

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
Sassy Cow Creamery LLC/)
Baerwolf Dairies LLC) **Administrator’s Decision**
)
Columbus, Wisconsin) **APL-060-20**
)

This Decision responds to an Appeal (APL-060-20) of a Notice of Proposed Suspension of National Organic Program (NOP) certification issued to Sassy Cow Creamery LLC/Baerwolf Dairies LLC (Baerwolf) of Columbus, Wisconsin, by 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

¹ 7 U.S.C. 6501-6522

² 7 C.F.R. Part 205

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. Baerwolf was initially certified organic for crops and livestock on November 8, 2000.
2. On January 16, 2018, Baerwolf and MOSA entered into a Settlement Agreement.
3. On March 28, 2018, MOSA issued a Notice of Noncompliance.
4. On December 20, 2018, MOSA issued a Notice of Proposed Suspension.
5. On January 15, 2019, Baerwolf filed an Appeal.
6. On July 30, 2019, AMS issued an Administrator’s Decision denying Baerwolf’s Appeal and affirming the Notice of Proposed Suspension (Case APL-017-19).
7. On August 19, 2019, Baerwolf requested an administrative hearing before an Administrative Law Judge (ALJ).
8. On August 19, 2019, Baerwolf’s hearing request was formally acknowledged. The hearing is still pending.
9. On January 24, 2020, MOSA issued a Notice of Noncompliance.
10. On March 19, 2020, MOSA issued a Notice of Proposed Suspension.
11. On April 23, 2020, MOSA issued a Notice of Rejection of Mediation to Baerwolf’s request for mediation.
12. On May 20, 2020, Baerwolf 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 group(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; (3) Be maintained for not less than 5 years beyond their creation; and (4) Be sufficient to demonstrate compliance with the Act and the regulations in this part.”

The organic regulations at §205.201, Organic production and handling system plan, state that, “(a) The producer or handler of a production or handling operation, except as exempt or excluded under §205.101, intending to sell, label, or represent agricultural products as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s))” must develop an organic production or handling system plan that is agreed to by the producer or handler and an accredited certifying agent. An organic system plan must meet the requirements set forth in this section for organic production or handling. An organic production or handling system plan must include: (1) A description of practices and procedures to be performed and maintained, including the frequency with which they will be performed; (2) A list of each substance to be used as a production or handling input, indicating its composition, source, location(s) where it will be used, and documentation of commercial availability, as applicable; (3) A description of the monitoring practices and procedures to be performed and maintained, including the frequency with which they will be performed, to verify that the plan is effectively

implemented; (4) A description of the recordkeeping system implemented to comply with the requirements established in §205.103; (5) A description of the management practices and physical barriers established to prevent commingling of organic and nonorganic products on a split operation and to prevent contact of organic production and handling operations and products with prohibited substances; and (6) Additional information deemed necessary by the certifying agent to evaluate compliance with the regulations.”

The organic regulations at §205.205, Crop rotation practice standard, state that, “The producer must implement a crop rotation including but not limited to sod, cover crops, green manure crops, and catch crops that provide the following functions that are applicable to the operation: (a) Maintain or improve soil organic matter content..”

The organic regulations at §205.236, Origin of livestock, 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: *Except*, That: ... (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; and ... (iii) Once an entire, distinct herd has been converted to organic production, all dairy animals shall be under organic management from the last third of gestation...(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... (c) The producer of an organic livestock operation must maintain records sufficient to preserve the identity of all organically managed animals and edible and nonedible animal products produced on the operation.”

The organic regulations at §205.237, Livestock feed, state that, “(a) The producer of an organic livestock operation must provide livestock with a total feed ration composed of agricultural products, including pasture and forage, that are organically produced and handled... (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. 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. (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... (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. (2) Document the amount of each type of feed actually fed to each type and class of animal...”

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, fresh air, clean water for drinking, and direct sunlight... Yards, feeding pads, and feedlots may be used to provide ruminants with access to the outdoors during the non-grazing season... Continuous total confinement of any animal indoors is prohibited...(2) For all ruminants, management on pasture and daily grazing throughout the grazing season(s) to meet the requirements of §205.237...(4) Shelter designed to allow for...(b) The producer of an organic livestock operation may provide temporary confinement or shelter for an animal because of: (1) Inclement weather..."

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." Specifically, producers must manage pasture 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.

Certifier MOSA stated in the Notice of Proposed Suspension issued on March 19, 2020, that Baerwolf's crop rotation practices found during the November 2019 inspection were non-compliant; Baerwolf had moved livestock between the organic and conventional operations; and records on livestock feed and rations were not available to determine compliance with the regulations. MOSA also found there was not enough information available to determine if DMI requirements were being met, and that not all livestock were provided year-round outdoor access.

Baerwolf stated in its Appeal that it has "worked very hard in good faith with MOSA to correct any issues concerning our operation." Baerwolf states it has repeatedly attempted to prove that the DMI requirements are being met, and that the raising of its heifers and the housing

operations are in compliance with the NOP organic regulations. However, Baerwolf states that MOSA doesn't seem to understand its records, or it requests additional information above that required of other operations.

Baerwolf operates organic and conventional dairy operations with organic and conventional livestock on separate farms; and markets their dairy products under their own brand name. Documentation substantiates that Baerwolf has a history of noncompliance regarding recordkeeping on livestock feed and rations, meeting DMI requirements, re-transitioning livestock, and crop rotation. MOSA's November 2017 inspection revealed a number of noncompliances, which led to a Settlement Agreement of January 16, 2018 between MOSA and Baerwolf. However, after issuing a Pre-Decisional Requirements Letter on February 26, 2018, MOSA issued a Notice of Noncompliance on March 28, 2018, which was subsequently resolved on May 14, 2018. However, the October 29 – 30, 2018 inspection again revealed noncompliances and led to a December 20, 2018 Notice of Proposed Suspension, which Baerwolf appealed on January 15, 2019.

On July 30, 2019, AMS issued an Administrator's Decision (Case APL-017-19) denying Baerwolf's Appeal and affirming the December 20, 2018 Notice of Proposed Suspension. On August 19, 2019, Baerwolf submitted a request for an administrative hearing before an ALJ, which was formally acknowledged that same day. However, as the requested hearing is still pending, Baerwolf's certification remains active and it has continued operations under the review of MOSA.

Therefore, as a separate set of actions from the previous proposed adverse action and appeal, MOSA conducted an inspection of Baerwolf's farm, livestock, and handling operations on November 14 and 15, 2019. Many of the same noncompliances were again found; however,

because these happened after the issuance of the previous proposed adverse action, they are considered separate and independent violations from the previous case. The inspection findings resulted in issuance of a Notice of Noncompliance on January 24, 2020, stating that required records were not maintained; inputs were used prior to MOSA's approval; Baerwolf's crop rotation was non-compliant; and Baerwolf hadn't followed the regulations regarding the origin of livestock and pasture practice standards. Baerwolf was given until February 17, 2020 to respond to MOSA, and although some of the cited noncompliances were subsequently resolved, others were not resolved.

Therefore, on March 19, 2020, MOSA issued a Notice of Proposed Suspension citing to the still outstanding noncompliances. Specifically, MOSA stated that the May 23, 2019 Certification Letter had noted Baerwolf's typical crop rotation plan of 3 to 4 years of alfalfa followed by 1 to 2 years of corn, and that Baerwolf would notify MOSA if it planned to plant corn more than 2 consecutive years. However, this plan wasn't followed, as Baerwolf's Field 37 had corn planted 4 consecutive years, while Field 38 had corn planted 6 consecutive years. MOSA noted that Baerwolf had responded to the Notice of Noncompliance and said that climate conditions and low-lying fields hadn't allowed it to follow the crop rotation plan in 2019. However, while the November 2019 inspection reports noted that Baerwolf's land is flat, MOSA stated that Baerwolf must have a more robust plan to ensure crop rotation even when weather conditions change.

Lastly, MOSA stated that records weren't available to determine Baerwolf's compliance with pasture practice standards; feeding records didn't show how many animals were in each group; and there wasn't enough information to determine if Baerwolf had met DMI requirements of ruminant animals receiving at least 30% of the DMI from grazing throughout the grazing

season. Further, records showed that the animals were given outside access only 131 days in 2019 while the average for the geographical area is 150 – 180 days. MOSA stated that while Baerwolf claims that the lactating cows were on pasture 131 days, the other groups of animals were on pasture at least 150 days, but there were no records submitted to substantiate this.

Baerwolf requested mediation, which MOSA rejected on April 23, 2020. MOSA stated that due to several previously cited noncompliances, issuance of adverse action notices, and a settlement agreement with Baerwolf which was breached, MOSA doesn't "have confidence" in Baerwolf's ability to satisfactorily correct the noncompliances. MOSA also stated that it hadn't received any new information that would change their decision. Baerwolf stated in its May 20, 2020 Appeal that it wishes to continue working with MOSA, and already submitted its 2020 documentation and certification fees, but that MOSA doesn't seem to understand the documentation which Baerwolf has submitted although they have worked hard "in good faith" to correct noncompliances.

During the pendency of the Appeal, MOSA conducted the 2020 inspection on September 28 and 29, 2020, and submitted the Handler Inspection Report, Livestock Inspection Report, and Farm Inspection Report to NOP on October 9, 2020. Initially MOSA stated that it hadn't yet reviewed the reports, though it appeared that there has been improvement by Baerwolf though clarification may still be needed on feed rations. NOP's review of the reports shows the inspector noted that all animals now have or will have daily outdoor access including the dry cow/big heifer group which previously hadn't had such access in the winter. The inspector stated that the grazing season had started May 1, 2020 and as of September 27, 2020, all groups of animals had 144 days on pasture, and with time still remaining in the grazing season would

reach 150 days for the season. This is an increase from the 2019 season where documentation substantiated only 131 days on pasture.

The inspector identified calves still transitioning from conventional to organic management, for which Baerwolf has a transition plan in place. The inspector also stated that Baerwolf was prepared for the inspection with both pasture/feed logs and ration records for the 3 animal groups. The Livestock Inspection Report stated that Baerwolf and its nutritionist disagreed with MOSA's Dry Matter Demand chart and calculations, and the inspector noted that Baerwolf's position was a 'fair argument,' for which Baerwolf's nutritionist could submit a supporting letter.

Lastly, the inspector noted that all corn planted in 2020 was planted in fields not used for corn in 2019. Baerwolf stated that it and the inspector spent a lot of time discussing the feed and pasture requirements at the recent inspection and that MOSA agreed that some of the benchmark figures need to be updated. However, MOSA subsequently informed NOP that it completed the review of the September 2020 inspection reports and issued a Notice of Noncompliance on October 19, 2020, for the continued use of inputs which hadn't previously been approved by MOSA.

In conclusion, while Baerwolf appears to now be addressing the noncompliances regarding the origin of livestock, recordkeeping, pasture practice standards, and crop rotation, the noncompliances have been long-standing, systemic, repeat noncompliances. Baerwolf must be able to consistently maintain compliance with all the organic regulations on a long-term basis, which hasn't been established at this time.

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. Evidence substantiates that Baerwolf's violations of the organic regulations at 7 C.F.R. §205.103; 7 C.F.R. §205.201; 7 C.F.R. §205.205; 7 C.F.R. §205.236; 7 C.F.R. §205.237; 7 C.F.R. §205.239; and 7 C.F.R. §205.240. The November 2019 inspection by MOSA confirmed that these noncompliances occurred from October 31, 2018, subsequent to the prior inspection, to November 14-15, 2019, and are therefore separate from the case before the ALJ at this time. Therefore, Baerwolf may not remain certified at this time.

DECISION

The Appeal of May 20, 2020 is denied. MOSA's March 19, 2020 Notice of Proposed Suspension is affirmed. Baerwolf's crop and livestock certification is to be suspended. However, pursuant to 7 C.F.R. §205.662(f)(1), Baerwolf may apply for reinstatement of its crop and livestock certification at any time. The request for reinstatement must be accompanied by evidence demonstrating correction of each noncompliance found by MOSA and corrective actions taken to comply with and remain in compliance with the Act and the organic regulations. While its certification is suspended, Baerwolf may not sell, represent, or label its agricultural products as organic.

Attached to this formal Administrator's Decision denying Baerwolf's Appeal is a Request for Hearing form. Baerwolf has thirty (30) days to request an administrative hearing

before an Administrative Law Judge. If Baerwolf waives the hearing, the Agricultural Marketing Service will direct MOSA to issue a Notice of Suspension.

Done at Washington, D.C., on this 23rd
day of November, 2020

**BRUCE
SUMMERS**

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SUMMERS
Date: 2020.11.22 20:44:37 -05'00'

Bruce Summers
Administrator
Agricultural Marketing Service