

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
Basin and Range Organics) **Administrator's Decision**
Reno, Nevada) **APL-007-19**
)
)

This Decision responds to appeals (APL-007-19) of Notices of Proposed Suspension of Accreditation issued to Basin and Range Organics by the U.S. Department of Agriculture (USDA), Agricultural Marketing Service (AMS), National Organic Program (NOP). The certifier has been deemed not in compliance with the Organic Foods Production Act of 1990 (Act)¹ and the U.S. Department of Agriculture organic regulations.²

BACKGROUND

The Act authorizes the Secretary to accredit agents to certify crop, livestock, wild crop, and handling operations pursuant to the USDA organic regulations (7 C.F.R. Part 205). Accreditation of certifying agents is done by the NOP, which also initiates compliance actions to enforce program requirements. Noncompliance procedures for certifying agents are set forth in §205.665 of the USDA organic regulations. Persons subject to the Act who believe that they are adversely affected by a noncompliance decision of the NOP may appeal such decision to the

¹ 7 U.S.C. 6501-6522

² 7 C.F.R. Part 205

AMS Administrator, pursuant to §205.680 Adverse Action Appeals Process – General, and §205.681, Appeals of the USDA organic regulations.

FINDINGS OF FACT

1. On January 26, 2016, NOP granted accreditation to Basin and Range Organics (BARO) as a USDA certifying agent for crops, wild crops, livestock, and handling operations. NOP approved BARO's accreditation application subject to several conditions set forth in a Terms of Accreditation document.
2. On September 13-15, 2017, NOP conducted an on-site audit of BARO, finding multiple noncompliances, and subsequently prepared a Corrective Action Report.
3. On February 5, 2018, NOP issued a Notice of Noncompliance, citing 16 new noncompliances found during the September 2017 on-site audit and attaching the Corrective Action Report for BARO to address the noncompliances.
4. On March 23, 2018, NOP issued a Notice of Noncompliance to BARO citing 13 noncompliances found in BARO's 2018 Annual Report submitted on January 24, 2018.
5. Between April and September 2018 (April 22, 2018; April 25, 2018; April 26, 2018; May 3, 2018; May 18, 2018; July 26, 2018; August 31, 2018; September 4, 2018; September 14, 2018; and September 19, 2018), BARO submitted responses to the notices of noncompliance.
6. On October 21, 2018, NOP issued a Notice of Proposed Suspension of Accreditation to BARO stating that only 2 of the 13 noncompliances cited in the March 23, 2018 Notice of Noncompliance had been resolved.

7. On November 20, 2018, BARO filed an Appeal to the October 21, 2018 Notice of Proposed Suspension of Accreditation.
8. On February 3, 2019, NOP issued a second Notice of Proposed Suspension of Accreditation to BARO stating that only 5 of the 16 noncompliances cited in the February 5, 2018 Notice of Noncompliance had been resolved.
9. On March 1, 2019, BARO filed an Appeal to the February 3, 2019 Notice of Proposed Suspension of Accreditation.

DISCUSSION

The NOP proposed a suspension of BARO's accreditation, stating that BARO is noncompliant with the USDA organic regulations at 7 CFR §205 as follows:

The organic regulations at 7 C.F.R. 205.403(c)(1-2) state that, "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; (2) That the information including the organic production or handling system plan...accurately reflects the practices used or to be used by the applicant for certification or by the certified operation."

The organic regulations at 7 C.F.R. 205.405(d)(1) state that, "A notice of denial of certification must state the reason(s) for denial and the applicant's right to: (1) Reapply for certification pursuant to §§205.401 and 205.405(e)."

The organic regulations at 7 C.F.R. 205.501(a)(1-3) state that, "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; and 3) Carry out the provisions of the Act and the regulations in this part...”

The organic regulations at 7 C.F.R. 205.501(a)(5-7) state that, “A private or governmental entity accredited as a certifying agent under this subpart must: 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; and 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.”

The organic regulations at 7 C.F.R. 205.501(a)(11)(i) state that, “A private or governmental entity accredited as a certifying agent under this subpart must: Prevent conflicts of interest by: Not certifying a production or handling operation if the certifying agent or a responsibly connected party of such certifying agent has or has held a commercial interest in the production or handling operation, including an immediate family interest or the provision of consulting services, within the 12-month period prior to the application for certification.”

The organic regulations at 7 C.F.R. 205.501(a)(11)(v) state that, “A private or governmental entity accredited as a certifying agent under this subpart must: Prevent conflicts of

interest by: Requiring 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 all parties responsibly connected to the certifying agent to complete an annual conflict of interest disclosure report.”

The organic regulations at 7 C.F.R. 205.501(a)(21) state that, “A private or governmental entity accredited as a certifying agent under this subpart must: Comply with, implement, and carry out any other terms and conditions determined by the Administrator to be necessary.”

The organic regulations at 7 C.F.R. 205.504(b)(1) 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...A copy of the procedures to be used to evaluate certification applicants, make certification decisions; and issue certification certificates.”

The organic regulations at 7 C.F.R. 205.504(b)(5)(i - ii) 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...A copy of the procedures to be used, including any fees to be assessed, for making the following information available to any member of the public upon request: (i) Certification certificates issued during the current and 3 preceding calendar years; and ii) A list of producers and handlers whose operations it has certified, including for each the name of the operation, type(s) of operation,

products produced, and the effective date of the certification, during the current and 3 preceding calendar years.”

The organic regulations at 7 C.F.R. 205.642 state that, “Fees charged by a certifying agent must be reasonable, and a certifying agent shall charge applicants for certification and certified production and handling operations only those fees and charges that it has filed with the Administrator. The certifying agent shall provide each applicant with an estimate of the total cost of certification and an estimate of the annual cost of updating the certification.”

The organic regulations at 7 C.F.R. 205.662(c)(3)-(4) state that, “The notification of proposed suspension or revocation of certification shall state: (3) The impact of a suspension or revocation on future eligibility for certification; and (4) The right to request mediation pursuant to §205.663 or to file an appeal pursuant to §205.681.”

Specifically, NOP stated in the October 21, 2018 Notice of Proposed Suspension of Accreditation that despite multiple attempts, BARO had resolved only 2 of the 13 noncompliances described in the March 23, 2018 Notice of Noncompliance. BARO was required pursuant to the organic regulations to conduct an annual performance review of all persons who perform certification services but submitted evaluations for only 6 of its 9 certification personnel. The evaluations were identical to the ones submitted the prior year. BARO had stated that it would conduct all the evaluations in a timely manner in 2018, but no evidence was submitted to substantiate that the evaluations had been done. Additionally, BARO hadn’t conducted regular field evaluations of all inspectors, and subsequently submitted evaluations for only 3 of the 6 inspectors.

Despite assurances that these noncompliances would be corrected, BARO then only submitted evaluations for the Program Administrator and a processor/handler/crop inspector;

however, the evaluation for the Program Administrator was incomplete and the inspector's evaluation only covered a field evaluation. Additionally, a newly hired processor/handler reviewer had no experience, education, or training in agriculture, organic production, or organic handling techniques. NOP asked for an update on any additional training, experience, or qualifications for BARO's certification reviewers, but BARO failed to provide this information.

In addition, BARO's 2017 internal audit wasn't conducted by a qualified reviewer and BARO didn't respond to NOP's request for the procedures and documentation used to conduct said review. Further, conflict of interest forms for 5 personnel were identical to the forms submitted the prior year; forms for 2 personnel were dated 2015; and there were no forms for 3 personnel. A form from one staff person indicated a conflict which BARO hadn't noted on its personnel roster. NOP also found that BARO had certified (1) an operation which is owned/operated by a staff member who performs inspections, and (2) an operation owned/operated by the current Program Administrator who conducts certification activities. BARO stated it would amend its By-Laws to avoid such conflicts in the future and use the personnel roster to track and eliminate potential conflicts but didn't provide any evidence of mitigating these conflicts.

BARO's fee schedule, which was revised June 30, 2017, didn't match with the fee schedule on file with NOP. Additionally, NOP was unable to verify the fee schedule on BARO's website as the website was not operational. BARO failed to explain how this noncompliance would be corrected. NOP also found that an organic certificate issued by BARO to an operation on January 5, 2018, didn't identify specific certified organic products covered by the certificate. Although BARO stated that it issued an updated certificate, it didn't submit the updated certificate. Additionally, BARO didn't update the Organic Integrity Database (OID) with the

certificates issued to its certified operations. The inoperability of BARO's website also detrimentally affected public access to the list of producers and handlers whose operations it had certified, as well as other information on each operation. This meant that BARO did not have a means to provide either the certificates issued or a list of the operations it had certified to the public as required by the organic regulations.

NOP subsequently issued a second Notice of Proposed Suspension of Accreditation on February 3, 2019, based on findings from the on-site audit in September 13-15, 2017, and described in the February 5, 2018 Notice of Noncompliance. NOP determined that BARO hadn't sufficiently addressed 11 of the 16 noncompliances which are separate from, and in addition to, the findings in the October 21, 2018 Notice of Proposed Suspension. BARO had not mitigated the conflicts of interest, and the 'transfer' of 3 individuals from the Board of Directors to Advisory Committee positions was insufficient. NOP again found a lack of expertise by some of BARO's personnel, and that BARO had not maintained training logs for inspectors and reviewers to demonstrate that they had the training and knowledge of the organic regulations and supplemental information needed to conduct certification activities. BARO failed to conduct a comprehensive review of all personnel files and issue a report to NOP after promising to do so. Conflicts of interest and inadequate personnel qualifications were previously cited in the October 21, 2018 Notice of Proposed Suspension.

BARO's Organic System Plan (OSP) forms used by its certified operations do not consistently request the operations to disclose whether they import or export organic products, and inspection reports do not ask about imports and exports. BARO stated it created an Addendum to the 2018 Annual Update to request such information from operations, created addendums for various inspection forms, and plans to revise all forms for 2019. However,

BARO's corrective action submission didn't include documentary evidence of how BARO would correct the issue for future years. BARO also didn't update the issue date when organic certificates were re-issued to operations and is inconsistent on how it identifies anniversary dates on certificates. BARO didn't complete the review of all its issued certificates by cross-checking them with OSPs, inspection reports, and the OID or complete updates in the OID. As such, the certificates may not accurately reflect the activities of the operation. Further, BARO's new policy on establishing anniversary dates conflicted with the NOP requirement that the anniversary date is the date when the certified operation must submit its annual update. BARO's policy states that the anniversary date on all future certificates will be September 1st; however, BARO requires its operations to submit their annual update by March 31st of each year.

NOP's review of 7 operation files during its on-site audit found that in 4 of the files, the Certification Agreement letters didn't reflect the issues of concern noted in the inspection reports and exit interviews. This is indicative of personnel with insufficient expertise to identify noncompliances and make proper certification decisions based on evidence. BARO stated it created a new final review checklist for use by reviewers and 3 of its personnel will conduct certification reviews; however, NOP found the resumes of those 3 individuals do not show that they have sufficient expertise in organic certification to make certification decisions and conduct the review of prior certification decisions. NOP also found that trace back audits and in-out balance audits recorded in 6 of the 7 inspection reports were incomplete. BARO stated it created a new traceback and mass balance worksheet for use by its inspectors, but NOP found that BARO's corrective action didn't include documentary evidence of how these report deficiencies would be prevented in the future. Notices of proposed suspension and notices of proposed revocation which BARO issued to operations were also missing crucial statements

regarding an operation's rights to request mediation and appeal the decision, and as well as statements regarding the impact of a suspension or revocation on an operation.

A review of the labels which BARO had approved for its certified operations showed that BARO was not catching errors on organic labels. Although BARO stated it would conduct a label review, it didn't submit any evidence supporting how the noncompliance would be prevented in the future, as BARO's written procedures hadn't been updated with information on how to conduct a proper label review. Further, BARO was not recording the review of and decisions regarding materials identified in OSPs by applicants and certified operations. BARO stated it was compiling a database of materials used by its various operations and would track when materials need to be re-reviewed. However, NOP found that BARO had not updated its procedures regarding material reviews and decisions and thus there was no evidence of how this noncompliance would be prevented in the future. Lastly, BARO hadn't developed sampling procedures, sampling receipts, or chain of custody documents for samples taken at operations. A new sample collection form subsequently submitted by BARO was found to contain instructions which were not compliant with the organic regulations.

In its appeals, BARO acknowledges that its early staff lacked the expertise to perform certification services. It states it began consulting with the former Administrator of Nevada's now-terminated organic program in December of 2017, and contracted a new Certification Administrator, with 20 years of organic experience, in April of 2018. BARO states it reelected the Board of Directors, re-staffed its personnel, and established a Compliance Committee composed of 2 Board members to meet monthly with the Certification Administrator to ensure NOP requests are answered and deadlines are met. Further, the Board passed resolutions at the November 20, 2018 meeting to hire qualified consultants, establish a training program, and

schedule strategic planning workshops. BARO also ceased accepting any new certification applications from December 15, 2018 to March 15, 2019 to allow time for meeting with staff and advisors and reviewing policies and procedures.

Addressing point by point the noncompliances cited in the two Notices of Proposed Suspension, BARO states that its final contract staff decision wasn't made until October 15, 2018 and the final roster wasn't submitted to NOP until it appealed the October 21, 2018 Notice of Proposed Suspension. However, BARO states that performance evaluations have now been completed for all staff and staff have been matched to roles for which they are best suited. BARO submitted staff performance evaluations for individuals not previously evaluated or whose evaluations weren't complete. Also, BARO developed a comprehensive evaluation form, as well as a Document Tracking Checklist for completion of conflict of interest checks and performance evaluations which will be reviewed and updated monthly. BARO states that although a previously submitted staff roster listed 6 staff members, only 4 actually performed any work during the 2018 season. A new roster has removed the 2 inactive individuals. BARO states it now utilizing long and short forms for inspectors' field evaluations and submitted the missing October 2018 evaluation of a staff member. BARO agrees that not all staff previously had the expertise needed to conduct certification services but states that the 3 current review staff members have the expertise and training and will continue to undergo training. A new Staff Training Document contains spaces for a staff member's qualifications, education, experience in organic agriculture, and training and a new staff training protocol sets forth specific training that each category of staff, i.e. inspector, reviewer, must undergo.

BARO stated that conflict of interest forms are on file for all staff members and that the 3 individuals (Board members) with a conflict of interest have been moved to Advisory positions

pursuant to a January 15, 2019 roster. BARO also revised its By-Laws to prohibit anyone with a conflict of interest from serving on the Board or in a position where he/she would make certification decisions. BARO agrees it did not have a qualified auditor conduct its 2017 internal program review but stated that it has selected a highly qualified individual to conduct the 2018 self-audit and submitted her resume and contract. BARO has also updated its Directions for the Preparation of the Annual BARO Internal Audit, which is now titled the BARO Policy on Conducting and Implementing the Annual Program Review and Self-Audit and has submitted the document to NOP.

BARO created a new Compliance Committee on November 6, 2018, whose duties include meeting monthly to update the staff roster and verify that information is updated in the OID. BARO also updated and corrected its certified operations in the OID and uploaded the actual organic certificates for those operations. BARO submitted a Report on Certificate Updates and Data Review on the OID. BARO also published a directory of all its certified operations on its website and will keep the directory updated and current. BARO states its website is now operable and is controlled by the Board as a whole, is checked monthly, and has a placeholder page in the event of a crash.

Addressing its certification services, BARO states it updated its Handler OSP application template and the Annual Handler Update to ask handlers whether they import and/or export organic products. The inspection report for 2018 included an addendum to provide this information, and the report itself has now been revised to include this inquiry. The Final Review Checklist has also been revised to include verification of import/export activities. BARO states it has updated its fee schedule to align with that submitted to NOP, as well as its policy on properly identifying anniversary dates on organic certificates to comply with NOP

organic regulations. BARO again referred to its new training protocol to address deficiencies in its personnel; stated that it has developed a Traceback and Mass Balance Worksheet that is required to be completed by the inspector at each inspection; and revised its On-Site Inspection Request letter it sends to each inspector for each inspection. BARO states it revised its adverse action notices to contain the missing statements including the operation's right to appeal.

BARO also completed an audit of all client labels on December 30, 2018; sent a report to NOP on January 26, 2019; developed a Label Review Checklist and Label Roster; and has adopted Best Practices for Developing Consistency in the Product Label Review Process drafted by the Accredited Certifiers Association, Inc. BARO's inspectors will use a Materials Tracking Spreadsheet to log the materials used by each certified operation and will send each operation a new materials form to identify the new materials used by that operation. BARO also updated its Residue Testing Sample Collection form for which NOP had found the instructions were noncompliant. BARO sent emails to its personnel announcing the various new policies and documents, some of which are referenced directly above. NOP has also confirmed that BARO's website is now operational and contains a 41-page Policies and Procedures document, various forms, the NOP organic regulations, a fee schedule, and links to other relevant sites.

However, the AMS review of this case reveals a voluminous amount of evidence substantiating that BARO has a history of noncompliance with the Act and the organic regulations dating back to its application for accreditation in 2015. The noncompliances described in the Notices of Proposed Suspension of Accreditation are numerous and recurrent. BARO has acknowledged a lack of timeliness in correcting its noncompliances. However, it is not just a matter of not timely correcting noncompliances, rather it is not correcting the noncompliances at all in some cases. The 8 noncompliances which NOP found during the

Document Adequacy Review and a Pre-decisional Accreditation Assessment and cited in a December 18, 2015 Notice of Noncompliance, were to be corrected per the Terms of Accreditation. However, these same noncompliances continued and were the subject of the 2 Notices of Noncompliance on February 5, 2018 and March 23, 2018, which lead to the Notices of Proposed Suspension on February 3, 2019 and October 21, 2018 respectively. Specifically, the February 3, 2019 Notice of Proposed Suspension stated that 11 of the 16 noncompliances cited in the February 5, 2018 Notice of Noncompliance remained unresolved. The October 21, 2018 Notice of Proposed Suspension stated that 11 of the 13 noncompliances cited in the March 23, 2018 Notice of Noncompliance remained unresolved.

Further, in the interim, NOP issued a Notice of Noncompliance to BARO on June 15, 2016 after BARO granted organic certification to an applicant operation without having sent the documents to NOP for review as required by the Terms of Accreditation. NOP also issued a Notice of Noncompliance on July 13, 2016 for BARO's charging a certification applicant fees which were not on file with NOP. NOP issued Notices of Noncompliance Resolution for both notices on July 21, 2016 and August 26, 2016 respectively. However, the noncompliance involving charging fees not on file with NOP was again cited in the March 23, 2018 Notice of Noncompliance and the October 21, 2018 Notice of Proposed Suspension.

CONCLUSION

The evidence substantiates that BARO has violated the organic regulations at 7 CFR §205.403(c)(1-2); 7 CFR §205.405(d)(1); 7 CFR §§205.501(a)(1-3); 7 CFR §§205.501(a)(5-7); 7 CFR §205.501(a)(11)(i); 7 CFR §205.501(a)(11)(v); 7 CFR §205.501(a)(21); 7 CFR §205.504(b)(1); 7 CFR §205.504(b)(5)(i-ii); 7 CFR §205.642; and 7 CFR §205.662(c)(3-4). An accredited certifying agent must demonstrate the ability to fully comply with the requirements

for accreditation set forth in the organic regulations. Specifically, an accredited certifying agent is required pursuant to 7 CFR 205.501, General requirements for accreditation, to “use a sufficient number of adequately trained personnel, including inspectors and certification review personnel...(and) 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.” Further, a certifying agent must “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.”

However, NOP has routinely found numerous noncompliances related to critical accreditation activities. BARO had multiple opportunities over extended periods of time, specifically after issuance of the notices of noncompliance and prior to issuance of the notices of proposed suspension, during which it failed to adequately resolve all noncompliances. BARO didn't contend the noncompliance findings were in error and is now attempting to resolve the noncompliances through the appeals process. However, these efforts are belated.

Further, BARO stated that it has adopted new policies and is utilizing new forms, checklists and logs for such items as training, traceback and mass balance audits, reviewing of material inputs, conflicts of interest, and performance evaluations, and submitted information to NOP on changes/revisions it made to policies, procedures, forms, et cetera. However, BARO didn't address how the noncompliances would be corrected or prevented in the future.

Additionally, although the 3 board members with conflicts of interest are no longer board members, they still serve as advisors. BARO didn't address how their prior holding of board

positions was mitigated, as operations were granted certification which may not have been done if these individuals were not board members.

BARO's failure to sufficiently correct numerous noncompliances; the volume of noncompliances; and the fact that many noncompliances occur repeatedly demonstrate a failure to comply with accreditation requirements. New information and documentation submitted by BARO during this appeal process would need to be evaluated via an application for accreditation that would include a review of the documents and an on-site inspection to verify the implementation of the corrective actions.

DECISION

The appeal is denied and BARO's accreditation is to be suspended for 1 year. Attached to this formal Administrator's Decision is a Request for Hearing form. BARO has thirty days to request an administrative hearing before an Administrative Law Judge. If BARO does not request a hearing in that period, this Decision will be implemented and the suspension of BARO's accreditation will become final.

However, in accordance with the organic regulations at 7 C.F.R. §205.665, BARO may apply for reinstatement of its accreditation at any time in accordance with §205.502 of the organic regulations.

Done at Washington, D.C., on this 20th
day of June, 2019.



Bruce Summers
Administrator
Agricultural Marketing Service