The long awaited Origin of Livestock Rule is published

By Ed Maltby, NODPA Executive Director

On Tuesday, March 29, 2022 the USDA National Organic Program (NOP) published the Final Rule for the Origin of Livestock which determines which animals can be considered organic and produce organic milk and milk products. The Final Rule brings clarity and one standard that all certifiers are required to enforce and milk buyers adhere to in their contracts with farmers. NODPA Policy Director and past president Kathy Arnold, a New York farmer, commented, “Hallelujah! After having spent close to two decades working on having the loophole that allowed conventional dairy stock to be continuously transitioned as replacements on a subset of organic dairy operations--that for the most part have been large scale operations--this is a most welcome and absolutely positive change. I give my thanks to Jenny Tucker and all the National Organic Program staff who were involved in crafting this wording change and guiding it through the approval process. Best news for family scale organic dairy in a long time!”

The Final Rule is not perfect but it does carry significant changes that will stop continuous transition of conventional animals and the sale of transition animals as organically certified. The wording is clear and well enough defined to stand up to legal challenge. There now can be no complaint from certifiers or the NOP that they cannot enforce these basic standards. ‘Origin of Livestock’ loopholes have been a longstanding problem, creating significant economic harm for small to medium-sized organic dairies, and causing consumers to question the integrity of organic milk. The ambiguity in the existing regulations has been present since the NOP was established, and the rule has been interpreted in many different ways by farmers, milk buyers and certifiers. From the Final Rule: “This final rule will improve AMS’s ability to effectively administer the National Organic Program (NOP) and improve AMS’s oversight of the USDA-accredited certifying agents that inspect and certify organic dairy operations.”

In describing the conditions that certifiers and farmers have to follow when animals are transitioning, the new regulation is prescriptive, mandating an Organic System Plan (OSP) which covers any use of third-year transition feed. It also includes the requirement that “individual identification of animals intended to complete transition” is required and tracked by the certifier which ensures that there are no substitutions. If there are substitutions then the clock on the transition of the whole operation starts again. The regulation is also clear that the operation is required to submit an application to start the process and that starts the twelve month clock, it is no longer arbitrary. So, an operation will still be in transition until the twelve months has been completed under the submitted OSP.

The regulation is clear about which animals are transitional, not just the dairy cows but any progeny born during that transitional year that consumes the third year transitional feed. This will again be a test for producers and certifiers to ensure that there is accurate and audited record keeping at a time of increased stress during the transitional process. Relatively easy on a small herd for which this exception was originally designed, but more complicated for both certifier and producer on a larger herd. Within these new regulations there is a recurring wording about good recordkeeping which can then be enforced and audited by the increasing numbers of NOP employees.

There is a new, and at first glance worrying, variance that has been added that will allow the movement of transitioned animals between organic herds. It is a loophole but the variance is not at the discretion of the certifier but has to go through the certifier to the Administrator. It also has a restriction on the size of the operation under the SBA definition of a small dairy business (13 CFR Part 121). Regulations currently establish that a dairy cattle operation is a small business if it takes in less than one million dollars in annual receipts. For an organic herd, assuming a herd average of 14,000 pounds annually per lactating cow at the low, but current, farmgate price of $31 per hundred, the number of cows would be approximately 220. This variance was introduced to minimize adverse economic impact on small entities, as directed by the Regulatory Flexibility Act.

This regulation, the Final Rule, does strike out one of my favorite phrases “an entire, distinct herd.” The NOP has decided to us the words ‘certified operation’ to define who can use the one-time exemption, which it says brings more uniformity to all the regulations and is easier to track and enforce. Not producer or person as these titles has been the subject of many interpretations. In its explanation for the choice of entity it defers to the certifiers as the ones that will have to monitor and enforce who has already used the one-time exemption. It dismissed NODPA’s and other’s ‘responsibly connected person’ within the certified business argument for who can or can not use the exemption as being too difficult to enforce, although the term is used and enforced elsewhere in AMS. Using the ‘certified operation’ does allow the transition to be used many times by the same businesses or individuals if they start a new operation even if it is on the same property with the same owners or management. Our hope is the careful tracking of transitional animals, the better definition of transitional and the prohibition of organic dairies sourcing (a good overarching word to cover any form of transfer) transitional animals will give certifiers enough tools to stop as much abuse as possible.

There has always been concern that with those operations that bring breeder stock onto an organic operation, manage them organically for the last third of gestation so that the breeder stock can produce and nurse the organic offspring, and then return that breeder stock to nonorganic management until they are again bred. The NOSB and others have suggested that such a practice does not align with a regulatory provision that prohibits organic livestock removed from organic operations and subsequently managed on nonorganic operations to be sold, labeled, or represented as organically produced (7 CFR 205.236(b)).3 To clarify these potentially conflicting regulations, the Final Rule addresses the use and management of breeder stock on organic operations. The Final Rule reiterates that nonorganic breeder stock may be brought from a nonorganic operation onto an organic operation at any time, but they must be brought onto the organic operation no later than the last third of gestation if their offspring are to be raised as organic livestock.

Given the time that everyone has been preparing for this regulation, and the number of times comments have been submitted, we had supported immediate implementation of the prohibition of organic dairies sourcing transitional animals and the ending of any existing organic dairies continuing to bring conventional animals on board. The Final Rule established a compliance date of April 5, 2023, or ten months after the effective date of the Rule. The effective date of the Rule is sixty days from the publication date in the Federal Register of April 5 2022. This means that a certified operation may still add or sell transitioned animals up to one year from the publication date in the National Register. Certified operations would have to stop any more transitions that would not be completed by one year from the publication date in the Federal Register, so immediately. Starting on the compliance date of one year from the effective date of the rule all certified operations (i.e., operations certified as of the compliance date) must fully comply with the provisions of this final rule, therefore no more sourcing of transitional animals or continuous transition.

I hope that this article has assisted with the understanding of what the new Final Rule is and how it will be interpreted by the certifiers and the NOP auditors. The organic community has done its work in attempting to create regulations that are clear, enforceable and fair. It is now over to the certifiers, NOP and the milk buyers to enforce these standards and take away the organic certification of those that don’t follow the mandated requirement or the certifier status of those certifiers that do not enforce the regulation. To quote one well known organic dairy farmer when asked for a comment on the publication of the Final Rule, we can now have relief after “20 years of banging our heads against the wall.” Thanks to all that have worked on this for 20 years, both from the community and at NOP, and the next generation of organic dairy farmers’ thanks you, too.

Below is the text of the changes to regulation from that has not yet been published in the Federal Register (as of 3.30.2022) and is not the official version of the Origin of Livestock final rule.

**Change is definitions:**

***Organic management:*** Management of a production or handling operation in compliance with all applicable provisions under this part.

***Third-year transitional crop*:** Crops and forage from land included in the organic system plan of a producer’s operation that is not certified organic but is in the third year of organic management and is eligible for organic certification in one year or less.

***Transitioned animal*:** A dairy animal converted to organic milk production in accordance with §205.236(a)(2) that has not been under continuous organic management from the last third of gestation; offspring born to a transitioned animal that, during its last third of gestation, consumes third-year transitional crops; and offspring born during the one-time transition exception that themselves consume third-year transitional crops.

**§ 205.236 Origin of livestock.**

(**a**)Livestock products that are to be sold, labeled, or represented as organic must be from livestock under continuous organic management from the last third of gestation or hatching: *Except*, That:

(**a**) (**1**) ***Poultry***. Poultry or edible poultry products must be from poultry that has been under continuous organic management beginning no later than the second day of life;

(**a**) (**2**) ***Dairy animals***. Subject to the requirements of this paragraph, an operation that is not certified for organic livestock and that has never transitioned dairy animals may transition nonorganic animals to organic production only once. After the one-time transition is complete, **the operation** may not transition additional animals or source transitioned animals from other operations; the operation must source only animals that have been under continuous organic management from the last third of gestation. Eligible operations converting to organic production by transitioning organic animals under this paragraph must meet the following requirements and conditions:

(i) Dairy animals must be under continuous organic management for a minimum of 12 months immediately prior to production of milk or milk products that are to be sold, labeled, or represented as organic. Only certified operations may represent or sell products as organic.

(ii) The operation must describe the transition as part of its organic system plan. The description must include the actual or expected start date of the minimum 12-month transition, individual identification of animals intended to complete transition, and any additional information or records deemed necessary by the certifying agent to determine compliance with the regulations. Transitioning animals are not considered organic until the operation is certified.

(iii) During the 12-month transition period, dairy animals and their offspring may consume third-year transitional crops from land included in the organic system plan of the operation transitioning the animals;

(iv)Offspring born during or after the 12-month transition period are transitioned animals if they consume third-year transitional crops during the transition or if the mother consumes third-year transitional crops during the offspring’s last third of gestation;

(v) Consistent with the breeder stock provisions in §205.236(a)(3), offspring born from transitioning dairy animals are not considered to be transitioned animals if they are under continuous organic management and if only certified organic crops and forages are fed from their last third of gestation (rather, they are considered to have been managed organically from the last third of gestation);

 (vi)All dairy animals must end the transition at the same time;

(vii) Dairy animals that complete the transition and that are part of a certified operation are transitioned animals and must not be used for organic livestock products.

(**a**) (**3)Breeder stock**. Livestock used as breeder stock may be brought from a nonorganic operation onto an organic operation at any time, Provided, That the following conditions are met:

(i)Such breeder stock must be brought onto the operation no later than the last third of gestation if their offspring are to be raised as organic livestock; and

(ii)Such breeder stock must be managed organically throughout the last third of gestation and the lactation period during which time they may nurse their own offspring.

(b) The following are prohibited:

(1)Livestock that are removed from an organic operation and subsequently managed or handled on a nonorganic operation may not be sold, labeled, or represented as organic.

(2)Breeder stock, dairy animals, or transitioned animals that have not been under continuous organic management since the last third of gestation may not be sold, labeled, or represented as organic slaughter stock.

(c)The producer of an organic livestock operation must maintain records sufficient to preserve the identity of all organically managed animals, including whether they are transitioned animals, and edible and nonedible animal products produced on the operation.

(d)**A request for a variance** to allow sourcing of transitioned animals between certified operations must adhere to the following:

(1)A variance from the requirement to source dairy animals that have been under continuous organic management from the last third of gestation, as stated in§205.236(a)(2), may be granted by the Administrator to certified operations that are small businesses, as determined in 13 CFR Part 121, for any of the following reasons:

(i)The certified operation selling the transitioned animals is part of a bankruptcy proceeding or a forced sale; or

(ii)The certified operation has become insolvent, must liquidate its animals, and as a result has initiated a formal process to cease its operations; or

(iii)The certified operation wishes to conduct an intergenerational transfer of transitioned animals to an immediate family member.

(2)A certifying agent must request a variance on behalf of a certified operation, in writing, to the Administrator within ten days of receiving the request of variance from the operation. The variance request shall include documentation to demonstrate one or more of the circumstances listed in paragraph (d)(1) of this section.

(3)The Administrator will provide written notification to the certifying agent and to the operation(s) involved as to whether the variance is granted or rejected.

Section 205.237 is amended by revising paragraph (a) 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 and handled by operations certified under this part, except as provided in §§205.236(a)(2)(iii) and 205.236(a)(3), except, that, synthetic substances allowed under §205.603 and nonsynthetic substances not prohibited under §205.604 may be used as feed additives and feed supplements, *Provided*, That, all agricultural ingredients included in the ingredients list, for such additives and supplements, shall habeen produced and handled organically.

Section 205.239 is amended by revising paragraph (a)(3) to read as follows:

**§ 205.239** Livestock living conditions.

(a) \*\*\*

(3) Appropriate clean, dry bedding. When roughages are used as bedding, they shall have been organically produced in accordance with this part by an operation certified under this part, except as provided in §205.236(a)(2)(iii), and, if applicable, organically handled by operations certified under this part.