

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
Fraga Farmstead Creamery LLC) **Administrator's Decision**
Gales Creek, Oregon) **APL-009-19**
)
)

This Decision responds to an appeal (APL-009-19) of a Notice of Noncompliance and Proposed Suspension of National Organic Program certification issued to Fraga Farmstead Creamery LLC of Gales Creek, Oregon by Oregon Tilth Certified Organic. The operation has been deemed not in compliance with the Organic Foods Production Act of 1990 (Act)¹ and the U.S. Department of Agriculture (USDA) organic regulations.²

BACKGROUND

The Act authorizes the Secretary to accredit agents to certify crop, livestock, wild crop, and/or handling operations to the USDA organic regulations (7 C.F.R. Part 205). Certifying agents also initiate compliance actions to enforce program requirements, as described in section 205.662, Noncompliance procedure for certified operations. Persons subject to the Act who believe they are adversely affected by a noncompliance decision of a certifying agent may appeal such decision to the USDA Agricultural Marketing Service (AMS) pursuant to § 205.680

¹ 7 U.S.C. 6501-6522

² 7 C.F.R. Part 205

Adverse Action Appeals Process – General, and § 205.681, Appeals of the USDA organic regulations.

FINDINGS OF FACT

1. On September 9, 2014, Fraga Farmstead Creamery LLC (Fraga) applied for organic certification to Oregon Tilth Certified Organic (OTCO).
2. On January 26, 2015, OTCO conducted its first pre-certification inspection of Fraga, citing numerous noncompliances.
3. On April 1, 2015, OTCO issued a Notice of Noncompliance citing noncompliances in violation of several organic regulations.
4. On May 21, 2015, OTCO issued a Notice of Noncompliance citing noncompliances in labeling.
5. On June 22, 2015, OTCO issued a Notice of Denial of Certification, denying Fraga's application for organic certification after Fraga failed to respond to the prior notices of noncompliance.
6. On July 9, 2015, Fraga requested mediation, to which OTCO agreed.
7. On August 26, 2015, Fraga and OTCO engaged entered into a Settlement Agreement to resolve several of the noncompliances after having engaged in mediation conducted by a third party.
8. On September 10, 2015, pursuant to meeting the terms of the August 26, 2015 mediation settlement agreement, OTCO granted certification to Fraga for livestock, crops, and handling.

9. On June 6, 2016, OTCO conducted an inspection of Fraga, resulting in many findings of noncompliance, including several which were specifically addressed in the 2015 mediated settlement agreement.
10. On August 24, 2016, OTCO issued Fraga a Notice of Noncompliance and Proposed Suspension.
11. On September 14, 2016, OTCO issued a revised Notice of Noncompliance and Proposed Suspension, because the prior notice had the wrong address for filing an appeal to NOP.
12. On September 29, 2016, OTCO issued a Denial of Mediation, denying Fraga's September 22, 2016 request for mediation.
13. On October 28, 2016, Fraga filed an Appeal to NOP.
14. On November 12, 2016, OTCO submitted a statement to NOP addressing the grounds for the prior Notice of Noncompliance and Proposed Suspension, and Denial of Mediation.
15. On April 19, 2017, NOP entered into a Settlement Agreement with Fraga, setting forth several specific terms requiring the correction of noncompliances.
16. On June 6, 2017, NOP wrote Fraga a letter with the subject line of 'Settlement Agreement and Information Required', reiterating the terms of the Settlement Agreement. NOP stated that Fraga had failed to comply with those terms and gave Fraga until June 15, 2017 to submit the required documentation to OTCO.
17. On June 7, 2017, OTCO conducted an inspection of Fraga noting several noncompliances many of which were repeat issues.
18. On July 25, 2017, NOP issued Fraga a Notice of Noncompliance and Request for Corrective Action stating that Fraga had failed to comply with the settlement terms and giving Fraga 30 days from the date of the notice to submit its proposed corrective action.

19. On September 8, 2017, NOP issued Fraga a Notice of Noncompliance Resolution, stating that Fraga had submitted the requested information/documentation on August 10 and 23, 2017.
20. On November 29, 2017, OTCO issued a Notice of Resolution of Noncompliance stating that all noncompliances noted during the June 7, 2017 inspection have been resolved. OTCO instructed Fraga to ensure that a process/handling flow chart is included with the OSP, as well as an audit flow chart, and that Fraga is to maintain pest control logs.
21. On July 10, 2018, OTCO conducted an inspection of Fraga, finding several noncompliances, many of which were repeat noncompliances.
22. On September 19, 2018, OTCO issued a Notice of Noncompliance and Proposed Suspension citing numerous noncompliances found at the recent inspection.
23. On October 24, 2018, OTCO issued a Denial of Mediation stating that the noncompliances cited in the notice were repeat issues and that corrective actions hadn't been followed.
24. On November 22, 2018, Fraga filed an Appeal.

DISCUSSION

The USDA organic regulations at 7 C.F.R. 205.406(a), Continuation of certification, state that "To continue certification, a certified operation must annually pay the certification fees and submit the following information, as applicable, to the certifying agent: (1) An updated organic production or handling system plan which includes: (i) A summary statement, supported by documentation, detailing any deviations from, changes to, modifications to, or other amendments made to the previous year's organic system plan during the previous year; and (ii) Any additions or deletions to the previous year's organic system plan, intended to be undertaken in the coming

year...(3) An update on the correction of minor noncompliances previously identified by the certifying agent as requiring correction for continued certification; and (4) Other information as deemed necessary by the certifying agent to determine compliance with the Act and the regulations in this part.”

The organic regulations at §205.103, Recordkeeping by certified operations, state that, “(a) A certified operation must maintain records concerning the production, harvesting, and handling of agricultural products that are or that are intended to be sold, labeled, or represented as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food groups(s)).” (b) Such records must: (1) Be adapted to the particular business that the certified operation is conducting; (2) Fully disclose all activities and transactions of the certified operation in sufficient detail as to be readily understood and audited...and (4) Be sufficient to demonstrate compliance with the Act and the regulations in this part. (c) The certified operation must make such records available for inspection...”

The organic regulations at §205.201, Organic production and handling system plan, state that, “(a) The producer or handler or a production or handling operation...must develop an organic production or handling system plan that is agreed to by the producer or handler and an accredited certifying agent. An organic system plan must meet the requirements set forth in this section for organic production or handling.” The requirements include a description of practices and procedures to be performed and maintained; a description of the recordkeeping system implemented by the operation; and any additional information deemed necessary by the certifying agent.

The organic regulations at §205.237, Livestock feed, state that, “(c) During the grazing season, producers shall: (1) 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 residual forage or vegetation rooted in pasture). This shall be calculated as an average over the entire grazing season for each type and class of animal. Ruminant animals must be grazed throughout the entire grazing season for the geographical region, which shall be not less than 120 days per calendar year. Due to weather, season, and/or climate, the grazing season may or may not be continuous.” The section also states that producers shall “(2) Provide pasture of a sufficient quality and quantity to graze throughout the grazing season and to provide all ruminants under the organic system plan with an average of not less than 30 percent of their dry matter intake from grazing throughout the grazing season.” Additionally, the regulations require that livestock producers “(1) Describe the total feed ration for each type and class of animal. The description must include (i) All feed produced on-farm; (ii) All feed purchased from off-farm sources; (iii) The percentage of each feed type, including pasture, in the total ration; and (iv) A list of all feed supplements and additives. (2) Document the amount of each type of feed actually fed to each type and class of animal. (3) Document changes that are made to all rations throughout the year in response to seasonal grazing changes. (4) Provide the method for calculating dry matter demand and dry matter intake.”

The organic regulations at §205.238, Livestock health care practice standard, state that, “(a) The producer must establish and maintain preventive livestock health care practices, including:...(2) Provision of a feed ration sufficient to meet nutritional requirements, including vitamins, minerals, protein and/or amino acids, fatty acids, energy sources, and fiber (ruminants); (3) Establishment of appropriate housing, pasture conditions, and sanitation practices to minimize the occurrence and spread of diseases and parasites; (4) Provision of conditions which allow for exercise, freedom of movement, and reduction of stress appropriate to the species...”

The organic regulations at §205.239, Livestock living conditions, state that, “(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...suitable to the species...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...to feed simultaneously without crowding and without competition for food.”

The organic regulations at §205.240, Pasture practice standard, state that, “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. (a) Pasture must be managed as a crop in full compliance” with the organic regulations. Additionally, “(b) Producers must provide pasture...and manage pasture to comply with the requirements...to annually provide a minimum of 30 percent of a ruminant’s dry matter intake (DMI), on average, over the course of the grazing season...”

OTCO proposed a suspension of Fraga’s organic certification, which would prohibit the sale, labeling, or representation of its products as organic, stating that Fraga has displayed a repeated, systemic inability to comply with the organic regulations. On September 19, 2018, OTCO issued a Notice of Noncompliance and Proposed Suspension due to numerous noncompliances found at the July 10, 2018 inspection. OTCO stated that Fraga didn’t maintain or make available during inspection records on ration changes; rations fed per class of animal; grazing; receipts for straw, feed supplement, and kelp; purchased alfalfa; veterinary treatment of animals; and goat birthing records. This is a continuation of recordkeeping noncompliances

from 2015, 2016, and 2017. Additionally, the inspector observed young goats, 12 – 18 months of age, in a pen of less than 1 acre with no pasture vegetation, being fed only felled fir trees. However, Fraga's OSP states that the young goats have access to 2 acres of pasture. OTCO stated that a lack of sufficient pasture was also observed in 2015, and DMI from pasture was previously found to be less than 7% across all goat classes. OTCO stated that these noncompliances were identified at the 2017 annual inspection and haven't been corrected.

OTCO also found that Fraga was still using noncompliant labels despite a six-month time limit that had been set for 'using up' incorrect labels. Fraga also again made changes to the OSP without OTCO's prior review and approval, specifically, all formulations for cheese products were inconsistent with what was approved and on file with OTCO. Fraga was still lacking sanitation and pest control records, and Fraga hadn't completed the 2017 audit flow chart which OTCO had already reminded Fraga to do.

In its appeal, Fraga states that many of the cited noncompliances are due to OTCO's recordkeeping failures and that OTCO hasn't provided essential support and doesn't understand a goat operation. Fraga contends the noncompliances are small and fixable, and that OTCO should have discussed the noncompliances with it to work out a plan to remedy the noncompliances and clarify inaccuracies in OTCO's inspection report. Fraga states that its OSP which was submitted in 2014 was incomplete and should have received more attention before it was approved.

Fraga states its goats are out on pasture every day of the year, and that it had grazed the goat herd in a limited fenced area but has moved the herd to a new property of more than six acres of pasture. Further, it also herds the goats into paddocks which are moved around portions of their ten acres of wildlife habitat and a large wildlife corridor. Fraga acknowledged that the

teenage goats, 12 – 18 months, graze on its 20 acres of large Douglas fir trees, but that it had a nutritional analysis done on the Douglas fir bows which were found to contain very significant nutrition – roughly 35% of the nutrition of prime pasture grass. Fraga states that OTCO needs to realize that goats will eat various things, unlike cows.

Fraga also states that it maintains feeding records which are kept in barn notebooks and on clipboards. Fraga tracks all feed as it is fed to the herd, recording each bale as it is opened, which allows Fraga to add all the bales up at the end of the month to ensure that it is on track with feeding and pasturing goals. To meet its OSP requirements, Fraga states it logs all the hay as feed and records all grazing activity. Fraga states it maintains birthing records on a clipboard in the barn because it is very hectic with dozens of babies born in a short time frame. Further, Fraga states that because it doesn't brand its animals and it is hard to keep collars on the goat kids, birth to lactation tracking is a challenge. Therefore, Fraga states it has begun photographing all female kids with their mother and including the pictures in the adult goat herd book. Fraga states the herd is exceptionally healthy, there haven't been any veterinary calls this year on the milking herd, and it only lost 2 out of 114 kids this year. Additionally, Fraga maintains veterinary records for the herd which are complete except for information on one kid goat which had a broken leg and was adopted out. Fraga states that OTCO's inspector was unfamiliar with goat operations and was ill-prepared to conduct a livestock inspection.

Fraga states it doesn't need to maintain sanitation and pest control records because it doesn't use both organic and conventional ingredients in any of the vessels and does not use chemicals for pest control. Fraga also states it submitted blank sanitation logs for the bulk tank and the milking system on August 28, 2017; and that the organic regulations do not require the maintenance of pest logs. Addressing the use on non-compliant labels, Fraga states they

estimated there was a six-month supply of the non-compliant labels, and that OTCO stated they could use up those labels. Further, Fraga states OTCO saw the newly purchased labels at the inspection which were already in use on half of the products. Fraga didn't believe that by estimating a six-month supply, they were agreeing to use the non-compliant labels for only another six months. Fraga states it has been using the same formulations for years, that those formulations have been approved, and all ingredients are documented. The only inconsistency in the formulations is the use of the abbreviation "Tbs" for teaspoon instead of "Tsp." However, Fraga contends the formulation file is in the inspector's portal access, and therefore, Fraga can't make the correction. Fraga acknowledges that it hasn't submitted an audit flow chart to OTCO.

A review of all the evidence shows that Fraga has been unable to maintain compliance with the organic regulations since before its initial certification. Since applying for certification in 2014, Fraga has received 3 Notices of Noncompliance, 1 Denial of Certification, 2 Notices of Noncompliance and Proposed Suspension, and has entered into 2 Settlement Agreements, one with OTCO and one with AMS.

Fraga's appeal doesn't resolve any of the current noncompliances. The inspector noted at the July 10, 2018 inspection, which resulted in the September 19, 2018 Notice of Noncompliance and Proposed Suspension, that records were not being maintained nor available during the inspection on the livestock portion of the operation. Specifically, changes in rations, rations fed by class, grazing records for the 12-18-month old goats, receipts for the (b) (4) feed supplement and kelp, documentation to connect the alfalfa purchased from (b) (4) to the organic certificates provided, vet treatment records, birthing records, and ID tracking records were not available. Fraga claims to maintain barn notebooks and clipboards, but no such records have been submitted. Additionally, although Fraga claims that it moved the goats from a 2-acre

area to a 6-acre area, and that it uses movable padlocks to move the goats to other areas, Fraga hasn't clearly indicated that this is the case for the class of animals in question – the 12 to 18-month old dairy goats for which the noncompliance was issued. Further, during the last inspection, the 12 to 18-month-old goats were observed in a fenced area of less than one acre with no ground vegetation and only hay scraps and felled fir trees. OTCO presented pictures taken during the inspection showing the grazing area. Additionally, this observation by the inspector conflicts with Fraga's OSP that states the outdoor area for the 12-18-month-old goats is 2 acres of pasture with perennial grasses, alfalfa, and blackberries in addition to felled fir trees.

As OTCO noted, the organic regulations define pasture as "land used for livestock grazing that is managed to provide feed value and maintain or improve soil, water, and vegetative resources." AMS notes that even if the felled fir trees did constitute pasture, Fraga would still need to provide documentation to show that the DMI requirements were being met. Although Fraga had a nutritional analysis done on the felled fir trees, it wasn't done until after OTCO issued the Notice of Noncompliance and Proposed Suspension. Therefore, it doesn't appear that Fraga fed the goats the felled fir trees for its nutritional value, since this information wasn't known when the goats were observed feeding on the fir trees.

OTCO noted in the July 10, 2018 Crop/Livestock/Wild Harvest Inspection Report that, "The operator does not fully understand the NOP ruminant pasturing standards. The operator stated that the standard only requires that the herd receive 30% DMI from pasture during the grazing season and that classes of their livestock, such as milking goats or 12 to 18-month-old goats, wouldn't require separate rations and feeding records." The inspector noted that he advised Fraga of the DMI requirements and that contrary to Fraga's contention, each class of animal must meet the standard. Fraga can't determine the DMI for the entire herd to satisfy the

pasturing requirements. Further, Fraga doesn't maintain records for rations for individual classes of goats, and a DMI audit couldn't be completed. Fraga is assuming that bales weigh 1 ton each; however, the records from the hay seller only show the total weight of hay purchased and there isn't a bale count to verify the average weight of the bales on the load. OTCO also previously stated in the 2017 inspection report that Fraga "did not appear to have a complete grasp on the DMI and grazing season requirements" and didn't understand how to calculate DMI.

Additionally, Fraga states the teenage does are moved into a pen with a buck in early summer, which indicates that this class of animals do not get moved around as Fraga claims for the duration of the grazing period. The lack of records documenting the date(s) the goats were moved into this area also makes it impossible to determine the total amount of days that these animals spend in the penned area. This information is essential when determining a confinement period, a grazing period, and DMI.

OTCO stated that the use of noncompliant labels has been an ongoing problem and that it had informed Fraga that it could use up the estimated noncompliant labels for 6 months. However, Fraga didn't notify OTCO after the 6-month period that there were remaining noncompliant labels and that it would continue to use the labels. Further, although the milk production audit traceback conducted during the inspection was successful, Fraga is incorrect in its contention that its formulations were correct except for an error in abbreviating teaspoons. The inspection reports of July 10, 2018 clearly show that Fraga indicated that the formulations were all inaccurate for the cheeses, and that the amount of non-organic ingredients needed to be updated. Further, Fraga's submission of blank sanitation logs doesn't constitute maintaining sanitation records and Fraga has repeatedly failed to maintain pest control logs despite being told

to do so by OTCO. OTCO presented a summary of Fraga's non-compliances year by year, and the same noncompliances appear repeatedly.

CONCLUSION

The USDA organic regulations assure consumers that products with the USDA organic seal meet consistent, uniform standards. Key to these standards is that products with the USDA organic seal are produced and handled in accordance with the organic regulations. However, Fraga has shown systemic and repeated violations of the organic regulations at 7 C.F.R. §205.406; 7 C.F.R. §205.103; 7 C.F.R. §205.201; 7 C.F.R. §205.237; 7 C.F.R. §205.238; 7 C.F.R. §205.239; and 7 C.F.R. §205.240. This is despite the efforts of OTCO to help Fraga come into compliance and settlement agreements with both OTCO and AMS. Fraga contends the noncompliances are "small and fixable;" however, if that was true, the same noncompliances wouldn't appear year after year and Fraga would have successfully completed the terms of the settlement agreements.

Additionally, Fraga proposed in its appeal that it be allowed to continue operating as an organic operation while it remedies the various non-compliances and completes a new OSP with a different certifier familiar with goat operations. Fraga may contact a new certifier if it chooses to seek reinstatement after the suspension period is completed; however, the open and repeated noncompliances do not allow for continued certification.

DECISION

The appeal is denied and Fraga's organic certification is to be suspended. Attached to this formal Administrator's Decision denying Fraga's appeal is a Request for Hearing form.

Fraga has thirty (30) days to request an administrative hearing before an Administrative Law Judge.

If Fraga waives the hearing, the Agricultural Marketing Service will direct OTCO to issue a Notice of Suspension. At any time after suspension, Fraga may, "...submit a request to the Secretary for reinstatement of its certification. The request must be accompanied by evidence demonstrating correction of each noncompliance and corrective actions taken to comply with and remain in compliance with the Act and the regulations in this part." Fraga may work with any certifier to complete a request for reinstatement.

Done at Washington, D.C., on this 29th
day of May, 2019.



Bruce Summers
Administrator
Agricultural Marketing Service