

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
2 Creeks Farm/Ellinghuysen)
) **Administrator's Decision**
)
Peterson, Minnesota) **APL-73-20**
)
)

This Decision responds to an Appeal (APL-073-20) of a Notice of Proposed Suspension of National Organic Program (NOP) certification issued to 2 Creeks Farm/Ellinghuysen (Ellinghuysen) of Peterson, Minnesota, by Midwest Organic Services Association (MOSA), an 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 may appeal

¹ 7 U.S.C. 6501-6522

² 7 C.F.R. Part 205

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. Ellinghuysen is an organic operation initially certified on February 22, 2010 for crops and livestock, specifically, dairy goats for milk.
2. On September 16, 2019, AMS issued an Administrator’s Decision (APL-046-19) denying Ellinghuysen’s April 5, 2019 Appeal to a March 15, 2019 Notice of Proposed Suspension for Ellinghuysen’s livestock certification. The Administrator found that Ellinghuysen had been unable to comply with the requirement that its goat herd receive 30% of its dry matter intake (DMI) from pasture and recently had also been unable to demonstrate that its available pastures produced enough dry matter to allow for its goat herd to receive 30% of its DMI from pasture.
3. On November 12, 2019, Ellinghuysen requested an administrative hearing which was acknowledged by NOP that same day. The hearing is still pending.
4. On May 29, 2020, MOSA issued a Notice of Noncompliance.
5. On June 29, 2020, MOSA issued a Notice of Proposed Suspension.
6. On July 20, 2020, Ellinghuysen filed an Appeal.

DISCUSSION

The USDA organic regulations at 7 CFR §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...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 §205.239, 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 ... (2) For all ruminants, management on pasture and daily grazing throughout the grazing season(s) to meet the requirements of §205.237...”

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 ... (b) Producers must provide pasture in compliance with §205.239(a)(2) and manage pasture to comply with the requirements of §205.237(c)(2), 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...”

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 of this part...”

MOSA issued the June 29, 2020 Notice of Proposed Suspension stating that Ellinghuysen hadn't adequately responded to the prior Notice of Noncompliance which stated that the November 21, 2019 inspection had shown there wasn't enough available pasture for the goats to meet the requirement that the goats receive 30% of their DMI from pasture for the 2019 grazing season. MOSA found that Ellinghuysen's ^(b)₍₄₎ acres of pasture available to the lactating doe goats couldn't, even under optimal production conditions, produce dry matter in a quantity needed to ensure the goats receive 30% of their DMI from pasture.

Ellinghuysen stated its opposition to the 30% DMI requirement, claiming it is not in the best interest of the goats, and in fact is detrimental to their health, as goats don't graze like cows and sheep but rather are 'browsers'. Ellinghuysen states that when it tried locking the goats out on pasture, they didn't graze, but instead became stressed. Ellinghuysen stated that all goat producers oppose the 30% DMI requirement for goats.

A review of the evidence shows Ellinghuysen has a long history of noncompliance with the 30% DMI requirement of the organic regulations. MOSA had issued a Notice of Noncompliance to Ellinghuysen on January 12, 2015 citing to a violation of the DMI requirement; and a Notice of Proposed Suspension on March 4, 2015; with an Administrator's Decision of November 9, 2015 (APL-019-15) denying Ellinghuysen's Appeal. Ellinghuysen requested a hearing on December 10, 2015. While Ellinghuysen's requested hearing was pending, MOSA issued another Notice of Noncompliance on July 27, 2016; and a Notice of Proposed Suspension on January 30, 2017. An Administrator's Decision of September 11, 2017 (APL-019-17) denied Ellinghuysen's Appeal, and again Ellinghuysen requested an administrative hearing on September 25, 2017 which was acknowledged September 28, 2017. Subsequently, MOSA issued another Notice of Noncompliance on February 2, 2018, but then

issued a Notice of Noncompliance Resolution on September 28, 2018 after Ellinghuysen submitted adequate documentation of meeting the 30% DMI requirement. Therefore, on October 29, 2018, AMS/NOP and Ellinghuysen entered into a Settlement Agreement whereby Ellinghuysen withdrew its requests for hearing regarding the two previous Administrator Decisions (APL-019-15 and APL-019-17), and agreed to comply with the required 30% DMI from pasture during the grazing season for its goat herd, as well as specific recordkeeping requirements.

However, on January 21, 2019, MOSA issued a Notice of Noncompliance stating that for the 2018 grazing season it had considered Ellinghuysen's available pasture; production of the pasture; and the dry matter fed to the herd divided by lactating does and kids/yearlings. Calculations of the amount of dry matter that the goats, by type, would need to obtain to meet the 30% DMI requirement couldn't be obtained from the available pasture. On March 15, 2019, MOSA issued a Notice of Proposed Suspension which resulted in a September 16, 2019 Administrator's Decision (APL-046-19) denying Ellinghuysen's April 5, 2019 Appeal of the Notice of Proposed Suspension and affirming the suspension of Ellinghuysen's livestock certification. The Administrator found that Ellinghuysen had been unable to comply with the requirement that its goat herd receive 30% of its DMI from pasture and recently had also been unable to prove that its available pastures produce enough dry matter to allow for its goat herd to receive 30% of its DMI from pasture. On November 12, 2019, Ellinghuysen requested a hearing before an Administrative Law Judge. The hearing is still pending.

As Ellinghuysen's organic certification is active pending final adjudication, MOSA has continued to oversee Ellinghuysen's compliance with the organic regulations. MOSA conducted the annual inspection of Ellinghuysen on November 21, 2019, covering the 2019 grazing season,

at which the inspector found that Ellinghuysen's (b) (4) available acres of pasture for lactating goats in 2019, even with optimal production, couldn't produce enough dry matter for the goats to meet the requirement of obtaining 30% of their DMI from pasture. MOSA issued a Notice of Noncompliance on May 29, 2020, detailing the inspection findings. Specifically, the notice stated that the (b) (4) lactating adult does had access to a (b) (4) acre pasture and a (b) (4) acre pasture which were managed as one pasture in 2019, with the (b) (4) does grazing for 2 weeks and then alternating with the (b) (4) yearlings which grazed for 1 week. The inspector considered the grazing times of the does, the available acreage, and the total production of dry matter under the best management; and found that the dairy herd wouldn't be able to obtain 30% of its DMI from pasture. After Ellinghuysen failed to provide an adequate response to the notice, MOSA issued a Notice of Proposed Suspension on June 29, 2020. Although the notice didn't specifically identify whether the suspension was being proposed as to Ellinghuysen's livestock and/or crop certification, only noncompliances regarding livestock regulations were cited. Therefore, it is only the livestock certification which is at issue.

Ellinghuysen stated in its July 20, 2020 Appeal that forcing goats to graze by locking them out to pasture is negligent and inhumane because goats are browsers, not grazers. Ellinghuysen states its goat herd has 24/7 access to quality pasture and the inspector even noted that "all groups appeared in superior body condition and that you had a well maintained, beautiful herd. The continued health of your herd indicates that your goats acquired the appropriate amount of DM over the grazing season." Ellinghuysen submitted an article on goat nutrition as well as a letter from a "ruminant nutritionist," both of which state that goats are browsers, don't naturally eat grass pasture but rather prefer leaves, shoots, and woody plants; and forcing goats to pasture is detrimental to the goats' health. The nutritionist states that the DMI

requirement is oriented toward dairy cows, not goats. Ellinghuysen stated that he spoke to all goat producers in the United States in 2015, and all agreed that the 30% DMI requirement isn't appropriate for goats.

Ellinghuysen has voiced opposition to the 30% DMI requirement for the past several years. Ellinghuysen stated in its June 4, 2015 Appeal to the March 4, 2015 Notice of Proposed Suspension that the requirement has been a hardship for dairy goat producers and resulted in 'stressed' goats standing by the pasture gate, and lower production and profits. Ellinghuysen stated in its April 5, 2019 Appeal to the March 15, 2019 Notice of Proposed Suspension that the 30% DMI requirement isn't in the best interest of the goats as it forces them to graze like cows or sheep which is not in a goat's nature because they are browsers. Ellinghuysen states that organic goats should have access to vegetative pasture but not be forced to eat a certain percent by grazing.

The AMS Administrator in the November 9, 2015 Administrator's Decision, addressed Ellinghuysen's contention that the pasture compliance regulations "are not broad enough to include the type of animals in his operation." The Administrator stated that there are certified operations raising goats that are compliant with the requirements and there are not different rules for one type of ruminant versus the other, i.e. goats versus cows or sheep. The Administrator concluded that Ellinghuysen had not met the DMI requirements for the prior four years, which dated to its initial certification. The AMS Administrator stated again in the September 11, 2017 Administrator's Decision that the regulations have clear grazing requirements for all ruminants regardless of whether it is more difficult to demonstrate compliance for goat operations. Most recently, in the September 16, 2019 Administrator's Decision, for which a hearing is pending, the Administrator stated that Ellinghuysen has been unable to comply with the requirement that

its goat herd receive 30% of its DMI from pasture and recently has been unable to demonstrate that its available pastures produce enough dry matter to allow for its goat herd to receive 30% of its DMI from pasture. The inspector stated in the November 21, 2019 Livestock Inspection Report that Ellinghuysen's herd "appeared in superior body condition," and was well maintained and beautiful; and also that Ellinghuysen has "struggled with determining the DMI requirements of their herd as they are an incredibly productive herd and current DM for a herd of this production and body size is debatable." However, all goat herds are required to meet the 30% DMI requirement set forth in the organic regulations as long as those regulations remain in effect. The pasture requirements for organic ruminants are intended for a range of livestock and conditions and provide flexibility for various grazing strategies. Public comments submitted during the *Access to Pasture* rulemaking process did not raise concerns to AMS about goats meeting the DMI from pasture during the development of those requirements. AMS provides several resources on calculating dry matter demand and DMI specifically for dairy goats on its website. Currently, there are 63 organic livestock operations raising goats. This demonstrates that goat operations can comply with the pasture requirements for organic ruminant livestock.

Although the recently issued Notice of Noncompliance of May 29, 2020 and Notice of Proposed Suspension of June 29, 2020 address the same regulation violations for which Ellinghuysen was cited in several previous years, the current adverse action notices are separate actions and address 'new occurrences' of the noncompliances during the 2019 grazing season found at the November 21, 2019 inspection. The inspection by MOSA confirmed that these noncompliances occurred subsequent to the 2018 inspection regarding the 2018 grazing season, and are therefore, separate from the case before the Administrative Law Judge 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, the evidence substantiates that Ellinghuysen has a long history of failing to comply with the organic regulations and has again violated the regulations regarding livestock feed (7 C.F.R. §205.237); livestock living conditions (7 C.F.R. §205.239); and pasture practice standards (7 C.F.R. §205.240); and therefore also general requirements for certification (7 C.F.R. §205.400).

Ellinghuysen has been unable to consistently comply with the requirement that its goat herd receive 30% of its DMI from pasture and has also been unable to demonstrate that its available pastures produce enough dry matter to allow for its goat herd to receive 30% of its DMI from pasture for the 2019 grazing season. These violations have occurred despite prior notices of noncompliance, notices of proposed suspension, Administrator Decisions ruling against Ellinghuysen, and a settlement agreement giving Ellinghuysen an opportunity again to come into compliance. Ellinghuysen has voiced its opposition to the 30% DMI requirement for goats for several years. However, Ellinghuysen chose to become certified organic and as long as Ellinghuysen is certified organic, it must comply with all organic regulations regardless of whether it personally is opposed to a specific regulation. Due to Ellinghuysen's systemic and repeated violations of the organic regulations, specifically the 30% DMI requirement, it may not remain certified.

DECISION

The July 20, 2020 Appeal is denied, and the June 29, 2020 Notice of Proposed Suspension is affirmed. Ellinghuysen's livestock certification is to be suspended for 1 year. However, pursuant to 7 C.F.R. §205.662(f)(1), Ellinghuysen may apply for reinstatement of its livestock certification after completion of the 1-year suspension period. The request for reinstatement must be accompanied by evidence demonstrating correction of the noncompliances found by MOSA and corrective actions taken to comply with and remain in compliance with the Act and the organic regulations. While its livestock certification is suspended, Ellinghuysen may not sell, represent, or label its agricultural products resulting from its livestock as organic.

Attached to this formal Administrator's Decision denying Ellinghuysen's Appeal is a Request for Hearing form. Ellinghuysen has thirty (30) days to request an administrative hearing before an Administrative Law Judge. If Ellinghuysen waives the hearing, this Administrator's Decision suspending Ellinghuysen's livestock certification will become final.

Done at Washington, D.C., on this 24th
day of February, 2021.

BRUCE SUMMERS

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Bruce Summers
Administrator
Agricultural Marketing Service