

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)	
)	
Kendall’s Dairy)	
)	
)	Administrator’s Decision
)	APL-032-24
Perham, Maine)	
)	

This Decision responds to an Appeal (APL-032-24) of a Notice of Noncompliance and Proposed Suspension under the National Organic Program (NOP) issued to Kendall’s Dairy (Kendall’s) of Perham, Maine by USDA-accredited certifying agent MOFGA Certification Services, LLC (MOFGA). 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 May 17, 2021, MOFGA certified Kendall's for crops and livestock.
2. On September 16, 2022, MOFGA issued a Notice of Noncompliance to Kendall's based on findings at the August 2, 2022 inspection.
3. On January 18, 2023, MOFGA issued a Resolution Notice stating that Kendall's had resolved the noncompliances cited in the September 16, 2022 noncompliance notice.
4. On August 8, 2023, MOFGA issued a Notice of Noncompliance to Kendall's, stating that Kendall's had failed to submit an updated Organic System Plan (OSP) for 2023, and owed annual fees.
5. On August 28, 2023, MOFGA issued a Resolution Notice, stating that Kendall's had resolved the August 8, 2023 Notice of Noncompliance.
6. On December 1, 2023, MOFGA issued a Notice of Noncompliance and Proposed Suspension after finding additional noncompliances at the November 3, 2023 inspection, and that noncompliances from the August 2022 inspection had reoccurred.
7. On January 4, 2024, Kendall's submitted an Appeal.
8. On June 3, 2024, NOP and Kendall's entered into a Settlement Agreement.
9. On June 21, 2024, MOFGA reported to NOP that Kendall's had breached the NOP Settlement Agreement.
10. On July 10, 2024, NOP issued a Notice of Noncompliance and Request for Corrective Action to Kendall's requesting that Kendall's resolve the reported breach of the settlement.

REGULATORY CITATIONS

The USDA organic regulations at 7 C.F.R. §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 of this part; (b) Establish, implement, and update annually an organic production or handling system plan that is submitted to an accredited certifying agent as provided for in §205.200; ... (d) Maintain all records applicable to the organic operation for not less than 5 years beyond their creation and allow ... the certifying agent access to such records during normal business hours for review ... (e) Submit the applicable fees charged by the certifying agent ...” Additionally, the 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 ... (4) Other information as deemed necessary by the certifying agent to determine compliance with the Act and the regulations in this part.”

DISCUSSION

Evidence substantiates that Kendall’s was certified organic for crops and livestock on May 17, 2021 by MOFGA. However, Kendall’s has experienced difficulties remaining in compliance. On April 5, 2021, MOFGA wrote Kendall’s stating that it needed to address soil fertility, specifically a large manure pile at the operation; properly cleaning equipment; ensure livestock has sufficient pasture of a high quality; and maintain records on purchased livestock. Subsequently, on May 30, 2022, MOFGA wrote to Kendall’s stating that it had reviewed the

submitted OSP, and Kendall's was lacking a herd list; needed to meet the pasture rule requirements and recalculate dry matter intake (DMI) of the livestock; and maintain receipts for purchased livestock.

MOFGA conducted an inspection of Kendall's on August 2, 2022, finding that Kendall's had failed to conduct soil tests; needed updated maps; wasn't doing crop rotation; kept livestock in the barn from January into March with no reason provided; the pasture was weedy; and the manure pile was still behind the barn. On September 16, 2022, MOFGA issued a Notice of Noncompliance to Kendall's, citing the findings of the prior inspection. However, on January 18, 2023, MOFGA issued a Resolution Notice to Kendall's, stating that the prior noncompliance notice had been resolved.

Subsequently, on August 8, 2023, MOFGA issued Kendall's a Notice of Noncompliance, stating that Kendall's had failed to submit its 2023 OSP update, which was due on April 21, 2023. MOFGA noted it had sent the materials to Kendall's on January 25, 2023 and again on June 8, 2023. Additionally, Kendall's hadn't submitted its annual fees. However, on August 28, 2023, MOFGA issued a Resolution Notice to Kendall's stating that it had submitted the 2023 annual update, as well as a herd list. MOFGA found some noncompliances remained unresolved, so it wrote Kendall's on August 29, 2023, stating that the review of Kendall's OSP revealed that Kendall's needed to submit a field map, prior land use affidavit, and field history for a new field it wished to add to the certificate; and also needed to complete an annual fee sheet to set up a payment plan for fees, as well as submit a current herd list.

Subsequently, on November 3, 2023, MOFGA conducted an inspection, which found that Kendall's was working with USDA's NRCS (Natural Resources Conservation Services) on developing a nutrient management plan and making several improvements to the operation, i.e.

installing fencing. However, MOFGA noted that the center aisle in the barn had been scraped away and was over a foot below the level of the stanchions where the cows stand for milking. MOFGA also noted muddy areas around the barn. Therefore, on December 1, 2023, MOFGA issued a Notice of Noncompliance and Proposed Suspension to Kendall's, citing to the inspection findings, and that some noncompliances from the prior August 2022 reoccurred.

Kendall's filed an Appeal on January 4, 2024, stating the former owner of the operation was Amish and had shoveled out the barn by hand; and when Kendall's used a tractor to remove manure in the barn, it scraped up the top surface and hit the gravel below. Kendall's stated it is working with NRCS to make needed improvements and delineated the improvements. The inspector had noted that Kendall's owner works 50 hours a week at another position. Kendall's also had temporarily stopped shipping organic milk to be able to address the noncompliances. Kendall's submitted the NRCS Conservation Plan contract and the plan itself.

While numerous recordkeeping and other noncompliances were found, MOFGA's inspector noted at the August 2, 2022 inspection that the livestock were healthy and there were good herd records. At the November 3, 2023 inspection, MOFGA noted grazing rotation had improved, dedicated organic equipment was being used, and DMI requirements were met. Further, Kendall's had taken action to address and resolve nutrient issues and physical aspects of the operation.

Therefore, NOP entered into a Settlement Agreement with Kendall's on June 3, 2024, to give Kendall's a last chance to address the persistent problems of muddy areas and the center aisle in the barn being lower than the stanchions, with the guidance of NRCS, and to address the recordkeeping noncompliances. Kendall's agreed to maintain numerous records, including an OSP updated annually, meet pasture and DMI requirements, and conduct periodic soil tests. The

agreement also required Kendall's to reply to all requests from MOFGA for documentation and information by the set deadline, and to submit its 2024 and 2025 annual renewal certification materials, including an updated OSP and required certification fees, by the deadline set by its certifier unless Kendall's requests and is granted an extension.

However, on June 21, 2024, MOFGA reported to NOP that Kendall's hadn't submitted its 2024 renewal application and fees, as it had agreed to do. MOFGA stated that it had sent the 2024 renewal application packet to Kendall; and USPS tracking record documentation shows Kendall's received it on March 22, 2024. Further, MOFGA sent a text to Kendall's on May 30, 2024 asking for an update, as Kendall's had said it was seeking a new certifier. MOFGA also extended the deadline after Kendall's had signed the NOP Settlement Agreement, and instructed Kendall's to submit its 2024 renewal update by June 15, 2024. MOFGA stated that Kendall's isn't communicating with MOFGA. Because Kendall's had resolved noncompliances in the past, instead of immediately issuing a noncompliance notice, NOP emailed Kendall's on June 21, 2024, reminding it of the settlement terms and its agreement to timely submit its 2024 renewal. NOP further informed Kendall's that although it may seek to switch certifiers, it is still certified by MOFGA and must comply with the organic regulations and the settlement terms.

After Kendall's failed to respond to NOP's email and NOP confirmed with MOFGA that Kendall's hadn't yet submitted its 2024 renewal materials, NOP issued a Notice of Noncompliance and Request for Corrective Action to Kendall's on July 10, 2024, stating that Kendall's had 15 days to submit its 2024 renewal certification materials and all related fees for 2024 to MOFGA. In communication with MOFGA on July 24, 2024, MOFGA informed NOP that Kendall's had still not submitted its 2024 renewal materials. Therefore, NOP sent Kendall's a 'last chance' email on July 25, 2024, giving it until August 5, 2024, to submit its complete

2024 renewal application, including updates and all fees, and noting that failure to do so could result in suspension of its certification.

On August 5, 2024, Kendall's submitted a photograph of gravel laid in the barn on which concrete would be poured, as well as several soil tests. However, MOFGA confirmed that Kendall's had still not submitted its 2024 renewal materials, OSP update, and fees.

Subsequently, on August 12, 2024, a week after the 'last chance' deadline, Kendall's emailed NOP and MOFGA stating that it hadn't received the 2024 renewal application packet; however, MOFGA replied that it had sent the packet, which was received by Kendall's on March 22, 2024, as seen above. Kendall's has yet to submit the 2024 renewal application, OSP update, and fees.

While operations are free to change certifiers at any time, they must still comply with the organic regulations and their relationship and communication with their current certifier.

Further, Kendall's specifically agreed in its Settlement Agreement with NOP, Term 4I, that it would timely submit its 2024 certification renewal materials, OSP update, and all certification fees to its certifier, which is still MOFGA. The NOP Settlement Agreement of June 3, 2024 further states in Term 4O that, "Kendall's agrees that the failure to abide by the terms of paragraphs immediately above shall result in USDA, AMS possibly pursuing administrative action against Kendall's." Clause 3D of the Settlement Agreement states that, "Kendall's withdraws its appeal and waives further appeal rights in this matter. Failure to comply with the Settlement Agreement shall automatically void paragraph 2 above." Paragraph 2 states, "USDA, AMS agrees not to issue a formal Administrator's Decision charging Kendall's with alleged violations of the OFPA and the USDA organic regulations for any actions disclosed by the investigation which gave rise to this agreement." A closure letter sent to Kendall's on June 3, 2024 with the executed agreement also stated that, "... failure to abide by the terms of the

agreement shall automatically void the Settlement Agreement and USDA, and AMS may pursue an administrative hearing process.” AMS finds that Kendall’s has breached its Settlement Agreement with NOP.

CONCLUSION

The evidence substantiates that Kendall’s violated the organic regulations at 7 C.F.R. §205.400, General requirements for certification; and 7 C.F.R. §205.406, Continuation of certification. Kendall’s has failed to submit its 2024 certification renewal materials, including an OSP update and all certification fees, to its certifier MOFGA. The deadline for submitting these has passed; MOFGA and NOP issued several reminders, including a Notice from NOP; and Kendall’s specifically agreed in its Settlement Agreement with NOP to submit the 2024 renewal materials, update, and fees by the deadline. Kendall’s has breached the Settlement Agreement with NOP and violated the organic regulations. Therefore, it may not remain certified.


DECISION

Kendall’s January 4, 2024 Appeal of the December 1, 2023 Notice of Noncompliance and Proposed Suspended is denied. The crop and livestock certification of Kendall’s is suspended. Pursuant to the organic regulations at 7 C.F.R. §205.665(g)(1), Kendall’s may apply for reinstatement of its certification upon submission of all required documentation substantiating its compliance with the organic regulations.

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

Done at Washington, D.C., on this 19th
day of August, 2024.

**BRUCE
SUMMERS**

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SUMMERS
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Bruce Summers
Administrator
Agricultural Marketing Service