

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
)
Malone Dairy) **Administrator’s Decision**
) **APL-048-23**
)
Otter Tail, Minnesota)

This Decision responds to an Appeal (APL-048-23) of a Notice of Noncompliance and Proposed Revocation of Certification under the National Organic Program (NOP) issued to Malone Dairy (Malone) of Otter Tail, Minnesota by Midwest Organic Services Association (MOSA), a USDA accredited certifying agent. 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, or a

¹ 7 U.S.C. 6501-6522

² 7 C.F.R. Part 205

noncompliance decision of the NOP may appeal 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. On July 3, 2007, Malone was certified organic for crops and livestock by MOSA. Justin Malone and Marea Malone are the owners of Malone.
2. On March 16, 2023, MOSA and Malone entered into a Settlement Agreement to resolve a prior adverse action notice, with Malone agreeing to maintain and submit within 14 days a multitude of records.
3. On April 12, 2023, MOSA issued a Notice of Proposed Suspension citing Malone's breach of the prior MOSA Settlement Agreement, and the failure to submit numerous required livestock records.
4. On April 25, 2023, MOSA rejected Malone's April 19, 2023 Mediation Request.
5. On June 1, 2023, Malone filed an Appeal, which was acknowledged by NOP on June 6, 2023.
6. On August 12, 2023, MOSA issued a Notice of Noncompliance citing a multitude of noncompliances involving violations of livestock regulations.
7. On August 12, 2023, MOSA issued a Certification Determination: Additional Final Review – Pre-Decision Requirements document citing findings at two unannounced inspections in the summer of 2023, and the denial of access to needed records.
8. On August 12, 2023, MOSA issued a Notice of Noncompliance and Proposed Revocation citing willful violations of the organic regulations involving missing livestock and

input/feed purchase records, and the refusal to allow the release of records held by third parties.

9. On August 29, 2023, MOSA issued a Notice of Noncompliance for Malone's failure to pay certification fees.
10. On September 8, 2023, MOSA denied Malone's request for mediation of the August 12, 2023 Notice of Noncompliance and Proposed Revocation.
11. On September 11, 2023, Malone filed an Appeal to the August 12, 2023 Notice of Noncompliance and Proposed Revocation, which was acknowledged by NOP on September 27, 2023.
12. On September 12, 2023, MOSA issued a Notice of Proposed Suspension relating back to the August 12, 2023 Notice of Noncompliance, after the numerous noncompliances weren't resolved. Malone didn't file an Appeal.
13. On September 28, 2023, MOSA issued a Notice of Proposed Suspension relating back to the August 29, 2023 Notice of Noncompliance after Malone failed to pay overdue certification fees. Malone didn't file an Appeal.
14. On October 31, 2023, NOP issued a Dismissal of Malone's June 1, 2023 Appeal to the April 12, 2023 Notice of Proposed Suspension, as Malone hadn't filed appeals to the September 12, 2023 and September 28, 2023 Notices of Proposed Suspension. Malone's crop and livestock certification was suspended. MOSA issued the Suspension Notice. However, Malone's September 11, 2023 Appeal to the August 12, 2023 Notice of Noncompliance and Proposed Revocation remained pending, as revocation is a more serious adverse action than suspension.

REGULATORY CITATIONS

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; ... 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 and copying during normal business hours by authorized representatives of the Secretary ... and the certifying agent.”

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 ... 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; ... (3) A description of the monitoring practices and procedures to be performed and maintained ... (4) A description of the recordkeeping system implemented to comply with the requirements ... (6) Additional information deemed necessary by the certifying agent to evaluate compliance with the regulations ...”

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 ... (c) Permit on-site inspections with complete access to the production or handling operation, including noncertified production and handling areas, structures, and offices by the certifying agent ... (d) Maintain all records applicable to the organic operation for not less than 5 years beyond their creation and allow authorized representatives of the Secretary ... and the certifying agent access to such records ... (e) Submit the applicable fees charged by the certifying agent; and (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 §205.403, On-site inspections, state that, “(a) *On-site inspections*. (1) A certifying agent must conduct an initial on-site inspection of each production unit, facility, and site that produces or handles organic products ... An on-site inspection shall be conducted annually thereafter for each certified operation ... (2)(i) A certifying agent may conduct additional on-site inspections ... to determine compliance ... (iii) Additional inspections may be announced or unannounced at the discretion of the certifying agent or as required by the Administrator ... (b) *Scheduling*. ... (2) All on-site inspections must be conducted when an authorized representative of the operation who is knowledgeable about the operation is present and at a time when land, facilities, and activities that demonstrate the operation’s compliance with or capability to comply with the applicable provisions ... “

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 ... (4) Other information as deemed necessary by the certifying agent to determine compliance with the Act and the regulations in this part.”

DISCUSSION

Malone was certified for crops and livestock by MOSA on July 3, 2007. MOSA and Malone entered into a Settlement Agreement on March 16, 2023, after recordkeeping noncompliances had been found and MOSA had issued a Notice of Noncompliance on November 18, 2022. Malone agreed that within 14 days of the settlement execution, it would submit all organic and conventional livestock purchase and sales records for 2020-2022; an updated livestock list with detailed information; updated maps and field plans for organic and conventional acreage; clarification on the source of sawdust bedding; and pay overdue fees.

However, on April 12, 2023, MOSA issued a Notice of Proposed Suspension, citing to Malone’s breach of the prior Settlement Agreement for failure to submit all the identified livestock records. MOSA stated that Malone had submitted the organic and conventional livestock purchase records for 2020-2022, and the updated maps and field plan. However, MOSA stated that Malone didn’t submit the organic and conventional livestock sales records for 2020-2022; didn’t submit a complete updated livestock list; didn’t provide clarification on the source of sawdust bedding; and still has unpaid fees. On April 25, 2023, MOSA rejected Malone’s mediation request; and Malone filed an Appeal on June 1, 2023, which NOP acknowledged June 6, 2023.

On June 29, 2023 and July 6, 2023, MOSA conducted unannounced inspections of Malone where numerous noncompliances were found. MOSA issued a Notice of Noncompliance on August 12, 2023, detailing the noncompliances involving a lack of records on

livestock feed, specifically no labels or bags identifying the feed were available at that time; the presence of numerous prohibited inputs being found in the milkhouse; indications that prohibited inputs were in use on the organic livestock; the lack of complete health care records; pasture practice standard noncompliances, with cows being confined without access to pasture; feeding/grazing records not being available; a lack of clear Dry Matter Intake records; inaccurate or missing milk pickup records; an incomplete Organic System Plan; livestock living conditions with standing water in alleys and no bedding; 2023 crop seed invoices and 2023 input invoices not being available; and the maps not showing all storage facilities. After Malone failed to address these numerous noncompliances cited in the August 12, 2023 noncompliance notice, MOSA issued a Notice of Proposed Suspension on September 12, 2023. However, Malone didn't file an Appeal to that notice.

Concurrently, on August 12, 2023, MOSA issued a Notice of Noncompliance and Proposed Revocation citing to willful violations of the organic regulations involving missing livestock and input/feed records, and the refusal to allow the release of records held by third parties. Specifically, MOSA stated that it was noted at the July 6, 2023 unannounced inspection that documentation of livestock sold or deceased wasn't kept, and when MOSA contacted (b) (4) to request sales records from June 2020 to the inspection date, Malone wouldn't grant permission for the stockyards to release the sales records. Additionally, records regarding inputs and input applications weren't available. MOSA contacted (b) (4) from which Malone had purchased inputs/feed; however, (b) (4) wouldn't release the records without Malone's permission. While MOSA obtained some information regarding purchases made under the Malone Dairy account, it was told by (b) (4) that Malone hadn't given permission to release information for purchases made under other accounts of Justin Malone,

owner of Malone Dairy. MOSA found the refusal to provide access to all requested records constitutes a willful violation of the organic regulations. Subsequently, on September 8, 2023, MOSA denied Malone's request for mediation of the proposed revocation, and Malone filed an Appeal on September 11, 2023, which NOP acknowledged on September 27, 2023.

Lastly, MOSA issued a Notice of Noncompliance to Malone on August 29, 2023 for the failure to pay overdue certification fees, and after Malone still hadn't paid the fees, MOSA issued a Notice of Proposed Suspension on September 28, 2023. Malone didn't file an appeal of this adverse action notice.

As Malone hadn't filed appeals to the September 12, 2023 and September 28, 2023 Notices of Proposed Suspension, Malone's crop and livestock certification was suspended on October 31, 2023. Further, Malone's June 1, 2023 Appeal to the April 12, 2023 Notice of Proposed Suspension was dismissed as moot. However, as revocation of certification is a more severe adverse action, Malone's September 11, 2023 Appeal to the August 12, 2023 Notice of Noncompliance and Proposed Revocation was maintained. It is noted that the two proposed suspension notices to which appeals weren't filed, both specifically stated that appeals must be filed to 'this notice.'

On October 31, 2023, MOSA issued a Suspension Notice to Malone; and NOP affirmed the suspension of Malone's certification and dismissed the one appeal to a separate proposed suspension.

Malone remains suspended for 3 years, and the proposed revocation is pending and addressed herein. As seen above, MOSA issued several adverse action notices addressing recordkeeping noncompliances and noncompliances regarding the livestock operation. The proposed revocation notice cites to a lack of sales records regarding Malone's transactions with a

specific stockyard, and input purchase records from a specific supplier. The livestock sales records from 2020-2022 were already required under the March 16, 2023 MOSA-Malone Settlement Agreement; were cited in the April 12, 2023 Notice of Proposed Suspension; and were referenced in the August 12, 2023 Notice of Noncompliance which led to the September 12, 2023 Notice of Proposed Suspension. Additionally, the matter of livestock inputs was already cited in the August 12, 2023 Notice of Noncompliance, which listed specific prohibited inputs seen in the milkhouse, and for which MOSA requested information. Based on a review of the scope of the notices involved, this case specifically focuses on the matter of Malone's alleged refusal to release specific livestock and input purchase records from third parties to MOSA, which is stated in MOSA's August 12, 2023 Notice of Noncompliance and Proposed Revocation.

On June 28, 2023, MOSA had received a Complaint against Malone, submitted by a client of another certifier. The Complainant stated that Malone's organic livestock was treated with prohibited inputs; and bottles of antibiotics and syringes were present throughout the milk house. The Complainant also stated that non-organic feed from (b) (4) non-organic hay from an individual milk hauler; and non-organic corn silage from another local individual were fed to the organic livestock. The Complainant didn't have direct knowledge of these occurrences, but stated it learned of the occurrences from other individuals. Nevertheless, the Complaint led MOSA to conduct the unannounced July 6, 2023 inspection, to investigate the allegations.

At the July 6, 2023, unannounced inspection, the Inspection Report indicates that Malone didn't maintain a list identifying cattle sold or ones who had died. However, the inspector noted a dock receipt from (b) (4) listing certain cattle that had been sold. Blake Malone represented Malone at the inspection since Justin Malone wasn't present and stated that the cattle were sold

as organic cattle. However, the (b) (4) document didn't identify the cattle as organic and a settlement stub for the cattle sold wasn't available. Further, the inspector noted that there were no invoices or records for calf feed available at the inspection. The inspector also viewed numerous livestock health inputs in the milkhouse that were not listed on Malone's input inventory, and which are prohibited in organic operations. The inputs included antibiotics and hormones. MOSA informed NOP in a letter on July 12, 2023, about the June 28, 2023, Complaint. MOSA also stated that it had contacted (b) (4) and was told it doesn't sell organic feed, though it does sell conventional chemicals and calf feed.

Therefore, on July 21, 2023, MOSA emailed (b) (4) requesting the records for input/feed and service purchases made by Malone and input application records. On August 1, 2023, MOSA emailed Malone, namely, its representative, Justin Malone, and sent him Release of Information Request forms for (b) (4) and for Malone's veterinarian, who could have administered inputs to livestock. In a letter of August 3, 2023 to Justin Malone, MOSA noted that it was still awaiting the return of signed releases for (b) (4) and the veterinarian. In an email of August 7, 2023 to (b) (4) MOSA acknowledged that (b) (4) had said that Justin Malone approved the release of product sale and application records. However, MOSA told (b) (4) that it needed records from all accounts under which input products or services were purchased for or delivered to the Malone Dairy location. MOSA reiterated this in an email the next day. (b) (4) stated in an August 8, 2023 email to MOSA that Justin Malone has multiple accounts with (b) (4) but that (b) (4) had only sent records regarding the Malone Dairy operation.

After MOSA reiterated its request again for records from all accounts (b) (4) stated in an August 9, 2023 email that Justin Malone needs to give (b) (4) permission to release the records for the other accounts. MOSA emailed (b) (4) on August 10, 2023, asking if Justin Malone's

permission had been sought. (b) (4) mailed MOSA on August 11, 2023, stating that it had asked Justin Malone about releasing the records of other accounts, and Justin Malone had said he wouldn't approve the release of the other records. MOSA submitted to NOP the email exchanges between MOSA and (b) (4) as well as communications to Justin Malone.

Following up on the livestock document from (b) (4) found at the July 6, 2023 inspection, MOSA asked Justin Malone to allow the release of livestock sales records from (b) (4) is certified organic by USDA accredited certifier CCOF. However, on August 3, 2023, (b) (4) emailed MOSA that Justin Malone didn't give them permission to release those records. In the August 3, 2023 letter of MOSA to Justin Malone, MOSA stated that it had been informed by (b) (4) that Justin Malone refused to allow the release of livestock sales records. MOSA also stated that it hadn't received the forms allowing the release of purchase input/feed and input application records from (b) (4) MOSA stated that operations are required to grant access to records on such things as livestock sales and livestock health treatments. Since the records weren't available at the prior inspection, MOSA was again requesting the records. MOSA pointed to the organic regulations, which require that operations maintain records that fully disclose all activities and transactions, and that such records are made available for inspection by the operation's certifier. Further, MOSA stated that the refusal to provide access to records applicable to an organic operation is grounds for proposing a revocation of the operation's certification. MOSA ended the letter again asking if Justin Malone would allow MOSA access to records it deemed necessary including those from (b) (4) and the veterinarian. However, as seen above, (b) (4) subsequently told MOSA that Justin Malone denied the request to allow access to (b) (4) records. Further, to date, Justin Malone hasn't allowed access to the input/feed and service purchase records, or input application records held

by (b) (4) the livestock sales records of (b) (4) or records from the veterinarian, though the veterinary records weren't mentioned in MOSA's Notice of Noncompliance and Proposed Revocation.

Subsequently, MOSA issued the August 12, 2023 Notice of Noncompliance and Proposed Revocation, based on the fact that specific livestock sales and input/feed purchase and input application records were not available at the July 6, 2023 inspection, and that Malone refused to allow the release of those records held by third parties. MOSA delineated the actions it had taken in trying to obtain releases from Justin Malone for the (b) (4) livestock sales records, and the (b) (4) input purchase and application records. MOSA found that not only was the refusal to allow MOSA access to the records a violation of the organic regulations, but that the pointed refusal to allow access constitutes a willful violation of the standards. MOSA had even stated in its follow-up August 3, 2023 letter to Justin Malone that he had previously agreed to a release of information from suppliers such as input dealers and suppliers, and service providers, such as a veterinarian. MOSA referenced its Terms and Conditions Agreement, which all certified operations must sign as a condition of certification. Although Justin Malone had signed the agreement over 10 years ago, it is still applicable. The agreement specifically states that the operation would "hereby agree to a release of information from suppliers or service providers, should such be necessary to verify compliance."

Malone's Appeal didn't mention or address the refusal to allow MOSA access to all input and service purchase records, and input application records, from (b) (4) including purchases made under names other than Malone Dairy; and livestock sales records from (b) (4) NOP contacted Malone, and specifically asked Justin Malone to address the statements made by MOSA regarding the refusal to allow access to records. Justin Malone emailed NOP on

February 4, 2024, stating that (b) (4) had sent all requested records to MOSA. However, NOP contacted MOSA to see if any last minute submission had been made by (b) (4) and was informed that the records involving other entities with which Justin Malone is involved weren't submitted. As to (b) (4) Justin Malone stated that MOSA had contacted (b) (4) certifier, CCOF, and threatened to report CCOF to NOP if CCOF didn't audit (b) (4) for Malone's records. MOSA denies this allegation. Further, while Justin Malone stated he didn't engage in any organic livestock transactions with (b) (4) in 2020 and 2021, MOSA had requested records for June 2020 to the current date, and therefore, records for 2022 and 2023 are applicable.

Lastly, while not stated in the August 12, 2023 Notice of Noncompliance and Proposed Revocation, Malone has unpaid overdue certification fees, due MOSA, in the amount of \$4,759.73.

CONCLUSION

Evidence substantiates that Malone violated the organic regulations at 7 C.F.R. §205.103, Recordkeeping by certified operations; 7 C.F.R. §205.201, Organic production and handling system plan; 7 C.F.R. §205.400, General requirements for certification; 7 C.F.R. §205.403, On-site inspections; and 7 C.F.R. §205.406, Continuation of certification. As MOSA stated in the proposed revocation notice, the organic regulations at 7 C.F.R. §205.103 specifically state that a certified operation must maintain records that fully disclose all activities and transactions of the certified operation in sufficient detail as to be readily understood and audited. Pursuant to 7 C.F.R. §205.201, a certified operation must maintain an Organic System Plan which describes its practices and procedures and describes the operation's recordkeeping system. Further, required records must be available for inspection by the operation's certifier. Additionally, the

regulations at 7 C.F.R. §205.403, state that certifiers may conduct additional inspections, including unannounced inspections, to determine an operation's compliance with the organic regulations. The sufficiency of records may also be determined at an unannounced inspection. In this case, Malone failed to maintain and provide to its certifier at inspection, the requested livestock sales records and records on purchased livestock inputs/feed, and application records. Further, Malone failed to cooperate with MOSA on obtaining the records from third parties which held said records. The maintenance and availability of records and providing access to records are key requirements for an operation to obtain and continue certification.

MOSA further stated that Malone's refusal to provide access to the records constitutes a willful violation of the regulations. Per 7 C.F.R. §205.662(d), if a certifier has reason to believe that a certified operation has willfully violated the Act or the organic regulations, the certifier may issue a notification of proposed suspension or revocation of the entire operation or a part of the operation. AMS finds that the failure by Malone to maintain the required identified records, make them available at inspection to the certifier, and then refuse to allow the release of the records held by third parties constitutes a willful violation. The maintenance of records and review of those records by a certifier is crucial to determining if an operation is compliant with the organic regulations. The review of the records requested is especially important as Malone also has a conventional livestock operation, as stated by MOSA in a January 26, 2024 email to NOP. However, Malone outright refused to allow the release of records affecting the operation and held by (b) (4) and (b) (4) to be released to Malone's certifier. A certifier must have access to all records regarding activities and transactions of certified operation, and Malone had even agreed specifically to allow access to records held by third parties pursuant to MOSA's Terms and Conditions of certification.

AMS finds that Malone violated the organic regulations, and that Malone's refusal to provide access to specified records held by others is a willful violation of those regulations. Therefore, the revocation of Malone's organic certification is warranted. The refusal to allow the release of these records prevented MOSA from fully reviewing all activities and transactions of the operation and prevented MOSA from determining Malone's compliance with the organic regulations, specifically the organic status of livestock that were part of transactions with an organic stockyard, and whether non-organic inputs/feed had been used on organic livestock. This is particularly critical as Malone also has a conventional livestock operation. Operations with, or seeking, organic certification must be completely forthcoming with NOP and any USDA accredited certifier, on the specifics of the operation, and maintain and allow access to and review of all records for all transactions. As Malone hasn't done this, its certification is to be revoked.

DECISION

Malone's September 11, 2023 Appeal of August 12, 2023 Notice of Noncompliance and Proposed Revocation is denied. Malone's organic certification is revoked for 5 years. Pursuant to 7 C.F.R. §205.662(f), Malone and any responsibly connected person to Malone are ineligible for certification for 5 years after the date of issuance of the revocation notice. The suspension of Malone's certification issued on October 31, 2023, remains in effect but due to the subsequent revocation, the suspension is now 'a lesser included adverse action.'

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

Done at Washington, D.C., on this 14th
day of March, 2024.

**BRUCE
SUMMERS**

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Bruce Summers
Administrator
Agricultural Marketing Service