

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
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)
Dale Fink Farms) **Administrator’s Decision**
Tomah, Wisconsin) **APL-026-20**
)
)

This Decision responds to an appeal (APL-026-20) of a Notice of Noncompliance and Proposed Revocation under the National Organic Program issued to Dale Fink Farms (Fink) of Tomah, Wisconsin by the Minnesota Crop Improvement Association (MCIA). 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. Fink is certified organic for crops. The Fink family (Dale, Samantha, and Cody) also have another certified operation, Triple F LLC (Triple), a livestock operation. The Fink family has both crops and livestock, with numerous fields at the 4 locations.
2. On July 5, 2019, MCIA issued a Notice of Noncompliance and Proposed Revocation of Certification to Triple after 2 unannounced inspections on June 22, 2019 and June 27, 2019 at the 4 locations revealed numerous noncompliances. The notice addressed noncompliances in both the livestock and crop operations of the Fink family.
3. On July 29, 2019, MCIA issued a Rejection of Mediation notice to Triple's July 22, 2019 request for mediation.
4. On August 29, 2019, Triple filed an Appeal.
5. On January 14, 2020, MCIA told NOP that it had inadvertently neglected to add a second operation, Fink, to their database when converting software systems. Both operations had been folded together under the Triple certification in MCIA's database and MCIA hadn't obtained an updated separate Organic System Plan (OSP) or other documentation for the certification of Fink, a crops operation. Some noncompliances apply to both operations.
6. On January 29, 2020, at the direction of NOP, MCIA rescinded the July 5, 2019 Notice of Noncompliance and Proposed Revocation issued to Triple and issued 2 separate Notices of Noncompliance and Proposed Revocation, one to Triple and one to Fink, breaking out the noncompliances by operation. The Appeal filed on August 29, 2019 addressed the

noncompliances cited in the original notice as to both operations and therefore, it was deemed an Appeal as to both operations and Fink didn't need to file a new appeal. A corrected notice was issued to Fink on February 5, 2020, after an error was found in its reissued notice. Triple also appealed the Notice of Noncompliance and Proposed Revocation issued to it. It is a separate case, APL-072-19.

DISCUSSION

The USDA organic regulations at 7 C.F.R. 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 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 §205.202, Land requirements, state that, “Any field or farm parcel from which harvested crops are intended to be sold, labeled, or represented as “organic,” must: (a) Have been managed in accordance with the provisions of §§205.203 through 205.206; (b) Have had no prohibited substances, as listed in §205.105, applied to it for a period of 3 years immediately preceding harvest of the crop; and (c) Have distinct, defined boundaries and buffer zones such as runoff diversions to prevent the unintended application of a prohibited substance to the crop or contact with a prohibited substance applied to adjoining land that is not under organic management.”

The organic regulations at §205.400, General requirements for certification, state that, “A person seeking to receive or maintain organic certification under the regulations in this part must: (a) Comply with the Act and applicable organic production and handling regulations in this part; (b) Establish, implement, and update annually an organic production or handling system plan that is submitted to an accredited certifying agent... (f) Immediately notify the certifying agent concerning any:...(2) Change in a certified operation or any portion of a certified operation that may affect its compliance with the Act and the regulations in this part.”

The organic regulations at §205.406, Continuation of certification, state that, “(a) To continue certification, a certified operation must annually pay the certification fees and submit the following information, as applicable, to the certifying agent: (1) An updated organic production or handling system plan which includes: (i) A summary statement, supported by documentation, detailing any deviations from, changes to, modifications to, or other amendments made to the previous year’s organic system plan during the previous year; ;and (ii) Any additions

or deletions to the previous year's organic system plan, intended to be undertaken in the coming year...(4) Other information as deemed necessary by the certifying agent to determine compliance with the Act and the regulations in this part.”

Certifier MCIA conducted unannounced inspections at the 4 locations on June 22, 2019 and June 27, 2019, which revealed numerous noncompliances. MCIA states that Triple and Fink both have operations at various of the 4 locations. The noncompliances constitute violations by Fink of the organic regulations at 7 CFR §205.201, Organic production and handling system plan; 7 CFR §205.202, Land requirements; and 7 CFR §205.406, Continuation of certification. The noncompliances include spraying weeds next to a corn field requested for certification without informing MCIA and having no buffer; spraying herbicide around several silos and buildings without informing MCIA; converting a field from pasture to corn without informing MICA; and spraying several fields at Pine Creek Ridge, with a prohibited herbicide, after having converted these fields from organic to nonorganic, GMO status without informing MCIA. Some of the allegations in Fink's notice - not having livestock out to pasture yet for the grazing season and reducing the amount of pasture available - also appear, and more accurately so, in Triple's notice; therefore, they are not addressed here. Fink stated that the livestock operation is under Triple while the crop operation is under Fink, though both operations operate at any one of the 4 locations.

Fink addressed the cited noncompliances in its Appeal stating it believed the substances sprayed were allowed, and that it was unaware that it needed to inform MCIA when changing fields from pasture to corn, or from organic to nonorganic status.

A review of the submitted documentation shows that MCIA conducted unannounced inspections on June 22, 2019 at the Trempealeau locations: [REDACTED],

Trempealeau, Wisconsin; [REDACTED], Arcadia, Wisconsin; and [REDACTED], Trempealeau, Wisconsin; and on June 27, 2019 at the Tomah location at [REDACTED], Tomah, Wisconsin. MCIA found numerous noncompliances throughout Fink's operation which were described in detail by MCIA.

MCIA found that Fink had sprayed herbicide on weeds around several silos and buildings without informing MCIA, as well as in a field adjoining a corn field requested for certification and next to the heifer pasture fence at [REDACTED], when there is no buffer on the pasture side of the fence. The June 22, 2019 inspection reports indicated there are several equipment storage areas around the buildings which had been sprayed. MCIA states it hadn't been informed by Fink that it would be spraying these areas. Fink states it sprayed herbicides around the silos and other buildings, along with vinegar, salt and dish soap and believed that they could use that combination to kill weeds. Fink didn't address the absence of a buffer zone next to the heifer pasture. However, the organic regulations at 7 CFR §205.201, Organic production and handling system plan, requires operations to describe practices and procedures to be performed at the operation; and to list all substances to be used as production or handling inputs so that the certifier can review and approve said substances. An operation must also describe practices and physical barriers to prevent contact of organic production and handling operations and products with prohibited substances. Therefore, Fink's use of inputs, whether prohibited or not, and the spraying of herbicides, without the inputs, substances, or practices being in Fink's OSP or having notified MCIA, is in violation of the organic regulations. Further, MCIA states that Fink had previously confirmed that it would mow or hand pull weeds around the silos and buildings. The OSP of April 18, 2016, although noted as being for dairy, covers the crops and livestock

operations. Due to MCIA's inadvertent omission of Fink in its computer system, a separate OSP for Fink wasn't obtained.

Additionally, the organic regulations at 7 CFR §205.202, Land requirements, state that any field from which harvested crops are to be sold, labeled, or represented as "organic" must not have had any prohibited substances applied for a period of 3 years immediately preceding the harvest. The inspector noted in the inspection report of June 22, 2019, that he observed Fink spraying weeds in the field directly adjoining a corn field requested for certification. However, MCIA acknowledged it didn't take samples from around the silos and buildings, or in the field adjoining the corn field or the corn field itself. Therefore, no testing was done to determine what substance was allegedly sprayed though MCIA claims that Fink admitted it used herbicides. Fink also didn't provide information or documentation on what exactly was sprayed to substantiate that the substance wasn't prohibited.

MCIA states that Fink also violated the organic regulations at 7 CFR §205.406, Continuation of certification, which requires that certified operations annually provide to their certifiers an updated OSP, noting any additions or deletions from the prior plan; an update on the correction of previously identified minor noncompliances; and other information deemed necessary by the certifier to determine compliance with the Act and organic regulations. In addition to not notifying MCIA of spraying to be done around the silo and buildings, and in the field adjacent to a corn field, Fink hadn't kept MCIA informed of changes in the status of various fields. Specifically, at the June 22, 2019 inspection, Fink stated that fields at [REDACTED] had been changed from organic to nonorganic status; that GMO nonorganic corn had been planted in the fields; and that the fields had been sprayed with a herbicide which was prohibited for organic crops. Additionally, the lactating cow pasture south of [REDACTED] at Tomah

had been converted from pasture to corn without informing MCIA. This, along with other pastures not being used yet for grazing, significantly impacts the amount of pasture available, and therefore, the livestock's ability to meet dry matter intake (DMI) requirements. The reduction of pasture and DMI is addressed extensively in the Triple (livestock) case and is not addressed here. Lastly, MCIA states that a field was added to the Fink certification at the inspection on June 22, 2019, and another was added at the inspection on June 27, 2019, though neither had been updated in Fink's OSP. The inspection reports show a field south of [REDACTED] and what appear to be fields adjacent to [REDACTED] being added.

In conclusion, the evidence substantiates that Fink violated the Act and the organic regulations at 7 CFR §205.201; and 7 CFR §205.406, as alleged by MCIA. Additionally, the evidence substantiates that Fink violated the regulations at 7 CFR §205.400, General requirements for certification, which require that a person seeking to maintain organic certification must immediately notify the certifying agent of any changes in the operation or any portion of the operation that may affect its compliance with the Act or regulations. As discussed above, Fink didn't notify MCIA of several changes in its operations. However, the evidence doesn't substantiate that Fink violated the organic regulations at 7 CFR §205.202, Land requirements, as MCIA did not collect samples from the corn field next to the Field by [REDACTED], and surrounding area or around the silo and buildings, to support its allegation that Fink sprayed prohibited herbicides. Therefore, no testing was done to determine what, if any prohibited substance, was sprayed.

However, Fink's noncompliances are systemic and repeated. Fink failed on numerous occasions to inform MCIA of changes/conversions/additions of various fields as well as sprayings to fields, and failed to provide information on inputs, substances, and practices in its

OSP. Additionally, Fink operates at 4 different locations, with numerous fields, and the Fink family has another operation, Triple, which was also issued a Notice of Noncompliance and Proposed Revocation by MCI. Although Fink states that its operation – the Dale Fink Farms - is mostly a crops operation and that the livestock are under the Triple F LLC certification, there is overlap between the two operations and within the various locations. Further, actions taken at one operation can affect the other operation. For example, the conversion of land from pasture to corn production affects the available grazing area for the livestock, and therefore, potentially detrimentally affects the livestock's ability to meet the DMI requirement. As both operations can be found at any of the 4 locations, there is no clear delineation of operations by location. As Fink has been unable to maintain compliance with the organic regulations, it can't remain certified 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. However, Fink violated the Act and the organic regulations at 7 CFR §205.201; 7 CFR §205.400; and 7 CFR §205.406. The repetitive, systemic violations require Fink to conduct a thorough review of its operation and ample time to correct the numerous noncompliances. Fink may not remain certified at this time; however, the noncompliances, unlike those found in the Triple case, do not warrant revocation of Fink's certification. Although MCI's allegation that prohibited substances were sprayed on fields can't be substantiated, Fink is informed that the finding of any prohibited substances on crops in the future will result in said crops prohibited from being sold,

labeled or represented as organic and the land on which the crops were raised being removed from organic status for 3 years pursuant to 7 CFR §205.202.

DECISION

The Appeal is denied and the Notice of Noncompliance and Proposed Revocation of Fink's certification is upheld with a modification to suspend Fink's certification. Fink's crop certification is hereby suspended for 1 year. Pursuant to 7 CFR §205.662(f)(1), Fink may reapply for certification at any time but will be required to provide evidence that each noncompliance has been resolved and that Fink can meet all requirements for certification. Additionally, attached to this formal Administrator's Decision denying Fink's Appeal is a Request for Hearing form. Fink has thirty (30) days to request an administrative hearing before an Administrative Law Judge.

Done at Washington, D.C., on this _____
day of _____, 2020.

**BRUCE
SUMMERS**

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Bruce Summers
Administrator
Agricultural Marketing Service