

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
Michael Tierney, dba Birchwood Farms) **Administrator's Decision**
Newtown, Pennsylvania) **APL-073-19**
)
)

This Decision responds to an appeal (APL-073-19) of a Notice to Cease and Desist with Civil Penalty issued to Michael Tierney, dba Birchwood Farms by the U.S. Department of Agriculture (USDA), Agricultural Marketing Service (AMS), National Organic Program (NOP). 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 organic regulations.²

BACKGROUND

The Act authorizes the Secretary to accredit agents to certify crop, livestock, wild crop, and handling operations pursuant to the USDA organic regulations (7 C.F.R. Part 205). Accreditation of certifying agents is done by the NOP, which also initiates compliance actions to enforce program requirements. Noncompliance procedures for certifying agents are set forth in §205.665 of the USDA organic regulations. Persons subject to the Act who believe that they are adversely affected by a noncompliance decision of the NOP may appeal such decision to the

¹ 7 U.S.C. 6501-6522

² 7 C.F.R. Part 205

AMS Administrator, pursuant to §205.680 Adverse Action Appeals Process – General, and §205.681, Appeals of the USDA organic regulations.

FINDINGS OF FACT

1. Michael Tierney, dba Birchwood Farms (Birchwood) was initially certified organic on April 15, 2004 for crops, livestock, and processing under the NOP. The certification was revoked for 5 years, effective May 21, 2013, and Birchwood has not been re-certified.
2. On January 12, 2010, Birchwood's then-certifying agent Pennsylvania Certified Organic (PCO) issued a Notice of Noncompliance and Proposed Revocation of Birchwood's organic certification.
3. On February 12, 2010, PCO denied Birchwood's January 28, 2010 request for mediation.
4. On February 27, 2010, Birchwood filed an Appeal.
5. On August 9, 2010, PCO issued a Notice of Noncompliance and Proposed Revocation to Birchwood.
6. On August 19, 2010, Birchwood filed an Appeal.
7. On June 16, 2011, the AMS Administrator issued an Administrator's Decision denying Birchwood's Appeals after finding that Birchwood had violated several provisions of the organic regulations at 7 CFR 205. The Administrator revoked Birchwood's certification for 5 years.
8. On July 5, 2011, Birchwood filed a request for an administrative hearing before an Administrative Law Judge (ALJ).
9. On March 21, 2013, the AMS Administrator filed a Complaint against Birchwood with the ALJ.

10. On October 10, 2014, the ALJ issued a Decision and Order finding that Birchwood had violated numerous provisions of the Act and the organic regulations. These violations included selling, labeling, and representing livestock as organic when the preponderance of the evidence demonstrated that the livestock wasn't produced or handled under a continuous organic management plan; slaughtering organically-raised livestock at a non-organic facility; and providing livestock with a product which included a prohibited synthetic substance. Additionally, the ALJ found Birchwood had advertised, labeled, and sold non-organic cheese and meat products as organic; failed to update its Organic System Plan to include additional products; and failed to maintain adequate records to allow the certifier to determine compliance with the organic regulations. The ALJ found Birchwood's actions to be willful as Birchwood attempted to attribute its noncompliance to PCO's failure to provide guidance, a lack of training by government entities, misunderstanding of the regulations, and ignorance, although Birchwood never sought advice from PCO and purposely devised ways to avoid compliance. The ALJ revoked Birchwood's certification for 5 years, commencing retroactive to May 21, 2013, the effective date of a suspension arising from a prior adverse action.
11. On December 9, 2014, the Judicial Officer (JO) issued an Order Dismissing Purported Appeal Petition after finding that Birchwood's November 18, 2014 Appeal of the ALJ decision was untimely.
12. On December 29, 2014, the JO issued an Order Denying Petition for Reconsideration, after finding that Birchwood's December 22, 2014 Petition for Reconsideration was untimely. The five-year revocation of Birchwood's certification was thereby affirmed.

13. On August 14, 2019, the NOP issued a Notice to Cease and Desist with Civil Penalty stating that Birchwood is knowingly and willfully violating the USDA organic regulations at 7 CFR §205.311(a) by its use of the USDA organic seal on its website to represent non-organic products as having been produced, handled, and certified to the USDA organic regulations, after Birchwood's certification had been revoked. Additionally, NOP imposed a civil penalty of \$2,000 on Birchwood pursuant to 7 CFR §205.100(c).
14. On September 16, 2019, Birchwood filed an Appeal.

DISCUSSION

The NOP issued a Notice to Cease and Desist with Civil Penalty stating that Birchwood is knowingly and willfully violating the USDA organic regulations at 7 CFR §205.311(a) by its use of the USDA organic seal on its website to represent non-organic products as having been produced, handled, and certified to the USDA organic regulations, after Birchwood's certification had been revoked. Additionally, NOP imposed a civil penalty of \$2,000 on Birchwood pursuant to 7 CFR §205.100(c).

The organic regulations at 7 CFR §205.311(a) state that "The USDA seal described in paragraphs (b) and (c) of this section may be used only for raw or processed agricultural products described in paragraphs (a), (b), (e)(1), and (e)(2) of §205.301."

The organic regulations at Section 205.100(a) state that, "Except for operations exempt or excluded in §205.101, each production or handling operation or specified portion of a production or handling operation that produces or handles crops, livestock, livestock products, or other agricultural products that are intended to be sold, labeled, or represented as "100 percent

organic,” “organic,” or “made with organic (specified ingredients or food group(s))” must be certified according to the provisions of subpart E of this part and must meet all other applicable requirements of this part.”

The organic regulations at Section 205.100(c) state that, “Any operation that: (1) Knowingly sells or labels a product as organic, except in accordance with the Act, shall be subject to a civil penalty of not more than the amount specified in §3.91(b)(1) of this title per violation.” The penalty pursuant to 7 CFR §3.91 for violations of the Act shall be not more than \$17,952 per violation.

Specifically, NOP’s Compliance and Enforcement Division states that it received a complaint on April 7, 2017, that Birchwood was using the NOP organic seal which the complainant found to be misleading. The complainant provided a screenshot of Birchwood’s website homepage displaying the USDA organic seal. On June 14, 2017, NOP received a second complaint from another individual stating that Birchwood continues to use the organic seal. However, Birchwood’s organic certification had been revoked pursuant to an ALJ Decision and Order of October 10, 2014, retroactive to May 21, 2013. This decision was affirmed by JO decisions of December 9, 2014 and December 29, 2014.

Therefore, NOP began periodically reviewing Birchwood’s website and confirmed the continued use of the USDA organic seal on the home page of the website. NOP also saw a disclaimer on the home page which states, “After over 10 years of being certified organic, we have decided to NOT pursue Organic Certification. Our products are no longer certified organic by USDA, however, they are produced in the same fashion as when we were certified. Our dairy is 100% Jersey Milk, No grain, No GMO’s.” However, as a revoked operation, Birchwood may not use the USDA organic seals regardless of the ‘disclaimer.’

In its Appeal, Birchwood stated that its organic certification was revoked 5 years ago on a ‘drummed up complaint’ and through a ‘corrupt internal administration hearing’, as well as its civil liberties being violated. Birchwood contends that it was then instructed to “cover or remove organic verbiage in our store and to remove any ‘certified organic’ verbiage listed on our product list.” Birchwood explains that the USDA organic seal was “part of the picture frame of the website, so we agreed to put a disclaimer stating that we were no longer certified organic but that the USDA seal represents the certified organic products that we do sell.” Birchwood states that PCO has ‘spot-checked’ them once a week for the past 5 years and none of the products are labeled as organic.

During the review of the Appeal, it was learned that Birchwood’s organic certification was revoked in its entirety – crops, livestock, and processing – effective May 21, 2013. Contrary to Birchwood’s allegations, Birchwood was given the opportunity and did avail itself of the administrative hearing process after an Administrator’s Decision of June 16, 2011 denied its Appeals of PCO’s January 12, 2010 and August 9, 2010 Notices of Noncompliance and Proposed Revocation. The subsequent ALJ Decision and Order of October 10, 2014 found that Birchwood had knowingly and willfully violated numerous provisions of the organic regulations and ordered Birchwood’s certification revoked for 5 years retroactive to May 21, 2013. The JO affirmed the ALJ decision in orders of December 9, 2014 and December 29, 2014, after considering Birchwood’s Appeal of the ALJ decision and a Petition for Reconsideration.

Birchwood’s certification has remained revoked. The organic regulations at 7 CFR §205.311, USDA Seal, provide that “The USDA seal described in paragraphs (b) and (c) of this section may be used only for raw or agricultural products described in paragraphs (a), (b),

(e)(1), and (e)(2) of §205.301.” The regulations at 7 CFR §205.301, Product composition discuss the requirements of products to be sold, labeled, or represented as organic. However, despite its organic certification being revoked, Birchwood has continued to display the USDA organic seal on the home page of its website at www.birchwoodfarmdairy.com. The April 7, 2017 complainant included a screenshot of the website homepage with the USDA organic seal displayed in 2 locations. A second complaint was received on June 14, 2017 about Birchwood’s use of the NOP organic seal. NOP’s investigation observed the seal when it checked the website on March 26, 2018 and again on August 8, 2019. A check of the website on January 2, 2020 shows the website homepage still displays the USDA organic seal in 2 locations: in the top right corner, and to left of a section entitled ‘Quality before Quantity.’ The home page also still contains the disclaimer cited by NOP, which states: “After over 10 years of being certified organic, we have decided to NOT pursue Organic Certification. However, our products are produced in the same fashion as when we were certified. Our dairy is 100% Jersey Milk, No grain, No GMO’s and grass/forage fed ONLY.” It continues, “We use the USDA” but then stops.

Birchwood acknowledges in the disclaimer that it is no longer certified organic by NOP and has acknowledged to NOP that its certification is revoked. A prior screenshot of the home page by NOP shows the disclaimer also contained the statement that “Our products are no longer certified organic by USDA,” though that clause has since been removed and the sentence now only states that the products are produced in the same fashion as when Appellant was certified. However, it is irrelevant if Birchwood is or is not organically managing its crops, livestock, and processing operations. Birchwood is no longer certified organic and can’t use the USDA organic seal to sell or represent its products as organic or claim its products are

organic. The website homepage has the seal in 2 places and is the first thing seen by potential customers. The disclaimer doesn't excuse the use of the organic seal and is 'overshadowed' by the placement of the seal twice on main page. Further, the disclaimer language alludes to the products being organic.

Birchwood stated it removed the USDA organic seal from its product labels, and a check of their Facebook page, which shows some of their products, doesn't show the seal on any of the products. However, Birchwood's home webpage with the USDA organic seal in 2 places has a link to a list of Birchwood's products and one may infer from seeing the organic seal that the listed products are certified organic. That also appears to be Birchwood's intent as Birchwood states in its Appeal that "the USDA seal represents the certified organic products that we do sell." However, none of Birchwood's products are organic or certified organic as an operation can only claim that if the operation is certified organic, and Birchwood is no longer certified. The organic regulations at 7 CFR §205.100(a) specifically state that, "...each production or handling operation...that produces or handles crops, livestock, livestock products, or other agricultural products that are intended to be sold, labeled, or represented" as organic "must be certified...and must meet all other applicable requirements of this part."

Birchwood also has knowingly and willfully continued to violate the organic regulations by the use of the USDA organic seal on its website, thereby marketing and representing itself as a certified operation and its products as organic. The ALJ stated in its decision that Birchwood's actions were willful as Birchwood purposely devised ways to avoid compliance with the organic regulations while pleading ignorance. The ALJ ordered Birchwood to cease and desist violating the organic regulations. The JO affirmed the ALJ's decision in its 2 orders. The August 14, 2019 NOP-issued Notice to Cease and Desist with Civil Penalty states that

Birchwood “continues to represent agricultural products as organic...through display of the USDA organic seal on its website,” and that Birchwood is “knowingly and willfully violating that USDA organic regulations through the use of the USDA seal on its website after revocation...” Therefore, there is no doubt that Birchwood was aware that it couldn’t use the USDA seal on its website page. Yet even after receiving the August 14, 2019 notice, Birchwood continued to display the USDA seal as recently as January 2, 2020. Birchwood’s continued representation of its products as organic through use of the USDA seal after having its certification revoked effective May 21, 2013, and after issuance by NOP of the Notice to Cease and Desist with Civil Penalty on August 14, 2019, is an aggravating factor to the violation.

Due to Birchwood’s knowing and willful violation, NOP’s August 14, 2019 notice also imposed a civil penalty of \$2,000 on Birchwood. This civil penalty is provided for under the regulations at 7 CFR §205.100(c) and 7 CFR §205.662(g) which both state, “Any operation that: (1) Knowingly sells or labels a product as organic, except in accordance with the Act, shall be subject to a civil penalty of not more than the amount specified in §3.91(b)(1) of this title per violation.” The penalty pursuant to 7 CFR §3.91 for violations of the Act shall be not more than \$17,952 per violation. Birchwood’s continued use of the USDA organic seal to represent and sell its products as organic after revocation of its certification, and the continued use of the seal after specifically being told not to, constitutes an aggravating factor and willful violation. Therefore, Birchwood is subject to a civil penalty. The \$2,000 civil penalty imposed in the August 14, 2019 notice is greatly reduced from the provided-for amount of \$17,952. However, additional civil penalties may be imposed if Birchwood fails to cease and desist in using the NOP organic seal while uncertified.

CONCLUSION

The evidence substantiates that Birchwood has violated the organic regulations at 7 CFR §205.100(a) and 7 CFR §205.311(a). Birchwood has used and continues to use the USDA organic seal to represent and sell its products as organic after revocation of its certification. As this continued use of the seal after specifically being told not to constitutes an aggravating factor and willful violation, Birchwood is also subject to a civil penalty pursuant to 7 CFR §205.100(c).

DECISION

The Appeal is denied and the Notice to Cease and Desist with Civil Penalty is upheld. Birchwood's certification remains revoked. Birchwood is to cease and desist using the USDA organic seal to represent and sell its products as organic and is to remove the USDA seal from its website. Additionally, Birchwood is ordered to pay a civil penalty of \$2,000.00, a reduction of the possible penalty of 17,952 per violation. In this case, the use of the USDA organic seal on its website represents a violation.

Attached to this formal Administrator's Decision is a Request for Hearing form. Birchwood has thirty days to request an administrative hearing before an Administrative Law Judge. If Birchwood does not request a hearing in that period, this Decision will be implemented and the August 14, 2019 order to cease and desist the use of the USDA organic seal and representation of its products as organic, and imposition of the civil penalty will become final.

Done at Washington, D.C., on this 4th
day of February, 2020.



Bruce Summers
Administrator
Agricultural Marketing Service