

Appendix A: Legal Complaint

September 27, 2010

NOP Compliance
Agricultural Marketing Service
United States Department of Agriculture
1400 Independence Avenue, S.W.
Mail Stop 0268
Washington, D.C. 20250

RE: Complaint concerning possible violation of the National Organic Program’s regulatory standards by various egg producers.

Dear Mr./Ms.,

The Cornucopia Institute is filing this complaint with your office concerning a possible violation of the National Organic Program’s regulatory standards by the following organic egg producers:

- The Country Hen in Hubbartson, Massachusetts
- Hillandale in Spring Grove, Pennsylvania
- Petaluma Farms in Petaluma, California
- Paul Fuenger Farm, Genoa, Wisconsin

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

- Cal-Maine Foods
- Chino Valley Ranchers organic facility in Idalou, Texas
- Delta Egg Farms
- Dixie Egg Company
- Fassio Egg Farms
- Fort Recovery Equity, Inc.
- Herbruck’s Poultry Ranch (Green Meadow Organics) in Saranac, Michigan
- Kreher’s Farm Fresh Eggs, LLC
- Nature Pure, LLC
- Oakdell Egg Farms
- Ritewood, Inc.
- R.W. Sauder, Inc.

In written and oral communications with the NOSB, these companies have made it abundantly clear that offering outdoor access to their birds is incompatible with their present management systems and would drive them from the organic industry.

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—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—meets either the letter or the intent of the organic rule. Moreover, some producers, such as Petaluma Farms in California and the Fuenger farm in Wisconsin, appear to confine their organic birds continuously, therefore 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.

Cornucopia’s interpretation of the rule is consistent with the NOSB’s clarification of the rule for organic poultry producers, and that was passed by a 12-1 Board vote at their May 2002 meeting. The Board specifically clarified to the organic community that:

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 and direct sunshine. The producer’s organic system plan shall illustrate how the producer will **maximize and encourage access to the outdoors (emphasis added)**.
2. **Bare surfaces other than soil (e.g. metal, concrete, wood) do not meet the intent of the National Organic Standards** (emphasis added).
3. The producer of organically managed poultry may, when justified in the organic system plan, provide temporary confinement because of:
 - a. Inclement weather;
 - b. The stage of production (i.e. sufficient feathering to prevent health problems caused by outside exposure);
 - c. Conditions under which the health, safety, or well being of the poultry could be jeopardized;
 - d. Risk to soil or water quality.

The organic egg producers named in this complaint provide 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 Board 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 all birds to go outside at the same time, 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 no incentive and little opportunity to do so.

Studies published in 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 concrete porches and fail to provide outdoor runs are in violation of the rule.

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 Mathews 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).

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.

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.¹⁶³ One particular study demonstrated that hens in outdoor runs spend 35.3-47.5% of their time foraging,¹⁶⁴ 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.”¹⁶⁵

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.¹⁶⁶

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.¹⁶⁷ 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,¹⁶⁸ and studies show that birds in housing systems that promote physical activity, such as outdoor runs, have less osteoporosis.¹⁶⁹ Weak bones lead to fractures caused during the laying period or during depopulation, and are a serious welfare issue.¹⁷⁰ 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.¹⁷¹

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.¹⁷²

The Country Hen Decision

The 2002 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 respectfully request an investigation of the above-named producers’ compliance with 205.238 and 205.238’s requirements for outdoor access.

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.

Specific alleged violations of the organic standards

Henhouses used by producers named in this complaint share three common features, 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 concrete porches qualify as “the outdoors,” which we most assuredly do not, they are too small to accommodate all birds at the same time, 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.

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, 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

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

Producers named in this complaint will likely argue that the 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.

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. Also in 2002, the NOSB clarified that organically produced animals must be able to choose to go outside, and bare concrete surfaces do not meet the intent of the rule.

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 a new administration that does respect 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 past NOP management handled incidents such as the penalty phase of the Aurora Dairy scandal and their allowance of illegal synthetic substances in organic infant formula. These past improprieties cannot be left unchallenged by the current management at the USDA and we applaud the corrective actions that are already under way.

Please keep The Cornucopia Institute apprised of the status of 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 Fante
Research Director
The Cornucopia Institute

Appendix B: Ratings for the Organic Egg Scorecard

ORGANIC EGG SCORECARD RATINGS

Total Possible Score: 2,200 points

Ownership Structure (100 points)

100	Family Farm (owned and operated by resident farm family)
90	Farmer-owned cooperative
80	Family-owned business with close ties/partnerships with farmers
70	Investor-owned, public corporation
0	No answer

Organic Certifying Agency (100 points)

100	<p>Certifying agencies that have not, to our knowledge, approved henhouses without adequate outdoor space.</p> <p>Certifiers:</p> <ul style="list-style-type: none"> Baystate Organic Certifiers Global Organic Alliance International Certification Services Maine Organic Farmers and Gardeners Association Maryland Dept. of Agriculture Midwest Organic Services Association Montana Dept. of Agriculture Nature's International Certification Services NOFA – New York Certified Organic Ohio Ecological Food and Farming Association Organic Crop Improvement Association Stellar Certification Services Utah State Dept. of Agriculture Vermont Organic Farmers Washington State Department of Agriculture
85	<p>These certifiers, generally well regarded, have approved industrial-scale livestock operations without “legitimate” access to the outdoors. In some cases, certifiers listed below approved industrial-scale dairy operations without legitimate pasture; in other cases the certifier has permitted henhouses with porches, many including roofs with concrete or wood floors. (Cornucopia and other organic policy experts do not consider these structures as meeting the legal requirement for access to the “outdoors.”) (In almost all cases, the square footage provided by these porches is a small fraction of the square footage of the principal housing; therefore, even if these enclosures qualified as the outdoors, only a small percentage of the hens would have access.)</p> <p>Certifiers:</p> <ul style="list-style-type: none"> Pennsylvania Certified Organic California Certified Organic Farmers Oregon Tilth Certified Organic New Hampshire State Department of Agriculture Natural Food Certifiers
75	QAI
0	No answer

Egg Supply (100 points)

100	All eggs produced on single-family farm
95	Eggs produced on family farm, buys additional eggs from other family-scale farmers
90	Cooperative of multiple family farms
80	Business buys eggs from independent family farmers
70	Contract farmers; company owns chickens and feed, farmers supplies building and labor
60	Vertically integrated business model; corporation owns and manages every aspect of egg production
0	No answer

Note: Organic Valley received 75 points: Their eggs come primarily from cooperative members, but they also buy a significant number of eggs from an industrial-scale egg company in California, and have bought additional eggs on the spot market from non-members who do not meet their published standards, which are higher than the USDA minimums.

Disclosure (100 points)

100	Full and open disclosure
1-90	Depending on percentage of questions substantively answered
0	No disclosure

Commitment to Organics (100 points)

100	Exclusively organic—henhouses and other crops, commodities and livestock
80	Company markets both organic and conventional cage-free eggs; all organic eggs are produced on exclusively organic farms
40	Split operation with conventional cage-free; no cages
25	Split operation with caged
0	No answer

OUTDOOR ACCESS

Single- or double-story henhouse(s) (100 points)

100	Single
30	Double
0	No answer

Explanation: In a double henhouse, birds on the second story are either required to walk down a ramp to reach outdoor space, or are granted a second-story porch as “outdoor access.” In both cases, the double henhouse is designed for maximum production, not for encouraging outdoor access.

Outdoor space (100 points)

100	5 or more square feet per bird
80	1.75– 4.99 square feet per bird
60	1.0-1.75 square feet per bird
20	Less than 1.0 square feet. per bird
10	No outdoor access
0	No answer

Note: Organic Valley receives 75 points; while most of their eggs come from farmer-members who comply with Organic Valley’s policy of five square feet per bird of outdoor space, their California supplier grants no outdoor access at all. Moreover, there are some questions in terms of enforcement of the cooperative’s standard of five square feet per bird—a farmer-member in Wisconsin who supplies Organic Valley eggs, visited by Cornucopia staff, appears to grant no outdoor access.

Popholes/Exit to the outdoors (100 points)

100	Birds kept on rotated pasture in mobile housing; or at least 1 large door for fewer than 500 birds.
90	One door or more per 500 birds
80	At least one door per 501-1,000 birds
40	One door per 1,000-2,000 birds
20	Fewer than one exit door per 1,000 birds
0	No answer

Note: If the housing system does not have multiple small doors, but another type of exit that clearly grants easy outdoor access to all birds in the building, the producer receives a full score on this question. This includes large barn doors accessible to all birds, houses with an entire side open to the outdoors, etc.

For brands with multiple suppliers, an average score is given depending on the various systems used by different family-farm suppliers.

Outdoor space exemptions (100 points)

100	Outdoor access year-round
90	Outdoor access year-round except during freezing temperatures or heavy rain; inclement weather
70	Confined seasonally
0	No answer

Opportunity for all birds to be outside simultaneously (100 points)

100	Yes; 100%
75	Approximately 75% or more of the birds can be outside at one time
25	Approximately 25-75% of the birds can be outside at one time
10	Less than 25% of the birds can be outside at one time
0	No answer

Note: Organic Valley receives a score of 75; while the majority of its eggs come from farms where all birds can be outside at one time, its California supplier grants no outdoor access at all. We also have concerns about the enforcement of the cooperative's policy that all birds must have five square feet of outdoor space. The cooperative's members generally seem to be in compliance, but we have found some glaring exceptions to its standards.

OUTDOOR MANAGEMENT

Rotation of outdoor space (100 points)

100	Rotated pasture; mobile housing
90	Well managed and rotated; at least 20 square feet per bird of outdoor space
80	Rotated fixed outdoor space; or managed to prevent degradation
60	No rotation, adequate outdoors
40	No rotation, all birds cannot go outside at the same time
20	Porches without vegetation
10	No outdoor access
0	No answer

Note: Organic Valley receives a score of 55; most eggs come from farms with adequate outdoor space without rotation, but California eggs are supplied by a producer that grants no outdoor space and a few of their farmer-members are out of compliance.

Outdoor vegetation (100 points)

100	Rotated pasture with mobile housing
90	Managed pasture with fixed housing
80	Living vegetation and dirt
50	No living vegetation in outdoor space
20	Bare surfaces like concrete or wood (porch)
10	No outdoor access
0	No answer

Note: Organic Valley receives a score of 60; most eggs come from farms with living vegetation and dirt in the outdoor run, but California eggs come from a farm with no outdoor access.

INDOOR – QUALITY OF LIFE AND WELFARE

Indoor space per bird (100 points)

100	> 1.8 square feet per bird
90	1.5-1.8 square feet per bird
80	1.2-1.49 square feet per bird
60	< 1.2 square feet per bird
0	No answer

Indoor enrichment such as perches, litter, etc. (100 points)

100	Perches, scratching areas and deep litter; producers granting year-round outdoor access on pasture also receive the highest score for indoor enrichment
90	Some, but not all, farms have perches and other indoor enrichment, standards are implemented to require them
80	Scratching areas and deep litter, no perches
60	No perches, no scratching areas and bare flooring
0	No answer

Natural light (100 points)

100	Birds have ample access to the outdoors for natural light
90	Abundant natural light is available inside the house
80	Limited natural light available inside the house
50	Henhouse is lit exclusively by artificial light
0	No answer

Note: An average score is taken for brands that have multiple suppliers with varying levels of natural light.

ORGANIC PRINCIPLES—FARM INTERDEPENDENCE AND ECOLOGICAL SUSTAINABILITY

Other animals on pasture (100 points)

100	Pasture rotated and shared with other livestock, such as cows, goats, sheep
90	Birds are pastured with no other animals sharing pasture
50	No pasture
25	No living vegetation
0	No answer

Cycling of nutrients—manure (100 points)

100	Manure is recycled on the farm—used as fertilizer for crops and/or pasture
90	Manure is shared with local farmer(s) who grow(s) feed for chickens
80	Manure is composted and sold off-farm
0	No answer

Note: For brands with multiple suppliers with different practices, an average score is given.

Feed produced on farm (100 points)

100	All feed is produced on farm
90	Some feed is produced on farm along with pasture
80	Some feed is produced on farm
70	No feed is produced on farm, but birds acquire some nutritional intake from well-managed pasture
60	Multiple suppliers with some farms producing some or all feed, others producing no feed
50	No feed is produced on farm
0	No answer

Replacement Stock (100 points)

100	Farm raises own pullets from chicks
90	Company or cooperative raises own replacement pullets in an effort to train the birds for using the outdoor space
60	Farmers purchase/acquire replacement pullets from outside sources; or company raises own replacement pullets in industrial-scale setting
0	No answer

Note: For brands with multiple suppliers with different practices, an average score is given.

Laying Hen Lifespan (100 points)

100	Hens live out natural lifespan—die a natural death
90	Hens live an average of 3+ years
80	Hens live 1.6-3 years
70	Hens live 1.5 years
60	Hens live less than 1.5 years
0	No answer

Beak Trimming (100 points)

100	No beak trimming
75	Beaks trimmed prior to age 10 days
50	No policy on beak trimming, no age limit
0	No answer

Farm Support (100 points)

100	Farmer-owners live/work on-site
90	Farmer-owners live/work on-site; representatives visit additional farms regularly
80	Farmer-owners live/work on-site; relies on additional third party inspection
70	Cooperative or company representative visits farms regularly
60	Relies on regular third-party inspection
10	No oversight
0	No answer

Note about Organic Valley's ratings:

Organic Valley received a limited number of points in terms of its approach to transparency.

Due to some past ethical lapses by management, discovered by The Cornucopia Institute, the company was not willing to participate in this study. Since it very well could represent the largest name brand in the industry, it was important for us to do additional research in preparing this report.

Organic Valley is a farmer-owned cooperative that primarily produces dairy products. It is highly rated in our organic dairy study but has lost points in recent years due to its unwillingness to continue releasing information.

In 2008, Cornucopia discovered that although Organic Valley maintains high standards for its family-scale farmers, who produce the lion share of the cooperative's organic milk, it had, for well over a year, been purchasing from a 7,200-cow factory farm in Texas. The industrial dairy in Texas violated a number of fundamental standards that the co-op stated were in force for all their dairy producers. Purchases from this dairy were quickly discontinued after Cornucopia brought its concerns to the farmers who own and oversee the cooperative.

More recently, when we published Cornucopia's organic soy scorecard, we were forced to deal directly with Organic Valley's farmers producing soybeans to obtain detailed information about its operation. Organic Valley once again received a high rating. Without management's cooperation, the farmers stepped in themselves. If the individual farmers hadn't stepped up, the cooperative's brand, that they own, could have had its reputation irreparably injured.

A similar dynamic took place in our current research on organic eggs. It has been the farmers who have been open themselves about their management and production practices and have shared the standards that the cooperative uses to manage production.

We did discover, however, that one of Organic Valley's "members" supplying organic eggs is actually an industrial-scale farm in Northern California that grants no outdoor access to the laying hens. Scores given to Organic Valley on this scorecard therefore factor in the cooperative's high standards and the fact that it also markets eggs from hens with no outdoor access, as well as the unfortunate reality that its management has attempted to mislead its customers, and even their farmer-members (with rhetoric on its website and packaging) and has refused to be open and transparent about its practices, unlike so many of its competitors.

We encourage loyal Organic Valley consumers to contact the company and encourage it to fully share with our researchers details about how its eggs are produced. We would be pleased to raise its ratings if we receive the same cooperation as was offered by the other companies listed on the scorecard.