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## Legal Inconsistencies in the New Organic Livestock Rule

*An analysis of where these rules might conflict  
with OFPA or the existing regulations*

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The Organic Foods Production Act (OFPA), codified at 7 U.S.C. ch. 94; 7 U.S.C. §6501 *et seq.*, generally regulates livestock in compliance with organic certification. When analyzed, there were no direct conflicts between OFPA and the proposed Organic Livestock and Poultry Practices rule.

The new rule adds to and changes the existing organic livestock regulations. The additions are significant and were clearly the focus of the new rule, adding a completely new section of avian living conditions (§205.241).

Inconsistencies and issues exist within the new rule itself – in some instances *because* of the changes made in the new rendition. In particular, these inconsistencies have to do with the health and well-being of the animals.

From the current version of the Livestock Living Conditions regulations (updated in 2010):

**7 CFR § 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;*

*(1) Year-round access for all animals to the outdoors, shade, shelter, exercise areas, fresh air, clean water for drinking, and direct sunlight, suitable to the species, its stage of life, the climate, and the environment: Except, that, animals may be **temporarily** denied access to the outdoors in accordance with §205.239(b) and (c).*

*Yards, feeding pads, and feedlots may be used to provide ruminants with access to the outdoors during the non-grazing season and supplemental feeding during the grazing season. Yards, feeding pads, and feedlots shall be large enough to allow all ruminant livestock occupying the yard, feeding pad, or feedlot to feed simultaneously without crowding and without competition for food. **Continuous total confinement***

***of any animal indoors is prohibited. Continuous total confinement of ruminants in yards, feeding pads, and feedlots is prohibited. [Emphasis added]***

Several sections in the new rule seem to conflict with the regulation requiring that “[t]he producer of an organic livestock operation must establish and maintain year-round livestock living conditions which accommodate the health and natural behavior of animals...” This section [§205.239(a)] remains largely unchanged in the new rule (changes bolded below):

(a) *The producer of an organic livestock operation must establish and maintain year-round livestock living conditions which accommodate the **well-being** and natural behavior of animals, including: (1) Year-round access for all animals to the outdoors, shade, shelter, exercise areas, fresh air, clean water for drinking, and direct sunlight, suitable to the species, its stage of life, the climate, and the environment: Except, that, animals may be temporarily denied access to the outdoors in accordance with paragraphs (b) and (c) of this section.*

While the term “health” could be considered synonymous, the term “well-being” encompasses more than just an animal’s biological functions. As a case in point, the Merriam-Webster dictionary defines “well-being” as: “the state of being happy, healthy, or prosperous.” Because this term encompasses an animal’s emotional state, which we can interpret through their behavior, we must now take that into account for organic production. This would seem to be an improvement, allowing for more comprehensive coverage of animal welfare in comparison to the current language.

What follows is a list of some specific concerns depicting where the final rule conflicts with the language that living conditions must “*accommodate the **well-being** and natural behavior of animals.*” These issues are particularly relevant to the new rule as it applies to hogs and poultry.

## **Hogs**

The new §205.239(a)(9) and (10), concerning swine housing, are applicable to the performance of natural behaviors by pigs and require the ability to display instinctive rooting behaviors throughout (even when temporarily confined).

However, §205.239(a)(10) allows for denial of access to **rooting material** when hogs are farrowing due to commenter concern that piglets would be suffocated or crushed. There is no requirement in the new rule that some bedding must be provided to hogs when farrowing, even if it is not deep enough to root in. The new requirement for **outdoor access** seems broad in §205.239(a)(12)<sup>1</sup>. However, in the AMS guidelines and commentary on the final rule, it is stated that swine are “***not required to have access to the soil or vegetation.***” This is not specified in the actual final rule.

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<sup>1</sup> § 205.239(a)(12) Outdoor space must be provided year-round. When the outdoor space includes soil, maximal vegetative cover must be maintained as appropriate for the season, climate, geography, species of livestock, and stage of production.

Both digging and wallowing are natural behaviors for hogs. While the rooting instinct may be served by providing deep bedding material, digging and wallowing are not. There is a strong argument that hogs being prevented from wallowing and rooting would affect an animal's *well-being* as the final rule states. It could also increase stress and aggression in the hogs.

Another related concern for the well-being of hogs is that both **needle teeth clipping and tail docking** will still be allowed in this final rule under §205.238(a)(5)(i). Even when done at a young age, these procedures are typically performed without any kind of anesthesia and can cause profound trauma, compromising the “well-being” of the animal.

While the AMS argues that prohibiting the practices raises welfare concerns because swine can injure each other with the needle teeth (often they chew on each other's tails and ears when stressed, becoming cannibalistic), by the time such injuries occur, the animals are already in a stressed environment. In addition, while the new rule requires some documentation that alternative methods were tried, there is no age cap nor requirement to try certain alternatives that would promote the natural behavior of swine. Presumably, if other methods to curb aggression must be used, hogs could quickly become too old to perform these modifications.

The best prevention practice for hog aggression would require providing more space, lower stocking densities, and opportunities for animals to engage in their natural instinctive behaviors. These require material changes to management practices and infrastructure. Unless changes in either the industry or the regulations occur, the justification for routine physical alterations will be maintained in perpetuity.

It remains to be seen how the qualification in the new rule that, “[t]he following practice may not be routinely used and must be used only with documentation that alternative methods to prevent harm failed...” will be enforced due to the vagary of the language. This leaves open the potential for abuse by industrial-scale producers who have, without regulatory mandate, an economic disincentive to provide a richer environment for their animals. Few, if any, family-scale producers who afford swine authentic access to the outdoors, on soil, find the necessity to physically alter their hogs due to aggression.

## **Poultry**

The Livestock and Living Conditions section does apply to poultry, as it is included in the OFPA definition.<sup>2</sup>

**Beak trimming** is still allowed for poultry, while de-beaking remains prohibited<sup>3</sup>. However, combining the language of the rules, there is inconsistency in how this would be applied. The new §205.238(a)(5)(ii) prohibits beak trimming after 10 days of age.

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<sup>2</sup> 7 USC § 6502(11) Livestock. The term "livestock" means any cattle, sheep, goats, swine, **poultry**, equine animals used for food or in the production of food, fish used for food, wild or domesticated game, or other nonplant life. [emphasis added]

<sup>3</sup> § 205.238(a)(5)(ii)

Dissimilar to the problem of tail docking and needle teeth trimming in hogs, there is no requirement that aggression is documented in the birds before beak trimming is performed — because of the maximum age requirement, any perceived need would have to be determined on a pro-forma basis.

Despite being less extreme than de-beaking, beak trimming affects the birds' well-being by taking away the tip of their beak. This makes it more difficult for them to perform natural behaviors – particularly foraging and the consumption of vegetation and invertebrates outdoors. As with the problem of hogs, aggression and cannibalism in poultry is directly related to the welfare of the flock. Overcrowding and the inability to perform natural behaviors increase the stress response in poultry. Few, if any, producers who afford their birds legitimate access to pasture engage in beak trimming.

The new allowance for pullets to be confined up to 16 weeks, with 5 weeks of possible added time for nest box training (a total of 21 weeks), also contradicts the animals' well-being and natural behavior.<sup>4</sup> Poultry, by nature, instinctively peck, scratch, and hunt for palatable vegetation and protein (usually in the form of invertebrates). Confining pullets completely indoors during the first 21 weeks of life (5.25 months) prevents them from going outdoors to access soil and vegetation.

There are already provisions for dealing with confinement due to inclement weather, which should cover confining younger birds when environmental conditions could harm them; temporary confinement allowance is detailed in the new provision §205.241(d).

The new §205.241(c) deals with outdoor space requirements for poultry. Part of this requirement states that: “[p]roducers must provide access to the outdoors at an early age to encourage (i.e., train) birds to go outdoors.” This appears to be in conflict with allowing pullets to be confined for up to 21 weeks.

Unfortunately, even under the current standards, a very small percentage of organic laying hens ever venture outdoors because, as young pullets, they were never “trained” to be comfortable outside of the building.

The final rule [§205.241 (b)(1)] also states that: “[p]oultry housing must be sufficiently spacious to allow all birds to move freely, stretch their wings, stand normally, and engage in natural behaviors.” Research shows that the average grown hen needs 2 ft<sup>2</sup> to fully stretch both of her wings. The indoor stocking density allotted by the final rule, providing as little as 1 ft<sup>2</sup> in aviaries and 1.5 ft<sup>2</sup> in single-level houses, will not provide this needed space, preventing the most basic physical activity in some birds.

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<sup>4</sup> The new § 205.241(d)(2)(ii) allows for the 16 week confinement for pullets. (§ 205.241(d)(7) allows the additional 5 weeks for nest box training, with the limiting language that “...provided that birds shall not be confined any longer than required to establish the proper behavior.”

What follows are detailed notes taken on the recent release of the proposed rule and the Agricultural Marketing Service's general comments and responses to public comment.

**NOTES AND ANALYSIS:  
ORGANIC LIVESTOCK AND POULTRY PRACTICES FINAL RULE  
AMS-NOP-15-0012; RIN 0581-AD44**

The following is Cornucopia's technical analysis of the new Organic Livestock Rule.

Note: Cornucopia's commentary is in **red text**, interesting changes are highlighted in **yellow**, and language changes within the rule are underlined.

The Agricultural Marketing Service (AMS) via the National Organic Program (NOP) released this final rule to address the care and production practices, transport, slaughter, and living conditions for organic livestock and poultry. 6,675 written comments were received, of which 78% (5,182) were form letters. There were 1,493 individual (non-form) comments on the proposed rule. The final rule addresses some of those commenter concerns, but not others.

It is the contention of The Cornucopia Institute that key elements of this rule were not necessary to facilitate enforcement of the existing standards (for example, affording organic poultry meaningful access to the outdoors is already mandated by law). Furthermore, by virtue of the years-long delay in promulgating and clarifying the standards, the majority of organic livestock production has become industrialized.

Many of the provisions are inadequate. Standards that would have upheld the true intent of the Organic Foods Production Act are missing.

What follows are notes and analysis on the final rule, including notes on the AMS commentary.

**NOTES REGARDING THE EXECUTIVE SUMMARY**

- **Implementation timing:** This rule will be fully implemented March 20, 2018 EXCEPT organic egg operations that are certified before March 20, 2020 need to implement the outdoor access requirements by March 21, 2022. Organic egg operations that become certified after March 20, 2020 need to comply with the outdoor access requirements in order to obtain certification. Organic broiler operations must fully implement the indoor space requirements by March 20, 2020.
- The final rule only applies to chickens (not organic turkeys — further rulemaking will be required).
- One goal of the rule: reduce certification burdens on producers because they won't have to get certified by independent animal welfare certification programs (the USDA found that the majority of organic producers also participate in private, third-party verified animal welfare certification programs).
- Adds new terms to § 205.2: *beak trimming*, *caaponization*, *cattle wattling*, *de-beaking*, *de-snooding*, *dubbing*, *indoors or indoor space*, *mulesing*, *non-ambulatory*, *outdoors*

*or outdoor space, perch, pullet, ritual slaughter, soil, toe clipping, and vegetation.* (Italicized terms were either revised from or NOT in the proposed rule).

- Definition of “outdoors or outdoor space”: any area outside of an enclosed building or enclosed housing structure, but including roofed areas that are not enclosed. In this definition, “outdoors or outdoor space” includes all of the non-enclosed space encompassing soil-based areas such as pastures, pens, or sacrifice lots; hardened surface areas such as feedlots, walkways, or loafing sheds; and areas providing outdoor shelter such as windbreaks and shade structures. The definition has species based requirements (the 50% vegetation requirement for poultry remains). [17]
- Confirms that USDA has the authority to conduct this rulemaking and the NOSB is authorized to recommend standards.
- Many comments asked the AMS to clarify the current rule, prompting them to continue with this rulemaking.
- Commenters asked how this final rule would impact existing organic trade agreements, such as equivalency agreements and recognition agreements. The USDA will respond and assist with these issues relating to foreign governments (and does not foresee a problem).

#### **NOTES ON THE AMS RESPONSE AND ANALYSIS TO COMMENTS ON THE GENERAL SUMMARY & DEFINITIONS (§ 205.2)**

- Amended definition of “de-beaking” and stood by definition and prohibition of caponization. [20-22]
- AMS amended the definition of de-beaking in the final rule to make it more specific (as to how much of the beak can be removed).
- Definition of indoors: commenters were specifically concerns about how the rule would apply to things like chicken tractors, which may have a roof but also offer full contact to the soil/vegetation. In response AMS revised definition of indoors to *define it as the space inside of an enclosed building or housing structure with solid, slatted, or perforated flooring.* [23-24]
- AMS replaced the term “pasture housing” with “mobile housing.” [24]
- Notes that outdoor space is the default living space. [25]
- Regarding nest boxes being included in indoor space – AMS choose to exclude nest boxes from indoor space calculations. [26]
  - ***This is an important clarification – nest boxes should never be included in the calculation.***
- AMS chose to qualify porches as “indoor space” as long as they are accessible to birds at all times. [27].
  - ***Allowing porches to be considered part of the “indoor space” calculation needs more clarification. While on the surface the AMS seems to want to appeal to businesses who have relied on porches to meet outdoor access requirements, most porches are not arranged such that they are accessible to all birds at all times (often porches are accessed through doors that make the limited space hard for all birds to access). If included in any space calculation, these porches must be “accessible to ALL birds”***

*and standards should be developed for certifiers to determine whether that space is being used continuously.*

*Furthermore, since most porches have concrete or wood floors, are devoid of any natural amenities that would interest chickens, and do not provide food and water, few if any chickens will take advantage of that additional space. The end result will be higher stocking densities in the primary structure itself (this rule already allows producers to stock at levels which are no better than conventional factory livestock facilities provide).*

- Comments on soil/vegetation requirement: [28-29]
  - AMS says that requirements for vegetation would be hard to meet seasonally.
- Spaces with roofs are allowed to be calculated as “outdoors” as long as they meet other qualifications, including not being “enclosed.” [29]
  - *This is a considerable loophole since businesses could erect temporary roofed structures that could qualify as outdoor space or potentially even convert porches, by removing the screened walls, to meet the new definition of “outdoors”. What may save this issue is the language (cited below) that structures are “moved regularly.”*
  - The language in the final rule (in the definition section § 205.2) is as follows: Outdoors or outdoor space. Any area outside an enclosed building or enclosed housing structure, including roofed areas that are not enclosed. Outdoor space for avian species includes, but is not limited to: (1) Pasture pens. Floorless pens, with full or partial roofing, that are moved regularly and provide direct access to soil and vegetation.
- Comments on how confusing it is to have “roost” and “perch” – AMS choose to just define perch. [30]
- Definition of “soil” – many comments on the issue, but AMS retained the proposed definition. [30-31]
- Stocking density: AMS removed the phrase “at any one time” and included “given area” in response to comments that the term is used for both indoor and outdoor areas. [31-32]
- AMS refused to define “swine aggression” (commenter concern). [34]

## **NOTES ON THE AMS COMMENTS AND CONSIDERATIONS FOR LIVESTOCK CARE AND PRODUCTION PRACTICES STANDARD (§ 205.238)**

### **Notes on the description and summary of the final rule:**

- Needle teeth clipping and tail docking in pigs is still allowed when there are documented welfare reasons. [35-36]
  - *This continued allowance is indefensible, even with the restrictions. AMS argues that preventing it entirely raises welfare concerns because swine can injure each other with the needle teeth (often they chew on each other’s tails and ears), but by the time such injuries occur the animals are already in a stressed environment. Responding by tail docking and teeth clipping only serves to enhance the suffering at that point. This is a*

**crutch for the high density confinement industrial model of raising hogs regardless of scale. (See p. 45 for more detail on the AMS reasoning).**

- New § 205.238(a)(8) that requires organic producers to actively monitor and document lameness within the herd or flock. [37]
- Synthetic medications are allowed to reduce suffering; withholding times established. [37]
- AMS added the new § 205.238(c)(8) to prohibit organic livestock producers from withholding individual treatment **designed to minimize pain** and suffering for injured, diseased, or sick animals. The final rule, in § 205.238(c)(8), also references the AVMA guidelines on euthanasia. [38-39]
  - ***This was always assumed in the organic standards but has now been clarified and explicitly listed. Simple analgesics relieve suffering and pain in animals with health conditions. The desire to maintain the organic status of an animal should never be used as an excuse to promote individual pain and suffering. The added reference to euthanasia should provide some guidance to livestock producers as well.***
- Forced molting is now prohibited – § 205.238(c)(10).
- A parasite control plan is now required.
- Sections on euthanasia prevent suffocation, manual blows to the head by blunt instrument or manual blunt force trauma, and use of equipment that crushes the neck [(205.238(e)(2)]. [39-40]

**Discussion of comments received on Livestock Healthcare Practice Standard:**

- Breed selection comments (esp. regarding poultry breeding that affects the health of the animal) – the AMS said this isn't possible. [40-41]
- Regarding comments saying that physical alterations should not be performed because of "hygiene" (that this could create a loophole in the rule) – AMS REMOVED hygiene from the final rule. ***(A positive change.)*** HOWEVER, physical identification is still an allowed purpose for physical alteration. [41-42]
- Comments on swine needle teeth/tail docking – that it is still allowed. [45]
- § 205.238(a)(5)(ii) clarified in response to comments concerned about loophole with language "The following practices must not be performed on a certified operation..." [45-46]
- AMS is NOT entirely prohibiting beak trimming. [47]
  - ***This is detrimental for animal welfare. In high welfare organic systems beak trimming is unneeded – it is an indicator of POOR WELFARE if the birds are aggressive/cannibalizing each other. It may be preferable that individual aggressive birds are culled and/or that birds are selected for less aggression (typically aggression is indicative of stress related to stocking density and denying birds the opportunity to exhibit their natural instinctive behaviors). In general when enough space and enrichments are given to birds (and livestock of all kinds, as in the case of tooth clipping and tail docking and hogs) these kinds of painful and disfiguring alterations are not needed. NOTE: beak trimming does make it more difficult for birds to consume grass and other vegetation.***



- Comments requested prohibition on all branding, but AMS only prohibited face branding EXCEPT where there is an exception for state or federal law. [50-51]
  - ***Face branding is something that should be banned wholesale, and it's beneficial that the new rule takes this into account. Branding in general is painful for animals – ear tags, ear notches, back tags, neck chains, tail tags, freeze brands, tattoos, paint marks, leg bands, and electronic identification methods are all less painful. Face branding is already illegal in many states and is widely considered “cruel” by the scientific community.***
- AMS removed the term “edible” from §205.238(c)(1) after commenter concerns that the sale of fiber would be okay for animals undergoing treatment. [54]
- There were detailed changes made regarding administering synthetic drugs. The proposed §205.238(b)(3) has been deleted and the requirements for this provision have been incorporated under § 205.238(b). [56-57]
  - The language of the final rule at 205.238(b) is as follows: (b) Producers may administer medications that are allowed under 205.603 to alleviate pain or suffering, and when preventive practices and veterinary biologics are inadequate to prevent sickness. Parasiticides allowed under § 205.603 may be used on: (1) Breeder stock, when used prior to the last third of gestation but not during lactation for progeny that are to be sold, labeled, or represented as organically produced; And (2) Dairy stock, when used a minimum of 90 days prior to the production of milk or milk products that are to be sold, labeled, or represented as organic.
- AMS amended § 205.238(c)(3) to provide clarification on the allowed use of oxytocin by adding the condition, “except as provided in § 205.603.” [58]
- Notes that livestock producers should describe their comprehensive parasite management plan within their overall organic system plan. [61]
- Comments regarding the killing of male chicks or unhatched eggs responded to by noting that the concern was “out of scope”. Under the USDA organic regulations, poultry or edible poultry products must be sourced from poultry that has been under continuous organic management beginning no later than the second day of life. [63]

## **NOTES ON AMS SUMMARY AND COMMENTS REGARDING MAMMALIAN LIVING CONDITIONS (§ 205.39)**

### **Notes on the description and summary of the final rule:**

- AMS revised § 205.239(a)(4)(i) to specify that shelter must be designed to accommodate natural behaviors over every 24-hour period. Shelter must have sufficient space for the animals to lie down, stand up, and fully stretch their limbs and allow livestock to express their normal patterns of behavior over a 24-hour period.
  - Edits to the rule include (according to AMS summary): **Dairy animals can be housed in stalls that direct manure and urine for part of the day as long as they have complete freedom of movement during parts of the day for grazing, loafing, and exhibiting natural behavior.** [64-65]

- Indoor space is not required for livestock, but *shelter* is. [65]
- Rule allows the individual housing of young animals until weaning (no longer than 6mo.) but they have to be able to turn, stretch, lie down, etc. [65]
- THREE new provisions in § 205.239(a)(8) to require the group housing of swine, with three listed exceptions:
  - § 205.239(a)(8)(i) allows for sows to be individually housed at farrowing and during the suckling period;
  - § 205.239(a)(8)(ii) allows for boars to be individually housed to reduce the likelihood of fights and injuries; and
  - § 205.239(a)(8)(iii) allows for swine to be individually housed after multiple documented instances of aggression or to allow an individual pig to recover from a documented illness. [66]
    - ***There should be more clarity in how the aggression is documented - aggression is usually only a serious problem with overcrowding and the inability to perform natural behaviors.***
- ROOTING: new provisions in §§ 205.239(a)(9) and (10) concerning swine housing are applicable to the performance of natural behaviors by pigs.
  - Section 205.239(a)(9) prohibits the use of flat decks or piglet cages. It also prohibits the stacking of piglets in flat decks in multiple layers.
  - §205.239(a)(10) requires that both indoor and outdoor areas for swine have some space that permits rooting. Producers have to demonstrate how swine can root during temporary confinement as well. The rule actually states: (10) For swine, rooting materials must be provided, except during the farrowing and suckling period.
    - ***Guidance will likely be needed to assure an adequate amount of space/material is provided to for the appropriate number of animals.***
- ADDED new requirement for outdoor access in § 205.239(a)(12). Organic livestock are required to have unencumbered access to the outdoors year-round, unless temporary confinement is justified under a specific reason described in the regulations (e.g., nighttime confinement for protection from predators for poultry). [67]
  - NOTE: Swine are not required to have access to the soil or vegetation according to AMS guidelines & commentary on the final rule.
- Confinement for breeding. Section 205.239(c)(1) describes the time when ruminants may be denied access to pasture, but not access to the outdoors, before and after a breeding attempt. Livestock can't be confined indoors to observe estrus or until they are determined to be pregnant, but groups of livestock can be confined before procedures. [68]

### **Discussion of comments received on Mammalian Living Conditions:**

- Comments that opposed soil as part of the requirement. AMS responded that many of the concerns were already addressed in the pasture rule (temporary confinement to protect soil and water quality). [70-71]
- Final rule requires year-round outdoor access for swine but AMS removed requirement that swine have access to soil due to comments. [72] (In the

commentary the AMS acknowledged that this was only really a problem when swine were placed in *too-small an area*.)

- Comments regarding free stall, tie stall, or stanchion barns for dairy animals: problem with current facilities and requirements to turn around, etc. (The draft rule would've required stall designs which would have resulted in animals urinating and defecating in their own bedding). AMS revised the standard to specifically state that **over a 24 hour period, mammalian livestock must have the opportunity to move, turn around, and exhibit natural behaviors.** Their comments state that the animals cannot be confined in stalls all day. [73-75]
  - ***This is an acceptable compromise. It would be preferable to phase-out these kinds of barns – i.e. no new barns built of this type. Phasing out the use of these barns would also benefit animal welfare. (Note: almost all dairy barns that are being built today are free-stall barns as they are less labor-intensive for farm workers and contribute to the well-being of the animals.)***
- Cattle young – some commenters wanted group housing required at a younger age. [73]
- Some comments were against farrowing crates or stalls for pigs.
  - AMS changed rule to NOT require rooting material during farrowing period. See for the language. [75-76]
    - ***This decreases humane conditions for farrowing hogs – they should have bedding of some kind. Depth of bedding will also matter for rooting, as bedding that is too shallow cannot meet a hogs need to root and dig (again, a guidance might be needed to negate a possible loophole here). The concern commenters and the AMS had regarding rooting material during farrowing is related to piglets being smothered/crushed by their mothers or deep bedding. Again, this is less of an issue in high welfare systems where a farrowing hog is given ample space. Some bedding should be provided even if it is not deep enough for true rooting.***

## NOTES ON AMS SUMMARY AND COMMENTS AVIAN LIVING CONDITIONS (§ 205.241)

### Notes on the description and summary of the final rule:

- Required living conditions include: year-round access to the outdoors, soil, shade, shelter, exercise areas, fresh air, direct sunlight, clean water for drinking, materials for dust bathing, and adequate space to escape aggressive behaviors. [77]
- Indoor space requirements (§ 205.241(b))
- Ammonia levels (205.241(b)(2)) – When ammonia levels exceed 10 ppm, producers must implement additional practices and additional monitoring to reduce ammonia levels below 10 ppm. Above 25ppm is not allowed. ***(Not altered from proposal – this threshold level is still very high considering other welfare considerations.)***
- Lighting requirements allow up to 16 hours of light (§ 205.241(b)(3)). [78]
  - The language of the rule reads as follows: (3) For layers and fully feathered birds, artificial light may be used to prolong the day length, to provide up to 16 hours of continuous light. Artificial light intensity must be lowered

gradually to encourage hens to move to perches or settle for the night. Natural light must be sufficient indoors on sunny days so that an inspector can read and write when all lights are turned off.

- Rule requires that litter be maintained in a “dry” manner; but can be topped off. Also indoor space has to allow for scratching and dust bathing. § 205.241(b)(6) [79]
- 205.241(b)(7) includes specific flooring requirements, including at least 30% solid flooring. [80]
- INDOOR SPACING REQUIREMENTS (New §§ 205.241(b)(8), 205.241(b)(9), and 205.241(b)(10)). Space requirements vary on type of housing for *layers*.
  - No more than 2.25 pounds of hen per ft<sup>2</sup> for housing that does not fit into defined types. [80]
  - NOTE: mobile pens do not count as “indoors”.
  - Aviary housing requires less indoor space than houses with limited vertical access.
- NOTE: AMS has only established indoor space stocking density rules for CHICKENS in this final rule. [81]
  - The final rule regarding actual allowed CHICKEN stocking densities is located at **205.241(b)(8)-(10)**, with stocking density for layers, pullets, and broilers denoted as separate from each other. The final rule reads as follows for indoor stocking densities [206]:
    - (8) For layers (*Gallus gallus*), indoor stocking density must not exceed (live bird weight): (i) Mobile housing: 4.5 pounds per square foot. (ii) Aviary housing: 4.5 pounds per square foot. (iii) Slatted/mesh floor housing: 3.75 pounds per square foot. (iv) Floor litter housing: 3.0 pounds per square foot. (v) Other housing: 2.25 pounds per square foot.
    - (9) For pullets (*Gallus gallus*), indoor stocking density must not exceed 3.0 pounds of bird per square foot.
    - (10) For broilers (*Gallus gallus*), indoor stocking density must not exceed 5.0 pounds of bird per square foot.
- Space provided depends on the average weight of the birds at the time (according to AMS summaries). AND larger breeds must be provided with more space, so the loophole with breed types may be avoided. [81-82 talking about the weight of birds]
  - Space is calculated by measuring all flat spaces (not perches or nest boxes).
  - **NOTE: the language of the actual rule does not specify that indoor stocking density must specifically be determined by the weight of the birds at the time (or rather, average weight of the birds), only that stocking densities be calculated by pounds per foot of room. This could be problematic because producers may rely on breed averages rather than determining the actual average weight of the birds they have (for example, one batch of layers may be heavier than average).**
  - **Additionally, the space required for birds—approximately one square foot in aviary systems—is no better for certified organic animals than for typical conventional, industrial-scale production. This was a real missed opportunity for the organic label to truly distinguish itself. It is folly for**

***the USDA to suggest that additional animal welfare labeling will no longer be required and suggesting that as a cost-saving for producers.***

- 205.241(c)(1) requires that the outdoor space be designed to promote and encourage outdoor access for all birds, DAILY.
- 205.241(c)(2) requires outdoor areas for poultry to have a minimum of 50% soil and that the soil portion of the outdoor area includes “maximal vegetative cover.” [83-84]
  - ***“Maximal vegetative cover” is going to be hard to police, especially because allowances are made for climate differences. Poultry producers in very arid or very cold climates may get a free pass when it comes to vegetation. AMS should include a guidance, similar to what they have done for ruminant grazing, that appropriate cultivars and management practices need to be implemented to assure vegetative cover even in climates where vegetation might not be expected.***
  - The language of the final rule (regarding vegetative cover) is as follows: (2) At least 50 percent of outdoor space must be soil. Outdoor space with soil **must include maximal vegetative cover appropriate for the season, climate, geography, species of livestock, and stage of production.** Vegetative cover must be maintained in a manner that does not provide harborage for rodents and other pests. [207]
- Spacing requirements: [84]
  - Layers: 1ft<sup>2</sup> outdoor space for every 2.25 pounds of bird in the flock. Ex. average 4.5 pounds, a producer must provide 2.0 square feet of outdoor space for each bird in the flock.
  - Pullets: 1 ft<sup>2</sup> of outdoor space for every 3.0 pounds of bird in the flock.
  - Broilers: 1 ft<sup>2</sup> of outdoor space for every 5.0 pounds of bird in the flock.
  - ***This type of spacing requirement should not be considered a “victory” in the organic industry. Organic Valley requires 5 ft<sup>2</sup> of outdoor space and other welfare certification programs and producers give 50-100 ft<sup>2</sup> for pastured birds. European regulators require 43 ft<sup>2</sup>. Mobile (chicken tractor) systems do give less apparent space to their birds, but because the pens are moved frequently, they are always exposed to new ground while still being kept safe.***
- New § 205.241(c)(7): porches and lean-tos that allow birds to freely access (with roof, but no screens) can count as outdoor space.
  - ***Allowing roofed structures attached to buildings to operate as “outdoor space” gives big industry another loophole with which to avoid giving their birds true outdoor access. These producers will be able to use this extra “space” to enable higher stocking densities.***
  - ***Note that porches can be utilized as either indoor OR outdoor space in the final rule. This is problematic. As worded, porches could count as both indoor and outdoor space during certain times. Even if porches cannot count as indoor and outdoor space simultaneously, their status***

***could potentially change depending on the season or time of day. This is confusing, potentially ripe for abuse, and needs guidance.***

- New § 205.241(d) describes allowed conditions for temporary confinement. Records need to be kept. This section maintained the requirement from the proposal that poultry must have access to the outdoors. Stage of life is an allowed condition for temporary confinement (4 weeks for broilers and up to 16 weeks for pullets without counting time for nest-box training). [85-86]
  - ***This is objectionable since many commercial pullet producers have testified that they allow young birds outdoor access. Again, this is a missed opportunity to distinguish organics.***
  - ***NOTE: allows for nest box training up to five weeks. This could extend the time pullets (or young layers at that point) are not given access to the outdoors up to 21 weeks. This is an unnecessarily long time.***
- § 205.241(d)(4) provides an allowance for indoor confinement to prevent risk to soil or water quality. Apparently this provision *allows for confinement of birds when the outdoor area is being managed to reestablish vegetation.* [87]
  - ***This could constitute another loophole. Industrial farms could “re-seed” multiple times per year and keep the ground free of poultry for a month or more at a time. These passages need to have further guidance to clarify and prevent their use in this fashion.***

#### **Discussion of comments received on Avian Living Conditions:**

- Clarification added that producers must try and maintain ammonia levels below 10ppm. [89-90] Non-subjective methods must be used to measure ammonia. [91]
- Lighting: rule edited to require up to 16 hours of *continuous light*. [91] ***(A beneficial clarification)***
- Issues of natural light – AMS kept the subjective test for inspectors (natural light indoors is sufficient for an inspector to read and write when all lights are turned off *anywhere indoors*). [93-94]
  - ***All fully feathered birds and layers are subject to the light requirements now with this beneficial clarification. Note that the natural light requirement, as written, could be interpreted to not require natural light for young birds (because the rest of 205.241(b)(3) speaks to fully-feathered and layers).***
- Section § 205.241(b)(5). Now contains all the exit area requirements instead of them being in different sections. [94-95]
- **AMS REMOVED** the requirement, as proposed, that exit areas be designed so that all birds within the house can go through the exit areas within one hour (b/c it would be too hard to verify compliance). [95]
  - ***This standard is intentionally vague and makes it even harder to enforce because the standard is less clear for producers.***
- Also regarding EXIT AREAS – it no longer says that exits have to be distributed around the building, just that “Poultry houses must have sufficient exit areas that are appropriately distributed to ensure that all birds have ready access to the outdoors...” [96]

- ***This change ONLY benefits large producers with fixed barns. AMS removed the explicit requirement that doors be spaced all around the building. Despite arguments to the contrary, this may make it difficult for all birds to exit in very large barns. The language requiring doors to be spaced around entire buildings should have been maintained for fixed barns.***
- Perches and roosts [97-98]
- Comments on INDOOR SPACE: Many comments recommended birds be provided with at least 1.5 ft<sup>2</sup> per bird, regardless of size. Other comments noted the requirements proposed by AMS fell short of the 2 ft<sup>2</sup> of indoor space recommended by the NOSB.
  - Standards fell on: for a 4.5lb layer (because the rule calculates space available by weight) 1.5 square feet per bird for floor litter housing; 1.2 square feet per bird for slatted/mesh floor housing; and 1 square foot per bird for mobile and aviary housing. [99]
    - ***These changes make mobile and aviary housing equivalent when they are not. The explanation is that houses with vertical space provide more space access in the house, BUT all flat surfaces in an aviary are still counted in the space calculation. In addition, mobile housing is always associated with true pasture production.***
  - NOTE the actual rule at **§ 205.241(b)(8)** states: (i) Mobile housing: 4.5 pounds per square foot. (ii) Aviary housing: 4.5 pounds per square foot. (iii) Slatted/mesh floor housing: 3.75 pounds per square foot. (iv) Floor litter housing: 3.0 pounds per square foot. (v) Other housing: 2.25 pounds per square foot.
- AMS removed the specific space requirements for turkeys and other avian species (both outdoors and indoors). [100 & 103]
- OUTDOOR SPACE: many commenters said the outdoor space was not large enough, that there was not strict enough rules for vegetation, etc. they also received comments that these requirements would make some people discontinue organic production. AMS did not change their outdoor space requirements. [101-102]
  - The outdoor area requirement: must be calculated as the outdoor area available to all birds in the flock at any given time. For example, if a producer rotates birds between two outdoor areas, each area must be large enough to meet the stocking density requirement. [108-109]
    - ***This language and requirement is reasonable, though the stocking densities themselves are not.***
  - Goes into more details as to how “porches” can be considered “outside” (discussed earlier and goes into more detail later). [109-112] **NOTE: they state that many commenters seem surprised/did not know that porches met the entire requirement for “outdoor access” before.**
  - Biosecurity: AMS addresses comments saying outdoor access is bad for biosecurity saying outdoor access requirements can be factored into comprehensive biosecurity plans. [113]

- They also state: “...rule does not obviate the necessity to comply with all other applicable laws and regulations, including animal health regulations of APHIS.”
  - Vegetation must be maintained to avoid harboring pests. Doors must also prevent pests from entering houses (wild birds/rodents). [117-118]
  - AMS did keep the 50% soil rule that was in the proposal but has tweaked the language to require “...maximal vegetative cover appropriate for the season, climate, geography, species of livestock, and stage of production...” [119]
- CONFINEMENT: Birds can also be confined when there is a risk to soil/water quality OR when vegetation needs to be reestablished. This allowance was added to § 205.241(c)(2) to allow re-seeding and time for the seeds to germinate and establish. [120] *(This could be utilized as a serious loophole for producers with fixed barns in particular, since their outdoors areas may be stripped of vegetation quite quickly if any appreciable number of birds actually venture outdoors.)*
- Enrichment: AMS just emphasizes that enrichment pertains to the point that birds be able to engage in natural behaviors indoors. [122-123]
  - ***This point could raise questions because some natural behaviors may not be accounted for.***
- Temperature range: no changes to the range (40-90 deg. F). AMS notes that weather may still qualify as inclement weather (§ 205.2) even within this temperature range [124-126]
- Temporary confinement:
  - AGE: AMS notes that it received comments saying that young layers should go out *before 16 weeks* of age. Other comments said that having outdoor access earlier would “train” them to go outdoors. AMS responds that producers *can* let birds out before 16 wks. [126-127]
  - DISEASE/MIGRATORY BIRDS: To temporarily confine birds under this provision, producers must be able to demonstrate that the “birds’ health, safety, or well-being are jeopardized by access to the outdoors.” If they can, then the AMS changes to the final rule allow for more flexibility in how and when the birds are confined. [127-128]
    - ***Allowing confinement for migratory pathways could constitute another large loophole for poultry producers. Some areas have continuous bird migration seasonally. Additional guidance is needed for temporary confinement due to bird migrations so that producers are not confining their birds for entire migratory seasons.***
  - Nest box training: the rule allows 2 weeks for confining birds. Some comments said this was *too short*. The proposed rule was modified based on these comments. *Birds may be confined to train birds to use nests, but the period must not exceed five weeks.* [129]
    - ***This creates another extended period of time within which birds can be confined (specifically layers). This extension is not needed. Many organic producers say they only confine birds for this purpose for a few days, or at most two weeks. Chickens instinctually seek out nesting boxes within which to lay their***



**eggs. Adding this exemption for outdoor access, to the first 16 weeks of life for pullets, means that organic birds can be confined, exclusively, for an outrageously long 21 weeks before they are ever offered outdoor access (the outdoors will seem unfamiliar and frightening at that point in time). Our observations are that when larger buildings offer outdoor access, utilizing similar management practices for their younger birds, that only between three and 10% of the birds actually go outdoors. This is obviously a violation of the spirit of the rules and the expectations of organic consumers.**

- § 205.241(d) to clarify, “Operations may temporarily confine birds” for reasons at § 205.241(d).
- Temporary confinement for youth events (like 4H) up to 24 hours after the event. [132]
- Recording confinement: Commenters said that having to record instances of confinement was unnecessary with respect to the recordkeeping requirements already in the organic rules. AMS has revised § 205.241(d) to clarify that confinement must be recorded. Producers do not need to record each instance of confinement if the producer has described the reasons for routine temporary confinement (i.e., a standard operating procedure) in their OSP. [130-131]
  - **Essentially if confinement is part of standard operating procedure (such as confinement at night) it can be part of the OSP. However, it is not specified whether every instance of other confinement has to be recorded. We support detailed recordkeeping for any non-standard practice (with standard practices always outlined in the OSP). Recordkeeping of this nature is required for farmers and ranchers raising ruminants to document when they are not on pasture.**
- Soil and water quality – many comments apparently stated that increased outdoor access would lead to more outdoor contamination. The AMS, to minimize potential impacts to soil or water quality from livestock with outdoor access, has included a requirement in the final rule for vegetation in outdoor areas (§ 205.241(c)(2)). The AMS discusses NPDES requirements briefly. [133]
  - **Vegetation should be a greater requirement (more of the area should be required to have vegetation, rather than just “maximizing” vegetation) to maximize the environmental benefits of vegetation.**
- Comments about slow growing breeds were not addressed by the AMS. It was stated that the NOSB should comment on this issue to influence further rulemaking.
- Litter being required (in a dry condition) for poultry is now a standalone requirement. In the final rule, this requirement has been moved to § 205.241(b)(6). The requirements for scratch areas, dust baths, and litter now appear at §§ 205.241(b)(6) and (7). [136]
- Comments requested that “litter” be defined, but the AMS apparently declined. The concern of the commenters was that dehydrated manure could be used as litter. [136-137]
  - **The AMS should acknowledge, and give guidance, on whether or not dehydrated manure can be used as bedding.**

## NOTES ON AMS SUMMARY AND COMMENTS REGARDING TRANSPORT (§ 205.242(a)).

### Notes on the description and summary of the final rule:

- New § 205.242(a)(1) requires that animals are clearly identified during transport. [138]
- New § 205.242(a)(2) sets minimum fitness requirements for livestock to be transported. (New.)
- New §§ 205.242(a)(3) and (4) set minimum standards for the trailer, truck, or shipping container used for transporting organic livestock.
- 205.242(a)(5) requires that all livestock be provided with organic feed and clean water if transport time exceeds 12 hours. [138-139]
- The new § 205.242(a)(6) requires that operations that transport livestock to sales or slaughter have emergency plans in place that adequately address problems reasonably possible during transport. [139]

### Discussion of comments received regarding Transport:

- Clarification that 205.242(a)(1) applies to transport of organic livestock to buyers, auction, and slaughter facilities. [139]
- Due to concerns about the burden of identification AMS revised the proposal. The new language in § 205.242(a)(1) *removed* the requirement for designating and identifying organic pens during transport, changing the text to read: “Certified organic livestock must be clearly identified as organic, and the identity must be traceable during transport to buyers, auction, and slaughter facilities.” [140]
- Language in proposal 205.242(a)(2)(ii) was revised to read “non-ambulatory”, getting rid of language that would remove an animal from slaughter for being “sick, injured, weak, disabled, blind, and lame.” [140]
  - ***The commenters and the AMS seem to dismiss this list (sick, injured, etc.) as “minor ailments” now because it would not seem to affect the quality of the slaughter product. The issue here is that “minor ailments” is a vague term that could encompass many levels of suffering even if they do not pose a risk to human health. Additional guidance should be published addressing these ambiguities. Consumers would rightly be concerned if sick or otherwise suffering animals are being slaughtered – that does not fit into the definition of “humane.” Further clarification is needed in this section to address the vagueness of the language.***
- Transport of calves sections were not changed.
- Section 205.242(a)(4) includes the phrase “as needed,” when it comes to bedding during transport. [140-141]
  - ***This is unlikely to get producers or truckers to operate in a manner that will truly enforce good animal welfare if bedding is otherwise inconvenient or costly for producers/shippers.***
- Many commenters stated that it was cruel to ship for 12 hours because animals would have to go without food and water for that long of a period (or more, if they were withheld food and water prior to loading). Other commenters recommended reliance on the federal 28-hour law and removal of the access to feed requirement.

AMS responded that the 12 hours was recommended by the NOSB, which the AMS determined was humane – animals can still be shipped for more than 12 hours, but they must be given access to food and water. [143]

- Regarding the federal 28-hour rule, some commenters stated that it is poorly enforced, inhumane, etc. Note: this federal regulation currently EXCLUDES poultry. AMS has decided to remove reference to the Twenty-Eight Hour Law in the final rule due to redundancy with APHIS. [145-146]
  - ***Despite the perceived redundancy, AMS did not address the problem that poultry are not covered under this federal law. While the final rule now requires that all livestock be provided with organic feed and clean water if transport time exceeds 12 hours, the fact that poultry are excluded from the 28-hours law is still extremely important. The 28-hour law goes into more detail about what is and what is not allowed when transporting livestock. Yes, organic poultry will have to be given food and water, but they are still garnering less respect under this rule, this should have been acknowledged by the AMS (as it was in their proposed rule). NOTE: poultry are ALSO not covered under the Animal Welfare Act.***
- AMS has changed §§ 205.242(a)(5)(i) and 205.242(a)(6) to specify that the certified operation responsible for overseeing the transport of organic livestock is responsible for keeping verification records that demonstrate organic compliance during transport.

#### **NOTES ON AMS SUMMARY AND COMMENTS SLAUGHTER AND THE HANDLING OF LIVESTOCK IN CONNECTION WITH SLAUGHTER (§ 205.242(b) and (c)).**

***NOTE: Cornucopia did not submit in-depth comments on this topic.***

***Also, AMS has separated mammalian from avian slaughter requirements due to the differences in how mammalian and avian livestock are handled and slaughtered.***

#### **Notes on the description and summary of the final rule:**

- NEW § 205.242(b) regarding mammalian slaughter clarifies the authority in this section. [148]
- NEW 205.242(b)(1) requires certified organic slaughter facilities to be in full compliance with the Humane Methods of Slaughter Act (HMSA) of 1978 (7 U.S.C. 1901 149 et seq.) and its implementing FSIS regulations, as determined by FSIS.
  - ***NOTE: the HMSA does not apply to poultry or livestock killed in ritual slaughter.<sup>5</sup> The organic industry could truly stand out for consumers by requiring that humane practices of slaughter are applicable to all poultry species. While FSIS regulations require that breathing has stopped before birds are scalded, evidence shows that many slaughter facilities do not meet these and other standards.***
- The new § 205.242(b)(2) deals with the slaughter of exotic animals.

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<sup>5</sup> For more information and discussion on the HMSA, this article is particularly helpful: Detailed Discussion of the Humane Methods of Slaughter Act, by Cynthia F. Hodges. Michigan State University College of Law, 2010. Available online at: <https://www.animallaw.info/article/detailed-discussion-humane-methods-slaughter-act>

- New § 205.242(b)(3) requires that all certified organic slaughter facilities provide any FSIS noncompliance records or corrective action records relating to humane handling and slaughter to certifying agents during inspections or upon request.
- With respect to poultry:
  - The new § 205.242(c) deals particularly with avian slaughter facilities. Specifically, this section is concerned with making sure organic slaughter meets the Poultry Products Inspection Act (PPIA). [152-155] This issue is also discussed in the comments section. [162]

**Discussion of comments received regarding Slaughter:**

- Many commenters were concerned that inspectors would not be appropriately trained in recognizing violations to slaughter regulations (particularly as they arise from FSIS). The AMS noted that FSIS requirements apply to both organic and non-organic slaughter and that certifiers have to check if FSIS has issued noncompliance orders. [158-159]
- Vocalization thresholds: both commenters and the NOSB recommended certain vocalization thresholds to promote welfare within the slaughter facilities. AMS did not feel this was warranted due to FSIS requirements already in place. [158-159]