

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 205

[Docket Number: TM-05-14]

RIN 0581-AC57

National Organic Program (NOP) – Access to Pasture (Livestock).

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Advanced notice of proposed rulemaking with request for comments.

SUMMARY: The United States Department of Agriculture (USDA) invites comments from producers, handlers, processors, food manufacturers, exporters, consumers, scientists, industry representatives, and all other interested parties on how USDA should address the relationship between ruminant animals, particularly dairy animals, and pasture or land used for grazing under the NOP regulations. During the development of the NOP, and since its implementation, various parties, including the National Organic Standards Board (NOSB), have expressed concern about the role of pasture in organic management of ruminant animals -- particularly dairy animals.

The NOP is authorized by the Organic Foods Production Act of 1990 (7 U.S.C. §§ 6501 et. seq.) (OFPA). The Agricultural Marketing Service (AMS) administers the NOP. Under the NOP, AMS oversees national standards for the production and handling of organically produced agricultural products. This action is being taken by AMS to ensure that NOP regulations are clear and consistent, stimulate growth of the organic sector, satisfy consumer expectations, and allow organic producers and handlers flexibility in making site-specific, real-time management decisions.

DATES: Comments on this ANPR must be submitted on or before [60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Interested parties may comment on this ANPR using the following procedures:

- Mail: Comments may be submitted by mail to: Mark A. Bradley, Associate Deputy Administrator, Transportation and Marketing Programs, National Organic Program, 1400 Independence Ave., SW., Room 4008–So., Ag Stop 0268, Washington, DC 20250.
- E-mail: Comments may be submitted via the internet to:
NOP.Livestock@usda.gov.
- Internet: www.regulations.gov.
- Fax: Comments may be submitted by fax to: (202) 205-7808.
- Written comments on this ANPR should be identified with the docket number TM-05-14.
- Commenters should identify the issue or questions of this ANPR to which the comment refers. Comments should directly relate to issues or questions raised by the ANPR.
- Comments should be supported by reliable data. Commenters may include a copy of articles or other references that support their comments. Only relevant material should be submitted.

It is our intention to have all comments to this ANPR, whether submitted by mail, e-mail, or fax, available for viewing on the NOP homepage. Comments submitted in response to this ANPR also will be available for viewing in person at USDA-AMS,

Transportation and Marketing, Room 4008-South Building, 1400 Independence Ave., SW., Washington, DC, from 9 a.m. to 12 noon and from 1 p.m. to 4 p.m., Monday through Friday (except official Federal holidays). Parties wanting to visit the USDA South Building to view comments received in response to this ANPR are requested to make an appointment in advance by calling (202) 720-3252.

FOR FURTHER INFORMATION CONTACT: Mark A. Bradley, Associate Deputy Administrator, Transportation and Marketing Programs, National Organic Program, 1400 Independence Ave., SW., Room 4008–So., Ag Stop 0268, Washington, DC 20250. Telephone: (202) 720-3252; Fax: (202) 205-7808.

SUPPLEMENTARY INFORMATION: This action has been determined to be significant for purposes of Executive Order 12866, and therefore, has been reviewed by the Office of Management and Budget.

When the OFPA was drafted in 1990, many private certification standards did not require pasture for ruminant animals. Certification standards for dairy herds permitted a wide range of practices, from pasture-based systems to conventional dry-lot operations. The OFPA, therefore, contains no provisions regarding the role of pasture or conditions for livestock confinement in organic livestock production systems.

Appropriate access to pasture has been a topic of discussion in the organic community for many years, including by the NOSB, because of a lack of statutory language and widely varying private certification standards for the relationship between ruminant animals, particularly dairy animals, and pasture.¹ The NOP final regulations on livestock feed, health care, and living conditions were based on recommendations made

¹The NOSB is appointed by the Secretary of Agriculture and is comprised of representatives from the following categories: farmer/grower; handler/processor; retailer; consumer/public interest; environmentalist; scientist; and certifying agent (7 U.S.C. 6518).

by the NOSB and public comment offered through various issue papers and two proposed rules, from 1994 through 2000. In addition, the NOSB has further explored the issue several times in public meetings since the NOP regulations were implemented in October 2002. The NOSB has also drafted several recommendations and guidance which it has proposed to AMS at various times either for guidance or rulemaking under the NOP.

Background:

Over the period 1994-2005, the NOSB made six recommendations regarding access to the outdoors for livestock, pasture, and conditions for temporary confinement of animals. Also during this period, USDA issued two proposed rulemakings and a final regulation regarding national standards for production and handling of organic products, including livestock and their products. The NOSB as well as the public commented on these rulemakings with regard to these issues.

(1) In 1994, the NOSB recommended that certified operations provide "access to shade, shelter, fresh air, and daylight suitable to the species, the stage of production, the climate, and the environment." The NOSB also proposed that design of animal housing must accommodate "the natural maintenance, comfort behaviors, and the opportunity to exercise" required by specific species.

(2) In 1995, the NOSB modified its recommendation on organic livestock living standards by specifying the conditions under which temporary confinement may be justified. These conditions were inclement weather, the health, safety and well being of the livestock and protection of soil and water quality.

(3) In 1998, the NOSB reaffirmed its earlier positions on confinement and recommended that no exceptions be made for large livestock concentrations. However,

the NOSB did not further define or add context to the phrase “large livestock concentrations”.

In our December 1997 first proposed rule (62 FR 65850, December 16, 1997), based on NOSB recommendations, we proposed that, if necessary, animals could be maintained under conditions that restrict the available space for movement or access to outdoors if other living conditions were still met so that an animal's health could be maintained without the use of a permitted animal drug.

The provision for temporary confinement considered the effects of climate, geographical location, and physical surroundings on the ability of animals to have access to the outdoors. Our understanding was considered in balance with other animal health issues, such as the need to keep animals indoors during extended periods of inclement weather. The determination of "necessary" was to be based on site-specific conditions described by the producer in an organic system plan, which requires approval from the certifying agent. We stated in the preamble to that first proposed rule that such flexibility "would allow operations without facilities for outdoor access to be certified for organic livestock production and would permit animals to be confined during critical periods such as farrowing."² As a part of the 1997 proposal, we specifically requested public comment as to the conditions under which animals may be maintained to restrict the available space for movement or access to the outdoors.

In October 1998, we released an issue paper, “Livestock Confinement in Organic Production Systems” to obtain further input on this issue and improve the drafting of the Department’s second proposed rule that was published in March 2000 (65 FR 13512, March 13, 2000). In response to the March 2000 proposed rule, commenters stated that

² Federal Register, Vol.62.No.241, Proposed Rules, 7 CFR 205, Preamble, p.65881, December 16, 1997.

the requirement that ruminants receive "access to pasture" did not adequately describe the relationship that should exist between ruminants and the land they graze. Many of these commenters requested that the final rule require that ruminant production be "pasture-based." The NOSB shared this perspective and also requested that the final rule require that ruminant production systems be pasture-based.

Other comments we received stated that a uniform, prescriptive definition of pasture was inappropriate to be applied universally over all dairy farms. These comments stated that the diversity of growing seasons, environmental variables, and forage and grass species could not be captured in a single definition and that certifying agents should work with livestock producers to evaluate pasture on an individual farm basis. These comments disagreed with a pasture-based requirement and stated that pasture should be only one of several components of balanced livestock nutrition. These comments said that making pasture the foundation for ruminant management would distort this balance; it would also deprive crop producers of the revenue and rotation benefits they could earn by growing livestock feed.

The Department considered all these comments but ultimately decided to retain the proposed "access to pasture" requirement in the final regulations published in December 2000 (65 FR 80548, December 21, 2000). No comments were submitted that defined a pasture-based system or how a pasture-based system would replace access to pasture.

The March 2000 proposed rule also retained provisions allowing for temporary confinement for animals: inclement weather, stage of production, conditions under

which the health, safety, or well-being of the animal is jeopardized, or risk to soil or water quality.

Many comments were received that expressed concern that the exemption for stage of production might be used to deny an animal's access to the outdoors during naturally occurring life stages, including lactation for dairy animals. Commenters overwhelmingly opposed such an allowance, stating that the stage of production exemption should be narrowly applied. Commenters stated that a dairy operation, for example, might have seven or eight distinct age groups of animals, with each group requiring distinct living conditions. Under these circumstances, these commenters maintained that a producer should be allowed to temporarily house one of these age groups indoors to maximize use of the whole farm and the available pasture. In drafting the final rule, we retained the stage of production exemption because of the difficulty of adding further restrictions to the confinement exemption based on species, age group, production stage, or in relation to pasture.

Following both the March 2000 proposed rule and December 2000 final regulations, the NOSB continued work on a recommendation to address the relationship between ruminant animals, conditions for temporary confinement of ruminant animals, and pasture.

(4) In June 2000, the NOSB recommended that "the allowance for temporary confinement should be restricted to short-term events such as birthing of newborn, finish feeding for slaughter stock, and should specifically exclude lactating dairy animals."

(5) In June 2001, the NOSB recommended that "ruminant livestock must have access to graze pasture during the months of the year when pasture can provide edible

forage, and the grazed feed must provide a significant portion of the total feed requirements." The NOSB further recommended that "the producer of ruminant livestock may be allowed temporary exemption to pasture because of conditions under which the health, safety, or well-being of the animal could be jeopardized, inclement weather or temporary conditions which pose a risk to soil and water quality."

(6) In February 2005, the NOSB modified its June 2001, recommendation by proposing to further amend the livestock living condition requirement for access to pasture (§ 205.239). Under this requirement, the producer of an organic livestock operation must establish and maintain livestock living conditions which accommodate the health and natural behavior of animals, including providing "access to pasture." The NOSB proposed to replace the phrase "access to pasture" with the phrase "ruminant animals grazing pasture during the growing season."

The NOSB also proposed exceptions to the general requirement for pasturing: for birthing, for dairy animals up to 6 months of age and for beef animals during the final finishing stage--not to exceed 120 days. Finally, the NOSB recommendation noted that lactation of dairy animals is not a stage of life that may be used to deny pasture for grazing.

At the same time, the NOSB asked the NOP to issue guidance to interpret the existing NOP pasture requirements, and the NOSB drafted the guidance that it wanted NOP to issue. The NOSB guidance would have, for the first time, imposed specific requirements within a livestock producer's organic system plan (OSP). An organic system plan is the basic business plan that must be developed by each organic operation and agreed to by an accredited certifying agent (ACA) (§ 205.201). An OSP has six

required elements and is a fundamental requirement of the NOP final regulations. Under the NOSB guidance, the requirements would have imposed the following for livestock producers:

- The OSP shall have the goal of providing grazed feed greater than 30 percent of the total dry matter intake on a daily basis during the growing season but not less than 120 days;
- The OSP must include a timeline showing how the producer will satisfy the goal to maximize the pasture component of total feed used in the farm system;
- For livestock operations with ruminant animals, the OSP must describe: 1) the amount of pasture provided per animal; 2) the average amount of time that animals are grazed on a daily basis; 3) the portion of the total feed requirement that will be provided from pasture; 4) circumstances under which animals will be temporarily confined; and 5) the records that are maintained to demonstrate compliance with pasture requirements.

The NOSB's guidance also addressed temporary confinement and the conditions of pasture. In NOSB's guidance, temporary confinement would be permitted only during periods of inclement weather such as severe weather occurring over a period of a few days during the grazing season; conditions under which the health, safety, or well being of an individual animal could be jeopardized, including to restore the health of an individual animal or to prevent the spread of disease from an infected animal to other animals; and to protect soil or water quality. The guidance also stated that appropriate pasture conditions shall be determined according to the regional Natural Resources

Conservation Service Conservation (NRCS) Practice Standards for Prescribed Grazing (Code 528) for the animals in the OSP.

The NOSB requested public comments on organic system plan requirements; temporary confinement; and what constitutes “appropriate pasture conditions.” In particular, NOSB asked for input on specific dry matter intake from pasture language; reference to regional NRCS prescribed grazing standards; and whether or not any of the text described above should be recommended to the NOP for rule change.

USDA posted the NOSB guidance and received comments from the public, including farmers, consumers, and at least one accredited certifying agent. Many consumers that supported the NOSB guidance stated that they expected organic dairy animals to be grazed on pasture. Many commenters identified themselves as organic dairy producers and said they would support the NOSB guidance. But many other organic dairy farmers provided comments that did not support the NOSB guidance. These commenters said that although they were organic farmers in compliance with the NOP regulations and that they supported the principles of organic management and production, they would be decertified under the minimum number of days required on pasture or the minimum amount of dry matter intake (DMI) required from pasture for livestock feed.

Other comments questioned the source of the minimum DMI and days on pasture, suggesting that these requirements came from studies conducted at Cornell University and Michigan State University. If so, these commenters stated that such minimums would not necessarily be applicable or suitable for all areas of the United States, because they meet a particular climate and topography, namely a homogeneous climate with

respect to growing season, precipitation, and vegetation. One certifying agent said that at least half of their responding livestock operations, most with fewer than 50 dairy cows, would not be able to meet the guidance criteria put forth by the NOSB despite meeting all other NOP requirements. Other commenters found the reference to the NRCS Conservation Guide troubling as it was designed for beef cattle operations and they stated it could not be adapted easily to dairy operations or to various operations in differing parts of the country easily. Several commenters wrote that the most complicating issue with the NOSB guidance would be the difficulty for both producers and certifying agents in measuring and verifying the minimums for feed derived from pasture for a single cow or an entire herd, because of multiple variables that change constantly over time. Such variables include: factors affecting the animals themselves - age of the animals, nutritional needs in relation to reproductive cycle, body condition, etc; and factors affecting the quality of the pasture - precipitation, animal-units per acre, species of grasses, sunlight, temperature, etc. These commenters asked how a producer is to calculate the minimum specified for each dairy cow at any particular point in time in order to avoid risk of losing their organic certification. One commenter said that if farmers want to get around the pasture requirement, they can get around the pasture requirement even if it is made stricter; the issue is enforcement, not the regulations.

Under NOP's Good Guidance Practices (70 FR 5129), guidance documents do not establish legally enforceable rights or responsibilities and are not legally binding on the public or the program. Guidance statements also do not introduce new requirements on the regulated community. Because guidance is not binding, words that describe a mandatory action such as "shall," "must," "require," and "requirement," are not used

unless they describe an existing legal requirement. Thus, we could not accept the NOSB guidance in its recommended format. The nature and specificity of the NOSB's recommendations, moreover, are more appropriately dealt with through amendment of the NOP regulations.

Questions for consideration in commenting on this ANPR:

The topics and questions below are designed to assist in commenting on potential changes to the NOP. Input on these questions will aid USDA in determining whether there is sufficient interest in changing the role of pasture and whether there is adequate information to change the role of pasture in the regulations.

Consumer preferences:

- Are there market-based or other types of research to substantiate an expectation by consumers that organic milk comes from dairy cows raised on pasture?
- Is there evidence, data, or other types of research that the role of pasture as it exists in the regulations does not support consumers' beliefs about the relationship between organic milk and organic dairy cows?

Access to pasture:

- Is there evidence in dairy or animal science literature that supports an appropriate minimum amount of time that dairy cows (or other ruminant animals) should be kept on pasture?
- Is there evidence in dairy or animal science literature that supports a minimum amount of feed that should come from pasture?

- Should age and reproductive cycle of the animal be taken into account in determining the minimum amount of time an animal spends on pasture or the amount of feed derived from pasture?

Ruminant animal nutrition:

- What is the appropriate contribution of pasture to ruminant animal nutrition?
- What would the effect be to require a minimum dry matter intake (DMI) of 30 percent derived from pasture? Is this an achievable goal? What evidence is available to support 30 percent as a benchmark?
- What factors could affect a minimum DMI variable?
- Does pasture quality affect DMI? Can DMI be affected by factors beyond producers' control, such as weather-related events (e.g., flood or drought)?
- Is it useful to establish a single benchmark or measure, such as minimum DMI, for all dairy operations in the United States and all foreign organic operations who want to be certified to the NOP standard?
- Please provide input on how the regulations should address forage nutritional quality factors such as crude protein, acid detergent fiber, neutral detergent fiber and net energy for lactation? Is this level of detail adequate to ensure the role of pasture is met for organic livestock management under the NOP regulations?

Minimum pasture requirements:

- Please provide input on the implications of adopting a minimum pasture requirement, such as required that dairy animals should spend at least 120 days on pasture. How would the 120 days be counted?

- What evidence in dairy science or animal literature helps explain the appropriate amount of minimum time that dairy cows should be kept on pasture?
- Is the minimum time spent on pasture based primarily on the quality of the pasture, or the quantity of the feed provided by the pasture?
- How is the pasture requirement affected by drought, flood, or other natural disaster?
- Should pasture condition or quality be considered? Should there be a minimum pasture quality requirement?
- Should specific animal-unit stocking rates per acre be considered? How?
- In lieu of a uniform pasture requirement, could a time range (based on the field quality, number of cows, type of operation, and other farm-specific factors included in the organic system plan) adequately or appropriately define the role of pasture in organic livestock management?
- Should a livestock feed requirement uniformly specify how much feed comes from pasture?

Measurement, enforcement, and compliance:

- How would an accredited certifying agent appropriately measure compliance with specific measures adopted to change the role of pasture? For example, if dry matter intake is used as a benchmark, should it be measured as the average DMI over a certain time period, such as a calendar year or average 12 months?

- How should producers and certifying agents verify compliance over time for a herd of cows that are at various stages of growth or have varying states of nutritional needs? Can the producer and certifying agent determine this in the organic system plan?

Market and other impacts:

- What are the effects on a dairy operation's cost of production (both fixed and variable) if the regulation is amended to include requirements such as minimum time or minimum amount of feed derived from pasture?
- Is there a relationship between the number of cows and number of acres on a farm and the producer's ability to comply with minimum pasture requirements?
- How do the age of the animal, its stage of development, and feed from pasture, interact to affect milk output?
- How would a larger role for pasture affect supplies of organic and non-organic milk and milk products? Please provide any evidence or research to support your discussion.
- What are the effects on consumer prices for dairy products if the NOP regulations include a larger role for pasture on dairy livestock producers?
- How would a larger role for pasture affect the geographical distribution of organic dairy production operations within the United States and foreign countries? Please provide any evidence or research to support your discussion.

Scope of the ANPR

In this ANPR, USDA is seeking input on the following issues:

- (1) Is the current role of pasture in the NOP regulations adequate for dairy livestock under principles of organic livestock management and production?
- (2) If the current role of pasture as it is described in the NOP regulations is not adequate, what factors should be considered to change the role of pasture within the NOP regulations. Provide any available evidence in support of concerns raised.
- (3) Which parts of the NOP regulations should be changed to address the role of pasture in organic livestock management? Pasture appears in the NOP definitions (subpart B, § 205.2), and in subpart C of production and handling requirements under livestock feed (§ 205.237), livestock healthcare (§ 205.238), and livestock living conditions (§ 205.239). Should the organic system plan requirements (§ 205.201) be changed to introduce a specific means to measure and evaluate compliance with pasture requirements for all producers of dairy or other livestock operations? Or, should a new standard be developed just for pasture alone?

All interested parties are encouraged to comment on the issues raised in the scope of this ANPR. Please be specific in your comments. This action is being taken by the NOP to ensure its regulations are clear and consistent, stimulate growth of the organic sector, satisfy consumer expectations, and allow organic producers flexibility in making site-specific, real-time management decisions.

Authority: 7 U.S.C. 6501-6522.

Dated:

Lloyd C. Day, Administrator
Agricultural Marketing Service