

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
Brooks Co. Grains LLC)
Quitman, Georgia) **Administrator’s Decision**
) **APL-010-20**
)

This Decision responds to an appeal (APL-010-20) of a Notice of Noncompliance and Proposed Suspension under the National Organic Program (NOP) issued to Brooks Co. Grains LLC (Brooks) of Quitman, Georgia by Americert International (AI). 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. AI certified Brooks for organic crops on October 1, 2018.
2. On October 28, 2019, AI issued a Notice of Noncompliance and Proposed Suspension to Brooks for numerous noncompliances found during the October 15, 2019 inspection.
3. On November 11, 2019, AI denied Brooks' request for mediation.
4. On November 11, 2019, Brooks surrendered its organic certification, but then contacted NOP about appealing the adverse action notice.
5. On November 26, 2019, AI accepted Brooks' November 25, 2019 rescission of its prior surrender and reinstated its certification. The rescission occurred during the allowed appeal period.
6. On November 26, 2019, Brooks' Appeal was accepted by NOP and Brooks subsequently submitted an Appeal letter on December 12, 2019.

DISCUSSION

The USDA organic regulations at 7 C.F.R. 205.103, Recordkeeping, 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 group(s))” (b) Such records must:...(2) Fully disclose all activities and transactions of the certified operation in sufficient detail as to be readily understood and audited; (3) Be maintained for not less than 5

years beyond their creation; and (4) Be sufficient to demonstrate compliance with the Act and the regulations in this part...”

The organic regulations at §205.201, Organic production and handling system plan, state that, “(a) The producer or handler of a production or handling operation, except as exempt or excluded under §205.101, intending to sell, label, or represent agricultural products as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s))” 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 production or handling system plan must include: (1) A description of practices and procedures to be performed and maintained, including the frequency with which they will be performed; (2) A list of each substance to be used as a production or handling input, indicating its composition, source, location(s) where it will be used, and documentation of commercial availability, as applicable; (3) A description of the monitoring practices and procedures to be performed and maintained, including the frequency with which they will be performed, to verify that the plan is effectively implemented; (4) A description of the recordkeeping system implemented to comply with the requirements established in §205.103; (5) A description of the management practices and physical barriers established to prevent commingling of organic and nonorganic products on a split operation and to prevent contact of organic production and handling operations and products with prohibited substances; and (6) Additional information deemed necessary by the certifying agent to evaluate compliance with the regulations.”

The organic regulations at §205.202, Land requirements, state that, “Any field or farm parcel from which harvested crops are intended to be sold, labeled, or represented as “organic,” must: (a) Have been managed in accordance with the provisions of §§205.203 through 205.206;

(b) Have had no prohibited substances, as listed in §205.105, applied to it for a period of 3 years immediately preceding harvest of the crop; and (c) Have distinct, defined boundaries and buffer zones such as runoff diversions to prevent the unintended application of a prohibited substance to the crop or contact with a prohibited substance applied to adjoining land that is not under organic management.”

Certifier AI conducted an inspection of Brooks on October 15, 2019, which revealed numerous noncompliances, documented in an Inspection Report, an Addendum to the Inspection Report, and the Exit Interview for the inspection. The noncompliances constitute violations of the organic regulations at 7 CFR 205.103, Recordkeeping; 7 CFR 205.201, Organic production and handling system plan; and 7 CFR 205.202, Land requirements. The noncompliances include failing to maintain harvest records; failing to record input usage; failing to follow the approved Organic System Plan (OSP); failing to disclose practices actually used; using unlisted, unapproved, and prohibited substances; and failing to maintain adequate buffer zones after agreeing to do so.

Brooks stated in its Appeal that it provided all required records during the inspection, but the inspector didn't review the records; and that it mistakenly told the inspector that it used Dimilin, a prohibited substance, when it actually used DiPel, an allowed substance for pest control. Brooks further denied using any herbicides; and stated that the previously agreed upon buffer crops weren't needed as a buffer.

AI's allegations and Brooks' responses are described in the following paragraphs. A review of the submitted documentation shows that AI described the noncompliances in detail, and that the issuance of the combined notice was appropriate.

First, citing to a violation of the organic regulations at 7 CFR 205.103, Recordkeeping, AI stated that during the October 15, 2019 inspection, the inspector found that Brooks failed “to maintain contemporaneous harvest records for product harvested and delivered to your own silo/bin” and also failed to record input usage for herbicides and pesticides; failed to maintain invoices for the substances; failed to record the locations where chicken litter was applied; and failed to maintain documentation of the non-GMO status of corn seed. AI determined that Brooks failed to maintain documentation of all transactions and activities in sufficient detail as to be readily understood and auditable.

Brooks replied in its Appeal that at the inspection it provided seed receipts and a calendar with monthly notes for various field activities; however, the inspector didn’t look at the records and just said that they were insufficient. Brooks submitted numerous documents with its Appeal. A document for Field Activity from April – October 2019 shows such actions as planting corn in Field 3H on April 29 and 30, 2019; however, this Field Activity record is only a little over one page, shows very little actual activity, and only has 1-line descriptions. Further, while Field Delivery Tickets show soybeans and corn, as well as the harvest date and harvested fields, they do not list the amounts of harvested product or other information. An October 20, 2019 invoice shows the storage of soybeans, without supporting details; and a letter from a seed company shows the purchase of conventional non-GMO soy seeds for 2017, but no seed search documentation was submitted. These and other disparate documents are not sufficient to document all transactions and activities in sufficient detail, are not easily understood, and aren’t auditable. Although Brooks referenced maintaining numerous records in its September 16, 2019 Organic Grower Plan/Application for Certification, very few of these records were observed during the October 15, 2019 inspection.

Second, AI cited violations of 7 CFR 205.201, stating that Brooks failed to follow the approved OSP; failed to disclose the practices used; and used unlisted, unapproved, and prohibited substances, violating 7 CFR 205.202. The NOP Organic Grower Inspection Report of October 15, 2019 shows Brooks admitted to using synthetic herbicides to manage one or more fields, treelines adjoining fields, and around equipment sheds.

AI stated in the Addendum to the inspection report that Brooks admitted to using Laudis on Field 7 to control ‘coffee weeds’ in 2019, despite Brooks stating that its last use of the product was in 2014. Further, Brooks referred to both Dimilin, which is a prohibited substance, and DiPel, which is allowed; though Brooks states that it never used herbicides on organic crops, and only used DiPel as a pesticide for Army worms. Brooks contends it mistakenly told the inspector that it had used Dimilin, but corrected itself to say it used DiPel, which is an allowed Biological Insecticide Granule, and that it only uses non-synthetic, biological, botanical, or mineral inputs. However, failing to maintain complete records of pest and weed control activities and products is a violation of the organic regulations.

The inspector also saw multiple containers of synthetic herbicides in the equipment sheds which Brooks said are old containers used to hold oil and gas, that the labels have peeled off, and that AI’s inspector didn’t walk over to where the old containers were piled. However, one photo of a Laudis container provided by AI shows a ‘manufactured in 2019’ label. Addressing this, Brooks states it has a newer bottle of Laudis which is used along with Cornerstone to spray the weeds around the shop and barn, and in the woods. Although AI submitted labels/information sheets for this and other containers seen at the inspection, AI didn’t collect any samples of the soil or crops.

Third, AI contends that Brooks violated the organic regulations in 7 CFR 205.201 and 7 CFR 205.202 by failing to take agreed-upon corrective actions to prevent the risk of contamination of organic crops, specifically the creation of adequate buffer zones. AI's October 10, 2018 notice granting Brooks certification also cited Brooks for failing to maintain adequate buffers since adjacent fields are conventional production. Specifically, fields 2, 5, and 7 are abutted on at least one side by conventional production which includes cotton; however, there are no signs indicating that Brooks' fields are organic or a buffer zone despite Brooks' application stating such practices would be used to reduce the risk of contamination from surrounding conventional production. Therefore, AI stated that Brooks must implement the practices described in its OSP – the use of signs and buffer zones. Brooks acknowledged AI's instructions in an October 19, 2018 email, attaching pictures of signage placed in the buffer areas in question and stating, "Planned crop for buffer is Rye which is being sourced now. Americert will be notified of any changes to this plan." AI approved this corrective action by Brooks in an October 24, 2018 letter.

Further, Brooks stated in its September 16, 2019 Organic Grower Plan/Application for Certification that, "Adjacent land is observed and buffer zones are intact (50 ft or more between crop and surrounding lands) with treelines, roadways, etc. Any neighboring fields that have insufficient buffers have signage and either sunflowers or rye planted to prevent drift." Brooks subsequently noted that buffers and surrounding land use are visually monitored on a weekly basis. However, at the October 15, 2019 inspection, the inspector noted that Brooks' organic fields had minimal physical barriers and no rye or sunflower crops in the buffer zones despite Brooks' own corrective action agreeing to maintain such buffer zones.

Brooks stated in its Appeal that it already has a wide buffer zone around organic crops and since there are natural barriers, there is no need for rye or sunflower buffer crops. When asked specifically about AI's contention that it had agreed to maintain rye or sunflower buffer zones, Brooks stated that while it had planted rye as a cover crop to inhibit weeds in the soybean fields, it had received mixed messages from AI regarding buffer zones despite AI's communication to Brooks on this matter.

AI states that Brooks' failure to maintain the buffer zones after agreeing to do so is a willful violation of the organic regulations. Further, the inspector noted in the Addendum to the inspection report that Brooks stated it had already harvested the rye planted as a buffer and it was in storage but provided no evidence to the inspector. Brooks submitted with its Appeal a May 30, 2019 Inventory Receipt for the storage of 2400 bags of rye which it had noted to the inspector. Therefore, Brooks has proof that the harvested rye is in storage. However, as AI contends, already-harvested rye can't serve as a buffer crop for corn and soybean not yet planted when the rye was already harvested.

The inspector also noted conventional cotton bolls were drifting in Brooks' fields from adjacent conventional fields. However, Brooks claims they were only on the edge of the road and had flown off passing trucks transporting harvested cotton. AI provided photographs showing the cotton fields across the two-lane highway; that Brooks' side has a 10-yard grassy area next to the highway; and there is another 10-yard wide harvested crop area before Brooks' organic field. Another photo reveals similar numbers of cotton bolls in the grassy area and in the organic field. The presence of cotton bolls in Brooks' fields justifies the need for the buffer zones that Brooks had agreed to install and failed to do.

As seen, AI issued a combined Notice of Noncompliance and Proposed Suspension citing to numerous noncompliances. The organic regulations at 7 C.F.R. §205.662(a) state that, “When an inspection, review, or investigation of a certified operation by a certifying agent...reveals any noncompliance with the Act or regulations in this part, a written notification of noncompliance shall be sent to the certified operation...” Then if an operation’s rebuttal of the cited noncompliances is unsuccessful or corrective actions are not completed within the prescribed time, the certifier shall send the operation a written notice of proposed suspension pursuant to §205.662(c).

However, the regulations at §205.662(d) provide that, “if a certifying agent...has reason to believe that a certified operation has willfully violated the Act or regulations in this part, the certifying agent...shall send the certified operation a notification of proposed suspension or revocation of certification of the entire operation or a portion of the operation, as applicable to the noncompliance.” Based on the totality of the evidence, including the fact that these noncompliances occurred despite prior notice by AI and Brooks’ acknowledgment of its requirements for recordkeeping and buffer zones, AI had reason to believe that Brooks willfully violated the Act and the regulations. Therefore, AI was justified in issuing a combined Notice of Noncompliance and Proposed Suspension.

During the pendency of the Appeal, AI issued Brooks another Notice of Noncompliance and Proposed Suspension for additional noncompliances on April 11, 2020. Brooks responded by informing AI and NOP on May 11, 2020 that it was surrendering its organic certification. However, due to the of the violations noted in the October 28, 2019 Notice of Noncompliance and Proposed Suspension, which Brooks appealed, AMS is proceeding with the current action.

In conclusion, the evidence substantiates that Brooks violated the organic regulations at 7 CFR 205.103; 7 CFR 205.201; and 7 CFR 205.202. Brooks failed to maintain adequate records of organic production activities and transactions and failed to follow the approved OSP and disclose the practices actually used. Although evidence does not definitively prove that Brooks used prohibited substances on organic crops, Brooks violated the organic regulations by failing to maintain adequate buffer zones around the organic crops after previous warnings.

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, Brooks violated the Act and the organic regulations at 7 CFR §205.103; 7 CFR §205.201; and 7 CFR §205.202. Due to the extent of the violations, Brooks may not remain certified at this time.

DECISION

The Appeal is denied and the Notice of Noncompliance and Proposed Suspension of Brooks' certification is upheld. Brooks' certification is hereby suspended. Although Brooks surrendered its certification on May 11, 2020, the suspension is still being imposed. However, pursuant to 7 CFR §205.662(f)(1), Brooks may apply for reinstatement of its organic certification at any time, and with any USDA-accredited certifying agent. The request for reinstatement must be accompanied by evidence demonstrating correction of each substantiated noncompliance cited by AI and the corrective actions taken to comply with and remain in compliance with the Organic Foods Production Act and the organic regulations. Additionally,

attached to this formal Administrator's Decision denying Brooks' Appeal is a Request for Hearing form. Brooks has thirty (30) days to request an administrative hearing before an Administrative Law Judge.

Done at Washington, D.C., on this _____
day of _____, 2020.

**BRUCE
SUMMERS**

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Bruce Summers
Administrator
Agricultural Marketing Service