resources Law for their work.


3 Id. at 2 (Table 1).

4 Id. (Table 2).

5 Id. (Table 1).

6 Id. (Table 2).
behind consumption.”

This combination of booming growth and lagging supply reflects increasing consumer interest in organic foods. A 2014 Gallup survey reported nearly half of Americans “actively [tried] to include” organic foods in their diets. The survey also implied that this growth would continue. As the respondents’ age decreased, their likelihood to seek organic foods increased. About 53 percent of eighteen- to twenty-nine-year olds “actively [tried] to include” organic foods in their diets; 48 percent of thirty- to forty-nine-year olds, 45 percent of fifty- to sixty-four-year olds, and 33 percent of those older than sixty-five did the same. These figures indicate that the organic sector can expect continued demand as interested consumers age.

Consumers have also showed interested in animal welfare. A 2015 Consumer Reports survey found 84 percent of respondents deemed it important to improve livestock living conditions. 52 percent called this “very important,” up from 40 percent in 2014. 57 percent of respondents believed that organic livestock’s “living space met some meaningful minimum size requirements.” 54 percent believed that organic livestock went outside. Additionally, 73 percent of respondents said that organic livestock’s living requirements should meet “some meaningful minimum size requirements,” and 68 percent believed organic livestock should go outside. Consumers are clearly interested livestock welfare, with a particular interest in organic livestock.

On April 13, 2016, the United States Department of Agriculture’s (“USDA”) Agricultural Marketing Service (“AMS”) proposed major regulatory revisions to improve the welfare of

1 U.S. organic sales post new record of $43.3 billion in 2015, supra note 1.
3 Id.
4 Id.
6 Id.
7 Id. at 5.
8 Id.
9 Id.
organic livestock.\textsuperscript{15} In response to that proposal, some industry members argued the regulations contradict congressional intent and exceed agency authority.\textsuperscript{16} This Article addresses the industry members' arguments in turn. Part II of this Comment examines the general legislative and regulatory structure pertaining to organics. Part III then outlines current regulatory and statutory standards specifically related to organic livestock production. Part IV explains the proposed rule's changes to the current system and concludes by arguing that the proposed rules do not contradict congressional intent or exceed agency authority.

\textbf{II. THE ORGANIC FOODS PRODUCTION ACT OF 1990 AND THE NATIONAL ORGANIC PROGRAM}

The "organic movement" began in 1940 with Jerome Rodale, who founded Organic Gardening and Farming Magazine.\textsuperscript{17} In 1973, prior to any federal legislative action in the area, Oregon became the first state to regulate organic foods.\textsuperscript{18} By 1990, over twenty state legislatures had defined or regulated organic foods.\textsuperscript{19} Producers in states with no regulations could


\textsuperscript{19} Valerie J. Watnick, The Organic Foods Production Act, The Process/Product
make organic claims that were "virtually meaningless."\textsuperscript{20} In response to this patchwork of state regulation, Congress passed the Organic Foods Production Act of 1990 ("OFPA").\textsuperscript{21} The OFPA authorized the USDA to create the National Organics Program ("NOP").\textsuperscript{22} The USDA's AMS administers the NOP.\textsuperscript{23} The NOP's first set of proposed rules generated more comments than any other USDA regulation in history, which explains why the initial regulations were not finalized and made effective until over a decade after the OFPA's enactment.\textsuperscript{24}

Notably, the current organic statutory and regulatory structure is focused on the labeling and marketing of organic products.\textsuperscript{25} The regulations permit three primary ways to label organic products.\textsuperscript{26} Commentators have frequently noted that these regulations are "process-based" and not "product-based,"\textsuperscript{27} meaning the regulations govern production methods and inputs rather than focusing on testing or certifying end products.\textsuperscript{28} Most commentators have called for a change from the "process-based" regulatory structure to a "product-based" structure, but these changes have not yet materialized.\textsuperscript{29} Either way, this "process-product distinction"\textsuperscript{30} is important when ultimately determining

\begin{quote}
\end{quote}

\textsuperscript{20} Harrison, supra note 17, at 215.


\textsuperscript{22} See 7 U.S.C. § 6503.


\textsuperscript{25} See 7 U.S.C. § 6501(1) (2016): What has to be certified, 7 C.F.R. § 205.100(a); see also Product composition, 7 C.F.R. § 205.301(a)–(c).

\textsuperscript{26} 7 C.F.R. 205.301(a)–(c). These include "100 percent organic," "organic," and "made with organic (specified ingredients or food group(s))". Additionally, livestock feed, 7 C.F.R. § 205.301(e), and products with "less than 70 percent organically produced ingredients," 7 C.F.R. § 205.301(d), may be marketed as organic in some circumstances.


\textsuperscript{28} See Friedland, Lessing, Green, and Toomey, supra note 27.

\textsuperscript{29} See Friedland, Lessing, Green, and Toomey, supra note 27.

\textsuperscript{30} Michelle T. Friedland, \textit{You Call That Organic? The USDA’s Misleading Food
the propriety of regulating animal welfare through the NOP.

III. CURRENT ORGANIC LIVESTOCK REGULATION

Before one can fully understand the current organic governance's structure, one must understand some key definitions from the OFPA and NOP. The OFPA does not define "organic"; instead, it defines products that are "organically produced."31 "Organically produced" products are "agricultural product[s] that [are] produced and handled in accordance with" the OFPA.32 Agricultural products are defined in both the OFPA and NOP as "any agricultural commodity or product, whether raw or processed, including any commodity or product derived from livestock that is marketed in the United States for human or livestock consumption."33 The OFPA defines "livestock" as "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."34

Again, the current organic regulatory structure is "process-based" — not "product-based."35 Organic farmers and ranchers must create an organic system plan prior to certification.36 This plan must describe the organic management practices and procedures that will be implemented to ensure compliance with the NOP and OFPA.37 This reflects the "process-based" approach. The organic system plan must essentially describe the "process" by which organically produced products will be "produced and handled in accordance with" the OFPA and NOP.38


31 Watnick, supra note 19, at 46. The NOP defines "organic" as "[a] labeling term that refers to an agricultural product produced in accordance with the [OFPA] and the regulations in" the NOP, 7 C.F.R. § 205.2.
33 7 U.S.C. § 6502(1); 7 C.F.R. § 205.2.
34 7 U.S.C. § 6502(11). Notably, the NOP definition of "livestock" excludes "aquatic animals for the production of food, fiber, feed, or other agricultural-based consumer products." 7 C.F.R. § 205.2. Otherwise, the definition is the same as the OFPA's definition.
35 See supra note 27 and accompanying text.
36 7 C.F.R. § 205.201.
37 Id.
38 7 U.S.C. § 6502(14).
Certified organic livestock must generally be raised under "continuous organic management from the last third of gestation or hatching."\textsuperscript{39} This rule created an exception for poultry, dairy animals, and breeder stock. Poultry must be "under continuous organic management" after their first day of life.\textsuperscript{40} Dairy products must be derived from animals under "continuous organic management" for one year prior to production.\textsuperscript{41} Breeder stock\textsuperscript{42} may be inserted into an organic operation at any time, but if they are being used to produce organic livestock, the "last third of gestation" rule applies.\textsuperscript{43} Producers must "maintain records sufficient to preserve the identity" of all organic livestock.\textsuperscript{44}

Organic livestock must generally be fed organically produced feed.\textsuperscript{45} The OFPA specifically prohibits using "plastic pellets for roughage; . . . manure refeeding; . . . [and] feed formulas containing urea."\textsuperscript{46} Ruminants must be allowed to graze daily during grazing season.\textsuperscript{47} Pasture must be "managed as a crop,"\textsuperscript{48} and management practices must be included in the organic system plan.\textsuperscript{49} Pasture management requirements are partly aimed at reducing the risk of disease and parasite infestation.\textsuperscript{50} Pasture size and access requirements have been the subject of much debate.\textsuperscript{51}

\begin{itemize}
\item \textsuperscript{39} 7 C.F.R. § 205.236(a).
\item \textsuperscript{40} 7 C.F.R. § 205.236(a)(1).
\item \textsuperscript{41} 7 C.F.R. § 205.236(a)(2). This is subject to further exceptions related to organic feed and transitioning dairy animals. See generally 7 C.F.R. § 205.236(a)(2)(i)-(iii).
\item \textsuperscript{42} Breeder stock are "[f]emale livestock whose offspring may be incorporated into an organic operation at the time of their birth." 7 C.F.R. § 205.2.
\item \textsuperscript{43} 7 C.F.R. § 205.236(a)(3).
\item \textsuperscript{44} 7 C.F.R. § 205.2 (c); see also 7 U.S.C. § 6509(c).
\item \textsuperscript{45} 7 C.F.R. § 205.237.
\item \textsuperscript{46} 7 U.S.C. § 6509(c).
\item \textsuperscript{47} 7 C.F.R. § 205.239(a)(2). "Grazing season" is "[t]he period of time when pasture is available for grazing, due to natural precipitation or irrigation. Grazing season dates may vary because of mid-summer heat/humidity, significant precipitation events, floods, hurricanes, droughts or winter weather events. Grazing season may be extended by the grazing of residual forage as agreed in the operation's organic system plan. Due to weather, season, or climate, the grazing season may or may not be continuous. Grazing season may range from 120 days to 365 days, but not less than 120 days per year." 7 C.F.R. § 205.2.
\item \textsuperscript{48} 7 C.F.R. § 205.240(a).
\item \textsuperscript{49} 7 C.F.R. § 205.240(c).
\item \textsuperscript{50} 7 C.F.R. § 205.240(b).
\item \textsuperscript{51} See Watnick, supra note 20; Harrison, supra note 18; Adam Schlosser, A Meating of the Minds: Possible Pitfalls and Benefits of Certified Organic Livestock
\end{itemize}
Livestock may not be administered subtherapeutic antibiotics, routine doses of synthetic internal parasiticides, or medicines when not ill. Importantly, the National Organic Standards Board ("NOSB") is empowered to "recommend to the Secretary [of Agriculture] standards in addition to those [previously listed prohibited practices] for the care of livestock to ensure that such livestock is organically produced." Physical alterations may be performed "as needed to promote the animal's welfare and in a manner that minimizes pain and stress." Animals must live in conditions that allow exercise, free movement, and stress reduction.

The NOP requires organic livestock producers to develop permanent living conditions to accommodate the animals' "health and natural behavior." This includes "[y]ear-round access to the outdoors, shade, shelter, exercise areas, fresh air, clean water for drinking, and direct sunlight, suitable to the species, its stage of life, and the environment." Animals may be denied these requirements for breeding, health care, shipping, or weather, among other situations. Livestock bedding must be kept clean and dry, and it must be organically produced if roughage is used. Shelter should be designed to accommodate natural behaviors and give animals the opportunity to exercise. "Continuous total confinement of any animal indoors is prohibited."

The current regulations provide rather general standards for organic livestock production, but they clearly regulate the

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53 The NOSB helps develop organic production standards and advises the NOP. 7 U.S.C. § 6518(a). It is a fifteen-member board composed of organic farmers, organic handlers, retailers, environmentalists, consumer interest groups, scientists, and certifying agents. *Id.* at (b).

54 7 U.S.C. § 6509(d)(2). This provision is relevant to the discussion of congressional intent found *infra* Part IV, Section A.

55 7 C.F.R. § 205.238(a)(5).

56 7 C.F.R. § 205.238(a)(4).

57 7 C.F.R. § 205.239(a).

58 7 C.F.R. § 205.239(a)(1).

59 7 C.F.R. § 205.239(b).

60 7 C.F.R. § 205.239(a)(3).

61 7 C.F.R. § 205.239(a)(4).

62 7 C.F.R. § 205.239(a)(1).
areas of animal health and welfare. However, the lack of clarity and specificity of the current regulations governing animal health and welfare is problematic. There are few species-specific regulations. Instead, the regulations provide ambiguously for living conditions “suitable to the species” or “appropriate to the species.” This ambiguity has led to questionable treatment of organic livestock, specifically dairy cows and poultry.

IV. PROPOSED RULES FOR ORGANIC LIVESTOCK AND POULTRY PRACTICES

On April 13, 2016, the NOP proposed new rules that, if implemented, would vastly alter current organic livestock production methods. The AMS proposed these rules to provide more clarity and specificity so that organic producers may ensure consistent compliance with the NOP. The proposed rules seek to provide “additional specificity and clarity to better ensure consistent compliance by certified organic operations . . . .” Ultimately, these rules are intended to provide “a uniform and verifiable animal welfare standard” for consumers.

The proposed rule adds fifteen definitions to 7 C.F.R. § 205.2. It defines several species-specific physical alteration techniques such as “beak trimming,” “cattle wattling,” and “mulesing.” “Indoors” is now defined, which includes four separate poultry housing style definitions. “Outdoors” is defined as “[a]ny area in the open air with at least 50 percent soil, outside a building or shelter where there are no solid walls or solid roof attached to the indoor living space structure. Fencing or netting

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63 7 C.F.R. § 205.239(a)(1).
64 7 C.F.R. § 205.238(a)(4).
65 Harrison, supra note 18.
66 Schlosser, supra note 52, at 224.
67 See generally Proposed Rule, supra note 16.
68 Id.
69 Id.
72 Proposed Rule, supra note 16, at 22,005. It also defines “caponization,” “de-beaking,” “de-snooding,” “dubbing,” and “toe clipping.” Id.
73 Id. These four are “pasture housing,” “aviary housing,” “slatted/mesh floor housing,” and “floor litter housing.” Id.
that does not block sunlight or rain may be used as necessary.”

Finally, “soil” is defined, which, combined with “outdoors,” indirectly addresses the use of poultry porches, pavement, and gravel in place of true pasture.

Additions and amendments to livestock health care practices are also found in the proposed rule. Feed must now be provided in an amount that not only provides adequate nutrition, but also “result[s] in appropriate body condition.” Physical alterations may only be made for the welfare of the animal or identification purposes. They must be made with minimal pain and stress when the animal is a reasonably young age and must be performed by a competent person. Notably, the proposed rules specifically prohibit:

De-beaking, de-snooding, caaponization, dubbing, toe trimming of chickens, toe trimming of turkeys unless with infrared at hatchery, beak trimming after 10 days of age, tail docking of cattle, wattling of cattle, face branding of cattle, tail docking of sheep shorter than the distal end of the caudal fold, and mulesing of sheep.

Further, needle teeth trimming and tail docking of pigs must be used non-routinely and with documentation. Poultry house ammonia levels must now be monitored and kept less than twenty-five parts per million.

Certain synthetic medications are allowed and may be used to treat illness or pain and suffering. Vaccinations and

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74 Id.
75 Id. Poultry porches, or screened, roofed areas attached to the poultry house, were previously used by some organic poultry producers to provide outdoor access.
76 See 7 C.F.R. § 205.238(a)(2).
77 Proposed Rule, supra note 16, at 21,962 (to be codified at 7 C.F.R. § 205.238(a)(2)).
78 Id. (to be codified at 7 C.F.R. § 205.238(a)(5)).
79 Id.
80 Id. (to be codified at 7 C.F.R. § 205.238(a)(5)(ii)).
81 Id. (to be codified at 7 C.F.R. § 205.238(a)(5)(ii)).
82 Id. at 21,963 (to be codified at 7 C.F.R. § 205.238(a)(9)).
83 Id. (to be codified at 7 C.F.R. § 205.238(a)(5)(ii)).
veterinary biologics may be administered, but no other drug may be administered in the absence of illness or pain and suffering.84 Treatment for injured, diseased, or sick animals may not be withheld.85 Such animals must be identified, and such instances must be recorded.86 The organic system plan must include preventive and emergency parasite control measures.87 It must also include plans for “prompt, humane euthanasia,”88 for which the following tactics are not permitted: “suffocation; blow to the head by blunt instrument; and the use of equipment that crushes the neck, including killing pliers or burdizzo clamps.”89 Euthanized livestock must be examined post-euthanasia and confirmed dead.90

There are also revisions and additions to organic livestock living conditions. These are divided into two categories: (1) mammalian livestock living conditions and (2) avian living conditions.91 Mammalian livestock must still have clean, dry bedding,92 but now the animals themselves “must be kept clean during all stages of life.”93 They must also have enough space to lie down, stand up, turn around, fully stretch their limbs without touching their enclosure or other animals, and exhibit normal behavioral patterns.94 Specific housing requirements are set forth for dairy animals95 as well as hogs.96 Outdoor access space for mammalian livestock must be composed of 50 percent soil.97

Avian living conditions would be codified in a new section at 7 C.F.R. § 205.241.98 Birds must have year-round access to the

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84 Id. (to be codified at 7 C.F.R. § 205.238(c)(1)).
85 Id. at 21,964 (to be codified at 7 C.F.R. § 205.238(c)(8)).
86 Id. (to be codified at 7 C.F.R. § 205.238(c)(9)).
87 Id. (to be codified at 7 C.F.R. § 205.238(d)).
88 Id. (to be codified at 7 C.F.R. § 205.238(e)(1)).
89 Id. (to be codified at 7 C.F.R. § 205.238(e)(2)).
90 Id. (to be codified at 7 C.F.R. § 205.238(e)(3)).
91 See generally Proposed Rule, supra note 16, at 21,966, 21,970.
92 7 C.F.R. § 205.239(a)(3).
93 Proposed Rule, supra note 16, at 21,966 (to be codified at 7 C.F.R. § 205.239(a)(3)).
94 Id. (to be codified at 7 C.F.R. § 205.239(a)(4)(6)).
95 Proposed Rule, supra note 16, at 21,966–21,967 (to be codified at 7 C.F.R. § 205.239(a)(7)).
96 Proposed Rule, supra note 16, at 21,967 (to be codified at 7 C.F.R. § 205.239(a)(8)).
97 Id. (to be codified at 7 C.F.R. § 205.239(a)(12)).
outdoors, exercise, clean water, dust bathing materials, and adequate outdoor space to avoid predators and aggressive behaviors from other birds. Natural light must illuminate poultry houses so that inspectors can read and write when all lights are turned off, but artificial light can be used to extend the day’s length. However, lights must be lowered to encourage birds to settle for the night. Each bird must have six inches of perch space, and all birds must be able to perch at the same time. There would be specific indoor stocking density regulations that are species-specific and housing-specific. Birds must have access to scratch areas inside the house, and they must have sufficient space to engage in other natural behaviors, including standing, moving freely, and stretching their wings.

Further, the rule includes outdoor space requirements for poultry. The facility must be designed to encourage the birds to take daily trips outdoors, where they should find “suitable enrichment.” Exits should be able to accommodate more than one bird at a time and should allow all birds to exit the house within one hour. Importantly, “outdoor access” does not include space where a solid roof attached to the indoor space is overhead—in other words, poultry porches will not suffice. Shade must be provided outdoors, and outdoor access space must be at least 50 percent soil. Of course, birds may be confined in certain conditions to protect their health, to accommodate their stage of life, or for training or shipping.

The proposed rule also covers transport and slaughter of

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99 Id. at 21970 (to be codified at 7 C.F.R. § 205.241(a)).
100 Id. (to be codified at 7 C.F.R. § 205.241(b)(3)).
101 Id. (to be codified at 7 C.F.R. § 205.241(b)(3)).
102 Id. (to be codified at 7 C.F.R. § 205.241(b)(6)). However, in multi-tiered facilities, 55 percent of the birds must be able to perch at one time. Id. Further, species that do not perch are not subject to this requirement. Id.
103 Id. (to be codified at 7 C.F.R. § 205.241(b)(7)).
104 Id. (to be codified at 7 C.F.R. § 205.241(b)(10)-(11)).
105 Id. (to be codified at 7 C.F.R. § 205.241(c)).
106 Id. (to be codified at 7 C.F.R. § 205.241(c)(1)).
107 Id. (to be codified at 7 C.F.R. § 205.241(c)(2)).
108 Id. (to be codified at 7 C.F.R. § 205.241(c)(6)).
109 Id. (to be codified at 7 C.F.R. § 205.241(c)(7)(8)).
110 See generally Proposed Rule, supra note 15, at 21,970–21,971 (to be codified at 7 C.F.R. § 205.241(d)).
organic livestock, previously a relatively unregulated area. New provisions require clear identification of organic animals during transport; that the animals be fit for transportation; "adequate and season-appropriate ventilation;" and organic bedding, feed, and water during transport. Mammalian and avian slaughter are regulated separately, but recordkeeping is required for both. Mammalian slaughter must comply with the Federal Meat Inspection Act and its regulations or the Agricultural Marketing Act of 1946 and its regulations, whichever is applicable. Similarly, avian slaughter must comply with the Poultry Products Inspection Act ("PPIA") and its regulations. When the slaughterer is exempt from the PPIA, he or she still may not shackle birds, hang birds, or carry birds by their legs. Any shackled birds "must be stunned prior to exsanguination," and "all birds must be irreversibly insensible prior to being" shackled.

These proposed rules were met with some industry pushback. Industry groups' resistance may be divided in two broad arguments. First, the groups argued that the proposed rules contradict congressional intent. Second, they argued that, even if consistent with congressional intent, these rules exceed agency authority. These arguments were submitted as comments to the proposed rule and therefore will be considered prior to any final rulemaking.

112 Id. (to be codified at 7 C.F.R. § 205.242(a)(1)).
113 Id. (to be codified at 7 C.F.R. § 205.242(a)(2)).
114 Id. (to be codified at 7 C.F.R. § 205.242(a)(3)).
115 Id. (to be codified at 7 C.F.R. § 205.242(a)(4)-(5)).
116 Id.
117 Proposed Rule, supra note 16, at 21,974-21,975 (to be codified at 7 C.F.R. § 205.242(b)). The Federal Meat Inspection Act regulates livestock slaughter while the AMS of 1946 regulates exotic animal slaughter. Id.
118 Id. (at 21975, to be codified at 7 C.F.R. § 205.242(c)(1)).
119 Id. (to be codified at 7 C.F.R. § 205.242(c)(3)(i)).
120 Id. (to be codified at 7 C.F.R. § 205.242(c)(3)(ii)).
121 Id. (to be codified at 7 C.F.R. § 205.242(c)(3)(iii)).
122 See generally Letters, supra note 17.
123 Id.
A. Congressional Intent

Congress provided an OFPA section devoted to the OFPA's purpose. The OFPA's stated purposes are threefold:

1. to establish national standards governing the marketing of certain agricultural products as organically produced products;
2. to assure consumers that organically produced products meet a consistent standard; and
3. to facilitate interstate commerce in fresh and processed food that is organically produced.  

Consider the first two provisions in conjunction with one another. Congress intended to create a national marketing system that represents organic products that would be produced consistent with certain production standards. The OFPA's Senate Report notes that the Committee wanted to "ensure the 'organically produced' label indeed signifies that the product has been produced in accordance with the requirements of this title"—this reflects the "process-based" approach. In fact, the Committee recognized that organically produced food is not safer, healthier, more nutritious, or residue free, but rather is "food produced using certain defined materials and production methods." From this, it is clear the OFPA's purpose is to create an organic marketing standard, and, to be marketed as organic, food must be produced in accordance with the OFPA and NOP. Livestock welfare regulations are production and health care practices with which producers must comply to market products as organic, making the proposed rules consistent with the OFPA's intent.

Further, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* supports the notion that these rules are consistent with the OFPA. *Chevron* provides a two-step analysis to determine whether an agency's regulatory framework is

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126 *Id.*
consistent with statutory intent. The first step is to establish "whether Congress has directly spoken to the precise question at issue." If so, Congress's direction must be honored. If not, the regulations are granted substantial deference, meaning they are valid unless "arbitrary, capricious, or manifestly contrary to the statute."

Here, Congress has "directly spoken to the precise question at issue," which is whether the USDA can regulate animal welfare under the OFPA. 7 U.S.C. § 6509 is titled "Animal production practices and materials." It specifically prohibits types of feed, hormones, antibiotics, and certain health care practices. Importantly, it requires the NOSB to recommend additional standards in the future for the care of organic livestock. From this, coupled with the Senate Report, Congress's intent seems clear: organic regulations can provide for animal welfare as production and health care practices. Thus, Congress's intent should be given full effect, and the proposed rules should be allowed to proceed.

However, even if one decides Congress has not "directly spoken to the precise question at issue," the agency's regulatory structure is given deference. Based on the simple fact that the OFPA was designed as a process-based regulatory approach and not a product-based approach, these regulations are consistent with the OFPA. As established above, the Senate Report clearly indicates that the OFPA is supposed to regulate the process of producing organic foods, which logically includes animal living conditions and health care practices as part of that process. The proposed rule is not "arbitrary, capricious, or manifestly contrary to the statute" because it is consistent with the statute's purpose as a "process-based" marketing program.

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128 Id. at 842.
129 Id. at 842–43.
130 Id. at 844.
131 Id. at 842.
132 7 U.S.C. § 6509(c).
133 Id. at § 6509(d).
134 Id. at § 6509(d)(2).
135 Chevron, 467 U.S. at 842.
136 Id. at 844.
137 Chevron, 467 U.S. at 844.
Therefore, the proposed rules are not contrary to congressional intent.

B. USDA’s Authority

Nor do the rules exceed the USDA’s authority. The Senate Committee acknowledged that in the OFPA crop production is more standardized than livestock production because there were very few organic livestock producers at the time. However, the Committee expected the USDA to elaborate on organic livestock and aquaculture standardization. Indeed, the Committee wanted the NOSB and USDA to balance livestock medication restrictions and the need to raise livestock humanely, seemingly acknowledging that organic regulation should in the future account for livestock rearing practices. The Committee sought to delegate, and the OFPA clearly delegates, to the USDA the authority to implement more specific livestock production standards than those enumerated at the OFPA’s outset. Because of this express delegation, the USDA has authority to regulate animal welfare under the NOP.

V. CONCLUSION

The proposed rules regulating the welfare of organic livestock are consistent with congressional intent. These rules, while perhaps unnecessary, are a valid exercise of USDA’s authority to regulate livestock production standards under the NOP. If passed, these rules will provide organic producers with the clarity and specificity they deserve, ultimately “assur[ing] consumers that organically produced products meet a consistent

139 Id.
140 Id. at 4,956.
141 “If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.” Chevron, 467 U.S. at 843–44.
142 The necessity of the proposed rules is beyond this Comment’s scope. This Comment strictly addresses whether the proposed rules are contrary to congressional intent and beyond agency authority.
standard,\textsuperscript{143} and will thus achieve one of the OFPA’s primary goals.

\textsuperscript{143} 7 U.S.C. § 6501(2).