



July 12, 2021

Dr. Jennifer Tucker  
Deputy Administrator  
National Organic Program, USDA-AMS-NOP  
1400 Independence Avenue SW, Room 2642 – S., Stop 0268  
Washington, DC 20250-0268

Liz Bawden, Co- President, NY  
Kirk Arnold, Co-President NY  
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George Wright, Treasurer, NY  
Henry Perkins, Past President ME

Re: Origin of Livestock Proposed Rule;  
Docket Number AMS-NOP-11-0009; Docket RIN 0581-AD89

Submitted electronically

Dear Dr. Tucker,

The Northeast Organic Dairy Producers Alliance (NODPA) strongly supports the immediate implementation of a Final Rule on the Origin of Livestock (OOL). **We continue to fully support all of our very specific comments on the Proposed Rule that were submitted to AMS-NOP on July 27, 2015 and again on December 2, 2019.**

NODPA has been submitting comment to USDA National Organic Program (NOP) on the interpretation of the one-time exemption of transitioning non-organically certified dairy bovine animals to organic production since 2005.

The intent of the exemption was originally to allow for the transition of an “established, discrete dairy herd in conjunction with the land resources that sustain it.” As the organic dairy industry has grown, the inconsistency of implementing this exception has increased and now there are many differing interpretations and no legal basis for the NOP to enforce one standard. Organic dairy producers have suffered economic harm with this inconsistency in implementation OOL and the organic seal has had its integrity questioned by certifiers, consumers, and Inspector Generals.

The Final OOL Rule must prevent the one-time transition of a non-organic dairy herd from being a convenient tool to respond to market demand. This undermines the integrity of the organic label and harms the economic viability of established organic dairies.

**NODPA’s Mission**

*To enable organic dairy family farmers, situated across an extensive area, to have informed discussion about matters critical to the well-being of the organic dairy industry as a whole.*

Ryan Murray, NY  
Rick Segalla CT  
Steven Russell, ME  
Ed Zimba, MI  
Darlene Coehoorn, WI  
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Jennifer Beretta, WODPA

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Nora Owens

In these comments NODPA will describe our view that, to have a meaningful rule that will be enforceable and effectively close existing loopholes, the NOP should:

- **Prohibit organic dairy operations from acquiring transitioned animals to expand or replace animals or start a new organic dairy herd.** NODPA stated this position previously in our comments on the Proposed Rule in 2015 and 2019. Allowing transitioned animals to be sold or transferred as organically certified discriminates against the producers who had to invest more money in raising organic dairy animals from last third of gestation, and unfairly rewards the producer with transitioned animals. This unfair economic advantage of transitioned animals is what has driven the abuse of the current rule and it will continue to drive abuse of a new rule if the door on transitioned dairy replacement animals being equal to last third of gestation dairy animals is not tightly shut. This limitation is consistent with the intent of the final organic rule, published in 2000, which states that the one-time transition is for an “established, discrete dairy herd in conjunction with the land resources that sustain it” rather than for a new start-up operation.
- **Clarify that an individual who has held 10% ownership of an organic operation that has already used the one-time exemption is not eligible to use the exemption again.**
- **Ensure immediate implementation upon publications of the Final Rule**, with the only exception being those dairies that have already started their transition and have a certifier approved Organic System Plan (OSP). Those operations that have an OSP that includes continuous transition will need a new OSP with the publication of the Rule and the immediate cessation of this practice upon the implementation of the Final Rule.
- **Transition animals cannot be sold as organically certified milking or breeding animals from the date of publication of the Rule.**
- **Prohibit exceptions to the one-time allowance requirement.**
- **Require careful recording keeping and verification from certifiers of these records to ensure compliance with the rule, including the maintenance of animal lists documenting all livestock on each operation.**
- **Consider using the Organic Integrity Database to collect and provide additional data to the organic dairy industry.**

We have provided more details and our rationale for these positions in our comments below.

NODPA asserts that the NOP’s updated economic analysis continues to support the need for this rulemaking and the benefits of bringing specificity, clarity, and uniformity to the regulations will support consumer confidence and strengthen the value of the organic label.

1. **NOP seeks views on “whether the final rule should prohibit organic dairy operations from acquiring transitioned animals to expand or replace animals to produce organic milk”.** We unequivocally say **yes**, transitioned animals can only produce organic milk on the operation they were transitioned on. We strongly advise that transitioned animals lose their organic dairy status if they are sold, transferred, gifted, moved to another operation, or they are included as part of a merger of their certified entity with other organic livestock where ownership remains with the original certified entity but there is common management of many different certified entities.

Allowing transitioned animals to be sold as certified organic creates a loophole that will be exploited.<sup>1</sup> Transitioned animals are, technically, not organic. A transitioned animal is certified to produce organic milk under an exemption to the regulations that is imposed only on organic dairy (for example, there is no transition exemption to convert non-organic meat animals to organic). They cannot be sold for organic slaughter, and should not be allowed to be sold as an organic dairy animal. If culled from the herd, a transitioned animal should be sold into the conventional market, whether it is a dairy or a beef market. There will be no decrease in the asset value to the owner as the original value of the livestock was as a conventional animal and the owner has recouped any expense incurred in transitioning to organic certification through the price differential received for organic milk produced. Some justifications for this position are below:

- A. A transitioned animal, by definition, did not have organic management throughout its life. It did not have equal inputs to an animal that was raised on organic feeds and management (more costly than non-organic inputs) its whole life and therefore should not have as high an economic value as dairy stock that are organic from the last third of gestation.
- B. To equate transitioned dairy animals to last third of gestation organic animals de-values those animals raised organic from the last third of gestation and the investment by farmers to achieve that status.
- C. It discriminates against the producers who had to invest more money in the raising of the last third of gestation dairy animals and unfairly rewards the producer of transitioned animals. This unfair economic advantage of transitioned animals is what has driven the abuse of the current rule and it will continue to drive abuse of a new rule if the door on transitioned dairy replacement animals being equal to last third of gestation dairy animals is not tightly shut.<sup>2</sup>
- D. Tracking of transitioned animals versus last third of gestation animals will require no more record keeping or work for producers or certifiers than should already be done. Organic slaughter stock and last third of gestation dairy stock are the same category. Transitioned dairy animals will not be able to be sold as either organic slaughter or dairy replacement stock, which will be easy to track as their status will never change.
- E. Putting transitioned animals on the same level as those raised as organic from the last third of gestation undermines any environmental benefits of organic livestock production.

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1 For example: There are predictions that there will be an increase in demand for organic milk. Operation A transitions 500 replacement milking animals from their conventional herd to land they rent on an established organic dairy farm, operation B. Operation B has several milking parlors as they milk 5000 organic cows. Operation B has successfully secured a large contract from a retailer to supply their store brand milk. They need more milk. Once the 12 month transition has been completed operation A sells all the now transitioned organic animals raised conventionally and cheaper to Operation B to increase the number of animals on their dairy and control the supply of organic milk. Operation A dissolves his business. This is happening now and will continue to happen if transitioned animals can be sold as organically certified dairy animals.

2 Several analyses have looked at the difference in the cost of raising dairy replacement heifers under organic management versus conventional management during the first year of life. NOC included the details of these analyses as appendices in the Origin of Livestock comments we submitted in 2019. An analysis that focused on the cost of feed inputs, conducted by Greg Brickner, staff veterinarian for CROPP Cooperative/Organic Valley, determined that organic management costs \$623 more per heifer per year. NOC member organization, Northeast Organic Farming Association of Vermont (NOFA-VT), spoke to three operations in Vermont and from the information they gleaned from those producers, they have estimated that the cost difference for one year of organic management during the first year of life, compared to conventional management, is somewhere between \$800 to \$1,300 higher.

A third analysis completed in November of 2019 by Fay Benson, an extension educator for Cornell Cooperative Extension and specialist in organic dairy for the Cornell Organic Dairy program, determined that the cost is up to \$2,577.93 higher per animal for organic management during the first year of life. The approach taken in the Cornell analysis was more comprehensive, because in addition to the higher feed costs, the analysis considered additional factors such as labor, buildings, machinery, health costs, trucking, manure handling, and culling.

- F. There is no reason why a new start-up should not buy organically certified cows as the organic dairy industry is now mature enough to have enough dairy replacements, or would be if the price paid for organic replacements reflected a fair return. The December 21, 2000 Federal Register National Organic Program Final Rule does not mention an option of buying and transitioning conventional heifers as a means to start a new organic dairy herd. It states that the one time transition is for an “established, discrete dairy herd in conjunction with the land resources that sustain it”.
- G. Having a thriving market for last third replacements will allow small to mid-size organic dairy operations to diversify into raising and selling replacements whose price will better reflect the true cost of organic dairy at their scale of production if they are not competing against transitioned animals for the same market.

## **2. Implementation Timeframe**

We urge that all requirements of the rule be implemented immediately upon publication of the Final Rule, with the only exception being those dairies with discrete, distinct herds that have already started their transition and have an Organic System Plan (OSP) for transition approved by a certifying agent. Having anticipated a Final Rule since 2015, no one can validly claim they need more time. Any operation that has been continuously transitioning conventional animal to organic under the exception must stop the practice with the publication of the Final Rule. Those operations will have to change their OSPs to be compliant with the Final Rule. With the publication of the Final Rule, all transitioned animal will not be allowed to be sold as organically certified.

## **3. Record keeping, auditing, and verification of animal identification will be essential.**

NOP needs to recognize and utilize the updated technology now being used by organic dairy farmers to track their individual animals and require standardized forms for transfer/sale of animals so that each animal has its own ‘passport.’ Uniform and consistent implementation of this requirement is necessary if NOP is to meet its goal as stated in their reopening of comments 2021 justification for continuing the onetime exemption, “that certifiers will be able to enforce a rule that allows for a limited and well-defined transition.”

Recordkeeping is currently not well defined, except by reference to other parts of the rule and this area needs more clarity in a final rule. There is the question about communication between different certifiers about the past history of producers, and the need for some degree of uniformity in certificates of organic certification, especially important for organically certified auctions. The fact that a transitioned animal and any progeny fed third-year transitional crops can never be sold as organic beef, nor as organic dairy stock, will need specific attention in any record-keeping and on-farm accountability.

NODPA’s understanding is that there are certifiers who still don’t require animal lists for dairy stock to be submitted at least annually. This must change. To be assured of compliance, there needs to be close tracking and scrutiny of all animals on a certified dairy operation. Without a definitive and required paper trail that is verified by direct observation and auditing of a set percentage of animals, there is far too much opportunity for fraud as animals can easily be moved in and out of a herd. This requirement for direct observation is no different than spot testing and auditing now being required of inspectors verifying a percentage of invoices and available pasture to confirm pasture records.

The following are needed as requirements for organic livestock records. High risk, large herds will have all animals tagged electronically and be relatively easy to track and verify. Smaller operations will be easy to track by walking through the barn after milking or during winter confinement. NOP needs to require certifiers to inspect detailed animal lists from all dairy operations. From those lists they will randomly choose animals that they want to inspect through a direct observation to verify the accuracy of the record. For each animal, the list must include:

- Their unique identification name or number or unique ear tag or RFID tag (radio frequency identification) or a tattoo number
- Date of birth, dam and breed/cross breed
- Whether the animal was transitioned or fully organic from last third of gestation
- Whether the animal was purchased or farm raised, and date of purchase along with verification of purchased animals source.
- Documentation of disposition (leaving the herd). A full health history is already required.

Ensuing auditing of the randomly chosen animals must include verification that each animal's dam is/was in the herd for farm raised animals, verification that the date of birth is in the dam's record, auditing of a percentage of mature cow's progeny to cross verify integrity of the herd, and full documentation for any animals stated as purchased (including the individual cow's "passport" mentioned above). If certifiers don't have the ability to satisfy these requirements and provide follow-through, they should not be accredited to certify dairy operations.

The above suggestions follow the NOSB instruction on recordkeeping approved by the NOP July 22, 2011:

#### 5.2 Organic Livestock Producer Records:

##### 1. Origin of Livestock Records

- a. Breeding, birthing, and weaning records (e.g. calendar, chart, notebook, veterinary documents)
- b. Invoices, receiving records, and organic certification verification for all purchased animals

#### **4. Increased data on organic dairy**

The NOP admitted it had difficulty finding the information it needed for its economic justification of the benefits of its proposed regulation and the economic effect of various alternatives. In admitting that there is a shortage of up-to-date, non-proprietary data, the NOP reflected the challenge every producer has in determining the size, competitiveness and economic sustainability of the organic dairy market for their own dairy. The dairy industry has great depth of data that is collected by USDA AMS and the Federal Milk Marketing Orders (FMMO). Processors are required to report very detailed information on the milk they receive and how it is utilized and packaged on a monthly basis. It is important for organic dairy producers to know how much milk is used in retail products, manufacturing, or diverted at a lower price into the conventional market. The FMMO's have that data but only one Order is publishing it on a monthly basis, FMMO 1. When organic dairy was only one or two percent of total milk production, the data was insignificant. Now it is judged to be as high as six percent of total milk production and expanding its market where conventional milk sales are contracting and dependent on exports.

The USDA's Organic Production Market and Data Initiatives (ODI) collects information vital to maintaining stable markets, creating risk management tools, tracking production trends, and increasing exports. But it is neither comprehensive nor complete. Waiting for the organic census

to publish its data from self-reporting operations is not good enough for a market as large and growing as organic dairy. We support the expansion of reporting of real time data on organic dairy and the cooperation between all agencies within USDA, principally the Federal Milk Marketing Orders, USDA ERS and USDA AMS, to provide producers with an accurate and independent assessment of the market. Since there is no Federal Milk Pricing specific to organic dairy (the price paid to organic producers is an over order payment of the conventional FMMO price; organic milk is still assessed in different classes tied to utilization), producers have to sign individual contracts with milk buyers and need detailed independent information to arrive at a sustainable pay price with buyers in what is an increasing monopsony supply side market.

With the expansion of the organic database, there is no reason why certifiers cannot include the number of organic dairy producers, total volume of milk they certify, the average yields of milk per cow/operation and the total number of milking cows and heifers in their annual reporting to the NOP. This can be done without sharing any individual or propriety information.

**5. Operation or producer: The NOP is asking for comment on “whether AMS should use the term “operation” to describe the regulated entity, rather than “producer.”**

If NOP reads its own comments in the 2015 Proposed Rule, it will be able to answer some of its own questions. This question is wider than organic dairy and has implications for all certified entities.

The regulatory language in terms defined (§ 205.2 Terms defined), has no definition for certified entity. Perhaps there should be one. NOP needs to standardize what legal structure they want for a certified operation as defined in 'Terms defined'. A 'Producer' under Term defined, includes the classification of a 'Person'. Under Terms defined, a Person is “An individual, partnership, corporation, association, cooperative, or other entity.” For many, the farming operation is a dba under a sole proprietor's social security number or under an LLC, Corporation, or partnership using a TIN or EIN number. Many individuals and business entities have many production, distribution, and branding ‘partnerships’ under dba’s. Within the regulation, the term producer and operation are used in different contexts and at times seem interchangeable.

Certified operation under terms defined is “Certified operation. A crop or livestock production, wild-crop harvesting or handling operation, or portion of such operation that is certified by an accredited certifying agent as utilizing a system of organic production or handling as described by the Act and the regulations in this part.”

NODPA has long proposed that a producer with an established conventional herd can use the one-time exemption to transition their whole herd in order to maintain the genetics and inbred immunities that the herd has developed but only if the owner(s) have not held more than 10% ownership share of an organic operation that has already used the one-time exemption. The regulations also define a person as an ‘individual, partnership, corporation, association, cooperative or other entity’ (section 205.2).” While we understand that the intent of tying the transition exemption to an operation is to prevent organic dairies from transitioning multiple herds, NODPA believes that the intent would be more directly and effectively accomplished by tying the transition to the “responsibly connected person(s).” In accordance with the “responsibly connected person” approach, any person who is a partner, officer, director, holder, or owner of 10 percent or more of an applicant or a recipient of certification would only be allowed a one-time herd transition exemption. An exemption regulated in this manner would stop new start-ups that

consisted of or included responsibly connected persons who had already used the one-time exemption, thus ending the ability to transition multiple conventional herds to organic. Conversely, attaching the exemption to an operation, as recommended by NOP, would allow any newly certified entity (however configured) to be eligible for the one-time transition of a conventional dairy herd each time a business arrangement was reconfigured, which could include persons with a 10% or more ownership stake in another operation that had already used the one time exemption. Continuing to allow the one time exemption to be used by the same person(s) to transition under multiple entities is not leveling the playing field. Tying the one time exemption to a responsibly connected person will greatly help level the playing field, although the only way to really level it would be to impose a limit on how many animals each responsibly connected person could transition, such as 250 animals.

USDA AMS already uses the “the responsibly connected person” approach to enforce other regulations and this approach is also consistent with proposal in the Strengthening Organic Enforcement (SOE) proposed rule regarding noncompliance procedures for certified operations. In the SOE proposed rule, USDA has proposed amending the regulations to clarify that “a person who is responsibly connected to an operation that violates the OFPA or the USDA organic regulations may be subject to a suspension of certification (if the responsibly connected person is certified), or civil penalties or criminal charges and/or may be ineligible to receive certification.” Similarly, in order to enforce Origin of Livestock provisions, USDA must identify and regulate responsibly connected person(s) with ownership stakes that are connected to organic operations making use of the one-time transition. This will bolster the enforcement capacity of USDA by ensuring that the same entity (producer/corporation) does not transition multiple conventional herds to organic by continually establishing new operations.

In sum, attaching the one-time transition exemption to the “responsibly connected person(s)” would more effectively fulfill a primary goal of the proposed rule—to prevent organic dairies and or individuals, from transitioning multiple conventional herds or groups of animals. It would do so in a manner that would preclude producers from circumventing the one-time rule.

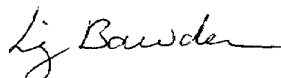
We understand that some certifiers may have limited support for requiring the tracking of herd owners and including that information in the organic certification, but it is a necessity. Those certifiers will have to follow the history of the responsible connected person(s), which may be difficult but an operation with several dba's will be just as difficult to track. Ownership in businesses are easily tracked electronically on a state level, so should be possible through the organic data-base. Certifiers are used to thinking of "operations" as being certified and associating "responsible connected people" to those operations. Without that connection, there is no legal entity to work with. Certifiers and the NOP currently should be tracking those certified entities that practice certifier shopping once they receive non-compliances they do not want to remedy.

**6. Implementation timeframe.** We urge that all requirements of the rule be implemented immediately upon publications of the Final Rule, with the only exception being those dairies that have already started their one-time transition and were already approved by a certifying agent. Having anticipated a Final Rule since 2015, no one can validly claim they need more time.

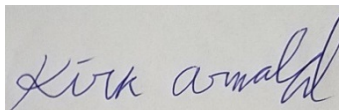
In summary, we need a Final Rule on the OOL and we need it now. We need to protect the integrity of USDA organic certification in order to have a level playing field in which there can be a thriving organic dairy market that pays a fair price to producers while guaranteeing the integrity of the product for consumers. Despite increase in retail sales, processors are still imposing lower payprices and reductions on volume in a monopsony<sup>3</sup> supply market that increasing is dominated by large operations that are growing volumes of organic milk at low cost operations. To start to address the inequities in the supply side, the regulation needs to be implemented immediately when the Final Rule is published with the only exception being those established, discrete dairy herds that have already started their transition and have registered their Organic Plan with a certifier. Enforcement is the key, as it is with any regulation. Within certification agencies, inspectors and desk reviewers play key roles in enforcement of the status of transitioned livestock and verification of livestock records. If one chooses to benefit from organically certified production, one has chosen to actively engage with one's certifier in ensuring a high level of accountability. That level of cooperation is what this new regulation will need to have, as well as strict auditing of animal lists and enforcement, if it is to have any effect on the organic supply market and hopefully secure some form of future for small to mid-size organic dairies that follow the regulations and have no opportunities to use economies of scale to level the playing field.

Thank you for your consideration. Please contact NODPA Executive Director Ed Maltby if you require any more information.

Sincerely,



NODPA Co-President and NY organic dairy farmer



NODPA Co-President and NY organic dairy farmer

NODPA is the largest organic dairy producer organization in the country with a membership of eight hundred and thirty six organic dairy producers in the Eastern USA. NODPA's mission is to "enable organic dairy family farmers, situated across an extensive area, to have informed discussion about matters critical to the well-being of the organic dairy industry as a whole." NODPA is not aligned with any one processor or cooperative and therefore is able to represent the views and needs of many different farmers.

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□ On April 3, 2017, the Antitrust Division of the U.S. Department of Justice announced that it completed its review of Danone S.A.'s acquisition of The WhiteWave Foods Company Inc. ("WhiteWave"). In order to allow the \$12.5 billion acquisition to proceed, the Antitrust Division is requiring Danone to divest the Stonyfield Farms business to an independent buyer approved by the U.S. government.

<https://www.huntonretailindustryblog.com/2017/04/articles/competition-antitrust/doj-completes-review-danone-whitewave-merger-requires-divestitures/>

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