

June 26, 2023

Ms. Valeria Frances
Agricultural Marketing Specialist
National Organic Program, AMS/USDA
1400 Independence Ave.
SW, Room 2642–South, Ag Stop 0268,
Washington, DC 20250–0268.

**7 CFR Part 205 [Document Number AMS–NOP–22–0055]
Origin of Livestock; New Information Collection**

Dear Ms. Frances:

We, the undersigned, are responding to AMS’ request for public comment on the burdens, costs, and other effects of the information collection required by the new variance in the Origin of Livestock” (OOL) final rule (87 FR 19740) (Final Rule) that has three different reasons for allowing the sale of transitioned dairy cows to another operation as organically certified animals.

Our principal points are:

- **We are against all forms of exemption from regulation because they are a way for certified organic and non-certified operations to circumvent both the intent and the legal definition of a regulation.**
- **The bar for granting a variance should be set high and be difficult to obtain so that it does not undermine the integrity of the organic seal and protects the value of the seal as a marketing tool.**
- **The decision whether to approve an application for a variance must be made by the AMS Administrator, not the certifier.**
- **Using the SBA definition for “small business” will include a large majority of organic dairy operations, up to a size which is by no means considered small in the organic dairy world.**
- **The requirements for each type of variance do still allow possible opportunities for fraudulent claims.**
- **If decision-making about a variance is to be made consistently, the information on which it is based must be current and accurate. The review by the certifying agent as to whether the variance request matches the reasons listed at § 205.236(d) and whether the documentation provided by the operation justifies the need for the variance must provide the reasons for their recommendation and include any documentation that supports their recommendation. Then, USDA AMS determines whether to grant the variance request based on the recommendation of the certifier(s) and USDA’s own assessment of the situation. This cannot be done in a vacuum, based on data from non-organic dairy production or based on anecdotal**

information from the certifier. The documents to justify the variance must be compared to current and independent organic dairy production data.

- **Certifiers and USDA AMS staff that decide on variances should be instructed to talk directly to those asking for the variance.**

We are against all forms of exemption from regulation because they are a way for certified organic and non-certified operations to circumvent both the intent and the legal definition of a regulation. This is especially true with the Origin of Livestock regulation. The interpretation of the exemption, for using only animals that are organically certified from the last third of gestation for operations who are transitioning non-organic cows to organic production, has varied greatly and is the reason for the publication of the Final Rule. The variation of the interpretation has often happened at the level of the certifier because the wording of the exemption in the Organic Food and Production Act (OFPA) was not defined well enough to give USDA a legal mandate to enforce the intent of the regulation. The bar for granting a variance should be set high and be difficult to obtain so that it does not undermine the integrity of the organic seal and protects the value of the seal as a marketing tool. Any perceived loss of financial value should be judged against the investment by those that follow the regulations in transitioning non-organic cows to organic. This cost can be as high as \$1,000 per animal¹ more than the conventional cost of raising heifers from birth to first calving.

The USDA Agricultural Marketing Service (AMS) very clearly stated the problem in the Final Rule in deciding when dealing with requests for variances. We agree that an application for a variance must contain very detailed information about the operating structure, governance and financial health of the certified operation and the recipient of the animals. This decision must finally be made by the USDA Administrator² not the certifier. From the Final Rule:

“AMS considered allowing certified agents to decide various requests but decided to retain those decisions at the Administrator level similar to the existing temporary variances process at 205. By requiring operations to seek approval from the Administrator rather than individual certifying agents, AMS believes that the process will result in more consistent decision making.

AMS is best positioned to make these decisions (vs. certifiers) because it can most easily request information from any accredited certifier. AMS anticipates that it may need to obtain or verify information from more than one certifier to assess the variance request.

1-USDA Puts Northeast Organic Dairies at a Disadvantage, January 13, 2020/Fay Benson (<https://smallfarms.cornell.edu/2020/01/usda-puts-northeast-organic-dairies-at-a-disadvantage/>) and the final regulatory flexibility analysis in the OOL Final Rule (<https://www.federalregister.gov/documents/2022/04/05/2022-06957/national-organic-program-origin-of-livestock>)

2-The Administrator includes a “representative to whom authority has been delegated to act in the instead of the Administrator” which could be the NOP Program Manager, i.e., the NOP Deputy Administrator.

AMS is also best positioned to track whether any one operation is making multiple variance requests as a means to continue to resource transition animals. The new origin of livestock paragraph describing this type of variance identifies the scenarios for which a variance could be granted and describes the process for requesting a variance. The limited circumstances in which a variance may be granted will prevent this process from being used as a mechanism for an operation to continually source transitioned animals. The variance must be submitted to NOP through a certifier and will be considered by the Administrator against the limited circumstances listed in the regulation in § 205.236(d)(1).”

Variances will be made only for businesses that are ‘small’, as determined by the Small Business Administration (SBA) in the small business size regulations (13 CFR part 121). In 13 CFR § 121.201 Subsector 112—Animal Production and Aquaculture, the size of a small dairy operation is one that has \$3.75 million or less in annual receipts. For organic herds that have lower annual production averages than non-organic, (the average organic production is 14,000 lbs. a year or 140 cwt per cow per year) that variance will be available to the majority of organic dairy operations. Assuming a \$31/cwt pay price-plus a 20% culling rate, an average organic herd of 700 milking cows would qualify as a small herd by 13 CFR part 121. The average size of a non-organic dairy herd in 2022 was 337 milking cows.³ According to the USDA NASS report in 2021 the average size of an organic herd is approximately 130 milking cows. The addition of 700 organic dairy cows to another operation in a region is significant and should be seen as affecting the dynamics of a regional supply side market. CROPP Cooperative says the average size of their organic dairy members is 89 cows. The introduction of 700 more cows into a region could affect 9 other farms in that region, especially as buyers look for economies on trucking milk.

AMS has invited comments on the following topics:

Question 1. Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.

The criteria for granting a variance are too broad and lack definition; therefore, the available information needs to inform the Administrator of all the financial, operational and governance details of both parties to the variance to determine the decision on the request as every situation will be different. The lack of market data on the value of transitioned and certified animals increases the need for detailed information on each applicant for a variance. To use comparable data from the marketing of non-organic animals is not applicable as the demand for non-organic and organic animals does not operate on the same criteria. Demand for non-organic animals

3 - Milk Production (May 2023) USDA, National Agricultural Statistics Service

depends largely on the worldwide demand and supply of milk, whereas the demand for certified animals is tied to domestic supply and demand, competition among organic dairy buyers and cost of inputs.

Below, we examine the requirements of each type of variance and the possible opportunities for fraudulent claims:

§ 205.236.(d) (i) *The certified operation selling the transitioned animals is part of a bankruptcy proceeding or a forced sale.* It is imperative that the Administrator is aware of the reasons for the bankruptcy or forced sale. Declaring bankruptcy can be a tool in restructuring a company whose principal owner(s) will sell/transfer assets to another of their organic dairy operations as part of the terms of the bankruptcy court agreement. This may coincidentally occur when the price for organic milk is high and in short supply. Bankruptcy or a forced sale of assets could be as simple as the calling in of a loan or failure to pay for feed supplied by one of the owners, who has another organic dairy recently transitioned. The activities of the beneficiary of bankruptcy assets should be under the same scrutiny as the operation filing bankruptcy.

§ 205.236.(d) (ii) *The certified operation has become insolvent, must liquidate its animals, and as a result has initiated a formal process to cease its operations.* There are generally two types of insolvency – cashflow and balance sheet. Unfortunately, most organic dairies live in cash flow insolvency for extended periods of time. Many of them extend that into balance sheet insolvency when the cash value of their assets and the current and potential income are insufficient to meet their debts. There’s no reason why the liquidation of animals should be acceptable for a variance in their status at sale. The animals would not have lost any value because of their transition to organic, so their cash value at the time of sale will be the same either as organic or non-organic. Currently, there is no market data that shows an increased value for organic animals. In fact, the reverse is often true.⁴ The possibility that the variance can be manipulated exists without declaring bankruptcy but just by showing financial data that, on paper, shows insolvency. The operation may not need to surrender its certified status but makes the claim that by selling its organic animals at an inflated rate to another operation, which is an LLC where the operations owner is a member, it can keep both animals and land in organic certification.

§ 205.236.(d) (iii) *The certified operation wishes to conduct an intergenerational transfer of transitioned animals to an immediate family member.* We see no reason to approve any requests using this variance. This variance lacks definition as to an immediate family member and there

⁴ In a recent report from a livestock auction in New York, organic cull cows traded slightly below the conventional cows in March 2023. The average high price for the conventional cull cows was \$1.12 per hundredweight, compared to an average high price of \$0.92 per hundredweight for organic cull cows. The average price for conventional cull cows was \$0.80 per hundredweight, compared to an average of \$0.88 per hundredweight for organic cull cows.

are other ways in which a transfer for both planned and unexpected reasons (poor health; loss in the family) can be achieved. NOP has decided that the one-time transition exemption for non-organic cows to organically certified is for the operation, not the owner of the operation, 'responsible person' or the operator. The intergenerational transition can be done within the operation ownership using any number of different ways to reimburse the family member who is transferring the assets. Family members can join in the ownership and operation of an existing organic operation, allowing the receiving generation to receive the cows that were transitioned by the giving generation, because they are part of the operation that transitioned the animals. Within 5 years of transition, the majority of the herd will have a last third of gestation status which then presents no problems for the family transfer, except if the transfer only incorporates cows over 7 years old.

Question 2: The accuracy of the agencies estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used.

Once again regulation is being hindered by the lack of independent information on organic dairy. The prediction of the number of operations who would claim the variance is said to be based on the number of total variances granted in one year over all certified operations. For comparison, AMS used the 10 temporary variance requests received out of 46,277 operations which is .02%. The NASS 2021 survey report stated that there were 2,528 certified organic dairy farms. Using .02% of that figure would effectively leave one request for a variance not the 28 that was used by USDA in its calculations. Based on industry knowledge and an assessment of the organic dairy market for both cull and milking cows, plus the current lack of economic sustainability of organic dairy, we estimate that no more than 10 variance requests will be received in any one year, not 28. Many of these will be from the 40% of operations that are outside of the USA. Anecdotal reports from domestic buyers, certifiers and producers across the country are that organic dairies are leaving the industry or returning to a more secure income as non-organic dairies who have an extensive and well-funded safety net program. Most, if not all, are organic dairies that would qualify as small under the variance. The limited information from the State of Vermont shows that the number of organic dairies has dropped from 203 in 2016 to 126 in 2023.

The information about the time that certifiers will have to spend on each application is dependent on the type of recordkeeping employed and questions asked of the producer by the certifiers, which varies from certifier to certifier. Certifiers will have some of the information but will have to access more detailed financial and personal information from the operation itself. The estimate of one hour for this task is too low. For producers, this will be a major financial decision so they will have all their financial and operational information already prepared for banks or other lenders, so the one hour projected to provide a copy to the certifier is reasonable.

The other calculations of cost are well documented and relevant to the industry.

Question 3: Ways to enhance the quality, utility, and clarity of the information to be collected.

In the Origin of Livestock Final Rule and the recently published Notice of Funds Availability (NOFA) for the ODMAP program the USDA AMS and FSA made it clear that they did not have enough organic dairy information available to use in their decision making. They had to use information from the non-organic market which is very different from the organic market, which does not have its own Federal Milk Marketing Order (FMMO) or something similar. For many years, the National Organic Coalition (NOC), the Organic Farmers Association (OFA), Western Organic Dairy Producers (WODPA), Northeast Organic Dairy Producers (NODPA) and many others have been asking for USDA to improve its collection and publication of information about the organic dairy market. In some cases, that information is being collected but not published as distinct organic data.

If decision-making about a variance is to be made consistently, the information on which it is based must be current and accurate. The review by the certifying agent, as to whether the variance request matches the reasons listed at § 205.236(d) and whether the documentation provided by the operation justifies the need for the variance, must provide the reasons for their recommendation and include any documentation that supports their recommendation. Then, USDA AMS determines whether to grant the variance request based on the recommendation of the certifier(s) and USDA's own assessment of the situation. This cannot be done in a vacuum or based on anecdotal information from the certifier. The documents to justify the variance must be compared to current and independent information. For example, in the case NOP made for the justification for the information to be collected for a variance, then arriving at a decision for allowing a variance, it would have been useful to know how many organic dairy producers there are and how much total organic milk is produced. The USDA National Agricultural Statistics Service (NASS), Agricultural Statistics Board produces a report monthly for non-organic dairy on how many milking cows there are, number of operations and volume of milk produced. There is no report on the number of organic dairy operations or volumes of organic milk produced except for a 4- or 5-year survey completed by NASS. Another example is knowing the value of organic versus non-organic animals. Information provided to justify a variance under § 205.236.(d) (ii) must be compared to independent information on the costs of inputs and projected gross income before a decision can be made on financial solvency. This information does not currently exist for organic dairy.

The following information has been requested by many individuals and organizations both directly to USDA and submitted by organizations to Congress as part of their Farm Bill platforms. This information is needed to provide more information to organic producers, their lenders, Congress, USDA and regulators to provide current and independent data in making decisions on organic dairy.

- A survey every 6 months to be conducted by USDA Economic Research Service (ERS) to collect and publish cost of production data for organic milk

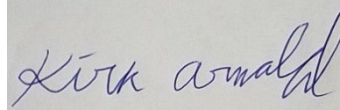
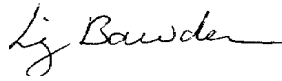
(including all costs, not just organic feed) similar to the Recent Milk Cost of Production Estimates for non-organic dairy published by ERS.

- Requirement for USDA to regularly publish regional reports on:
 - Utilization of organic Fluid Milk products and cream from Producer Receipts
 - Utilization of Fluid Milk Products and Cream by Pool Plants for Class 1 Milk, for all Federal Milk Marketing Orders either independently or aggregated by region in the case where there are not sufficient handlers.
 - Organic Mailbox Price by region.
 - Export of organic dairy products
 - Receipts of Organic Milk produced by state.
- Establishment, by USDA, of an Organic All Milk Price Survey, analogous to the existing National Agriculture Statistic Service (NASS) All Milk Price Survey, to gather and report monthly data about what organic farmers are being paid for their milk, nationally and in the largest organic dairy production states.
- Require USDA to set up an organic database equivalent to what conventional dairy has in place, using NASS or ERS (Economic Research Service) data.

Question 4: Ways to minimize the burden of collection of information on those who are to respond including the use of appropriate automated, electronic, mechanical or other technological collection of techniques or other forms of information technology.

One of the prime ways to minimize the burden of information collection is by direct personal contact with the producer. In the situation where the owner is also responsible for the hands-on management of their farm operation, asking for this variance will be at a time of high stress as the family will be making important decisions while still working on the farm. This should be considered by both certifier and USDA in working with the producer. Organic dairy producers and their families that work the land have a long-term commitment to improving the soil, the health of their animals and the environment, but perhaps not to using the latest technology. They may not be comfortable using “***appropriate automated, electronic, mechanical or other technological collection of techniques or other forms of information technology.***” Within some communities, their religion and/or culture does not permit the use of this technology, for example the Amish Plain People. Within that community, it would be most efficient and quickest to have an answering service that they could call, using their landline phone or a communal phone. Online agricultural auctions have adapted their technology to now include a designated call-in line and fax line where bids can be made by phone by the Amish who have received a printed list of items for sale. These lines are staffed by people who understand the cultural barriers. Also, sending requests and information by email may seem to be the quickest way to reach someone but if that email is not checked for 3 days it has little effect. Certifiers and USDA AMS staff that decide on variances should be instructed to talk directly to those asking for the variance. In the end, it is usually the quickest way.

Sincerely



NODPA Co-President and NY organic dairy farmer NODPA Co-President and NY organic dairy farmer

Northeast Organic Dairy Producers Alliance is a grass roots organization of organic dairy producers advocating on behalf of producers, regardless of who they sell their milk to, for a sustainable pay price, plus protect the integrity of the USDA Organic Regulations. www.nodpa.com



Lia Sieler - WODPA Executive Director



Zach Cahill - WODPA President

The Western Organic Dairy Producers Alliance (WODPA) strives to preserve, protect, and ensure the sustainability and integrity of organic dairy farming by representing organic dairy farm families in the 12 Western states. WODPA is committed to advocating for organic dairies, their livelihoods and issues impacting the sustainability of the organic dairy industry.



Kate Mendenhall - OFA Executive Director

The Organic Farmers Association (OFA) is a membership organization that represents U.S. certified organic farmers. The mission of the Organic Farmers Association is to provide a strong and unified national voice for domestic certified organic producers. 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.



Abby Youngblood – National Organic Coalition Executive Director

The National Organic Coalition (NOC) is an alliance of organizations and companies representing the full spectrum of stakeholders from across the country with an interest in organic agriculture. Our membership includes farmers, ranchers, environmentalists, consumers, retailers, certifying agents, and organic industry members. NOC seeks to advance organic agriculture and ensure a united voice for organic integrity, which means strong, enforceable, and continuously improved standards to maximize the multiple health, environmental, and economic benefits that organic agriculture provides.



Katie Baidon – NOFA-NY Policy Manager

Northeast Organic Farming Association of New York (NOFA-NY) is an organization of farmers, gardeners, and consumers working together to create a sustainable regional food system that's ecologically sound and economically viable. Through demonstration and education, we promote land stewardship, organic food production, and local marketing. We bring consumer and farmer together to make high-quality food available to all people.