

Earthjustice Talking Points on FDA Proposed Ruling on Alternative Dairy Products

Shared with OMB on June 16, 2022

In March 2022, the United States Food & Drug Administration (FDA) submitted a [draft policy](#) regarding the “labeling of plant-based milk alternatives” to the Office of Management and Budget (OMB). On June 16, 2022, the Earthjustice Sustainable Food & Farming Team shared concerns with the FDA and the Office of Information and Regulatory Affairs (OIRA) within OMB about the harmful impact restrictive labeling of plant-based milks, as it would weaken a critical tool necessary to mitigate climate change, and would raise serious concerns around racial equity and dietary racism.

Earthjustice raised the points below. For more information, please contact Senior Legislative Representative Ranjani Prabhakar at rprabhakar@earthjustice.org.

Earthjustice Points on Labeling of Plant-Based Milk Alternatives

1. **Climate Harms.** Handicapping plant-based milk products’ ability to compete weakens an essential tool for fighting climate change.¹
 - a. Agriculture is a huge contributor to climate change; we will not meet our climate goals without changes to agriculture. A few critical points on the true climate cost of agriculture:
 - i. EPA estimates that agriculture was responsible for approximately 11% of total U.S anthropogenic GHG emissions in 2021, comprised of direct emissions of carbon dioxide, methane, and nitrous oxide, and these emissions are actively increasing. While frequently cited as the total climate impact of agriculture, these direct emissions represent only one component of agriculture’s contributions to climate change, which also include emissions from energy use, production of inputs like fertilizer, and land use impacts, in addition to emissions from food waste.
 - ii. Animal production – especially meat and dairy – stands out as a major contributor to agriculture’s full climate footprint. Beef and dairy cows directly emit vast quantities of methane from their exhalations, and they lead to tremendous emissions of methane and nitrous oxide from their manure management.
 - iii. In addition, animal agriculture requires vast amounts of land. Approximately 800 million acres of land is devoted to grazing – mostly for beef and dairy cows – and approximately half of all harvested cropland is devoted to animal feed crop production. Most of this land has been stripped of carbon and is accelerating climate change rather than helping to slow it down.
 - iv. Thus, all told, in the United States, meat and dairy production—including emissions related to production of the feed, land use for grazing, enteric

¹ Lehner, Peter H., and Nathan A. Rosenberg. 2022. *Farming for Our Future: The Science, Law, and Policy of Climate-Neutral Agriculture*. Saint Paul, MN: Environmental Law Institute.

- fermentation, and manure— accounts for almost 80% of EPA’s estimate of agriculture’s greenhouse gas emissions.
- b. Plant-based products are a critical tool to reduce the carbon footprint of agriculture, as it is very hard to reduce the climate impact of today’s large-scale dairies.
 - i. Dairy production has a particularly high GHG impact – with both enteric emissions and emissions from wet manure management.
 - ii. The biggest impact is from enteric emissions. While feed additives have the potential to reduce emissions from cows (by only about 10%), there is nothing now available.
 - iii. Most large dairies (that produce most product) use liquid manure management that produces about 20-40 times more methane than dry or pasture management. Currently, there are no methane emissions limits on dairies.
 - iv. You may have heard about biogas and the idea of capturing methane and making it into energy. This is unlikely to be a real solution. As Cornell found, it’s very expensive – more than 15 times more expensive than simply covering and flaring and even more so compared to dry management. There are lots of leaks. It does not address enteric or field spreading methane.
 - v. The impacts from feed production can be reduced through regenerative agriculture, but these practices are now used on only about 2-4% of US cropland, and change in agriculture is very slow.
 - vi. For these reasons, **demand side reduction is a critical strategy to address these emissions**. The fair, market-based competition of plant-based milk is a necessary demand side measure.
 - c. The draft guidance will hamper plant-based milk’s opportunity to compete on equal footing. It is therefore contrary to the [Biden Administration’s Executive Order on Tackling the Climate Crisis at Home and Abroad](#), which requires using all tools in the toolkit to tackle the climate crisis.
 - i. The Biden Administration Climate EO directs federal agencies to end fossil fuel subsidies; adopt policies to address disproportionate health, environmental, economic, and climate impacts on disadvantaged communities; and invest in climate-friendly infrastructure and jobs. Artificially protecting dairy milk is a form of subsidy for a highly polluting industry and is thus directly contrary to EO.
 - d. The Intergovernmental Panel on Climate Change (IPCC) report² found that “the greatest shift potential (to mitigate climate change) would come from switching to plant-based diets”, it also notes that growing demand for meat is expected to drive a 14% increase in conventional meat production by 2029.
 - i. With the report finding that hard-to-change behaviors such as diets require a transition to more sustainable food sources, governments should invest in plant-based as an alternative to conventional dairy/meat. Policymakers can make behavior change for consumers as easy as possible by making more sustainable

² IPCC — Intergovernmental Panel on Climate Change. n.d. “IPCC WG III Contribution to the Sixth Assessment Report.”

https://report.ipcc.ch/ar6wg3/pdf/IPCC_AR6_WGIII_FinalDraft_TechnicalSummary.pdf.

options as delicious and affordable as their conventionally produced counterparts, enabling the food system shift necessary to meet global climate targets.

2. **Racial Equity.** Creating barriers for accessing plant-based milk alternatives disproportionately burdens communities of color.
 - a. Labeling plant-based milks as “imitation” products or implying that those products are nutritionally inferior to dairy milk is not only inaccurate, but it is also harmful to communities of color. It is designed to scare people, including people of color, away from healthy alternatives. Such guidance would not further consumer protection or facilitate consumer choices; rather, its true purpose would be to nudge sales toward dairy milk products – to boost the dairy industry – and away from plant-based milk products. This is harmful to the health of many communities of color who have a high percentage of people that are lactose intolerant.
 - b. A Cornell University study³ finds that most people -- about 60% globally and primarily those of Asian and African descent -- stop producing lactase, the enzyme required to digest milk, as they mature. People of northern European descent, however, tend to retain the ability to produce the enzyme and drink milk throughout life.
 - ii. FDA itself has cited NIH research demonstrating that 75% of African Americans and Native Americans and 90% of Asian Americans are lactose intolerant.⁴ The NIH also found that 50% to 80% of Hispanic Americans suffer from lactose intolerance.⁵
 - iii. Moreover, lactose intolerance often manifests in ways that are not immediately apparent and the sufferer may not even realize that dairy is the source of their symptoms. Given this, it is especially pernicious to nudge people toward dairy milk when they may be unaware of the harms of that.
 - c. Creating hurdles to the ability of plant-based milk products to compete with dairy products unfairly disadvantages people of color. Thus, a guidance that erects barriers to plant-based milk consumption would be entirely contrary to the Administration’s racial equity Executive Order.⁶
 - i. That executive order instructs federal agencies to, among other things, (1) identify “potential barriers” faced by “underserved communities and individuals” in accessing “benefits and services” provided by the federal government, (2) identify “[w]hether new policies, regulations, or guidance documents” are needed

³ Cornell University. "Lactose Intolerance Linked To Ancestral Environment." ScienceDaily. www.sciencedaily.com/releases/2005/06/050602012109.htm (accessed June 15, 2022).

⁴ Food and Drug Administration. 2009. “Problems Digesting Dairy Products?” <https://efnep.ucanr.edu/files/93469.pdf>.

⁵Malik TF, Panuganti KK. Lactose Intolerance. In: StatPearls [Internet]. Treasure Island (FL): StatPearls Publishing; 2022 Jan. <https://www.ncbi.nlm.nih.gov/books/NBK532285/>

⁶ *Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*. 2021. <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

- to “advance equity in agency actions and programs,” and (3) produce a plan to address the barriers previously identified.
 - ii. A guidance that inaccurately describes plant-based milks as nutritionally inferior to dairy milk or requires those products to include confusing and misleading “imitation” labels on their products would erect additional barriers for underserved communities, directly contravening the Administration’s policy of reducing and eliminating such barriers.
3. **Nutrition and Health.** Disadvantaging plant-based milk products is contrary to public health and thus contrary to FDA’s statutory mandate
- d. There are multiple health benefits to plant-based diets, including plant-based milk options.
 - i. A study from two professors and researchers at Harvard University⁷ shows that plant-based milk such as soy milk lines up with dairy milk in terms of calcium, vitamin D, other nutrients, and calories. The nutrition profile is almost identical. Additionally, soy milk is an alternative that matches cow’s milk at 8 grams of protein per cup. But protein deficiency is not a concern in the United States.
 - ii. The study includes a suggestion to include products that are fortified with vitamin D and calcium, although it is noted that Americans don’t need as much calcium for bone health as they think they do. In fact, there is no evidence of a correlation between high dairy consumption and a reduction of fracture rates. This proposed rule is thus contrary to public health and FDA is violating its statutory mandate by undermining access to a healthy dairy alternative
 - e. FDA’s job is to protect public health. There is no public health justification for the proposed rule. The claim of confusion about what constitutes “milk” has been repeatedly rejected.
 - i. Several consumer class-action lawsuits leveled the dairy industry’s misbranding theories against soy and almond milk, resulting in dismissals as judges found no issues of consumer confusion or deception. Addressing the purported “violation” of milk’s standard of identity, one court noted that under this theory of misbranding, a “consumer might also believe that veggie bacon contains pork, that flourless chocolate cake contains flour, or that e-books are made out of paper.”⁸
 - ii. Since there is no evidence of consumer confusion, this draft rule is designed to cater to the dairy industry. This was not driven by health concerns or concerns about consumer confusion, but rather by concerns about lost profits by the dairy industry.
 - iii. It is against consumer preference, which has shifted – and continues to shift -- to plant-based options. Consumers seek out plant-based options for sustainability reasons or health reasons, making a knowing choice

⁷ Willett, Walter C., and David S. Ludwig. 2020. “Milk and Health.” *The New England Journal of Medicine* 382 (7): 644–54. <https://doi.org/10.1056/NEJMra1903547>.

⁸ *Ang v. Whitewave Foods Co.*, Case No. 13-cv-1953 (N.D. Cal. Dec. 10, 2013)

1. During the 2010s, milk consumption fell by an annual average of 2.6% each year, which was up from an annual average 1% decline during the 2000s. See 2021 USDA Economic Research Service Report.⁹
- f. FDA has not previously required producers to disclose other variations in nutritional content; there are nutritional differences in the various types of animal dairy, but no distinguishing labels are required.
 - i. From a letter to OMB from Senators Cory Booker and Mike Lee, and Congresswomen Julia Brownley and Nancy Mace, “any guidance, even if voluntary, that asks plant-based milks to identify differences without doing the same for animal milk is discriminatory towards the plant-based industry as well as the hard-working farmers who grow crops like oats and almonds. FDA should not be using its labeling authority to harm a growing industry and the millions of American consumers for whom plant-based foods are an important part of their diet.”

Relevant Links:

- [Lehner, Peter H., and Nathan A. Rosenberg. 2022. Farming for Our Future: The Science, Law, and Policy of Climate-Neutral Agriculture. Saint Paul, MN: Environmental Law Institute.](#)
- [USDA Comments in Response to Advance Notice of Proposed Rulemaking Regarding Labeling of Meat or Poultry Products Comprised of or Containing Cultured Animal Cells, 86 Fed. Reg. 49,491, Docket No. FSIS-2020-0036 \(Sept. 3, 2021\)](#)
- [USDA Comments in response to Notice of Request for Public Comment on the Executive Order on Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 14403 \(Mar. 16, 2021\), Docket No. USDA-2021-0003](#)
- [Working Group III Contribution to the IPCC 6th Assessment Technical Summary](#)
- [EAT –Lancet Commission Summary Report](#)

⁹ U.S. Department of Agriculture, Economic Research Service. 2021. “Examining the Decline in U.S. Per Capita Consumption of Fluid Cow’s Milk, 2003–18.”
<https://ers.usda.gov/webdocs/publications/102447/err-300.pdf?v=3585.8>.