



## **DEPARTMENT OF AGRICULTURE**

### **Agricultural Marketing Service**

#### **7 CFR Part 205**

**[Doc. No. AMS-NOP-15-0012; NOP-15-06]**

**RIN 0581-AD74**

### **National Organic Program (NOP); Organic Livestock and Poultry Practices**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule; delay of effective date.

**SUMMARY:** The United States Department of Agriculture's Agricultural Marketing Service (AMS) is delaying the effective date of the Organic Livestock and Poultry Practices final rule published in the *Federal Register* on January 19, 2017 (OLPP final rule), until May 14, 2018.

**DATES:** As of November 9, 2017, the effective date of the final rule published on January 19, 2017 (82 FR 7042), delayed on February 9, 2017 (82 FR 9967), further delayed on May 10, 2017 (82 FR 21677), is further delayed until May 14, 2018.

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**SUPPLEMENTARY INFORMATION:** The OLPP final rule amends the organic livestock and poultry production requirements of the USDA organic regulations by adding new provisions for livestock handling and transport for slaughter and avian living conditions; and expands and clarifies existing requirements covering livestock care and production practices and mammalian living conditions. The rule finalized a proposed rule that AMS published in the *Federal Register* on April 13, 2016 (81 FR 21955). The OLPP final rule was scheduled to become effective on March 20, 2017. Consistent with the memorandum of January 20, 2017, to the heads of

executive departments and agencies from the Assistant to the President and Chief of Staff, entitled, “Regulatory Freeze Pending Review,” on February 9, 2017, AMS delayed the effective date of the OLPP final rule until May 19, 2017.

Because significant policy and legal issues addressed within the final rule warranted further review by USDA, AMS delayed the effective date by an additional 180 days from May 19, 2017 to November 14, 2017. In addition, AMS published a notice of proposed rulemaking (NPRM) that solicited public comments on the direction that USDA should take with respect to the rule. The NPRM presented four options for agency action: “Option 1: Implement,” allowing the Organic Livestock and Poultry Practices final rule to take effect on November 14, 2017; “Option 2: Suspend,” suspending the Organic Livestock and Poultry Practices final rule indefinitely; “Option 3: Delay,” delaying the Organic Livestock and Poultry Practices final rule’s effective date beyond November 14, 2017; and “Option 4: Withdraw,” withdrawing the Organic Livestock and Poultry Practices final rule. The 30-day public comment period closed on June 9, 2017.

AMS received over 47,000 comments on the four options for agency action. Over 40,000 of commenters, including over 34,600 submitted as form letters, supported “Option 1: Implement”; twenty-eight other commenters supported “Option 4: Withdraw”; a few chose “Option 2: Suspend”; and only one chose “Option 3: Delay.” The remaining commenters did not indicate a clear preference.

Most commenters supporting “Option 1: Implement” expressed concern animals would be harmed if USDA did otherwise. Some said consumers expect animal welfare to be a part of organic certification and consumers are concerned about humane transport and slaughter procedures. Noting the inclusive nature of the rule development process, these commenters

advocated for clear, consistent standards so that organic farmers would be on a “level playing field.” Others said they believed “Option 1: Implement” would strengthen USDA’s organic seal broadly and benefit organic farmers.

Commenters supporting “Option 2: Suspend” included veterinarians and farmers, and commenters supporting “Option 4: Withdraw” included organic producers and trade associations. These commenters gave similar reasons for their positions, including the economic costs and regulatory compliance burdens; increased consumer prices and reduced availability of organic eggs; biosecurity and food safety risks; and potentially higher avian mortality rates. Some commenters stated that the Organic Livestock and Poultry Practices final rule is unnecessary because current regulations are sufficient and the final rule is outside the scope of the NOP’s authority and role. Others noted the significant investment costs in land and facilities that would be required to implement the poultry space and outdoor access requirements, making business unsustainable for many organic farmers. This final rule adopts Option 3: Delay, so that important questions regarding USDA’s statutory authority to promulgate the OLPP rule and the likely costs and benefits of that rule, can be more fully assessed through the notice and comment process prior to AMS making a final decision on whether the OLPP final rule should take effect.

The Organic Livestock and Poultry Practices final rule consisted, in large part, of rules clarifying how producers and handlers participating in the National Organic Program must treat livestock and poultry to ensure their wellbeing. (82 FR 7042.) Although animal welfare is an important USDA priority, AMS believes that OFPA’s reference to additional regulatory standards “for the care” of organically produced livestock is limited to health care practices similar to those specified by Congress in the statute, rather than as reflecting a stand-alone concern for animal welfare. AMS intends to seek public comment on this interpretation.

AMS also is concerned that the Organic Livestock and Poultry Practices final rule is not consistent with USDA regulatory policy principles, including those expressed in Executive Orders 12866 and 13563, because the requirements in that rule may not represent the most innovative and least burdensome tools for achieving regulatory ends; may impose costs that are not justified by the potential benefits; and may not reasonably be tethered to OFPA's statutory text, nature, and purpose. AMS intends to seek public comment on these questions. Of note, during the course of reviewing the rulemaking record for the OLPP final rule, AMS discovered a significant, material error in the mathematical calculation of the benefits estimates. With the material error, the regulatory impact analysis presented costs and benefits in a table that could be reasonably interpreted to conclude that benefits were likely to exceed the costs. (82 FR 7083-82 FR 7084.) However, AMS believes that the regulatory impact analysis' calculation of benefits was flawed because the incorrect calculation was applied for the 3 percent and 7 percent discount rates. Re-analysis using the correct mathematical calculations suggests that this error was material. It is not appropriate for AMS to allow a final rule to become effective based on a record containing such a material error. AMS intends to seek public comment on the revised calculation of benefits.

Due to these significant concerns regarding statutory authority for, and costs and benefits of, the OLPP rule, including the question whether the OLPP final rule was based on a mathematically flawed assessment of benefits, AMS is selecting Option 3: Delay. AMS is issuing this final rule to further delay the effective date for until May 14, 2018 to allow for AMS to issue another notice of proposed rulemaking to receive comments on USDA statutory authority under the OFPA to regulate animal welfare; the likely costs and benefits of the OLPP rule viewed in terms of the statutory objectives of the OPFA, as interpreted above; whether the

OLPP rule's requirements represent the most innovative and least burdensome way to achieve regulatory ends, and the revised calculations and analysis of the benefits of the OLPP rule. This delay will provide additional time for AMS to solicit comment on these important issues and review all the comments prior to making a final decision on the direction of the OLPP final rule.

To preserve the status quo rather than allow an expansive set of new requirements to become effective only to be delayed, suspended, or withdrawn a short time later and to allow AMS to receive and consider comments on the issues discussed above, this final rule action is effective upon publication because AMS believes that the 30-day delay is impracticable, unnecessary, and contrary to the public interest. When agencies establish good cause for an immediate effective date, Congress intended that, combined with unavoidable time limitations, "the primary consideration was to be the 'convenience or necessity of the people affected.'" *United States v. Gavrilovic*, 551 F.2d 1099, 1104 (8th Cir. 1977) (citing S.Rep.No.752, 79th Cong., 1st Sess. 15 (1946); H.R.Rep.No.1980, 79th Cong., 2d Sess. 25 (1946)). Ordinarily, the thirty-day waiting period gives stakeholders and the public a reasonable time to adjust behavior. *Omnipoint Corp. v. F.C.C.*, 78 F.3d 620, 630 (D.C. Cir. 1996). In this case, however, a thirty-day waiting period would require stakeholders to begin changing their behavior to comply with the OLPP final rule, when that rule may be delayed, suspended, or withdrawn after the agency has completed review of comments in response to an notice of proposed rulemaking that will present the issues discussed above. It is also contrary to the public interest to allow a final rule that is based on a flawed record to become effective. Thus, and for the reasons stated above, waiting for thirty days to delay the effective date of the OLPP final rule is not warranted by "convenience" and would be unnecessary and contrary to the public interest.

Dated: November 8, 2017

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