

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
Joel Cross) **Administrator's Decision**
Harrisburg, Nebraska) **APL-024-18**
)

This Decision responds to an appeal (APL-024-18) of a Notice of Proposed Suspension of National Organic Program certification issued to Joel Cross of Harrisburg, Nebraska, by the Organic Crop Improvement Association. 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 § 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 Adverse Action Appeals Process – General, and § 205.681, Appeals of the USDA organic regulations.

¹ 7 U.S.C. 6501-6522

² 7 C.F.R. Part 205

FINDINGS OF FACT

1. Organic Crop Improvement Association (OCIA) is an accredited certifying agent under the USDA organic regulations. Joel Cross (Cross) of Harrisburg, Nebraska, is certified for crops and livestock under the USDA organic regulations. (Exhibit 1).
2. On September 30, 2015, OCIA issued a Notice of Noncompliance for Cross' failure to pay the 2014 "acreage fees" and 2015 certification fees, despite numerous contacts by OCIA (Exhibit 2).
3. In May 2016, OCIA offered Cross a Settlement Agreement, whereby Cross would agree to submit a complete application for continuation of certification by May 20, 2016. Cross signed the Settlement Agreement; however, due to an oversight, the Agreement was never counter-signed by OCIA with a fully executed copy being sent to Cross (Exhibit 3).
4. On June 2, 2016, OCIA issued a Notice of Noncompliance for Cross' failure to submit the 2016 certification materials and fees (Exhibit 4).
5. On July 11, 2016, OCIA issued a Notice of Proposed Suspension after reviewing Cross' certification application and finding that Cross failed to adequately meet the terms of the May 2016 Settlement Agreement, because there was missing documentation in the application for certification. OCIA did not realize at that time that it never executed the Agreement (Exhibit 5).
6. On September 16, 2016, OCIA and Cross entered into a Settlement Agreement, whereby Cross agreed that he would answer all future correspondence and requests from OCIA on or before the deadlines set by OCIA. (Exhibit 6)
7. On June 27, 2017, OCIA conducted a routine annual inspection. OCIA noted in the Livestock Inspection Report (Exhibit 7) that there were no records for recent spring cattle

working, i.e. dehorning; herd records were absent; and there were no grazing records, feeding records or vaccination/health records. OCIA noted in the Crop Production Inspection Report (Exhibit 8) that the field histories were not up to date for inputs applied or crops grown on the fields; and the Organic System Plan (OSP) was inaccurate regarding equipment and harvest production, as well as the storage facility information. The traceback audit and audit trail conducted at the inspection were not successful due to missing records.

8. On November 15, 2017, OCIA issued a Notice of Noncompliance stating that Cross failed to maintain livestock and adequate crop production audit trail records. OCIA also identified additional information needed to finalize a certification decision. OCIA stated that responses to the noncompliance findings and the outstanding information must be submitted to OCIA within 30 days of receipt of the Notice. (Exhibit 9)
9. On December 20, 2017, Cross submitted a response to the November 15, 2017 Notice comprised of pregnancy check records, calving records, Dry Matter Intake (DMI) forms and ration tables (Exhibit 10); however, Cross did not submit complete feeding records, and health and vaccination records.
10. On January 2, 2018, OCIA issued a Notice of Proposed Suspension, stating that Cross' response had not successfully corrected or rebutted the noncompliances and deficiencies remained. Cross failed to maintain livestock audit trail records (7 C.F.R. 205.103), specifically, livestock feed, health and vaccination records were absent; and the feed information on the Livestock OSP did not match with information on the DMI calculation worksheets. OCIA also stated that Cross had failed to meet the terms of the September 2016 Settlement Agreement, because Cross did not respond to all outstanding

items described in the Notice of Noncompliance by the given deadline (7 C.F.R. 205.406). Therefore, OCIA stated that it was re-instating the 2016 Notice of Proposed Suspension (Exhibit 11).

11. On January 29, 2018, Cross submitted a mediation request (Exhibit 12) to OCIA along with livestock records, including herd health information; bangs vaccination information; ID numbers for replacement heifers; updated DMI sheets; and also submitted a Prior Land Use Affidavit (PLUA) for land in transition to organic production, with maps and a field history. Cross also submitted maps, a Prevention of Commingling and Contamination form; a Certification Renewal Application dated December 2016; and what appears to be a feed 'diary.' (Exhibit 10)
12. On February 8, 2018, OCIA denied Cross' request for mediation, noting Cross' continued failure to submit requested documentation and Cross' breach of the September 16, 2016 Settlement Agreement (Exhibit 13).
13. On March 1, 2018, AMS received Cross' appeal to OCIA's Notice of Proposed Suspension. (Exhibit 14).

DISCUSSION

The organic regulations at 7 C.F.R. 205.103, Recordkeeping by certified operations, state that 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 organic. The records must fully disclose all activities and transactions of the certified operation in sufficient detail as to be readily understood and audited; and be sufficient to demonstrate compliance with the Act and the regulations.

The organic regulations at 7 C.F.R. 205.406, Continuation of certification, state that in order for a certified operation to continue certification, it must submit to the certifying agent any update on the correction of minor noncompliances previously identified by the certifying agent as being required for continued certification, and other information deemed necessary by the certifying agent to determine the certified operation's compliance with the Act and the USDA organic regulations.

On January 2, 2018, OCIA proposed a suspension of Cross' organic certification, which would prohibit the sale, labeling, or representation of its products as organic. Presenting the reasons for proposing a suspension, OCIA stated that Cross failed to maintain livestock audit trail records as required by USDA organic regulations at § 205.103, as well as other livestock records; and failed to meet the terms of a pre-existing settlement agreement, which required the timely and complete submission of certification documents, thus violating USDA organic regulations at § 205.406.

Addressing Cross' failure to maintain livestock audit trail records, OCIA stated that at the June 2017 inspection, Cross did not present livestock production records, including feeding records, pasture movement/grazing records, and health/vaccination records for review. Further, although Cross responded to the November 2017 Notice of Noncompliance, which was issued in regard to the inspection findings, Cross' response still showed deficiencies in recordkeeping. Specifically, there was no evidence that Cross maintained complete feeding records or health and vaccination records, as only pregnancy check and calving records were submitted, which also revealed another noncompliance in that calves were given the same ID tag number as their mothers. Further, the DMI information and calculation worksheets and the Livestock OSP still

did not match, and the feed ration forms did not consistently show the season in which a feed is provided or the amount provided per animal, or provide a specific date range for pasture access.

OCIA's November 2017 Notice of Noncompliance had also listed the additional information needed to finalize a certification decision on Cross. However, OCIA found that Cross did not timely submit all information requested, as Cross had agreed to do in the September 2016 Settlement Agreement. Cross had not successfully corrected or rebutted the noncompliances, and while Cross provided some of the requested information, other items were not addressed at all. Further, Cross' OSP had not been revised to identify what equipment is used on non-organic acreage and the current storage areas. Therefore, OCIA issued the Notice of Proposed Suspension on January 2, 2018, and subsequently denied Cross' request for mediation.

Cross stated in the Appeal that livestock audit trail records were not available at the June 2017 inspection due to unforeseen circumstances; however, they have since been provided to OCIA, including feeding, pasture movement/grazing, and health vaccination records; and additionally the DMI records were updated. Cross also claims that individual signing the PLUA overlooked a section on the form, but it had been updated and no seed treatments were used on the associated land.

Cross submitted numerous documents with the mediation request to OCIA and with the appeal to AMS (Exhibit 10); though an inventory of the documents revealed that the same documentation was supplied for both submissions. Most of said documentation had also been submitted with Cross' response to the prior Notice of Noncompliance, with the possible exception of a DMI Calculation Worksheet submitted with the appeal. AMS sent this latter document (Exhibit 15) to OCIA, and asked OCIA to determine if it addressed any of the

noncompliances cited as the basis for the January 2018 Notice of Proposed Suspension. OCIA replied that the DMI Calculation Worksheet was insufficient, because it did not properly address the grazing season and because it listed feed for the entire year, treating the grazing season as year round, when it is not year-round in practice. Further, the information on the Worksheet does not match the information in the ration tables of the Livestock OSP in regard to the amounts fed to various classes of livestock. (Exhibits 16 and 17) Despite Cross' documentation submissions with the mediation request and the appeal, numerous specific requests remain unaddressed.

Additionally, during the pendency of the appeal, OCIA submitted to AMS a Pre-Inspection Report issued on May 8, 2018, detailing several findings from OCIA's review of Cross' 2018 certification renewal application. For example, there was conflicting information within Cross' records on the use of equipment and storage units; additional fields and/or acreage added to existing fields which were not previously disclosed; a feed table showing uncertified wheat straw; and a pasture map lacking information. There were also additional recordkeeping discrepancies as well as missing information (Exhibit 18).

The record in this case shows a continual stream of noncompliances by Cross dating back to the spring of 2016, when OCIA found that Cross failed to submit a complete application for continuation of its organic certification. OCIA and Cross entered into a settlement agreement on September 16, 2016, in an attempt to resolve the noncompliances, and Cross agreed, as part of the terms of that settlement agreement, to answer all future requests from OCIA on or before deadlines set by OCIA. However, the routine annual inspection of June 2017 showed continued deficiencies in Cross' recordkeeping in several areas; and although the November 2017 Notice of Noncompliance and January 2018 Notice of Proposed Suspension specifically identify required

documentation or actions to resolve the noncompliances, Cross has been unable to fully come into compliance and adequately address all the noncompliances raised by OCIA.

CONCLUSION

The availability of complete and coherent records for certifiers and inspectors is a basic requirement for organic certification and is essential to oversight. Failure to maintain or make available necessary documents precludes a certifier from verifying that practices throughout the handling cycle comply with the USDA organic regulations.

Cross has shown an inability to comply with recordkeeping requirements and respond sufficiently to the OCIA's specific requests for documentation, despite OCIA giving Cross several opportunities to do so, and Cross agreeing in a September 16, 2016 Settlement Agreement to submit requested documentation to OCIA by or before deadlines set by OCIA. Therefore, Cross is found to be violation of the Act and the USDA organic regulations, specifically the recordkeeping provisions at § 205.103, and continuation of certification requirements at § 205.406.

DECISION

The appeal is denied and Cross is to be suspended. Attached to this formal Administrator's Decision denying Cross' appeal is a Request for Hearing form. Cross has thirty (30) days to request an administrative hearing before an Administrative Law Judge.

If Cross waives the hearing, the Agricultural Marketing Service will direct OCIA to issue a Notice of Suspension. At any time after suspension, Cross 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.”

Done at Washington, D.C., on this 22nd
day of June, 2018.



Bruce Summers
Administrator
Agricultural Marketing Service