

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
Tad Ellinghuysen/) **Administrator's Decision**
2 Creeks Farm)
Peterson, Minnesota) **APL-046-19**
)
)

This Decision responds to an appeal (APL-046-19) of a Notice of Proposed Suspension of National Organic Program certification issued to Tad Ellinghuysen/2 Creeks Farm (Ellinghuysen) of Peterson, Minnesota by the Midwest Organic Services Association (MOSA). 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. On January 21, 2019, MOSA issued a Notice of Noncompliance.
2. On March 15, 2019, MOSA issued a Notice of Proposed Suspension.
3. On April 5, 2019, Ellinghuysen filed an Appeal.

DISCUSSION

The USDA organic regulations at 7 C.F.R. 205.103, Recordkeeping by certified operations, 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 groups(s)).” (b) Such records must: (1) Be adapted to the particular business that the certified operation is conducting; (2) Fully disclose all activities and transactions of the certified operation in sufficient detail as to be readily understood and audited...and (4) Be sufficient to demonstrate compliance with the Act and the regulations in this part. (c) The certified operation must make such records available for inspection...”

The organic regulations at §205.237, Livestock feed, state that, “(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 (dry matter fed does not include dry matter grazed from residual forage or vegetation rooted in pasture). This shall be calculated as an average over the entire grazing season for each type and class of animal. Ruminant animals must be grazed

throughout the entire grazing season for the geographical region, which shall be not less than 120 days per calendar year. Due to weather, season, and/or climate, the grazing season may or may not be continuous.” The section also states that producers shall “(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 throughout the grazing season.” Additionally, the regulations require that livestock producers “(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. (2) Document the amount of each type of feed actually fed to each type and class of animal. (3) Document changes that are made to all rations throughout the year in response to seasonal grazing changes. (4) Provide the method for calculating dry matter demand and dry matter intake.”

The organic regulations at §205.239, Livestock living conditions, state that, “(a) The producer of an organic livestock operation must establish and maintain year-round livestock living conditions which accommodate the health and natural behavior of animals, including: (1) Year-round access for all animals to the outdoors, shade, shelter, exercise areas...suitable to the species...Yards, feeding pads, and feedlots shall be large enough to allow all ruminant livestock...to feed simultaneously without crowding and without competition for food; (2) For all ruminants, management on pasture and daily grazing throughout the grazing season(s) to meet the requirements of §205.237....”

The organic 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” with the organic regulations.

Additionally, “(b) Producers must provide pasture...and manage pasture to comply with the requirements...to annually provide a minimum of 30 percent of a ruminant’s dry matter intake (DMI), on average, over the course of the grazing season...”

MOSA proposed a suspension of Ellinghuysen’s organic certification in its entirety, issuing a Notice of Proposed Suspension on March 15, 2019, stating that Ellinghuysen hadn’t adequately responded to a prior adverse action notice issued after the November 2, 2018 inspection had shown there wasn’t enough available pasture for the milker goats to meet the requirement that the goats receive 30% of their DMI from pasture. The prior notice, a January 21, 2019 Notice of Noncompliance had stated that the lactating doe goats were not getting 30% of their DMI from pasture and that even under the best management practices, the alfalfa and grass mix couldn’t produce enough grazeable pasture for the goats to meet the 30% DMI requirement. MOSA asked Ellinghuysen to submit a plan on how it proposed to bring the goat herd into DMI compliance.

In its Appeal, Ellinghuysen stated its opposition to the 30% DMI requirement, claiming it is not in the best interest of the goats, and in fact is detrimental to their health, as goats don’t graze like cows and sheep but rather are ‘browsers’. Ellinghuysen states that when it tried locking the goats out on pasture, they didn’t graze, but instead became stressed. Ellinghuysen stated that all goat producers oppose the 30% DMI requirement for goats.

Ellinghuysen was initially certified organic on February 22, 2010 for crops and livestock, specifically, dairy goats for milk, dairy goat replacements, and goat milk. However, the evidence substantiates that Ellinghuysen has a long history of noncompliance with the 30% DMI

requirement of the organic regulations, which requires livestock to receive 30% of their dry matter intake from pasture during the grazing season. On January 12, 2015, MOSA issued a Notice of Noncompliance stating that Ellinghuysen had failed to provide that its goat herd over 6 months of age received 30% of its DMI from pasture over the grazing season. Subsequently, on March 4, 2015, MOSA issued a Notice of Proposed Suspension citing to Ellinghuysen's failure to comply with pasture practice standards and the unwillingness to change its rations to comply. Ellinghuysen filed an Appeal on June 4, 2015, and the Agricultural Marketing Service (AMS) issued an Administrator's Decision (APL-019-15) on November 9, 2015, denying the Appeal after finding that Ellinghuysen "has not met the USDA organic regulations regarding Dry Matter Intake requirements, on a systemic basis for the past four certification years." The decision stated that Ellinghuysen's certificate would be suspended as to livestock. On December 10, 2015, Ellinghuysen verbally requested an administrative hearing before an Administrative Law Judge.

While the administrative hearing was pending, MOSA issued another Notice of Noncompliance on July 27, 2016, after finding that Ellinghuysen again failed to comply with pasture practice standards and ensure that its goat herd received 30% of its DMI from pasture during the grazing season. MOSA issued a Notice of Proposed Suspension on January 30, 2017, stating Ellinghuysen failed to substantiate that its goat herd were receiving 30% of DMI from pasture and that it could not provide accurate dry matter demand figures for the animals. Ellinghuysen filed an Appeal to this notice on February 7, 2017, and on September 11, 2017, AMS issued an Administrator's Decision (APL-019-17) denying the Appeal after finding that Ellinghuysen failed to meet the 30% DMI requirement for its goat herd. The decision stated that Ellinghuysen's certification would be suspended as to livestock. On September 25, 2017, Ellinghuysen requested an administrative hearing before an Administrative Law Judge.

With two requests for administrative hearing pending, MOSA issued another Notice of Noncompliance on February 2, 2018 for Ellinghuysen's failure to comply with the 30% DMI requirement for its goat herd. Subsequently, on September 28, 2018, MOSA issued a Notice of Noncompliance Resolution after Ellinghuysen submitted ration information substantiating that it was complying with the 30% DMI requirement. MOSA confirmed that the noncompliances noted in the March 4, 2015 and January 30, 2017 Notices of Proposed Suspension, regarding which administrative hearings had been requested, were also resolved. Therefore, on October 29, 2018, AMS/NOP and Ellinghuysen entered into a Settlement Agreement whereby Ellinghuysen withdrew its requests for hearing regarding the two previous Administrator Decisions (APL-019-15 and APL-019-17), and agreed to maintain detailed records of all ration changes for its ruminant goat livestock throughout the year, as well as the average milk production during peak and non-peak seasons. Further, Ellinghuysen agreed to comply with livestock feed requirements for ruminants, specifically the required 30% DMI from pasture during the grazing season for its goat herd.

However, on December 3, 2018, MOSA issued a Final Review Pre-Decision Requirements notice requesting that Ellinghuysen clarify its ration information and explain how its goats are meeting DMI requirements based on previously provided information. MOSA noted that information indicates that the available pastures couldn't produce the amount needed over the course of the grazing season for the goats to meet the DMI requirement. MOSA cited to the specific acreage of Ellinghuysen's operation; the average yield for alfalfa pastures in the Filmore County, Minnesota region; and the DMI requirements of the goat herd based on the information on Ellinghuysen's ration sheets and dry matter fed. MOSA concluded that the pasture would need to produce (b) (4) lbs. per acre over the course of the grazing season to

meet the DMI required by the suggested dry matter demand submitted by Ellinghuysen. However, MOSA found that the available pasture would be (b) (4) lbs. over the course of the 120-day grazing season, far below what is needed to meet the DMI requirement. MOSA also asked Ellinghuysen to provide information on the temporary confinement of the goats.

On January 21, 2019, MOSA issued a Notice of Noncompliance stating that it had considered the available pasture; production of the pasture; and the dry matter fed to the herd divided by lactating does and kids/yearlings; and calculated the amount of dry matter that the goats, by type, would need to obtain to meet the 30% DMI requirement. MOSA asked Ellinghuysen to submit a plan by February 12, 2019, on how it would meet the requirement. In the March 15, 2019 Notice of Proposed Suspension being appealed, MOSA noted that while the 2017 noncompliance with pasture practice standards had been resolved and the November 2, 2018 inspection showed the goats had “good body condition and other health indicators including high production,” the information provided shows that the pasture available in 2018 was not sufficient to provide the 30% DMI required. MOSA also stated that even if all (b) of Ellinghuysen’s pasture were used for the milking goats in 2019 as Ellinghuysen mentioned in its submission, the (b) acres of pasture, using the same calculations as noted in the notice of noncompliance and at optimum production, couldn’t produce enough dry matter to supply the current dairy goat herd with 30% of their DMI.

Ellinghuysen stated that MOSA erred by adding (b) more milking goats than what it has, which skewed the calculations. Ellinghuysen stated it notified MOSA of this error on January 8, 2019. MOSA acknowledged this error in the December 3, 2018 Final Review Pre-Decision Requirements notice which identifies (b) lactating does at the beginning of the notice, and then

mentions (b) . However, MOSA corrected this error in the January 21, 2019 Notice of Noncompliance which identifies (b) lactating does. MOSA states that the March 15, 2019 Notice of Proposed Suspension also was based on the corrected figure. Ellinghuysen also stated that MOSA didn't use the 2017 values for dry matter demand which would have shown the adults receiving 62.5% of DMI from pasture, and the does receiving 49.6% of DMI from pasture in 2018, both far exceeding the 30% requirement. MOSA replied that Ellinghuysen's 2017 dry matter demand values weren't used because current published values didn't support the high dry matter demand. Rather, MOSA used lower dry matter demand values from Ellinghuysen's nutritionist though Ellinghuysen didn't agree with those figures either. Further, regardless of which numbers were used, the pastures were not sufficient to produce the dry matter needed. The dry matter demand is the expected dry matter intake for a class of animal. It is common to calculate DMI from pasture as the difference between dry matter demand and the dry matter fed to the animals.

Ellinghuysen has also voiced opposition to the 30% DMI requirement for the past several years. Ellinghuysen stated in its June 4, 2015 Appeal to the March 4, 2015 Notice of Proposed Suspension that the requirement has been a hardship for dairy goat producers and has resulted in 'stressed' goats standing by the pasture gate, and lower production and profits. Ellinghuysen stated in its current Appeal that the 30% DMI requirement isn't in the best interest of the goats as it forces them to graze like cows or sheep which is not in a goat's nature because they are browsers. Ellinghuysen states that organic goats should have access to vegetative pasture but not be forced to eat a certain percent by grazing.

The AMS Administrator stated in the November 9, 2015 Administrator's Decision that accredited certifying agents have reported that the 30% DMI requirement for goats is a challenge

for goat operations. However, the Administrator also stated that there are certified operations that are compliant with the requirements and there are not different rules for one type of ruminant versus the other, i.e. goats versus cows or sheep. The Administrator concluded that Ellinghuysen has not met the DMI requirements for the prior four years, which dates to its initial certification. The AMS Administrator stated again in the September 11, 2017 Administrator's Decision that the regulations have clear grazing requirements for all ruminants regardless of whether it is more difficult to demonstrate compliance for goat operations.

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, Ellinghuysen has shown systemic and repeated violations of the organic regulations at 7 C.F.R. §205.103; 7 C.F.R. §205.237; 7 C.F.R. §205.239; and 7 C.F.R. §205.240. Ellinghuysen has been unable to comply with the requirement that its goat herd receive 30% of its DMI from pasture and recently has also been unable to prove that its available pastures produce enough dry matter to allow for its goat herd to receive 30% of its DMI from pasture. Further, despite prior notices of noncompliance, notices of proposed suspension, Administrator Decisions ruling against it, and a settlement agreement giving it an opportunity again to come into compliance, Ellinghuysen has been unable to do so. Ellinghuysen has voiced its opposition to the 30% DMI requirement throughout and states the DMI requirement isn't applicable to its "extremely high-yielding dairy animals." However, Ellinghuysen chose to become certified organic and was aware of the DMI from pasture requirements when it did. It is acknowledged that inspections have found

Ellinghuysen's goats to be in good condition; however, all goat operations must comply with all organic regulations. Ellinghuysen has a fundamental disagreement with the existence of the requirement, and Ellinghuysen should not remain certified organic for livestock as it has been unable to maintain long-term continued compliance.

DECISION

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

If Ellinghuysen waives the hearing, the Agricultural Marketing Service will direct MOSA to issue a Notice of Suspension for Ellinghuysen's livestock certification. At any time after suspension, Ellinghuysen may, "...submit a request to the Secretary for reinstatement of its livestock 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 16th
day of September, 2019.



Bruce Summers
Administrator
Agricultural Marketing Service