

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
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)
Texas Department of Agriculture) **Administrator’s Decision**
) **APL-037-22**
Austin, Texas)
)

This Decision responds to an Appeal (APL-037-22) of a Notice of Noncompliance and Proposed Suspension under the National Organic Program (NOP) issued to the Texas Department of Agriculture (TDA) of Austin, Texas, a USDA accredited certifying agent, by the NOP. The certifying agent 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). The accreditation of a certifying agent is for a period of 5 years from the date of approval of accreditation pursuant to section 205.506 and shall continue in effect until such time as the certifying agent fails to renew accreditation as provided in section 205.510(c), the certifying agent voluntarily ceases its certification activities, or accreditation is suspended or revoked

¹ 7 U.S.C. 6501-6522

² 7 C.F.R. Part 205

pursuant to section 205.665. An accredited certifying agent subject to the Act which believes it is adversely affected by a noncompliance decision of 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 April 29, 2002, TDA was accredited to certify organic operations for crops, livestock, and handling under NOP organic standards.
2. On January 11, 2017, NOP issued a Noncompliance Report detailing numerous noncompliances found during the December 5 – 9, 2016 renewal audit of TDA. NOP deferred renewing TDA’s accreditation due to these findings.
3. On June 1, 2018, NOP issued a Noncompliance Report detailing the findings of the March 12 – 14, 2018 onsite audit.
4. On November 2, 2018, NOP issued a Notice of Noncompliance after the review of TDA’s certification and monitoring of organic dairies from May to August 2018 revealed several noncompliances in TDA’s practices and procedures in its livestock program.
5. On July 8, 2019, NOP issued another Notice of Noncompliance after the review of TDA’s Annual Report submitted on April 29, 2019 revealed continued noncompliances.
6. On August 19, 2019, NOP and TDA entered into a Settlement Agreement setting forth 8 specific terms detailing corrective actions which TDA must take, within specific time frames, to avoid a suspension of its livestock accreditation.

7. On September 3, 2019, NOP issued a notice renewing TDA's accreditation for crops, livestock, and handling subject to the terms of the August 19, 2019 Settlement Agreement. The effective date of the accreditation was back-dated to April 29, 2017.
8. On December 3, 2019, NOP issued another Notice of Noncompliance after the review of a TDA inspection of a dairy operation revealed TDA failed to verify several critical requirements.
9. On May 15, 2020, NOP wrote TDA summarizing the findings of the desk audit of TDA's livestock program conducted on April 14 – 16, 2020, and also granting TDA an extension to July 30, 2020 in which to comply with certain terms of the August 2019 Settlement Agreement.
10. On August 24 – 28, 2020, NOP conducted a desk audit of TDA's livestock program and found that TDA didn't successfully complete 2 of the 8 terms in the Settlement Agreement.
11. On November 18 – 24, 2020, NOP conducted a mid-term audit of TDA's full organic program, including crops, handling, and livestock, and found that noncompliances remained outstanding from prior audits, and new noncompliances were found.
12. On February 4, 2021, NOP sent TDA a Summary of Findings from the August 2020 audit and the November 2020 mid-term audit and prior compliance audits, citing the noncompliances and the terms of the Settlement Agreement with which TDA failed to comply.
13. On June 2, 2021, NOP issued TDA a 'final opportunity letter' with specific conditions which TDA must satisfy to remain accredited. The specific corrective actions/required actions were provided in detail and were divided into actions to be completed within 30, 60, or 90 days.

TDA was informed that NOP would conduct witness audits of operations, and TDA was to conduct an internal program review.

14. On August 25, 2021, NOP issued a report on the Results of Witness Audits, detailing the findings of NOP's August 10 – 12, 2021 onsite audits of TDA inspections of three of its certified operations, 1 each for crops, handling, and livestock.
15. On February 25, 2022, NOP issued a Notice of Noncompliance and Proposed Suspension to TDA, detailing the history of TDA's ongoing failure to demonstrate the ability to operate a compliant organic certification program and NOP's attempts to bring TDA into compliance. NOP also offered TDA a Settlement Agreement, whereby TDA could surrender its livestock and handling scopes of accreditation but retain the crops accreditation. NOP's notice stated that despite opportunities for improvement, noncompliances remain, and it remains clear that TDA personnel are not sufficiently qualified to conduct inspections, lack knowledge of the USDA organic regulations, and inconsistently implement the regulations and policies.
16. On March 24, 2022, TDA filed an Appeal. TDA didn't address or accept the offered settlement and stated that the proposed suspension "was not proper or made in accordance with applicable program regulations, policies, or procedures." This is deemed a rejection of the settlement offer.

DISCUSSION

The USDA organic regulations at 7 C.F.R. §205.403, On-site inspections, state that, "A certifying agent must conduct an initial on-site inspection of each production unit, facility, and site that produces or handles organic products and that is included in an operation for which certification is requested. An on-site inspection shall be conducted annually thereafter for each

certified operation that produces or handles organic products for the purpose of determining whether to approve the request for certification or whether the certification of the operation should continue... (c) *Verification of information*. The on-site inspection of an operation must verify: (1) The operation's compliance or capability to comply with the Act and the regulations in this part ... (d) *Exit interview*. The inspector must conduct an exit interview with an authorized representative of the operation who is knowledgeable about the inspected operation to confirm the accuracy and completeness of inspection observations and information gathered during the on-site inspection. The inspector must also address the need for any additional information as well as any issues of concern.”

The organic regulations at §205.404, Granting certification, state that, a certifying agent must review the on-site inspection report of operations seeking certification, the results of any analyses for substances, and any additional information requested from or supplied by the applicant operation, and determine if the organic system plan and all procedures and activities of the applicant's operation are in compliance with the organic regulations and that the applicant is able to conduct operations in accordance with its plan.

The organic regulations at §205.406, Continuation of certification, state that, upon receipt of a certified operation's updated organic production or handling system plan, any update on the correction of minor noncompliances previously identified by the certifying agent, and any other information deemed necessary, the certifying agent shall, within a reasonable time, arrange and conduct an on-site inspection of the operation, determine if the operation is in compliance with the Act and organic regulations, and provide a written notification of noncompliance to the operation if the certifying agent has reason to believe that the operation is not in compliance.

The organic regulations at §205.501, General requirements for accreditation, state that,

“(a) A private or governmental entity accredited as a certifying agent under this subpart must:

- (1) Have sufficient expertise in organic production or handling techniques to fully comply with and implement the terms and conditions of the organic certification program established under the Act and the regulations in this part;
- (2) Demonstrate the ability to fully comply with the requirements for accreditation set forth in this subpart;
- (3) Carry out the provisions of the Act and the regulations in this part ...
- (4) Use a sufficient number of adequately trained personnel, including inspectors and certification review personnel, to comply with and implement the organic certification program established under the Act and the regulations in subpart E of this part ...
- (5) Ensure that its responsibly connected persons, employees, and contractors with inspection, analysis, and decision-making responsibilities have sufficient expertise in organic production or handling techniques to successfully perform the duties assigned ...
- (6) Conduct an annual performance evaluation of all persons who review applications for certification, perform on-site inspections, review certification documents, evaluate qualifications for certification, make recommendations concerning certification, or make certification decisions and implement measures to correct any deficiencies in certification services;
- (7) Have an annual program review of its certification activities conducted by the certifying agent’s staff, an outside auditor, or a consultant who has expertise to conduct such reviews and implement measures to correct any noncompliances with the Act and the regulations in this part that are identified in the evaluation ...
- (18) Provide the inspector, prior to each on-site inspection, with previous on-site inspection reports and notify the inspector of its decision regarding certification of the production or handling operation site inspected by the inspector and of any requirements for the correction of minor noncompliances ...
- (21) Comply with, implement, and carry out any other terms and

conditions determined by the Administrator to be necessary ...

The organic regulations at §205.504, Evidence of expertise and ability, state that, “A private or governmental entity seeking accreditation as a certifying agent must submit the following documents and information to demonstrate its expertise in organic production or handling techniques; its ability to fully comply with and implement the organic certification program ... and its ability to comply with the requirements for accreditation ...”

The organic regulations at §205.505, Statement of agreement, state that, a private or government entity seeking accreditation must sign and return a statement of agreement which affirms that, if granted accreditation as a certifying agent, the entity will carry out the provisions of the Act and the organic regulations, including “(3) Conduct an annual performance evaluation of all persons who review applications for certification, perform on-site inspections, review certification documents, evaluate qualifications for certification, make recommendations concerning certification, or make certification decisions and implement measures to correct any deficiencies in certification services; (4) Have an annual internal program review conducted of its certification activities by certifying agent staff, an outside auditor, or a consultant who has the expertise to conduct such reviews and implement measures to correct any noncompliances with the Act and the regulations...(6) Comply with, implement, and carry out any other terms and conditions determined by the Administrator to be necessary.”

On April 29, 2002, TDA was accredited to certify organic operations for crops, livestock, and handling under NOP organic standards. However, between 2017 and 2021, NOP issued various noncompliance reports and Notices of Noncompliance to TDA. TDA submitted replies with cited corrective actions taken, as well as revised documentation to address the noncompliances. However, NOP found that often TDA’s submissions weren’t adequate to

resolve or completely resolve all the cited noncompliances. Further, NOP conducted several on-site and desk audits, as well as witness audits of TDA inspections of its certified operations, and the NOP and TDA entered into a Settlement Agreement with specific terms to be met by TDA. However, noncompliances remained, and at various times over the past few years, NOP ‘cleared’ noncompliances at an audit only to find new noncompliances.

Therefore, NOP issued a ‘final opportunity letter’ to TDA on June 2, 2021, with 4 specific conditions which TDA was told it must satisfy to remain accredited. The specific corrective actions/required actions were divided into actions to be completed within 30, 60, or 90 days. NOP also stated that it would conduct witness audits of TDA-certified operations, and TDA was to conduct an internal program review. NOP stated that first, TDA must demonstrate that its personnel, including inspection and certification review personnel, are fully trained and qualified to conduct the multiple activities including performing inspections; reviewing Organic System Plans (OSP) for accuracy and completeness; reviewing material inputs; reviewing labels for compliance; verifying an operation’s compliance with organic import/export requirements and international organic equivalency arrangements; and issuing adverse action notices to operations in a timely manner. NOP also set forth specific training that all TDA’s certification staff must successfully complete within 60 days of the letter, with 13 trainings in the Organic Integrity Learning Center (OILC) and 1 training through the International Organic Inspectors Association (IOIA).

Second, NOP stated that TDA must demonstrate that it has the administrative capacity to conduct unannounced inspections of at least 5% of its certified operations on an annual basis; and submit a list of the unannounced inspections done in 2020 and 2021, with the inspection reports and OSPs of the operations. Third, NOP stated that TDA must demonstrate that its staff

are verifying the accuracy of an operation's OSPs during inspections; and that NOP would conduct witness audits of 3 TDA inspections of its certified operations to cover all scopes of accreditation. TDA was also required to establish and provide NOP with its system for tracking noncompliances of operations through the adverse action process to ensure timely issuance of noncompliance and adverse action notices. TDA was also required to provide all labels it had approved, to ensure that TDA only approved compliant labels; and to provide its list of approved material inputs that it allows in organic production. Fourth and lastly, TDA was required to demonstrate that the policies, procedures, and templates for conducting certification and accreditation activities fully comply with the regulations. These activities include reviewing and verifying OSPs, documenting inspections, verifying compliance with import/exports requirements and international equivalency arrangements, conducting residue testing and conveying findings, and conducting an annual program review. NOP instructed TDA to revise its templates for OSPs, inspection reports, and exit interviews; and establish a procedure for issuing sample receipts and a procedure for conducting an internal review.

In response to these requirements, TDA submitted its '30-day' submission on June 30, 2021, including a list of unannounced inspections conducted in 2020 and 2021 and the inspection reports; the Corrective Action Tracker; a Label Index and all labels; and numerous revised and new documents including the Organic Inspection Manual, Livestock OSP, Organic Livestock Producer Inspection Report, Nonorganic Ingredient Declaration, Natural Flavor Product Questionnaire, Material Summary Sheet, Crop OSP, International Market Requirements form, and Fee Schedule. TDA stated that it would continue to train all certification and inspection staff.

TDA submitted its '60-day' submission on July 30, 2021, including the certificates for 15 staff members who completed the 13 courses in NOP's OILC. TDA stated that all staff couldn't complete the 14th/last training required as the advanced IOIA livestock course required that staff complete a pre-requisite and have livestock inspection experience; however, TDA indicate it was working with IOIA to enroll its remaining staff in the 100 Level Livestock Standards course as soon as it is available. TDA submitted an updated Corrective Action Tracker; and documentation regarding training it conducted for all inspectors and review staff on July 22, 2021 on residue sampling. As to the required internal review, TDA stated it developed a policy and procedure for the internal review, to be conducted shortly and submitted the resume of a potential reviewer.

TDA submitted its '90-day' submission on September 1, 2021, including the Corrective Action Tracker which was further updated; documentation on residue sampling conducted at 3 operations; an approved Materials List; and Internal Review Procedures as well as a checklist and resume of another potential reviewer. The internal review was subsequently conducted in October 2021 by a third-party, from another state certifier. On October 15, 2021, TDA submitted the Internal Review outline, timeline, Summary and Findings, and TDA Summary of Responses and Planned Corrective Actions to NOP.

In the interim, NOP conducted three on-site witness audits of TDA inspections of its certified operations on August 10 – 12, 2021 – one each for crops, livestock, and handling. NOP issued the Results of Witness Audits on August 25, 2021, detailing noncompliances. NOP stated that TDA's inspectors for all 3 audits didn't fully verify the accuracy of the operations' OSPs and relied on interviews with the operations instead of reviewing essential records as the primary verification method. NOP found that the inspectors reviewed each question of the OSPs but

didn't fully verify whether the operations' practices and procedures were in compliance with the organic regulations. Further, during exit interviews, the inspectors didn't clearly identify the issues of concern and possible noncompliances found by the NOP auditors. NOP also found that TDA didn't consistently provide its inspectors with copies of prior inspection reports before the inspections and didn't notify the inspectors of the subsequent certification decisions. Lastly, NOP found that the organic certificate issued for the livestock operation wasn't compliant and included incorrect information.

NOP found that despite giving TDA a last opportunity as stated in NOP's June 2, 2021 letter, TDA failed to resolve the outstanding noncompliances. Therefore, NOP issued the February 25, 2022 Notice of Noncompliance and Proposed Suspension, stating it remains clear that TDA's personnel are not sufficiently qualified to conduct inspections, lack knowledge of the USDA organic regulations, and inconsistently implement the regulations and policies. The notice describes the specific prior reports (i.e. compliance audit reports, mid-term audit reports, renewal audit report, and witness audit reports), as well as the Notices of Noncompliances in which the violations were detailed. NOP stated that since TDA demonstrated a systemic inability to comply with its certification accreditation and uphold the organic regulations, it proposed to suspend TDA's accreditation for a period of 1 year. Specifically, while NOP stated that although TDA was noncompliant with several sections of the USDA organic regulations at 7 C.F.R. §205, it had determined that 4 noncompliances were the most significant and violated the regulations at sections 501(a)(2), 501(a)(4), 501(a)(5), 403(c), and 403(d). NOP stated the following:

- Although TDA submitted procedures for issuing export certificates, the procedures weren't compliant, thereby demonstrating TDA's continued inability to implement and

verify compliance with international trade agreements by its certified operations.

Although TDA subsequently provided an updated procedure which is compliant, the repeated nature of problems implementing international trade requirements over the years illustrate the sustained inability to effectively implement the requirements of a compliant system.

- TDA included noncompliant labels in its response to the last opportunity letter, which didn't identify the certifier and included a noncompliant version of the USDA organic seal.
- Addressing the witness audits conducted in August 2021, NOP stated that their auditors observed TDA's inspectors and found that the inspectors didn't request essential records nor physically inspect equipment to corroborate statements of operations, relying solely on the interviews. NOP states that this may have resulted in TDA's inspectors missing noncompliances. Further, since inspectors only asked questions and didn't take steps to verify compliance based on the responses, they missed at least 2 noncompliant practices and may have missed others.
- Lastly, the inspectors continued to fail to address areas of concern and potential noncompliances during the exit interviews.

TDA filed an Appeal to NOP's Notice of Noncompliance and Proposed Suspension, stating that it had corrected each noncompliance and the corrective actions taken comply with, and remain in compliance with, the Act and organic regulations. TDA stated that its program consistently certifies between 175 and 250 operations, for which it maintains up to 4 program technicians that review and make certification decisions, and currently 13 staff organic inspectors throughout the state of Texas. TDA contends that NOP's actions are 'federal

overreach' and that its program has "seen significant improvements throughout the past two years, with increased staffing, increased inspector and program staff training," and employed a new Organic Program Coordinator in February of 2020, who after an interim period, was made permanent. TDA submitted documentation to support its position.

TDA states in its Appeal that it has continued to take corrective actions to come into full compliance; and that as of November 15, 2021, all OSPs for all scopes had been revised to include a section on international trade and are in use. The inspection reports have also been revised to include this section. There is also a new policy manual with an in-depth section on all trade agreements, and instructions on issuing export certificates as required under the US/Japan equivalency arrangement are available. TDA acknowledges that NOP has "presented different avenues to present compliant measures," but also stated it has worked with NOP along the way to address NOP's cited noncompliances.

TDA states that it employs more organic staff than some other state organic programs. TDA also referenced a July 31, 2020 NOP memo to the National Organic Standards Board, in which NOP stated there is a known shortage of well-qualified organic inspectors and reviewers. TDA also participated in an on-line session with NOP on March 24, 2022, focused on state certifiers and their needs for training, administrative capacity, inspector retention, and staff challenges. Therefore, while NOP has stated that TDA doesn't have a sufficient number of adequately trained personnel, NOP is aware of the obstacles facing certifiers in finding said staff. Further, TDA contends that NOP hasn't identified a specific number of staff needed. TDA also noted that NOP stated in its January 11, 2017 Noncompliance Report on the December 2016 inspection, that TDA had a sufficient number of adequately trained personnel. TDA stated in its Appeal that its inspectors are cross trained in a variety of different agriculture programs and that

it will continue to identify capable and knowledgeable inspectors that are employed with the agency to increase the organic inspector pool.

However, addressing TDA's argument, AMS notes that the number of staff is not the current primary issue; rather, it is the abilities and expertise of the staff. Comparing the number of staff TDA has to other state programs isn't relevant and the program does not specify a specific number of staff needed to run an effective program.

TDA further stated in its Appeal that it has increased training of staff, and its documentation supports this. TDA submitted documentation including resumes of all staff, and training records showing that staff underwent extensive training in 2020 and 2021. Further, TDA had staff undergo 13 of the 14 required trainings cited in NOP's June 2, 2021 letter, within the required 60 days of the letter, as well as additional trainings. The 14th training – advanced livestock inspection - wasn't completed within the allotted time as the IOIA required attendees to complete a pre-requisite course which wasn't available at the time. TDA also noted that the COVID pandemic has also complicated training schedules. Subsequently, 7 inspectors completed the Level 100 Basic Livestock training in January 2022, and already completed the Level 200 Dairy Feed Audit course with the required score.

TDA noted that the requirement for the advanced livestock training isn't relevant to inspectors who will not complete livestock inspections. Nevertheless, TDA is working with IOIA to “determine the best platform to complete the advanced level course, as NOP required “all TDA certification staff, including inspectors” to take the advanced course and pass with a grade of at least 80%” (TDA notes that IOIA's passing score is 75%.) TDA states that it and IOIA determined that in order for the inspectors to do so, the delivery of the class would be changed from a “self-paced course to a live webinar course,” and was set for May 2022. TDA

states that due to the change in presentation, the cost is \$5,000 instead of the usual cost of \$2,450.

With respect to the onsite inspection, TDA notes that it is speculative to state that noncompliances ‘may have’ been missed by the inspectors at the 3 witness audits; and notes that “only 2” noncompliances were proven to have been missed. TDA states it will strive to have inspectors versed in all types of operations though it is hard to conduct a ‘perfect inspection.’

Addressing TDA’s contention that NOP’s statements are speculative, AMS notes that NOP observed specific noncompliances at the August 2021 witness audits of crop, handling and livestock operations. It is essential that inspectors conduct thorough inspections verifying the veracity of statements made by operations and the accuracy of OSPs, and whether practices and procedures comply with the regulations. TDA training records show they had already engaged in training prior to the June 2, 2021 last opportunity letter mandating 14 specific courses. Additionally, the August 2021 witness audits were conducted after TDA’s personnel had already completed the 13 training courses in the OILC. These courses included Fundamentals of Inspection; Advanced Inspections: Investigations; and Recordkeeping. However, despite this very recent specific training, TDA’s personnel were unable to conduct full inspections verifying the operations’ compliance with the organic regulations. Instead, TDA’s inspectors relied on statements made by the operations in interviews and in the OSPs rather than actually verify the statements through the review of documentation and the operation.

TDA also stated in its Appeal that all program technicians have been trained on label requirements through internal training or NOP training in the OILC. TDA also states it updated its procedure manual requiring 2 technicians to review all new labels; and that the 3 labels identified as noncompliant by NOP were found to be not in use, were mistakenly included in the

file, or were extremely old and approved prior to the employment of any current review staff. TDA states the 3 noncompliant labels were included in a submission of approximately 300 labels.

However, AMS notes that while the 3 labels represent only 1% of the 300 total labels, NOP reviewed only a sampling of labels, not all 300. Additionally, NOP expects all labels to be compliant, and although it is unknown when the labels in question were approved, the new Coordinator started her appointment on March 1, 2020. The errors should have been caught during annual certification renewal processes since that time.

Regarding verification of an operation's compliance with international trade agreements, this was noted as an unresolved noncompliance dating back to NOP's January 11, 2017 Noncompliance Report. TDA addressed this noncompliance in its reply to that report; however, it was subsequently identified as outstanding in NOP's June 1, 2018 Noncompliance Report. TDA stated it would update its procedures and OSP forms; and NOP accepted TDA's specific corrective actions. TDA did subsequently implement the corrective actions, and NOP stated in the February 25, 2022 Notice of Noncompliance and Proposed Suspension that TDA had provided an updated procedure implementing international trade requirements which is compliant. TDA states in its Appeal that this procedure is only applicable to a small number of operations, and previously stated it only applied to 2 operations.

However, AMS notes that a compliant procedure is needed regardless of how few clients it applies to, and NOP continued to work with TDA after issuance of the Notice of Noncompliance and Proposed Suspension. NOP provided feedback to TDA on May 6, 2022, on revisions made to TDA's Organic Certification Review Procedure Manual. NOP informed TDA that the manual doesn't correctly identify the current requirements for exporting to Canada, and

there are no procedures for exporting to the United Kingdom, which was a new arrangement put in place since the 2018 corrective action. The manual was purportedly revised on January 31, 2022, but it was not submitted to NOP until after issuance of the Notice of Noncompliance and Proposed Suspension on February 25, 2022. Therefore, NOP didn't address this in the notice. AMS notes that international trade arrangements are updated regularly, so compliant procedures in 2018 may not be compliant in 2022; certifiers are responsible for maintaining updated procedures as arrangements change over time. Further, NOP's review of the revised manual also found that it didn't contain procedures on criteria used to determine whether to grant or deny a mediation request, and appellant incorrectly stated that TDA could resolve an appeal with a settlement agreement.

TDA also stated in its Appeal that it acquired an inspection software program that was implemented in inspections beginning in February of 2021, and which provides for immediate auditable inspection reports and updates to forms if there is a regulation change. The next phase of the program will provide an online system for operations to enter their OSPs and updates in real time. This next phase is in development and should be in use for handlers by July 15, 2022.

NOP acknowledges that TDA has made some improvements in the past 2 years; however, outstanding noncompliances still exist. Further, the cited noncompliances have been ongoing, dating back further than 2 years; and TDA has been slow to take required corrective actions. The following discussion illustrates examples of this ongoing problem.

After its December 2016 inspection of TDA, NOP issued a January 11, 2017 Noncompliance Report, which addressed previously cited noncompliances and 'cleared' several of them, finding that TDA had taken corrective actions. NOP found that TDA had hired and trained additional program reviewers to ensure timely completion of applications and annual

updates, and that all certified operations were inspected, and the backlog of inspections had been cleared. Additionally, NOP found that TDA conducted the required number of unannounced inspections which is 5% of all certified operations. Therefore, while NOP had previously found that TDA didn't have sufficient certification review personnel to comply with and implement the certification program, improvements had been made.

However, as seen above, this noncompliance was subsequently raised again by NOP – with an emphasis on inadequate skills and expertise of the personnel. Further, while TDA cleared prior noncompliances, NOP found new noncompliances, including insufficient label reviews, incorrect noncompliance letters issued to operations, and a lack of procedures and expertise to ensure that its certified operations complied with international equivalency arrangements, with OSPs and inspection reports not adequately addressing such arrangements, which continued up to the issuance of the June 2, 2021 last opportunity letter.

TDA stated in its Appeal that at the April 9 – 11, 2019 training for its inspectors, it instructed the inspectors to cite violated regulations; however, this was over 2 years after NOP informed TDA of this deficiency in the January 11, 2017 Noncompliance Report. Further, TDA didn't revise its inspection reports and exit interviews to include citations of the organic regulations violated until November 15, 2021.

On March 12 – 14, 2018, NOP conducted an on-site audit of TDA, and issued a Noncompliance Report on June 1, 2018, which shows that 4 of the newly cited noncompliances were 'cleared,' while NOP 'accepted' TDA's proposed corrective actions for the other 4. The proposed corrective actions were the updating of handler forms and international training modules regarding international equivalency arrangements; the issuance of a noncompliance notice to an operation using a prohibited substance and procedures to prevent a reoccurrence of

the oversight; and the proposed development of procedures for internal reviews and modification of the inspectors' procedure manual.

However, NOP noted that TDA hadn't updated procedures for reviewing handler product formulas nor were inspectors consistently applying procedures in the inspectors' manual. NOP subsequently issued a Notice of Noncompliance to TDA on November 2, 2018, after the review of TDA's certification and monitoring of organic dairies from May to August 2018 revealed several noncompliances in TDA's practices and procedures in its livestock program. On July 8, 2019, NOP issued another Notice of Noncompliance after the review of TDA's Annual Report submitted on April 29, 2019 revealed continued noncompliances. Further, while the NOP Corrective Action Report of December 12, 2018, regarding the March 2018 audit stated that TDA was to develop a new handler OSP by February 28, 2019, it wasn't in place until August 2019.

NOP, in another attempt to bring TDA into compliance, entered into a Settlement Agreement with TDA on August 19, 2019, setting forth 8 specific terms detailing corrective actions which TDA must take, within specific time frames, to avoid a suspension of its livestock accreditation. NOP subsequently issued a notice on September 3, 2019, renewing TDA's accreditation for crops, livestock, and handling, with the effective date being back-dated to April 29, 2017. However, while TDA points in its Appeal to the renewal of accreditation as a sign of its compliance attempts, the renewal letter specifically stated that the renewal was subject to the terms of the August 19, 2019 Settlement Agreement.

Further, on December 3, 2019, NOP issued another Notice of Noncompliance after the review of TDA's inspection of a dairy operation revealed TDA failed to verify several critical requirements of such an operation. NOP subsequently conducted a desk audit of TDA's

livestock program on April 14 – 16, 2020, and issued a report on May 15, 2020, citing to its findings. NOP also granted TDA an extension in which to comply with certain terms of the August 2019 Settlement Agreement. The following year, from August 24 – 28, 2020, NOP conducted a desk audit of TDA’s livestock program and found that despite the extension, the noncompliances continued, with TDA not successfully completing 2 of the 8 terms in the Settlement Agreement.

Regular communication between NOP and TDA continued from the end of 2019 through the summer of 2020, with NOP stressing the importance of complying with the Settlement Agreement, including emails from NOP to TDA between November 2019 and February 2020. However, NOP found during the August 2020 audit that TDA’s inspections of certified operations still failed to verify the operations’ compliance or capability to comply with the organic regulations, involving such matters as actual days grazed, actual dry matter intake, livestock feed, and the reasons for temporary confinement of livestock. NOP again found deficiencies with TDA’s staff, stating that it doesn’t ensure that its employees with inspection, analysis, and decision-making responsibilities have sufficient expertise in organic production or handling techniques. NOP had reviewed the certification files for all 5 of TDA’s certified livestock operations. Numerous examples were given of these deficiencies. Therefore, NOP found that TDA hadn’t complied with a Settlement Agreement term, whereby it was to assess the qualifications of its staff or contracts before assigning them inspections and hadn’t assigned inspectors with the knowledge and expertise needed to inspect the specific operation based on its size and operational complexity. NOP also found that TDA hadn’t complied with another term by not completing all necessary compliance checks.

Subsequently, NOP conducted a mid-term audit of TDA's full organic program, including crops, handling and livestock on November 18 – 24, 2020, and found the 2 terms from the Settlement Agreement cited in the August 2020 audit were still outstanding, previously cited noncompliances were unresolved, and new noncompliances were found. NOP found that TDA continued to lack procedures and expertise to ensure its certified operations complied with international equivalency arrangements; its Organic Program Coordinator conducted the internal review which is contraindicated since the coordinator conducts certification activities; and inspectors continue to fail to cite to organic regulations violated during exit interviews. Continued noncompliances were cited in regard to such items as the Multi-ingredient Product Listing form, improper labels, and supplier lists.

NOP also found new noncompliances including the failure to conduct unannounced inspections of 5% of its certified operations; deficiencies in TDA's review of certification applications; an insufficient number of staff to implement the organic certification program; failure to inspect all operations; not ensuring staff have sufficient expertise; and not issuing adverse actions to operations found to have noncompliances. As seen above, NOP's January 11, 2017 Noncompliance Report noted that TDA had conducted the required number of unannounced inspections, had hired and trained new program reviewers, and had cleared the backlog of inspections. Therefore, it appears that TDA 'lapsed back' into noncompliance regarding these requirements.

Lastly, while NOP cited to noncompliances and deficiencies involving TDA's inspection reports, forms, reviews, labels, staff numbers and staff training, international trade equivalency agreements, corrective actions, and other matters over the course of almost 5 years, TDA's Organic Certification Review Procedure Manual which covers these items wasn't revised until

January 31, 2022. TDA stated in its Appeal that the lack of procedures in a manual regarding international agreements doesn't equate to the measures not being taken; however, procedures need to be written down so that compliance with those procedures can be verified.

In its appeal, TDA also noted that NOP had not sent formal audit reports for the August 2020 and November 2020 Noncompliance Reports until June 2, 2021, which justified TDA's not submitting formal corrective actions to those reports. However, on February 4, 2021, NOP had sent TDA a Summary of Findings from both the August 2020 and November 2020 audits, detailing the noncompliances and outstanding settlement terms. The summary identified the specific noncompliances found at the August and November 2020 inspections. Therefore, TDA should have been able to discern what corrective actions needed to be taken, especially in light of all the prior notices and compliance reports it received from NOP with many of the same noncompliances cited.

Nevertheless, on June 2, 2021, with its "last opportunity letter," NOP sent TDA a detailed discussion of the noncompliances and the specific corrective actions to be taken by TDA with time deadlines for each action, discussed above. Despite this very direct NOP letter with instructions, NOP found that TDA still was unable to fully come into compliance. This, coupled with the findings of the August 2021 witness audits, ultimately led to the issuance of the February 25, 2022 adverse action being appealed.

CONCLUSION

The evidence substantiates that TDA has or continues to violate the organic regulations at 7 C.F.R. §205.501, General requirements for accreditation; and 7 C.F.R. §205.403, On-site inspections, as cited by NOP, as well as 7 C.F.R. §205.404, Granting certification; 7 C.F.R.

§205.406, Continuation of certification; 7 C.F.R. §205.504, Evidence of expertise and ability; and 7 C.F.R. §205.505, Statement of agreement.

The evidence substantiates that on a consistent basis, TDA has failed to ensure it has sufficient expertise to fully comply with and implement the terms and conditions of the organic certification program; demonstrate the ability to fully comply with the requirements for accreditation; use a sufficient number of adequately trained personnel, including inspectors and certification review personnel, to comply with and implement the organic certification program; ensure that all its responsibly connected persons have sufficient expertise; conduct annual evaluations of all personnel; have an annual internal review conducted; provide inspectors with prior inspection reports of the operations the inspectors are to inspect; and draft, maintain and implement all required documentation, forms templates and policies and procedures needed to ensure that it and all certified operations comply with the organic regulations.

Additionally, the evidence substantiates that TDA has failed to consistently conduct the required annual inspections of all certified operations as well as the required number of unannounced inspections; adequately address all noncompliances during exit interviews with operations; adequately review documentation of operations to verify compliance with the organic regulations; and issue notices of noncompliance to operations found to have violated the organic regulations.

Therefore, NOP was justified in issuing the Notice of Noncompliance and Proposed Suspension, as it has been very generous and patient in giving TDA chance after chance to come into compliance. AMS acknowledges that TDA has shown some improvement in the past 2 years, evidenced by feedback from the independent review conducted during the “final opportunity” timeframe. Also, TDA has created and implemented needed procedures, has

trained and hired staff, and revised many certification-related forms including handler OSPs and other templates. However, while TDA has made improvements, those improvements have been slow, previously 'cleared' noncompliances have reoccurred, and new noncompliances have been found. As NOP accredited TDA to conduct crop, livestock, and handling certification services, TDA must be able to do so with a sufficient number of adequately trained personnel, and to perform all duties required to ensure that its certified operations comply with all the organic regulations. However, TDA has been unable to fully come into, and stay in, compliance with the organic regulations as they relate to the qualifications of a certifying agent of the USDA. Therefore, TDA may not remain accredited.

DECISION

TDA's March 24, 2022 Appeal of the February 25, 2022 Notice of Noncompliance and Proposed Suspension issued by NOP is denied. TDA's accreditation as a certifying agent for NOP's organic program is suspended in its entirety. Pursuant to 7 C.F.R. §205.665, TDA must cease all certification activities in each area of accreditation, and transfer to the Secretary all records concerning its certification activities. TDA may submit a request for reinstatement of its accreditation after completion of the 1-year suspension period. The request must be accompanied by evidence demonstrating correction of each noncompliance and corrective actions to comply with and remain in compliance with the Act and the organic regulations.

Pursuant to 7 C.F.R. § 205.680(e), and a delegation of authority from the USDA/AMS Administrator, the TDA Appeal has been reviewed, heard, and decided upon by persons not involved with the NOP decision being appealed.

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

Done at Washington, D.C., on this _____
day of _____, 2022.

Kevin Shea
Administrator
Animal and Plant Health Inspection Service
U.S.D.A.