

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-017-19**
)
)

This Decision responds to an appeal (APL-017-19) of a Notice of Proposed Suspension of National Organic Program certification issued to Sassy Cow Creamery LLC/Baerwolf Dairies LLC of Columbus, Wisconsin by the Midwest Organic Services Association. 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 January 16, 2018, Sassy Cow Creamery LLC/Baerwolf Dairies LLC (Baerwolf) and the Midwest Organic Services Association (MOSA) entered into a Settlement Agreement.
2. On March 28, 2018, MOSA issued a Notice of Noncompliance.
3. On December 20, 2018, MOSA issued a Notice of Proposed Suspension.
4. On January 15, 2019, Baerwolf filed an Appeal to NOP.

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 groups(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...”

The organic regulations at §205.105, Allowed and prohibited substances, methods, and ingredients in organic production and handling, state that, “To be sold or labeled as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s)),” the product

must be produced and handled without the use of: (a) Synthetic substances and ingredients, except as provided in §205.601 or §205.603; (b) Nonsynthetic substances prohibited in §205.602 or §205.604...”

The organic regulations at §205.201, Organic production and handling system plan, state that, “(a) The producer or handler or 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 system plan must meet the requirements set forth in this section for organic production or handling.” The requirements include a description of practices and procedures to be performed and maintained; a description of the recordkeeping system implemented by the operation; and any additional information deemed necessary by the certifying agent.

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; (b) Provide for pest management in annual and perennial crops; (c) Manage deficient or excess plant nutrients; and (d) Provide erosion control.”

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...(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 not be sold, labeled, or represented as organically produced. (2) Breeder or dairy stock that has not been under

continuous organic management since the last third of gestation may not be sold, labeled, or represented as organic slaughter stock. (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, “(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...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.”

The organic regulations at §205.239, Livestock living conditions, state that, “(b) The producer of an organic livestock operation may provide temporary confinement or shelter for an animal because of: (1) Inclement weather...(4) Risk to soil or water quality...”

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.

(a) Pasture must be managed as a crop in full compliance” with the organic regulations.

Additionally, “(b) Producers must provide pasture...and manage pasture to comply with the requirements...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...”

MOSA proposed a suspension of Baerwolf’s organic certification, which would prohibit the sale, labeling, or representation of its products as organic, stating that Baerwolf had breached a January 16, 2018 Settlement Agreement between MOSA and Baerwolf. Pursuant to the agreement, Baerwolf had agreed to maintain and submit to MOSA various records; obtain

approval from MOSA before using new inputs; and follow the crop rotation practices set forth in the Organic System Plan (OSP). However, during its October 2018 inspection, MOSA found that Baerwolf had failed to maintain many of the required records set forth in the Settlement Agreement; had used 3 new cleaners and 1 new custom fertility mix without prior approval from MOSA; and deviated from the crop rotation practices set forth in the OSP without informing MOSA.

Additionally, MOSA found that Baerwolf had moved 3 livestock from conventional management to calving and milking with the organic herd prior to the animals completing the required 1-year transition. Lastly, MOSA cited to a Notice of Noncompliance issued on March 28, 2018 related to Baerwolf's failure to comply with pasture practice standards. This noncompliance had been resolved after Baerwolf confirmed that all groups of dairy cattle over 6 months of age would be provided a minimum of 30% DMI from pasture; and submitted a grazing plan for the livestock. However, MOSA found at the October 2018 inspection that the livestock had received only 103 days on pasture and the average DMI from pasture was found to be 25.98%. The inspector noted it wasn't clear if the required minimum 120 days on pasture, or the required minimum average of 30% DMI, could be reached during the grazing season. Additionally, Baerwolf's feeding/grazing records were insufficient, and it was hard to determine the number of animals in each group.

In its appeal, Baerwolf stated that "some of the concerns are too small to warrant decertification" and that "in regard to the more major issues we feel we have made strong, measurable efforts to come into compliance." Baerwolf pointed out that MOSA noted, in reference to the pasture practice standards and the livestock only being on pasture for 103 days,

that 2018 was the second wettest year on record for its location which Baerwolf contends needs to be taken into consideration.

A review of all the evidence shows that Baerwolf has a history of noncompliance. MOSA's inspections of Baerwolf in November 2017 found several noncompliances. The Livestock Inspection Report of November 15, 2017, as well as the Farm Inspection Report of November 14, 2017, revealed that although all animals were found to be in 'great shape,' the inspector found that not all animals were receiving the minimum of 30% of DMI from pasture. Further, Baerwolf was missing records from May 2017, and therefore, it could not be determined if the livestock met the requirement of 120 days on pasture during the grazing season. Baerwolf also hadn't maintained temporary confinement records for the livestock, but Baerwolf told the inspector that the Total Mixed Rations (TMR), which are recorded, serve as confinement records because the rations increase when the livestock are confined. Further, Baerwolf didn't maintain records of the treatment of animals with prohibited substances, though the affected animals are separated from the herd and sold as cull. The inspector concluded that Baerwolf's livestock records set forth in the OSP were not maintained accurately and sufficiently to demonstrate Baerwolf's compliance with the national organic standards.

These findings of noncompliances led to a Settlement Agreement of January 16, 2018 between MOSA and Baerwolf, whereby Baerwolf agreed to "keep sufficient, auditable records and have these records available at inspection." The records included seed documentation; custom fertilizer information; equipment cleaning documentation; harvest records; health herd records; and records on the movement of the animals to and from the organic farm. Additionally, Baerwolf agreed to obtain approval from MOSA prior to using any new inputs; cease the re-transitioning of heifers for organic milk production that were born on the organic

farm but raised on the conventional farm; and continue following the crop rotation plan listed in the OSP. MOSA also sent Baerwolf a Pre-Decisional Requirements Letter on February 26, 2018, requesting additional information regarding the feeding, grazing, and temporary confinement of the dairy herd in 2017.

Although Baerwolf provided a response to the February 26, 2018 letter, MOSA deemed it insufficient and issued a Notice of Noncompliance on March 28, 2018, regarding recordkeeping, feed rations, and pasture access for the dairy herd. MOSA stated that available records do not demonstrate that the dairy herd is spending the required minimum of 120 days on pasture during the grazing season; ration records are not complete; records do not clearly disclose the number of animals in each group; calculations for DMI from pasture for each group were not maintained; and records do not adequately document temporary confinement or denial of access to pasture and the reason for these actions. MOSA considered the failure to maintain sufficient, auditable records, and having the records available to MOSA to be a breach of the January 16, 2018 Settlement Agreement. Baerwolf replied to the notice by sending what MOSA deemed to be 'adequate information.' MOSA issued a Notice of Noncompliance Resolution on May 14, 2018. As stated in that notice, Baerwolf had stated its plan for providing all groups of animals over 6 months of age with access to pasture during the grazing season for a minimum of 150 days; a minimum average of 30% DMI from pasture; and keeping complete records on pasture access; feed rations; temporary confinement; and compliance with the DMI requirements.

However, at the October 29 – 30, 2018 inspections, MOSA again found the same or similar noncompliances. The inspector noted in the Livestock Inspection Report and the Farm Inspection Report that while Baerwolf's stated goal for 2018 was to have the dairy herd grazing for a minimum of 150 days. However, it had only met 103 days at that point and it was unlikely

that 150 days would be achieved before year-end. Further, Baerwolf had again failed to meet the 30% of DMI from pasture for all animal groups. The inspector also found that some heifers had not completed their transition before being moved to the organic farm and it wasn't clear from livestock records which animals are transition calves; Baerwolf still wasn't maintaining records on the use of prohibited substances on animals; and seed search records were not fully available. The findings at the October 2018 inspection led to MOSA's issuance of the December 20, 2018 Notice of Proposed Suspension.

It is also noted that Baerwolf has a history of noncompliances beyond those discussed above. The Handler Inspection Report of November 16, 2017 references a 2016 Notice of Noncompliance and Proposed Suspension, resulting in Baerwolf updating its handler OSP; and a July 24, 2017 Notice of Noncompliance and Proposed Suspension regarding Baerwolf's failure to update its Handler Input Inventory and report changes to its Sanitation Standard Operating Procedure. However, despite those references, it is acknowledged that the Handler Inspection Reports of November 16, 2017 and October 29, 2018 noted there were no issues of concern or noncompliances, and that 2018 production records were available.

Baerwolf specifically addressed the finding that the dairy herd was only out to pasture for 103 days in 2018, as of the October 29, 2018 inspection stating that 2018 was the second wettest year on record for its geographical area in Wisconsin. The Farm Inspection Report for 2018 states that the "soil (is) very water-logged and the pastures and lots and pathways adjacent to buildings are muddy/rutted due to the wet condition." MOSA also confirmed it was very wet in Wisconsin in 2018. However, other Wisconsin dairy farmers under MOSA's supervision were still able to comply with the standards. Further, although inclement weather may be grounds for temporary confinement, wet weather isn't unforeseen, and if Baerwolf's noncompliance is due to

wet weather, there is likely a need for a contingency plan to ensure standards are still met.

Baerwolf also states that as of January 1, 2019, it has completed housing to keep all youngstock on continuous organic management, and all calves born on the organic farm remain under 100% organic management from birth until death or sale.

Baerwolf has made some progress in coming into compliance as noted above; however, it has been unable to consistently comply with the organic regulations. Although Baerwolf stated in its Appeal that some of the noncompliances are small, such as paperwork and documentation, all certified operations must comply with all applicable organic regulations. Further, some of Baerwolf's violations are in crucial components of an organic livestock operation.

CONCLUSION

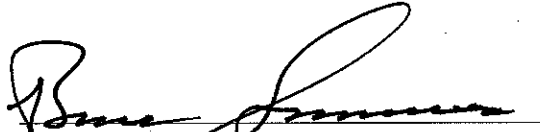
The USDA organic regulations assure consumers that products with the USDA organic seal meet consistent, uniform standards. Key to these standards is that products with the USDA organic seal are produced and handled in accordance with the organic regulations. However, Baerwolf has shown systemic and repeated violations of the organic regulations at 7 C.F.R. §205.103; 7 C.F.R. §205.105; 7 C.F.R. §205.201; 7 C.F.R. §205.205; 7 C.F.R. §205.236; 7 C.F.R. §205.237; and 7 C.F.R. §205.240. This is despite the efforts of MOSA to help Baerwolf come into compliance and a settlement agreement between Baerwolf and MOSA. Baerwolf contends that some of the concerns "are too small to warrant decertification" and that it has made "measurable efforts" on "major issues"; however, if that was true, the same noncompliances wouldn't re-appear and Baerwolf would have successfully completed the terms of the settlement agreement. These noncompliances do not allow for continued certification at this time.

DECISION

The appeal is denied and Baerwolf's organic certification is to be suspended. 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. At any time after suspension, Baerwolf may, "...submit a request to the Secretary for reinstatement of its certification. The request must be accompanied by evidence demonstrating correction of each noncompliance and corrective actions taken to comply with and remain in compliance with the Act and the regulations in this part." Baerwolf may work with any certifier to complete a request for reinstatement.

Done at Washington, D.C., on this 30th
day of July, 2019.


Bruce Summers
Administrator
Agricultural Marketing Service