

August 3, 2021

Submitted via electronic mail at agoregulations@mass.gov



Office of the Attorney General
ATTN: Chapter 333 Regulations
1 Ashburton Place, 20th Floor
Boston, MA 02108

Re: Comments on 940 CMR 36.00 - Proposed Regulations Implementing Chapter 333 of the Acts of 2016 (aka Question 3 - An Act To Prevent Cruelty To Farm Animals)

Dear Attorney General Healey:

On behalf of the National Pork Producers Council (NPPC), thank you for the opportunity to provide written comments to the proposed rules issued by your office on the implementation of Chapter 333 of the Acts of 2016 (Question 3). NPPC is a national association representing the interests of more than 60,000 U.S. pork producers. The U.S. pork industry supports more than 500,000 domestic jobs, generates more than \$39 billion in gross national product, and exports an increasing volume of product, which in 2020 was valued at more than \$7.7 billion. NPPC's members are the farmers who care for and raise pigs, which are processed into pork and provide millions of Massachusetts citizens with an affordable, nutritious, and delicious protein for their diet.

Unfortunately, due to the passage of Question 3 and the delay in promulgating regulations implementing it, the vast majority of those farmers do not meet the standards intended by the proponents of Question 3 and will not meet those standards by the end of this year. As your office continues to examine how to implement the requirements of Question 3, we strongly encourage efforts to bring in experts who understand modern livestock and pork production, an industry that resides almost entirely outside the borders of the commonwealth. We also urge that the work be done in a collaborative process with the impacted stakeholders throughout the entire supply chain to develop final regulations. Clear guidance is critical in ensuring that the regulatory requirements being developed are feasible and will not disrupt the supply of pork to Massachusetts consumers. To that end, NPPC continues to support the commonwealth's effort to shift primary responsibility of promulgating regulatory requirements to the Massachusetts Department of Agricultural Resources (MDAR).

In addition, NPPC respectfully requests that the Attorney General's Office suspend the implementation of Question 3 to ensure that farmers, and Massachusetts consumers of pork, are afforded the full two-year window between promulgation of final rules and regulations, and the effective date of the Act. Meeting the requirements of Question 3 is difficult enough to do in normal conditions, requiring significant investments of labor and capital, as farmers must convert to a compliant system to continue to meet Question 3's requirements. The time and cost of this challenge has been exacerbated over the last two years as the industry struggles to overcome the challenges – both to our workers and to the marketplaces for pigs and pork – caused by COVID-19.

Question 3 already has a relatively short implementation period of two years – compared to other statutes requiring significant changes to agricultural production practices around the country – and the law requires prompt action by relevant regulators and affected businesses. Question 3 was passed with the specific understanding that regulated parties would be preparing for implementation with the development of a clear and concise regulatory roadmap. Question 3 will be implemented in less than six months and the guidelines have yet to be finalized, providing tremendous uncertainty for regulated parties.

Delay the January 1, 2022 Implementation Date

Question 3 clearly stated that the “The Attorney General shall promulgate rules and regulations for the implementation of this Act on or before January 1, 2020.”

This deadline, 24 months prior to the Jan. 1, 2022 compliance date, is an essential component of Question 3 and necessary to provide time for hog farmers to understand and comply with the regulations, undertake any necessary conversions, and work to provide certification that the animals they raise are compliance with Question 3’s requirements.

Regulatory compliance will require the pork industry to divert resources from maintaining a critical food supply and reallocate personnel to prepare for the compliance deadline. Businesses will need to rework operations and supply chains to comply with the forthcoming regulatory requirements. Farmers will need to expend substantial capital costs to build or retrofit housing, which is a decades-long investment. To undertake those significant costs now, before the issuance of final rules and guidance, would be impractical if not impossible

To correct this error and maintain the necessary window for compliance that Question 3 contemplated, the implementation date should be delayed at least two years from the date when its regulations are finally promulgated.

NPPC Supports Shifting Primary Regulatory Responsibility to the Massachusetts Department of Agricultural Resources

NPPC strongly supports the provision in S. 2481, which seeks to shift primarily responsibility for promulgating regulatory requirements to MDAR, while preserving an advisory role for the Massachusetts Attorney General. The attorney general’s office has been consistent in its message that they are not the “best suited government office to lead the regulatory effort” and it is confounding at best, onerous at worst, as to why Question 3 proponents chose to originally exclude MDAR as part of the regulatory process. Clear guidance is critical in ensuring that the regulatory requirements being developed are feasible and will not disrupt the supply of pork to Massachusetts consumers. NPPC commends the Attorney General for seeking out MDAR authority to put forth regulations. MDAR’s understanding of modern livestock and pork production, an industry that resides almost entirely outside the borders of the commonwealth, is critical. NPPC is hopeful that this collaboration will lead to a regulatory process that establishes substantive dialogue with the impacted stakeholders throughout the entire supply chain to develop final regulations.

It is important to note that the potential shift in regulatory authority amidst pending legislation has created confusion throughout the pork supply chain, as it remains unclear what the ultimate implementation rules will be or which agency is leading the charge. Why MDAR was not selected by the proponents when they put Question 3 before the voters remains a mystery, but what has become very clear is the need for delaying the implementation date in order to allow for a comprehensive regulatory process to unfold.

Request for Further Stakeholder Engagement and Development of Clear Industry Guidance

The rules which have been proposed are short on details and provide minimum guidance to producers on what will be required of them to comply. NPPC strongly encourages Massachusetts to host stakeholder workshops to help farmers better understand the impacts of its proposals and how best to comply with the requirements of Question 3 when it is ultimately enforced.

In addition, NPPC strongly encourages the development of clear, user-friendly guidance to assist hog farmers in understanding what the regulations require as they undertake the costly process to convert their farms to meet the requirements of Question 3.

Massachusetts Must Ensure Question 3 and Its Implementing Regulations Are Consistent with U.S. Trade Obligations

It is widely known that virtually the entire burden of Question 3 will fall on hog farmers outside of Massachusetts. While most assume this burden will be born solely by U.S.- based producers, the reality is the financial impact of Question 3 will be felt worldwide, including by U.S. trading partners who ship significant levels of pork into the United States every year. These imports range from piglets born to breeding pigs in Canada and shipped south to be finished in the United States, to whole pork meat produced in a variety of countries including Canada, Mexico, Denmark, Italy, Poland, and Spain. These and other trading partners will be subject to, and impacted by, the provisions of Question 3. In light of this, the potential exists for conflicts and inconsistencies between Question 3, Massachusetts proposed regulations, and ongoing U.S. international trade obligations, including those under the World Trade Organization (WTO) agreements (the Technical Barriers to Trade Agreement (TBT Agreement), the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), and the General Agreement on Tariffs and Trade (GATT) 1994, as well as the recently completed U.S.-Mexico-Canada Agreement (USMCA). As a result, we strongly encourage Massachusetts to reconsider Question 3 and its implementing regulations to ensure they are promulgated in a manner that doesn't trigger an international dispute and costly retaliation from U.S. trading partners.

Massachusetts Draft Regulations Remain Vague and Fail to Provide Sufficient Clarity for Compliance

The proposed regulations simply do not provide the clarity necessary for producers to adequately understand how to comply with the law, especially for purposes of constructing and designing their farms and seeking certification. For instance, while the regulations address some aspects of what is meant by the term "confined in a cruel manner," it remains silent on how precisely a farmer is to keep sows from "touching the side of an enclosure." Is incidental contact of the enclosure allowed? Does it matter if contact with the enclosure is the free choice of the animals? Do producers need to actively manage their herds to prevent contact with each other or the sides of their pens?

Effective Date of Implementation

Notwithstanding the need to extend the implementation date of the regulations, final regulatory language must clarify the date of compliance when breeding pigs must be moved to new housing. Likewise, the final regulations should also make clear that animals born before the implementation date – as well as pork that has already been processed and is in the supply chain – are either exempt from compliance with the regulations or are not subject to the regulations.

Section 36.01 Purpose

NPPC strongly opposes the language in this section in its entirety. Conventional animal breeding practices are neither cruel nor extreme. In fact, the California Department of Food and Agriculture (CDFA) commented in its own proposal to implement Proposition 12¹ that:

- Proposition 12’s “space allowances” are “not based in specific peer-reviewed published scientific literature or accepted as standards within the scientific community to reduce food-borne illness” or “other human safety concerns,” nor “drawn from specific industry standards” (p.16);
- Proposition 12 will make pork “more expensive to consumers” and “disproportionately reduce food purchasing power of low-income consumers” (p.22); substantially increase costs to public entities like schools (pp.8-9); and impose substantial conversion, operating, and record-keeping costs on sow farmers, including “lower piglet output per animal and increased breeding pig mortality” (pp.12-13); and
- Proposition 12 “does not directly impact human health and welfare of California residents,” but that CDFA “can infer that benefits accrue to Californians knowing that breeding pigs” are “raised with a minimum space requirement,” whether or not they “consume covered products,” even though “[t]here are no quantitative studies that document or measure” that effect (p.6; *see also* pp.12, 16);

Section 36.03 Definitions

The definition of “**breeding pig**” fails to adequately define what it means by the phrase “for the purposes of commercial breeding.” NPPC strongly encourages that the proposed regulations clarify what this phrase means. For most farmers, the determination to keep a sow for breeding purposes is not a static event, but instead occurs throughout the period when the animal is in its care. From the moment a female pig arrives on a farm, it is subject to evaluation. Initially, a determination to breed any animal is not made until after the initial estrus cycle. Many farmers would wait to make a final determination to keep a female pig as a breeding animal until the second cycle, at which point they would decide whether to breed the animal or send it to market. Further, post weaning, sows will constantly be re-evaluated and their status as a “breeding pig” will change.

The proposed regulations should make clear that a sow’s status as a “breeding pig” can and will change depending on the circumstances on the farm. At a minimum, the term “breeding pig” should not include animals which have not been bred yet, nor animals which have been removed from a farm’s breeding program and are awaiting transportation to cull markets.

The definition of “whole pork meat” should also be more thoroughly defined. The proposed regulations should better define what is meant by “cut,” “seasoning,” and “uncooked” among other terms, in addition to what is meant by “processed or prepared food products.”

¹ www.cdfa.ca.gov/AHFSS/regulations.html#ACP-Prop12.
The language of Proposition 12 is substantially the same as Question 3.

In particular, NPPC strongly recommends that the term “cut” be specifically defined to exclude pork meat that is processed or prepared and is comminuted, diced, ground, or otherwise finely sliced. These products are often handled and processed similarly and are not sold as whole muscle cuts. They are often packaged as a mixed product with multiple sources of pork that are combined when placed in a final package. Finally, they are clearly “processed and prepared”, and can be excluded without undermining the intent or scope of Question 3.

Section 36.04: Prohibition on the Confinement of Covered Animals

As proposed, the language in **subsection (2)(e)** is unduly restrictive and would undermine the veterinary care of animals by eliminating the ability of veterinarians to utilize and rely on veterinary techs or trained on farm personnel to carry out their orders and directives. NPPC strongly encourages Massachusetts to instead consider adopting the language proposed by California, which allows individuals to care for animals under the directions and order of a veterinarian without the veterinarian being physically present. Veterinarians are trained medical professionals who trust and rely on the veterinary tech and animal care staff on farms to carry out the day-to-day care and management of animals under their care.

The proposed regulations should be revised to allow veterinarians the freedom to use their professional judgment when assessing and addressing the health and welfare of breeding pigs and to rely on their trained professional staff to implement their directives and recommendations. This flexibility would allow for management of breeding pigs, including segregation if sows become injured to allow for their recovery or to prevent fighting that places the sows or farm workers at risk. This flexibility is especially important in the post-weaning phase when sows are first forming new groups or if sows prematurely return to estrus.

Additionally, NPPC also supports the language included by California in its proposed rules implementing Proposition 12 that the definition of “individual treatment” relies on the existing veterinarian-client-patient relationship (VCPR). Under an established VCPR, pork producers and their professional veterinary care staff may administer treatments and otherwise care for animals in their care as indicated and directed by their veterinarian. Inclusion and recognition of the VCPR in the proposed definition would extend the use of this established relationship and allows the necessary flexibility for veterinarians and producers to implement and comply with the regulations.

Furthermore, we would also encourage reconsideration of language in **subsection 2(f)**, which provides an exemption for a “breeding pig during the five-day period prior to the breeding pig's expected date of giving birth, and any day that the breeding pig is nursing piglets.” The birth process is based on a variety of biological factors. While it can often be predicted accurately, the potential for some significant variability exists. We would encourage Massachusetts to define the “expected date of giving birth” to be as flexible as possible and to allow for this necessary variability. For instance, a producer may move a sow into farrowing (the housing system in which breeding pigs will give birth and nurse piglets) expecting delivery five days later. It's possible this breeding pig may deliver piglets two days later or nine days later. We would encourage your office to amend the proposed regulations to account for this potential variability even as producers make good faith efforts to comply with the regulations.

36.06: Certifications

The proposed certification process is unduly burdensome and needs significantly more flexibility for it to be workable and successful.

As currently drafted, the proposed regulations require a packer that harvests hogs, processes those hogs and produces bacon and pork tenderloins, and sells those products to customers in Massachusetts to create and keep for three years a “certification” for every single transaction.² The proposed regulations use language that implies this requirement without explicitly stating it. The proposed regulations should be clear on what information, if any, is required.

The recordkeeping-burden the proposed certification rules would impose is unworkable and overly burdensome. Large packer processors could have thousands of transactions a year in Massachusetts. Plus, they undoubtedly sell covered pork or veal products to third parties who, in turn, sell the covered products in Massachusetts, but the packer often will not know when it sells the product whether that product will be sold in the commonwealth. Indeed, the distributor may not know when it purchases from the packer to whom the product will be sold.

For example, a packer may sell bacon to a distributor in New Hampshire. That distributor may, or may not, sell that bacon in Massachusetts, depending on the vagaries of the marketplace. This uncertainty would require a packer to do one of two things: certify every sale, which is impossible because not every producer from whom the packer buys hogs will comply with the proposal’s requirements; or segregate hogs and products derived from them based on Question 3 compliance.

Instead of mandating individual certifications for every transaction, the regulations should implement a simple outcome-based requirement. The seller would supply the purchaser with a guarantee, certification, or other information to demonstrate the animals or products are compliant. The businesses could then utilize existing processes to handle the information, minimizing the record-keeping burden. For example, some business may utilize annual affidavits while other may provide attestations on shipping documents. Many supply chains can provide this data in electronic form. In providing a sample form, the agency sets a perceived minimum based on antiquated and cumbersome information sharing practices. Lastly, the three-year recordkeeping provision should be reduced to one-year given the sheer volume of transactions.

Thank you again for the opportunity to submit these comments. We welcome the opportunity to work closely with your office, or any other branch of the commonwealth as this process moves forward. If you have questions about these comments or anything else regarding Question 3, please do not hesitate to contact me at formicam@nppc.org or by phone at 202-347-3600.

Respectfully submitted,



Michael C. Formica
Asst. Vice President for Domestic Policy and General Counsel
National Pork Producers Council

² The three-year requirement is found in proposed section 36.06(7).