

# **When Your Processor Requires More than Organic Certification**

## Additional Requirements in Organic Milk Contracts

By Jill Krueger

April 2008



FARMERS' LEGAL  
ACTION GROUP  
INCORPORATED

Farmers' Legal Action Group, Inc.  
360 North Robert Street, Suite 500, Saint Paul, Minnesota 55101-1589  
Phone: 651-223-5400 ~ Fax: 651-223-5335  
Email: [lawyers@flaginc.org](mailto:lawyers@flaginc.org) ~ Website: [www.flaginc.org](http://www.flaginc.org)

PUBLISHED BY

Farmers' Legal Action Group, Inc.  
360 North Robert Street, Suite 500  
Saint Paul, Minnesota 55101-1589  
lawyers@flaginc.org  
www.flaginc.org

Text © Copyright 2008, Farmers' Legal Action Group, Inc.  
This booklet may be reprinted for educational purposes only  
so long as Farmers' Legal Action Group, Inc. (FLAG), is  
credited when reprinting.

Cover photo: © Coldfusion | Dreamstime.com

*Financial support for this booklet was provided by the Northeast Organic  
Dairy Producers Alliance and the Agua Fund.*

Visit [www.flaginc.org](http://www.flaginc.org) for more information on legal issues related to organic farming.

Companion Article:

***Hushed Up: Confidentiality Clauses in Organic Milk Contracts***

# When Your Processor Requires More than Organic Certification

## Additional Requirements in Organic Milk Contracts

Jill Krueger, Farmers' Legal Action Group, Inc.

April 2008

Many organic dairy producers are offered and enter into contracts to sell milk to a processor. These contracts have some common features. A previous article addressed the use of confidentiality clauses in organic milk contracts.

This article discusses contract clauses that require organic dairy producers to use farming practices not specifically required by the National Organic Program (the "NOP") regulations. Such contract clauses will be referred to as "**additional requirements**" in this article. This term is imperfect, because some "additional requirements" are clearly an addition to NOP requirements, but others are not. In some cases, processors use contract clauses to emphasize the NOP requirement, or to express the processor's interpretation of an NOP regulation. This article treats all of these contract clauses as "additional requirements." The fact that a processor imposes additional requirements does not necessarily mean that its contract terms are worse or better overall than those offered by other processors. **It is important to read and understand all of the clauses in a contract before signing it.**

In preparation for writing this article, unsigned contracts for sale of organic milk with Dairy Marketing Services (DMS), HP Hood, Horizon Organic, and the CROPP Cooperative (Organic Valley) were reviewed. The Organic Valley documents reviewed did not include the Membership Agreement for the cooperative. The contracts reviewed were being used in summer and fall of 2007, though other contracts may also have been used by these processors in 2007. Contracts offered in 2008 may differ.

### **What are the requirements for certification under the NOP standards?**

Before discussing additional practices required by processors, it may be helpful to review some basic requirements for certification of an organic dairy under the NOP.<sup>1</sup> In general, they include:

#### *Pasture and feed*

- Producer must provide livestock with a total feed ration composed of agricultural products, including pasture and forage, that are organically produced and handled.<sup>2</sup>
- Producer must establish and maintain preventive livestock health care practices, including establishment of appropriate pasture conditions, housing, and sanitation practices to minimize the occurrence and spread of disease and parasites.<sup>3</sup>

***When Your Processor Requires More than Organic Certification:  
Additional Requirements in Organic Milk Contracts***

---

- Producer must provide conditions which allow for exercise, freedom of movement, and reduction of stress appropriate to the species.<sup>4</sup>
- Producer must establish and maintain livestock living conditions which accommodate the health and natural behavior of animals, including access to pasture for ruminants.<sup>5</sup>
- 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.<sup>6</sup> Shelter must be designed to allow for natural maintenance, comfort behaviors, opportunity to exercise, suitable temperature level, ventilation, air circulation, and reduction of potential for livestock injury.<sup>7</sup>

***Antibiotics, hormones, and other substances***

- Producer must not use animal drugs, including hormones, to promote growth.<sup>8</sup>
- When preventive practices do not prevent sickness, producer may administer synthetic medications. These include (1) oxytocin after a cow has given birth, and (2) ivermectin for breeder stock prior to the last third of gestation but not during lactation for organic offspring, and (3) ivermectin for dairy stock when used at least 90 days prior to production of organic milk.<sup>9</sup>
- Producer must not administer synthetic parasiticides such as ivermectin either (1) on a routine basis or (2) to slaughter stock.<sup>10</sup>
- Producer must not sell milk from any animal treated with antibiotics as organic.<sup>11</sup>
- Producer must not administer any animal drug, other than vaccinations, in the absence of illness.<sup>12</sup>

***Origin of livestock***

- Milk must be from animals that have been under continuous organic management for at least one year prior to the production of the organic milk. Once an entire, distinct herd has been converted to organic production, all dairy animals must be under continuous organic management from the last third of gestation.<sup>13</sup>

***Other requirements***

- Address all aspects of organic livestock production in organic system plan.<sup>14</sup>

In order to ensure that they are buying organic milk, processors generally require that the producers from whom they buy demonstrate that they are certified organic. In addition, most contracts reviewed require the producer to comply with all local, state, and federal laws, as well as the processor's own standards.

**Why might a processor want to impose additional farming requirements?**

Just as farmers may have many reasons for adopting organic farming practices, processors may have a variety of reasons for requiring additional farming practices.

***When Your Processor Requires More than Organic Certification:  
Additional Requirements in Organic Milk Contracts***

---

The processor may want to respond to consumer demand. Or the processor may want to set itself apart from its competitors.

**What types of additional practices do processors require?**

Processors use additional requirements in order to set themselves apart, so the processors' additional requirements differ. Yet, several types of additional requirements were common among the contracts reviewed. Many of the additional requirements contained in the contracts are described below.

***Pasture and feed***<sup>15</sup>

Both the HP Hood and Organic Valley contracts reviewed had detailed requirements regarding access to pasture and the amount of forage in a lactating cow's diet. Both contracts require the producer to submit a written plan describing how the producer will ensure the dairy herd's access to pasture and that related contract requirements are met.

Some of the language in the contracts reviewed was vague, such as "must be a pasture based farm." This phrase does not make it clear exactly how or when the producer must make pasture available to the dairy cows.

Other language in the contracts reviewed was quite specific. In general, the contracts focused upon the number of days of access to pasture during the growing season (120 days was a common minimum). Contracts that addressed pasture requirements also frequently specified the amount of dry matter intake which must be provided by grazing, with 30 percent a common minimum. The contracts usually set forth the age of the individual animal at which the pasture requirements applied. Contracts tended not to specify the amount of time per day that grazing was required, though some specified the number of animals allowed per acre.

Contracts with pasture requirements generally referred producers to USDA's Natural Resource Conservation Service for information on grazing and appropriate pasture conditions in their area. Several processors also offered mentoring programs with other producers.

Whether a producer is presented with vague or specific contract clauses, it seems likely that processors expect all requirements to be addressed in the written pasture plan. The processor's approval of the producer's written plan would seem to provide strong evidence that the producer meets contract requirements.

***Antibiotics, hormones, and other substances***

The HP Hood, Organic Valley, and Horizon contracts reviewed all addressed the use of antibiotics, hormones, and other substances in some way. Many of these clauses repeat NOP requirements, though some create additional requirements. Under the Organic Valley contract reviewed, any cow treated with antibiotics may not return to organic milk production. In addition, under the Organic Valley contract, an animal treated with antibiotics may also not be used for organic meat production, and antibiotic use is prohibited in calves of any age. The Horizon contract simply states "no antibiotics."

***When Your Processor Requires More than Organic Certification:  
Additional Requirements in Organic Milk Contracts***

---

Both the Horizon and Organic Valley contracts prohibit rBGH and rBST, though this seems to repeat the NOP regulations prohibiting the use of growth hormones. Organic Valley's contract also states that breeding, growth, and production hormones, including oxytocin, are prohibited. The HP Hood contract states that use of oxytocin is not allowed.

The Organic Valley contract states that ivermectin/systemic parasiticides are prohibited for one year prior to organic milk production, and are not allowed for animals to be sold as organic meat. The HP Hood contract states that ivermectin is not allowed for use on lactating animals, but that ivermectin may be used on replacement animals under eight months old.

The Organic Valley contract prohibits pour-on systemic louse/worm/grub treatment.

***Family-owned and/or family-operated***

The HP Hood contract reviewed required the producer to attest that the labor and/or management of the farm is provided by the family that owns, or leases, the productive assets.

***Humane treatment***

The HP Hood contract reviewed required the producer to attest that the farm practices "humane and caring animal husbandry, in accordance with industry standards." The contract did not indicate what the "industry standards" are, nor did it describe the practices that would comply with the requirement. The contract did not indicate whether the "industry standards" referred to were those of the organic dairy industry, or of the dairy industry more generally, or of a specific humane treatment certification program.

***Origin of livestock/replacement animals***

The HP Hood contract reviewed required that dairy replacement animals entering a certified organic herd are treated organically from the last third of gestation.

***Generally neat***

One HP Hood contract reviewed required producers to maintain a "generally neat" farmstead. Another HP Hood contract required producers to maintain an "aesthetically pleasing" farmstead. Neither contract defined "generally neat" or "aesthetically pleasing," or described how a farm's compliance would be measured.

**Does imposing additional requirements violate any laws?**

Whether additional requirements are lawful depends upon who imposes the additional requirements, and for what purpose. An accredited certifying agent must not require producers to meet a higher standard than that contained in the NOP regulations in order to grant organic certification. However, a buyer may impose additional requirements before it will agree to buy goods from an organic farmer.

The organic standard is intended to be a consistent national standard. However, it is lawful for a producer or handler to include both the USDA Organic seal and additional claims related to farming and processing practices on products labeled organic. Thus, if a processor would like to make claims in addition to "organic" on its products,

***When Your Processor Requires More than Organic Certification:  
Additional Requirements in Organic Milk Contracts***

---

the processor is free to require farmers to meet additional requirements. As with any contract to buy or sell goods, the buyer may set forth its requirements, and the seller is free to agree to the contract, not agree to the contract, or seek to negotiate.

**Must producers comply with the additional requirements?**

Yes, if a producer agrees to a contract, he or she is bound. “A contract” may include several different documents. For example, several of the contracts reviewed for this article included additional practice requirements in an appendix or other document. If the main contract signed by the producer included a reference to the appendix, then the producer is bound by the appendix. This is known as “incorporation by reference,” because by referring in the contract to the other document, the other document becomes part of the contract. For example, one contract reviewed stated, “The producer agrees to abide by attached terms, guidelines, and qualifications for organic milk (Exhibit A) required by HP Hood.” The Organic Valley contract reviewed required producers to sign an affidavit specifically agreeing to comply with practice requirements in addition to those under the NOP.

If any additional requirements are not incorporated in the written contract, then the processor could have difficulty proving their existence in court. Indeed, the HP Hood contract reviewed included a clause stating that the “entire understanding” of the parties was included in the written agreement. Under such an “entirety clause,” a contract may generally not be added to or changed, unless the parties enter into another written agreement. Similarly, if a contract includes an entirety clause, both parties are generally barred from submitting evidence of any oral agreements.

**What happens if a producer fails to meet the additional requirements?**

To understand what the consequences would be if a producer were to fail to satisfy the additional requirements, the producer should read his or her contract language. The 2007 contracts reviewed addressed failure to meet additional requirements in a variety of ways.

At least some of the DMS contracts reviewed stated that, “DMS will market milk as conventional temporarily in situations where a DMS member or a member of a coop affiliated with DMS is taken off the organic truck provided they meet DMS quality standards for conventional milk.”

The Horizon contract stated that, “Failure to meet quality standards will result in a series of progressive responses.” These responses include follow-up communication and investigation, written warning, probation, and suspension. The HP Hood contract also provided for suspension from the organic milk market if quality standards were not met.

The HP Hood contracts reviewed stated that, for pasture requirements, producers who failed to come under compliance will be given six months to adhere to the pasture requirements. Some versions of the contract stated that if the producer failed to comply with pasture requirements in the six-month period allowed, Hood could terminate the agreement by giving the producer a six-month notice. The contracts noted that producers could request mentoring in order to receive guidance on how to comply.

***When Your Processor Requires More than Organic Certification:  
Additional Requirements in Organic Milk Contracts***

---

The Organic Valley contracts reviewed stated that, “Any existing Organic Valley producer that currently does not meet this Farm Pasture Plan has one year to comply. If needed, more time may be arranged through a written appeal process to the Dairy Executive Committee.” The contracts also noted that other producers would be available to serve as mentors to help producers in need of guidance in order to expand their pasturing operations.

Under some contracts reviewed, if the processor finds the producer failed to meet contract requirements, the processor may terminate the contract. However, where the contract addresses specific contract violations—such as the failure to comply with pasture requirements—in a specific clause, then arguably that clause should control how the processor responds to those specific violations, rather than the contract clause for a general failure to meet contract requirements. Contract cancellation is discussed further in the next section.

A producer would not lose his or her organic certification as a result of failing to meet a processor’s additional requirements, as long as the producer was still in compliance with all organic requirements, as determined by the accredited certifying agent. The producer could try to find another buyer.

**When may a contract be canceled?**

As noted above, several of the contracts reviewed have clauses that describe how the processor will respond if the producer fails to meet additional requirements, such as pasture requirements. In addition to those clauses related to violations of additional requirements, several of the contracts have clauses that address when the processor or the producer may cancel a contract.

At least some of the HP Hood contracts reviewed stated that, “Either party may elect to terminate this Commitment prior to the date of its expiration by delivery of written notice to the other party in the event that (a) the other party commits a breach of any term or provision of this Commitment and fails to cure said breach within thirty (30) days of receipt of written notice from the other party or (b) if the other party becomes insolvent or . . . a bankruptcy, reorganization, or insolvency proceeding is instituted. . . .”

Arguably, the processor would be required to give longer than 30 days’ notice prior to cancellation for reasons related to failure to provide pasture, due to the specific clause discussed above.

The HP Hood contract reviewed also stated that, “Producer may terminate this Commitment at any time with a 90 day notice to HP Hood and DMS if the pay prices in Section 1 are not competitive with pay prices offered by other organic milk processors.”

As noted above, the Organic Valley Membership Agreement was not available for review for this article. However, an Organic Transition Agreement available through Organic Valley was reviewed. Under this agreement, Organic Valley offered a transition premium of \$2 per hundredweight of milk sold by transitioning producers for 12 months. In return for this premium, producers were required to agree not to give notice of termination of the Membership Agreement with Organic Valley until 18 months following the date of



*When Your Processor Requires More than Organic Certification:  
Additional Requirements in Organic Milk Contracts*

---

the first shipment. Presumably, the Membership Agreement addresses how the producer and processor may cancel the contract in situations other than the transition to organic.

**What steps can the producer take to prevent problems related to additional requirements?**

The first step for producers trying to prevent problems is to understand all clauses in their contracts that include any requirements beyond organic certification. Before agreeing to a contract, producers should be sure they understand all additional requirements. Is it a measurable standard, such as a requirement that 30 percent of dry matter intake come from grazing; or is it a vague standard or a standard depending upon personal taste, such as maintaining an aesthetically pleasing farmstead? For some requirements, it may not be obvious how the producer can comply.

The producer should ask the processor what records are needed to demonstrate compliance with additional requirements. If the processor does not provide a required form or recommend what types of records should be kept, the producer may want to ask a producer mentor for guidance. Or the producer may adapt his or her organic system plan to show that additional requirements have been met.

**Who determines if the producer has complied with the additional requirements?**

This is one of the most important questions for producers to consider before entering into a contract which includes additional requirements. The contracts reviewed do not spell out who determines if the producer has satisfied additional requirements. In practice, the processor will generally make the first decision about whether or not the producer complied. Under the HP Hood contract reviewed, the processor has the right to conduct random drug testing of the producer's herd, to conduct surprise inspections of the farm, and to review the producer's records to assure compliance with NOP regulations and contract requirements.

Agreeing to a contract that allows the processor to determine compliance can be risky. The processor has its own interests and is not a neutral decision-maker.

**If the processor says the producer has not complied with the additional requirements, what can the producer do?**

To understand how to resolve disputes about whether a producer has met the additional requirements, the producer should read his or her contract language. In general, the 2007 contracts reviewed did not address how disputes would be resolved.<sup>16</sup> One exception was found in the Organic Valley Pasture Policy, which provided that a producer needing more than one year to come into compliance with the Farm Pasture Plan could seek to arrange more time through a written appeals process to the Dairy Executive Committee within the cooperative.

For some disputes, having a written plan may help protect the producer. For example, as noted above, several of the processors with additional requirements related to access to

***When Your Processor Requires More than Organic Certification:  
Additional Requirements in Organic Milk Contracts***

---

pasture require a written plan explaining how the producer will comply with the requirements. If the processor approved the producer's written plan as sufficient under the contract, then the producer will have evidence that he or she is in compliance with the contract as long as he or she carries out the written plan.

Producers may want to find out whether their state has an agricultural mediation program that could provide a neutral facilitator to help resolve disputes and try to preserve the relationship between producer and processor. Otherwise, the producer may challenge a processor's decision in court. It is hard to predict how a judge would decide a particular case. In general, if the dispute involves a vague contract requirement, a judge would likely ask whether a "reasonable person" would believe the producer had complied.

### **May the processor change the additional requirements?**

When a producer decides whether to enter into a contract with a processor, the producer should be aware that the processor may wish to change the requirements later.

For example, at the end of the contract term, which is typically one or two years, the processor may offer a new contract that contains new requirements of the producer. In general, this does not violate the law. The processor is bound by the previous contract only during the term of that contract. The producer may accept the new contract, attempt to negotiate, or reject the new contract.

It is more complicated when the processor wants to change the requirements under the contract before the contract period has expired. For example, the processor might wish to change its pasture requirements during the sixth month of a one-year contract. In general, the processor may not change the terms of the contract during the contract period without the producer's agreement. However, the processor might argue that it was only "clarifying" the additional requirements, and was not actually "changing" them. If faced with this kind of argument, the producer should review the contract carefully and seek the advice of an attorney.

While the processor may not change the contract without agreement, in practice, the contract may allow the processor to cancel the contract, or to give notice and then cancel the contract. A processor might seek to use the threat of termination to coerce the producer to "agree" to changes in the contract requirements.

The opposite problem may arise for producers who plan to end the contract with a processor when the contract period ends. Producers in this situation may assume they no longer have a contract with the first processor because they did not sign a new one with them. But the DMS contracts reviewed include clauses stating that the contract will be renewed unless the producer or processor gives written notice 180 days in advance not to renew the contract.

One final note is that if USDA were to change the NOP regulations, this would be different from a change to the contract by the processor. The regulations may change at any time. In order to maintain organic certification, the producer must comply with NOP regulations after they are changed. USDA has generally allowed time for producers to come into compliance with changes to the NOP regulations.

*When Your Processor Requires More than Organic Certification:  
Additional Requirements in Organic Milk Contracts*

---

### **Options for producers who are offered a contract containing additional requirements**

Producers have a variety of options when offered a contract for the sale of organic milk which contains additional requirements. Producers may want to consider one or more of the following strategies:

- Consult an attorney in the producer's state. The producer is not bound by the contract until he or she has signed it.
- Negotiate with the processor for the removal of the additional requirements. Research on whether the processor's competitors require the same or similar additional requirements might help in the negotiations. However, if the processor notes the additional requirements on its product labels, the producer is unlikely to succeed in negotiating for the removal of the additional requirements.
- Cross out the clause(s) containing additional requirements (the producer should initial and date the change) and sign the contract. The processor may accept the cancellation of the clause(s), or reject the change proposed by the producer.
- Negotiate with the processor for changes to the additional requirements. For example, the producer might ask for more time to comply with the additional requirements. Or the producer might ask for objective ways to measure compliance with contract requirements. If the contract offered does not require a written plan describing how additional practice requirements will be met, the producer may want to suggest it. The additional recordkeeping burden might pay off later if a dispute were to arise and the producer were able to show that the processor had approved the producer's plan.
- Negotiate with the processor for a clause setting forth how any disputes under the contract, including disputes about whether the additional requirements were met, will be resolved.
- Negotiate to require more notice from the processor before the processor may cancel the contract in return for agreeing to the additional requirements.
- Decline to sign the contract. Search for another processor.
- Sign the contract with the intention of complying with the additional requirements. Be sure to understand exactly what is required in order to comply. Maintain records to document that additional requirements have been met.
- Immediately discuss any difficulties in complying with the additional requirements with the processor or an attorney. Take advantage of mentoring or other programs to help producers meet additional requirements.

A producer may agree to meet additional requirements for a variety of reasons—lack of other buyers, philosophical agreement with the requirements, better pay, etc. Whatever the reason, once the producer signs the contract, the producer is bound to meet the additional requirements.

***When Your Processor Requires More than Organic Certification:  
Additional Requirements in Organic Milk Contracts***

---

**NOTES:**

<sup>1</sup> The regulations for certification of organic livestock production are found at 7 C.F.R. §§ 205.236 to 205.239. Producers should ask their certifier or an attorney if they have questions about the application of organic regulations to their particular situation.

<sup>2</sup> 7 C.F.R. § 205.237(a) (2008). Crops and forage from land included in the organic system plan of a dairy farm that is in the third year of organic management may be consumed by dairy animals during the twelve-month period prior to the sale of organic milk. 7 C.F.R. § 205.236(a)(2)(i) (2008).

<sup>3</sup> 7 C.F.R. § 205.238(a)(3) (2008).

<sup>4</sup> 7 C.F.R. § 205.238(a)(4) (2008).

<sup>5</sup> 7 C.F.R. § 205.239(a)(2) (2008). In 2006, USDA issued an advance notice of proposed rulemaking in order to clarify the requirement of access to pasture. 71 Fed. Reg. 19, 131 (April 13, 2006). No further regulatory action has been taken.

<sup>6</sup> 7 C.F.R. § 205.239(a)(1) (2008).

<sup>7</sup> 7 C.F.R. § 205.239(a)(4) (2008).

<sup>8</sup> 7 C.F.R. § 205.237(b) (2008). See also 7 C.F.R. § 205.238(c)(3) (2008).

<sup>9</sup> 7 C.F.R. § 205.238(b) (2008) and 7 C.F.R. § 205.603(a)(17) and (a)(18) (2008).

<sup>10</sup> 7 C.F.R. § 205.238(c)(4) and (c)(5) (2008).

<sup>11</sup> 7 C.F.R. § 205.238(c)(1) (2008).

<sup>12</sup> 7 C.F.R. § 205.238(c)(2) (2008).

<sup>13</sup> 7 C.F.R. § 205.236(a)(2) (2008). These provisions have been a source of some confusion and controversy. Most certifiers, organic milk processors, and farmers appear to interpret them to mean that once a farm has been certified as an organic dairy farm, all replacement animals (whether born on the farm or purchased) must have been managed organically from the last third of gestation. Put another way, the provision allowing organic milk to come from cows that have been managed organically for just one year applies only while a farm is taking advantage of the one-time transition to organic production.

<sup>14</sup> 7 C.F.R. § 205.201 (2008). Many certifiers provide forms which producers may use to develop their organic system plan. Producers new to organic production should also know about ATTRA, the National Sustainable Agriculture Information Service. ATTRA has prepared sample worksheets which organic producers may incorporate into their organic system plans. ATTRA's website is [www.attra.ncat.org](http://www.attra.ncat.org). ATTRA's telephone number is 800-346-9140; Spanish speakers may call 800-411-3222.

<sup>15</sup> In 2006, USDA issued an advance notice of proposed rulemaking in order to clarify the NOP requirement of access to pasture for ruminants. 71 Fed. Reg. 19, 131 (April 13, 2006). No further regulatory action has been taken.

<sup>16</sup> For disputes related to organic certification, the NOP regulations recognize the producer's right to rebut or correct noncompliances, request mediation, and file appeals. 7 C.F.R. §§ 205.680 and 205.681 (2007). See Jill Krueger, *Dispute Resolution Under the National Organic Program* (Farmers' Legal Action Group, forthcoming in May of 2008).