



# Federal Register

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**Friday,  
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## **Part III**

## **Department of Agriculture**

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**Agricultural Marketing Service  
7 CFR Part 205**

**National Organic Program (NOP)—Access  
to Pasture (Livestock); Proposed Rule**

**DEPARTMENT OF AGRICULTURE****Agricultural Marketing Service****7 CFR Part 205**

[Docket No. AMS-TM-06-0198; TM-05-14]

RIN 0581-AC57

**National Organic Program (NOP)—  
Access to Pasture (Livestock)****AGENCY:** Agricultural Marketing Service, USDA.**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would amend livestock and related provisions of the NOP. Comments have been received from consumers, producers, certifying agents, trade associations, retailers, organic associations, animal welfare organizations, consumer groups, and various industry groups seeking greater detail on the role of pasture in organic livestock production. Also since implementation of the NOP in 2002, the National Organic Standards Board (NOSB) has made several recommendations regarding the role of pasture. As a result of comments, complaints, and noncompliances, we are proposing amendments to the livestock provisions of the NOP. This proposed rule provides greater detail for selected provisions of the existing livestock regulations, especially as they relate to pasture and ruminant animals. By specifying in greater detail that producers are to provide ruminants with pasture, recognize pasture as a crop, and incorporate pasture into their organic system plan, producers will have better records and tools for managing pasture and demonstrating compliance with the livestock regulations. Certifying agents will have better tools for measuring compliance with the livestock regulations. Consumers will have better assurances that the organic label is applied in ways that meet their expectations that ruminant livestock animals graze pastures during the growing season. This proposed rule would also clarify the replacement animal provision for dairy animals.

**DATES:** Comments must be received by December 23, 2008.

Comments on the information collection and recordkeeping requirements contained in this proposed rule must be received by December 23, 2008.

**ADDRESSES:** Interested persons may comment on this proposed rule using the following procedures:

- *Mail:* Comments may be submitted by mail to: Richard H. Mathews, Chief, Standards Development and Review

Branch, National Organic Program, Transportation and Marketing Programs, USDA-AMS-TMP-NOP, 1400 Independence Ave., SW., Room 4008—So., Ag Stop 0268, Washington, DC 20250.

- *Internet:* <http://www.regulations.gov>.

- Written comments on this proposed rule should be identified with the docket number AMS-TM-06-0198; TM-05-14.

- Identify the issue or questions of this proposed rule to which the comment refers. Comments should directly relate to issues or questions raised by the proposed rule.

- Clearly indicate if you are for or against the proposed rule or some portion of it and your reason for your position. Include recommended language changes as appropriate.

- Comments should be supported by reliable data. Commentors 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 proposed rule, including names and addresses when provided, whether submitted by mail or internet, available for viewing on the Regulations.gov ([www.regulations.gov](http://www.regulations.gov)) Internet site. Comments submitted in response to this proposed rule 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). Persons wanting to visit the USDA South Building to view comments received in response to this proposed rule are requested to make an appointment in advance by calling (202) 720-3252.

Pursuant to the Paperwork Reduction Act, interested persons may comment on the information collection and recordkeeping requirements required by this proposed rule by:

- *Mail:* Comments should be sent to above address and to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, 725 17th Street, NW., Room 725, Washington, D.C. 20503.

- Written comments on this proposed rule should be identified with the docket number AMS-TM-06-0198; TM-05-14 and should reference the date and page number of this issue of the **Federal Register** and indicate that the comment is regarding the

information collection and recordkeeping requirements.

- Comments are specifically invited on: (1) The accuracy of the Agency's burden estimate of the proposed collection of information; (2) ways to minimize the burden of the collection of information on those affected; (3) whether the proposed collection of information is sufficient or necessary to demonstrate compliance with the requirement that, during the growing season, producers of organic ruminants provide not more than an average of 70 percent of a ruminant's dry matter demand from dry matter feed; and (4) ways to enhance the quality, utility, and clarity of the information to be collected.

All comments on the information collection and recordkeeping requirements required by new paragraph 205.237(c) of this proposed rule will become a matter of public record and will be available for public viewing at the above referenced location.

**FOR FURTHER INFORMATION CONTACT:**

Richard H. Mathews, Chief, Standards Development and Review Branch, Telephone: (202) 720-3252; Fax: (202) 205-7808.

**SUPPLEMENTARY INFORMATION:****Background**

The NOP is authorized by the Organic Foods Production Act of 1990 (OFPA), as amended, (7 U.S.C. 6501 *et seq.*). 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 livestock production regulations have sufficient specificity and clarity to enable AMS and accredited certifying agents to efficiently administer the NOP and to facilitate and improve compliance and enforcement. This action is also intended to satisfy consumer expectations that ruminant livestock animals graze pastures during the growing season. The Secretary of Agriculture (Secretary) appointed members to the NOSB for the first time in January 1992. The NOSB began holding formal committee meetings in May 1992 and its first full Board meeting in September 1992. The NOSB's initial recommendations were presented to the Secretary on August 1, 1994. 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.

(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. Natural maintenance refers to the animal’s ability to engage in natural activities including but not limited to lick, scratch, stretch, lie down, stand up.

(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.

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” (62 FR 65881, December 16, 1997). 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.

(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 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, some commenters stated that 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 received in response to the March 2000 proposed rule 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.

These 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 (February 2005), the NOSB asked the NOP to issue guidance to interpret the existing NOP pasture requirements, and the NOSB drafted the guidance that it wanted the NOP to issue. The NOP posted the draft guidance on the Web for comment to the NOSB. The NOSB formally approved its recommendation to the Secretary at its August 2005 meeting. The NOSB guidance would have imposed specific requirements within a livestock producer's organic system plan (OSP). An OSP is the basic business plan that must be developed by each organic operation and agreed to by an accredited certifying agent (§ 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 guidance also addressed temporary confinement and the conditions of pasture. In the NOSB 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 (NRCS) Conservation Practice Standards for Prescribed Grazing (Code 528) for the animals in the OSP.

On April 13, 2006, NOP published an Advanced Notice of Proposed Rulemaking (ANPR) (71 FR 19131) seeking input on the following issues:

- (1) Whether the current role of pasture in the NOP regulations is 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; and,
- (3) What parts of the NOP regulations should be amended 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).

We also asked whether the organic system plan requirements (§ 205.201) should be changed to introduce specific means to measure and evaluate compliance with pasture requirements for all producers of livestock operations, or whether a new standard should be developed just for pasture alone.

#### Comments Received

We received over 80,500 comments. There were approximately 250 individual comments with the remaining comments in a modified form letter. Comments were received from consumers, producers, certifying agents, trade associations, retailers, organic associations, animal welfare organizations, consumer groups, and various industry groups. Support for strict standards and greater detail on the role of pasture in organic livestock production was nearly unanimous with just 28 of the over 80,500 comments opposing changes to the pasture requirements. Over 54,000 commenters stated that they pay a premium for milk from animals that graze pastures. At the time that these comments were submitted organic milk was selling at a 50 percent premium over conventionally produced milk. Over 71,300 commenters expressed opposition to the feeding of organic dairy animals in non-pasture settings such as dry-lots. Over 10,500 commenters suggested amending the regulations to require pasture stocking rates. The most common figure cited was no more than and preferably less

than, three ruminants per acre, in order to meet combined feed intake and ecological goals.

Consumers and other commenters, including small entities, have expressed a clear expectation that organic ruminants graze pastures for the purpose of obtaining nutritional value as well as to accommodate their health and natural behavior. Commenters supported the adoption or incorporation of quantifiable, numeric measures into the regulations for the minimum amount of feed, measured as dry matter intake (DMI) (30 percent of the daily need), obtained from pasture and the minimum amount of time that ruminants should spend on pasture during a year (120 days). This compares to comments we received supplying consumer survey results in which consumers expressed varying degrees of negative feedback over dairy animals not being raised on pasture. A Whole Foods Market, Inc. survey revealed that 69 percent of consumer respondents expected most of an organic dairy animal's food to come from pasture. A Consumers Union survey found that more than two-thirds of those surveyed believed that the NOP standards should require that organic animals graze outdoors. Finally, a Natural Marketing Institute study found that 72 percent of organic dairy users indicated that it was "extremely/somewhat" important that organic dairy products, including organic milk, are from animals that graze in a pasture.

Many of the comments received related quantifiable minimums to improvements in herd and animal health, taste and quality of the milk, soil and pasture quality, compliance with the intent of the organic regulations, and confidence in the integrity of the organic label for consumers. In addition, some commenters related increased time that animals spend on pasture to increased health of the soil, a relationship that has been demonstrated in research through the recycling of manure. Some of the health benefits that commenters related indirectly to pasture, such as the benefits of conjugated linoleic acid, an anti-carcinogen stemming from milk and allegedly related to reduced rates of some forms of cancer, have not been verified by the Food and Drug Administration (FDA) and are not presently permitted for labeling on dairy products.

Commenters supported the pasturing of animals during lactation. More generally, we received comments that lactation is not a stage of production that justifies confinement and keeping animals off pasture. We received

comments that animals should graze during months of the year when pasture can provide edible forage and that animals should receive a significant portion of their diet from grazing. We received comments from consumers who expressed concern over factory-style farms that import calves and raise them in feedlot dairies with little or no access to pasture. We received comments that prohibited materials are being used on dairy animals, although such comments are not the subject of this rulemaking.

We also received comments about dairy replacement animals in this rulemaking, although such comments are not the subject of this rulemaking. These comments may have been jointly submitted at the time that the USDA dairy symposium was held and the rulemaking pursuant to the court order in *Harvey v. Johanns* was published for comment (71 FR 24820, April 27, 2006). Therefore, these comments were not considered as part of this rulemaking on pasture, but have been considered regarding the intended rulemaking on origin of livestock.

We also received comments identifying the OSP as the appropriate section of the NOP regulations to enhance a measurable role for pasture by livestock producers. We received comments from producers who were concerned that regardless of the changes made, some producers would find a way around the regulations, because the problem is not the regulations themselves, but enforcement of the regulations.

We received comments from certifying agents concerned about quantifiable minimum measures, such as 120 days on pasture or that animals receive at least 30 percent of their daily DMI from pasture on days that they graze. Their concerns were that quantifiable minimums may present problems with compliance and enforcement for producers who might not meet the minimums by small amounts over some period of time, but who otherwise successfully demonstrate compliance with the livestock regulations.

We received comments concerned about changes to the pasture regulations without recognizing differences in species of animals, in climate, topography, animal health, age, veterinary needs, or other factors. We received comments that the suggested 30 percent-DMI and 120-day minimum pasture requirements have never been supported by scientific evidence and appear arbitrary.

We received comments on the NOSB recommendation that beef animals be

exempted from pasture for the final finishing stage—not to exceed 120 days. Of the over 80,500 comments on the ANPR, the overwhelming majority spoke to the pasturing of dairy animals. However, even in these comments, there was a consistent theme of opposition to confining animals (tens of thousands of commenters) and feedlot feeding (thousands of commenters).

Commenters who favored such an exemption requested that the exemption not exceed 90 days. Others argued that allowing beef animals to be confined for the last 120 days of finish feeding, prior to slaughter, is not in keeping with the integrity (accommodation of the health and natural behavior of animals) of the organic standards that consumers expect from the certified organic label. It was also argued that this is contrary to the expected intent of pasture-raised animals in organic systems. A commenter made the point that such an exemption would permit beef animals to be raised off pasture, in some climates, for nearly their entire lives. This commenter cited the 6 months pasture exemption for young stock, the non-growing season, and a 4-month pasture exemption for finish feeding as possibly consisting of as many as 17 months of a beef animal's 18- to 24-month life span.

#### Proposed Changes Based on Comments

The role of pasture in an organic livestock operation is defined in the following sections of the NOP regulations. Section 205.2 defines pasture as land used for livestock grazing that is managed to provide feed value and maintain or improve soil, water, and vegetative resources. Section 205.237 requires the producer of an organic livestock operation to provide livestock with a total feed ration composed of agricultural products, including pasture and forage that are organically produced. Section 205.238(a)(3) requires producers to establish and maintain livestock health care practices which include establishing appropriate pasture conditions to minimize the occurrence and spread of diseases and parasites. Finally, § 205.239 requires that ruminants be given access to pasture. The regulations, as originally published and currently in effect, require ruminants to graze pastures for the purposes of obtaining nutritional value as well as to accommodate their health and natural behavior.

Some producers, with the approval of their certifying agents, have used other provisions within the regulations to avoid or minimize the role of pasture, or to justify not providing ruminants with

pasture. Some producers have claimed, for instance, that lactation is a stage of production for which dairy animals require near-constant veterinary care or oversight and therefore, must be denied access to pasture for health and safety reasons. We agree with commenters that lactation is not a stage of production that justifies keeping dairy animals off pasture. This practice is not in compliance with § 205.239, livestock living conditions. Some producers have also provided dairy animals with feed rations totally or nearly devoid of pasture. This practice is also not in compliance with § 205.237, livestock feed. Other producers have put ruminants on acreage, which certifying agents have certified as pasture, that is so devoid of rooted grazable vegetation that the acreage does not meet the definition of pasture as defined in § 205.2. Such producers feed ruminants on such acreage with forage harvested from other acreages certified as pasture.

As noted in § 205.2, pasture is defined as land used for livestock grazing that is managed to provide feed value and maintain or improve soil, water, and vegetative resources. Accordingly, producers must actively manage pasture, in full compliance with §§ 205.200 through 205.206, just as they manage any other cropland, to provide adequate feed and forage for animals while balancing the ecological needs of the soil, water, and other natural resources.

Commenters stated that pasture practices should be part of each producer's OSP, and that it should be obviously available as a compliance tool for inspectors and certifying agents. We agree. Section 205.201 requires that producers develop an OSP that includes, among other things, a description of practices and procedures to be performed and maintained, including the frequency with which they will be performed. As stated in the preamble to the December 21, 2000 Final Rule (65 FR 80548), the OSP commits the producer to a sequence of practices and procedures resulting in an operation that complies with every applicable provision in the regulations. Since implementation of these regulations, however, we have learned that producers need to improve their description of the practices and procedures they employ to comply with the livestock regulations in general and the pasture requirements in particular. Accordingly we conclude that the role of pasture needs to be further defined.

To address the issues noted above and the NOSB February 2005 recommendation for a pasture guidance document, we are proposing

amendments to §§ 205.237 and 205.239 and the addition of a pasture practice standard as new § 205.240.

Additionally, we are proposing new definitions to be added to § 205.2.

We are also proposing, in this proposed rulemaking, to clarify the replacement animal provision of paragraph 205.236(a)(2)(iii) which applies when what is commonly referred to as the “80/20 rule” (paragraph 205.236(a)(2)(ii)) was used to convert an entire distinct herd to organic production. It now also applies to paragraph 205.236(a)(2)(i) which was added (71 FR 32803) following amendment to OFPA (Pub. L. 109–97, Title VII, § 797). In discussing the 80/20 rule, the preamble to the final rule published December 21, 2000, (65 FR 80570) contains the sentence “After a dairy operation has been certified, animals brought onto the operation must be organically raised from the last third of gestation.” We are proposing to replace the language currently found in paragraph 205.236(a)(2)(iii) with language similar to the sentence found in the final rule preamble and the phrase “using the exception in paragraph (a)(2)(i) or (ii) of this section.” Paragraph 205.236(a)(2)(iii) would now read, “Once an operation has been certified for organic production using the exception in paragraph (a)(2)(i) or (ii) of this section, all dairy animals brought onto the operation shall be under organic management from the last third of gestation.” We are taking this action to clarify that there remain two tracks for replacement dairy animals following the Congressional amendment (Pub. L. 109–97, Title VII, § 797) and the final rulemaking that was published June 7, 2006, (71 FR 32803) based on the court order in *Harvey v. Johanns*. One track applies to operations that were certified for organic production using the exception in paragraph (a)(2)(i) or (ii) of § 205.236. For these operations all dairy animals brought onto the operation are required to be under organic management from the last third of gestation. The second track applies to operations that did not use the exception in paragraph (a)(2)(i) or (ii) of § 205.236. These operations may purchase conventional animals for conversion to organic production or animals that have been converted from conventional to organic. In a separate rulemaking action, we intend to address the two track system and seek public comment relative to recommended changes to the origin of livestock in organic production.

This action adds a new § 205.240, Pasture practice standard. Section 205.240 provides that a producer of an

organic livestock operation must, for all ruminant livestock on the operation, demonstrate through auditable records in the OSP, a functioning management plan for pasture that meets all requirements of §§ 205.200 through 205.240. Producers are encouraged to work with their local Cooperative Extension or NRCS office to develop an active management plan for pasture.

Section 205.240 also requires pasture to be managed as a crop in accordance with §§ 205.200 through 205.206. To the extent that they have not already done so, producers would be required to develop and annually update a comprehensive pasture plan for inclusion in their OSP. At the time of annual update, certified operations will submit an updated comprehensive pasture plan. When there is no change to the previous year’s comprehensive pasture plan the certified operation may resubmit the previous year’s comprehensive pasture plan.

Currently, paragraph 205.103(b)(2) requires that records fully disclose all activities and transactions of the certified operation in sufficient detail as to be readily understood and audited. Also paragraph 205.201(a)(1) requires an OSP that includes a description of practices and procedures to be performed and maintained, including the frequency with which they will be performed. Accordingly, proposed § 205.240 also provides that a comprehensive pasture plan must include a detailed description of: (1) Crops to be grown in the pasture and haymaking system; (2) cultural practices, including but not limited to varying the crops and their maturity dates in the pasture system, to be used to ensure pasture of a sufficient quality and quantity is available to graze throughout the growing season and to provide all ruminants under the organic systems plan with an average of not less than 30 percent of their dry matter intake from grazing throughout the growing season; (3) the haymaking system; (4) the location of pasture and haymaking fields, including maps showing the pasture and haymaking system and giving each field its own identity; (5) the types of grazing methods to be used in the pasture system; (6) the location and types of fences and the location and source of shade and water (paragraph 205.239(a)(1) provision); (7) the soil fertility, seeding, and crop rotation systems (§§ 205.203, 205.204, 205.205 provisions); (8) the pest, weed, and disease control practices (§ 205.206 provision); (9) the erosion control and protection of natural wetlands, riparian areas, and soil and water quality

practices (§ 205.200 and paragraph 205.203(c) provisions); (10) pasture and soil sustainability practices (§ 205.200 provision); and (11) restoration of pastures practices (§ 205.200 provision).

Section 205.240 also introduces the requirement that the pasture system include a sacrificial pasture. A sacrificial pasture is intended to protect the other pastures from excessive damage during periods when saturated soil conditions render the pasture(s) too wet for animals to graze. The sacrificial pasture must be sufficient in size to accommodate all animals in the herd without crowding. The sacrificial pasture must be located where: Soils have good trafficability, well-drained, there is a low risk of soil erosion, there is low or no potential of manure runoff, surrounded by vegetated areas, and easily restored. The sacrificial pasture must be managed to: Provide feed value and maintain or improve soil, water, and vegetative resources. Finally, the sacrificial pasture must be restored through active pasture management.

This provision will assist producers in complying with existing requirements in § 205.200, which requires that producers maintain or improve the natural resources of the operation, while complying with the pasturing requirements of paragraph 205.239(a)(2). We have included this requirement on sacrificial pasture because we have observed some producers using minimal amounts of rainfall to deny access to pasture, claiming that these wet conditions are detrimental to the pasture and the health and well being of the animals. We do not concur.

By requiring that the pasture system include a sacrificial pasture, the regulations ensure that ruminants are on pasture when it is raining and immediately after it has rained. Drawing from USDA and University Extension research on sacrificial pastures, we propose to define sacrificial pasture as “a pasture or pastures within the pasture system, of sufficient size to accommodate all animals in the herd without crowding, where animals are kept for short periods during saturated soil conditions to confine pasture damage to an area where potential environmental impacts can be controlled. This pasture is then deferred from grazing until it has been restored through active pasture management. Sacrificial pastures are located where soils have good trafficability, are well-drained, have low risk of soil erosion, have low or no potential of manure runoff, are surrounded by vegetated areas, and are easily restored. A sacrificial pasture is land used for

livestock grazing that is managed to provide feed value and maintain or improve soil, water, and vegetative resources; it is not a dry lot or feedlot." The Dictionary of Agriculture (Lipton 1995) defines dry lot as "[a] relatively small enclosure without vegetation, either with a shelter or an open yard, in which animals may be confined indefinitely." Dry lot is defined by the Environmental Protection Agency (EPA) and the Purdue Research Foundation as "an open lot that may be covered with concrete, but that has no vegetative cover. Generally used as exercise areas in most of the United States, but may be used as primary cow housing in the more arid climates" (U.S. EPA, Ag 101, Glossary). Thus, drawing upon these definitions, we propose to define dry lot as "a confined area that may be covered with concrete, but that has no vegetative cover." The same EPA publication defines feedlot as an "enterprise in which cattle are fed grains and other concentrates for usually 90–120 days. Feedlots range in size from less than 100-head capacity to many thousands." The USDA's National Agricultural Library Thesaurus defines feedlots as "confinement facilities where cattle are fed to produce beef for the commercial trade." The Dictionary of Agriculture and Environmental Science (Troeh and Donahue, 2003) defines feedlot, in part, as "a confined area for the controlled feeding of animals for fattening and finishing for market." Thus, we propose to define feedlot as "a confined area for the controlled feeding of ruminants." Dry lots and feedlots do not meet the requirements for pasturing organic ruminant animals.

Finally, § 205.240 requires producers to manage pasture in ways that comply with all applicable requirements of §§ 205.236 through 205.239.

We are proposing to amend the definition of the term "crop" in § 205.2, by inserting the phrase "pastures, sod, cover crops, green manure crops, catch crops, and any" at the beginning of the definition and "or used in the field to manage nutrients and soil fertility" at the end of the definition. We are taking this action to ensure that pastures and sod are crops. This amendment would also ensure the fact that pastures, sod, cover crops, green manure crops, and catch crops are crops subject to the requirements of § 205.204. The definition for "crop" would now read, "Pastures, sod, cover crops, green manure crops, catch crops, and any plant or part of a plant intended to be marketed as an agricultural product, fed to livestock, or used in the field to manage nutrients and soil fertility."

We are proposing to amend § 205.239, livestock living conditions, by adding the words "year-round" to the introductory text of paragraphs (a) and (a)(1). To the end of the introductory text of paragraph (a) we propose adding the text "those listed in paragraphs (a)(1) through (a)(3) of this section. Further, producers shall not prevent, withhold, restrain, or otherwise restrict animals from being outdoors, except as otherwise provided in paragraph (b) and (c) of this section. Producers shall also provide:". We also propose adding the words "for all animals" to paragraph 205.239(a)(1). These changes will help producers and certifying agents understand that producers are to accommodate the health and natural behavior of animals throughout the year. Further, we propose to amend paragraph 205.239(a)(1) by amending the words "its stage of production" to read "its stage of life." We are taking this action so that producers do not use this provision to deny lactating dairy animals access to pasture. We also propose to amend paragraph 205.239(a)(1) by adding "water for drinking" to the list of items provided to animals. We are adding "water for drinking" to paragraph 205.239(a)(1) to ensure that all producers are providing water for drinking to their animals while the animals are outdoors. The introductory text of paragraphs (a) and (a)(1) would now read, "(a) The producer of an organic livestock operation must establish and maintain year-round livestock living conditions which accommodate the health and natural behavior of animals, including those listed in paragraphs (a)(1) through (a)(3) of this section. Further, producers shall not prevent, withhold, restrain, or otherwise restrict animals from being outdoors, except as otherwise provided in paragraph (b) and (c) of this section. Producers shall also provide: (1) Year-round access for all animals to the outdoors, shade, shelter, exercise areas, fresh air, water for drinking, and direct sunlight, suitable to the species, its stage of life, the climate, and the environment."

In seeking ways to respond to commenters who proposed a minimum of 120 days on pasture and to help producers and certifying agents understand the role of pasture without a new regulatory requirement that specifies a minimum number of days and would require significant documentation, we looked for other ways to describe a time frame that would capture the intent that animals graze as much as possible in a broad range of climatic conditions. A

commonly used indicator throughout agriculture is the growing season. The growing season is commonly defined as the time period from the date of the average last killing frost in late winter or spring to the date of the average first killing frost in the fall or early winter. Growing seasons vary throughout the United States (and other countries); however, they provide a variable but easily measurable timeframe that clearly defines periods when organic operations and their certifying agents can, except during periods of drought, ensure pastures provide sufficient forage to allow all ruminant animals opportunity to graze. In the United States, growing seasons range from 121 days to 365 days, depending on location. By using the growing season as the minimum time period for grazing, the regulations ensure that ruminants raised in areas with longer grazing periods are not denied the opportunity to graze for more than the minimum of 120 days proposed by commenters. We consider this measure to align with commenters' proposed minimum 120 days on pasture. Accordingly, we propose to amend paragraph 205.239(a)(2) to require that ruminants be provided with continuous year-round management on pasture for grazing throughout the growing season. Additionally, we propose to amend paragraph 205.239(a)(2) to require that ruminants be provided with continuous year-round management on pasture for access to the outdoors throughout the year, including during the non-growing season. Exceptions to these requirements would be listed in paragraph 205.239(c).

We also include in the amendment to paragraph 205.239(a)(2), the statement that dry lots and feedlots are prohibited. As previously stated, a dry lot is a confined area that may be covered with concrete, but that has no vegetative cover. Feedlots are confined areas for the controlled feeding of ruminants.

We believe that amended paragraph 205.239(a)(2) and new paragraph 205.240(c)(2) meet the original intent of the regulations and the expectations of some commenters that dairy animals graze on pasture throughout the growing season and be on pasture during the non-growing season. Amended paragraph 205.239(a)(2) would now read, "For all ruminants, continuous year-round management on pasture, except as otherwise provided in paragraph (c) of this section, for: (i) grazing throughout the growing season; and (ii) access to the outdoors throughout the year, including during the non-growing season. Dry lots and feedlots are prohibited."

We propose to amend paragraph 205.239(a)(3) by removing “If the bedding is typically consumed by the animal species, it must comply with the feed requirements of § 205.237” and inserting in its place “When hay, straw, ground cobs, or other crop matter typically fed to the animal species is used as bedding, it must comply with the feed requirements of § 205.237.” We are taking this action because some producers, with the approval of their certifying agents, have used conventional bedding typically consumed by the animal species. Such producers claim that their animals do not consume their bedding. However, paragraph 205.239(a)(3) does not say that organic bedding is required when the animals consume their bedding. It requires organic bedding when crop matter typically consumed by the animal species is used as bedding. This amendment is intended to eliminate this manipulation of the wording in existing paragraph 205.239(a)(3). Amended paragraph 205.239(a)(3) would now read, “Appropriate clean, dry bedding. When hay, straw, ground cobs, or other crop matter typically fed to the animal species is used as bedding, it must comply with the feed requirements of § 205.237.”

We propose to amend paragraph 205.239(b) to make it only applicable to non-ruminant animals. Temporary confinement of ruminants would now be covered under a new paragraph 205.239(c). The existing paragraph 205.239(c) would be redesignated as 205.239(e). We also propose to amend paragraph 205.239(b)(2) by changing the word “production” to “life” to make the animal stage provision consistent with amended paragraph 205.239(a)(1). Amended paragraph 205.239(b) would now read, “The producer of an organic livestock operation may temporarily deny a non-ruminant animal access to the outdoors because of.” Amended paragraph 205.239(b)(2) would now read, “The animal’s stage of life.”

Under proposed paragraph 205.239(c), the producer of an organic livestock operation may temporarily deny a ruminant animal pasture when: (1) The animal is segregated for treatment of illness or injury (the various life stages, such as lactation, are not an illness or injury); (2) one week prior to parturition (birthing), parturition, and up to one week after parturition; (3) in the case of newborns for up to six months, after which they must be on pasture and may no longer be individually housed; (4) in the case of goats, during periods of inclement weather; (5) in the case of sheep, for short periods for shearing; and (6) in the case of dairy animals, for

short periods daily for milking. Milking must be scheduled in a manner to ensure sufficient grazing time to provide each animal with an average dry matter intake from grazing of not less than 30 percent throughout the growing season. Milking frequencies or duration practices cannot be used to deny dairy animals pasture.

The provisions of new paragraph 205.239(c) provide a detailed description of requirements under current paragraphs 205.239(b)(1) through (3). Risk to soil and water quality is now addressed through the sacrificial pasture provision of new § 205.240.

Paragraph 205.239(c)(2) addresses the expectation of many consumers and producers that lactating organic dairy animals not be denied pasture. Paragraph 205.239(c)(4) addresses the NOSB recommendation and generally recognized practice of allowing denial of pasture to ruminants below six months of age for health reasons. Paragraph 205.239(c)(7) addresses consumer and producer expectations that organic dairy animals receive not less than 30 percent of their dry matter intake from grazing pastures.

Through this action we provide greater detail regarding existing paragraph 205.239(b) because some producers, with the approval of their certifying agents, have incorrectly used paragraphs (b)(1) and (b)(3) of this section to deny ruminants pasture. An example is the claim by some producers that lactation is a stage of production for which dairy animals require constant veterinary care or oversight and therefore, must be denied pasture for health and safety reasons. We do not concur. Other examples include denying pasture because of rain, regardless of the amount of rain. Some producers have claimed that pasturing the animals in wet fields would damage the pasture and compromise the health and safety of the animals. While this is true of saturated pastures, it is not true each time it rains. As noted above, we have included in this action a proposal requiring a sacrificial pasture (new § 205.240 paragraph (d)) for use when saturated soil conditions render the pasture(s) too wet for animals to graze. By requiring that the pasture system include a sacrificial pasture, the regulations ensure that ruminants are on pasture when it is raining and immediately after it has rained.

Existing paragraph 205.238(a)(3) requires the producer to maintain preventive livestock health care practices including the establishment of appropriate housing, pasture conditions, and sanitation practices to minimize the

occurrence and spread of diseases and parasites. Further, paragraph 205.239(a) provides that producers must establish and maintain livestock living conditions to accommodate the health and natural behavior of animals in general. This action adds a new paragraph 205.239(d) which elaborates on the good practices necessary to provide living conditions that accommodate the health and natural behavior of ruminant animals. New paragraph 205.239(d) clarifies that the good dairy management practices carried out by most organic dairy operations are required of all. To that end, ruminants must be provided with: (1) A lying area with well-maintained clean, dry bedding, which complies with paragraph (a)(3) of this section, during periods of temporary housing, provided due to temporary denial of pasture during conditions listed in paragraphs (c)(1) through (c)(5) of this section; (2) yards and passageways kept in good condition and well-drained; (3) shade and, in the case of goats, shelter open on at least one side; (4) water at all times except during short periods for milking or shearing—such water must be protected from fouling; (5) feeding and watering equipment that is designed, constructed, and placed to protect from fouling—such equipment must be cleaned weekly; and (6) in the case of newborns, hay in a rack off the ground, beginning 7 days after birth, unless on pasture, and pasture for grazing in compliance with paragraph 205.240(a) not later than six months after birth. The provision that newborns be provided with pasture for grazing in compliance with paragraph 205.240(a) not later than six months after birth codifies the NOSB recommendation, the common practice of organic dairy producers, and comments from some of the public.

In this action we propose further addressing risk to soil or water quality through a new paragraph 205.239(f), which provides that the producer of an organic livestock operation must manage outdoor access areas, including pastures, in a manner that does not put soil or water quality at risk. This would include the use of fences and buffer zones to prevent ruminants and their waste products from entering ponds, streams, and other bodies of water. Buffer zone size shall be extensive enough, in full consideration of the physical features of the site, to prevent the waste products of ruminants from entering ponds, streams, and other bodies of water. Proposed paragraph 205.239(f) makes it clear that allowing ruminants to enter ponds, streams, and other bodies of water is not consistent

with protecting soil and water from contamination as currently required under existing §§ 205.202 and 205.203. New paragraph 205.239(f) reinforces that producers are to manage outdoor access areas, including pastures, in a manner that would protect soil and water quality. Benefits to fencing ponds, streams, and other bodies of water include minimizing erosion of shoreline, reducing sediment deposition, improving water quality for livestock, wildlife, and aquatic life, eliminating or minimizing fecal oral transmission of diseases through water and better wildlife habitat along the shoreline. Fencing will also extend the useful life of a pond and prevent animals from getting on ice during the winter and falling into the pond.

New paragraph 205.239(f) would also help ensure that the temporary confinement provision, risk to soil and water quality, of paragraph 205.239(b)(4) would only be used under the most extreme climatic conditions.

Amended § 205.239 uses the terms “growing season,” “inclement weather,” and “temporary and temporarily.” We are proposing to define these terms by amending § 205.2, terms defined. Because the proposed definition for growing season uses the term “killing frost,” we also propose a definition for killing frost. We are using the NRCS, National Water and Climate Center, WETS Table Documentation, May 15, 1995 document to craft the definition for growing season. This definition for growing season is consistent with use of the term growing season as it occurs in the definition of crop year found in § 205.2 and the OFPA. Growing season is defined as, “the period of time between the average date of the last killing frost in the spring to the average date of the first killing frost in the fall or early winter in the local area of production. This represents a temperature threshold of 28 degrees Fahrenheit (– 3.9 degrees Celsius) or lower at a frequency of 5 years in 10. Growing season may range from 121 days to 365 days.” The range most often cited for a killing frost is between 25 degrees and 28 degrees Fahrenheit. Accordingly, this proposal defines killing frost as, “a frost that takes place at temperatures between 25 degrees and 28 degrees Fahrenheit (– 2.2 and – 3.9 degrees Celsius) for a period sufficiently severe to end the growing season or delay its beginning.” Livestock producers can obtain information concerning the growing season in their area from their local NRCS office. This proposal defines inclement weather as, “weather that is violent, or characterized by temperatures (high or

low), that can kill or cause permanent physical harm to a given species of livestock.” Finally, this proposal defines temporary and temporarily as, “occurring for a limited time only (e.g., overnight, throughout a storm, during a period of illness, the period of time specified by the Administrator when granting a temporary variance), and not permanent or lasting.”

We have been asked whether “organically produced” in paragraph 205.237(a) means that agricultural products, including pasture and forage, have to be produced by certified organic operations. Persons raising the questions were interested in whether agricultural products produced by exempt operations and operations transitioning to organic could be fed to organic livestock. Agricultural products, including pasture and forage, do have to be produced by certified organic operations except as provided in paragraph 205.236(a)(i). Paragraph 205.236(a)(i) provides that, 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 the dairy animals of the farm during the 12-month period immediately prior to the sale of organic milk or milk products. Accordingly, we are amending paragraph 205.237(a) to clarify that agricultural products, including pasture and forage, must be organically produced by operations certified to the NOP, except as provided in paragraph 205.236(a)(i), and, if applicable, organically handled by operations certified to the NOP.

We are also proposing in paragraph 205.237(a) to reverse the reference to nonsynthetic substances and synthetic substances allowed under § 205.603 so that it reads, “*Except*, That, synthetic substances allowed under § 205.603 and nonsynthetic substances may be used as feed additives and supplements.” We are proposing this simple restructuring of the sentence because when read incorrectly this sentence can lead some to assume that nonsynthetic substances are also listed in § 205.603 when they are not. This action does not create a new requirement.

Finally, we propose to add to the end of paragraph 205.237(a) the proviso that reads, “*Provided*, That, all agricultural ingredients in such additives and supplements shall have been produced and handled organically.” Section 205.237 already requires that the producer provide a total feed ration composed of agricultural products that have been organically produced and handled. However, some additive and supplement handlers have used

nonorganic agricultural ingredients in products for which they have sought and received certification, by claiming that the agricultural ingredients were supplements or used as carriers. One example involved a product that contained conventionally produced molasses as the primary ingredient. This proposal clarifies the existing requirement that organic livestock must be provided with a total feed ration composed of agricultural products that are organically produced and handled. Section 205.237 provides no exceptions which permit the use of nonorganic agricultural products. This action does not create a new requirement.

Paragraph 205.237(a) would now read, “(a) The producer of an organic livestock operation must provide livestock with a total feed ration composed of agricultural products, including pasture and forage, that are organically produced by operations certified to the NOP, except as provided in § 205.236(a)(i), and, if applicable, organically handled by operations certified to the NOP: *Except*, That, synthetic substances allowed under § 205.603 and nonsynthetic substances may be used as feed additives and supplements, *Provided*, That, all agricultural ingredients in such additives and supplements shall have been produced and handled organically.”

We propose to amend § 205.237 by removing the word “or” from the end of paragraph 205.237(b)(5) and replacing the period at the end of paragraph 205.237(b)(6) with a semicolon.

We also propose amending § 205.237 by adding new paragraphs 205.237(b)(7) and 205.237(b)(8). New paragraph 205.237(b)(7) would prohibit producers from providing feed or forage to which anyone, at anytime, has added an antibiotic. New paragraph 205.237(b)(8) prohibits producers from preventing, withholding, restraining, or otherwise restricting ruminant animals from actively obtaining feed grazed from pasture during the growing season, except for conditions as described in paragraph 205.239(c). The prohibition on antibiotics in new paragraph 205.237(b)(7) reinforces the existing prohibition on the use of antibiotics found in paragraph 205.238(c)(1). Existing § 205.237 provides for feed from pasture and existing § 205.239 provides for access to pasture and lists reasons for temporary confinement from pasture. New paragraph 205.237(b)(8) reinforces these requirements and those of amended paragraph 205.239(a)(2), which provides that ruminants have continuous year-round management on pasture.

In response to an NOSB recommendation, and public comments, that ruminants receive not less than thirty percent of their dry matter intake from pastures, this action adds a new paragraph 205.237(c). This new regulation provides that during the growing season, producers shall provide not more than an average of 70 percent of a ruminant's dry matter demand from dry matter feed (dry matter feed does not include dry matter grazed from vegetation rooted in pasture). The paragraph further provides that producers shall, once a month, on a

monthly basis: (1) Document each feed ration (in other words, for each type of animal (beef cattle, dairy cattle, sheep, goat), each class of animal's intended daily diet showing all ingredients, daily pounds of each ingredient per animal, each ingredient's percentage of the total ration, the dry matter percentage for each ingredient, and the dry matter pounds for each ingredient); (2) Document the daily dry matter demand of each class of animal using the formula:  $\text{Average Weight/Animal (lbs)} \times .03 = \text{lbs DM/Head/Day} \times \text{Number of Animals} = \text{Total DM Demand in lbs/}$

Day; (3) Document how much dry matter is fed daily to each class of animal; and (4) Document the percentage of dry matter fed daily to each class of animal using the formula:  $(\text{DM Fed} \div \text{DM Demand in lbs/day}) \times 100 = \% \text{ DM Fed}$ . Plans for complying with new paragraph 205.237(c) must be a part of the producer's annual OSP.

The following is an example of a feed ration document that producers could use to document compliance with new paragraph 205.237(c).

**BILLING CODE 3410-02-P**

**Feed Ration****For the Month of:** \_\_\_\_\_**Date:** \_\_\_\_\_**Type of Animal:** \_\_\_\_\_ (For example: Beef Cattle, Dairy Cattle, Sheep, Goat)**Class of Animal:** \_\_\_\_\_ (For example: Calf, Dry Cow, Lactating Cow, Bull, Growing

Cattle; Calf, Heifer, Springer, Lactating Cow, Bull; Dry and Early Pregnancy Ewes, Late

Pregnancy Ewes, Nursing Ewes, Breeding Ewes, Lambs, Yearlings; Bucks, Dry Does, Late

Gestation, Lactation, Weaning, Yearlings.

**Number of Animals in Class of Animal:** \_\_\_\_\_**Amount of Dry Matter Required Daily by this Class of Animal:** \_\_\_\_\_ (Calculateusing the formula: Average Weight Per Animal (Pounds)  $\times$  .03 = Pounds Dry Matter Per HeadPer Day  $\times$  Number of Animals = Total Dry Matter Demand in Pounds Per Day.**Amount of Dry Matter Fed Daily to Identified Class of Animal:** \_\_\_\_\_**Percentage of Dry Matter Fed Daily to Identified Class of Animal:** \_\_\_\_\_ (Calculateusing the formula: (Dry Matter Fed  $\div$  Dry Matter Demand in Pounds Per Day)  $\times$  100 = Percent

Dry Matter Fed.

**Feed Ration Formula:**

|               |              |               |                   |            |
|---------------|--------------|---------------|-------------------|------------|
|               | <b>Daily</b> | <b>Ration</b> | <b>Dry Matter</b> | <b>Dry</b> |
| <b>Matter</b> |              |               |                   |            |

|                    |                      |                |                |               |
|--------------------|----------------------|----------------|----------------|---------------|
| <b>Ingredients</b> | <b>Pounds/Animal</b> | <b>Percent</b> | <b>Percent</b> | <b>Pounds</b> |
|--------------------|----------------------|----------------|----------------|---------------|

Finally, this action proposes that § 205.2 be further amended to add definitions for graze, grazing, dry matter, dry lot, and feedlot. These are terms found in new and amended language in §§ 205.237, 205.239, and 205.240. Their addition to § 205.2 will facilitate understanding of the terms as used. The definitions for graze, grazing, and dry matter come from the NRCS, National Range and Pasture Handbook, Glossary, September 1997. The definitions for dry lot and feedlot are

derived from the various sources as discussed above. Graze is defined as, “(1) The consumption of standing forage by livestock. (2) To put livestock to feed on standing forage.” Grazing is defined as, “To graze.” Dry matter is defined as, “The amount of a feedstuff remaining after all the free moisture is evaporated out.” Dry lot is defined as, “A confined area that may be covered with concrete, but that has no vegetative cover.” Dry lots are prohibited in organic livestock production. Feedlot is defined as, “A

confined area for the controlled feeding of ruminants.” Feedlots are prohibited in organic livestock production.

**Changes Requested But Not Made**

In developing this proposed rule, we considered the implications of 120 days as a minimum requirement for the amount of time that ruminants should spend on pasture during the calendar year. A 120-day minimum pasture requirement means that animals potentially could be confined indoors or

in dry lots for the remaining 245 days of the year and still be in compliance with the regulation. We believe this is contrary to the expectations of the organic community and consumers. The intent of pasture is for all animals of an operation to graze on pasture throughout the growing season. In the United States, growing seasons range from 121 days to 365 days, depending on location. By using growing season as the minimum time period for grazing, the regulations ensure the ruminants raised in areas with longer grazing periods are not denied the opportunity to graze for more than the commenter proposed 120 days. We consider the amendment to paragraph 205.239(a)(2) to closely align with commenters' proposed minimum 120 days on pasture. As previously discussed in this action, paragraph 205.239(a)(2), as amended, would require, for all ruminants, continuous year-round management on pasture for grazing throughout the growing season and access to the outdoors throughout the year, including during the non-growing season; except as otherwise provided in paragraph (c) of § 205.239. Paragraph 205.239(a)(2) further provides that dry lots and feedlots are prohibited. Therefore, we are declining to specify a minimum number of days spent on pasture because an arbitrary number of days to graze may not be consistent with the growing season for an organic livestock operation.

Over 10,500 commenters suggested amending the regulations to require pasture stocking rates. The most common figure cited was no more than and preferably less than, three ruminants per acre, in order to meet combined feed intake and ecological goals. We believe that the broad range of pasture types and grazing strategies available to producers makes a prescribed minimum stocking rate for pasture arbitrary and often contrary to good management practices. We believe that on organic operations in balance with the resources available to them, stocking rates will best be determined by grazing only the number of animals during the required time period on a parcel that can support such grazing without harm to the pasture, soil, or water quality. Higher quality pastures will support greater numbers of animals per acre, while lesser stands will support a lower stocking density. Therefore, we did not include a specified stocking rate for pastures in this proposed rule.

We received comments on the NOSB recommendation that beef animals be exempted from pasture for the final finishing stage—not to exceed 120 days.

Of the over 80,500 comments on the ANPR, the overwhelming majority spoke to the pasturing of dairy animals. However, even in these comments, there was a consistent theme of opposition to confining animals (tens of thousands of commenters) and feedlot feeding (thousands of commenters). Commenters who favored such an exemption requested that the exemption not exceed 90 days. Others argued that allowing beef animals to be confined for the last 120 days of finish feeding, prior to slaughter, is not in keeping with the integrity (accommodation of the health and natural behavior of animals) of the organic standards that consumers expect from the certified organic label. It was also argued that this is contrary to the expected intent of pasture-raised animals in organic systems. A commenter made the point that such an exemption would permit beef animals to be raised off pasture, in some climates, for nearly their entire lives. This commenter cited the 6 months pasture exemption for young stock, the non-growing season, and a 4 month pasture exemption for finish feeding as possibly consisting of as many as 17 months of a beef animal's 18 to 24 month life span.

We agree with those commenters who argued that exemption from pasture for finish feeding is contrary to the expected intent of pasture-raised animals in organic systems. There is nothing inherent in the finish feeding of beef cattle that precludes them from being provided with pasture. Allowing confinement feeding for beef cattle would constitute an inconsistent application of the pasturing requirement and would lead to other misapplications of this part of the regulations. Further, routinely confining animals to dry lots or feedlots for any stage of production for any reason is inconsistent with consumers' expectations, based on comments received, that livestock graze on pasture during the growing season. As noted above, we have included in the amendment to paragraph 205.239(a)(2), the statement that dry lots and feedlots are prohibited. We are not providing an exemption to the requirement for pasture or to the requirements of new paragraph 205.237(c), for the finish feeding of beef cattle. New paragraph 205.237(c) provides that for the growing season, producers shall provide not more than an average of 70 percent of a ruminant's dry matter demand from dry matter fed (dry matter fed does not include dry matter grazed from vegetation rooted in pasture).

### Other Proposed Changes

Paragraph (a) of § 205.102 requires that any agricultural product that is sold, labeled, or represented as "100 percent organic," "organic," or "made with organic," to be produced in accordance with livestock §§ 205.236 through 205.239. This action would amend paragraph 205.102(a) by adding proposed § 205.240. Paragraph 205.102(a) would now read "Produced in accordance with the requirements specified in § 205.101 or §§ 205.202 through 205.207 or §§ 205.236 through 205.240 and all other applicable requirements of part 205."

Paragraph (a) of § 205.290 authorizes temporary variances from the requirements in livestock §§ 205.236 through 205.239. This action would amend paragraph 205.290(a) by adding proposed § 205.240. Paragraph 205.290(a) would now read "Temporary variances from the requirements in §§ 205.203 through 205.207, 205.236 through 205.240 and 205.270 through 205.272 may be established by the Administrator for the following reasons."

Section 205.690 lists the OMB control number assigned to the information collection requirements in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as 0581–0181. This number was listed incorrectly in the final regulations published December 21, 2000 (65 FR 80548, December 21, 2000). The correct number is 0581–0191. Accordingly, this action amends § 205.690 to correct the OMB number to read as follows: "The control number assigned to the information collection requirements in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, is OMB number 0581–0191."

Section 205.2 of the final regulations published on December 21, 2000 (65 FR 80548, December 21, 2000) defines "livestock" as "Any cattle, sheep, goat, swine, poultry, equine animals used for food or in the production of food, fiber, feed, or other agricultural-based consumer products; wild or domesticated game; or other nonplant life, except such term shall not include aquatic animals or bees for the production of food, fiber, feed or other agricultural-based consumer products." This definition of livestock excludes aquatic animals and bees for the production of food, fiber, feed or other agricultural-based consumer products. These exclusions are inconsistent with the definition of livestock found in the

OFPA. Further, the exclusion of aquatic animals is inconsistent with the 2003 Public Law 108–11 which amended the OFPA section 2107 (7 U.S.C. § 6506) to allow, through regulations promulgated after public notice and opportunity for comment, the certification and labeling of wild seafood as organic. The exclusion of bees is also inconsistent with AMS's determination that apiculture and the products of apiculture can be certified under the NOP regulations. For the preceding reasons we propose to remove the exclusions from the definition of livestock as currently found at § 205.2. Removal of the exclusion from the definition of livestock does not change the fact that standards must be developed before aquatic species qualify for certification under the NOP. Further we are adding "bee" to make it clear that bees used in the production of food, fiber, feed, or other agricultural-based consumer products may be certified organic provided they comply with the NOP. The definition of "livestock" would now read, "Any bee, cattle, sheep, goats, swine, poultry, equine animals used for food or in the production of food, fiber, feed, or other agricultural-based consumer products; fish used for food; wild or domesticated game; or other nonplant life."

#### A. Executive Order 12988

Executive Order 12988 instructs each executive agency to adhere to certain requirements in the development of new and revised regulations in order to avoid unduly burdening the court system. This final rule is not intended to have a retroactive effect.

States and local jurisdictions are preempted under the OFPA from creating programs of accreditation for private persons or State officials who want to become certifying agents of organic farms or handling operations. A governing State official would have to apply to USDA to be accredited as a certifying agent, as described in paragraph 2115(b) of the OFPA (7 U.S.C. 6514(b)). States are also preempted under §§ 2104 through 2108 of the OFPA (7 U.S.C. 6503 through 6507) from creating certification programs to certify organic farms or handling operations unless the State programs have been submitted to, and approved by, the Secretary as meeting the requirements of the OFPA.

Pursuant to paragraph 2108(b)(2) of the OFPA (7 U.S.C. 6507(b)(2)), a State organic certification program may contain additional requirements for the production and handling of organically produced agricultural products that are produced in the State and for the

certification of organic farm and handling operations located within the State under certain circumstances. Such additional requirements must: (a) Further the purposes of the OFPA, (b) not be inconsistent with the OFPA, (c) not be discriminatory toward agricultural commodities organically produced in other States, and (d) not be effective until approved by the Secretary.

Pursuant to paragraph 2120(f) of the OFPA (7 U.S.C. 6519(f)), this proposed rule would not alter the authority of the Secretary under the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Poultry Products Inspections Act (21 U.S.C. 451 *et seq.*), or the Egg Products Inspection Act (21 U.S.C. 1031 *et seq.*), concerning meat, poultry, and egg products, nor any of the authorities of the Secretary of Health and Human Services under the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301 *et seq.*), nor the authority of the Administrator of the Environmental Protection Agency (EPA) under the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. 136 *et seq.*).

Section 2121 of the OFPA (7 U.S.C. 6520) provides for the Secretary to establish an expedited administrative appeals procedure under which persons may appeal an action of the Secretary, the applicable governing State official, or a certifying agent under this title that adversely affects such person or is inconsistent with the organic certification program established under this title. The OFPA also provides that the U.S. District Court for the district in which a person is located has jurisdiction to review the Secretary's decision.

#### B. Executive Order 12866

This action has been determined significant for purposes of Executive Order 12866, and therefore, has been reviewed by the Office of Management and Budget. Executive Order 12866 requires the agency to consider alternatives to the proposed rulemaking and the benefits and costs of the proposed rule.

##### *Need for the Rule*

AMS has determined that current regulations regarding access to pasture and the contribution of grazing to the diet of organically raised livestock lack sufficient specificity and clarity to enable AMS to efficiently administer the Program. OSPs dealing with livestock management reflects different application of existing regulations and interpretations of requirements across Accredited Certifying Agents (ACAs). AMS has received 11 complaints

requesting enforcement actions for alleged violations of the pasture provisions of the NOP livestock standards.

Furthermore, 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. The NOSB process for the development of recommendations consists of: (1) Identification of a need by members of the public, the NOSB, or the NOP; (2) development of a draft NOSB recommendation; (3) public meeting notice published by the NOP on its Web site and in the **Federal Register**; (4) solicitation of public comments on the recommendation through regulations.gov and at the NOSB's public meetings; (5) finalization of the recommendation; (6) NOSB approval of the recommendation; and (7) NOSB referral to the Secretary for the Secretary's consideration and any appropriate action (e.g., rulemaking, policy development, guidance).

In response, on April 13, 2006, NOP published an Advanced Notice of Proposed Rulemaking (ANPR) (71 FR 19131) seeking input on the role of pasture in the NOP regulations and what parts of the NOP regulations should be amended to address the role of pasture in organic livestock management.

Over 80,500 comments were received on the ANPR. Support for strict standards and greater detail on the role of pasture in organic livestock production was nearly unanimous with just 28 of the comments opposing changes to the pasture requirements. Organic consumers have clearly stated in comments that they expect organic ruminants to graze pasture and receive not less than 30 percent of their DMI needs from grazing. Nearly all of the over 80,500 comments were received from consumers requesting regulations that would clearly establish grazing as a primary source of nourishment. Approximately 80,250 of these comments were in a modified form letter. Many of these consumers requested that grazing account for at least 30 percent of the ruminant's DMI needs.

Thirty percent DMI from grazing was recommended to the Secretary by the NOSB. That figure was recommended to the NOSB by dairy producers through public testimony at NOSB meetings. The choice of 30 percent was based on producer collaboration on what was the minimum DMI from grazing necessary to meet the requirement that ruminants obtain feed value from the grazing of pasture.

### *Regulatory Objective*

The goal in amending the NOP regulations is to bring uniformity in application to the livestock regulations, especially as they relate to the pasturing of ruminants, so as to facilitate enforcement of livestock regulations that reflect consumer expectations and producer perspectives regarding the production of organic livestock and their products. The proposed rule would establish uniformity in the application of regulations for all ruminant livestock producers regardless of operation size or location. This is especially important to small producers who account for an estimated 93 percent of organic livestock producers. This action makes clear what pasturing means under the NOP.

This action is being taken by AMS to ensure that NOP livestock production regulations have sufficient specificity and clarity to enable AMS and ACAs to efficiently administer the NOP and to facilitate and improve compliance and enforcement. This action is also intended to satisfy consumer expectations that ruminant livestock animals graze pastures during the growing season.

### *Alternatives Considered*

Alternatives to this proposed rulemaking are to: (1) Make no changes to the existing regulations; (2) adopt a reduced pasturing period, such as the 120 day minimum period recommended by the NOSB and some commenters; or (3) adopt a 3 ruminants per acre stocking rate measure as suggested by some commenters.

Alternative one is make no changes to the existing regulations. This option would result in continued dissatisfaction among consumers, producers, and certifying agents in the organic community. This option would also continue to pose difficulty in enforcement of the existing regulations by certifying agents who are seeking greater regulatory certainty in these pasture provisions. This proposed rulemaking was requested by consumers, producers, and certifying agents to ensure uniformity in application of livestock regulations by requiring that all organic ruminant livestock graze pasture throughout the growing season. Support for strict standards and greater detail on the role of pasture in organic livestock production was nearly unanimous with just 28 of the over 80,500 comments, on the ANPR, opposing changes to the pasture requirements. Finally, a stated purpose of the OFPA (7 U.S.C. § 6501) is to assure consumers that organically

produced products meet a consistent standard. The current livestock provisions need additional specificity to assist ACAs with assuring the consistent standard purpose of the OFPA. This is evidenced by the enforcement actions resulting from the current inconsistent application of the livestock standards among the ACAs. Amendment to the existing regulations is necessary to bring about enforceable consistency in application.

A second alternative is to adopt the 120 day minimum pasturing period as recommended by the NOSB. This NOSB recommendation was developed with public input. The choice of 120 days was based on producer knowledge of the minimum period when pasture is actively growing and suitable for grazing. As recommended, however, this option would create a situation where ruminants could be denied pasture for grazing for as much as 245 days during the year. During this time the ruminants could conceivably be confined indoors or in dry lots for the remaining 245 days a year and still be in compliance with the regulations. We considered what this minimum requirement would mean for the remainder of the calendar year and determined that this option falls short in meeting the expectations of consumers, producers, and ACAs that organic ruminants graze pasture throughout the growing season.

This option would also create a situation where producers in areas with the shortest growing seasons could, due to a late spring or early winter, fail to achieve the mandatory 120 days on pasture for grazing. From a compliance objective, certifying agents stated their reluctance to take an enforcement action if a producer fails by one or a few days to meet the minimum requirement of days on pasture. Furthermore, it is not clear how to achieve regulatory compliance if the goals are met for all but one or a few animals on the operation, compared with failing to meet the goals for all animals for a brief time.

The proposed rule modifies the NOSB's recommendation to eliminate both of the identified short comings. We accomplish this by requiring continuous year-round management on pasture, except for the temporary confinement periods specifically provided within the regulations. This will ensure that ruminants graze pasture throughout the growing season and that ruminants are provided access to the outdoors throughout the year, including during the non-growing season. We are seeking comments on why ruminants should be

allowed to graze for 120 days rather than for the growing season.

The NOSB has recommended that the Secretary publish regulatory language authorizing temporary confinement (up to 120 days) in feedlots for the finish feeding of organic slaughter stock. This NOSB recommendation also stated that such temporary confinement should specifically exclude lactating dairy animals. We agree with those commenters who argued that exemption from pasture for finish feeding is contrary to the expected intent of pasture-raised animals in organic systems. Accordingly, the proposed rule specifically prohibits dry lots and feedlots which are currently not authorized within the regulations.

A third alternative is to adopt a 3-ruminants-per-acre stocking rate measure as suggested by some commenters. Commenters suggested that the regulations require pasture stocking rates of no more than and preferably less than, three ruminants per acre, in order to meet combined feed intake and ecological goals. These comments do not appear to consider what would be the appropriate stocking rate for the diverse species of ruminant (e.g., buffalo, bison, cattle, goats, sheep). Further, this option would not achieve the goal of ensuring that ruminants graze pasture at a level sufficient to provide an average of not less than 30 percent of each animal's daily dry matter needs during the growing season. Nor would it assure that ruminants graze pasture throughout the growing season. It would, however, limit the number of ruminants an operation could raise per acre.

The broad range of pasture types and grazing strategies available to producers makes a prescribed maximum stocking rate for pasture arbitrary and often contrary to good management practices. Stocking rates are dependent on pasture and grazing management. The ability of any given pasture to provide nutritional value to a ruminant is dependent on the pasture's forage quality and quantity. Thus, stocking rates will vary from pasture to pasture and quite possibly within pastures.

A mandated maximum stocking rate of 3 ruminants per acre could interfere with a producer's ability to balance forage supply with ruminant demand. On one hand, a maximum 3 ruminants per acre stocking rate could result in overgrazing of lesser quality pastures accompanied by adverse environmental consequences such as erosion and nutrient runoff. On the other hand, producers with high quality pastures could be prevented from maximizing the forage availability of their pasture

due to the mandated 3 ruminants per acre stocking rate. Rather than prescribing a specific stocking rate, the producer, together with their ACA, should be allowed to vary the stocking rate to conform to the carrying capacity of the pasture. Therefore, the proposed rule requires that the producer manage pasture as a crop in full compliance with §§ 205.200 through 205.206. This proposal requires that ruminants receive an average of not less than 30 percent of their dry matter needs from grazing during the growing season. Within these parameters the producer, together with their ACA, is free to determine the number of animals the operation can accommodate while complying with all of the NOP regulations and the stocking rate appropriate for each pasture within the operation. The alternative that is proposed requires grazing throughout the growing season and a limit of not less than 30% DMI from grazing during the growing season. We are adopting the 30% standard recommended by the NOSB and supported by comments received in response to the ANPR, but welcome further comment on the impact of this standard, how many producers currently achieve this standard, how many producers would have to change their practices to achieve this standard, and the suitability of alternative percentages.

#### *Baseline*

Based on the 2005 Agricultural Research Management (ARM) Survey of ACAs conducted by the Economic Research Service (ERS), U.S. certified organic acreage stood at 4 million acres of which approximately 2.3 million was pasture and rangeland. The actual amount of certified organic acreage as of this date is currently unknown.

By the end of 2005, the number of U.S. certified organic crop, livestock, and handling operations totaled about 8,500. Of this total, AMS estimates that there are currently approximately 1,800 U.S. organic dairy producers. The number of certified organic beef, sheep, lamb, goat, buffalo, and bison operations is currently unknown.

Data from the 2005 ARM Survey shows that there were 36,113 organic beef cows, 87,082 organic dairy cows, 58,822 unclassified cows and young stock, and 4,471 sheep and lambs. Not broken out in this data is the number of organic goats, buffalo, and bison which were lumped with other animals. ERS includes goats, buffalo, bison, rabbits, and other specialties in the designation other animals. The actual number of certified organic ruminants of each type as of this date is currently unknown.

With regard to dairies, the 2005 ARM Survey found that 84 percent of organic dairies and 60 percent of the organic milk cows were located in the Northeast and Upper Midwest. Nine percent of organic dairies and 8 percent of the organic milk cows are found in the Corn Belt. By contrast only 7 percent of the organic dairies were located in the West, but these operations held 32 percent of the organic milk cows. Nationally the mean size of an organic dairy is 82 cows. The mean size of organic dairies in the Northeast is 52 cows versus 64 cows in the Upper Midwest and 381 cows in the West. USDA lacks data to determine whether these distributions have changed over the last three years.

The 2005 ARM Survey also found that organic dairies averaged about 13,600 pounds of milk per cow or a daily average of 45 pounds of milk per cow. Using a pay-price of \$22 per hundredweight each cow would generate approximately \$2,992. Based on the Small Business Administration (SBA) definition of what constitutes a small agricultural producer, this would make a small dairy any dairy with less than 251 cows. As noted in the previous paragraph, 7 percent of the organic dairies were located in the West, but these operations held 32 percent of the organic milk cows and had a mean size of 381 cows. This would suggest that over 93 percent of the organic dairies are small producers and that large producers operate primarily in the West.

For feed from grazing (According to the 2005 ARM Survey), costs per hundredweight of milk sold were eight times less expensive than home-grown harvested feed and ten times cheaper than purchased feed on organic farms. AMS believes, but lacks data to substantiate, that these spreads have increased due to today's high costs for fuel and organic feed.

The 2005 ARM Survey found that more than 60 percent of organic dairies provided their animals with pasture that provided more than 50 percent of their forage needs throughout the growing season. USDA lacks data to determine whether these distributions have changed over the last three years.

Livestock access to pasture and grazing as a source of nourishment varies greatly across regions because of climatic and related environmental conditions. Further, grazing practices and access to pasture vary greatly among similarly situated organic producers. OSPs dealing with livestock management reflect different application of existing regulations and interpretations of requirements across ACAs. This has resulted in a lack of uniformity in application of the

livestock regulations, especially as they relate to the pasturing of ruminants. Current practices are expected to continue in the absence of additional specificity and clarity in the livestock regulations.

#### *Benefits to the Proposed Rule*

This proposed rule brings uniformity in application to the livestock regulations; especially as they relate to the pasturing of ruminants. This uniformity will create equitable, consistent, performance standards for all ruminant livestock producers. Producers who currently operate based on grazing will perceive a benefit because these producers claim an economic disadvantage in competing with livestock operations that do not provide pasture. This proposed rule would also bring uniformity in application to the livestock regulations. This uniformity in application will allow the ACAs and AMS to administer the livestock regulations in a way that reflects consumer preferences regarding the production of organic livestock and their products. Commenters have clearly stated that they expect organic ruminants to graze pasture and receive not less than 30 percent of their dry matter needs from grazing. Because of this, it is crucial that consumer expectations are met. This proposed rulemaking is intended to reflect consumer expectations and producer perspectives. This action makes clear what access to pasture means under the NOP.

This action will ensure that NOP livestock production regulations have sufficient specificity and clarity to enable AMS and ACAs to efficiently administer the NOP and to facilitate and improve compliance and enforcement. This specificity and clarity is expected to assure that ACAs and producers know what constitutes compliance and will satisfy consumer expectations that ruminant livestock animals graze pastures during the growing season. This proposed rule also adds 3 new regulatory provisions, which many ruminant livestock producers already comply with. New regulatory provisions include: (1) The requirement that pastures be managed for grazing throughout the growing season (The pasture system must provide all ruminants under the OSP with an average of not less than 30 percent of their DMI from grazing throughout the growing season.); (2) use of a sacrificial pasture; and (3) the requirement that for the growing season, producers provide not more than an average of 70 percent of a ruminant's DMI from their total feed ration minus grazed vegetation rooted in

pasture. These 3 new regulatory provisions will ensure that ruminants spend more time on pasture and that they receive a significant portion of their daily feed intake, during the growing season, from grazing vegetation rooted in pasture. Inconsistency in the application of the livestock regulations by producers and ACAs has resulted in the filing of consumer complaints under the NOP complaint procedures. Some of these complaints have been followed by negative press generated by a consumer activist organization. This negative press has created consumer uncertainty regarding the organic status of milk and milk products labeled "organic." Accordingly, this action provides more information which will contribute to producer and certifying agent understanding which will in turn eliminate the current inconsistent application of livestock regulations under the NOP. Further, since the NOP regulations were implemented in October 2002, we have found that producers need to improve their description of the practices and procedures they employ to comply with the livestock regulations in general and the pasture requirements in particular. Accordingly, this action provides greater detail about acceptable and required practices related to organic livestock and pasture management that will result in more thorough OSPs. The OSP commits the producer to a sequence of practices and procedures resulting in an operation that complies with every applicable provision in the regulations.

By eliminating the current inconsistent application of livestock regulations under the NOP and improving OSPs, consumers will have the assurance that the organic label is applied according to clear, consistently applied, standards. These standards will provide for the grazing of ruminants on pasture throughout the growing season such that ruminants obtain feed value from the grazing of pasture. This will in turn satisfy consumer expectations that ruminant livestock animals graze pastures during the growing season. Eliminating the current inconsistent application of livestock regulations is expected to end the filing of complaints which will, in turn, end the generation of negative press which has damaged the image of organic milk and milk products.

#### *Costs of Proposed Rule*

This action will increase the cost of production for producers who currently do not pasture their animals and those producers who do not manage their pastures at a sufficient level to provide

at least 30 percent DMI. For organic slaughter stock producers, an increase in costs might result in a greater volume of slaughter animals, at least in the short term, entering the market driving down prices. Longer term these increased costs could result in increased consumer prices unless the increased costs are offset by reductions in other costs of production. Other costs of production that could be expected to go down are costs associated with producer harvest and purchase of feed and the cost of herd health. Because we have so little data on the organic slaughter sector, we are seeking input from commenters on how production costs and consumer prices may be affected by the changes in this proposed rulemaking.

Dairy producers not currently pasturing their animals and those not managing their pastures at a level sufficient to provide at least 30 percent DMI are also expected to experience increased costs. This increased cost could, at least in the short term, lead to a reduced milk supply. Increased costs combined with a reduced milk supply might be followed by an increased pay-price to producers. Milk and milk product processors would be motivated to increase the pay-price so as to both maintain existing supplies and to encourage expanded supplies. With increased consumer prices accompanied by increased pay-price to producers, some organic producers would be expected to expand production and additional conventional producers would be expected to transition to organic production. An increased pay-price to producers would surely result in increased consumer prices. Longer term increased costs should be offset, at least in part, by reductions in other costs of production. Other costs of production that could be expected to go down are costs associated with producer harvest and purchase of feed and the cost of herd health. Because we have so little data on the organic dairy sector, we are seeking input from commenters on how production costs and consumer prices may be affected by the changes in this proposed rule.

Organic livestock producers are currently faced with tight feed supplies and high costs. Because we have so little data on the organic feed sector, we are seeking input from commenters on how the availability of feed supplies and costs may be affected by the changes in this proposed rule. We are also seeking data from commenters on whether current feed stocks and price are limiting the expansion of livestock production.

The costs associated with complying with this proposed rule would vary based on the livestock producer's current practices and the degree to which they conform to the proposed clarified and amended livestock regulations. Cost factors could include land and seed for pasture; fencing to protect ponds, streams, and other bodies of water; and documenting feed rations, once a month, on a monthly basis. We are seeking further comment on these costs, as the data we have on this industry are limited at this time.

Some producers may see an overall reduction in production costs as a result of this proposed rule. For feed from grazing (According to the 2005 ARM Survey), costs per hundredweight of milk sold were eight times less expensive than home-grown harvested feed and ten times cheaper than purchased feed on organic farms.<sup>1</sup> Therefore, we are also seeking additional information on how costs may decline if ruminants increase time grazing compared with being fed grain or harvested forage.

New regulatory provisions include: (1) The requirement that pastures be managed for grazing throughout the growing season (The pasture system must provide all ruminants under the OSP with an average of not less than 30 percent of their DMI from grazing throughout the growing season.); (2) use of a sacrificial pasture; and (3) the requirement that for the growing season, producers provide not more than an average of 70 percent of a ruminant's DMI from their total feed ration minus grazed vegetation rooted in pasture.

According to the Federation of Organic Dairy Farmers (FOOD Farmers) most ruminant livestock producers pasture their animals and many maximize the use of pasture. FOOD Farmers is a national dairy producer organization representing over 1,200 of the approximately 1,800 U.S. organic dairy producers. The 2005 ARM Survey found that more than 60 percent of organic dairies provided their animals with pasture that provided more than 50 percent of their forage needs throughout the growing season.

Ruminant livestock operations currently pasturing their animals may see minimal increased costs, if any. Some who already pasture their animals may need to improve the quality of their pastures to provide sufficient vegetation for grazing throughout the growing season to meet the average 30 percent

<sup>1</sup> McBride, William D., and Catherine Greene, "A Comparison of Conventional and Organic Milk Production Systems in the U.S.," Selected Paper prepared for presentation at the AAEP, Portland, Oregon, 2007.

DMI level. Costs associated with providing sufficient vegetation for grazing throughout the growing season would include the time (labor) spent seeding the pastures, fuel for equipment used in seeding, and the cost of seed.

Geographical location, current year growing conditions, and pasture conditions will influence the need for seeding. Productive well managed perennial grass pastures would likely not require annual seeding. Poor producing and poorly managed perennial grass pastures would require annual seeding. It is anticipated that some producers will need to annually plant annual crops for grazing to provide sufficient vegetation for grazing throughout the growing season. This would be especially true for those periods during the growing season when perennial grass pastures are dormant.

Seed costs will vary depending on what is to be grown and how many acres are to be grown. As an example, if organic fescue is to be grown, the seed will cost approximately \$60 per acre at 2007 prices. If organic festolium is to be grown the seed will cost approximately \$50 per acre at 2007 prices. Certified organic orchardgrass would cost approximately \$46 per acre at 2007 prices. Certified organic ryegrass would cost approximately \$75 per acre at 2007 prices. Benefits of using improved pasture include a lower cost of purchased feed (grains and forages) per hundredweight of milk or meat produced, reduced forage harvest costs, and reduced veterinary costs, which could result in an overall increase in farm profitability (as noted above). For an example of data on reduced veterinary costs see page 76 of Knoblauch, Wayne A., Putnam, Linda D., and Karszes, Jason. *Dairy Farm Management Business Summary New York State 2004*. Ithaca, New York: Cornell University, November, 2005. An additional benefit is that with uniform application of the NOP livestock regulations there should be a near elimination of violations of the pasture regulations. This will eliminate the filing of complaints regarding the pasturing of ruminants. In the past such complaints have been followed by negative press generated by a consumer activist organization. This negative press has created consumer uncertainty regarding the organic status of milk and milk products labeled "organic." This should lead to an improved image for organic milk and milk products which should increase consumer confidence and result in increased markets for organic livestock products. Because we have so little data on the pasturing of ruminant animals by organic producers

and the ability of existing pastures to provide the minimum 30 percent DMI over the growing season, we are seeking input from commenters on how production costs may be affected by the changes in this proposed rule.

Some ruminant livestock producers have not been providing pasture, or have insufficient pasture to support the size of their herd, and may need to obtain pasture to comply with the new regulatory provisions. The exact number of producers who may need to obtain pasture to comply with the new regulatory provisions is unknown, but estimated to be well under 100. This estimate is based on our understanding that almost all of the estimated 1,800 ruminant livestock producers are currently providing at least some pasture and that only a few currently lack sufficient pasture to graze all of their animals enough to achieve the 30 percent DMI level. Because we lack this data, we are seeking input from commenters on how many ruminant livestock producers are not providing pasture or have insufficient pasture to support the size of their herd.

Costs of pasture vary depending on location. USDA's *Agricultural Statistics, 2007*, show 2006 pasture land values ranging from \$11,700 per acre in New Jersey to \$250 per acre in North Dakota. Costs would likely be higher for certified organic pasture. USDA's *Agricultural Statistics, 2007*, show 2006 pasture land cash rents ranging from \$38 per acre in Iowa and Wisconsin to \$2 per acre in New Mexico. Again, costs would likely be higher for certified organic pasture. Per acre rental rates would also vary based on pasture quality factors. The higher the pasture quality, the more the producer may pay per acre, but the fewer the acres needed to comply with the regulations. Benefits of pasture include a lower cost of purchased feed (grains and forages) per hundredweight of milk or meat produced, reduced forage harvest costs, and reduced veterinary costs. On the other hand, producers may not require more pasture at all, but instead may shift to using intensive rotational grazing, which is becoming the standard for grazing today. Under intensive grazing, producers use the same or fewer acres of land to graze the same or greater numbers of animals. Because we lack data on the price of organic pasture, we are seeking input from commenters. Costs associated with complying with the proposed new sacrificial pasture provision will depend on the individual producer's current practices and location. Sacrificial pastures are used as a place where animals are kept for short periods during saturated soil conditions

to confine pasture damage to an area where potential environmental impacts can be controlled. Livestock operations already using a sacrificial pasture system would see minimal increased costs. Costs to livestock producers who do not currently use a sacrificial pasture system will vary. Costs will depend on what it would take to modify an existing pasture and its surrounding area to ensure that environmental impacts can be controlled. For livestock producers who have not been providing pasture, they will need to include a sacrificial pasture in their new pasture system. They will also need to ensure that the pasture used as a sacrificial pasture and its surrounding area are, if necessary, modified to ensure that environmental impacts can be controlled. Because we have so little data on the costs associated with providing a sacrificial pasture, we are seeking input from commenters on the costs associated with establishment and maintenance of a sacrificial pasture as well as how production costs may be affected.

Some ruminant livestock operations have one or more pastures that contain a pond or have a stream running through. The exact number of organic ruminant livestock operations having one or more pastures that contain a pond or have a stream running through is unknown. Because we lack this data, we are seeking input from commenters.

Water quality is adversely impacted when livestock are not excluded from ponds and streams. In this action we propose further addressing risk to soil or water quality through a new paragraph 205.239(f), which provides that the producer of an organic livestock operation must manage outdoor access areas, including pastures, in a manner that minimizes the potential adverse impacts of grazing on soil and water quality. This would include the use of fences and buffer zones to prevent ruminants and their waste products from entering ponds, streams, and other bodies of water. Proposed paragraph 205.239(f) makes it clear that allowing ruminants to enter ponds, streams, and other bodies of water is not consistent with protecting soil and water from contamination as currently required under existing §§ 205.202 and 205.203. New paragraph 205.239(f) reinforces that producers are to manage outdoor access areas, including pastures, in a manner that would protect soil and water quality.

Costs associated with complying with new paragraph 205.239(f) may vary depending on the presence of any ponds, streams or other bodies of water, and the individual producer's current practices. Producers who already

prevent their animals from entering ponds, streams, and other bodies of water should see minimal increased costs. Producers who allow their animals to enter ponds, streams, and other bodies of water would incur costs for the fencing necessary to prevent

such access. Costs associated with installing a fence will vary depending on its type, how it is installed, the terrain, and the type of animal (e.g., bison, cattle, sheep, goats) to be fenced in or out. Costs of building a ¼-mile (1,320 feet) straight perimeter fence are

presented in Tables 1 through 3 and are included to illustrate to the public the potential costs of compliance. These tables compare three commonly used types of fencing (woven, barbed wire, high-tensile electrified).

TABLE 1—CONSTRUCTION COSTS FOR WOVEN WIRE FENCE <sup>2</sup>

[Based on a 1,320 foot fence]

| Item                             | Amount           | Cost per unit | Total cost |
|----------------------------------|------------------|---------------|------------|
| Wood posts (8-in diameter) ..... | 4 .....          | \$22.00       | \$88.00    |
| Wood posts (4-in diameter) ..... | 57 .....         | 9.30          | 530.00     |
| Steel posts (6.5 feet) .....     | 55 .....         | 3.69          | 203.00     |
| Staples and clips .....          | 10 pounds .....  | 1.80          | 18.00      |
| Barbed wire .....                | 1,320 feet ..... | 0.037         | 49.00      |
| Woven wire (48 inch) .....       | 1,320 feet ..... | 0.40          | 528.00     |
| Labor (estimated) .....          | 42 hours .....   | 13.60         | 571.00     |
| Total .....                      | .....            | .....         | 1,987.00   |
| Total per foot .....             | .....            | .....         | 1.51       |

TABLE 2—CONSTRUCTION COSTS FOR BARBED WIRE FENCE <sup>2</sup>

[Based on a 1,320 foot fence]

| Item                             | Amount           | Cost per unit | Total cost |
|----------------------------------|------------------|---------------|------------|
| Wood posts (8-in diameter) ..... | 4 .....          | \$22.00       | \$88.00    |
| Wood posts (4-in diameter) ..... | 57 .....         | 9.30          | 530.00     |
| Steel posts (6.5 feet) .....     | 55 .....         | 3.69          | 203.00     |
| Staples and clips .....          | 10 pounds .....  | 1.80          | 18.00      |
| Barbed wire .....                | 6,600 feet ..... | 0.037         | 244.00     |
| Labor (estimated) .....          | 39 hours .....   | 13.60         | 530.00     |
| Total .....                      | .....            | .....         | 1,614.00   |
| Total per foot .....             | .....            | .....         | 1.23       |

TABLE 3—CONSTRUCTION COSTS FOR HIGH-TENSILE ELECTRIFIED WIRE FENCE <sup>2</sup>

[Based on a 1,320 foot fence]

| Item                                  | Amount           | Cost per unit | Total cost |
|---------------------------------------|------------------|---------------|------------|
| Wood posts (8-in diameter) .....      | 6 .....          | \$22.00       | \$132.00   |
| Wood posts (4-in diameter) .....      | 4 .....          | 9.30          | 37.00      |
| Steel posts (6.5 feet) .....          | 52 .....         | 3.69          | 192.00     |
| Insulators .....                      | 285 .....        | 0.15          | 43.00      |
| Springs .....                         | 5 .....          | 4.50          | 23.00      |
| Strainers .....                       | 5 .....          | 2.50          | 13.00      |
| High-tensile wire .....               | 6,600 feet ..... | 0.0225        | 149.00     |
| Energizer (priced over 4 years) ..... | ¼ .....          | 200.00        | 50.00      |
| Cut-out switch .....                  | 1 .....          | 9.00          | 9.00       |
| Ground/lightning rods .....           | 4 .....          | 9.00          | 36.00      |
| Labor (estimated) .....               | 18 hours .....   | 13.60         | 245.00     |
| Total .....                           | .....            | .....         | 927.00     |
| Total per foot .....                  | .....            | .....         | 0.70       |

Livestock producers can avail themselves of various Federal, State, and local conservation programs

designed to assist producers with the cost of installing fencing for the purpose of protecting water quality. These programs can also provide technical assistance regarding suitability of various fencing materials and the buffer area within the fence that will properly control runoff. Qualified producers can

voluntarily apply to the Environmental Quality Incentives Program (EQIP), administered by the Natural Resources Conservation Service (NRCS), and if approved, may receive reimbursement for part of the cost of practice installation. For example, a producer could receive EQIP payments of up to

<sup>2</sup> Estimates from Iowa State University Extension (ISU) publication FM 1855 Estimated Costs for Livestock Fencing (Revised July 2005).

75 percent towards the cost of installation of a fence along a stream that provides protection or improvement of water quality. Producers installing fencing to comply with new paragraph 205.239(f) may also incur costs for providing water to their animals if the only source of drinking water currently available is to allow their animals to enter ponds, streams, and other bodies of water to obtain drinking water. These costs will vary depending on what option is chosen for providing water. A pond from which water can be drawn will cost an estimated \$3,000. A spring-fed watering system will cost an estimated \$1,000 or more. A wet well will cost an estimated \$1,500 to \$2,500 installed. A drilled well will cost an estimated \$15 to \$30 per foot to drill plus \$500 to \$1,000 or more for a pumping system. It will cost an estimated \$1,000 to \$2,000 or more depending on the distance from water main to distribution point for rural water district supplies plus monthly fees. Hauling water includes costs for a tank and trailer, recurring labor, and fuel costs. Also to be factored in is the cost of an animal drink delivery system such as a bottomless tank or a fiberglass or galvanized tank. A bottomless tank will cost an estimated \$1,400 for a 30' x 30' x 6" concrete pad; \$300 for rebar, bolts, overflow pipe; and \$1,700 for rings. A 300 gallon fiberglass tank will cost an estimated \$180 while a 10 foot diameter galvanized tank will cost an estimated \$500.<sup>3</sup>

Livestock producers can avail themselves of various Federal, State, and Local conservation programs designed to assist producers with the cost of installing watering systems. For example, producers can voluntarily apply to the EQIP, administered by the NRCS, and if approved, may receive reimbursement for part of the cost of installing water systems. Using EQIP, depending on location, qualified producers could receive EQIP payments of up to 75 percent to assist with the installation of conservation practices ponds, wells, and watering facilities that provide environmental benefits.

### C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) requires agencies to consider the economic impact of each rule on small entities and evaluate alternatives that would accomplish the objectives of the rule without unduly

burdening small entities or erecting barriers that would restrict their ability to compete in the market. The purpose is to fit regulatory actions to the scale of businesses subject to the action. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

Pursuant to the requirements set forth in the RFA, AMS performed an economic impact analysis on small entities in the final rule published in the **Federal Register** on December 21, 2000 (65 FR 80548). AMS has also considered the economic impact of this action on small entities. Small entities include agricultural service firms, such as producers, handlers, and ACAs. AMS has determined that this rule will not have a significant economic impact on a substantial number of small entities.

AMS notes that several requirements to complete the RFA overlap with the Regulatory Impact Analysis (RIA) and the Paperwork Reduction Act (PRA). For example, the RFA requires an analysis of a proposed rule's costs to small entities. The RIA provides an analysis of the benefits and cost of a proposed rule. Further, the RFA requires a description of the projected reporting and recordkeeping requirements of a proposed rule. The PRA provides an estimate of the reporting and recordkeeping (information collection) requirements of a proposed rule. In order to avoid duplication, we combine some analyses as allowed in section 605(b) of the Act. The RFA in the Access to Pasture proposed rule provides summary information on the size of the domestic organic crop and livestock sector especially as it applies to ruminant producers who are the entities affected by this rulemaking action. It also provides information on potential costs to livestock producers who elect to produce organically. The RIA and PRA should be referred to for more detail.

Small agricultural service firms, which include producers, handlers, and ACAs, have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$6,500,000.

The U.S. organic industry at the end of 2001 included nearly 6,949 certified organic crop and livestock operations. These operations reported certified acreage totaling just over 2 million acres of organic farm production of which approximately 790 thousand acres were pasture and rangeland. Data on the numbers of certified organic handling operations (any operation that transforms raw product into processed

products using organic ingredients) were not available at the time of survey in 2001; but they were estimated to be in the thousands. Based on the 2005 ARM Survey U.S. certified organic acreage had increased to 4 million acres of which approximately 2.3 million was pasture and rangeland. By the end of 2005, the number of U.S. certified organic crop, livestock, and handling operations totaled about 8,500. AMS estimates that most of these entities would be considered small entities under the criteria established by the SBA.

U.S. sales of organic food and beverages have grown from \$1 billion in 1990, to an estimated \$12.2 billion in 2004 and \$13.8 billion in 2005 and nearly \$17 billion in 2006. The organic industry is viewed as the fastest growing sector of agriculture, representing almost 3 percent of overall food and beverage sales. Since 1990, organic retail sales have historically demonstrated a growth rate between 20 to 24 percent each year, including a 22 percent increase in 2006.

In addition, USDA has 95 ACAs who provide certification services to producers and handlers. A complete list of names and addresses of ACAs may be found on the AMS NOP Web site, at <http://www.ams.usda.gov/nop>. AMS estimates that most of these entities would be considered small entities under the criteria established by the SBA.

AMS believes that the impact of this rule, if any, on small agricultural service firms will be minor.

Small agricultural producers are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$750,000. This proposed rule is not expected to have an impact on a substantial number of small agricultural producers.

Data from the 2005 ARM Survey shows that there were 36,113 organic beef cows, 87,082 organic dairy cows, 58,822 unclassified cows and young stock, and 4,471 sheep and lambs. Not broken out in this data is the number of organic goats, buffalo, and bison which were lumped with other animals. ERS includes goats, buffalo, bison, rabbits, and other specialties in the designation other animals. Of the 36,113 organic beef animals, 21 percent of these are located in Alaska. Using the total certified pastureland and total numbers of certified animals, there is sufficient pasture for 12 acres per certified animal in the United States currently, based on these average numbers reported in 2005.

With regard to dairies, the 2005 ARM Survey found that 84 percent of organic

<sup>3</sup> Estimates used in this paragraph were sourced from: Blocksom, C.E. and G.M. Powell (eds). 2006. Waterers and watering systems: A handbook for livestock owners and landowners. Kansas State University Agricultural Experiment Station and Cooperative Extension Service, Manhattan, Kansas.

dairies and 60 percent of the organic milk cows were located in the Northeast and Upper Midwest. Nine percent of organic dairies and 8 percent of the organic milk cows are found in the Corn Belt. By contrast only 7 percent of the organic dairies were located in the West, but these operations held 32 percent of the organic milk cows. Nationally the mean size of an organic dairy is 82 cows. The mean size of organic dairies in the Northeast is 52 cows versus 64 cows in the Upper Midwest and 381 cows in the West. AMS does not have specific data on the numbers of certified organic livestock operations, including certified organic dairies. However, using these average size numbers, there could be around 1,000 U.S. organic dairies—fewer than 75 located in the West, the remaining approximately 900 in the Northeast and Upper Midwest.

Dairy pay-price varies with \$22 per hundredweight being the lowest. Milk production per cow per day over a 300-day milking period varies with 35 pounds per day being at the low end of the range. Accordingly, a conservative estimate of yield per cow per day would be 10,500 pounds for the 300-day milking period. At a pay-price of \$22 per hundredweight each cow would generate approximately \$2,310 during that period. Thus using the lowest end of the pay-price and yield ranges a small dairy is any dairy with less than 325 cows. When a yield of 40 pounds per day is used, the yield is 12,000 pounds per cow for the 300-day milking period. Again using the lowest pay-price of \$22 per hundredweight, each cow would generate approximately \$2,640 during that period. Dividing this in, \$750,000 would make a small dairy any dairy with less than 285 cows. The 2005 ARM Survey found that organic dairies averaged about 13,600 pounds of milk per cow or a daily average of 45 pounds of milk per cow. Once again using the lowest pay-price of \$22 per hundredweight, each cow would generate approximately \$2,992. Based on the SBA definition, this would make a small dairy any dairy with less than 251 cows. As noted in the previous paragraph, 7 percent of the organic dairies were located in the West, but these operations had a mean size of 381 cows. This would suggest that over 93 percent of the organic dairies are small producers.

Current NOP regulations require that organic ruminants have access to pasture and that pasture be managed to provide feed value. The 2005 ARM Survey found that more than 60 percent of organic dairies provided their animals with pasture that provided more than 50 percent of their forage

needs throughout the growing season. In addition, according to the Federation of Organic Dairy Farmers (FOOD Farmers), most ruminant livestock producers pasture their animals and many maximize the use of pasture.

Under its Livestock and Seed Programs, AMS also established a voluntary U.S. standard for Livestock and Meat Marketing Claims for a grass (forage) fed claim for ruminant livestock, published on October 10, 2007, in response to overwhelming comments by beef producers and consumers—many of them organic, expressing the desire for a 100-percent grass-fed claim. Under that proposed voluntary marketing claim, AMS received over 19,000 comments, many of which stated that in order to earn the grass-fed marketing claim, ruminant livestock must be grazed a minimum of 120 days on pasture, and longer, if possible, “as it is with organic standards.” Other commenters suggested that dry matter intake from forage should reach 99 percent. Additional comments expressed a desire for the livestock claim to be extended to dairy animals; however, AMS did not extend the grass-fed claim to more than ruminant meat animals and excepted dairy animals and their milk products. AMS also defined the growing season in this voluntary marketing standard as the time period extending from the average date of the last frost in spring to the average date of the first frost in the fall in the local area of production, in response to the overwhelming comments received during the comment period. (See FR Vol. 72, No. 199, p. 58631–58637).

Similarly, comments we received during the ANPR, including those from small entities, also expressed a clear expectation that organic ruminants graze pastures for the purpose of obtaining nutritional value as well as to accommodate their health and natural behavior. Support for strict standards and greater detail on the role of pasture in organic livestock production was nearly unanimous with just 28 of the over 80,500 comments opposing changes to the pasture requirements. Over 54,000 commenters stated that they pay a premium for milk from animals that graze pastures. Over 71,300 commenters expressed opposition to the feeding of organic dairy animals in non-pasture settings such as dry-lots. Over 10,500 commenters suggested amending the regulations to require stocking rates—generally of no more than 3 animals per acre. Overwhelmingly, commenters expressed a clear expectation that organic ruminants graze pastures to obtain nutrition, and to

accommodate their natural behavior and health. Commenters supported the adoption or incorporation of quantifiable, numeric measures into the regulations for the minimum amount of feed and the minimum amount of time spent on pasture. This is clearly reinforced by AMS's voluntary grass-fed claim for ruminant beef animals, which excludes dairy animals and milk products. Also, dairy producers recommended to the NOSB through public testimony at NOSB meetings that they expect organic ruminants to graze pasture and receive not less than 30 percent of the DMI needs from grazing. Because of this and other factors discussed herein, AMS believes that the impact of this rule, if any, on small agricultural service firms will be minor and limited to ruminant livestock producers.

The effect of this proposed rule would be to bring greater detail, uniformity in application, and regulatory transparency to the livestock regulations. Consumers and other commenters, including small entities, have expressed a clear expectation that organic ruminants actively graze pastures for the purposes of obtaining nutritional value as well as to accommodate their health and natural behavior. While the NOP regulations are a process-based, truth-in-marketing claim for producers and processors, consumers are clearly the intended beneficiary of products that communicate these nationally uniform standards with the organic label and they generally pay premium prices for organic products. Because of this, it is crucial that consumer expectations are met, which in turn benefits organic producers, including small entities, by ensuring that the demand for organic products remains strong. This proposed rulemaking is intended to reflect consumer expectations, and benefit organic producers, including small entities, by ensuring that the NOP standards are applied consistently and serve their intended purpose through language that is clear. Comments submitted during the 2006 ANPR to AMS included a Whole Foods Market, Inc. survey which revealed that 69 percent of consumer respondents expect most of an organic dairy animal's food to come from pasture, and a Consumers Union survey which found that more than two-thirds of those surveyed believed that the NOP standards should require that organic animals graze outdoors. This proposed rule would provide a substantial level of information which will contribute greatly to producer and certifying agent understanding, which will in turn

eliminate the current inconsistent application of livestock regulations under the NOP.

The proposed rule would establish uniformity in the application of regulations for all ruminant livestock producers regardless of operation size or location. This is especially important to small producers who account for an estimated 93 percent of organic livestock producers. This action makes clear what pasturing means under the NOP.

The costs associated with complying with this proposed rule would vary based on the livestock producer's current practices and the degree to which they conform to the proposed clarified and amended livestock regulations. Cost factors could include land and seed for pasture; fencing to protect ponds, streams, and other bodies of water; and documenting feed rations, once a month, on a monthly basis. Based on the information supplied to AMS from FOOD Farmers, and comments received during the dairy symposium and in response to the ANPR, AMS believes that most small entities already conform to the proposed clarified and amended livestock regulations and thus would incur minimal to no additional costs in complying with this proposed rule.

Although AMS has already published a voluntary grass-fed livestock claim, and is proposing clarifications to the pasture regulation in this proposed rulemaking in response to requests by organic livestock producers, we would still like to receive information about the costs associated with implementing these clarifications and changes by ruminant livestock producers.

This proposed rule amends existing regulatory language that already requires that ruminant livestock be provided with access to pasture and that pasture provide a source of nutrition. This proposed rule also adds new language to provide greater detail and regulatory meaning to the existing livestock provisions of the NOP; especially as those provisions apply to the requirements for pasturing ruminants. This proposed rule also adds 3 new regulatory provisions which will ensure that ruminants spend time on pasture and that they receive a significant portion of their daily feed intake, during the growing season, from grazing vegetation rooted in pasture. According to FOOD Farmers most ruminant livestock producers pasture their animals and many maximize the use of pasture. The 2005 ARM Survey found that more than 60 percent of existing organic dairies provided their animals with pasture that already offer

more than 50 percent of their forage needs throughout the growing season. Additionally, commenters, including small entities, expressed a clear expectation that organic ruminants graze pastures for the purpose of obtaining nutritional value as well as to accommodate their health and natural behavior. Therefore, AMS believes that most ruminant livestock operations currently pasture their animals and would see minimal increased costs, if any. Existing data support the ARM Survey results with data on pasture—sufficient certified pasture is available for producers to provide adequate nutrition to organic ruminant livestock. Of the 2.3 million acres of certified pasture in 2005, nearly 500,000 acres are in the Western states with fewer than 30,000 certified organic dairy animals. This implies that certified organic dairies in the west have nearly 16 acres of existing certified pasture per organic dairy animal, on average, to provide pasture as a source of nutrition. In the Upper Midwest and Northeast, over 90,000 acres have been certified as organic pasture, where approximately 50,000 organic dairy animals graze—or sufficient land for 2 acres per existing certified organic dairy animal. Based on commenters' request for stocking rates, existing certified pasture land in the Northeast would actually support three times the number of certified organic animals as presently exist, or upwards of 150,000 dairy animals, more than the entire certified organic livestock sector. Alaska, which has 21 percent of the certified organic beef animals located in its state, also has 65 percent of the certified organic pasture and rangeland—more than enough to graze its certified organic animals. A minority of livestock operations who already pasture their animals may need to improve the quality of their pastures to provide sufficient vegetation for grazing throughout the growing season to meet the average 30 percent DMI level. However, it should be noted that this 30 percent figure is based on recommendations to the NOSB by dairy producers, including small dairy producers, through public testimony at NOSB meetings.

Three new regulatory provisions may add some cost to becoming a certified organic operation or continuing organic certification. New regulatory provisions include: (1) The requirement that pastures be managed for grazing throughout the growing season (the pasture system must provide all ruminants under the OSP with an average of not less than 30 percent of their DMI from grazing throughout the

growing season.); (2) use of a sacrificial pasture; and (3) the requirement that for the growing season, producers provide not more than an average of 70 percent of a ruminant's DMI from their total feed ration minus grazed vegetation rooted in pasture.

These potential costs, which could vary widely among producers, are described in detail above in the Executive Order 12866 discussion. We are seeking comments from producers as to how these regulatory provisions may affect the costs of certification and costs of operation.

Costs associated with providing sufficient vegetation for grazing throughout the growing season would include the time (labor) spent seeding the pastures, fuel for equipment used in seeding, and the cost of seed. Seed costs will vary depending on what is to be grown and how many acres are to be grown. Examples of 2007 certified organic seed prices, per acre, include approximately \$60 for fescue, \$50 for festolium, \$46 for orchardgrass, and \$75 for ryegrass.

For example, according to FOOD Farmers, most producers of organic ruminants are currently pasturing their ruminant livestock. However, some livestock producers, as evidenced by AMS investigations and enforcement actions and the enforcement actions of ACAs, have not been providing pasture, or have insufficient pasture to support the size of their herd. These producers may need to obtain pasture to comply with the new regulatory provisions, switch to intensive grazing, reduce the number of animals, or exit the organic program.

Costs of pasture vary depending on location and quality, as described in detail above. USDA's *Agricultural Statistics, 2007*, show 2006 pasture land values ranging from \$11,700 per acre in New Jersey to \$250 per acre in North Dakota. Costs would likely be higher for certified organic pasture. USDA's *Agricultural Statistics, 2007*, show 2006 pasture land cash rents ranging from \$38 per acre in Iowa and Wisconsin to \$2 per acre in New Mexico. Again, costs would likely be higher for certified organic pasture. Per acre rental rates would also vary based on pasture quality factors. The higher the pasture quality, the more the producer may pay per acre, but the fewer the acres needed to comply with the regulations. Costs associated with providing pasture should only increase for those producers who currently do not pasture their animals at all (e.g., producers not in compliance with the current regulations) and those producers who do not manage their pastures at a

sufficient level to provide at least 30 percent DMI. As described above, AMS believes that most organic producers, including those that would be considered small entities, provide sufficient pasture to their animals. For those producers who do not provide sufficient pasture of their animals, the costs associated with providing sufficient pasture will vary not just on the location and quality, but also on the size of the herd. Large operations that do not provide adequate pasture may require large amounts of additional pasture, whereas small operations may require small amounts of additional pasture. According to the 2005 ARM Survey, geographic areas with higher land costs (such as the Northeast) have smaller livestock operations and areas with lower land costs (such as in the West) have larger livestock operations. Based on these data, those producers who do not have adequate pasture and are located in areas with high land costs will likely require smaller amounts of pasture compared to those producers who do not have adequate pasture and are located in areas with low land costs.

Costs associated with complying with the proposed new sacrificial pasture provision will also vary depending on a producer's current practices and location. We are proposing a sacrificial pasture to be used for short periods during saturated soil conditions to confine pasture damage to an area where potential environmental impacts can be controlled. Livestock operations already using a sacrificial pasture system, and small livestock operations with low-density pastures, should see minimal increased cost, if any. Costs to livestock producers who do not currently use a sacrificial pasture system, or who have high-density pastures, will vary. For some the cost will depend on what it would take to modify an existing pasture and surrounding area to ensure that environmental impacts can be controlled. If a producer has not been providing pasture, a sacrificial pasture will need to be included in the new pasture system. We are also seeking comments on the costs associated with designating sacrificial pasture, its effect on the operation, and alternatives.

Some ruminant livestock operations have one or more pastures that contain a pond or have a stream running through. The exact number of organic ruminant livestock operations having one or more pastures that contain a pond or have a stream running through is unknown. In discussion of this issue under "Costs of Proposed Rule" we acknowledge our lack data and seek input from commenters.

Water quality is adversely impacted when livestock are not excluded from ponds and streams. In this action we propose further addressing risk to soil or water quality through a new paragraph 205.239(f), which provides that the producer of an organic livestock operation must manage outdoor access areas, including pastures, in a manner that does not put soil or water quality at risk. This would include the use of fences and buffer zones to prevent ruminants and their waste products from entering ponds, streams, and other bodies of water. Proposed paragraph 205.239(f) makes it clear that allowing ruminants to enter ponds, streams, and other bodies of water is not consistent with protecting soil and water from contamination as currently required under existing §§ 205.202 and 205.203. New paragraph 205.239(f) reinforces that producers are to manage outdoor access areas, including pastures, in a manner that would protect soil and water quality.

Costs associated with complying with new paragraph 205.239(f) would vary depending on the presence of any ponds, streams or other bodies of water, and individual producer's current practices. Those producers who already prevent their animals from entering ponds, streams, and other bodies of water should see minimal increased cost, if any. Those producers who allow their animals to enter ponds, streams, and other bodies of water would incur costs for the fencing necessary to prevent such access. As described in detail above, costs associated with installing a fence will vary depending on its type, how it is installed, the terrain, and the type of animal (e.g., buffalo, bison, cattle, sheep, goats) to be fenced in or out. In the Executive Order 12866 discussion above, we include 3 tables for comparing the cost of building a ¼-mile (1,320 feet) straight perimeter fence. Table 1 shows that construction costs for 1,320 feet of woven wire fence would be \$1,987 or \$1.51 per foot. Table 2 shows that construction costs for 1,320 feet of barbed wire fence would be \$1,614 or \$1.23 per foot. Table 3 shows that construction costs for 1,320 feet of high-tensile electrified wire fence would be \$927 or \$0.70 per foot. These costs would be one-time expenses and, as explained in the Executive Order 12866 discussion above, a producer could receive EQIP payments of up to 75 percent towards the costs of installation of a fence. Thus, eligible producers could see their costs for a ¼-mile fence reimbursed up to as much as \$1,489, \$1,211, or \$695 in the examples above,

depending on the type of fencing installed.

Producers installing fencing to comply with new paragraph 205.239(f) may also incur costs for providing water to their animals if the only source of drinking water currently available is to allow their animals to enter ponds, streams, and other bodies of water to obtain drinking water. These costs will vary depending on what option is chosen for providing water. As noted above in the Executive Order 12866 discussion above, estimated cost is \$3,000 for a pond, \$1,000 or more for a spring-fed watering system, \$1,500 to \$2,500 installed for a wet well, \$15 to \$30 per foot to drill plus \$500 to \$1,000 or more for a pumping system for a drilled well, or \$1,000 to \$2,000 or more depending on the distance from water main to distribution point plus monthly fees for rural water district supplies. Hauling water includes costs for a tank and trailer, recurring labor, and fuel costs. Also to be factored in is the cost of an animal drink delivery system such as a bottomless tank or a fiberglass or galvanized tank. A bottomless tank will cost an estimated \$1,400 for a 30' x 30' x 6" concrete pad; \$300 for rebar, bolts, overflow pipe; and \$1,700 for rings. A 300 gallon fiberglass tank will cost an estimated \$180 while a 10 foot diameter galvanized tank will cost an estimated \$500. As explained in the Executive Order 12866 discussion above, qualified producers could receive EQIP payments of up to 75 percent towards the costs of installation of water systems. Again, eligible producers could receive reimbursements up to \$135–\$375, depending on the type of water system installed, to defray costs.

In consideration of the foregoing, and notwithstanding the additional costs that some producers may incur in complying with this proposed rule, AMS concludes that the economic impact on small producers of providing greater detail, uniformity in application, and regulatory transparency to the livestock regulations, if any, would be minimal. Nevertheless, AMS is seeking comments on these clarifications and how they may affect the costs of operating as organic livestock producers under this proposed rulemaking.

AMS believes that any costs incurred by producers in complying with this proposed rule would be offset by a stronger marketplace for organic livestock products. Implementation of this proposed rule will ensure that consumer expectations are met, and improve the image of organic milk and other organic livestock products, both of which in turn will lead to a robust market for these organic products. AMS

believes that, over the long run, the economic impact on producers of not implementing this proposed rule would be greater than the economic impact of this proposed rule.

#### D. Paperwork Reduction Act

In accordance with Office of Management and Budget (OMB) regulations (5 CFR Part 1320) that implement the Paperwork Reduction Act (44 U.S.C. 3501–3520) (PRA), the information collection requirements associated with the NOP have been previously approved by OMB and assigned OMB control number 0581–0191. A new information collection package is being submitted to OMB for approval of 7,200 hours in total burden hours to cover this new collection and recordkeeping burden of proposed paragraph 205.237(c) of this proposed rule. Upon OMB's approval of this new information collection, we will merge this collection into currently approved OMB Control Number 0581–0191. In accordance with 5 CFR Part 1320, we have included below a description of the collection and recordkeeping requirements and an estimate of the annual burden on organic ruminant producers who would be required to maintain information under this proposed rule. Authority for this action is the Organic Foods Production Act of 1990, as amended.

*Title:* National Organic Program.

*OMB Control Number:* 0581–NEW.

*Expiration Date of Approval:* 3 years from OMB date of approval.

*Type of Request:* New collection.

*Abstract:* The information collection and recordkeeping necessitated by new paragraph 205.237(c) is essential to establish that producers of organic ruminants, for the growing season, are providing not more than an average of 70 percent of a ruminant's dry matter demand from dry matter fed (dry matter fed does not include dry matter grazed from vegetation rooted in pasture). Based on information available, AMS estimates that there are approximately 1,800 organic ruminant livestock operations in the United States that will be subject to the provisions of new paragraph 205.237(c). This proposed rule would require that ruminant producers, once a month, on a monthly basis, document: (1) Each feed ration (i.e., each type of animal, each class of animal's intended daily diet showing all ingredients, daily pounds of each ingredient per animal, each ingredient's percentage of the total ration, the dry matter percentage of each ingredient, and the dry matter pounds for each ingredient); (2) the daily dry matter demand of each animal using the

formula: Average Weight/Animal (lbs) × .03 = lbs DM/Head/Day × Number of Animals = Total DM Demand in lbs/Day; (3) how much dry matter is fed daily to each animal; and (4) the percentage of dry matter fed daily to each animal using the formula: (DM Fed ÷ DM Demand in lbs/day) × 100 = % DM Fed. Plans for complying with new paragraph 205.237(c) must be a part of the producer's annual OSP.

According to FOOD Farmers (a dairy farmer organization representing over 1,200 of the approximately 1,800 U.S. organic dairy farmers) and accredited certifying agents, organic ruminant producers currently determine the daily DMI need of their animals and establish feed rations (which identify the percentage of dry matter for each ingredient) as a part of their good business and livestock management practices. Moreover, most of these organic ruminant producers already document and maintain feed ration records. New paragraph 205.237(c) establishes the common practice of documenting and maintaining feed ration records as a requirement for all organic ruminant producers. To minimize disruption to the normal business practices of the affected producers, producers will be permitted to develop their own format for documenting the requirements of paragraph 205.237(c).

The PRA also requires AMS to measure the recordkeeping burden. Under the NOP (§ 205.103) each producer is required to maintain and make available upon request, for 5 years, such records as are necessary to verify compliance with the NOP. Under this proposed rule, monthly documentation of: (1) Feed rations; (2) the daily dry matter demand of each animal; (3) how much dry matter is fed daily to each animal; and (4) the percentage of dry matter fed daily would become a part of that recordkeeping system. These records will provide the best evidence of compliance with the requirement that for the growing season, producers of organic ruminants provide not more than an average of 70 percent of a ruminant's dry matter demand from dry matter fed. The recordkeeping burden includes the amount of time needed to store and maintain records. AMS estimates that, since most organic ruminant producers already document and maintain feed ration records, additional annual costs will be nominal.

This information collection is only used by the organic ruminant producer; authorized representatives of USDA, including AMS, NOP staff; and USDA accredited certifying agents. Organic

ruminant producers and USDA accredited certifying agents are the primary users of the information and AMS is the secondary user.

#### Information Collection Burden

*Estimate of Burden:* Public reporting burden for collection of information is estimated to be a quarter of an hour per report. AMS estimates the annual collection cost per affected producer to be \$63.99. This estimate is based on an estimated 3 labor hours per year (15 minutes per month) at \$21.33 per hour for a total salary component cost of \$63.99 per year.

*Respondents:* Organic ruminant producers.

*Estimated Number of Respondents:* 1,800.

*Estimated Number of Responses per Respondent:* 12 (one per month).

*Estimated Total Annual Burden on Respondents:* 5,400 hours.

*Total Cost:* \$115,182.

#### Recordkeeping Burden

*Estimate of Burden:* Public recordkeeping burden is estimated to be 1.0 hour per year per respondent at \$21.33 per hour for a total salary component cost of \$21.33 per year.

*Respondents:* Organic ruminant producers.

*Estimated Number of Respondents:* 1,800.

*Estimated Number of Responses per Respondent:* 1 (per year).

*Estimated Total Annual Burden on Respondents:* 1,800 hours.

*Total Cost:* \$38,394.

*Comments:* AMS is inviting comments from all interested parties concerning the information collection and recordkeeping required as a result of new paragraph 205.237(c) of this proposed rule. Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments that specifically pertain to the information collection and recordkeeping requirements of this

action should be sent to Richard H. Mathews, Chief, Standards Development and Review Branch, National Organic Program, Transportation and Marketing Programs, at the previously referenced address and to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, 725 17th Street, NW., Room 725, Washington, DC 20503. Comments on the information collection and recordkeeping requirements should reference the date and page number of this issue of the **Federal Register**. All comments will become a matter of public record.

The comment period for the information collection and recordkeeping requirements contained in this proposed rule is 60 days.

AMS is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

#### E. Civil Rights Impact Analysis

AMS has reviewed this proposed rule in accordance with the Department Regulation 4300-4, Civil Rights Impact Analysis (CRIA), to address any major civil rights impacts the rule might have on minorities, women, and persons with disabilities. After a careful review of the rule's intent and provisions, AMS has determined that this rule would only impact the organic practices of livestock producers and that this rule has no potential for affecting livestock producers in protected groups differently than the general population of livestock producers. This rulemaking was initiated by the organic community and by small livestock producers in particular.

Protected individuals have the same opportunity to participate in the NOP as non-protected individuals. The NOP regulations prohibit discrimination by certifying agents. Specifically, paragraph 205.501(d) of the current accreditation of certifying agents regulations provides that "No private or governmental entity accredited as a certifying agent under this subpart shall exclude from participation in or deny the benefits of the NOP to any person due to discrimination because of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, or marital or family status." Paragraph 205.501(a)(2) requires "certifying agents to demonstrate the ability to fully comply with the

requirements for accreditation set forth in this subpart" including the prohibition on discrimination. The granting of accreditation to certifying agents under § 205.506 requires the review of information submitted by the certifying agent and an on-site review of the certifying agent's operation. Further, if certification is denied, paragraph 205.405(d) requires that the certifying agent notify the applicant of their right to file an appeal to the AMS Administrator in accordance with § 205.681. These regulations provide protections against discrimination, thereby permitting all livestock producers, regardless of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, or marital or family status, who voluntarily choose to adhere to the proposed rule and qualify, to be certified as meeting NOP requirements by an accredited certifying agent. This proposed rule in no way changes any of these protections against discrimination.

#### List of Subjects in 7 CFR Part 205

Administrative practice and procedure, Agriculture, Animals, Archives and records, Imports, Labeling, Organically produced products, Plants, Reporting and recordkeeping requirements, Seals and insignia, Soil conservation.

For the reasons set forth in the preamble, 7 CFR part 205, is proposed to be amended as follows:

#### PART 205—NATIONAL ORGANIC PROGRAM

1. The authority citation for 7 CFR part 205 continues to read as follows:

**Authority:** 7 U.S.C. 6501–6522.

2. Section 205.2 is amended by revising the definitions of "Crop" and "Livestock" and adding ten new terms in alphabetical order to read as follows:

##### § 205.2 Terms Defined.

\* \* \* \* \*

*Crop.* Pastures, sod, cover crops, green manure crops, catch crops, and any plant or part of a plant intended to be marketed as an agricultural product, fed to livestock, or used in the field to manage nutrients and soil fertility.

\* \* \* \* \*

*Dry matter.* The amount of a feedstuff remaining after all the free moisture is evaporated out.

*Dry lot.* A confined area that may be covered with concrete, but that has no vegetative cover.

\* \* \* \* \*

*Feedlot.* A confined area for the controlled feeding of ruminants.

\* \* \* \* \*

*Graze.* (1) The consumption of standing forage by livestock.

(2) To put livestock to feed on standing forage.

*Grazing.* To graze.

*Growing season.* The period of time between the average date of the last killing frost in the spring to the average date of the first killing frost in the fall or early winter in the local area of production. This represents a temperature threshold of 28 degrees Fahrenheit (– 3.9 degrees Celsius) or lower at a frequency of 5 years in 10. Growing season may range from 121 days to 365 days.

\* \* \* \* \*

*Inclement weather.* Weather that is violent, or characterized by temperatures (high or low), that can kill or cause permanent physical harm to a given species of livestock.

\* \* \* \* \*

*Killing frost.* A frost that takes place at temperatures between 25 degrees and 28 degrees Fahrenheit (– 2.2 and – 3.9 degrees Celsius) for a period sufficiently severe to end the growing season or delay its beginning.

\* \* \* \* \*

*Livestock.* Any bee, cattle, sheep, goats, swine, poultry, equine animals used for food or in the production of food, fiber, feed, or other agricultural-based consumer products; fish used for food; wild or domesticated game; or other nonplant life.

\* \* \* \* \*

*Sacrificial pasture.* A pasture or pastures within the pasture system, of sufficient size to accommodate all animals in the herd without crowding, where animals are kept for short periods during saturated soil conditions to confine pasture damage to an area where potential environmental impacts can be controlled. This pasture is then deferred from grazing until it has been restored through active pasture management. Sacrificial pastures are located where soils have good trafficability, are well-drained, have low risk of soil erosion, have low or no potential of manure runoff, are surrounded by vegetated areas, and are easily restored. A sacrificial pasture is land used for livestock grazing that is managed to provide feed value and maintain or improve soil, water, and vegetative resources; it is not a dry lot or feedlot.

\* \* \* \* \*

*Temporary and Temporarily.* Occurring for a limited time only (e.g.,

overnight, throughout a storm, during a period of illness, the period of time specified by the Administrator when granting a temporary variance), not permanent or lasting.

\* \* \* \* \*

3. Section 205.102 is amended by revising paragraph (a) to read as follows:

**§ 205.102 Use of the term, “organic.”**

\* \* \* \* \*

(a) Produced in accordance with the requirements specified in § 205.101 or §§ 205.202 through 205.207 or §§ 205.236 through 205.240 and all other applicable requirements of part 205; and

\* \* \* \* \*

4. Section 205.236 is amended by revising paragraph (a)(2)(iii) to read as follows:

**§ 205.236 Origin of Livestock.**

(a) \* \* \*

(2) \* \* \*

(iii) Once an operation has been certified for organic production using the exception in paragraph (a)(2)(i) or (ii) of this section, all dairy animals brought onto the operation shall be under organic management from the last third of gestation.

\* \* \* \* \*

5. Section 205.237 is amended by:

A. Revising paragraphs (a), (b)(5), and (b)(6);

B. Adding new paragraphs (b)(7) and (b)(8); and

C. Adding new paragraph (c) to read as follows:

**§ 205.237 Livestock feed.**

(a) The producer of an organic livestock operation must provide livestock with a total feed ration composed of agricultural products, including pasture and forage, that are organically produced by operations certified to the NOP, except as provided in § 205.236(a)(i), and, if applicable, organically handled by operations certified to the NOP: *Except*, That, synthetic substances allowed under § 205.603 and nonsynthetic substances may be used as feed additives and supplements, *Provided*, That, all agricultural ingredients in such additives and supplements shall have been produced and handled organically.

(b) \* \* \*

\* \* \* \* \*

(5) Feed mammalian or poultry slaughter by-products to mammals or poultry;

(6) Use feed, feed additives, and feed supplements in violation of the Federal Food, Drug, and Cosmetic Act;

(7) Provide feed or forage to which anyone, at anytime, has added an antibiotic; or

(8) Prevent, withhold, restrain, or otherwise restrict ruminant animals from actively obtaining feed grazed from pasture during the growing season, except for conditions as described under § 205.239(c).

(c) During the growing season, producers shall provide not more than an average of 70 percent of a ruminant's dry matter demand from dry matter fed (dry matter fed does not include dry matter grazed from vegetation rooted in pasture). Producers shall, once a month, on a monthly basis:

(1) Document each feed ration (i.e., for each type of animal, each class of animal's intended daily diet showing all ingredients, daily pounds of each ingredient per animal, each ingredient's percentage of the total ration, the dry matter percentage for each ingredient, and the dry matter pounds for each ingredient);

(2) Document the daily dry matter demand of each class of animal using the formula:

Average Weight/Animal (lbs) × .03 = lbs DM/Head/Day × Number of Animals = Total DM Demand in lbs/Day;

(3) Document how much dry matter is fed daily to each class of animal; and

(4) Document the percentage of dry matter fed daily to each class of animal using the formula: (DM Fed ÷ DM Demand in lbs/day) × 100 = % DM Fed.

6. Section 205.239 is amended by:

A. Revising paragraphs (a) introductory text, (a)(1)(a)(2) and (a)(3);

B. Revising paragraph (b) introductory text and paragraph (b)(2);

C. Redesignating paragraph (c) as (e); and

D. Adding new paragraphs (c), (d), and (f) to read as follows:

**§ 205.239 Livestock living conditions.**

(a) The producer of an organic livestock operation must establish and maintain year-round livestock living conditions which accommodate the health and natural behavior of animals, including those listed in paragraphs (a)(1) through (a)(3) of this section. Further, producers shall not prevent, withhold, restrain, or otherwise restrict animals from being outdoors, except as otherwise provided in paragraph (b) and (c) of this section. Producers shall also provide:

(1) Year-round access for all animals to the outdoors, shade, shelter, exercise areas, fresh air, water for drinking (indoors and outdoors), and direct sunlight, suitable to the species, its stage of life, the climate, and the environment.

(2) For all ruminants, continuous year-round management on pasture, except as otherwise provided in paragraph (c) of this section, for:

(i) Grazing throughout the growing season; and

(ii) Access to the outdoors throughout the year, including during the non-growing season. Dry lots and feedlots are prohibited.

(3) Appropriate clean, dry bedding. When hay, straw, ground cobs, or other crop matter typically fed to the animal species is used as bedding, it must comply with the feed requirements of § 205.237.

\* \* \* \* \*

(b) The producer of an organic livestock operation may temporarily deny a non-ruminant animal access to the outdoors because of:

(1) \* \* \*

(2) The animal's stage of life;

\* \* \* \* \*

(c) The producer of an organic livestock operation may temporarily deny a ruminant animal pasture under the following conditions:

(1) When the animal is segregated for treatment of illness or injury (the various life stages, such as lactation, are not an illness or injury);

(2) One week prior to parturition (birthing), parturition, and up to one week after parturition;

(3) In the case of newborns for up to six months, after which they must be on pasture and may no longer be individually housed;

(4) In the case of goats, during periods of inclement weather;

(5) In the case of sheep, for short periods for shearing; and

(6) In the case of dairy animals, for short periods daily for milking. Milking must be scheduled in a manner to ensure sufficient grazing time to provide each animal with an average dry matter intake from grazing of not less than 30 percent throughout the growing season. Milking frequencies or duration practices cannot be used to deny dairy animals pasture.

(d) Ruminants must be provided with:

(1) A lying area with well-maintained clean, dry bedding, which complies with paragraph (a)(3) of this section, during periods of temporary housing, provided due to temporary denial of pasture during conditions listed in paragraphs (c)(1) through (c)(5) of this section;

(2) Yards and passageways kept in good condition and well-drained;

(3) Shade and in the case of goats, shelter open on at least one side;

(4) Water at all times except during short periods for milking or shearing—

such water must be protected from fouling;

(5) Feeding and watering equipment that are designed, constructed, and placed to protect from fouling—such equipment must be cleaned weekly; and

(6) In the case of newborns, hay in a rack off the ground, beginning 7 days after birth, unless on pasture, and pasture for grazing in compliance with § 205.240(a) not later than six months after birth.

\* \* \* \* \*

(f) The producer of an organic livestock operation must manage outdoor access areas, including pastures, in a manner that does not put soil or water quality at risk; this includes the use of fences and buffer zones to prevent ruminants and their waste products from entering ponds, streams, and other bodies of water. Buffer zone size shall be extensive enough, in full consideration of the physical features of the site, to prevent the waste products of ruminants from entering ponds, streams, and other bodies of water.

7. Section 205.240 is added to subpart C to read as follows:

**§ 205.240 Pasture practice standard.**

The producer of an organic livestock operation must, for all ruminant livestock on the operation, demonstrate through auditable records in the organic system plan, a functioning management plan for pasture that meets all requirements of §§ 205.200–205.240.

(a) Pasture must be managed as a crop in full compliance with §§ 205.200 through 205.206.

(b) The producer must develop and annually update a comprehensive pasture plan for inclusion in the producer's organic system plan. When there is no change to the previous year's

comprehensive pasture plan the certified operation may resubmit the previous year's comprehensive pasture plan.

(c) The comprehensive pasture plan must include a detailed description of:

(1) Crops to be grown in the pasture and haymaking system;

(2) Cultural practices, including but not limited to varying the crops and their maturity dates in the pasture system, to be used to ensure pasture of a sufficient quality and quantity is available to graze throughout the growing season and to provide all ruminants under the organic systems plan with an average of not less than 30 percent of their dry matter intake from grazing throughout the growing season;

(3) The haymaking system;

(4) The location of pasture and haymaking fields, including maps showing the pasture and haymaking system and giving each field its own identity;

(5) The types of grazing methods to be used in the pasture system;

(6) The location and types of fences and the location and source of shade and water;

(7) The soil fertility, seeding, and crop rotation systems;

(8) The pest, weed, and disease control practices;

(9) The erosion control and protection of natural wetlands, riparian areas, and soil and water quality practices;

(10) Pasture and soil sustainability practices; and

(11) Restoration of pastures practices.

(d) The pasture system must include a sacrificial pasture, for grazing, to protect the other pastures from excessive damage during periods when saturated soil conditions render the pasture(s) too wet for animals to graze. The sacrificial pasture must be:

(1) Sufficient in size to accommodate all animals in the herd without crowding;

(2) Located where:

(i) Soils have good trafficability;

(ii) Well-drained;

(iii) There is a low risk of soil erosion;

(iv) There is low or no potential of manure runoff;

(v) Surrounded by vegetated areas; and

(vi) Easily restored.

(3) Managed to:

(i) Provide feed value; and

(ii) Maintain or improve soil, water, and vegetative resources.

(4) Restored through active pasture management.

(e) In addition to the above, producers must manage pasture to comply with all applicable requirements of §§ 205.236–205.239.

\* \* \* \* \*

8. Section 205.290 is amended by revising paragraph (a) to read as follows:

**§ 205.290 Temporary variances.**

(a) Temporary variances from the requirements in §§ 205.203 through 205.207, 205.236 through 205.240 and 205.270 through 205.272 may be established by the Administrator for the following reasons:

\* \* \* \* \*

**§ 205.690 [Amended]**

9. In § 205.690, the number “0581–0181” is revised to read “0581–0191”.

Dated: October 15, 2008.

**Lloyd C. Day,**

*Administrator, Agricultural Marketing Service.*

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