

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
Triple F LLC)
Tomah, Wisconsin) **Administrator’s Decision**
) **APL-072-19**
)

This Decision responds to an appeal (APL-072-19) of a Notice of Noncompliance and Proposed Revocation under the National Organic Program issued to Triple F LLC (Triple) 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. Triple was initially certified organic on November 18, 2016 for livestock. The Fink family (Dale, Samantha, and Cody) also has another certified operation, Dale Fink Farms, a crops operation. The Fink family has 4 locations with crop fields and livestock.
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.
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, upon questioning by NOP on allegations involving crop certification and the lack of said certification on Triple's certificate, MCIA stated that it had inadvertently neglected to add a second operation, Dale Fink Farms, to their database when converting software systems. Both operations had been folded together under the Triple certification in MCIA's. Some noncompliances apply to both operations.
6. On January 29, 2020, MCIA rescinded the July 5, 2019 Notice of Noncompliance and Proposed Revocation issued to Triple and issued 2 separate Notices of Noncompliance and Proposed Revocation, one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 Dale Fink Farms, breaking out the noncompliances by operation. Triple's Appeal addressed the noncompliances cited in the original notice as to both operations and therefore, Triple didn't need to file a new appeal.

Dale Fink Farms also appealed the Notice of Noncompliance and Proposed Revocation issued to it. It is a separate case, APL-026-20.

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; ... (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...”

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: ... (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 §205.236, Origin of livestock, state that, “... (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, “(a) The producer of an organic livestock operation must provide livestock with a total feed ration composed of agricultural products, including pasture and forage, that are organically produced and handled by operations certified to the NOP... (b) The producer of an organic operation must not: (1) Use animal drugs, including hormones, to promote growth... (8) Prevent, withhold, restrain, or otherwise restrict ruminant animals from actively obtaining feed grazed from pasture during the grazing season... (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 (dry matter fed does not include dry matter grazed from residual forage or vegetation rooted in pasture). This shall be calculated as an average over the entire grazing season for each type and class of animal. 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... (2) Provide pasture of a sufficient quality and quantity to graze throughout the grazing season and to provide all ruminants under the organic system plan with an average of not less than 30 percent of their dry matter intake from grazing throughout the grazing season...”

The organic regulations at §205.238, Livestock health care practice standard, state that, “(a) The producer must establish and maintain preventive livestock health care practices,

including:...(2) Provision of a feed ration sufficient to meet nutritional requirements, including vitamins, minerals, protein and/or amino acids, fatty acids, energy sources, and fiber (ruminants); (3) Establishment of appropriate housing, pasture conditions, and sanitation practices to minimize the occurrence and spread of diseases and parasites; (4) Provision of conditions which allow for exercise, freedom of movement, and reduction of stress appropriate to the species; (5) Performance of physical alterations as needed to promote the animal's welfare and in a manner that minimizes pain and stress...(c) The producer of an organic livestock operation must not:...(2) Administer any animal drug, other than vaccinations, in the absence of illness; (3) Administer hormones for growth promotion:...(7) Withhold medical treatment from a sick animal in an effort to preserve its organic status. All appropriate medications must be used to restore an animal to health when methods acceptable to organic production fail. Livestock treated with a prohibited substance must be clearly identified and shall not be sold, labeled, or represented as organically produced.”

The organic regulations at §205.239, Livestock living conditions, state that, “(a) The producer of an organic livestock operation must establish and maintain year-round livestock living conditions which accommodate the health and natural behavior of animals, including: (1) Year-round access for all animals to the outdoors, shade, shelter, exercise areas, fresh air, clean water for drinking, and direct sunlight, suitable to the species, its stage of life, the climate, and the environment...Yards, feeding pads, and feedlots may be used to provide ruminants with access to outdoors during the non-grazing season and supplemental feeding during the grazing season. Yards, feeding pads, and feedlots shall be large enough to allow all ruminant livestock occupying the yard, feeding pad, or feedlot to feed simultaneously without crowding and without competition for food...(3) Appropriate clean, dry bedding...(4) Shelter designed to allow for: (i)

Natural maintenance, comfort behaviors, and opportunity to exercise; (ii) Temperature level, ventilation, and air circulation suitable to the species; and (iii) Reduction of potential for livestock injury; (5) The use of yards, feeding pads, feedlots and laneways that shall be well-drained, kept in good condition (including frequent removal of wastes), and managed to prevent runoff of wastes and contaminated waters to adjoining or nearby surface water and across property boundaries...”

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... (b) Producers must provide pasture in compliance with §205.239(a)(2) and manage pasture 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...to minimize the occurrence and spread of diseases and parasites; and...to refrain from putting soil or water quality at risk. (c) A pasture plan must be included in the producer’s organic system plan, and be updated annually...When a change to an approved pasture plan is contemplated, which may affect the operation’s compliance with the Act or the regulations in this part, the producer shall seek the certifying agent’s agreement on the change prior to implementation...”

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 ... 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...”

The organic regulations at §205.603, Synthetic substances allowed for use in organic livestock production, specifically lists the allowed synthetic substances. These include electrolytes – without antibiotics. Any synthetic substance which isn’t listed isn’t allowed.

Certifier MCIA issued a Notice of Noncompliance and Proposed Revocation of Triple’s certification after conducting 2 unannounced inspections: (1) June 22, 2019 at Triple’s Trempealeau locations: [REDACTED], Trempealeau, Wisconsin; [REDACTED], [REDACTED], Arcadia, Wisconsin; and [REDACTED], Trempealeau, Wisconsin; and (2) June 27, 2019 at the Tomah location at [REDACTED], Tomah, Wisconsin. MCIA detailed several noncompliances, determining them to be both systemic and systemwide. Triple addressed most of the cited noncompliances in its Appeal either rebutting or explaining the noncompliances, and stating it has “fixed everything that we are able to fix” while also building a new barn and fixing a ‘calf shield.’

MCIA’s inspection of Triple’s Tomah location found several livestock inputs which hadn’t been reviewed or approved for use, including prohibited items Estrumate, Fertagyl, and

BlueLite C for Calves, and an unidentified brown salt block which had been put out for heifers in the [REDACTED] pasture. Triple stated that it thought the BlueLite C was approved and that the unidentified salt block was a mineral block but didn't address the use of Estrumate and Fertagyl. MCIA states that Triple was told that all inputs had to be reviewed by MCIA prior to use. The organic regulations at 7 CFR §205.201, Organic production and handling system plan, requires operations to list all production or handling inputs so that the certifier can review and approve said substances; however, the cited inputs were not in Triple's OSP and MCIA was not notified of their use, violating the regulations.

MCIA also found that Triple, without informing MCIA, had sprayed herbicide on weeds around several silos and buildings, as well as in a field adjoining a corn field requested for certification and next to the heifer pasture fence at [REDACTED], where there is no buffer on the pasture side of the fence. Triple 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. It didn't address the absence of a buffer zone next to the heifer pasture. Therefore, Triple's use of inputs and the spraying of herbicides, without the inputs, substances, or practices being in Triple's OSP or having notified MCIA, violates the organic regulations at 7 CFR §205.201.

MCIA observed at Triple's [REDACTED] lot, that organic heifers were mixed with nonorganic livestock; and several of the animals didn't have eartags. This is contrary to Triple's OSP, which states that all organic animals will be tagged with 2 ear tags. It also violates the organic regulations at 7 CFR §205.236, Origin of livestock, which requires that an organic livestock operation maintain records sufficient to preserve the identity of all organically managed

animals. Although Triple stated that all organic heifers on the [REDACTED], Trempealeau pasture were tagged on June 30, 2019, this was after the inspection of June 22, 2019.

MCIA also found several violations of the organic regulations at 7 CFR §205.237, Livestock feed. The June 27, 2019 inspection at the Tomah location found that heifers and dry cows were being fed out of a feed bunker, which Triple admitted contained a mixture of organic haylage and nonorganic corn. Further, the June 22, 2019 inspection at the [REDACTED] location revealed that the heifers hadn't yet been on pasture, which Triple stated was due to the pasture fence being broken and the lack of time to repair it. Further, Triple stated no livestock was using the "P" pasture at the Tomah location as it was too labor intensive, taking 3 people to get the livestock across [REDACTED] to the "P" pasture and the need to take a cutting from the "P" pasture before using it for livestock grazing; however, Triple doesn't provide a reason why this wasn't already done when their OSP and the organic regulations required livestock to be on pasture and receive 30% of DMI from pasture. MCIA stated that only the large, unused pasture across [REDACTED] was considered able to meet grazing and DMI requirements. Triple stated that the lactating cows had pasture in front of the house along [REDACTED] starting June 28, 2019, and the heifers at the [REDACTED] location were tagged and put to pasture on June 30, 2019; however, both dates are after the inspections and still substantiate a lengthy delay in getting the livestock to pasture, which according to Triple's OSP was to begin mid-April.

Triple's OSP states there are 25 acres of pasture at the Tomah location; however, since the "P" pasture isn't being used for grazing and another pasture South of [REDACTED] is now a corn field, the 130 milk and dry cows along with 100 heifers have less than 15 acres of pasture of a poor quality on which to graze. MCIA stated that even with a high estimate of available pasture, the DMI from pasture would be well below the required 30%. Although Triple stated it

planted corn in the [REDACTED] pasture to 'renourish' it, and problems with other pastures were due to being trodden upon and rain, rain is not an unforeseeable event and livestock must be provided with quality pasture to meet the DMI requirement. Triple did not submit any documentation addressing the DMI requirement or showing that it was being met.

MCIA also cited to violations of the organic regulations at 7 CFR §205.238, Livestock health care practice standard. The inspector found 2 prohibited cattle hormones in the milk refrigerator at the Tomah location. The hormones Estrumate and Fertagyl, both produced by Merck, are for synchronizing or promoting estrus. Specifically, Estrumate is a synthetic which is used as a luteolytic agent in cattle to manipulate the estrous cycle, while Fertagyl is a sterile injectable solution of gonadorelin acetate hormone used with Estrumate. A third substance found in the refrigerator, BlueLite C for Calves, made by Techmix, is an acidified electrolyte used to maintain hydration in calves prior to weaning. The organic regulations at 7 CFR §205.603 allows the use of electrolytes, without antibiotics, in organic livestock production. However, as discussed above, MCIA stated these products hadn't been reviewed or approved for use. Triple argues that the prohibited cattle hormones were only given to 2 cows to clean their uteri before they were sold; however, Triple didn't provide any documentation of this and no information was provided on whether the cows were sold as organic or conventional. The regulations state that organic livestock operation must not administer animal drugs in the absence of illness or administer hormones for growth production. Further, livestock treated with a prohibited substance must be clearly identified and can't be sold, labeled, or represented as organically produced.

The MCIA inspector also noted a lame cow laying in the barnyard area without food or water, and that Dale Fink said the cow had a bad shoulder which they didn't intend to treat.

Triple states that the cow had feed and water available and after a week the cow's shoulder was less swollen and it was sold. Triple acknowledged that the feed "was not the best," and that new alfalfa was being mixed with old feed. Further, the inspector noted that viewed pastures were of a poor quality; were 'beaten down;' had little feed value on them; and the milk cows were producing only 25 lbs. on average per day, which is extremely low and indicative of poor-quality feed and/or inadequate feed. Triple stated the low poundage of milk at the Tomah location was due to not having grain/corn available because of its high price; and instead it was feeding hay bales to lactating cows on pasture. However, MCIA states that the Finks sell 'plenty of organic corn' under the Dale Fink Farms operation and could have kept some corn aside to use as feed. The organic regulations at 7 CFR §205.238 require that livestock are provided with a "feed ration sufficient to meet nutritional requirements" as well as "conditions which allow for exercise, freedom of movement, and reduction of stress appropriate to the species." Additionally, as to the lame cow, a livestock operation may not "withhold medical treatment from a sick animal in an effort to preserve its organic status."

These conditions/findings, along with others, also constitute violations of the organic regulations at 7 CFR §205.239, Livestock living conditions. MCIA found that the feed lot at the [REDACTED] location was dirty and crowded with heifers standing in mud and manure up to their knees, with no visible bedding. Additionally, the shed's roof was hanging down in places, creating risks for livestock. The roof of the livestock shelter at the Tomah location was also in disrepair and at risk of falling on the livestock, who also didn't have any bedding. Triple even warned the inspector not to drive his vehicle into the barnyard area due to the debris that could damage the car, yet MCIA observed several heifers wandering the barnyard area. Additionally, the plastic roof of the calf facility had collapsed and was in the middle of the calf housing with

stagnant water. The inspector also noted the heifer and dry cow feeding lot at Tomah is small, causing the livestock to compete for feed; and again mentioned the above-noted lame cow laying in mud with no shelter or clean drinking water.

Triple states that the [REDACTED] location was 'cleaned out and bedded' on June 24, 2019, and the metal roof of the open-sided shed at [REDACTED] was fixed; , the organic and nonorganic cows at Trempealeau were separated and re-tagged; the Tomah facility was cleaned out and re-bedded for the organic heifers on June 24, 2019; the dry cow location was cleaned out and re-bedded on June 29, 2019; and the calves were moved from the calf shed where Triple drained the water, cleaned the area, and put down new bedding prior to moving the calves back into the shed. However, these events occurred after the inspections at Trempealeau and Tomah. Triple states it told the inspector not to park in the barnyard area because it had taken down a building and hadn't yet cleaned up the area. Triple disputes the heifer and dry cow feeding lot at Tomah is too small, stating the livestock had full access to the bunker which is 150 feet long and on which new feed is run every day and throughout the day. However, as MCIA noted, a feed bunker doesn't constitute pasture nor provide for meeting the grazing DMI requirement. Although Triple claims to have corrected all the noncompliances and deficiencies subsequent to the inspections at which they were noted, this doesn't negate their prior existence and that fact that the livestock living conditions had not been kept in compliance pursuant to 7 CFR §205.239.

Several noncompliances also violate the regulations at 7 CFR §205.240, Pasture practice standard, which require that pasture be managed as a crop and to annually provide the minimum 30% of DMI from pasture, with the operation notifying the certifier of any changes to the pasture plan prior to implementation. At the [REDACTED] location, the heifers hadn't yet been on the Nichols pasture as of June 22, 2019, due to the pasture fence being broken. Additionally, no

livestock was yet using the “P” pasture at the Tomah location which Triple stated was due to it being too labor intensive to get the livestock across [REDACTED] to the “P” pasture, and that it needed to take a cutting of hay off the “P” pasture before using it for livestock grazing; however, this delay reduced the time the pasture could be grazed and detrimentally affected the amount of feed available from grazing, and by extension, the DMI. Triple’s stated use of these pastures starting on June 30, 2019, is after the inspections and contrary to Triple’s OSP which identifies the grazing season as mid-April to mid-October.

MCIA also found that the Tomah location pastures were in poor condition or had been converted to corn crops, and the dry cow and heifer pasture was either bare ground or grass eaten down to the ground. Further, the lactating cow pasture south of the barn was in poor condition and offered little nutritional value; and the livestock there were huddled together and were not grazing. These observed conditions substantiate that the pastures were not being managed in such a way as to promote pasture growth and provide for the livestock receiving 30% of their DMI from pasture. Additionally, Triple hadn’t informed MCIA that the lactating cow pasture along [REDACTED] was planted for corn in 2019, which lessened the amount of available pasture with no increase in pasture elsewhere. The above-noted failure to use the “P” pasture and conversion of the pasture along [REDACTED] further reduced the available pasture for livestock grazing of the 130 milk and dry cows along with 100 heifers from 25 acres at the Tomah location to less than 15 acres. Triple stated that while the Nichols pasture at the [REDACTED] location wasn’t used in 2019, the livestock used the Leonards pasture; however, no proof of this was provided. Triple also states that the dry cows had a bale feeder, pasture grass, and a feed manger available, while lactating cows had a mobile feeder if needed, though feeders can’t substitute for pasture grazing. Triple claims it was unaware that it had to inform MCIA of

conversions of pasture to corn fields, though MCIA states that they have informed Triple on many occasions that such changes must be reported to MCIA. Further, the regulations clearly require an operation to seek approval of its certifier for any changes to its pasture plan prior to implementation.

Lastly, MCIA states that Triple violated the organic regulations at 7 CFR §205.406, Continuation of certification. The conversion of the lactating cow pasture south of [REDACTED] at Tomah to corn without informing MCIA; and the failure to use the “P” pasture at Tomah and a small area of the Nichols pasture at the Lime H Hill Trust farm significantly reduced Triple’s ability to comply with DMI requirements. Yet Triple hadn’t notified MCIA of these changes prior to the inspections. Triple acknowledges in its Appeal that [REDACTED] was also changed from pasture into a corn field though a pasture on [REDACTED] was restored to pasture but again claims it wasn’t aware that it needed to inform MCIA of this.

During the pendency of the Appeal, Triple ‘forfeited’ its livestock certification. However, a surrender does not stop the adverse action and appeals process.

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. The evidence substantiates that Triple violated the Act and the organic regulations at 7 CFR §205.201; 7 CFR §205.202; 7 CFR §205.236; 7 CFR §205.237; 7 CFR §205.238; 7 CFR §205.239; 7 CFR §205.240; and 7 CFR §205.406, as alleged by MCIA, as well as the regulations at 7 CFR §205.400 and 7 CFR §205.603. The wide-spread, systemic violations require Triple to conduct a

thorough review of its operation and ample time to correct the numerous noncompliances. Triple may not remain certified.

DECISION

The Appeal is denied and the Notice of Noncompliance and Proposed Revocation of Triple's certification is upheld. Pursuant to 7 CFR §205.662(f)(2), Triple's certification is hereby revoked for 5 years. Attached to this formal Administrator's Decision denying Triple's Appeal is a Request for Hearing form. Triple 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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SUMMERS
Date: 2020 06 07 22:17:53 -04'00'

Bruce Summers
Administrator
Agricultural Marketing Service