

FLAG



FARMERS' LEGAL
ACTION GROUP,
INCORPORATED

360 North Robert Street Suite 500
Saint Paul, Minnesota 55101

Phone: 651 223.5400
Fax: 651 223.5335

Internet:
lawyers@flaginc.org

Web site:
www.flaginc.org

November 11, 2011

Submitted electronically via: <http://www.ams.usda.gov/nosbsavannah>

Ms. Lorraine Coke
National Organic Standards Board
USDA-AMS-NOP
1400 Independence Ave., SW
Room 2646-So., Mail Stop 0268
Washington, DC 20250-0268
nosb@ams.usda.gov

**RE: NOSB Livestock Committee Animal Welfare Recommendations
Docket ID AMS-NOP-11-0081**

Dear National Organic Standards Board:

On behalf of the Rural Advancement Foundation International – USA (RAFI), Farmers' Legal Action Group, Inc. (FLAG), submits these comments on the National Organic Standards Board (NOSB) Livestock Committee's October 14, 2011 Proposed Recommendation on Animal Welfare, Proposed Guidance Recommendation on Animal Welfare and Stocking Rates, and Proposed Recommendation on Species-Specific Guidance.

RAFI cultivates markets, policies, and communities that support thriving, socially just, and environmentally sound family farms. RAFI has been at the forefront of the organic movement for decades, and currently advances its mission by developing practical strategies to promote and preserve organic integrity. RAFI's Just Foods program works nationally and internationally to promote meaningful standards for organic agriculture, comprehensive labels for products grown in environmentally sound and socially just ways, and improved certification programs.

FLAG is a nonprofit, public interest law center dedicated to the preservation of family farms. For the past 25 years, FLAG has provided legal services to thousands of small- and medium-scale family farmers throughout the nation in class action lawsuits, administrative proceedings, public education initiatives, and legislative technical assistance involving agricultural issues. FLAG has long provided legal support to grassroots sustainable agriculture organizations working to forge a new vision of

agriculture production based on principles of land stewardship, sound resource management, and the revitalization of rural economies.

These comments include the following: 1) The FDA Egg Safety Rule is not in conflict with meaningful access to the outdoors for organic poultry; 2) The history of the organic rulemaking process unmistakably contemplated access to the outdoors regulations for organic poultry; and 3) The NOSB should consider equivalency issues when making recommendations related to access to the outdoors standards for organic poultry.

At the outset, it is important to define the term “meaningful access to the outdoors.” This term is broad enough to encompass a variety of organic poultry husbandry systems, but must at least include: 1) access to soil with vegetative cover to provide benefits such as animal natural behavior, animal health and hygiene, and environmental benefits; 2) sufficient outdoor space to allow birds to stretch their wings; 3) sufficient outdoor space to allow weaker members of the flock to escape attacks by the stronger flock members; 4) access to direct sunlight; and 5) sufficient outdoor space to provide birds the opportunity to scratch, turn around, dust bathe in soil, and perform other natural behaviors. Meaningful outdoor access does not include enclosed spaces with solid roofs overhead, such as porches or winter gardens.

I. The FDA Egg Safety Rule is Not in Conflict With Meaningful Access to the Outdoors for Organic Layers.

The first issue is large-scale egg producers’ contention that the 2009 FDA Egg Safety Rule¹ directly conflicts with meaningful access to the outdoors for organic layers. Due to this conflict, the large-scale producers argue, the NOSB should not recommend any sort of outdoor access for organic poultry.²

However, as the text of the Egg Safety Rule makes clear, the Egg Safety Rule does not in any way preclude meaningful outdoor access for organic layers. In fact, as the Preamble

¹ The FDA published the “Final Rule on the Prevention of Salmonella Enteritidis in Shell Eggs During Production, Storage, and Transportation” in the *Federal Register* on July 9, 2009. See 74 Fed. Reg. 33030 – 33101.

² See, e.g., “Concerns Hereby Submitted By: U.S. Commercial Size Organic Egg Farms In Response To Proposed Standards Submitted by the Livestock Committee to the National Organic Standards Board,” available at <http://www.regulations.gov/#!documentDetail;D=AMS-NOP-10-0021-0073>. For the sake of brevity, these comments are referred to as having been submitted by “large-scale egg producers” or “large-scale producers.”

to the Egg Safety Rule shows, the FDA went out of its way to ensure that the text of the rule would accommodate a pastured organic poultry system.³

The analysis below explains why the Egg Safety Rule and the NOSB Livestock Committee's Animal Welfare Recommendation for meaningful access to the outdoors for organic layers are not in conflict.

A. The Egg Safety Rule's Definition of "Poultry House" Limits Most of the Rule's Application to the Structure that Houses Poultry.

The Egg Safety Rule defines "Poultry house" as "a building, other structure, or separate section within a structure used to house poultry. For structures comprising more than one section containing poultry, each section that is separated from the other sections is considered a separate house."⁴ In contrast to the poultry house definition, the Egg Safety Rule defines "Farm" as "all poultry houses and grounds immediately surrounding the poultry houses covered under a single biosecurity program."^{5 6} The definition of "farm" creates a stark distinction between the "poultry house" and the "grounds immediately surrounding the poultry houses." Under the rule, the term "farm" has two components: 1) the poultry house; and 2) the grounds immediately surrounding the poultry house. Clearly, then, the term "poultry house" cannot also include outdoor areas immediately surrounding the poultry house; the term is restricted to the structure that houses poultry.^{7 8}

³ See 74 Fed. Reg. 33038 (2009), stating that the FDA consulted with the Agricultural Marketing Service, which administers the National Organic Program to ensure the FDA rule would not make it impossible for egg producers to qualify for organic certification.

⁴ See 21 C.F.R. § 118.3.

⁵ See 21 C.F.R. § 118.3.

⁶ According to the Egg Safety Rule, "Biosecurity means a program, including the limiting of visitors on the farm and in poultry houses, maintaining personnel and equipment practices that will protect against cross contamination from one poultry house to another, preventing stray poultry, wild birds, cats, and other animals from entering poultry houses, and not allowing employees to keep birds at home, to ensure that there is no introduction or transfer of *Salmonella Enteritidis* (SE) onto a farm or among poultry houses." See 21 C.F.R. § 118.3.

⁷ The following canon of statutory interpretation applies here: Courts should not construe different terms within the same statute to embody the same meaning. See, e.g., *Russello v. United States*, 464 U.S. 16 (1983).

⁸ Additionally, some of the Egg Safety Rule's requirements for poultry houses are plainly inappropriate for application to an outdoor area outside a poultry house. For example, § 118.4 (d) requires cleaning and disinfection, including the removal of dust (impossible to do outside) and "disinfect...with spray, aerosol, fumigation, etc." See 21 C.F.R. § 118.4 (d) (3).

As discussed below, with only one exception, the Egg Safety Rule by its terms applies solely to the poultry house structure itself—not to the outdoor areas surrounding the poultry house. The rule’s biosecurity, pest control, and testing program activities are to be applied to the poultry house structure. Organic egg producers who provide meaningful outdoor access can comply with the Egg Safety Rule requirements by implementing these programs within their poultry houses. There is no requirement to apply the programs to pasture areas.⁹ Consequently, arguments that access to the outdoors requirements conflict with the Egg Safety Rule are misleading and inaccurate.¹⁰

B. The Egg Safety Rule’s Biosecurity Requirements Do Not Conflict With Meaningful Access to the Outdoors for Organic Layers.

Large-scale egg producers have pointed to the requirements of 21 C.F.R. § 118.4 (b), entitled “Biosecurity,” as an example of how the Egg Safety Rule conflicts with meaningful access to the outdoors requirements. This section states, in pertinent part:

As part of this program, you must take steps to ensure that there is no introduction or transfer of SE into or among poultry houses. Among such biosecurity measures you must, at a minimum:

- (1) Limit visitors on the farm and in the poultry houses;
- (2) Maintain practices that will protect against cross contamination when equipment is moved among poultry houses;
- (3) Maintain practices that will protect against cross contamination when persons move between poultry houses;
- (4) Prevent stray poultry, wild birds, cats, and other animals from entering poultry houses; and
- (5) Not allow employees to keep birds at home.

In particular, large-scale producers point to § 118.4 (b) (4), which requires egg producers to prevent stray poultry, wild birds, cats, and other animals from entering poultry houses.

⁹ As mentioned previously, there is one exception to this statement within the Rodent and Pest Control program. However, this exception simply applies to vegetation and debris immediately outside the poultry house. The purpose of clearing debris and vegetation adjacent to the poultry house is to protect the poultry house itself by assuring pests’ habitat does not exist directly adjacent to the poultry house. Additionally, the Rodent and Pest Control program language makes a clear distinction between the “poultry house,” and areas outside the poultry house. See 21 C.F.R. § 118.4 (c).

¹⁰ See, e.g., “Concerns Hereby Submitted By: U.S. Commercial Size Organic Egg Farms In Response To Proposed Standards Submitted by the Livestock Committee to the National Organic Standards Board,” available at <http://www.regulations.gov/#!documentDetail;D=AMS-NOP-10-0021-0073>.

RAFI Comments to NOSB, Docket ID AMS-NOP-11-0081

Page 5

November 11, 2011

FLAG

They argue that any NOP regulation requiring organic layers to go outside would make it impossible to comply with § 118.4 (b) because it would be impossible to prevent stray poultry, wild birds, cats, and other animals from entering the *outdoor area* the organic layers would occupy. This is inexplicable because the text of the rule makes it obvious that egg producers are in no way required to prevent stray poultry, wild birds, cats, and other animals from entering outdoor areas, including the grounds immediately surrounding the poultry house. If the FDA had intended to require prevention in this manner, the rule could have stated that egg producers were required to prevent stray poultry, wild birds, cats and other animals from entering the *farm*. However, the FDA purposefully chose not to do so.

In addition to the clarity of the plain text of the Egg Safety Rule's biosecurity program, the Preamble to the rule specifically states that the § 118.4 (b) prevention requirement is limited to the structure housing poultry and does not extend to the grounds or outdoor areas. The Preamble states,

We also agree that it is impractical to require egg producers to prevent stray animals from entering the grounds. Therefore, we have narrowed the provision for stray animals to apply only to the poultry houses.¹¹

In addition, the Preamble makes specific reference to the NOP's requirement that organic layers be provided access to the outdoors, and states that the FDA, in consultation with AMS, drafted the final rule so that organic producers could comply with both the NOP and FDA regulations:

(Comment 14) One comment questioned whether organic poultry producers would be able to comply with the requirement in the proposed

¹¹ 74 Fed. Reg. 33038 (2009) (In response to Comment 11 on § 118.4 Biosecurity). Comment 11 and the Response state, in part, "2. Biosecurity (Sec. 118.4 (b)) (Comment 11) Some comments stated that FDA should revise its biosecurity requirements to allow egg producers greater flexibility. In addition, some comments challenged specific biosecurity measures as being insufficiently supported by data demonstrating their effectiveness in controlling or preventing SE contamination. Specifically, comments questioned the value of requiring personal protective equipment and sanitizing stations between houses on one farm, limiting visitors, controlling movement of workers from house to house, preventing employees from having poultry at home, and preventing stray poultry, wild birds, and other animals from entering the grounds. ... (Response) FDA agrees with the comments that biosecurity measures could be more flexible in the final rule without jeopardizing the effectiveness of the SE prevention measures. ... We also agree that it is impractical to require egg producers to prevent stray animals from entering the grounds. Therefore, we have narrowed the provision for stray animals to apply only to the poultry houses."

rule (Sec. 118.4 (b) (4)) that requires egg producers to “prevent stray poultry, wild birds, and other animals from entering grounds and facilities.” The comment stated that this requirement is in conflict with a requirement under the USDA National Organic Program (7 CFR part 205) that organic poultry producers must provide outside access for all livestock. The comment also stated that farms that are based on a pastured poultry system, which typically provides a substantial percentage of the birds’ diet from pasture, would have difficulty complying with this requirement.

(Response) We agree that it would be difficult to prevent stray poultry and other animals from entering the grounds of the farm, and we believe it is sufficient to keep stray animals out of the poultry house. Therefore, in the final rule, we have changed the requirement for stray animals so that it applies *only to poultry houses rather than the entire grounds*. Further, we have consulted with AMS, which administers the National Organic Program, and AMS has informed us that this requirement would not make it impossible for eggs to qualify as organic. (Emphasis added.)¹²

While much has been made of the § 118.4 (b) prevention requirement, it is clear that the Egg Safety Rule’s biosecurity program does not in any way conflict with standards requiring meaningful access to the outdoors. Organic egg producers—like all egg producers—must prevent stray poultry, wild birds, cats, and other animals from entering poultry houses. As stated in the Preamble to the Egg Safety Rule, this can be done by keeping grass and weeds cut, minimizing the existence of standing pools of water near poultry houses, and repairing holes on poultry houses.¹³ Organic egg producers can simultaneously comply with this requirement and provide meaningful outdoor access for organic layers.

C. The Egg Safety Rule’s Rodent and Pest Control Requirement Does Not Conflict With Meaningful Access to the Outdoors for Organic Layers.

Large-scale egg producers have also pointed to the requirements of 21 C.F.R. § 118.4 (c), entitled “Rodents, flies, and other pest control,” as an example of how the Egg Safety Rule conflicts with meaningful access to the outdoors requirements. This section states, in pertinent part:

As part of this program, you must:

- (1) Monitor for rodents by visual inspection and mechanical traps or

¹² See 74 Fed. Reg. 33038 – 33039 (2009).

¹³ See 74 Fed. Reg. 33063 (2009).

RAFI Comments to NOSB, Docket ID AMS-NOP-11-0081

Page 7

November 11, 2011

FLAG

glueboards or another appropriate monitoring method and, when monitoring indicates unacceptable rodent activity within a poultry house, use appropriate methods to achieve satisfactory rodent control;

(2) Monitor for flies by spot cards, Scudder grills, or sticky traps or another appropriate monitoring method and, when monitoring indicates unacceptable fly activity within a poultry house, use appropriate methods to achieve satisfactory fly control;

(3) Remove debris within a poultry house and vegetation and debris outside a poultry house that may provide harborage for pests.^{14 15}

Again, organic egg producers can simultaneously provide meaningful outdoor access and comply with § 118 (c) (3). In contrast to statements by large-scale egg producers¹⁶, there is no requirement for poultry houses to be “rodent resistant.” The plain language of the rule simply requires: 1) removal of debris *within* a poultry house that may provide harborage for pests, and 2) requires removal of vegetation and debris *outside* a poultry house that may provide harborage for pests. The removal of debris within a poultry house is unaffected by an access to the outdoors requirement. The requirement for removal of debris and vegetation that may provide harborage for pests outside a poultry house is the only part of the Egg Safety Rule that applies outside of the poultry house. As stated in the Preamble to the Egg Safety Rule, practices such as limiting high grass in areas adjacent to the poultry house helps control rodents and pests.¹⁷ In light of the Preamble, the intent of the Egg Safety Rule § 118 (c) (3) is to ensure the outside areas immediately adjacent to the poultry house are maintained in such a way as to deter rodents and pests.

¹⁴ See 21 C.F.R. § 118.4 (c).

¹⁵ Note that the language of § 118.4 (c) makes it even more clear that term “poultry house” as used in the Egg Safety Rule cannot include areas outside the poultry house. Section 118.4 (c) makes a clear distinction between the poultry house and areas “outside a poultry house.”

¹⁶ See, e.g., “Concerns Hereby Submitted By: U.S. Commercial Size Organic Egg Farms In Response To Proposed Standards Submitted by the Livestock Committee to the National Organic Standards Board,” available at <http://www.regulations.gov/#!documentDetail;D=AMS-NOP-10-0021-0073> (“Housing systems for poultry should be designed to be rodent resistant and allow for monitoring for the presence of rodents so that steps may be taken to initiate eradication efforts if needed. We are concerned that the Pasture Rule and any future rule requiring outdoor access beyond a winter garden weakens the potential for appropriate rodent control and prevention of exposure of the hens to rodent droppings.”)

¹⁷ See 74 Fed. Reg. 33059 (2009).

Organic egg producers can ensure the areas immediately adjacent to the outside of the poultry house are kept free of debris and vegetation, while simultaneously providing access to outdoor areas at a short remove from the poultry house. In fact, most organic egg operations ensure as a matter of course that areas immediately adjacent to both fixed poultry houses and mobile poultry houses are free of vegetation—like tall grass—that could provide harborage for pests. Again, the Egg Safety Rule and the proposed outdoor access requirements are not in conflict.

D. The Egg Safety Rule’s Environmental Testing Requirement Does Not Conflict With Meaningful Access to the Outdoors for Organic Layers.

Finally, large-scale egg producers have also pointed to the requirements of 21 C.F.R. §§ 118.5, 118.7 and 118.8, requiring environmental testing for Salmonella Enteritidis (SE),” as another provision that conflicts with meaningful outdoor access requirements for organic layers. Section 118.5 states, in pertinent part:

(a) Environmental testing when laying hens are 40 to 45 weeks of age. As one indicator of the effectiveness of your SE prevention plan, you must perform environmental testing for SE (as described in Sec. Sec. 118.7 and 118.8) *in a poultry house* when any group of laying hens constituting the flock within the poultry house is 40 to 45 weeks of age. (Emphasis added.)

Section 118.7, entitled “Sampling methodology for Salmonella Enteritidis (SE),” goes on to explain:

(a) Environmental sampling. An environmental test must be done for each *poultry house* in accordance with Sec. 118.5 (a) and (b). *Within each poultry house*, you must sample the environment using a sampling plan appropriate to the *poultry house* layout.¹⁸ (Emphasis added.)

Section 118.8, entitled “Testing methodology or Salmonella Enteritidis (SE),” further explains that testing must be conducted using a method called “Environmental Sampling and Detection of Salmonella *in Poultry Houses*.”¹⁹ (Emphasis added.)

Additionally, the Preamble to the Egg Safety Rule states...

¹⁸ 21 C.F.R. § 118.7 (a).

¹⁹ See 21 C.F.R. § 118.8 (a).

Environmental sampling would be accomplished by a method such as swabbing manure piles *in the poultry house* and then culturing those swabs using a primary enrichment testing method.²⁰ (Emphasis added.)

Unmistakably, the environmental testing and sampling required by the Egg Safety Rule is to be conducted entirely *within the poultry house*. The FDA contemplated the specific testing method to involve swabbing piles of manure within the poultry house. Therefore, the movement of organic layers from the poultry house to the outdoors is irrelevant to the testing required by the Egg Safety Rule. Organic producers can test for SE within their poultry houses while simultaneously providing meaningful outdoor access for organic layers.

E. Large-scale Egg Producers' Professed Concerns About Animal Diseases Ignore Scientific Evidence, Are Simply Scare Tactics.

A large body of scientific research states that poultry flocks granted meaningful access to the outdoors are *less* likely to be at risk for diseases like avian bird flu. According to a leading USDA bird flu researcher, there has never been a recorded emergence of a highly pathogenic avian influenza virus in any backyard flock or free-range poultry operation.²¹ Also according to USDA researchers, it is the “high density confinement rearing methods” that give bird flu “a unique chance to adapt to the new species.” That is, today’s intensive farming practices may remove the natural obstacles to transmission that prevent the virus from becoming too dangerous.²²

Nevertheless, ignoring this research, large-scale egg producers repeatedly make inaccurate statements similar to the following: “Our best defense against [Highly Pathogenic Avian Influenza] is keeping birds indoors.”²³ In fact, there is no evidence that

²⁰ See 74 Fed. Reg. 33067-33068 (2009).

²¹ See, Greger, Michael, M.D., Director of Public Health and Animal Agriculture at the Humane Society of the United States, “Bird Flu: A Virus of Our Own Hatching,” Lantern Books, November 2006, available at: <http://birdflubook.com/a.php?id=63>, explaining why avian bird flu is a serious concern in poultry confinement operations but has never been documented as a serious threat in outdoor poultry flocks.

²² See, Greger, supra footnote 21, citing Suarez DL, Spackman E, and Senne DA. 2003. Update on molecular epidemiology of H1, H5, and H7 influenza virus infections in poultry in North America. *Avian Diseases* 47:888-97.

²³ See, “Concerns Hereby Submitted By: U.S. Commercial Size Organic Egg Farms In Response To Proposed Standards Submitted by the Livestock Committee to the National Organic Standards Board,” available at <http://www.regulations.gov/#!documentDetail;D=AMS-NOP-10-0021-0073>.

keeping poultry continuously confined does anything to prevent avian bird flu. To the contrary, Highly Pathogenic Avian Influenza is a problem concentrated in large-scale confinement practices—not in outdoor operations.²⁴ The following excerpt explains why this is so:

Imagine an outdoor setting. A duck flying overhead drops a dropping laden with relatively innocuous virus into a grassy field through which a flock of hens is pecking. The hens may be exposed to the virus, but coming straight from waterfowl, the virus is so finely tuned to duck physiology that it may not gain a foothold before being wiped out by a healthy chicken's immune system.

...

If an outdoor flock does manage to get infected, the virus still has to keep spreading to remain in existence. Influenza virus is rapidly killed by sunlight and tends to be dehydrated to death in the breeze. Its ability to spread efficiently from one chicken to the next outside in the open air is relatively limited. In a sparsely populated outdoor setting, there may simply be too few susceptible hosts nearby to passage between in order to build up enough adaptive mutations to do more than ruffle a few feathers.

...

Now imagine the mad scientist scenario. Tens of thousands of chickens crammed into a filthy, football field-sized broiler shed, left to lie beak-to-beak in their own waste. The air is choked with moist fecal dust and ammonia, which irritates the birds' respiratory passages, further increasing susceptibility in chickens already compromised by the stress of confinement. Since the birds are standing in their own excrement, the virus need not even develop true airborne transmission via nasal or respiratory secretions. Rather, the virus has an opportunity to be excreted

²⁴ “Bird flu is nothing new. It has co-existed rather peacefully with wild birds, small-scale poultry farming and live markets for centuries. But the highly-pathogenic strains of bird flu, such as the deadly H5N1, are essentially a problem of industrial poultry practices. H5N1's epicentre is the factory farms of China and Southeast Asia and, while wild birds can carry the disease (at least for short distances), its main vector is the highly self-regulated transnational poultry industry, which sends the products and waste of its farms around the world through a multitude of channels.” International Federation of Organic Agriculture Movements (IFOAM), Criticisms and Frequent Misconceptions about Organic Agriculture: The Counter Arguments, available at http://www.ifoam.org/growing_organic/1_arguments_for_oa/criticisms_misconceptions/misc_onceptions_no26.html.

in the feces and then inhaled or swallowed by the thousands of other birds confined in the shed, allowing the virus to rapidly and repeatedly circulate. With so many birds in which to readily mutate, low-virulence strains can sometimes turn into deadly ones. The dose of virus transmitted from one bird to another might also play a crucial role.

...

Highly pathogenic bird flu viruses are primarily the products of factory farming.²⁵

Similarly, salmonella enteritidis outbreaks in shell eggs are most often associated with large-scale confinement operations—operations that do not allow layers access to the outdoors. The SE outbreak in the summer of 2010 (which occurred after the implementation of the Egg Safety Rule) affected millions of eggs and was traced to a large confinement poultry operation in Iowa.²⁶ This is just one example that shows how preventing access to the outdoors does not prevent SE.

Large-scale producers should not be permitted to use inaccurate information as scare tactics to prevent the implementation of meaningful access to the outdoors requirements for organic livestock.

II. The Public 20+ Year History of the Organic Rulemaking Process Put Organic Egg Producers on Notice that Organic Production Required Access to the Outdoors for Organic Poultry.

The second issue is the organic large-scale egg producers' argument that the National Organic Program (NOP) should not impose standards requiring meaningful access to the outdoors for organic layers because the large-scale producers would be financially harmed by a change in the status quo.²⁷ These large-scale producers knowingly invested in large industrial-style egg production facilities on properties that cannot accommodate meaningful access to the outdoors. Many of these facilities were originally constructed for conventional industrial egg production, and were modified for organic production to take advantage of the organic premium. The large-scale producers state that they should not be forced to suffer financial harm because of new, more stringent regulations.

²⁵ See Greger, supra footnote 21, citing Horimoto T and Kawaoka Y. 2001. Pandemic threat posed by Avian Influenza A viruses. *Clinical Microbiology Reviews* 14:129-49.

²⁶ See Centers for Disease Control, "Investigation Update: Multistate Outbreak of Human Salmonella Enteritidis Infections Associated with Shell Eggs," December 2, 2010 (FINAL Update), available at <http://www.cdc.gov/salmonella/enteritidis/index.html>.

²⁷ McEvoy, Miles, Deputy Administrator, National Organic Program Notice to Stakeholders and Interested Parties, May 6, 2011, NOP Notice 11-7, at page 9.

In light of the last decade of legislative history of the NOP regulations and the NOSB recommendation process, it is impossible to accept that large-scale organic egg producers could not have predicted that NOP regulations would eventually be promulgated to require meaningful access to the outdoors. As discussed below, these producers clearly took a calculated risk when they entered the market and took advantage of the nascent rulemaking stages of the organic regulation. They should not be rewarded for failing to prepare for the inevitability of access to the outdoors regulation for organic layers.

National Organic Program certified organic status is a privilege, not a right. Large-scale producers can choose to come into compliance with access to the outdoors requirements, or they can exit the organic program. The organic label is the “gold standard” in food production, and the Organic Foods Production Act states that one purpose of the Act is “to assure consumers that organically produced products meet a consistent standard.”²⁸ Absent strong standards requiring meaningful access to the outdoors for organic layers, the production of organic eggs in the United States has occurred under wildly inconsistent conditions. Consumers are not currently assured that organic eggs come from a facility that allows poultry exercise, freedom of movement, and appropriate reduction of stress.²⁹ Because some large-scale producers have chosen to take advantage of the lack of regulatory specificity to produce organic eggs under conditions that do not comply with the spirit or the letter of the organic regulations, strong standards requiring meaningful access to the outdoors for organic layers are a necessity.

Additionally, claims by large-scale producers that investments in organic facilities are “worthless”³⁰ are highly questionable. Even if these facilities cannot come into compliance with access to the outdoors requirements, they can still capture a higher premium by labeling their eggs as “cage-free.”

The following sections detail the history of organic rulemaking leading up to the current NOSB animal welfare recommendation. As shown below, this history demonstrates an unmistakable intention to create strict standards relating to access to the outdoors for organic poultry.

²⁸ See 7 U.S.C. § 6501 (2).

²⁹ See “Scrambled Eggs: Separating Factory Farm Egg Production from Authentic Organic Agriculture,” Cornucopia Institute (2010), available at <http://www.cornucopia.org/2010/09/organic-egg-report-and-scorecard/>.

³⁰ See, “Concerns Hereby Submitted By: U.S. Commercial Size Organic Egg Farms In Response To Proposed Standards Submitted by the Livestock Committee to the National Organic Standards Board,” available at <http://www.regulations.gov/#!documentDetail;D=AMS-NOP-10-0021-0073>.

A. 1990 Passage of OFPA.

It was “widely understood” at the time of the OFPA’s passage that “organic livestock production would eventually include standards requiring superior welfare for animals.”³¹ Additionally, the Humane Society of the United States played a central role in advocating for the OFPA’s passage.³²

B. NOSB Recommendations, 1994 – 2005.

Over the period 1994 to 2005, the National Organic Standards Board and the NOSB Livestock Committee made at least twelve recommendations regarding access to the outdoors for livestock, pasture, and conditions for temporary confinement of animals.³³

³¹ NOP Policy Memo “Access to the Outdoors for Livestock” issued October 29, 2002 (reissued as a new policy memo January 31, 2011), NOP PM 11-5.

³² NOP Policy Memo “Access to the Outdoors for Livestock” issued October 29, 2002 (reissued as a new policy memo January 31, 2011), NOP PM 11-5.

³³ Advanced notice of rulemaking, Access to Pasture Rule (2005), available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3098229&acct=noprulmaking>. See also NOSB Formal Guidance on NOP Pasture Requirements, August 17, 2005, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3104468>; see NOSB Formal Recommendation on Pasture Rule, March 18, 2005, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3104502>; see NOSB Formal Recommendation for Rule Change “Stage of Production to Stage of Life”, March 18, 2005, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3104499>; see NOSB Recommendation on Access to the Outdoors, May 8, 2002, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3104560>, see NOSB Principles on Organic Handling and Production, May 7, 2001, (stating “An organic production system is designed to provide livestock with optimal living conditions that promote their health and well being.”), available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3104584>, see NOSB Livestock Committee Recommendation, February 11, 1999, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=stelprdc5058926>; see NOSB Livestock Committee Draft Recommendation on Access to the Outdoors for Poultry, December 21, 2001, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=stelprdc5058922>; see NOSB Final Recommendations on Livestock Issue Papers #1 and # 2, 1998-1999, (stating that livestock confinement must be temporary and that certified organic livestock farms shall incorporate access to the outdoors, direct sunlight, and managed pasture for ruminant animals), available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=stelprdc5058927>; see NOSB Livestock Committee Recommendation Amendment, February 11, 1999, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=stelprdc5058926>; see NOSB

As far back as 1994, the NOSB made a formal recommendation stating, “A production environment which limits livestock stress and promotes livestock health shall be provided; it must include the following factors: access to shade, shelter, fresh air, and daylight suitable to the species, the stage of production, the climate, and the environment.”³⁴ In 1998, the NOSB Livestock Committee reaffirmed the intent that all organic livestock shall be given meaningful outdoor access, requiring “[a]ccess to shade, shelter, fresh air, outdoors, and direct sunlight suitable to the species, the stage of production, the climate, and the environment.”³⁵ In 1999, the NOSB issued a final recommendation stating that livestock confinement must be temporary and that certified organic livestock farms shall incorporate access to the outdoors, direct sunlight, and managed pasture for ruminant animals.³⁶

C. 2000 Preamble to NOP Final Rule, and 2000 NOP Final Rule Language.

Animal health and welfare standards were also anticipated by USDA when it promulgated the National Organic Program Final Rule. The Preamble to the rule states:

Animals in an organic livestock operation must be maintained under conditions which provide for exercise, freedom of movement, and reduction of stress appropriate to the species.³⁷

Livestock Committee Report and Adopted Recommendations to the Secretary, March 16-20, 1998 (requiring “[a]ccess to shade, shelter, fresh air, outdoors, and direct sunlight suitable to the species, the stage of production, the climate, and the environment” for livestock), available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=stelprdc5058929>; see NOSB Final Board Recommendation on Organic Livestock Healthcare, Record-Keeping & Transportation Practices, June 2, 1994 (“A production environment which limits livestock stress and promotes livestock health shall be provided; it must include the following factors: access to shade, shelter, fresh air, and daylight suitable to the species, the stage of production, the climate, and the environment.”) available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=stelprdc5058942>.

³⁴ See NOSB Final Board Recommendation on Organic Livestock Healthcare, Record-Keeping & Transportation Practices, June 2, 1994, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=stelprdc5058942>.

³⁵ See NOSB Livestock Committee Report and Adopted Recommendations to the Secretary, March 16-20, 1998, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=stelprdc5058929>.

³⁶ See NOSB Final Recommendations on Livestock Issue Papers #1 and # 2, 1998-1999, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=stelprdc5058927>.

³⁷ 65 Fed. Reg. 80560 (2000).

The producer of an organic livestock operation must establish and maintain livestock living conditions for the animals under his or her care which accommodate the health and natural behavior of the livestock. The producer must provide access to the outdoors, shade, shelter, exercise areas, fresh air, and direct sunlight suitable to the species, its stage of production, the climate, and the environment.³⁸

In 2000, the National Organic Program Final Rule itself stated:

§ 205.239 Livestock living conditions.

(a) The producer of an organic livestock operation must establish and maintain livestock living conditions which accommodate the health and natural behavior of animals, including:

(1) Access to the outdoors, shade, shelter, exercise areas, fresh air, and direct sunlight suitable to the species, its stage of production, the climate, and the environment.³⁹

D. 2001 NOSB Livestock Committee Draft Recommendation on Access to the Outdoors for Poultry.

On December 21, 2001, the NOSB Livestock Committee promulgated a draft recommendation specifically stating the Committee's intent to create outdoor access regulations specifically for poultry. The Draft Recommendation states:

The intent of requiring access to the outdoors is to ensure that the organic poultry farm plan provides for living conditions that allow and encourage poultry to be able to go outside of buildings to satisfy their natural behavior patterns, provide adequate exercise area, provide preventive health care benefits and answer consumer expectations of organic livestock management. The intent is to incorporate the management plan for outdoor access as a required part of the livestock organic system plan.⁴⁰

³⁸ 65 Fed. Reg. 80561 (2000).

³⁹ See 7 C.F.R. 205.239 (2000), available at <http://www.gpo.gov/fdsys/pkg/CFR-2010-title7-vol3/pdf/CFR-2010-title7-vol3-part205.pdf>.

⁴⁰ See NOSB Livestock Committee Draft Recommendation on Access to the Outdoors for Poultry, December 21, 2001, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=stelprdc5058922>.

E. 2002 NOSB Recommendation on Access to Outdoors for Poultry.

The May 8, 2002, NOSB Recommendation on Access to the Outdoors for Poultry was passed by a vote of 12 to 1. The Recommendation states:

“1. Organically managed poultry must have access to the outdoors. Organic livestock facilities shall give poultry the ability to choose to be in the housing or outside in the open air or and direct sunshine. The producers’ organic system plan shall illustrate how the producer will maximize and encourage access to the outdoors. 2. Bare surfaces other than soil (e.g. meta[l], concrete, wood) do not meet the intent of the National Organic Standards.”⁴¹

F. 2002 NOP Policy Memo on “Access to the Outdoors for Livestock.”

The National Organic Program issued a policy memo entitled “Access to the Outdoors for Livestock” on October 29, 2002. It was reissued as a new policy memo on January 31, 2011.

The memo provided clarification for organic Accredited Certifying Agents regarding temporary confinement rules in light of access to the outdoors requirements, stating: “Access to the outdoors simply means that a producer must provide livestock with an opportunity to exit any barn or other enclosed structure.”⁴²

G. 2009 Formal NOSB Rulemaking Recommendation on Animal Welfare.

The NOSB issued a formal rulemaking recommendation on animal welfare by a vote of 13-0 on November 5, 2009. The Recommendation stated:

The need for specificity regarding animal welfare has been considered by the Livestock Committee for considerable time.

...

However, immediate priorities, such as material reviews, and lack of significant scientific data, had prevented the Committee from focusing on animal welfare from the perspective of the organic enterprise as a whole.

...

⁴¹ NOSB Recommendation, Access to Outdoors for Poultry (May 8, 2002), available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3104560>.

⁴² NOP Policy Memo “Access to the Outdoors for Livestock” issued October 29, 2002 (reissued as a new policy memo January 31, 2011), NOP PM 11-5.

Livestock Committee members arrived at the conclusion that current livestock regulation lacked specificity, with the potential for creating confusion between producers, inspectors and certifiers. Further, it was considered that the imprecise language had created unintended production practices which restricted the welfare of animals to a considerable degree.⁴³

H. 2010 Access to Pasture Rule Amendments.

The current NOP regulations on “Livestock living conditions” state:

The producer of an organic livestock operation must establish and maintain year-round livestock living conditions which accommodate the health and natural behavior of animals, including:

(1) Year-round access for all animals to the outdoors, shade, shelter, exercise areas, fresh air, clean water for drinking, and direct sunlight, suitable to the species, its stage of life, the climate, and the environment: Except, that, animals may be temporarily denied access to the outdoors in accordance with §§ 205.239 (b) and (c) Continuous total confinement of any animal indoors is prohibited.⁴⁴

To interpret a regulation, the court must look at its plain language and consider the terms in accordance with their common meaning.⁴⁵ The plain meaning of “continuous total confinement of any animal indoors is prohibited,” means that producers who do not allow organic layers access to the outdoors are in violation of the current organic regulations. As a result, large-scale organic egg producers using only concrete porches, winter gardens, or other enclosed spaces are in violation of the current NOP regulations prohibiting continuous confinement.⁴⁶

⁴³ Formal NOSB Rulemaking Recommendation on Animal Welfare, 13-0 vote, November 5, 2009.

⁴⁴ See 7 C.F.R. § 205.239 (a) (1).

⁴⁵ See *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2570 (2011) (citing *Auer v. Robbins*, 519 U.S. 452, 461, 462 (2011)) (“The Court defers to the FDA’s views because they are not plainly erroneous or inconsistent with the regulations, and there is no other reason to doubt that they reflect the FDA’s fair and considered judgment.”).

⁴⁶ See “Scrambled Eggs: Separating Factory Farm Egg Production from Authentic Organic Agriculture,” Appendix A, Cornucopia Institute (2010), available at <http://www.cornucopia.org/2010/09/organic-egg-report-and-scorecard/>.

I. Large-scale Egg Producers Were Given Notice of Intent to Create Access to the Outdoors Regulations.

The above review of the history of organic rulemaking makes clear that large-scale organic egg producers (and indeed, the public in general) were given clear notice of the NOP's intent to create access to the outdoors regulations for organic poultry. Producers who invested heavily in organic poultry facilities that could not easily accommodate access to the outdoors knowingly took a calculated risk that regulations would not be promulgated before the investors recouped their investment. The burden of that risk, however, is on those investors. It is not the NOP's job to ensure that poultry agribusiness companies make a profit. It is the NOP's job to create regulations that maintain the gold standard status for the organic label. Therefore, neither the NOSB nor the NOP should assign any weight to large-scale egg producers' complaints that they will lose money if strong standards requiring meaningful access to the outdoors for organic layers are adopted by the NOP.

J. The NOSB Should Adopt A Reasonable Transition Period for Organic Egg Producers to Comply with New Access to the Outdoors Regulations.

Although financial harm should not be a consideration in NOSB's decision to adopt stronger regulations on meaningful access to the outdoors for organic layers, NOSB should implement a reasonable transition period for organic producers to come into compliance with the organic rule. In particular, some mid-size organic producers will be able to transition but may need time to purchase property or transition land into pasture.

Under no circumstances should existing large-scale organic egg producers be "grandfathered" into a strengthened access to the outdoors regulatory regime. Creating a "grandfather" clause for these producers would be in direct violation of the OFPA's purpose "to assure consumers that organically produced products meet a consistent standard."⁴⁷

III. The NOSB Should Consider Equivalency Issues When Recommending Meaningful Access to the Outdoors Regulations for Organic Layers and Broilers.

Both the OFPA and the NOP regulations provide for equivalency arrangements with foreign nations. The OFPA states that "imported agricultural products may be sold or labeled as organically produced if the Secretary determines that such products have been produced and handled under an organic certification program that provides safeguards and guidelines governing the production and handling of such products that are at least

⁴⁷ See 7 U.S.C. § 6501 (2).

equivalent to the requirements of OFPA.”⁴⁸ Similarly, § 205.500 of the NOP regulations provides that USDA will accept a foreign certifying agent’s accreditation to certify organic production or handling operations if an equivalency agreement has been negotiated.⁴⁹

Article 2.7 of the Agreement on Technical Barriers to Trade states, “Member shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfill the objectives of their own regulations.” For the last decade, the United States has been in discussions with the European Union about creating a U.S./E.U. equivalency agreement.⁵⁰

However, as stated in Article 2.7 of the Agreement on Technical Barriers to Trade, in order to accept a second country’s regime as equivalent, the regulations of the second country should adequately fulfill the objectives of the first country’s regulations. The NOSB should take this into account when making recommendations relating to meaningful access to the outdoors, because the European regulation on organic layer outdoor stocking rates requires 42.8 square feet per bird. In contrast, the Livestock Committee’s recommendation proposes only 2 square feet per bird—and the minority position recommends only 5 square feet per bird. It is difficult to see how a U.S. regulation requiring such a comparatively small amount of outdoor access for organic poultry could “adequately fulfill” the objectives of E.U. regulations requiring over 40 additional square feet per bird. Additionally, E.U. organic regulations restrict the size of organic flocks to 3,000 birds or less. The U.S. has no restrictions on flock size, and the NOSB Livestock Committee has proposed no flock size restrictions.

Even if the U.S. organic program does not end up harmonizing the outdoor access for organic layers with the E.U. regulations (i.e., by creating a “carve-out” in this area), equivalency considerations should at least be addressed by the NOSB when making recommendations to the NOP.

RAFI has joined with the National Organic Coalition (NOC) in proposing a strong qualitative standard on access to the outdoors for organic poultry in lieu of the *quantitative* standards recommended by the Livestock Committee (e.g., 2 square feet per organic layer). A qualitative standard could better encompass the goals of an organic production system by taking into account animal welfare *in addition to* other, equally

⁴⁸ See 7 U.S.C. § 6505 (b).

⁴⁹ See 7 C.F.R. § 205.500 (c) (2).

⁵⁰ See Draft Recommendation on US/EU Equivalency, NOSB International Committee, April 15, 2002.

important organic principles—such as optimizing soil biological activity and minimizing soil erosion.⁵¹ Furthermore, a strong qualitative standard on access to the outdoors that supports a system of interrelated organic management choices may be more likely to “adequately fulfill” the objectives of E.U. regulations clearly intended to support a gold-standard E.U. regime for organic egg production.

Conclusion

The NOSB should disregard arguments against the implementation of regulations requiring meaningful access to the outdoors for organic layers that are based on a nonexistent conflict with: 1) the FDA Egg Safety Rule; or 2) inaccurate statements regarding the risk of animal diseases in outdoor flocks.

Additionally, the NOSB should disregard arguments that large-scale organic egg producers should be protected from the financial risk these producers took upon themselves by willfully ignoring over two decades of notice that regulations regarding access to the outdoors for organic layers would eventually be promulgated. Large-scale producers that do not currently offer meaningful outdoor access are currently in violation of the existing organic regulations prohibiting continuous confinement and requiring outdoor access for all livestock.

However, NOSB should be sensitive to the need for a reasonable transition period for those operations that could conceivably come into compliance with meaningful access to the outdoors requirements.

The NOSB should transparently account for the effect that significantly weaker U.S. access to the outdoors regulations for organic layers could have on a long-awaited U.S./E.U. equivalency agreement.

The NOSB should consider recommending a strong qualitative standard for access to the outdoors for organic poultry in lieu of the current Livestock Committee recommendation for a complex, paperwork-intensive quantitative system.

Finally, for NOP standards to retain the status of the “gold standard” for U.S. consumers and farmers, organic animal welfare requirements—while being flexible enough to meet the wide variations of organic practices—must also rise to the level of excellent to reclaim this status. Absent this, NOP standards for animal welfare will eventually lose market share and prestige to more vigorous market claims.

⁵¹ Please see the National Organic Coalition’s November 2011 comments to the NOSB regarding the Livestock Committee’s animal welfare recommendations.

RAFI Comments to NOSB, Docket ID AMS-NOP-11-0081

Page 21

November 11, 2011

FLAG

Sincerely,

/s/Amanda N. Heyman

Amanda N. Heyman
Staff Attorney
Email: aheyman@flaginc.org

ANH/rgc