

UNITED STATES DEPARTMENT OF AGRICULTURE  
AGRICULTURAL MARKETING SERVICE  
BEFORE THE ADMINISTRATOR

In re: )  
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)  
Postmus Dairy LLC )  
dba Postmus Organic Farms )  
) **Administrator's Decision**  
) **APL-012-23**  
)  
Dublin, Texas )  
)

This Decision responds to an Appeal (APL-012-23) of a Notice of Noncompliance and Proposed Suspension under the National Organic Program (NOP) issued to Postmus Dairy LLC, dba Postmus Organic Farms (Postmus) of Dublin, Texas by USDA accredited certifying agent Oregon Tilth Certified Organic (OTCO). Postmus has been deemed not in compliance with the Organic Foods Production Act of 1990 (Act)<sup>1</sup> and the U.S. Department of Agriculture (USDA) organic regulations.<sup>2</sup>

**INTRODUCTION**

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

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<sup>1</sup> 7 U.S.C. 6501-6522

<sup>2</sup> 7 C.F.R. Part 205

believe they are adversely affected by a noncompliance decision of a certifying agent or NOP 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.

### **FINDINGS OF FACT**

1. On February 27, 2008, Postmus was certified for crops and livestock.
2. On September 12, 2022, OTCO issued a Notice of Noncompliance and Proposed Suspension to Postmus.
3. On October 10, 2022, OTCO accepted Postmus’ request for mediation.
4. On December 6, 2022, after being unable to reach an agreement with Postmus, OTCO issued a Notice of Unsuccessful Mediation to Postmus.
5. On January 5, 2023, Postmus filed an Appeal.

### **REGULATORY CITATIONS**

The USDA organic regulations at 7 C.F.R. §205.105, Allowed and prohibited substances, methods, and ingredients in organic production and handling, state that, “To be sold or labeled as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s)),” the product must be produced and handled without the use of: (a) Synthetic substances and ingredients, except as provided in §205.601 or §205.603 ...”.

The regulations at §205.201, Organic production and handling system plan, state that, “(a) The producer or handler of a production or handling operation ... 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 ... (5) A description of 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 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: ... (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; ...” The regulations at §205.204, Seeds and planting stock practice standard, state that, “(a) The producer must use organically grown seeds, annual seedlings, and planting stock: *Except*, That, (1) Nonorganically produced, untreated seeds and planting stock may be used to produce an organic crop when an equivalent organically produced variety is not commercially available ... (2) Nonorganically produced seeds and planting stock that have been treated with a substance included on the National List of synthetic substances allowed for use in organic crop production may be used to produce an organic crop when an equivalent organically produced or untreated variety is not commercially available ...”

The regulations at §205.236, Origin of livestock, then in effect, state that, “(a) Livestock products that are to be sold, labeled, or represented as organic must be from livestock under continuous organic management from the last third of gestation or hatching ... (2) *Dairy*

*animals*. Milk or milk products must be from animals that have been under continuous organic management beginning no later than 1 year prior to the production of the milk or milk products that are to be sold, labeled, or represented as organic, *Except*, (i) That, crops and forage from land, included in the organic system plan of a dairy farm, that is in the third year of organic management may be consumed by the dairy animals of the farm during the 12-month period immediately prior to the sale of organic milk and milk products; ... (b) The following are prohibited: (1) Livestock or edible livestock products that are removed from an organic operation and subsequently managed on a nonorganic operation may be not (sic) sold, labeled, or represented as organically produced ...”

The regulations at §205.237, Livestock feed, state that, “(a) The producer of an organic livestock operation must provide livestock with a total feed ration comprised of agricultural products, including pasture and forage, that are organically produced and handled by operations certified to the NOP ... (b) The producer of an organic operation must not: ... (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 ... This shall be calculated as an average over the entire grazing season for each type and class of animal ... (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 through the grazing season ... (d) Ruminant livestock producers shall: (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...”

The 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 ... Land used for the production of annual crops for ruminant grazing must be managed in full compliance with §§205.202 through 205.206...” The regulation proceeds to set forth the numerous requirements for the pasture.

The regulations at §205.400, General requirements for certification, state that, “A person seeking to receive or maintain organic certification under the regulations in this part must: (a) Comply with the Act and applicable organic production and handling regulations of this part; (b) Establish, implement, and update annually an organic production or handling system plan that is submitted to an accredited certifying agent ... (f) Immediately notify the certifying agent concerning any: (1) Application, including drift, of a prohibited substance to any field, production unit, site, facility, livestock, or product that is part of an operation ...”

## DISCUSSION

Postmus was certified organic for crops and livestock on February 27, 2008; and is certified by OTCO. Postmus has (b) (4) acres of certified cropland, specifically pasture and forage, on which its certified livestock graze. The organic livestock include (b) (4) milk cows; (b) (4) dry cows; (b) (4) calves; (b) (4) open heifers; and (b) (4) bred heifers. The (b) (4) organic milk cows graze on (b) (4) acres of certified cropland close to the milking facility. The other (b) (4) acres of certified cropland is used to graze the other certified livestock.

OTCO conducted an annual inspection of the operation on May 17, 2022, where it was discovered that Postmus had planted treated Barduro Red Clover seed on October 21/22, 2021, in

the (b) (4) acres used to graze the (b) (4) organic milk cows. OTCO found the seed was treated with Yellow Jacket Enhanced Seed Coating by Barenbrug USA, which contains Apron XL, a prohibited systemic fungicide with the active ingredient Mefenoxam. Therefore, OTCO determined that the (b) (4) acres must be removed from the organic crop certification for 3 years while it undergoes a transition period, after which it can be certified again, if there was no intervening use of any prohibited substances or seed treated with prohibited substances. Further, as organic milk cows grazed on the (b) (4) acres of pasture, and harvested crops from the pasture are kept for livestock feed, OTCO determined that the (b) (4) organic milk cows must lose their organic status.

Therefore, on September 12, 2022, OTCO issued a Notice of Noncompliance and Proposed Suspension to Postmus, citing to these inspection findings. The Notice also stated that the inspector found that Postmus had used 15 new inputs without having them approved by OTCO, and 13 of the 15 inputs were not OMRI listed. Although OTCO didn't issue a Notice of Noncompliance prior to issuing the combined notice, the organic regulations at 7 C.F.R. §205.662 provide for the issuance of a combined Notice of Noncompliance and Proposed Suspension when correction of a noncompliance is not possible. OTCO, having found that the planting of the treated seed and grazing of the organic livestock on the affected pasture weren't correctable, issued the combined notice. Postmus requested mediation on October 10, 2022, which OTCO granted that same day. However, OTCO stated that the parties were unable to reach an agreement during the mediation session, and therefore, on December 6, 2022, OTCO issued a Notice of Unsuccessful Mediation.

Postmus filed an Appeal on January 5, 2023, stating that it had no reason to believe that the Barduro Red Clover treated seed couldn't be used in its organic crop operation until OTCO

informed it of such. Postmus stated that it had researched the seed prior to its purchase, and relied on their seed supplier, which knew Postmus is an organic operation, and a Texas Organic Program Specialist at the Texas A & M University AgriLife Extension. A (b) (4) representative stated in a Declaration submitted by Postmus, that he is aware that seed coating is normally a clay-based material; and hadn't been told that any of the different coatings of seeds he has sold contained any fungicides. From the material he had available at the time, the representative didn't see any indication that the Barduro Red Clover seed was treated with Yellow Jacket coating containing Mefenoxam.

Postmus stated in its Appeal that the Texas A&M specialist had examined the Barduro Red Clover treated seeds; and had planted a trial field with the Barduro Red Clover seed at the same time that Postmus planted the treated seed in (b) (4) acres of its certified cropland, on October 21/22, 2021. Subsequently, after OTCO raised the issue of the treated seed at the May 17, 2022 inspection, Postmus and the specialist both state that the specialist looked further into the seed and discovered that the Barduro Red Clover seed is treated with Apron XL, and the active ingredient in the fungicide is Mefenoxam.

Postmus and the specialist both contend that Mefenoxam breaks down very quickly in soil with a half-life of a few weeks and a half-life in plants of just a few days; and the seeds were planted deep in the soil. They further stated that none of the treated Barduro Red Clover seeds germinated in the (b) (4) acre pasture or in the specialist's trial area, as the soil was too dry in the Fall of 2021, and drought conditions continued into May of 2022, with large fires occurring throughout the drought in the surrounding areas.

Addressing the milk cows, Postmus stated that the organic milk cows didn't return to the (b) (4) acres of pasture in which the treated seeds were planted until February 22, 2022,

approximately 4 months after the seeds were planted. Postmus and the Texas A&M specialist stated that in general, livestock are not grazed after seeds are just planted to allow the seedling plants to become well established. Further, Postmus argued that since the seeds didn't germinate, they are "confident that none of my organic cows ever were in contact with or consumed either the treated seeds or the non-germinated crop." The appeal notes that although Postmus "mistakenly used seed that it should not have," the organic integrity of the crop and livestock operation wasn't affected. Postmus also stated that it has never amended its Organic System Plan prior to using a new seed and will inform OTCO in the future before using any new seed.

Postmus concludes in its Appeal that it is aware that it "cannot use any synthetic substances in its production and maintain its organic certification;" however, the organic regulation prohibiting such use is "not absolute." Postmus points to the EPA (Environmental Protection Agency) tolerance levels whereby residues of prohibited pesticides up to 5 percent of the EPA tolerance level is allowed in organic operations, though no laboratory analysis of a sample from the affected (b) (4) acres was submitted. Postmus states that while it used the treated seed, its use was not intentional and the seeds didn't germinate, and therefore, a suspension of certification is too harsh a penalty.

However, while the use of the treated seed wasn't intentional, Postmus did acknowledge planting Barduro Red Clover seed treated with Yellow Jacket Enhanced Seed Coating containing Mefenoxam in (b) (4) acres of organic cropland used for grazing by its (b) (4) organic milk cows. An Invoice from (b) (4) shows the purchase by Postmus on October 4, 2021 of (b) (4) of Barduro Red Clover seed. Documentation from Postmus shows that on October 22, 2021, Postmus planted 6 varieties of seeds, with 2 passes/plantings of each; and the



Barduro Red Clover seed was the 5<sup>th</sup> variety planted. The tag for the Barduro Red Clover seed clearly shows the seed is treated with Barenbrug Yellow Jacket “Enhanced Seed Coating with Water Absorbing Technology” and that the seed has “50% coating material.” While the tag doesn’t state that the coating is Apron XL with the active ingredient being Mefenoxam, this information was obtained by OTCO, and can be seen by conducting a general internet search. OTCO also contacted Barenbrug whose representative informed OTCO that the Yellow Jacket coating on the Barduro Red Clover seed is “NON Organic,” and that their organic coating has the OMRI logo on the tag. Barenbrug stated that the Yellow Jacket Seed Coating contains Apron XL, which is a systemic fungicide, specifically Mefenoxam. The Apron XL fungicide is manufactured by Syngenta Crop Protection LLC. The EPA registered Apron XL and approved the Syngenta label on August 20, 2020, which identifies Mefenoxam as the active ingredient of the Group 4 Fungicide. Additionally, the EPA has stated that Mefenoxam is very persistent in soil, can readily leach into many soils, and can migrate to the water table. This conflicts with Postmus’ argument that Mefenoxam has a half-life of a few weeks in soil and a few days in plants.

Further, Postmus claims that the Barduro Red Clover seed treated with Yellow Jacket Enhanced Seed Coating never germinated, citing to drought conditions. However, whether the seed germinated is irrelevant as the Barduro Red Clover seeds with the Mefenoxam coating remain in the soil of the (b) (4) acres in which the seeds were planted. It is noted that Barenbrug states the benefits of the Yellow Jacket Seed Coating include needing less water for establishment and the enhanced coating can hold up to 600 times its weight in water; that the coated seed moves readily through the turf canopy for improved soil contact; is rigorously tested to ensure durability; has proven performance in the most demanding applications; that the seed

coating holds the fungicide Mefenoxam longer; has the ability to nearly double the germination percentage over uncoated seed; and performs well in drought conditions.

Therefore, the above findings support OTCO's determination that the (b) (4) acres of organic pasture can no longer be certified organic and must undergo a 3 year transition from the date of the treated seed planting, October 21, 2021, to October 20, 2024, after which it is eligible again for certification. Further, as determined by OTCO, Postmus' (b) (4) organic milk cows grazed on the affected (b) (4) acres can no longer be considered organic. Postmus stated that while the treated seed was planted on October 21/22, 2021, the organic milk cows didn't return to the (b) (4) acres until February 22, 2022. Postmus therefore concludes that this, coupled with the failure of the treated seed to germinate, means that, "the chances that any cow could have ingested mefenoxam from any feed ... or even walked around on mefenoxam soil ... is almost zero." The specialist reiterated this contention in his Declaration.

However, regardless of whether the treated seed germinated, it remains in the soil, and while Postmus stated in the Appeal that the treated seed was planted deep in the soil, Henk Postmus stated in a Declaration that the seed was planted ½ to 1 inch deep. Therefore, it is possible that the organic dairy cows came into contact with the seeds coated with Yellow Jacket Enhanced Seed Coating of mefenoxam. Further, the organic dairy cows continue to graze on the affected (b) (4) acres. Postmus stated in its DMI (dry matter intake) charts that the organic dairy cows grazed from March 3, 2021 to September 8, 2021, which is prior to the planting of the treated seed, and again from March 1, 2022 (which contrasts with the statement that they returned February 22, 2022) to October 31, 2022. NOP asked Postmus about the other (b) (4) acres of certified land and was told that the organic dairy cows are grazed on the affected (b) (4) acres, as the other (b) (4) acres are too far from the milking facility. The other (b) (4) acres are

used to graze the other organic livestock. Therefore, the organic dairy cows have grazed and continue to graze on the affected (b) (4) acres. Further, OTCO states that Postmus has stated when the organic milk cows are provided outdoor access, they are again on the affected pasture; and crops harvested from the (b) (4) acre pasture are kept for livestock feed. Therefore, the organic milk cows are on the affected (b) (4) acres beyond the ‘grazing season.’

Lastly, while OTCO cited in the Notice of Noncompliance and Proposed Suspension to the use of several new inputs without Postmus having received approval by OTCO, Postmus didn’t address this allegation in its Appeal. Rather, Postmus only addressed the use of the treated Barduro Red Clover seed without having informed OTCO beforehand; and stated it would inform OTCO in the future before using any new seed. Postmus’ OSP shows the use of numerous crop and livestock inputs, with some noted as being allowed, some for which use is restricted, and some for which additional information is needed prior to approval. However, no specific input is identified as having been used without approval.

## CONCLUSION

Evidence substantiates that Postmus has violated the organic regulations at 7 C.F.R. §205.105, Allowed and prohibited substances, methods, and ingredients in organic production and handling; 7 C.F.R. §205.201, Organic production and handling system plan; 7 C.F.R. §205.202, Land requirements; 7 C.F.R. §205.204, Seeds and planting stock practice standard; 7 C.F.R. §205.236, Origin of livestock; 7 C.F.R. §205.237, Livestock feed; 7 C.F.R. §205.240, Pasture practice standard; and 7 C.F.R. §205.400, General requirements for certification.

Evidence substantiates that Postmus planted seeds treated with a prohibited substance in its (b) (4) acre pasture used to graze its (b) (4) organic milk cows and from which crops are harvested for

livestock feed. Specifically, Postmus planted Barduro Red Clover seeds with Yellow Jacket Enhanced Seed Coating, containing Apron XL, specifically Mefenoxam. The organic regulations at 7 C.F.R. §205.105 state that an organic production operation can't use any synthetic substance in the operation unless said substance is on the National List. Mefenoxam is not a synthetic substance allowed under 7 C.F.R. §205.601, Synthetic substances allowed for use in organic crop production. Although the prohibited substance wasn't applied directly, but rather is in the coating of the planted treated seed, the regulations at 7 C.F.R. §205.204 state that only untreated seeds or seeds treated with a substance on the National List of synthetic substances may be used in organic crop production. Additionally, although Postmus doesn't harvest and sell the crops from the (b) (4) acre pasture, the operation's organic milk cows are grazed on the pasture, and crops harvested from the pasture are kept for livestock feed. Further, although Postmus alleges that the treated seeds didn't germinate, the seeds remain stable in the soil. As Postmus violated the regulations at 7 C.F.R. §205.202, the (b) (4) acre pasture can't maintain its organic status and must undergo a 3 year transition prior to being eligible again for certification.

Additionally, as Postmus uses the (b) (4) acre pasture for the grazing of its (b) (4) organic milk cows, the pasture must be managed as a crop and meet pasture practice standards. The producer of an organic livestock operation must ensure pasture of a sufficient quality and quantity is available to graze throughout the grazing season and provide all ruminants with an average of not less than 30 percent of their dry matter intake from grazing throughout the grazing season. Postmus grazed the organic milk cows on the (b) (4) pasture from February 2022 to October 2022, appearing to meet DMI requirements, and the cows are on that pasture again in 2023. However, Postmus violated the organic regulations at 7 C.F.R. §205.240 by failing to manage the pasture as a crop in compliance with the regulations at 7 C.F.R. §205.202 and 7

C.F.R. §205.204, as stated above. Further, as the organic milk cows are grazing on pasture in which seed treated with a prohibited substance was planted, Postmus has violated the regulations at 7 C.F.R. §205.236 as milk or milk products must be from animals that have been under continuous organic management. While the regulations provide that the dairy animals may consume crops and forage from land included in the OSP of the dairy farm, the (b) (4) acres in which the treated seed was planted have lost their organic status and, therefore, the organic milk cows, having grazed and continuing to graze, on the (b) (4) pasture have also lost their organic status. Additionally, Postmus has violated the regulations at 7 C.F.R. §205.237 as Postmus uses crops harvested from the (b) (4) pasture for livestock feed, contrary to the requirement in that regulations for the producer of an organic livestock operation to provide its livestock with a total feed ration composed of agricultural products, including pasture and forage, that are organically produced.

Lastly, the use by Postmus of the treated seed without prior notification to and approval from OTCO, and the seed coating containing a prohibited substance, also constitute a violation of the organic regulations at 7 C.F.R. §205.201, which require that a certifier operation list all substances to be used as an input in the operation, and describe how the operation will prevent the contact of organic production operations and products with prohibited substances. The above cited violations constitute a violation of the organic regulations in general pursuant to 7 C.F.R. §205.400. It is acknowledged that Postmus states its planting of the seed with coating containing a prohibited substance wasn't intentional. However, the organic regulations do not provide an exemption for the unintentional use of a prohibited substance, seed coated with a prohibited substance, or the grazing of organic livestock on pasture in which the seed was planted.

## DECISION

Postmus' Appeal of January 5, 2023 is denied. The September 12, 2022 Notice of Noncompliance and Proposed Suspension is affirmed. The (b) (4) acre pasture discussed above is suspended from organic crop certification, and must undergo a 3 year transition from the date the treated seeds were planted, October 21/22, 2021, to October 20, 2024. Further, as Postmus' organic milk cows have been grazing on the affected (b) (4) acre pasture, they are suspended from organic livestock certification. The remaining livestock and (b) (4) acres of cropland remain certified.

Additionally, attached to this formal Administrator's Decision denying Postmus' Appeal is a Request for Hearing form. Should Postmus wish to further appeal this decision, Postmus has thirty (30) days to request an administrative hearing before an Administrative Law Judge.

Done at Washington, D.C., on this 8<sup>th</sup>  
day of \_\_\_\_\_, 2023.

**BRUCE  
SUMMERS**

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Bruce Summers  
Administrator  
Agricultural Marketing Service