



CORNUCOPIA
I N S T I T U T E

October 15, 2015

NOP Compliance and Enforcement Branch
Attn: Mr. Matthew Michael
Agricultural Marketing Service
United States Department of Agriculture
1400 Independence Avenue, S.W.
Mail Stop 0268, Room 2648-S
Washington, D.C. 20250-0268

RE: Complaint concerning possible violation of the National Organic Program's regulatory standards by Quality Assurance International

Dear Mr. Michael,

We were surprised that our formal complaint below, submitted in December 2014, was closed without the National Organic Program (NOP) conducting an investigation into our well-documented allegations of violations of federal organic standards.

While legally researching whether or not we had grounds to file a lawsuit challenging the NOP's lack of enforcement effort, we were surprised and dismayed to note that the procedures the NOP was following gave the National Organic Program itself discretion as to whether or not to investigate formal complaints submitted by members of the public.

Even though the NOP is currently operating in the "Age of Enforcement," in the words of Deputy Administrator Miles McEvoy, and despite Cornucopia's track record of bringing meritorious complaints forward, none of the 13 complaints was afforded even an investigation by the NOP, other than confirming with certifiers that these operations were in "good standing."

Our review of NOP procedures also determined that complaints brought against accredited certifiers would require a mandatory investigation by the NOP. Hence, we are re-filing the complaint below, and formally targeting the certifier.

In a thorough investigation, the NOP will be able to determine whether the certifier acted improperly in granting a certificate to an operation that is, allegedly, not properly providing pasture and/or outdoor access, sunshine, and fresh air and the opportunity for livestock to exhibit their natural instinctive behaviors (in addition to other organic management requirements). An investigation could also determine, if the certifier was

properly overseeing the operation but was intentionally deceived through an inaccurate Organic System Plan and/or subsequent subterfuge on the part of the operator.

Accordingly, we respectfully request that the USDA's National Organic Program formally investigate the certifier, **Quality Assurance International (QAI)**, based on our allegation that **Herbruck's Poultry Ranch, Inc.** is not complying with the organic standards. Please use the evidence that we provided to you in December 2014 for documents supporting this complaint.

For the past 10 years we have observed systemic violations of the law at numerous industrial-scale livestock facilities representing themselves as "organic." Although we have documented these with site visits, photographs, satellite imagery, first-hand witness accounts, and other documentary evidence, in most cases either no enforcement action whatsoever was taken by the USDA or minor sanctions were imposed.

In some cases the National Organic Program failed to carry out any independent investigation and instead delegated this function to the operation's certifier (which could have been deceived, could have acted incompetently, or could have been a co-conspirator in the violations). We're asking that NOP staff directly conduct investigations associated with this complaint.

In an effort to document the current improprieties, The Cornucopia Institute, facilitated by the generosity of a number of our individual, major donors, hired a firm that specializes in agricultural and industrial aerial photography to document some of the alleged abuses.

We respectfully request that your office thoroughly investigate QAI for its certification of Herbruck's Poultry Ranch, Inc. at their Green Meadows facility located near Saranac, Michigan.

The aerial photography images (contained on the computer discs forwarded to you via Federal Express and available in a lower resolution on our website) indicate the facility operates six large two-story henhouses (approximately 85,000 birds each) and an egg packing facility. There is also one building under construction.

The photographs were taken on August 15 2014. Of the estimated 510,000 birds, based on press reports quoting Herbruck family members detailing how many birds are managed at this facility, none were visible outdoors, as federal law requires.

Regulatory documents indicate this facility is permitted for over 1 million laying hens (Herbruck's reportedly manages a total of 6.6 million conventional and organic birds).

Porches are visible on each side of the building although, as a percentage, very few, if any birds, can be seen.

Furthermore, there appear to be no windows in the building. Even if there were windows the added overhang of the porches would block any sunlight from reaching the vast majority of the birds situated inside the main structure. In addition to being

deprived access to the outdoors these birds apparently are also deprived of “year-round access to direct sunshine” that federal organic regulations also require.

It is very important to understand the dynamic that takes place in most fixed henhouses. Even if a porch or modest outdoor area is provided (which is not the case at Herbruck’s Green Meadow facility where no outdoor spaces available whatsoever), the majority of birds are not close enough to pop holes to be able to exit the building or even access the porch.

In written and oral communications with the National Organic Standards Board (NOSB), some egg producers have made it abundantly clear that offering outdoor access to their birds is incompatible with their present management systems and could potentially drive them from the organic industry.

The alleged violations by Herbruck’s Poultry Ranch appear to be representative of widespread abuses in the industry. Prior formal complaints from The Cornucopia Institute have been ignored, or dismissed, to date.

We also request that the USDA conduct surprise inspections of other industrial-scale organic egg facilities, the majority of which are managed by signatories to a letter submitted to the NOSB by the United Egg Producers (UEP) in opposition to granting outdoor access to laying hens. These include:

- Cal-Maine Foods
- Delta Egg Farms
- Dixie Egg Company
- Fassio Egg Farms
- Fort Recovery Equity, Inc.
- Herbruck’s Poultry Ranch in Saranac, Michigan
- Kreher’s Farm Fresh Eggs, LLC
- Nature Pure, LLC
- Oakdell Egg Farms
- Ritewood, Inc.
- R.W. Sauder, Inc.

Outdoor Access in the Rule

Current organic standards state that organic livestock producers must “establish and maintain living conditions which accommodate the health and natural behavior of animals, including year-round access for all animals to the outdoors, shade, shelter, exercise areas, fresh air and direct sunlight suitable to the species” (7 CFR 205.239 (a)(1)).

The final rule released in February 2010 also specifies that “total continuous confinement of any animal indoors is prohibited” (7 CFR 205.239(a)(1)).

We believe that meaningful outdoor access — at a bare minimum an area large enough for every bird to be outside at the same time, and covered with either vegetation and/or

dirt — is necessary to accommodate the health and natural behavior of laying hens, as the rule states — and there must be meaningful egress so that the birds can access the outdoors.

We do not believe that small, bare, covered concrete or wood porches — that are inaccessible to the majority of the birds — meet either the letter or the intent of the organic rule. Moreover, some producers, specifically named in some of our complaints, appear to confine their organic birds continuously, not even creating an allegedly illegal/artificial porch as an outdoor space, therefore also violating the prohibition against “continuous confinement indoors.”

Furthermore, widespread abuses are taking place, nationally, in pullet production, where birds are routinely and exclusively confined through 17 weeks of age.

In addition to the published regulations, USDA Deputy Administrator Miles McEvoy issued a Policy Memorandum, on January 31, 2011, clearly stating, in terms of access to “outdoors,” that producers must provide livestock with, “an opportunity to exit any barn or other enclosed structure.”

For the sake of this discussion we will suggest that an “other enclosed structure” would include a porch, that was an integral part of the main “barn” or built as an addition to the main structure, as in the case of other large egg producers attempting to skirt this requirement of the law (The Country Hen as an example).

Because the term “outdoors” is not defined in the federal regulations, the USDA and the industry, and the courts if necessary, should rely upon common definitions as defined in respected reference dictionaries. As an example, the Merriam-Webster online dictionary and thesaurus defines “outdoors” as:

1.1 ²outdoors

noun plural but singular in construction

1.2 Definition of **OUTDOORS**

1

: a place or location away from the confines of a building

2

: the world away from human habitations

1.3 First Known Use of **OUTDOORS**

1830

1.4 Related to **OUTDOORS**

Synonyms

[open](#), [open air](#), [nature](#), [out-of-doors](#), [wild](#), [wilderness](#)

1.5 Examples of **OUTDOORS**

1. The game is meant to be played *outdoors*.
2. He worked *outdoors* all afternoon.

3. I went *outdoors* for some fresh air.

The Merriam-Webster thesaurus adds:

in or into the open air <please wait until you're *outdoors* to light up your cigarette>

Synonyms [alfresco](#), [out](#), [outside](#)

Related Words [without](#)

Near Antonyms [in](#), [inside](#), [within](#)

Antonyms [indoors](#)

To give an analogy, a parent would be instructing a child to go play baseball in an enclosed porch when they say, “It’s a beautiful day, if you’re bored, go outside and play baseball.”

The organic egg producer named in this complaint provides small concrete porches, with bare surfaces other than soil — which were specifically identified as “not [meeting] the intent of the National Organic Standards” by the NOSB beginning in 2002, or no outdoor access is being afforded it all. Their facilities also do not provide the ability to choose to go outside to all birds — their outdoor areas are too small to allow but a minute percentage of birds to go “outdoors” at the same time (even if we were going to concur that a porch was outdoors), and exit doors are inaccessible to the majority of the birds. In other words, these producers are actively *discouraging* the birds from going outside by providing both no incentive and little opportunity to do so.

Studies published in peer-reviewed, scientific journals and respected organic publications reveal that outdoor runs are necessary to accommodate the health and *natural behavior* of laying hens. As such, Cornucopia asserts that producers that provide only porches and fail to provide outdoor runs are in violation of the rule requiring affording organic livestock conditions that promote the “health and natural behavior of animals.”

The Importance of Outdoor Runs/Pasture for Organic Egg Laying Hens

When the organic standards were created, public input from the organic community made clear that stakeholders — consumers, farmers, marketers — expect organic animals to go outside. This is clear from the preamble to the final rule, published in 2002:

*Commenters were **virtually unanimous** that, except for the limited exceptions for temporary confinement, **all animals of all species must be afforded access to the outdoors**. Commenters also maintained that the outdoor area must accommodate natural livestock behavior, such as dust wallows for poultry (page 91) [emphasis added].*

*The NOSB recommended that the final rule state that all livestock shall have access to the outdoors. As a result of these comments, we have revised the final rule to establish that access to the outdoors is a **required** element for **all** organically raised livestock (page 91) [emphasis added].*

When the NOSB considered adopting this recommendation to clarify the intent of the rule, NOP staff member Richard Matthews told the Board members: “The preamble I think has always been pretty clear that the intent [of the rule] was that the birds go outside” (NOSB transcript, May 7, 2002, page 710).

And we would like to echo Mr. Matthews’ comments by emphasizing that, while the regulations were being promulgated, organic stakeholders did not just advocate for livestock to have “access” to the outdoors. They assumed that the application of these rules would result in animals actually being outdoors!

Besides for the facilities lacking any true outdoor access, many others discourage birds from actually going outside by providing inhospitable conditions, lack of feed, water and shade, inadequate size and number of doors, doors structured so birds cannot be assured that there are no avian predators present before exiting, and young pullets being continually confined, in violation of the law, for as many as 20 weeks prior to being afforded any access to the outdoors (at that point they are unfamiliar and afraid of the outdoors and are much less likely to exit a building).

Likewise, published studies by poultry scientists reveal that allowing chickens to exhibit their “natural behavior” — which the rule states is an important aspect of organic livestock production — requires access to the outdoors. Natural chicken behavior that requires an outdoor run or pasture includes foraging and sunbathing. Moreover, outdoor runs promote the health of chickens by strengthening their bones.

Lower stress on the animals results in demonstrably lower feather pecking, injury and death of flock mates. These are the kinds of conditions that stakeholders assume exist under organic management.

Foraging

Producers who let their chickens outside notice that hens spend a lot of time foraging and pecking in the vegetation and the dirt; therefore, observation of laying hen behavior leads to the conclusion that foraging is a natural behavior. Research confirms this.ⁱ One particular study demonstrated that hens in outdoor runs spend 35.3% to 47.5% of their time foraging,ⁱⁱ suggesting that foraging is an instinctive and natural behavior.

Based on a review of various scientific studies on the topic, one scientist concluded: “Depending on their quality, outdoor runs have a much higher number and diversity of stimuli than any indoor housing environment can provide Especially exploratory and foraging behavior is stimulated by such a rich environment. The diversity of plant species present in an outdoor run may elicit pecking, scratching, tearing, biting and harvesting of seeds.”ⁱⁱⁱ

Again, research suggests that a chicken’s ability to peck for insects and peck in the grass and the dirt on pasture may prevent her from pecking at flock mates. One researcher suggests feather pecking may be a redirection of ground pecking, which is a normal behavior of foraging and exploration in chickens.^{iv}

Natural sunlight

Pasture-based producers notice that chickens like to sunbathe. Research supports that hens exhibit sunbathing behavior only under real sunlight, not under artificial light indoors.^v Therefore, they would need a real outdoor run with adequate access to the outdoors to exhibit this natural behavior.

Bone health

Exercise is important for chicken health, especially bone health,^{vi} and studies show that birds in housing systems that promote physical activity, such as outdoor runs, have less osteoporosis.^{vii} Weak bones lead to fractures caused during the laying period or during depopulation, and are a serious welfare issue.^{viii} When comparing different systems currently used by organic producers, one study showed that aviaries without real access to an outdoor run, used by many industrial-scale organic producers, produces more bone fractures in hens than free-range systems that are popular with medium- and small-scale organic farmers.^{ix}

Another study showed that lack of exercise contributed to the problem of weak bones more than did calcium depletion — as with humans, chickens need exercise in addition to calcium supplements to prevent fractures.^x

The Country Hen Decision

In 2002, the NOSB adopted the recommendation for organic poultry production precisely to avoid a situation where bare concrete porches would become the norm. NOP staff members at the time, present at the meeting, encouraged this guidance to prevent concrete porches as passing for “outdoor access,” and discussion by Board members clearly indicates that their recommendation was adopted in part to clarify that concrete porches do not meet the intent of the rule.

And yet, later in the same year that the NOSB adopted this recommendation, management at the National Organic Program ruled in favor of The Country Hen in a dispute between the producer and their certifier. The certifier refused to certify The Country Hen based on their lack of outdoor access — clearly respecting and following both the letter and the intent of the organic standards.

This 2002 ruling by the USDA, in favor of The Country Hen, was yet another example of gross mismanagement of the National Organic Program at the time (management that has now been discredited, for similar incidents where career civil servants at the NOP were overruled, by independent media investigations and the 2010 Inspector General's report). With new leadership at the program, and a renewed commitment to respecting the law and the rules, we had hoped our requests for investigations of the above-named producers' compliance with 205.238 and 205.239's requirements for outdoor access would have been respected.

The USDA ruling in The Country Hen appeal was clearly an illegal interpretation outside of the intent of the organic foods production act of 1990 and its enabling regulation. Unless this situation is immediately corrected, producers who are complying with the regulations will be forced to consider seeking legal redress.

It should be noted that the then-manager of the National Organic Program, who ruled favorably on behalf of The Country Hen, later, after retiring, waltzed through the “revolving door” at the USDA to work on behalf of The Country Hen and lobbied the NOSB encouraging them not to tighten the standards emphasizing and defining the requirement for outdoor access.

The fact that the Obama administration has continued, by lack of enforcement action, to stand behind the corrupt Country Hen decision, made by the prior administration, is inexcusable, especially subsequent to the policy memorandum Deputy Administrator McEvoy issued in 2011.

Specific Alleged Violations of the Organic Standards

Henhouses used by the producer named in this complaint share three common features with other industrial-scale operators, which we allege violate the national organic standards for outdoor access.

1. Not all birds have access to the outdoors — outdoor area is too small — and/or birds are regularly prevented from any outdoor access.

Even if we were to concede that these porches qualify as “the outdoors,” which we most assuredly do not, they are too small to accommodate any appreciable percentage of birds, let alone all, at the same time; these porches are often just a small fraction of the total square footage of the buildings. Therefore, as soon as the porch is filled with birds, the other birds remaining in the building no longer have “access.” The outdoor space should be as large as the indoor space.

Deputy Administrator McEvoy’s policy memo, stating not all animals have to be outdoors at the same time, is misdirected. Precedent, in the form of the current regulations for ruminants, relating to access to pasture, stipulates that when pasture is unavailable/temporarily not required, and the animals are in an outdoor area, that the space provided has to accommodate 100% of the herd. We should expect nothing less, in terms of humane animal husbandry, when outdoor space is required for poultry or other species. At a very minimum, 100% of the flock should be accommodated.

It should be noted that if a producer afforded space for just 100% of the birds they would likely be violating a number of other tenets in the organic standards requiring sustainable stewardship, and competent environmental management, of the land, water and soil. In Europe, to qualify for organic certification, each bird has to be provided with 43 ft.² of space outdoors. And in the EU this scale has proved to be economically viable with a greater market penetration for organic eggs than is experienced in the U.S.

2. Not all birds have access to the outdoors — exit doors are inaccessible.

The exit doors in their buildings are not accessible by all birds. This means that not all organically managed poultry in the house meet the requirement for “access,” since it is generally impossible for the majority of the birds to reach the doors. While they theoretically have access if they flew over, or walked over, literally, tens of thousands of flock mates, they clearly do not have access in reality. Their “natural behavior” would

prevent them from aggressively encroaching on the space of other birds in an effort to reach a door.

3. The outdoor area's substrate is bare concrete/wood/gravel.

In many of these facilities bare concrete porches, and other bare materials, do not allow the hens to exhibit their natural behavior outdoors, such as foraging, dustbathing and pecking. The NOSB recommendation from 2002 clearly states that bare surfaces other than dirt do not meet the intent of the National Organic Standards.

Conclusion

Some certified organic CAFO operators argue that the existing rule is vague, and especially that the intent of the rule is unclear. We disagree. The rule clearly states that outdoor access is required for organically produced livestock — and inaccessible porches that only hold a small percentage of all birds should not pass as legitimate outdoor access.

Furthermore, the erroneous decision made by the National Organic Program, during the Bush administration, by an official who would later go to work for the industry, was not supported at the time by the regulations nor is it supported today. Operators who invested in facilities that were inconsistent with the letter of the law have no basis to complain about economic hardship if the USDA, now, judiciously applies the regulations to these scofflaws.

On the contrary, the farm operators who truly have a legal basis to complain are those that are complying with the spirit and letter of the law, affording their animals true access to the outdoors, and being placed at a competitive disadvantage by these giant agribusinesses that are not doing so.

Producers also have access to the preamble to the final rule, published in 2002, which clearly states that the organic community, at the time of the rule's writing, supports full access to the outdoors for all livestock, including poultry (the basis for the "intent" of the reasons).

Furthermore, the regulations make it clear that animals need to be afforded the ability to display their "natural behavior." Even if adequate space was provided, the use of concrete and many other materials clearly restricts the natural pecking behavior of the birds.

No producer is forced to become organic. Unlike most other federal rules, abiding by organic standards is completely voluntary. Producers wishing to become organic have a responsibility to their customers and to the organic community as a whole to understand the organic standards, including their intent. If they choose to look for loopholes in the rules, it is a gamble they willingly took and must be prepared for the consequences.

The Country Hen case does indeed provide a different perspective, but while this is viewed as a precedent by some certifiers, it does not hold the weight of the law and can

easily be reversed by the current USDA administration if it respects both the organic standards and the principles on which the organic standards were founded.

This is clearly true because of documented abuses in the way that past NOP management handled incidents such the allowance of illegal synthetic substances in organic infant formula. In this case the current USDA administration recognized that the impropriety could not be left unchallenged by the current management at the USDA and reversed the prior decision.

We believe that an investigation of QAI is warranted to determine their compliance with administration of certification standards, particularly as it applies to Herbruck's Poultry Ranch, Inc.

Please keep The Cornucopia Institute apprised of the status and progress of your investigation into this complaint.

It should be noted that nothing in this formal complaint shall be interpreted as a waiver of our right to appeal under the Adverse Action Appeals Process cited above.

You may contact us at your convenience.

Sincerely,



Will Fantle
Research Director
The Cornucopia Institute

ⁱ Cooper, J.J. and M.J. Albetosa (2003) Behavioural priorities of laying hens. *Avian and Poultry Biology Reviews* 14: 127-149.

ⁱⁱ Folsch, D.W. and K. Vestergaard (1981) Das Verhalten von Tieren. *Tierhaltung Band 12*, Basel, Birkhäuser Verlag.

ⁱⁱⁱ Knierim, U. (2006) Animal welfare aspects of outdoor runs for laying hens: a review. *NJAS* 54-2. Pages 133-145.

^{iv} Blokhuis, H.J. (1986). Feather pecking in poultry: its relation with ground pecking. *Applied Animal Behaviour Science* 16: 63-67.

^v Huber (1987).

^{vi} Whitehead C.C. (2004) Overview of bone biology in the egg-laying hen. *Poultry Science* 83: 193-199.

^{vii} Webster (2004) and Fleming (1994).

^{viii} Knowles, T.G. and L.J. Wilkins (1998) The problem of broken bones during the handling of laying hens—a review. *Poultry Science* 77: 1978-1802.

^{ix} Gregory, N.G., L.J. Wilkins, S.D. Elperuma, A.J. Ballantyne and N.D. Overfield (1990) Broken bones in chickens. 3. Effect of husbandry system and stunning methods in end of lay hens. *The Veterinary Record* 132: 127-129.

^x Leyendecker (2005).