



ORGANIC FARMERS ASSOCIATION

July 12, 2021

Jennifer Tucker
Deputy Administrator
National Organic Program
USDA-AMS-NOP
1400 Independence Ave. SW
Room 2642-So., Ag Stop 0268
Washington, DC 20250-0268

Re: Docket Number AMS-NOP-11-0009; NOP-21-04PR

Dear Dr. Tucker,

The Organic Farmers Association (OFA) is a membership organization that represents U.S. certified organic farmers. Our organization was founded by and is controlled by certified organic farmers, and only domestic certified organic farmers vote on OFA's policies and leadership. OFA appreciates the opportunity to provide comments on the "National Organic Program; Origin of Livestock; Reopening of Comment Period."

Our farmer members have ranked increasing NOP enforcement, especially origin of livestock and pasture rule enforcement, as a top priority every year that we have administered a national organic farmer survey.

The economic viability of organic dairy farmers is dependent upon clarification of regulations to stop the varied interpretations or loopholes regarding dairy livestock transitioning practices. Finalizing a strong, enforceable rule on the origin of livestock is important for the future of organic dairy farmers, their families, and the integrity of the entire organic label. The organic label is one of the most highly trusted labels for consumers. This is due to the strong Federal standards and enforcement behind the label. Solidifying standards to ensure all organic farmers operate under the same rules is essential for the entire organic community.

Unfortunately, the organic dairy producers who have utilized a loophole in the regulations, allowed by some certifiers, to continuously transition conventional animals into organic production have gained an economic advantage and contributed to the oversupply of organic milk. This has contributed to a significant drop in recent years in the milk prices paid to organic

dairy farmers, the majority of whom were held by their certifiers to a higher standard and stricter enforcement.

The long delay in clarifying the regulations on Origin of Livestock is inhibiting the National Organic Program (NOP)'s ability to provide consistent and fair enforcement, leaving our nation's organic animal standards unfair and inconsistent. Our members, who are independent small rural businesses, have experienced the inequities created by the lack of clarity within the current rules outlining bovine dairy transition to organic dairy production.

For 15 years, organic dairy farmers have advocated for an enforceable regulation applied equally to all certified producers. In 2015, USDA published a proposed rule to close the loopholes in the current regulations, by clarifying that "After completion of a one-time, 12-month transition period of an existing conventional dairy herd (or livestock to form new organic dairy operations), all new dairy animals milked on the organic dairy farm would need to be managed organically from the last third of gestation."

The organic community has provided comments two times on the proposed rule and it garnered strong, united support from the organic community and consumers, especially the provision to stop conventional livestock from continuously entering the organic herd. Unfortunately, the 2015 rule has never been finalized.

This delay has had real consequences for organic dairy farmers. Organic has been an important market that has provided for the viability of family-scale farms across the nation for both dairy farms and associated feed and grain producers. But there are conditions in the organic milk market in some regions of the country, especially the Northeast, that are different than those in conventional milk markets. Because USDA dedicates resources to ensuring the orderly marketing of conventional milk through the federal milk market order system, changes in the conventional milk market are predictable and widely publicized. But changes in the organic milk market in recent years came suddenly and without warning for organic dairy farmers. For example, in January 2017, organic milk marketers in New York were looking for more organic milk, in February 2017, they said there was an oversupply, and by March 2017, they were imposing quotas on organic dairy farms in the state.

One factor behind this volatility is the arrival of large supplies of cheaper organic milk from large dairies in the West and Midwest that expanded rapidly when the organic milk price was high in 2016. These large operations were able to expand rapidly to capitalize on the high organic milk price by working with organic certifiers that allowed them to continuously transition conventional cows to organic. The great majority of organic dairy operations are held to higher standards by their certifiers that reflect the intent of the origin of livestock regulations and consumer expectations. But the exploitation of regulatory loopholes has upset the balance of supply and demand previously found in the organic milk market. This has impacted the economic viability of organic dairy operations. According to the NOP's Organic Integrity Database, the number of organic dairy farms in the United States has remained essentially stagnant over the last five years, which is shocking given the dramatic annual growth rates seen

in organic product sales. The number of organic dairies declined year each year since 2016, with the exception of a large increase in 2019. In all other years since 2016, the organic dairy sector lost an average of 128 farms per year. One factor that has made it challenging for dairy operations to remain organic has been the inconsistent enforcement of standards like the origin of livestock.

It is not just organic dairy farmers who believe the lack of consistent enforcement of origin of livestock rules must be addressed. As referenced in this request for comment and in previous public comment periods, the USDA's Office of Inspector General released an audit in 2013 identifying the lack of clarity in the regulations and different interpretation by different certifiers as problems that could undermine consumer confidence in the organic milk certification process.¹ Furthermore, organic farmers across commodities support a strong origin of livestock rule because inconsistent standards weaken consumer trust in the label, which hurts the entire organic industry.

It is long past time for the NOP to finalize a rule to close the loopholes on origin of livestock. A final rule on origin of livestock must:

- Prohibit the continuous transition of conventional dairy livestock and stop the one-time exemption from being used to combine multiple transitioned herds to form one operation.
- Prohibit first calf heifers and young cows being transitioned from conventional production and then being sold to an existing organic dairy, which is not in line with the rule and undermines certified organic dairies by providing a cheaper, quicker alternative to raising organic replacements under organic management.
- Ensure that the whole transition happens over a twelve-month period and under the supervision of a certifier as part of the producer's organic system plan. If organic management of the dairy animal, starting at the last third of gestation or at any other time it has been organic, is interrupted, the animal cannot be returned to organic certification.
- Prohibit the practice of adding conventional animals during a transition process and extending the transition period.
- Prohibit the sale of transitioned animals (not raised in organic production from the last third of gestation) being sold as organic dairy animals that can be used to produce organic milk.

¹ USDA Office of Inspector General. "AMS-NOP – Organic Milk Operations." July 2013. Audit Report 01601-0002-32.

- Prohibit transitioned animals from retaining their organic status if they are moved to a different location under the same ownership.
- Prohibit the practice of having an organic and conventional dairy operation at the same location. While a split operation may be practical with other commodities, it is very difficult to audit and ensure that organic dairy product (raw milk) is not mixed with non-organic product. This will prevent any abuse or the perception of abuse.

Therefore, we urge the department to swiftly finalize an Origin of Livestock regulation that:

- Goes into effect immediately.
- Allows an operation or responsibly connected person(s) to transition bovine dairy animals into organic production only once.
 - This transition must occur over a continuous 12-month period prior to production of milk or milk products that are to be sold, labeled, or represented as organic.
 - An operation or responsibly connected person(s) must not transition any new bovine dairy animals into organic production after the end of the 12-month transition period. Once a distinct herd is transitioned to organic, all animals must be raised organically from last third of gestation.
 - The certifying entity will file an organic system plan prior to the start of transition and the transition process is overseen by the certifier as part of their accountability.
- Prohibits the transfer or sale of transitioned animals to any other operation as certified organic, for any purpose.
- Prohibits split bovine conventional and organic milking herds at the same location.

In addition to these overarching comments and priorities, we offer the following specific thoughts in response to questions posed in the request for comments.

Movement of Transitioned Animals

NOP should not allow transitioned animals to remain certified organic if they are sold, transferred, gifted, or moved to another operation. This includes preventing transitioned animals from retaining their organic status if they are moved to a different location under the same ownership. A transitioned animal should only be certified organic on the operation that

used its one-time exemption. If a transitioned animal moves to new operation through sale, gift or other transfer, it must be considered a conventional animal.

OFA believes that the final rule should prohibit organic dairy operations from acquiring transitioned animals to expand or replace animals to produce organic milk for several reasons:

- This is necessary to close the loopholes that have been plaguing the organic dairy sector for years.
- Ending this practice does not affect the value of the transitioned animal because its initial value was as a conventional animal. The cost of transitioning the animal was reflected by the higher pay price received for the milk produced after the animal was certified as organic.
- Family members or other responsibly connected persons who were part of the ownership of the transitioned entity who later want to start a new operation will need to purchase organically certified animals that were under organic production from the last third of gestation. They would not be eligible to transition conventional animals because they have already used their one-time exemption to transition conventional animals for the original operation. While this may complicate succession planning, strict clarity within this rule is required to end the abuse that has been undermining the integrity of organic certification across the dairy sector.
- This is consistent with existing requirements that transitioned animals cannot be certified organic for slaughter.

Certifiers will play a critical role in ensuring a level playing field when it comes to the supply of organic livestock. We urge the NOP to provide clear instructions to certifiers about recordkeeping and inspection practices necessary to enforce this standard. Certifiers should already have systems to ensure that transitioned livestock are not sold as organic for slaughter. NOP should work with certifiers to build on those procedures and ensure that an adequate level of detail, beyond just ear tag numbers, is used to track transitioned animals and ensure that their status is accurately reflected on organic certificates and other paperwork that would be used in a sale or transfer. NOP should also instruct certifiers on adequate auditing and verification activities to incorporate into their inspections so that new regulations are actually enforced. Finally, the NOP should work with certifiers to ensure that the plan for transitioning animals using the one-time exemption is part of the approved organic systems plan that operations use to plan their start-up phase and future growth.

Description of Regulated Entity

OFA supports using the term “operation” to describe the regulated entity, with the addition of a “responsibly connected person(s),” as already defined in the organic regulations.

Using the term “operation” for this regulation is consistent with the proposed rule being developed on Strengthening Organic Enforcement. We believe that the addition of the “responsibly connected person(s)” will address another problem facing the organic dairy sector, in which new business structures are created at the same operation in order to create new opportunities to use the one-time exemption. In addition to limiting an operation to using the exemption on transitioning animals to one time, NOP also needs to limit the key people involved in the operation as well.

In accordance with the “responsibly connected person(s)” approach, any person who is a partner, officer, director, holder, manager, or owner of 10 percent or more of the voting stock of an applicant or a recipient of certification would be allowed to execute the one-time herd transition exemption only once on any operation where they have a significant financial or managerial stake. After an operation they are connected to uses the one-time exemption, all responsibly connected persons for that operation will have used up their transition exemption allowance, even for different operations in the future. Any person with a significant financial or managerial stake in a dairy operation would utilize their one-time eligibility once a transition occurs at that operation and not be allowed to participate in another operation that is using the one-time exemption.

Implementation Timeframe

OFA supports an immediate effective date for the final rule. Those conventional dairy operations with existing herds that have not yet entered the certification process should be able to plan for their transition with their certifier using the one-time transition allowance as part of their approved organic systems plan. For operations that are in the process of getting certified on the final rule’s effective date, they should complete the one-time transition approved by their certifier within 12 months of the effective date.

Regulatory Impact Analysis

While ongoing gaps in economic and other data about organic operations presented a challenge for the agency in performing this analysis, we believe that the conclusions presented provide ample justification and support for prohibiting the transfer or sale of transitioned animals to another operation without losing their organic status.

These conclusions include:

- The benefits of clarifying the regulations will ensure a level playing field for all organic dairy producers, support consumer trust in the USDA organic seal by assuring consumers that organic dairy products meet a consistent standard, and support producer confidence in the organic label.
- Despite years of delay in finishing this proposed rule, there remains a need for this rulemaking.

- The uneven application of the current rule suggests that a smaller share of producers is benefitting from the cost advantage of transitioned heifers, at a higher level than is suggested by the average number of head purchased. Therefore, the majority of organic dairy farms that exclusively raise their own replacement animals are not expected to have higher production costs under the final rule. Producer cost increases would occur in limited scenarios and would amount to less than 2.5% of producer costs.
- Consumer milk price increases are estimated to be less than 0.08% (which translates to an extra 2 or 3 cents for a half gallon of organic milk). This very low price increase is not likely to limit industry growth nor noticeably affect consumer demand for organic milk.
- Sufficient numbers of organic heifers (organically managed from last third of gestation) would be available after the implementation of the rule to maintain and/or grow existing organic dairy operations.
- The long-term economic impact on producers of not implementing the proposal is greater than the economic impact of the rule due to the need for greater consistency in applying the origin of livestock standard across the organic dairy sector. We believe that this point is not fully developed in the analysis. Because of limitations in the availability of data on organic agriculture, waves of economic damage to organic dairy farms are not fully captured by examining the USDA's Census of Agriculture results or even the NOP's Organic Integrity Database. But even using the simplified metric of number of certified operations in the OID that specify that they produce milk or dairy, there have been recent years where significant numbers of certified dairy operations exited the organic market. One year with significant increases in the numbers of certified operations, 2019, offsets some of those significant losses. Therefore, simply looking at the growth between the 2015 proposed rule and today gives an incomplete picture of the economic health of the organic dairy sector. The failure to adequately enforce the origin of livestock rules has caused ongoing disruption and economic damage to the organic dairy sector that is not adequately captured in this analysis.

Additionally, the analysis fails to fully develop some of the benefits that should come from a final rule being enforced. One benefit that should be more fully appreciated is the opportunity for growing the organic dairy sector, as well as the affiliated organic grain sector that provides feed for organic dairy operations, if loopholes are closed. According to OFA members, organically certified livestock (managed organically from the last third of gestation) currently have no premium as most are sold on the conventional market. Addressing the problem of continuous transition that undermines the price of organic replacement animals will help create value for organic operations to sell organically-raised replacement animals and create a market that could help them diversify their operations and have a better tool to avoid overstocking and better manage their herd size relative to their land base.

Fay Benson, Cornell Cooperative Extension educator and project manager for the Cornell Organic Dairy Program, investigated the cost differences between organic and conventional practices during the first year of a dairy heifer's life and found that dairies that raised heifers conventionally to one year of age were able to save on average \$884 per animal compared to animals raised using organic methods on three farms in New York. The major components of these savings were due to increased labor and more expensive feed (organic milk) on organic operations. As an article about this research states, "Allowing the conventional raising of "pre" organic heifers allows these dairies to avoid the higher costs of feeding organic milk and also shortens the expensive period prior to weaning... This puts dairies that follow the NOP rule at a significant disadvantage, specifically in the Northeast."² The benefit of closing a loophole that provides an \$884 per head advantage to those operations that continuously transition animals into organic is significant.

Another benefit of a final rule to prohibit continuous transition and sale or transfer of transitioned animals as organic would be to reduce some of the volatility experienced in recent years in regional organic milk markets, as described earlier. The use of continuous transition allowed some herds to grow at a rapid pace and created market surpluses. Requiring operations to source organic animals would provide for a more gradual rate of growth of existing herds that does not undermine existing organic operations. This could also help assure conventional dairy operations that are considering a transition to organic that it is worth the effort and time to transition because, once certified, they will be able to count on steady growth and a level playing field based on uniform enforcement.

In the discussion of benefits of the proposed rule, the agency mentions that it expects the proposed rule to help support consumer confidence and that increased confidence could "disincentivize the (costly) establishment of credentials that are alternative to USDA organic certification." The concept that USDA organic does not represent the most credible marketplace standard for milk production is presented as an abstract possibility. But the proliferation of animal welfare and other label claims that certified organic producers feel increasing pressure to pursue in addition to USDA organic is not an abstract possibility. This pressure to pursue additional certifications is happening now and creating more work and expense for organic operations. If the USDA needs data on this, we urge you to work with groups like OFA or through USDA census processes to ask organic farmers about the pressure to pursue additional certifications because of perceived weaknesses in the organic standards and what these additional certifications are costing operations in both time and fees.

Exceptions to the One-Time Allowance

OFA does not support any exceptions to the one-time allowance.

² Fay Benson. Cornell College of Agriculture and Life Sciences. "USDA Puts Northeast Organic Dairies at a Disadvantage." *Small Farms Quarterly*. January 13, 2020. <https://smallfarms.cornell.edu/2020/01/usda-puts-northeast-organic-dairies-at-a-disadvantage/>

Conclusion

In addition to the issues raised for comment, we urge the agency to consider two more important topics.

Recordkeeping and Certification Procedures: The final rule should include details about how operations will communicate with their certifier about using the one-time exemption for transition and how those transitioned animals will be tracked. Certifiers should already be tracking transitioned animals to ensure they are not being sold for slaughter as certified organic. We also believe that the transition status of animals should be indicated on organic certificates and on records used when animals are taken to auction or sold off the farm. Animal lists with information such as vaccine numbers should be part of the records certifiers examine during their inspections of dairy operations, similar to how examination of pasture recordkeeping is now part of inspection procedures.

Organic Data: The regulatory impact analysis for this rulemaking has been challenging because of the inadequate state of data and understanding of the economics of organic dairy production. Even calculating the number of certified organic dairy operations over time proved challenging because of limitations in the NOP's Organic Integrity Database and the inadequate coverage of organic operations by the Census of Agriculture. This is in stark contrast to the wealth of data that is collected about the conventional milk sector, as a result of AMS' charge to administer pricing programs and ensure orderly marketing conditions. We urge the NOP to coordinate with the dairy program in AMS to establish better reporting on the movement of organic milk between regions and market conditions including organic pay price. It is difficult to persuade dairy farmers to make the significant commitment of transitioning to organic production if they cannot gain a clear view of the state of the organic milk market in their region. And as the volatility of the last several years shows us, organic producers can no longer assume that growth in the organic milk sector will be gradual or regionally-based.

The changes being considered by the agency are needed to uphold consumers' expectations about organic dairy. Finalizing this rulemaking is critical to bring consistent enforcement which would create a level playing field among all organic dairy producers and uphold strong organic integrity for all organic farmers across the country. Our members believe they can compete with the most efficient organic dairy operation of any size if they are treated equitably. Loopholes in the current rule put our members at a competitive disadvantage and allow inequitable interpretation and enforcement of the rule by some certifiers. Because organic certification is typically conducted by a regional certifier, inequitable interpretation between certifiers can pit different geographic regions or states against others. The current system places the majority of organic dairy farmers, and particularly family-owned and operated rural dairy operations, at a significant competitive disadvantage.

We appreciate that the USDA has committed itself to responding to the pandemic by addressing long-standing issues of limited resilience in the food and agriculture system. The USDA's new vision of a food system that is "fair, competitive, distributed, and resilient" is a

worthy goal and we hope that regionally-dispersed family-scale organic operations are part of USDA's vision. One item on USDA's agenda for strengthening resilience in the agriculture supply chain is encouraging more farms to transition to certified organic and providing assistance for them to do so.³ It is vital that those new entrants into the organic marketplace are able to compete on a level playing field, otherwise USDA's investment and encouragement will be wasted. A key step to making sure that new organic operations can thrive is to close the loopholes that allow a small number of large operations to create an unfair economic advantage by continuously transitioning conventional animals into organic. A strong, enforceable rule will help ensure economic equity for all organic dairy operations and ensure continued consumer confidence in the organic label.

Thank you for your consideration of these comments on the critical issue of the origin of organic livestock. Please contact Patty Lovera, (202) 526-2726 or patty@organicfarmersassociation.org, if you have questions or need additional information.

Sincerely,



Kate Mendenhall
Director

³ <https://www.usda.gov/media/press-releases/2021/06/15/usda-announces-additional-aid-ag-producers-and-businesses-pandemic>